COPYRIGHT LAW REVISION—CATV

1766 —

HEARINGS

BEFORE THE

SUBCOMMITTEE ON

PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-NINTH CONGRESS

SECOND SESSION

PURSUANT TO S. RES. 201

ON

S. 1006

AUGUST 2, 3, 4, AND 25, 1966

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

69-173 O WASHINGTON : 1966

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COPYRIGHT LAW REVISION—CATV

TUESDAY, AUGUST 2, 1966

U.S. SENATE,
SUBCOMMITTEE ON PATENTS,
TRADEMARKS, AND COPYRIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 1318, New Senate Office Building, Senator Quentin N. Burdick presiding.

Present: Senators Burdick (presiding), McClellan, Hart, and Fong.

Also present: Thomas C. Brennan, chief counsel; Edd N. Williams, Jr., assistant counsel; and Stephen G. Haaser, chief clerk, Subcommittee on Patents, Trademarks, and Copyrights.

Senator BURDICK. The subcommittee this morning is resuming the public hearing on S. 1006, to provide for a general revision of the copyright laws. This series of hearings will consider the copyright implications of community antenna television systems.

The distinguished chairman of the subcommittee has appointed me as the acting chairman for the purpose of conducting these hearings. I shall direct that a copy of a letter from Chairman McClellan appear in the record immediately following these remarks.

The subcommittee commenced hearings on this bill during the first session. It was the hope of the subcommittee that the current Congress could complete action on the entire revision bill. Despite the diligent efforts of the Copyright Office, the House Judiciary Subcommittee, and the interested parties, it has now become apparent that this will not be possible.

Important decisions relating to various aspects of CATV are currently being made in the Congress, the Federal Communications Commission, and the Federal courts. These developments cannot be deferred until a future Congress enacts a general copyright revision bill, yet whatever decision the Congress ultimately makes concerning the copyright question will have a significanut impact upon CATV operations. Under these circumstances, the chairman of the subcommittee has recommended that the subcommittee explore the advisability of action in this session of Congress to resolve the CATV copyright question. If, however, the subcommittee should determine not to act separately on the CATV issue, then these proceedings will be of assistance to the subcommittee when, in the next Congress, it acts upon the entire copyright revision program.

At the outset of these hearings, I wish to indicate that I have no predetermined view concerning this issue. I am confident that the subcommittee will seek a proper balance between the constitutional objective of the copyright system to encourage creativity, and the public interest in providing for the widest possible dissemination of information.

The attainment of such a balance is always a most difficult undertaking. But looking at the impressive list of witnesses whom we will hear in the next 3 days, I am hopeful that the subcommittee will be able to make a constructive contribution.

(The copy of a letter from Chairman McClellan follows:)

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS,
July 18, 1966.

Senator QUENTIN N. BURDICK,
110 Senate Office Building,
Washington, D.C.

DEAR SENATOR: In accordance with our conversation, I am designating you as acting Chairman of the Subcommittee on Patents, Trademarks, and Copyrights, for the purpose of conducting the hearings, commencing August 2nd, on the community antenna television aspects of S. 1006.

I appreciate your willingness to preside at the hearings on this important subject.

With kind regards, I am,
Sincerely,

JOHN L. MCCLELLAN,
Chairman.

Mr. BRENNAN. Mr. Chairman, I suggest that we incorporate at this point in the record the notice of this hearing which appeared in the Congressional Record of July 18.

Senator BURDICK. Without objection it will be received.

Mr. BRENNAN. Mr. Chairman, there will be references in the course of the hearings to the recommendations of the House subcommittee. I suggest at this point we incorporate the text of the proposal approved by the House subcommittee.

Senator BURDICK. Without objection it will be received.

(The notice of hearing and text of proposal referred to follow:)

[Congressional Record, July 18, 1966]

NOTICE OF PUBLIC HEARING ON CATV

Mr. MCCLELLAN. Mr. President, as chairman of the standing Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, I wish to announce that the subcommittee has scheduled a public hearing on S. 1006, the copyright revision bill, as it relates to community antenna television systems.

These hearings will be held on Tuesday, August 2; Wednesday, August 3; and Thursday, August 4, commencing at 10 a.m. in room 1318, New Senate Office Building.

Anyone who wishes to testify or file a statement for the record should communicate immediately with the office of the subcommittee, room 349–A, Senate Office Building, Washington, D.C., telephone 225–2268.

The subcommittee consists of the Senator from Michigan [Mr. HART], the Senator from North Dakota [Mr. BURDICK], the Senator from Pennsylvania [Mr. SCOTT], the Senator from Hawaii [Mr. FONG], and myself.

(Draft of House Judiciary Subcommittee No. 3 amendment to H.R. 4347:)

§ . Limitations on exclusive rights: Secondary transmissions.

(a) CERTAIN SECONDARY TRANSMISSION EXEMPTED.—

(1) Notwithstanding the provisions of subsection (b) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:

(A) the secondary transmission consists entirely of relaying the primary transmission to the private rooms of a hotel or other public establishment, and no direct charge is made to the occupants of the private rooms to see or hear the secondary transmission; or

(B) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 109; or

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

(2) Notwithstanding the provisions of subsection (c), but subject to the provisions of subsection (b), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is not an infringement of copyright if the secondary transmission is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without any charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(3) Subject to the provisions of subsections (b) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is not an infringement of copyright if the secondary transmission is made for reception solely within the limits of the area normally encompassed by the primary transmission.

(b) CERTAIN SECONDARY TRANSMISSIONS FULLY ACTIONABLE.—Notwithstanding the provisions of subsection (c) and of clauses (2) and (3) of subsection (a), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if:

(1) the content of the particular primary transmission is in any way altered by changes, deletions, or additions during its secondary transmission; or

(2) the secondary transmitter, within one month before or after the particular secondary transmission, originates any transmissions to those members of the public to whom it also makes the secondary transmission, except for no more than one transmission at any one time of whether and news reports; or

(3) the secondary transmitter, within one month before or after the particular secondary transmission, makes any separate, direct charge for any particular transmission it makes to those members of the public to whom it also makes the secondary transmission; or

(4) the secondary transmission is made for reception wholly or partly outside the limits of the area normally encompassed by the primary transmission, and

(A) the secondary transmitter, at least one month before the date of the secondary transmission, has not recorded in the Copyright Office, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the identity and address of the person who owns the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter; or

(B) the secondary transmission is made for reception wholly or partly within the limits of an area normally encompassed by one or more transmitting facilities, other than the primary transmitter, if:

(i) within that area no such facility is authorized to transmit the same performance or display of the work, and

(ii) the copyright owner has given written notice to the secondary transmitter, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, at least ten days before the primary transmission, that the copyright owner's authorization is necessary for the secondary transmission.

(c) LIMITATIONS ON LIABILITY FOR CERTAIN SECONDARY TRANSMISSIONS.—(1) Subject to the provisions of subsection (b), in the following cases involving a secondary transmission to the public of a primary transmission embodying a performance or display of a work, liability of the secondary transmitter for infringement under section 501 does not include the remedies provided by sections 502, 503, and 506, and its liability for the remedies provided by sections 504 and 505 is limited as provided by clause (2) of this subsection:

(A) Where the secondary transmission comes within the scope of paragraph (i) of subclause (B) of subsection (b) (4), but the copyright owner has not given notice as provided by paragraph (ii) of that subclause; or

(B) Where the secondary transmission is made for reception wholly or partly outside the limits of the area normally encompassed by the primary transmission, not including an area covered by subclause (B) of subsection (b)(4), and

(i) the secondary transmission is made for reception wholly or partly within the limits of an area normally encompassed by a transmitting facility, other than the primary transmitter, if such facility is authorized to transmit the same performance or display of the work on the date the secondary transmission is made, whether or not such authorized transmission is made on that date; or

(ii) the secondary transmission is made for reception wholly or partly within the limits of an area not normally encompassed by any transmitting facility.

(2) In any case coming within the scope of subclauses (A) or (B) of clause (1) of this subsection, the infringer's liability under section 504 does not include any of the infringer's profits or statutory damages, and the copyright owner's right to recover actual damages is, except as provided in subclauses (A) and (B) of this clause, limited to recovery of a reasonable license fee, as found by the court under the circumstances of the case.

(A) Where the court finds that the infringer has refused or failed to accept an offer of a license, in writing and signed by the copyright owner, in which the license fee stated was reasonable under the circumstances of the case, it may in its discretion increase the recovery under section 504 to a sum of not more than three times the amount of a reasonable license fee, to which may be added a discretionary award of costs and attorney's fees under section 505;

(B) Where the court finds that the copyright owner has refused or failed to accept the written offer, accompanied by a tender, of a license fee that was reasonable under the circumstances of the case, it may in its discretion award costs and attorney's fees under section 504 to the infringer, and may reduce or withhold an award of a reasonable license fee under section 504.

(d) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

(1) A "primary transmission" is one made by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

(2) A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission.

(3) The "area normally encompassed" by a transmission comprises the entire geographic area within the radius that the transmitter's signal is expected to reach effectively under normal conditions, including any parts of the area within that radius that its signal fails to reach effectively because of terrain, structures, or other physical or technical barriers. Where such geographic area has been designated by Federal statute or regulation for other purposes, the Register of Copyrights may, by regulation, make such designation applicable for purposes of this section.

HOUSE COPYRIGHT SUBCOMMITTEE RELEASES PROPOSED RECOMMENDATIONS ON CATV

The Copyright Subcommittee of the House Committee on the Judiciary today made public the following letter sent by Acting Subcommittee Chairman Robert W. Kastenmeier (D-Wis.) to Chairman Harley O. Staggers (D-W.Va.) of the House Committee on Interstate and Foreign Commerce, dealing with the Subcommittee's proposed solution of the Community Antenna Television issue under the pending Copyright Law revision:

MAY 5, 1966.

Hon. HARLEY O. STAGGERS,
Chairman, House Committee on Interstate and Foreign Commerce,
U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: As you know, Subcommittee No. 3 of the House Committee on the Judiciary is engaged in a series of executive sessions on H.R. 4347, a bill for the general revision of the Copyright Law, title 17 of the United States Code. One of the most important and controversial of the issues posed by the revision is the copyright status of transmissions by community antenna systems.

Under H.R. 4347, as introduced, commercial CATV systems would be fully liable for copyright infringement whenever they retransmit without permission a broadcast containing copyrighted material. After extensive consideration of the arguments made during the hearings and the legal and public policy issues involved, the Subcommittee has reached agreement on certain amendments which would substantially change the bill to be recommended to the full Committee.

The Subcommittee is, of course, aware that your Committee on Interstate and Foreign Commerce has been engaged in hearings and study of the problems of communications law presented by CATV activities. It has been our purpose, as far as possible, to resolve the copyright issues raised by CATV without trenching upon the area of communications problems. Because of the importance of this question and its relationship to the active consideration now being given by your Committee to measures that would define the status of CATV systems under the Communications Act, we have decided to announce our conclusions on this particular question at this time. The following is a broad simplified summary of what will necessarily be a complex statutory provision.

For the purpose of this summary, "CATV" refers to commercial services that intercept off-the-air transmissions of programs originated by others and retransmit them to paying subscribers by wire connections or the like, without altering their content, originating programs themselves, or making special charges for particular programs.

The Subcommittee's proposal would divide CATV activities, upon the basis of geographic and other characteristics, into three broad categories or "areas" which we call "white," "black," and "gray." In very general terms, the Subcommittee proposes to exempt CATV operations from copyright if they are entirely in the white area; make them fully liable if they are in black area; and subject them to limited liability in the nature of a "reasonable license fee" if they are in the gray area.

Under the Subcommittee's proposal, the white area embraces CATV retransmission solely within the radius of the area served by the primary broadcaster (in effect, its "Grade B contour") to fill in gaps or improve bad reception caused by technical interference. Example: A system operating solely within New York City and retransmitting New York City stations only.

The black area embraces retransmission beyond the area served by the primary broadcaster into an area already served by one or more other broadcasters, none of whom is licensed to carry the same program. Example: A system bringing a New York City station's broadcast of a motion picture to Philadelphia subscribers when no Philadelphia station is licensed to broadcast it.

The gray area embraces retransmissions beyond the area served by the primary broadcaster into an area already served by another broadcaster who has a license to carry the same program; or into an area not served by any primary broadcaster.

The Subcommittee believes that in the so-called white area where the CATV operation is merely a "fill-in" or "master antenna" service, operating solely within the area served by the primary broadcaster, the impact of the CATV operation is primarily to expand the audience by which the value of the copyright owner's license to the primary broadcaster is measured.

Where, on the other hand, the CATV operation occurs in a black area, i.e., where it extends into an area within which there are broadcasting facilities but the copyright owner has not granted his authorization for any transmission, the unauthorized retransmission by CATV could destroy a market and result in direct, immediate damage. Here the Subcommittee would impose full liability for infringement of copyright, including injunctive relief.

Intermediately, in the gray area situation, where the copyright owner has already licensed the use of his work in the area, or there is no broadcaster to license, there is no direct loss of market exclusivity. There is, however, an uncompensated "free ride" at the owner's expense. Advertisers will not pay for viewers living outside their area, and CATV service in these areas may keep out local broadcasters who would pay. Here, the Subcommittee believes that a reasonable license fee best meets the equities.

Beyond this allocation of different rights and remedies for the white, black and gray areas, the Subcommittee's proposal takes into account the arguments of the CATV operators as to the difficulties of obtaining advance clearances and the dangers of unlimited liability for statutory damages in this field. It proposes, with respect to CATV operations in the black area, to impose full liability only if the operator proceeds with the unauthorized retransmission after

having received advance notice from the copyright owner. If the owner does not provide advance notice, the retramsmission would be treated as if it were in the gray area.

As for CATV operations in the gray area, the Subcommittee proposes to withhold the possibility of an injunction or stautory damages, and limit the operator's liability to a "reasonable license fee" to be fixed by the court in the absence of agreement. However, in order to induce negotiations, the proposed amendment would provide the court with discretion to triple the recovery if it finds that the infringer failed to accept a reasonable offer, or to withhold any recovery if it finds that the copyright owner had refused to accept a reasonable offer.

It should be emphasized that the Subcommittee's proposal is directed solely to a prospective solution to the community antenna problem under the general revision by the copright law. It is in not intended as the expression of any opinion as to what the present law is under the 1909 statute or as to how the courts should ultimately decide that question.

With best regards,

Sincerely yours,

ROBERT W. KASTENMEIER,
Acting Chairman for Copyright Revision Subcommittee No. 3.

Mr. BRENNAN. The first witness is Mr. Abraham Kaminstein, Register of Copyrights.

Senator BURDICK. Mr. Kaminstein. Will you introduce your assistant for the record, please?

STATEMENT OF ABRAHAM KAMINSTEIN, REGISTER OF COPYRIGHTS; ACCOMPANIED BY BARBARA A. RINGER, ASSISTANT REGISTER OF COPYRIGHTS; AND ABE A. GOLDMAN, GENERAL COUNSEL, COPYRIGHT OFFICE

Mr. KAMINSTEIN. On my left is Miss Barbara Ringer, who is the Assistant Register of Copyrights and on my right our General Counsel, Abe Goldman.

Mr. Chairman, my name is Abraham L. Kaminstein and I am the Register of Copyrights. It is a privilege for me to appear again before your committee as a witness in this series of hearings devoted to one of the most difficult problems in copyright law revision: How community antenna television and similar retransmission services should be dealt with in the copyright law.

As I mentioned when I testified before you nearly a year ago, S. 1006 is the product of more than a decade of study, discussion, and drafting. Out of the many problems dealt with in the bill, one in particular did not emerge as an important issue until the last 2 or 3 years, and has become urgent only recently. That is the question of whether, in the revised copyright law, commercial community antenna television systems should be fully subject to copyright control or should be accorded special treatment. The Copyright Office, after carefully weighing the arguments put forward on both sides, concluded that what CATV is doing is a public performance that should be subject to copyright control, and we therefore drafted S. 1006 in terms of full CATV liability. In doing so, however, we were careful to point out that we were not expressing any opinion as to what the present law on the subject is, and that the problems facing CATV operators in obtaining clearances are real ones that cannot be brushed aside.

Under the 1965 revision bill, a commercial community system that picks up television or radio broadcasts of copyrighted material, and

retransmits them to paying subscribers over wires or similar connections, would be fully liable for copyright infringement unless it obtained a license from the copyright owner. These provisions of the bill were the subject of extensive testimony at the 1965 hearings before House Judiciary Subcommittee No. 3, under the chairmanship of Representative Robert W. Kastenmeier. Although most of the witnesses took flat positions favoring or opposing the bill on this point, it becomes increasingly apparent from their testimony that the problem is multifaceted and extremely complex. The legislative alternatives were obviously not limited to full liability or outright exemption, and the problem was complicated by the fact that, although in litigation for several years, the present law on the subject had never been construed by the courts.

Beginning in February of this year, the House subcommittee has been holding twice-weekly executive sessions aimed at revising and reporting the bill. So far there have been 40 of these sessions, and it would be difficult to imagine a more searching, comprehensive, and productive appraisal of any piece of legislation. Consideration of the CATV problem alone took well over a month, during which every aspect of this immensely complex problem was explored and a proposed solution was drafted, reviewed, and agreed upon. Because the closely related problem of regulation of community antenna systems by the Federal Communications Commission was being considered at the same time by the House Committee on Interstate and Foreign Commerce, the subcommittee communicated its conclusions by means of a letter from Mr. Kastenmeier to Chairman Staggers of the Commerce Committee. That letter was sent on May 5, 1966.

Since then, as you know, Judge Herlands has handed down his decision in one of the CATV cases, *United Artists Television, Incorporated* v. *Fortnightly Corporation* (149 U.S.P.Q. 758 (S.D.N.Y. 1966)), holding that the activities of a commercial CATV system constitute a "public performance for profit" and are therefore fully actionable as copyright infringements under the present copyright law. This development, coupled with the closely related problems of communications law and regulations confronting the FCC and the Congress in this area, have thrown a spotlight on Subcommittee No. 3's proposal, and have prompted a number of comments on it. I am sure that a good deal of testimony during this series of hearings will be directed toward the provisions of that proposed draft.

Senator BURDICK. Pardon me, Mr. Kaminstein. What was Subcommittee No. 3's proposal?

Mr. KAMINSTEIN. I should like to submit it for the record.

Senator BURDICK. Does that appear later in your statement?

Mr. KAMINSTEIN. Yes.

Senator BURDICK. Fine.

Mr. KAMINSTEIN. There is both the proposal of statutory language and a letter for release by the committee.[1]

I cannot, of course, speak for the members of the House Judiciary Subcommittee in arguing the substantive merits of their draft or in commenting on alternative proposals. However, since the Copyright Office assisted the subcommittee in developing the language of the

[1] The letter and proposal referred to appear on pp. 2–6.

proposal, I believe I can explain in general what it means and is intended to do. I should say also that I believe the draft has stood up well in the light of detailed comments from both sides, and that its general approach and content deserve serious consideration by your committee.

The basic theory of the subcommittee's proposal is that the extent of a CATV system's liability for copyright infringement should be related to the extent of its impact on the copyright owner's market. As explained in Mr. Kastenmeier's letter, the proposed compromise would divide CATV into three general areas, which for convenience can be called "white," "black," and "gray." In very broad terms, a community antenna system would be exempt from copyright liability with respect to its operations that are exclusively in the "white" area, and would be fully liable for its operations in the "black" area. "Gray" area operations would be subject to a sort of compulsory license.

The "white" area, as envisioned in the proposal, is the normal service area of the broadcaster whose signals the CATV operator is picking up. If the community antenna system is merely operating as a master antenna or fill-in service—picking up nothing but New York City signals and transmitting them to New York City subscribers only, for example—then the copyright owner would not appear to be damaged and the CATV should be exempt.

Conversely, in the "black" area situation, the CATV system is transmitting signals outside the broadcaster's normal service area and into an area where none of the existing broadcasters is licensed to carry the copyrighted program. For example, a CATV operator brought a New York broadcast of a motion picture into Washington when none of the Washington stations as yet had a license to broadcast it, this would be an example of a "black" area. In this situation the copyright owner's Washington market would presumably be destroyed or seriously damaged, and he should therefore be entitled to the full remedies of the statute.

The intermediate or "gray" area, as the subcommittee viewed it, is one where there would be no direct destruction of an existing market but where there is an uncompensated "free ride" and the possibility of indirect damage. Under the proposal there would be two types of "gray" area: first, where the broadcaster's signals are imported into an area where there is no other existing service at all; and second, where the area is already served by a broadcaster who has a license to carry the same program. An example of the first type would be a CATV system serving a town in the Far West that is not within the service area of any television station. An example of the second type would be a CATV that carries a local network outlet on one of its channels and an outlet of the same network in another city on another one of its channels; typically, its subscribers could receive "Bonanza" at the same time on either one of the two channels. In these two "gray" area situations the subcommittee felt that, in the absence of agreement, the operator's liability should be limited to a reasonable license fee as fixed by the court. Where in this type of case the court found that there had been a failure to bargain in good faith, the license fee could be reduced or, alternatively, could be increased up to three times.

In addition, the subcommittee proposed to make CATV operations in the "white" or "gray" areas fully actionable if the system alters the content of the programs it picked up, or made special charges for particular programs, or originates its own programing other than weather and news. On the other hand, in response to the arguments of the CATV operators as to the difficulty of obtaining advance clearances, the proposal would require advance notice from the copyright owner before a "black" area transmission would be fully actionable; if advance notice were not given, the transmission would be subject to a reasonable license fee.

On May 23, 1966, after the subcommittee's proposal was made public, the district court in the *United Artists* case decided in effect that all CATV operations are in the so-called "black" area today, that is under the present title 17. It is important to note, however, that this decision, which is presently being appealed, is based on a statutory construction of the present law, and does not purport to decide what the law should be for the future. Toward the end of his opinion Judge Herlands stated:

> The court notes in passing that, despite the fact that exemptions from inclusion within the copyright proprietor's performance monopoly may arguably be desirable in certain instances purely on policy grounds, such desiderata are for Congress and not the courts. (Citing, among other things, Mr. Kastenmeier's letter.)
>
> Once the court has determined, as it has herein, that a defendant's activities constitute a public performance for profit within the meaning of the Copyright Act, it has no discretionary power to except that defendant from the coverage of the Act. Only Congress can do that.

Similarly, Report No. 1635 of the Commerce Committee, issued June 17, 1966, on H.R. 13286, the bill to amend the Communications Act of 1934 with respect to community antenna systems, recognized the close relationship between the copyright and the communications aspects of this problem. It now appears, and I suspect that the testimony of the next 3 days will bear this out, that the three CATV threads of copyright legislation, communications legislation, and infringement litigation, which have been separately considered up to this point, are beginning to merge.

Since the subcommittee proposal was published, we in the Copyright Office have discussed it in detail with most of the private interests involved and with representatives of the FCC. It would be premature for me to express opinions on any of the specific proposals for amendments, but it might be helpful for me to try to pinpoint the most important suggestions concerning the subcommittee's proposal that are likely to be raised here.

Among others at these hearings:

1. On the question of exclusivity, it has been argued by the copyright owners and their licensees, the broadcasters, that it is unfair to regard as "gray" the situation in which a CATV system is importing a program that has already been licensed in the area. Their point, which certainly deserves consideration, is that a local broadcaster has a right to insist on exclusivity when he is buying a motion picture or a syndicated series; if a license to him will automatically permit a community antenna system to import the same program from another locality for a reasonable license fee, the value of his supposed exclusivity for which he now pays the copyright owner is destroyed.

2. Origination: the community antenna operators have challenged the provision of the proposal under which origination of programing on a CATV system, beyond mere news and weather reports, would convert "white" or "gray" situations into full liability. The theory behind the provision was that a CATV operator should not be permitted to build a subscribing audience on the basis of other transmitters' programs and then unfairly profit from them by originating its own competing programs. It is clear, however, that a new trend in CATV is toward an emphasis on local service programing.

3. The extent of the "white" area: Questions have been raised on both sides as to the extent of the "area normally encompassed" by the primary broadcaster. Should it be his grade A contour, his grade B contour, a fixed-mileage radius, or some other criterion? Although the proposal would leave this to regulations, the House subcommittee generally regarded the grade B contour of a station as the "area normally encompassed," and this may turn out not to be the appropriate area in some cases.

4. A view has been expressed that in a so-called underserved area, where CATV is bringing in programs that would not be received otherwise, the committee should consider whether the copyright owner should be allowed to enjoin this added service. In addition, issues involving the procedure for giving notice, the method of fixing the reasonable license fee, and other matters of practice and procedure are likely to be raised during the hearings, but are too detailed for discussion here. Important as these matters are, I believe they are essentially details of the House subcommittee proposal.

Out of the multitude of problems involved in copyright law revision, that of community antenna television is unique in many ways. Because of the mushrooming growth of the industry, the problem sprang into existence as a major issue in copyright law revision almost overnight and without warning. It is one of the few major issues on which the present law has been unsettled and hotly disputed. It is the only major issue that is inextricably bound up with policy questions in the communications field; these are questions of national importance that can affect the course of radio and television communications in this country for years to come. And of the principal disputed issues in revision it is by all odds the most complex.

Having lived and worked with this problem over the past several months, let me say that the active development of CATV jurisprudence, of which these hearings are a part, is one of the most fascinating studies of the law in action that I have ever seen. The interrelationships and interaction of interests and industries, the need for balancing between copyright and communications policies, and the impact of pending court actions on future legislation, all involving the future of the fastest growing mass communications medium on the American scene, have left me with a single profound conviction. It is, simply, that there is no easy shortcut for solving this problem; no outright exemption or provision for full liability would serve the public interest here. The need is for a reasonable, well-considered compromise, and for a fairminded, flexible approach on the part of all the interests affected in working toward it.

I have been impressed, during our many discussions of this subject over the past 3 months, by the constructive spirit and willingness to

cooperate in working out reasonable compromises manifested by most of the groups concerned. If this spirit continues to prevail during the present series of hearings, I believe we will be on the road to an ultimate solution.

Thank you for permitting us to present this, Mr. Chairman.

Senator BURDICK. Thank you, Mr. Kaminstein. I would say that you have done an excellent job in outlining the problem.

Mr. KAMINSTEIN. Thank you.

Senator BURDICK. And you have explained the Kastenmeier position. I want to ask you a few questions.

You stated at the end here:

> * * * there is no easy shortcut for solving this problem; no outright exemption or provision for full liability would serve the public interest here.

In other words, that would indicate that somewhere between these two poles you would like to have a solution.

Mr. KAMINSTEIN. Exactly, Mr. Chairman. I think the extremes have been explored. They have been proposed by opposite sides. I do not think that they are workable in the long run.

Senator BURDICK. Do you have any comment on the Kastenmeier position?

Mr. KAMINSTEIN. I think it is the only proposal that has received extensive consideration. While it sounds complex, it tries to work the equities out in a detailed manner. It avoids large areas of Government regulation, particularly as to license fees which it leaves to the parties to negotiate or, if they cannot agree, leaves to the courts to be decided in particular cases. I certainly think it is very worthwhile and should receive the attention of your committee.

Senator BURDICK. Does that mean you support the Kastenmeier position?

Mr. KAMINSTEIN. Certainly, as a basis for going forward.

Senator BURDICK. Would you support it as a basis for a new statute written by this committee?

Mr. KAMINSTEIN. Yes, I would, Mr. Chairman. I think some of the criticisms leveled at it may have merit, and I think that is for the consideration both of the House committee and yours.

There are built-in safeguards. For example, on the third point I made with respect to the "white" area, the House committee proposal actually leaves to the Register the designation of the boundaries of the "white" area within standards laid down under any statute or other Federal regulation. In other words, it would enable the Register to adopt regulations laid down by the FCC in defining areas.

Senator BURDICK. You also testified that these problems of jurisdiction, copyright applications and others is coming more together. What do you mean, this should be considered in one bill, jurisdiction, copyright, and other applications?

Mr. KAMINSTEIN. I think copyright legislation might now solve most of the problems that have been posed in all three areas, in litigation, in FCC legislation, and in copyright legislation.

Senator BURDICK. Do I understand your testimony in summary that you firmly believe there is a "white" area?

Mr. KAMINSTEIN. Yes, sir; I do.

Senator BURDICK. And a "black" area?

Mr. KAMINSTEIN. That is right.

Senator BURDICK. And a "mixed" area?

Mr. KAMINSTEIN. Right now under Judge Herlands' decision, the entire area is "black."

Senator BURDICK. I understand that. Senator McClellan? Mr. Brennan, do you have any questions?

Mr. BRENNAN. Yes, Mr. Chairman. Mr. Kaminstein, it would be helpful to the subcommittee to get your comments on some of the issues that will arise in the course of these 3 days of hearings. Does the Copyright Office have any objection in principle to a statutory requirement for the compulsory licensing of copyrights when this is deemed to be in the public interest?

Mr. KAMINSTEIN. The present statute already contains a compulsory licensing provision, and as I have indicated, the House committee proposal contains a provision which, in effect, amounts to a compulsory license. I see no objection to its use in this way.

Mr. BRENNAN. You testified last year in support of a compulsory licensing requirement with respect to musical recordings. Would you not agree that there is a greater public interest in assuring the public access to a larger number of TV channels than with respect to multiple recordings of the same composition?

Mr. KAMINSTEIN. My answer to that would be qualified. I think these matters are so important, reaching over into both copyright and communications areas, that they must be considered in the light of the particular situation. This is what the House committee proposal tries to do, to consider the equities in particular situations.

Mr. BRENNAN. But you do recognize that there is a public interest in having access to a variety of TV stations.

Mr. KAMINSTEIN. Certainly. I think the House committee proposal leads in that direction.

Mr. BRENNAN. Is there any objection in principle to a statutory rate or fee schedule?

Mr. KAMINSTEIN. I think there is. A compulsory license provision has to be used in a very guarded fashion, that is, only when it is absolutely necessary.

When you establish a statutory rate, you face a host of problems. One is that the statutory rate will be fixed for a great number of years. For example, the present provision in the 1909 statute as to musical recordings has remained at 2 cents for more than 57 years now.

In addition, when you try to fix a total rate for all works used, you face all the problems of distribution, which in some cases may be insurmountable.

Senator BURDICK. I have just one last good question. If a copyright is a property right, a property interest, why is any use of that right permitted without consent of the owner?

Mr. KAMINSTEIN. Senator Burdick, I think you will find that some of the witnesses will argue that any use is an infringement of their property right. My own feeling is that we should be a little more flexible than that, and the present statute does bend in that it contains a compulsory license provision with respect to records.

Senator BURDICK. I want your reasons why.

Mr. KAMINSTEIN. Why it should be?

Senator BURDICK. Yes.

Mr. KAMINSTEIN. Well, in considering the 1909 law, a great part of the hearings at that time were devoted to trying to arrive at a compromise in giving the copyright owner of music the right to record his music for use on piano rolls and phonograph records, while giving all recording companies access to the music recorded by any one of them.

As I indicated to Mr. Brennan, a compulsory license provision should be used very sparingly, but I think it has its uses and should be available in crucial situations.

I don't think this is an absolute right, and I don't think it can be treated as such in this situation.

Senator BURDICK. That is your answer, that it is not an absolute right.

Mr. KAMINSTEIN. That is right.

Senator BURDICK. Thank you.

Mr. KAMINSTEIN. I think the Congress has the ability to adapt it to a particular situation. For example, in the "white" area, the market of the copyright proprietor is being broadened in the area for which his right is sold, so that there is no real damage.

Senator BURDICK. There is no damage, but he has a right that has been used.

Mr. KAMINSTEIN. In theory I think that is absolutely correct.

Senator BURDICK. And I am trying to get the rationale for saying that it shouldn't apply in all cases.

Mr. KAMINSTEIN. I certainly agree that it should not apply in all cases. I think a compulsory license should be used only in crucial cases where no other agreement or compromise can be arrived at.

Senator BURDICK. Thank you very much.

The next witness is Mr. Rosel H. Hyde, Chairman of the Federal Communications Commission.

Would you introduce your associates also for the record?

STATEMENT OF ROSEL H. HYDE, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; ACCOMPANIED BY HENRY GELLER, GENERAL COUNSEL, AND ARTHUR STAMBLER, LEGAL COUNSEL TO THE CHAIRMAN

Mr. HYDE. I have at my right Henry Geller, General Counsel to the Federal Communications Commission, to my left Arthur Stambler, Legal Counsel to the Chairman.

My name is Rosel H. Hyde, Chairman of the Federal Communications Commission. I appreciate this oportunity to present our views concerning the proposed revision of copyright law in the area of community antenna television—CATV—which is an active currently subject to comprehensive Commission regulation. The Commission has long recognized that, for reasons I shall develop, copyright is a key factor in the community antenna television field.

The relationship between CATV and television broadcasters under the Communications Act has been one of the most important and most difficult problems facing the Commission in recent years. The Commission's CATV program, set forth in our second report and order of March 8, 1966, represents what we believe to be an effective

compromise of the divergent views of the several Commissioners as to the need for Commission regulatory direction of CATV development under present circumstances, namely, with no definitive, settled copyright requirements. However, there is far greater unanimity in the Commission that copyright considerations should play an instrumental role in the CATV field and that the resolution of the copyright problem may have a most significant effect upon the CATV regulatory program which we have recently adopted.

In this light, I believe it would be helpful to the subcommittee if I were to first provide a summary of our CATV rules and policies which will serve as a backdrop for my subsequent comments on the copyright issue itself.

The Commission has given the matter of CATV intensive study over recent years and has conducted a number of public rulemaking proceedings. Our second report and order provides rules to govern the operation of all CATV systems. The report is a lengthy one and the regulations complex. Rather than attempting to set forth its full details here, I respectfully request that the second report be incorporated in the record, and I will here only briefly point up some highlights of the report, particularly as they relate to the copyright question before you.

Senator BURDICK. Without objection, that will be done.

(The report follows:)

[From the Federal Register, Mar. 17, 1966]

[From the Federal Register, Mar. 17, 1966]

[*March 17, 1966*]

[*P. 4540*]

Title 47—TELECOMMUNICATION

Chapter I—Federal Communications Commission

[Docket Nos. 14895, 15233, 15971; FCC 66-220]

PART 21—DOMESTIC PUBLIC RADIO SERVICES (OTHER THAN MARITIME MOBILE)

PART 74—EXPERIMENTAL, AUXILIARY AND SPECIAL BROADCAST SERVICES

PART 91—INDUSTRIAL RADIO SERVICES

Community Antenna Television (CATV) Systems

In the matter of amendment of Subpart L, Part 91, to adopt rules and regulations to govern the grant of authorizations in the Business Radio Service for microwave stations to relay television signals to community antenna systems, Docket No. 14895; amendment of Subpart I, Part 21 to adopt rules and regulations to govern the grant of authorizations in the Domestic Public Point-to-Point Microwave Radio Service for microwave stations used to relay television broadcast signals to community antenna television systems, Docket No. 15233; amendment of Parts 21, 74, and 91 to adopt rules and regulations relating to the distribution of television broadcast signals by community antenna television systems, and related matters, Docket No. 15971 (RM Nos. 636, 672, 742, 755 and 766).

1. On April 23, 1965, the Commission issued a notice of inquiry and notice of proposed rule making in Docket No. 15971 (30 F.R. 6078), which divided the proceeding into two parts. In Part I the Commission reached an initial conclusion that it has jurisdiction over all community antenna television (CATV) systems, whether or not microwave facilities are used, and proposed to extend to nonmicrowave CATV systems the substantive provisions of the carriage and nonduplication rules adopted for microwave-served CATV's in Docket Nos. 14895 and 15233. First report and order in Docket Nos. 14895 and 15233, 30 FCC 683; memorandum opinion and order in Docket Nos. 14895 and 15233, 1 FCC 2d 524. Part I also invited comment on various auxiliary questions affecting all CATV's which were not resolved in Docket Nos. 14895 and 15233. These have to do with color duplication, educational television stations, station-owned translators, and a possible transition period before the carriage provisions are made fully applicable to existing CATV systems with limited channel capacity (notice, pars. 33–36).

2. In Part II of the proceeding the Commission initiated an inquiry looking toward possible rule making on broader questions posed by the trend of CATV development, including (1) the effect of CATV entry into major cities on UHF independent stations, (2) the possible need for limitations on the distance a station's signal may be extended by CATV, (3) "leap-frogging,"[1] (4) program origination or alteration by CATV and the related question of Pay-TV or combined CATV-Pay-TV operations, and (5) various miscellaneous questions. In paragraph 49 of Part II the Commission adopted an interim policy, pending the outcome of the proceeding, which provides that a microwave application to serve a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area. A like showing was required for microwave facilities to serve a CATV system in an "overshadowed" community where, because of its proximity to three or more existing stations, any new UHF station would be independent in operation. In paragraph 50 of Part II, the Commission proposed an interim rule along similar lines to govern nonmicrowave CATV entry into such areas.

3. Comment on Part I and paragraph 50 of Part II was due at an earlier date than that specified for the remaining portions of Part II,[2] which, it was anticipated, would require more lengthy

[1] "Leap-frogging" means the distribution by the CATV system of more distant signals in preference to signals of stations located much closer to the system.

[2] Comments and reply comments on Part I and par. 50 were originally due on June 25 and July 26, 1965, respectively. By orders issued on June 16 and June 30, 1965, these times for filing were extended to July 26 and Sept. 17, 1965. Formal comments and/or reply comments have been received from the parties listed in the attached Appendix A. In addition, a large number of informal comments or letters from members of the public have been received and placed in the docket.

consideration and possibly a further notice to afford an opportunity for comment on any specific rule proposals of the Commission (notice, pars. 64, 68). Comments and reply comments on Part I and paragraph 50 have now been fully considered by the Commission. This report and order deals only with these aspects of the proceeding.

PART I. THE CARRIAGE AND NONDUPLICATION PROVISIONS

4. In proposing that the substantive provisions of the carriage and nonduplication rules governing microwave CATV systems be extended to all CATV systems, the notice emphasized (pars. 27, 30) that two main issues were presented: (1) Whether the Commission can appropriately proceed on the basis of its present statutory authority and (2) whether any special problems of substance or procedure are posed by rules going to nonmicrowave systems. We turn now to a discussion of the first issue.

5. The threshold jurisdictional question is twofold: (a) Whether the Commission has jurisdiction as a matter of law over nonmicrowave CATV systems under the present provisions of the Communications Act and (b) whether it would be appropriate to exercise any such jurisdiction without a legislative enactment on the subject. In the notice we concluded initially, for the reasons set forth in our memorandum on jurisdiction attached to the notice, that CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It further appeared to us that the Commission's statutory powers, particularly under sections 4(i), 303 (f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of section 1 and 307(b) of the Act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave. However, we pointed up the following matters (par. 31 of the notice):

> While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out in order to afford interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (i) a congressional guidance as to policy and (ii) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest.
>
> It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the Commission from promulgating rules along the lines of those adopted in Docket Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rulemaking proceeding lead to the conclusion that the Commission does have present jurisdiction to extend [illegible] substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rule-making proceeding instituted by this notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

6. Following the issuance of the notice, H.R. 7715 was introduced in the House on April 28, 1965, and hearings on the bill were held before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign

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Commerce in May and June 1965. In the Commission's testimony concerning the bill, it was stated that the Commission did "not contemplate applying any new rules that we may enact with respect to the rest of the CATV industry until 1966, in other words, until at least after this session of Congress is over and it has had the ability to consider this problem." (Hearings before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on H.R. 7715, 89th Cong., 1st sess., p. 25.) No bill relating to CATV has been introduced in the Senate, and the 89th Congress adjourned its 1st session without enacting any legislation on CATV.

7. We think it appropriate, therefore, to take up without further delay Part I and paragraph 50 of the rulemaking proceeding. Here we note that CATV is developing and expanding at a very rapid rate (see pars. 31–39 within). We cannot ignore the increasing risk of adverse impact on the "public interest in

the larger and more effective use of radio" (section 303(g)) which accompanies the burgeoning CATV development. See paragraphs 116–117; Part II, within. Further, it is contrary to sound regulation for carriage and nonduplication to be applicable to the microwave CATV system and inapplicable to the nonmicrowave, which constitutes the other three-fourths of the industry. And, if the carriage and nonduplication provisions are to be applied to nonmicrowave systems, it would obviously minimize the disruption to the viewing public to do so as soon as possible—before a large number of incipient CATV systems commence operation and their subscribers become accustomed to service not in compliance with the rules. It would also appear to entail less hardship to the new CATV operator to commence operation under the rules than to undergo a subsequent conversion. Moreover, removal of the present uncertainty would assist local franchising authorities, as well as franchise applicants. We have received several inquiries from local authorities as to when a decision might be expected, with an indication in some instances that action on franchise applications was being withheld pending our decision. The "introduction of as much stability as possible into the planning perspective of those affected by our regulation" is regarded by us as a "highly desirable objective" (first report and order in Docket Nos. 14895 and 15233, par. 78). For all these considerations, developed more fully within, we think it our responsibility under the Communications Act to resolve the issues in Part I and paragraph 50.

A. JURISDICTION AS A MATTER OF LAW

8. While the comments filed in support of present jurisdiction outnumber those opposed,[3] there appears to be no need to review the substance of the supporting comments here. The bulk of the supporting comments either restate essentially the same matters set forth in the Commission's memorandum on its jurisdiction and authority (notice, attachment B) or express agreement with that memorandum.[4] Since we believe that the case for jurisdiction is sufficiently set forth in our memorandum, a copy of which is attached to this document for convenient reference (attachment C), we shall discuss only the arguments made in the opposition comments.

9. The comments urging a want of jurisdiction make three principal arguments. It is asserted, first, that the Communications Act contains no provision granting the Commission authority over CATV systems. Second, it is contended that there are specific provisions in the Act which show a lack of authority. And, third, it is urged that the Commission itself has repeatedly denied jurisdiction over CATV systems, that Congress is aware of and has acquiesced in this administrative interpretation, and that principles of statutory construction foreclose the Commission from now claiming jurisdiction. We shall discuss these arguments in order.

10. The contention that the Communications Act contains no provision granting the Commission authority over CATV systems takes issue with the sufficiency of the statutory base set forth in the Commission's memorandum (pp. 2–7). We there relied on the fact that section 2(a) states that the "provisions

[3] Supporting comments were filed by: National Association of Broadcasters; Association of Maximum Service Telecasters, Inc.; Storer Broadcasting Co.; American Broadcasting Co.; Westinghouse Broadcasting Co., Inc.; Fuqua Industries, Inc.; WTVY, Inc.; Snyder & Associates; Western Slope Broadcasting Co.; Black Canon Broadcasting Co.; Mesa Verde Broadcasting Co.; Houston Post Co.; WKBH Television, Inc.; Bonneville International Corp.; Mobile Video Tapes, Inc.; D. H. Overmyer; Aroostook Broadcasting Corp.; Taft Broadcasting Co.; WJAC, Inc.; Springfield Television Broadcasting Corp.; Midwest Television, Inc.; West Central Broadcasting Co.; RustCraft Broadcasting Co.; WGAL Television, Inc.; American Farm Bureau Federation; National Farmers Union; National Grange; Tri-State TV Translators Association; Labor Organizations Affiliated With the AFL–CIO; Eastern Educational Network; and commenting jointly, television stations KHOU–TV, KOTV, KXTX, WANE–TV, WAVE–TV, WFIE–TV, WFRV, WISH–TV, WJXT, WMT–TV, WNOK–TV, WTOP–TV. Opposition—Commenting in opposition to jurisdiction were: National Community Television Association, Inc.; Smith & Pepper (on behalf of 150 CATV systems); Columbia Broadcasting System; National Broadcasting Co.; TV Cable Service of Abilene, Inc.; Entron, Inc.; American Cable Television, Inc.; Meredith Broadcasting Co.; Triangle Publications, Inc.; Jerrold Electronics Corp.; International Teleprompter Corp.; Montgomery Television Association, Inc.; and Journal Co. Other—American Telephone & Telegraph Co. and United States Independent Telephone Association took no position on the jurisdictional question but requested that the carriage and nonduplication provisions be applied to CATV systems directly rather than to microwave common carriers.

[4] While Storer Broadcasting Co. does not agree with the impact argument (Commission's memorandum pp. 4–5) as a jurisdictional base, it takes the position that the Commission now has limited jurisdiction over all CATV systems which is sufficient to support the measures proposed in Part I and par. 50.

of this Act shall apply to all interstate and foreign communication by wire or radio * * * and to all persons engaged within the United States in such communication," and concluded that CATV systems are engaged in "communication by wire," within the meaning of section 3(a), which is interstate in nature. With respect to the provisions of the Act to be applied, we stated that the authority conferred by section 303(h) to issue rules establishing the area or zone to be served by any station includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act), and specifically a person subject to the provisions of the Act, and encompasses authority to specify by rule the conditions under which the station's signal may be extended beyond the prescribed service area or zone by CATV. Moreover, apart from section 303(h), the general rule making authority of the Commission (secs. 4(i) and 303 (f) and (r)) includes authority to take necessary action, not inconsistent with the Act or law, to prevent frustration of section 307(b) by CATV—an "interstate communication by wire" to which the Act's provisions are applicable (secs. 2(a) and 3(a)).

11. It is asserted that these sections do not suffice to support jurisdiction because it is necessary to find some specific provision of the Act expressly conferring jurisdiction over the subject matter of CATV. The authorities cited in our memorandum (pp. 4–6) to the effect that our authority does not depend on a specific reference to CATV or CATV practices in the Act[6] are distinguished on the ground that they concern authority over unspecified practices of regulated licensees rather than the power to regulate unspecified persons or businesses not licensed under the Act. Unless specific authority is required for regulation of nonlicensees, it is argued, the Commission could utilize its general rule making authority to regulate any business (such as amusements, program producers, etc.) which has an impact on broadcasting or uses communications facilities.

12. The attempted distinction, even assuming arguendo its validity, does not fit the situation here. We are not presented with the question of whether the Commission's broad powers to take action necessary to carry out the provisions of the Act include authority to regulate a business not subject to the Act merely because of some impact on, *[P. 4542]* or use of, interstate communications under the Act.[7] CATV systems differ from most other businesses, in that they are themselves engaged in "interstate communication by wire," a business to which the Act's provisions are expressly applicable (secs. 2(a), 3(a)).[7] Moreover, they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303 (h) and 307(b). We are not powerless to prevent frustration of our actions under those sections by persons subject to the Act merely because the licensing provisions of the statute are inapplicable to them. Section 312 (b) and (c) provide for the issuance of a cease and desist order against "any person"—not merely any "licensee or permittee"—who has "violated or failed to observe any rule or regulation of the Commission authorized in this Act * * *."

13. It is further asserted that Federal Power Commission v. Panhandle Eastern Pipeline Co., 337 U.S. 498, precludes a conclusion that the general rule making

[6] National Broadcasting Co. v. United States, 319 U.S. 190, 218–219; United States v. Storer Broadcasting Co.; 351 U.S. 192, 203; American Trucking Association v. United States, 344 U.S. 298, 309–311; United States v. Pennsylvania RR. Co.; 323 U.S. 612; United States v. Wrightwood Dairy Co., 315 U.S. 110; Houston, East & West Texas Railway Co. v. United States, 234 U.S. 342, Public Service Commission of State of New York v. Federal Power Commission, 327 F. 2d 893, 897 (C.A.D.C.).

[7] We have not claimed plenary power to regulate any business which may have some impact on broadcasting or other interstate communication by wire or radio. In the jurisdictional memorandum we stated that the "Commission clearly has no jurisdiction over bowling alleys or theatres, for example * * *." Moreover, we sought and obtained specific statutory authority to regulate the manufacture of television receivers shipped in interstate commerce for sale to the public (Public Law 87–529, 47 U.S.C. 303(s)). There may be instances, of course, where the Commission's regulatory power appropriately extends to some activities of persons not engaged in communication by wire or radio. But there is not necessity to determine the limits or basis for such authority here.

[7] Since CATV systems fall within the definition of communication by wire and their operations are interstate in nature, it makes no difference that they are not expressly mentioned by name. The Act applies to "*all* interstate communication by wire or radio" and to "*all* persons engaged in such communication" (sec. 2(a), italic added). For that matter, prior to the 1962 amendment incorporating section 303(s), the word "television" did not appear in the Act. Yet, it has long been established that the Act applies to television because it falls within the definitions of "radio communication" and "transmission of energy by radio" contained in section 3. Allen B. Dumont Labs, Inc., v. Carroll, 184 F. 2d 153, 155 (C.A. 3), cert. den. 340 U.S. 929.

power of the Commission encompasses authority to take necessary action, not inconsistent with the Act or law, to prevent frustration of section 307(b) and 303(h) by CATV. However, the Panhandle case is readily distinguishable. That case was decided upon the basis of a specific provision in the Natural Gas Act which denied the Federal Power Commission jurisdiction to deal with the problem there involved.[8] Section 1(b) of the Natural Gas Act provides that the "provisions of this Act shall apply * * * to the sale in interstate commerce of natural gas for resale * * * but shall not apply * * * to the production or gathering of natural gas" (52 Stat. 821, 15 U.S.C. sec. 717(b)). The Court held that the transfer of gas leases fell within the exclusion as to the "production or gathering of natural gas" and hence lay outside the scope of the Power Commission's regulatory powers. In declining to find authority in the Power Commission's general rule making powers, the Court stated that the "power to do the things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions" (337 U.S. at 508). By contrast, there is no provision in the Communications Act which specifically excludes CATV systems from the Commission's jurisdiction. On the contrary, section 2(a) states that the "provisions of this Act shall apply to *all* interstate communication by wire or radio * * * and to *all* persons engaged within the United States in such communication * * * (italic added)." Moreover, Panhandle has been construed narrowly in a recent case arising under the Natural Gas Act, which sustained the Power Commission's jurisdiction over gas leases for resale in interstate commerce. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 403–404.

14. The argument that the Communications Act contains language expressly excluding jurisdiction over CATV systems, is predicated primarily on the provisions of section 2(b) and section 214 (a) of the Act. Section 2(b) states that nothing in the Act shall be construed to give the Commission jurisdiction with respect to "intrastate communication service by wire or radio of any carrier" or "any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio with facilities located in an adjoinin State * * * of another carrier * * *." Section 214(a) provides, in pertinent part, that "no carrier" shall construct or operate a line without a prior certificate from the Commission: *Provided, however,* That no certificate is required for construction or operation of "a line within a single State unless such line constitutes part of an interstate line." It further states: "As used in this section the term 'line' means any channel of communication established by the interconnection of two or more existing channels."

15. We are not persuaded that these sections demonstrate a statutory denial of jurisdiction over CATV systems. In the first place, both sections by their terms apply to "carriers" and we have repeatedly ruled that CATV systems are not "carriers" within the meaning of section 3(h) of the Act. Frontier Broadcasting Co., 24 FCC 251; CATV and TV Repeater Services, 26 FCC 403, 427–428; WSTV, Inc. v. Fortnightly Corp., 23 Pike and Fischer, R.R. 184; Philadelphia Television Broadcasting Co., et al., FCC 65–702 (Aug. 8, 1965). Nor are television stations "carriers" under section 3(h). Moreover, even if CATV systems were to be deemed carriers, their operations are interstate in nature since they are carrying interstate television signals. A common carrier carrying television signals does not fall within the exemption in section 2(b)(1) because its physical facilities are located in only one State; it "performs an interstate communications service." Idaho Microwave, Inc. v. Federal Communications Commission, 352 F. 2d 729 (C.A.D.C.); Ward v. Northern Ohio Telephone Co., 300 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; Pacific Telatronics, Inc., 4 Pike and Fischer, R.R. 145; and cf. California Interstate Telephone Co. v. Federal Communications Commission 328 F. 2d 816 (C.A.D.C.).[9] See also, United States v. American Telephone & Telegraph Co., 57 F. Supp. 451, 454 (S.D.N.Y.), aff'd percuriam, sub nom.

[8] Other Federal Power Commission cases cited in the comments, Amerada Petroleum Corp. v. Federal Power Commission, 334 F. 2d 404 (C.A. 8), and Pan American Petroleum Corp. v. Federal Power Commission, 339 F. 2d 694, are similarly inapposite since they involved a lack of jurisdiction predicated upon a statutory exclusion.

[9] That the carrier in Idaho Microwave was carrying the signal of a television station located in another State is not of controlling significance. All television broadcasting is interstate in nature. Ward v. Northern Ohio Telephone Co., 300 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; Capital City Telephone Co., 3 FCC 189, 193–4; Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279. Moreover, in the case of network programing the communication link between the network and the station transmitter forms an additional part of the interstate chain of communication. Ward, supra, 300 F. 2d at 819.

Hotel Astor v. United States, 325 U.S. 837. By the same token a CATV system, if it were a carrier, would constitute "part of an interstate line" for purposes of section 214(a), even though its facilities were located within a single State.

16. The most vigorously pressed argument against jurisdiction is the assertion that the Commission is estopped by past disclaimers of jurisdiction over CATV systems and congressional acquiescence in those disclaimers (see par. 28 of the notice herein). Reliance is placed on the principle of statutory construction that a consistent, longstanding administrative interpretation is entitled to great weight, particularly where Congress is aware of the administrative determination and has subsequently amended the statute without changing the applicable section.[10] Whatever the force of this principle in other circumstances, we do not think that it is dispositive of the legal question of our jurisdiction here.

17. Initially, it bears noting that some of the precedents cited as establishing a consistent contrary position primarily concerned matters upon which we do not rely as a basis for jurisdiction. We have consistently held that CATV systems are not common carriers within the meaning of section 3(h), and hence do not come within the provisions of Title II applicable to carriers. Frontier Broadcasting Co., 24 FCC 251; CATV and TV Repeater Services, 26 FCC 403, 427–248; WSTV, Inc. v. Fortnightly Corp., 23 Pike & Fischer, R.R. 184. But we have

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not proposed to depart from this ruling, which has been reaffirmed since the issuance of the notice herein. Philadelphia Television Broadcasters Co., et al. v. Rollins Broadcasting, Inc., Docket No. 15926 (FCC 65–702, Aug. 2, 1965) now pending on appeal (case No. 19577, C.A.D.C.). Nor have we departed from our earlier rulings that CATV's are not engaged in "broadcasting" within the meaning of section 3(o) and are not encompassed within section 325(a). CATV and TV Repeater Services, 26 FCC 403, 428–430. In areas closer to the claimed basis for jurisdiction, the precedents do not reflect a consistent contrary position.[11] Thus, while we initially disclaimed jurisdiction to deny a common carrier microwave authorization to relay television signals to CATV systems (Intermountain Microwave, 24 FCC 54; CATV and TV Repeater Services, 26 FCC 403, 431–433), this ruling was later reversed in our Carter Mountain decision, 32 FCC 459, which was sustained on judicial review. Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F. 2d 359, 364 (C.A.D.C.), cert. den. 375 U.S. 951. In CATV and TV Repeater Services, we disclaimed plenary power, under section 303 (a), (b), (f), (g), (i), and (r), to "regulate any and all enterprises which happen to be connected with one of the many aspects of communications" (26 FCC at 429) a power which is not claimed here. However, we assumed, without deciding, that CATV's are within the scope of section 3(a) (26 FCC at 428), and also found it unnecessary to pass on the question of our authority to regulate them directly because of adverse effect on broadcasting (26 FCC at 431). And, finally, we have not previously ruled on the question of whether section 303 (h) encompasses authority to regulate CATV.

18. More important, even if our past rulings in this troublesome area had been consistent, we are not estopped from correcting a ruling of law which appears to be clearly erroneous. Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F. 2d 359, 364 (C.A.D.C.), cert. den. 375 U.S. 951; Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672; United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 404–406.[12] As the Supreme Court commented in the Phillips Petroleum case,

[10] Cases cited to us in this connection include: Hanover Bank, Ex. v. C.I.R., 369 U.S. 672, 686–687; United States v. Leslie Salt Co., 350 U.S. 383, 396–397; Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315; Luckenback Steamship Co. v. United States, 280 U.S. 173, 183; Cammarano v. United States, 358 U.S. 498.

[11] The position of Congress, if it has acquiesced in the Commission's rulings, is not clear. It is true, as set forth in the notice, par. 28, that following our decision in CATV and TV Repeater Services, 26 FCC 403, the 86th Congress gave extensive consideration to some of the various legislative proposals on CATV submitted by the Commission and others, but enacted no legislation. Moreover, bills introduced in subsequent Congresses received no action. However, Congress also took no action after being apprised of the partial reversal of that decision in Carter Mountain. Twenty-ninth FCC Annual Report, 1963. Congress likewise is aware of our initial conclusion as to jurisdiction in the notice herein issued on Apr. 23, 1965. Although a subcommittee of the House Commerce Committee subsequently held hearings on H.R. 7715, no committee report issued in the 1st session of the 89th Congress, and no legislation on CATV was considered or introduced in the Senate.

[12] See also, Calbeck v. Travellers Ins. Co., 370 U.S. 114, 127, fn. 15 Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 183, Association of Clerical Employees v. Brotherhood of R. & S.S. Clerks, 85 F. 2d 152, 156 (C.A. 7).

in sustaining the Federal Power Commission's jurisdiction over the sale of gas by gas producers for resale in interstate commerce despite that agency's consistent past disclaimer of jurisdiction, "even consistent error is still error" (347 U.S. 672, 678, fn. 5). Moreover, in United Gas Improvement the authority of the Power Commission over gas leases for resale in interstate commerce was upheld, notwithstanding the fact that the agency had initially concluded in the same proceeding that it lacked jurisdiction and then reversed itself on remand (on another ground) from a court of appeals decision which assumed a lack of authority on the basis of Panhandle (381 U.S. at 404–406). Public Service Commission of New York v. Federal Power Commission, 287 F. 2d 143, 145 (C.A.D.C.).

19. As indicated in the notice (par. 28), our "jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion." However, the arguments discussed above do not persuade us that jurisdiction is lacking, and no other bar to jurisdiction has been brought to our attention. After careful consideration of all the comments we are convinced that the case for present jurisdiction is a strong one. Accordingly, for the reasons set forth above and in our memorandum as to jurisdiction (Appendix C), we conclude that CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). We further conclude that our statutory powers, particularly under section 4(i), 303 (f), (g), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1, 307(b), and 303(s) of the Act and to prevent frustration of the regulatory scheme by CATV operations, whether or not microwave facilities are used. The rules proposed in Part I and paragraph 50 of the notice are within our legal authority.

B. ASSERTION OF JURISDICTION

20. We turn now to the further question of whether jurisdiction over nonmicrowave CATV should be exercised at this time. Most of the comments in support of jurisdiction favored an immediate extension of the carriage and nonduplication requirements to nonmicrowave CATV systems, and the adoption of an interim policy either along the lines proposed in paragraph 50 of the notice or of broader scope. However some of the supporting comments and many of the opposition comments took the position that we should not exercise jurisdiction, even if present, until Congress has legislated on the subject. It is urged that this would provide needed policy guidelines and avoid protracted litigation on the jurisdictional issue.

21. We stated in the notice (par. 31) that we would "welcome (i) a congressional guidance as to policy and (ii) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest." In this report, we stress again the desirability in our view of congressional guidance in this important area. But thus far the congressional guidance or clarification has not been forthcoming; and in the present circumstances, our decision cannot properly turn on a desire to avoid litigation or on the hope of obtaining policy guidance in the CATV field. The Commission has not been "left at large" as to the criterion to be following in performing our statutory duties in the dynamic communications field. National Broadcasting Co. v. United States, 319 U.S. 190, 219–220. The public interest touchstone provided by Congress afforded a sufficient standard for our decision to adopt the carriage and nonduplication requirements for microwave-served CATV systems in the first report and order in Docket Nos. 14895 and 15233. Since the "considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service apply equally" to nonmicrowave CATV systems (notice, par. 27), there is likewise a sufficient standard for judgment here. Finally, our action with respect to the paragraph 50 proposal is similarly dictated by the "public interest in the larger and more effective use of radio" (sec. 303(g)).

22. Most of the comments agree that, apart from the basis for jurisdiction, there is no significant difference between microwave and nonmicrowave systems. However, National Community Television Association, Inc. (NCTA), asserts that there is no basis for assuming they are alike. It points to no factual distinction. Rather, NCTA renews its contentions in Docket Nos. 14895 and 15233 that no adequate fact-finding inquiry has been conducted, and claims further that adverse impact has not been established and cannot support an assertion of jurisdiction. In this connection, NCTA has appended to its comments the material it submitted before the House Subcom-

mittee in hearings on H.R. 7715. It urges particularly that the 15 days before and after nonduplication period is unjustified, and has no reasonable relationship to the showing of nonnetwork programing. NCTA's staff has undertaken a study to test the validity of the Commission's sample week network study (first report, pars. 104–109), and has found that the data developed by the Commission supports its conclusion that delayed programing occurs most frequently among affiliates in the mountain time zone, and there in one and two station markets. NCTA claims that its [P. 4544] study of 33 mountain time zone stations with CATV penetration shows no adverse consequences (NCTA comments, Exhibit A). It points in addition to specific examples of small market stations which have allegedly increased circulation and maintained the same or a higher network hourly rate since 1960, despite substantial CATV penetration of their service areas (NCTA comments, Exhibits A and B).

23. While the inferences NCTA draws from its studies are sharply criticized in the reply comments of Association of Maximum Service Telecasters (AMST), we do not think it necessary or useful to set forth the contentions of each or to discuss their dispute as to individual situations. The NCTA appendices do not differentiate between microwave and nonmicrowave CATV systems; on their face they constitute an attack on the validity the first report and order in Docket Nos. 14895 and 15233. But the supplementary material upon which NCTA now relies as indicating a lack of past impact is similar in nature to the showing there considered at length and would not in itself warrant reversal of our conclusions.[13] Indeed, NCTA, in relying upon its showing, simply ignores the two most important grounds of our decision, namely, (i) the fair competition ground and (ii) the economic impact ground, based on the CATV trend in recent years. Since this is so, it may be well to restate those grounds briefly, and to take account of current information pertinent to those grounds.

24. In the first report and order in Docket Nos. 14895 and 15233, we concluded that CATV serves the public interest when it provides program choices not locally available off-the-air and acts as a supplement rather than a substitute for off-the-air television service, explaining our principal reasons as follows (par. 44):

> • • • Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis (secs. 1 and 307(b)) of the Communications Act. This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.

25. Our determination to adopt the carriage and nonduplication requirements rested on two basic grounds: (1) That failure to carry local stations and duplication of their programs are unfair competitive practices, which are inconsistent with the supplementary role of CATV (pars. 49–57, 76), and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential (pars. 58–75, 77).

26. With respect to the first ground, we found that the CATV system which fails to carry the local station on its system has in practical effect cut off the station from access to CATV subscribers (par. 51). We stated (par. 57):

> As a competitive practice, the failure or refusal by a CATV system to carry the signal of a local station is plainly inconsistent with our belief that CATV service should supplement, but not replace, off-the-air television service. The cable system that follows such a practice offers the subscriber the benefits of additional television service at the price of blocking or impeding his access to available off-the-air signals. • • •
>
> Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of

[13] We have decided, for the reasons set forth in paragraphs 47–55 below, to delete the provision for nonduplication 15 days before and after the local broadcast and to substitute a requirement for nonduplication only on the same day as the local broadcast. Thus, our resolution of this matter affords NCTA substantially the relief it has requested.

CATV competition upon broadcasting would be entirely negligible we consider countenancing such a practice.

27. We further pointed out that CATV, though distributing the programs of the television broadcast service, stands outside its normal program distribution process and fails to recognize the reasonable exclusivity for which the local stations have bargained in the program market when it duplicates local programing via the signals of distant stations (pars. 52–56). We summarized our conclusion that this was unfair and inconsistent with CATV's supplementary role as follows (par. 57):

In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programing via the signals of distant stations as a fair method of competition. We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct. We think it apparent, however, that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs. We think the basic congressional judgment underlying section 325(a) limitation on rebroadcasting is the same.

Nor do we consider the duplication of existing off-the-air service to be consistent with CATV's appropriate role as a supplementary service. Whatever the ultimate impact of CATV competition upon the revenues and operation of competing stations, duplication is highly likely to affect the audience for the specific programs involved. And it does so without generally offering the public a substantially different service. We believe that a service such as CATV, which lives on the product of the existing television service, should at a minimum give some measure of recognition to the fundamental distribution practices which have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries. Once again, unless we were convinced that the impact of CATV competition upon broadcasting service would be negligible, we would favor some restrictions upon the ability of CATV systems to duplicate the programs of local broadcasting systems, as a partial equalization of the conditions under which CATV and broadcasting service compete. (Footnotes omitted.)

28. We stated that the foregoing grounds were "enough to justify regulatory action" (par. 58) and that "every station affected is entitled to appropriate carriage and nonduplication benefits—irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station" (par. 76). But, as stated, w also turned to another ground based o the economic impact of CATV upon tele vision broadcast development. We con sidered at some length the data an arguments before us on the question c impact (pars. 58–75), finding—as i 1959—that it is "impossible, with th data at hand, to isolate reliably the effects of CATV competition from all o the other factors which operate to produce particular financial results in differing settings" (par. 68). However taking account of nationwide trend affecting the nature of CATV offerings the character of the markets entered and the degree of penetration achieved we also found it plain that CATV coul have a substantial negative effect upo station revenues and audiences ever though we lack the tools to measure precisely the degree of impact (pars. 65–69). We further found reason to believe that the impact was likely to be "more serious in the future than it has been in the past" (par. 69), and stressed our concern with the effect of explosive CATV growth in a critical period for UHF development (pars. 71–72). In sum, the Commission's judgment on this ground was based very largely, not upon the past, but upon the trends which were already evident and whose dimensions called for action now to assure the public interest in the future.

29. The additional showing made in the appendices to the NCTA comments is not directed to the above crucial considerations concerning the trends in the CATV or UHF fields. Instead, it focuses upon certain situations which, it claims, establish that CATV has no adverse impact upon television broadcasting. But each of its examples is sharply disputed by AMST, which points to significant impact in some cases or sets forth other factors for the improvement in the situation of the television station in the face of CATV competition. For example, AMST notes that several stations whose network hourly rate has not declined since 1960 were already at or near the

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minimum rate for the network involved (AMST reply comments, pp. 27–28, attachment A, pp. 10–14). It attributes whatever success Station WLUC–TV, Marquette, Mich., has enjoyed in recent years to new management beginning in 1960 and states that the station has suffered a decline in average quarterly hour audience while local revenues have remained stagnant (AMST reply comments, pp. 29–30, attachment A, p. 14). AMST also points out that WBOC–TV, Salisbury, Md., following a change in

ownership in 1961 and the infusion of a substantial financial investment, extended its hours of operation, improved its programing, and doubled its service area through a substantial power increase. (AMST reply comments, pp. 31–32, attachment A, pp. 15–16.)

30. It would, we think, serve no useful purpose to delve into each of those situations. For even assuming that it were possible to isolate the significance of CATV in each situation from other factors (as it was feasible in the Carter Mountain case, first report, par. 64), it would not afford greater insight into the crucial aspect of the matter—the explosive growth and changing character of CATV and its possible impact upon television broadcasting in the future. And, as to that aspect, events since the issuance of the first report reinforce the judgment made by us upon the basis of the above-mentioned trends in the industry. For, as the comments in this proceeding show, without dispute in this respect, the trends described in paragraph 65 of the first report have become even more pronounced. We shall briefly review those trends in light of their importance to our judgment.

31. In the first report we relied on estimates in the Seiden Report which were based on data compiled in 1964.[14] The Seiden Report stated (p. 2) that there were approximately 1300 CATV systems serving approximately 1.2 million TV homes. The reply comments of AMST, filed on September 17, 1965, contain the following estimates as of mid-1965 (AMST reply comments, attachment A, prepared by Economic Associates, Inc., of Washington, D.C., using data from Television Factbook (No. 35) and Television Digest):

Communities with operating CATV's	1,847
Communities with CATV's franchised (but not yet operating)	758
Communities with CATV applications pending	938

While these figures are not tendered as precisely accurate,[15] the rapidly accelerating rate of growth is confirmed in statistics given by licensees commenting on the situation within their service areas,[16] in the trade press, and in letters received by the Commission from local franchising authorities and other members of the public.

32. In addition, the channel capacity of CATV systems is increasing. According to the Seiden Report (pp. 2, 54) the usual CATV system in 1964 delivered five signals and 85 percent of all systems delivered between three and seven signals. However, there is indication in the record that most of the new CATV systems have a channel capacity of 12 channels and many of the older systems are expanding their original capacity. The AMST reply comments (attachment A) contain the following table showing the cable capacity for the 753 CATV systems for which it was able to obtain data:[17]

CATV's Capacity, in Number of Channels (Includes FM) [1]

Starting	2	3	4	5	6	7	8	9	10	11	12
Through											
1951	.....	3	.....	28	2	1	.....	.....	.....	.....	13
1952	.....	3	.....	26	.....	1	1	.....	.....	.....	15
1953	.....	3	1	36	1	4	.....	2	1	.....	10
1954	1	5	.....	30	3	3	.....	2	1	.....	20
1955	.....	5	.....	43	2	2	.....	4	.....	.....	11
1956	.....	3	1	30	.....	.....	.....	1	.....	.....	10
1957	1	.....	.....	23	.....	3	1	.....	1	.....	5
1958	.....	2	.....	27	1	.....	1	.....	1	.....	7
1959	.....	.....	1	28	.....	.....	1	1	.....	.....	4
1960	.....	2	.....	26	.....	2	1	1	.....	.....	6
1961	.....	.....	.....	21	.....	1	.....	.....	1	.....	9
1962	1	.....	.....	25	.....	.....	.....	1	.....	.....	16
1963	.....	.....	.....	21	1	1	1	.....	.....	.....	33
1964	.....	.....	.....	15	1	2	2	0	.....	3	53
July 1965	.....	.....	.....	5	.....	1	2	1	.....	.....	44
Totals	3	26	3	393	11	21	10	22	5	3	256

[1] Includes expansions subsequent to starting date. Limitations of the source data make it impossible to determine the original capacity of most of these systems.

[14] This estimate was based on comments filed in Docket Nos. 14895 and 15233 and the report submitted to us by Dr. Martin H. Seiden, entitled "An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry" (GPO, February 1965), hereafter referred to as the "Seiden Report."

[15] There are other estimates (see par. 116, describing the Television Digest estimate), but whatever the estimate, CATV growth is clearly explosive in nature.

[16] E.g., comments of Midwest Television, Inc.; West Central Broadcasting Co.; WKBH Television, Inc.; Mobile Video Tapes, Inc.; and Bonneville International Corp.

[17] The data were compiled from reports in Television Factbook (No. 35) Television Digest, questionnaires on file at the Commission, and ARB publications.

The expanding channel capacity is also reflected in the answers submitted to our questionnaire sent to all known CATV systems in connection with the transition period question. (See par. 103–107, within).

33. It further appears that CATV activity is accelerating in areas where there is the greatest interest in UHF development. The comments of AMST list all communities or metropolitan areas where UHF stations were operating, authorized or applied for as of July 8, 1965, and indicate the extent of co-located CATV activity (AMST comments, attachment C, table 2).[18] The results are summarized by AMST as follows (comments, p. 59):

> There are 237 UHF stations and 93 educational stations either operating or with outstanding construction permits or for which applications are pending in communities or metropolitan areas with a total population of over 112,000,000. The cities and metropolitan areas with CATV systems operating, pending or applied for account for at least 85,000,000 people. At least 145 communities or standard metropolitan areas with UHF stations operating, authorized or applied for also have CATV activity. In 68 such communities or metropolitan areas where there are already operating CATV systems; at least 67 have CATV systems franchised but not operating, and at least 93 have CATV applications proposed.

34. The situation in central Illinois is described by Midwest Television, Inc. (Midwest), licensee of VHF Station WCIA, Champaign, Ill.; UHF Station WMBC–TV, Peoria, Ill.; and applicant for a new UHF station in Springfield, Ill.[19] Midwest states that CATV is in process of growth in virtually all of the major communities served by WCIA, including Champaign and Urbana themselves.[20] Franchise applications have been filed or proposed in at least 12 communities within the WCIA Grade B service area, and CATV systems are operating, under construction, or franchised in some 15 more. These 27 communities have a total population of 464,500—nearly one-half of the total population within WCIA's Grade B service area. Within the Grade B service areas of WMBD–TV, Peoria and of W71AE, Midwest's La Salle translator, CATV is at various stages—from franchise proposals to actual operation—in at least five communities, including Peoria itself (which has three operating UHF stations and a vacant UHF commercial assignment). The total urban population of these five communities is 221,294—between one-third and one-half of the total population in the Grade B service areas of WMBD–TV and the La Salle translator. In Springfield (which has one operating UHF station and applications pending for two new UHF stations), applications for CATV franchises are under active consideration in Springfield and another community located in the Grade B contour of both proposed UHF stations. The

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total urban population of these two cities is 92,072—approximately one-half of the total population within the Grade B contour of Midwest's proposed new UHF station. Midwest states that the proposals for CATV in Springfield, Peoria, Champaign, and Urbana have all been announced since April 23, 1965, and that at least eight new CATV operators filed applications for local franchises in central Illinois during the first two weeks of July.

35. A description of CATV growth in the Rio Grande Valley of Texas is given by Mobile Video Tapes, Inc., the licensee of KRVG–TV in Weslaco-Harlingen, Tex. According to Mobile Video Tapes, Weslaco has a 1960 Census population of 15,649 and the population of the Harlingen-San Benito urbanized area is 61,658. It states that J. Walter Thompson Co. (Population and Its Distribution, the United States Markets, 8th ed., 1961), lists the Brownsville-Harlingen-San Benito market (which includes Weslaco) as a Class C market, the 143d market in the United States, with a population of only 151,098. The ARB total net weekly circulation of KRGV, as of March 1964, was only 75,100 homes. CATV franchises have been granted in five towns within its service area and other CATV systems are proposed. The communities with CATV franchises, their populations, and the grade of KRVG coverage are given by Mobile Video Tapes as follows:

Community	1960 Census population	KRGV coverage
Brownsville	48,040	Grade A.
Edinburg	18,706	City Grade.
McAllen	32,728	Grade A.
Mission	14,081	Grade B.
Pharr	14,106	City Grade.

Mobile Video Tapes points out that this "constitutes the heart of the market—

[18] According to AMST, table 2 is limited to the central communities or metropolitan areas where there is UHF activity, and does not include CATV activity elsewhere within the service area of a station located in the community or metropolitan area.

[19] Midwest is also the licensee of KFMB, San Diego, Calif.

[20] Champaign has one VHF and one UHF station, and is also the location of a UHF translator of a Decatur UHF station.

84.4 percent of the population shown by J. Walter Thompson for the entire Brownsville-Harlingen-San Benito market."

36. It appears, moreover, that there is significant CATV activity in the vicinity of fairly large cities with multiple channel assignments. The AMST comments (attachment C, tables I A, B, and C) [21] tabulate the CATV systems in operation, franchised or applied for within the Grade A and B contours of existing or potential VHF and UHF stations in 11 areas "believed to be centers of considerable CATV 'activity'": Bakersfield and Sacramento, Calif.; Orlando and St. Petersburg, Fla; Rockford, Ill.; Evansville and Indianapolis, Ind.; Rochester and Utica, N.Y.; and Columbus and Dayton, Ohio. The extent of CATV penetration is detailed in Tables I A, B, and C. All three give separate figures for Grade A and Grade B contours, for VHF and UHF respectively. Table IA shows the penetration in terms of number of places in which CATV franchises have been granted or applied for. Table IB gives the equivalent data in terms of potential CATV households [22] compared with the total number of households within broadcast contours. Table IC converts the data in IB to percentages of total number of households within the broadcast contours.

37. The analysis shows that in these eleven areas there are approximately 230 places in which a CATV system was operating, franchised or proposed (as of July 8, 1965) within the Grade B contours of existing or potential VHF and UHF stations located in the central community of each of the eleven markets. These 230 places contain nearly 1,900,000 households. In Bakersfield, Calif., an all UHF market, almost two-thirds of the potential UHF audience is already franchised to CATV systems. In Utica, N.Y., the figure is 44 percent. If already submitted or proposed applications result in franchises, a UHF station in Columbus, Ohio, would have CATV's potentially competing for 60 percent of its market and a VHF station for more than half. Existing and pending CATV's in the Indianapolis area involve half the VHF market and about three-fifths of the UHF market. In Sacramento, the CATV potential comes to over 40 percent of the UHF market and nearly half the VHF.

38. There is also widespread CATV activity within major cities. Our attention has been called to the asserted intent of CATV interests to wire up "almost all American cities—small and large" and 85 percent of all television sets—40 million homes.[23] The December 1965 issue of Television Magazine (vol. 22, No. 12) states that franchise applications have been filed in San Francisco, Seattle, Pittsburgh, Baltimore, Fresno, Columbus, Tucson, Birmingham, Providence, and Sacramento. Two of the commenting parties in this proceeding are applicants for CATV franchises in Philadelphia. The comments of Columbia Broadcasting System (CBS) refer to applications for CATV franchises in Albany and Syracuse, N.Y.; Galveston, Tex.; and the grant of a CATV franchise in Wilmington, Del. D. H. Overmyer, permittee of new UHF Station WDHO–TV in Toledo, Ohio, comments that local authorities have granted a CATV franchise for that city since the issuance of the joint notice herein. Toledo has two VHF stations, a UHF educational station, and—according to Storer Broadcasting Co., receives the signals of four Detroit-Windsor VHF stations, off-the-air and without reception difficulty. Telerama, Inc., an applicant for a CATV franchise in Cleveland, has filed comments describing its proposed cable operation for that city which has three VHF stations, a UHF educational station, and applications pending for two new UHF facilities.[24] Taft Broadcasting Co., in a June 1965 petition to deny a microwave application (File No. 6226–C1–P–65) to bring the three New York independent stations to CATV systems in the Wilkes-Barre-Scranton area of Pennsylvania, states that in the last 6 months 90 franchise applications have been filed in 54 communities in Lackawanna and Luzerne Counties. The Scranton-Wilkes-Barre area is served by three UHF sta-

[21] Corrections to these tables were supplied in an "Addendum" to the AMST comments submitted on August 12, 1965.

[22] The tables use potential, rather than actual audience; i.e., the total number of households within the broadcast contour, and the total number of households in the community of the CATV.

[23] Address by Milton J. Schapp, "CATV—Past, Present, Future," Dec. 8, 1964, reprinted in Television Digest Special Supplement, vol. 4, No. 50, Dec. 14, 1964, p. 1.

[24] Telerama plans to carry all local stations and two Canadian stations on a full-time basis and to carry on a part-time basis on the remaining channels the signals of network affiliated stations in Detroit, Toledo, Erie (Pa.), and Youngstown and Akron, Ohio. While it does not propose to acquire microwave facilities to bring in Chicago and New York independent stations, Telerama states that if these signals are made available to the Cleveland area by common carrier facilities, "then Telerama may avail itself of the accessibility to such signals." Since Telerama submitted its comments, Cleveland has granted a franchise to Telerama.

tions, providing three full network services.

39. The most factually detailed comments on big-city CATV were submitted by Midwest Television, Inc., licensee of Station KFMB–TV in San Diego, Calif. According to Midwest, CATV is growing with great speed in San Diego area, which is presently served by three VHF stations providing the programs of all three networks.[25] In addition, construction permits are outstanding for two new commercial UHF stations in San Diego and an application is pending for a UHF educational station. Since March 1963, when the first CATV system in the area was franchised, seven additional systems have been franchised. All eight CATV systems are within the Grade A contour of KFMB–TV, which falls within the metropolitan San Diego area; four are located in San Diego itself. While four of the eight systems are not yet operative, two of these are expected to begin operations momentarily. The operating CATV systems, which do not use microwave, carry the signals of all seven Los Angeles commercial VHF stations and carry the local stations without affording nonduplication protection. Midwest has been unable to obtain the current subscriber count, estimated at approximately 10,000 homes in February 1965.[26] However, its engineering personnel recently counted drops in a part of San Diego where CATV had been available for only 3 months. Of the 159 homes in that area, 58 were wired for CATV—and this, Midwest points out, "is an area where all three stations can be satisfactorily received" (Midwest comments, p. 24).

40. The Midwest comments also describe what it considers to be the effect CATV operations of this nature have on the audience of the local network-affili-

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ated stations. Southwest Surveys, an independent research organization, conducted a survey for Midwest in June 1965, interviewing 300 CATV subscribers and 300 nonsubscribers in the San Diego area. Forty-three percent of the CATV subscribers had been subscribers for less than 3 months. Midwest states (comments, p. 9) that during the prime evening hours of 7:30 p.m. to 11 p.m., when most of the programs broadcast by the three San Diego area stations were network programs, the San Diego area stations accounted for 88 percent and 9' percent of the total viewing time of non-CATV subscribers interviewed in two different areas and only 62 percent amon cable subscribers. During the hour from 9 p.m. to 10 p.m., Sunday through Wednesday when each program broadcast by each of the San Diego area stations was simultaneously duplicated or CATV by Los Angeles stations, 93 percent of the nonsubscribers saw them on loca stations whereas only 77 percent of the cable subscribers did so (pp. 9–10). O the cable subscribers, 49 percent reportec that they viewed a San Diego channe most; 55 percent named a Los Angeles channel. Of the nonsubscribers in two separate areas, San Diego stations were named by 108 percent and 94 percent, respectively, while Los Angeles stations were named by only 5 percent and 11 percent (id., p. 25).[27]

41. With respect to nonnetwork viewers, Midwest states that 25 percent of the CATV subscribers named a Los Angeles independent station as the channel they viewed most and only 1 percent and 2 percent, respectively, of the two groups of nonsubscribers did so. More than 56 percent of the CATV subscribers (as compared to 11 percent of the nonsubscribers) named at least one Los Angeles independent as one of the three stations most viewed (id., p. 26). During the period 5 p.m. to 6 p.m., Monday through Friday, there was no duplication by any Los Angeles station of programs broadcast in San Diego and the cable subscriber could watch any 1 of 10 different programs. Among nonsubscribers interviewed, 95 percent of those who watched television during that hour watched one of the San Diego stations. Among cable subscribers the Los Angles stations accounted for 52 percent and the San Diego stations 48 percent (id., pp. 26–27).

42. Moreover, appended to the comments of Columbia Broadcasting System (CBS), which is opposed to an assertion of jurisdiction, is a further study of CATV prepared by its Office of Economic Analysis. The CBS study points out that there is a time span lag before CATV impact is felt (CBS comments, Exhibit A, p. 27). This is partly because CATV penetration does not occur all at once; growth is gradual. But CBS also states that networks react slowly to changes in station audiences and that it might take 3 to 5 years for a change in an affiliate's audience to be reflected fully in the rela-

[25] Midwest's Station KFMB–TV is a CBS affiliate, KOGO (San Diego) is an NBC affiliate, and the third station, XETV (located in Tijuana, Mexico, just a few miles from San Diego), is an ABC affiliate.

[26] San Diego Telecasters, Inc., permittee of UHF Station KAAR–TV in San Diego, estimated as of Aug. 25, 1965, that there are "more than 15,000 sets now served by cable."

[27] Percentages total more than 100 percent because some multiple answers were given.

tive network rate. National spot revenues and local advertising, while reacting more quickly, would still take a considerable time. The study concludes (p. 31) that the "true reasons for the modest impact of CATV thus far are the relatively small amount of penetration that CATV's generally have in any particular market and the considerable length of time necessary for the effects of CATV to work themselves out." [28]

43. Like the Selden Report, the CBS study bases its discussion of CATV potential and impact on CATV systems operating or franchised as of August 1964. It concludes, therefore, that CATV potential is limited to communities more than 40 miles from three stations providing the service of the three networks (plus some metropolitan area apartment house dwellers), an estimated 6 to 8 million TV homes. However, the study recognizes (p. 14) that CATV "systems are clearly moving closer to transmitting points" and states further (pp. 16–17):

> There is a final caveat that must be made at this point. There has been in the very recent past, and not included in the systems in our study, a group of applications for CATV systems in communities with three more-than-adequate network services which do not appear to be related to apartment house reception problems. Thus, applications for franchises have been made in places like Albany, Syracuse, Galveston, Philadelphia, and Cleveland, and a franchise has just been granted in Wilmington, Del. * * * While these do provide alternative programing, we do not know as yet whether this added factor will be sufficient to make the systems viable. If these systems are established and thrive, it is clear that the potential for community antenna systems far exceeds anything that we have talked about thus far and, in fact, much of the country could ultimately become CATV territory.

44. In view of the rapidly changing circumstances outlined above, we can see no point in conducting a further fact-finding inquiry with respect to nonmicrowave CATV as it has existed in the past. The extensive studies conducted by Dr. Fisher, Dr. Selden and NCTA in conjunction with Docket Nos. 14895 and 15233, and further studies of CBS and AMST in this proceeding, all concerned nonmicrowave as well as microwave CATV systems. Studies of this nature are out-of-date almost before we have had time to consider them. Moreover, they are of limited value since they cannot measure some of the most important factors we are bound to consider. These include the cumulative future effect of greater penetration by CATV systems franchised or applied for but not yet in operation, the degree of success to be achieved by CATV systems in big cities or other well-served areas, and the effect of the burgeoning CATV activity—if left unregulated—on the decisions of potential applicants and existing licensees as to whether to inaugurate or improve service.[29]

45. What we said in the first report and order in rejecting NCTA's argument that regulatory action should not be taken in the absence of a showing that stations have ceased operation, or are about to cease operation, applies with equal force to its renewal of that argument here.[31] We stated (par. 77):

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[28] AMST argues that this time lag is not as great as CBS asserts. It states (reply comments, p. 22): "However long before an affiliate's network rate card is affected, advertisers will inevitably drop from network orders those stations which show serious audience losses, whether from CATV or any other cause. That this is the likely sequence is demonstrated by the parallel situation—network radio, which felt the impact of television by sharp decreases in station orders long before those stations' network rates were affected."

[29] See, e.g., pars. 20 and 32 of the first report and order in Docket Nos. 14895 and 15233, and p. 49 of the Selden Report.

[30] The CBS study further asserts (pp. 27–30) that the effects of a rise in CATV penetration with its depressing effect on station revenues are offset in large degree by the persistent rise in advertising demand for television time. However, as AMST points out, the number of stations sharing the advertising demand is also increasing as new UHF stations stimulated by the all-channel law commence operations. Moreover, annual broadcast expenses are on the average increasing apace with revenues.

[31] While the distant signal procedure adopted in Part II will probably have some effect on the trends we have been here discussing, we think that application of the carriage and nonduplication requirements to all systems is still required in the public interest. First not only will this end the present unwarranted discrimination between the microwave and nonmicrowave system, but it is called for on the basis of the fair competition ground, discussed in pars. 26–27. Second, as to the economic impact ground we note that in view of recent growth, there are a very substantial number of CATV systems operating on the date of release of this report with the capacity to keep growing to perhaps 50–70 percent of the television homes in their communities, and thus to have a cumulative effect in areas such as those noted in the prior discussion (e.g., pars. 35–37). New systems will continue to come into operation under the interim procedure, and it may be important that the cumulative effect of such systems, after growth to significant figures, be ameliorated to some extent by the carriage and nonduplication requirement. Most important, the distant signal procedure is of interim nature, subject to discontinuation or revision. See par. 150. The carriage and nonduplication rules which we adopt here are not interim—they are our best judgment of what the public interest calls for over an indefinite period.

NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above, it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. In short, we must plan now for the healthy co-existence of CATV and local stations and safeguard the public from future injury. Circumstances have changed since our 1959 report and order, and the likelihood or probability of adverse impact upon potential and existing service has become too substantial to be dismissed. If studies are in conflict and pre-

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sent a close question as to the precise extent of the impact, it is not close as to how this uncertainty should be resolved. This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." United States v. Detroit Navigation Co., 326 U.S. 230, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances uncertainties should be resolved in favor of ensuring the healthy growth and maintenance of the basic service.

46. In sum, we have concluded in the first report and order in Docket Nos. 14895 and 15233 that the public interest requires that CATV systems carry local stations without duplication for a reasonable period, in order to avoid unfair competitive disadvantage to and prejudicial effect on existing and potential broadcast service. We have concluded herein that we have authority under the present provisions of the Communications Act to extend these requirements to nonmicrowave systems. In view of the rapid surge in CATV growth since this proceeding was initiated, we think that our statutory obligations require us to act now in the areas we have proposed. This will end the present unwarranted distinction between microwave and nonmicrowave systems, and will enable us to make the rules effective before operations are commenced by a large number of CATV proposals presently in the franchise or application stage.

C. Substantive Provisions of the Rules

47. CATV systems, as we recognize in the first report (pars. 43, 48) and here again emphasize, have arisen in response to public need and demand for improved television service and perform valuable public services in this respect. CATV (like other auxiliary television services) makes possible the provision of a variety of program choices, particularly the three full network services, to many persons in areas with no local station and in one and two station markets. CATV systems also afford a means of providing nonnetwork commercial and educational services to many persons in areas with insufficent population to support local broadcast outlets of this nature. CATV systems make important contributions by providing good quality reception of color signals and improving reception of local signals in areas within the predicted contours of local stations where off-the-air reception is inferior or precluded because of terrain, man-made structures or other factors. We do not intend to deprive the public of these important benefits or to restrict the enriched programing selection which CATV makes available. Rather, our goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the Act), both those who are cable viewers and those dependent on off-the-air service. The new rules discussed below are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service.

48. To insure effective integration of CATV within a fully developed television service, the new regulations will apply equally to all CATV systems, including those which require microwave licenses and those which receive their signals off the air.[22] We have carefully reexamined the CATV rules currently in effect for microwave-fed systems, and have made some changes. The microwave rules will be revised to reflect the new rules adopted for all systems.

49. In brief, under the new rules, a CATV system will be required, upon request and within the limits of its channel capacity, to carry without material degradation the signals of all local television stations within whose Grade B contours the CATV system is located, in order of priority of signal grade. A CATV system will be required, upon request, to avoid duplication of the programs of local television stations carried on the system during the same day that such programs are broadcast by the local stations. This nonduplication protec-

[22] Excluded from these rules will be those CATV systems which serve less than 50 subscribers, or which serve only as an apartment house master antenna.

tion, as under the existing rules, will apply to "prime time" network programs (i.e., presented by the network between 6 and 11 p.m., e.t.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Nonduplication protection will not be afforded to programs which are carried in black and white by the local station and are available in color from a more distant station on the CATV system. Ad hoc consideration will be given to petitions from local television stations seeking a greater degree of protection than provided by the rules, or from CATV operators seeking a waiver of the rules, and we are adopting procedures to facilitate such petitions. Moreover, the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules.[49]

50. Thus, the carriage requirements made applicable to all CATV systems will be substantially the same as those applied to microwave-served systems by the Commission's first report, except in certain minor respects discussed in paragraphs 74 and 83 below. However, the new nonduplication rules embody two substantial changes from those adopted in the first report. First, the time period during which nonduplication protection must be afforded has been reduced from 15 days before and after local broadcast to the single day of the local broadcast. Second, a new exemption from the nonduplication requirement has been added as to color programs not carried in color by local stations. We shall discuss the nonduplication changes first because they are of a major nature.

1. The Nonduplication Provisions

51. Modification of the nonduplication period: Nonduplication at the same time that a local broadcast is being carried on the cable is clearly called for in the public interest for the reasons discussed above and in the first report. Simultaneous nonduplication protects the bulk of the popular network programing of most network affiliates and does not affect the time that such programing is available to the CATV subscriber. In the first report we further determined that some measure of protection beyond simultaneous nonduplication would also serve the public interest on a number of grounds. We shall not repeat here the reasons set forth in the first report for that determination or for the further judgment that a 15-day before-and-after the period was appropriate.

52. We have reconsidered the latter judgment and have decided to strike a different balance in light of the fact that the rules are now being made applicable to a large number of existing systems and will affect their existing service to the CATV viewing public. The systems which will now operate under the rules for the first time constitute the great bulk of the CATV industry. In addition to all nonmicrowave systems, they include a sizable number of microwave CATVs served pursuant to authorizations granted prior to December 1963 when the interim condition procedure began. We recognize that the imposition of a 15-day before-and-after nonduplication requirement on systems which have not previously operated in this manner would tend to substantially disrupt the viewing habits of the CATV subscribers. As NCTA points out (NCTA comments, Exhibit B, pp. 35–38), there is no question but that large numbers of CATV subscribers have become accustomed to viewing network programs at the time they are presented by the distant affiliates. Although 15-day before-and-after nonduplication was not required where timeliness was important, and all distant city programs deleted under the rules would have been available to the CATV subscriber via the local signal at some time within the total 30-day period, the CATV viewer might not be able to view it on the later date of presentation by the local station for any number of personal reasons.

53. We believe it desirable to avoid disruption to the established viewing habits of the public as much as possible. Moreover, we are seeking to preserve, to the extent practicable, the valuable public contribution of CATV in providing wider access to nationwide programing and a wider selection of programs on any particular day. Balancing all the pertinent considerations, we think that the nonduplication period should be reduced to the same day for existing systems. Not only will this eliminate the

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great bulk of delayed nonduplication requests (see par. 125, first report), but it will insure that the program is available to the CATV audience that same day and, in the case of network prime time program, that same evening. While not wholly eliminating any possible change in viewing time on the pertinent day, this revision clearly minimizes

[49] Private agreements will not avoid the necessity for evidentiary hearing for the importation of distant signals into the top 100 markets (Part II, below), though such agreements will be considered in our decision.

any disruptive effect on the CATV viewer. As an incidental benefit, we note that same-day-nonduplication will substantially reduce the areas of possible dispute between broadcasters and CATVs in complying with the rules, and to this extent will facilitate ease of administration.

54. Application of a 15-day before and after nonduplication provision to new systems would not, of course, cause a similar disruption to established viewing habits, since the CATV subscriber would from the beginning receive service in accordance with the rules. It would be possible to "grandfather" existing systems on a same-day nonduplication basis and make 15-day nonduplication effective only as to new systems. But there are a number of countervailing arguments. First, even in the case of the new system, there is disruptive effect to the extent that the CATV subscriber may not be able to view programs from distant stations at the times specified in his TV guide (and may be unable to view them at the later date presented by the local station for any number of reasons). It is our understanding that it is essentially for that reason that some broadcasters, although previosuly entitled under our microwave rules to 15-day before and after nonduplication protection, have requested only simultaneous nonduplication. Second, it is obviously preferable to have one set of rules for all systems and thus to avoid the anomalous situation of millions of CATV subscribers viewing under one set of rules and other millions, often neighbors in close-by communities, subjected to a different set. Under the circumstances, we think it better to provide by rule for same-day nonduplication for all systems, and to safeguard the public interest in the particular instance warranting different treatment pursuant to the ad hoc procedures discussed in paragraph 97 below.

55. We also considered the question of retaining the 15-day before-and-after nonduplication provision for nonnetwork programing. But, as we have previously recognized, and indeed stress in this report (pars. 123, 131 infra), 15 days before and after nonduplication affords, at best, only minimal protection with respect to the presentation by local stations of syndicated and film programing. Such programing is not presented on a nationwide simultaneous or even nearly simultaneous basis. Retention of the 15-day provision for nonnetwork programs alone would serve little effective purpose. Stated differently, the adoption of a uniform "same day" rule will not, in our judgment, significantly affect the protection afforded as to nonnetwork or independent programing. Rather, we have determined that we must look elsewhere if we are to achieve effective relief in this respect. We treat the situation of the independent station in Part II below.[31] As a general approach encompassing all stations, we are proposing to the Congress that it consider the question of extending the rebroadcast concept of section 325(a) to CATV. It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program market place. Here again, we shall consider requests seeking more extensive protection of nonnetwork programing on an ad hoc basis to insure that the public interest is not prejudiced in the unusual situation (although, as stated, we are unaware of any instance where the 15-day period afforded effective relief in this respect).

56. While conflicting considerations are presented, we believe that our resolution constitutes a fair compromise. First, "same day" nonduplication is clearly sufficient to take care of the time zone differential problem; i.e., to preclude a CATV system, which brings programs across either border of the mountain time zone, from duplicating most, if not all, of a local station's network programs an hour or two before or after they are presented locally. Moreover, it will afford the station affiliated with more than one network some leeway in presenting what it regards as the most attractive programs of each for the benefit of the non-CATV audience (and also, the CATV audience—see par. 115, first report) so long as such programs are presented on the same day as the network presentation and prime time programs are broadcast entirely within prime time hours.[32] This will, as stated,

[31] With "same day" nonduplication affording substantial protection to the most popular network programing, most network affiliated stations should be viable.

[32] In this connection, we note that the amount of delayed network broadcasting in the median one or two station markets is about 5½ and 11 hours per week, respectively. See par. 108, first report. While this amount is not insignificant and we recognize that there will be some detriment to the public if the local station in the median market curtails delayed broadcasts because of the absence of nonduplication protection, we point out that the amount of delayed broadcasts is not of too large a nature in the median market, and that we would not expect the local station to cease all delayed broadcasts in the absence of delayed nonduplication protection. Moreover, the pending liberalization of our translator policies may result in greater availability of off-the-air service in one and two station markets.

minimize any disruption to the CATV subscribers. In addition, we will consider requests by local stations and CATV systems for different treatment on an ad hoc basis, pursuant to the summary procedures discussed in paragraph 97, where possible, or by evidentiary hearing if necessary. Thus, the station which receives its network programming by mail, or the station or system which faces some other unusual problem, can bring its situation to our attention for such relief as may be appropriate in the individual circumstances and warranted by the public interest. Similarly, the CATV system can seek a waiver of the rules. We stress, in addition, that the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules. We believe that the above resolution fairly serves the public interest. If further revisions are needed on the basis of our experience with these new provisions, we shall of course move promptly to inplement such revisions.

57. Our decision to adopt "same day" nonduplication makes appropriate some other revisions in the exclusivity sections of the rules. First, however, we stress those provisions which remain unchanged. We shall retain the provision requiring the local station to present prime time network programing entirely within prime time hours in order to be entitled to nonduplication.[36] Thus, the CATV system need not delete reception of any network program which is scheduled by the network between the hours of 6 and 11 p.m., e.t., but which is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for the network programing in the time zone involved. This will insure that such programs are available to the CATV subscribers in maximum viewing hours. We shall also retain the provision that the CATV system need not delete reception of any program as to which time of presentation is of special significance, such as a speech or sporting event, except where the program is being simultaneously broadcast by the local station. And, although it is of greatly reduced significance for "same day" nonduplication, we shall retain the provision that the CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of the rules).

58. However, there no longer appears to be any real necessity for the provisos

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to §§ 21.712(g), 74.1033(e), and 91.559 (e); i.e., that:

(1) The system is not required to maintain the exclusivity of the network programing of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which substantially duplicates the network programing of the station requesting exclusivity; and

(2) The system is not required to maintain the exclusivity of the nonnetwork programing of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which operates in what are normally and usually considered other markets for purposes of television program distribution.

These provisions were grounded in the 15-day before-and-after nonduplication period which protected network programs delayed substantially beyond the date of network presentation and protected nonnetwork programs for a total of 30 days. In view of "same day" nonduplication, we shall provide simply that higher priority signals carried on the system are entitled to exclusivity against lower priority or more distant signals but not against signals of equal priority.[37]

[36] AMST has requested elimination of the exception for prime time programs broadcast outside of prime time hours. AMST urges that this provision is unnecessary because it is normally in the best interests of the station to carry prime time programs in prime hours and the Commission has ample power to remedy any abuse. It is further asserted that there may be instances where a station reasonably desires, and has network consent, to carry such programs at other hours. However, a prior CATV presentation does not preclude the station from repeating the program outside of prime time if it has good reason to do so, and it is unlikely that instances of this nature would arise often enough to make the loss of exclusivity a significant problem. Since the provision is designed to insure that CATV subscribers have prime time programs conveniently available in the hours of maximum viewing, the public interest is best served by its retention.

[37] Though these modifications stem from our action in shortening the nonduplication period, we note that changes of this nature were requested by AMST and ABC under the 15-day before-and-after nonduplication period.

59. Color duplication: In the first report and order in Docket Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (par. 143). However, we did not there determine whether such an exception should apply across the board or whether the CATV system should be required to make a threshold showing that a certain number or percentage of its subscribers possess color receiving sets. Comment on this question was invited in this proceeding.

60. Most of the comments, from broadcast and CATV interests alike, favor permitting color duplication on an across the board basis. No one has supported the proposed alternative of requiring a threshold showing by the CATV system. It is urged that it is in the public interest for color programing to be available to as many persons as possible, and that this should be encouraged by the Commission pursuant to section 303(g) of the Act. The few comments opposed to making an exception for color claim that it is unnecessary. They assert that most stations not already equipped to present network programs in color will acquire such equipment now that all of the networks have commenced a significant degree of color transmission. It is further asserted that the exception would penalize smaller stations lacking financial resources to convert to color.

61. In light of the comments, we have decided to permit color duplication of local black and white transmissions without requiring any threshold showing by the CATV system. It may be that most stations will shortly be equipped to present network programs in color. But in that event the broadcasters have no real cause for complaint in the adoption of a provision which will not adversely affect them. We think that the exception is in the direction of encouraging the wider distribution of color programing and that it is consistent with the supplementary role of CATV. Any local station finding itself at a significant disadvantage can install equipment for the transmission of network color programs "at relatively little expense" (comments of American Broadcasting Co.), which would benefit its non-CATV viewing public. Hardship situations may be brought to the Commission for such relief as may be warranted by the station's showing. Accordingly, the rules governing microwave-served CATV's will be amended in this respect and the exception will be incorporated in the rules adopted for all systems. The exception will also apply where a local station is equipped for simultaneous color transmission of network programs, but delays a color program for later presentation on the same day by means of black and white video tapes.

62. Some of the CATV comments urge us to go further and permit duplication of local colorcasts where a CATV system makes a showing that the technical quality of the local signal is substantially inferior to another signal. While we would, of course, consider any such showing on a case-by-case basis, we have no reason to anticipate any widespread problem warranting action by rule. We expect that valid complaints of this nature will be rare. In most instances the technical quality of the local signal should be sufficiently good to permit satisfactory color reception on the cable if the CATV system and the station cooperate in good faith to accomplish this result. We would expect good faith efforts by both to resolve any technical problem before any complaint is made to the Commission.

63. Other changes in the nonduplication provisions suggested by the parties. The comments of NCTA (Exhibit B, pp. 35–38) assert that last minute program changes by the local station require the CATV operator to bear the labor costs of a manually controlled switching device or to punch a new tape for the remainder of the week where an automatic switch is used. While this assertion was made in the context of the delayed nonduplication provision, we think that the broadcaster should afford the CATV sufficient advance notice of nonduplication requests to permit the CATV system to make its program schedule available to subscribers and to set an automatic switching device only once for the entire week. Accordingly, we shall amend §§ 21.712(h), 74.1033(f), and 91.559(f) to require that the station, upon request of the CATV operator, shall give notice under these sections at least 8 days prior to the broadcast to be deleted. Since "same day" nonduplication affects principally network programs, which are ordinarily presented at the same time each week during the network season, this amendment should pose no difficulty for the station.[38] Indeed, in most instances it would appear that such notice

[38] It has come to our attention that the requesting station may have difficulty in giving notice where the CATV does not always carry the same signals. Where a CATV system varies the signals carried, it should provide the local stations with a copy of the CATV schedule in sufficient time to permit the station to give notice of the programs to be deleted.

could be given at the start of the network season and continued in effect until further notice occasioned by changes in the schedule of the network or the local station.

64. AMST urges that the rules be modified to provide nonduplication protection to local stations which are not carried on the cable—either because no request has been made or because of the limited channel capacity of the system. It states that carriage has no essential relationship to nonduplication and should not be a condition of the latter. We cannot agree. If nonduplication were afforded where the local station is not carried, the CATV subscriber would, in some instances, be greatly inconvenienced and, much more important, in others be deprived of all opportunity to view the programs involved. See paragraph 51, first report. This is not the purpose or effect of the rules as written, nor would it serve the public interest. As set forth in paragraph 68 below, the better procedure where the system's channel capacity is too limited to permit full carriage of the local station is to substitute its programs for the duplicating outside signal. Partial carriage would retain the availability of the programs to CATV subscribers and at the same time afford the station some measure of protection.

65. Other changes in the nonduplication provisions requested by AMST and ABC have been rendered moot by our action in shortening the nonduplication period to 1 day and the modifications we have made in that connection. Accordingly, we shall not discuss their contentions in this respect. The comments with respect to nonduplication of noncommercial educational stations are discussed in a separate section on educational television (section 4 below).

2. The Carriage Provisions

66. We shall, as stated, apply to all CATV systems substantially the same carriage requirements as were adopted for microwave-served systems in the first report.[29] Thus, within the limits of its channel capacity, a CATV system will be required to carry the signals of all commercial and educational television stations within whose Grade B contour the system is located, giving priority: First, to principal community signals; second, [*P. 4551*]
to Grade A signals; and third, to Grade B signals. The CATV system need not carry the signal of any station, if (1) that station's network programing is substantially duplicated by one or more stations of higher priority and (2) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station. Moreover, in cases where (1) there are two or more signals of equal priority which substantially duplicate each other and (2) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations. Where a signal is required to be carried, it shall be carried without material degradation in quality, and shall be carried in full except to the extent that nonduplication of higher priority signals may be required under the rules. Upon request of the local station, the signal shall be carried on the system on the channel on which the station in transmitting (where practicable without material degradation) and on no more than one channel. Where a system is not carrying the signal of a Grade B or higher priority station, it shall offer and maintain for each subscriber a switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber indicates in writing that he does not desire this device.

67. Modifications requested by the parties. Some of the parties have requested changes in these provisions. Thus, NCTA urges that CATV subscribers see no reason why out-of-State stations should be regarded as local. It asserts that CATV systems should have the option to carry more distant signals originating within the same State in preference to out-of-State stations placing a Grade B signal over the community. We agree that there may well be instances where the programing of stations located within the State would be of greater interest than those of nearer, but out-of-State, stations, e.g., coverage of political elections and other public affairs of statewide concern. We recognize also that there may be instances where out-of-State stations located in another State are of greater community interest than the geographically nearer out-of-State stations because of closer community ties with the third State. Considerations of this nature will be accorded substantial weight as a basis for waiver of the carriage provisions.

[29] There are, however, changes stemming from our resolution of the translator question (sec. 3 below).

68. In this connection, we emphasize that we intend to make every effort, consistent with the public interest, to avoid disrupting existing service to the public in applying the carriage provisions of the rules to systems now in operation.[*] Where, because of limited channel capacity, a CATV system cannot carry all Grade B signals without dropping a more distant signal now being carried, we shall entertain a request for waiver of the rules pursuant to the summary procedures discussed in paragraph 97 below and upon the basis of the showing specified in paragraphs 104, 106. In appropriate circumstances, waivers will be granted, which will permit the system to continue to carry the distant signal and to substitute the nearer signal only where simultaneous duplication would occur. Thus, upon such waivers, the CATV viewers would continue to receive all programs to which they were accustomed, via the more distant signal when the programs are different and via the local signal when the programs are the same. New systems can commence operation with a channel capacity sufficient to carry both the local and the distant signals; indeed, most new systems now commence operation with 12 channel capacity.

69. Sections 21.712(f)(2), 74.1033(d)(2), and 91.559(d)(2) presently provide that where a signal is required to be carried, it "shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation)." WJAC, Inc., and WKBH Television, Inc., urge that carriage on channel should be a matter for the station's choice. According to WJAC, the station should be entitled both to insist that its signal be carried on another channel, and to select the channel of a lower priority or nonlocal station. AMST claims, on the other hand, that carriage on channel is extremely important and should be mandatory unless the CATV makes a compelling showing that this is not technically feasible without degradation. It states that the CATV should be required to take all reasonable steps to eliminate material degradation which may result from the CATV equipment used or inadequate installations.

70. Since §§ 21.712(f)(1), 74.1033(d)(1), and 91.559(d)(1) already provide that the "signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art)," we do not think that any change in subsection (2) is called for. The requirement for on-channel carriage is only operative upon request of the station licensee or permittee. If this results in material degradation, the station can request carriage on another channel. Moreover, if the channel capacity of the system is such that some signal must suffer material degradation, the inferior signal obviously should not be that of a higher priority station. First report and order in Docket Nos. 14895 and 15233, paragraph 135. However, no reason appears why it is necessary for the station itself to select the alternative channel. So long as the requirements of the rules are met, the CATV operator should be free to decide how the channels on its cable are to be utilized.

71. AMST further asserts that the CATV system should not have complete discretion under §§ 21.712(d)(2), 74.1033(b)(2), and 91.559(b)(2) to select among substantially duplicating signals of equal grade where noncarriage of one or more is necessary to preserve its ability to carry the signals of independent commercial or noncommercial, educational stations. It urges that the rule should be modified to set forth reasonable standards for selection, such as the respective distances of the stations from the community, relative signal strength, respective audiences in the community—as measured by audience surveys, terrain considerations and the like. We recognized in the first report and order in Docket Nos. 14895 and 15233, paragraph 91, that leaving the selection to the CATV's discretion makes possible "discrimination between local signals in some instances." We further stated that we would closely examine complaints of abuse, particularly where the CATV operator has an ownership or other interest in one of the duplicating channels. We shall also give particular consideration to any allegation that the station not carried is one with closer community ties. The criteria suggested by AMST would not do away with the necessity for case-by-case resolution of complaints. AMST concedes (comments, p. 20) that any criteria for determining priority should not be inflexible and that an opportunity should still be provided for the submission of other data to the Commission. In the circumstances, it seems preferable to retain the rule in its present form until experience in its administration demonstrates what refine-

[*] As in the case of our present policy with respect to microwave systems, carriage will not be required where a sufficient showing is made that a predicted signal is not in fact present in the community, or that a good signal is not obtainable because of technical deficiencies on the part of the station.

ments might be needed or appropriate.

72. AMST also claims that exclusion of nearby network-affiliated stations in order to bring in distant independent stations which do not place a Grade B signal over the community of the CATV, should not be permitted since "this would drastically affect the normal off-the-air competitive pattern of television service" (AMST comments, pp. 20–21). This provision is admittedly a "compromise approach," recognizing both that a CATV system owes its primary duty to the stations that are closest and place the best signal over its community, and also that carriage of nonnetwork signals may contribute to the diversity of its service (first report and order in Docket Nos. 14895 and 15233, par. 89). The general questions of whether there should be some limit on the distance and number of nonlocal signals brought in, as well as the matter of "leap-frogging," are being considered in Part II of this proceeding. Pending resolution of these matters, we shall retain the rule in its present form.

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73. Next, AMST asserts that the installation of a switching device should be mandatory in all cases, whether or not the local signal is carried, so that the subscriber will not be foreclosed from off-the-air service where the cable system is inoperative or not operating properly. It is further urged that no exception should be made when the subscriber indicates in writing that he does not desire a switch, since the requirement could easily be avoided by a "small-print" waiver in the subscription contract. While these suggestions may have some merit, we do not think they warrant a revision of the rules. The rules are designed to protect local stations in areas which are crucial and essential to preserve and encourage service to the public. For the reasons stated in par. 51 of the first report, particularly that going to "sheer inconvenience of switching • • •," we do not view this area as one of great significance, requiring further revision.

74. A further change suggested by AMST does, however, appear to warrant modification of the rules. Sections 21.712 (d)(3), 74.1033(b)(3), and 91.559(b)(3) now provide that where a CATV system operates within the Grade B or higher priority contour of both a satellite station and its parent, carriage of one will relieve the system of any obligation to carry the other. AMST points out that this would allow a CATV system in, or very near to, the same community as the satellite, to carry only the parent station, causing the satellite to lose audience for which it may be originating some local programming and reducing its incentive to originate programs. It urges that satellites should be treated like any other station in accordance with the prescribed priorities. Since satellites operate on assigned channels and possess the potential to develop into regular stations, there is a strong public interest in encouraging them to do so. Accordingly, §§ 21.712 (d)(3) and (g)(3), 74.1033 (b)(3) and (e)(3), and 91.559 (b)(3) and (e)(3), together with the note to those sections, will be deleted.

75. And, finally,[11] AMST suggests that CATV's be required to refrain from deleting or altering any portion (including advertising) of signals carried pursuant to the rules. Such a requirement is implicit in the carriage provisions and we would so rule upon complaint. The addition of an explicit provision does not appear necessary in the absence of some evidence of abuse. In this connection, we note that it is asserted in the comments of NCTA that some broadcasters who have requested systems to refrain from advance duplication of delayed broadcasts, have later presented only a portion of the program. Since the CATV system is relying exclusively upon the signal of the local station to bring the program to its subscribers, the station has an obligation to present in full any program for which nonduplication is requested. Again, upon complaint we would rule accordingly. See also paragraph 158, first report. Moreover, "same day" nonduplication will greatly reduce the likelihood of any incidents of this nature.

76. Accordingly, apart from the provisions relating to satellites and the changes occasioned by our disposition of the translator questions (sec. 3 below), the carriage requirements of the new rules will be the same as the provisions now governing microwave-served systems.

3. Translators

77. Part I of the notice in this proceed-

[11] AMST also asks that the definition of substantially duplicating network programing (§§ 21.710(f), 74.1001(e)(6), and 91.557 (f)) be modified to apply only to a situation where two or more stations are primary affiliates of the same network. While such a definition might have been equally acceptable as an original matter, we do not think that any difference between the two is significant enough to warrant redoing the rules at this point. An additional proposal of AMST that the substantially duplicated concept be retained only for purposes of carriage has in effect been granted in view of the matters discussed in par. 58 above.

ing (par. 36) requested comments on two questions concerning translators: (1) Whether CATV's should be required to carry and not duplicate the signals of station-owned translators operating beyond the parent station's Grade B contour,[42] and (2) whether translators should themselves be precluded from duplicating the programs of local stations.

78. With respect to the first question, the parties have expressed diverse views. The CATV interests and some of the broadcasters argue against extending any protection to translators outside the Grade B contour because such translators are operating outside the normal service area of the parent station, do not provide a local service or possess the potential for developing into regular local stations, and are relatively inexpensive to construct and operate. It is further asserted that translators should not be protected because they may impede the establishment of local stations.

79. AMST, Storer Broadcasting Co., NAEB, and the Farm Bureau urge, on the other hand, that all translators (including those not station owned) should be carried in order to provide an incentive for the establishment of translators. Translators, they claim, should be encouraged because their service is received off-the-air free and covers a wider area than cable service. They would exempt translators from the carriage requirement where: (1) The CATV system is carrying the translator's parent station, (2) the CATV system is within the Grade B contour of a station whose programing is substantially duplicated by the translator, or (3) the translator is supplying programing which substantially duplicates that of another translator whose originating station is closer. Nonduplication protection is not sought for the asserted reason that translators do not provide a local service or possess potential for developing into regular local stations.

80. We share the view that the public interest is served by encouraging expanded use of translators to bring television service to persons in rural areas and communities not now receiving adequate local television broadcast service. Apart from the fact that translator signals are received free and reach persons outside the urbanized areas served by CATV's, one of the major recommendations of the Selden Report was that increased consideration be given to the expanded use of translators. The report states (p. 22):

> Consideration should be given to the use of translators as a tool of structural policy. They require a substantially smaller investment than CATV and are compact, highly mobile, and can be sold in the secondary market. In general they provide the flexibility necessary in an industry in which structural policy must be kept free to adapt to technological and demographic change. Translators are ideally suited as a temporary communications medium, and their use should be required of broadcast licensees in fulfilling their obligations to the public by bringing their signal to all homes in their coverage area.

The report also recommends increased use of translators to broaden the coverage of UHF stations (p. 90).

81. We have already taken a step in this direction in the report and order in Docket No. 15858, issued on July 9, 1965, amending the rules to permit 100 watt VHF translators on any channel listed in the table of assignments unoccupied by a regular television station or satellite. The rules were also amended to permit 100 watt UHF translators on all unoccupied UHF channels in the table of assignments in lieu of the previous limitation to the upper 14 channels. In addition, we have recently proposed to permit the use of microwave frequencies to relay programs to translators (notice of proposed rule making in Docket No. 16424, FCC 66-41).

82. In line with this policy, we think that CATV systems should, upon request, carry the signals of commercial and educational translators operating in the community of the system with 100 watt or higher power, where the system has the channel capacity to do so. Since noncarriage may effectively block the translator from access to CATV subscribers (par. 51 of the first report), the inability to reach the central core of the community may well destroy the incentive to establish translator service for nonsubscribers in the community and persons in the surrounding areas. Moreover, we think that "same day" nonduplication should also be afforded to translators carried on the system. Translators operating with 100-watt or higher power are properly distinguishable from other translators since they have greater potential for development into stations, and it is particularly important that such development not be impeded by CATV operations.

83. Accordingly, we shall add a fourth priority to the three already listed in the

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carriage provisions of the rules. Fourth, all commercial and noncommercial edu-

[42] Under the rules adopted in Docket Nos. 14895 and 15233, station-owned translators located within the Grade B contour are treated as extensions of the originating station (§§ 21.710(b), 74.1001(e)(2), and 91.557 (b)). Such translators will be treated the same under the new rules.

cational translator stations operating in the community of the system with 100 watt or higher power. As requested in the comments, exceptions will be added to exempt CATV's from the translator carriage requirement where: (1) The CATV system is carrying the originating station, or (2) the CATV system is within the Grade B contour of a station carried on the system whose programing is substantially duplicated by the translator. The provisions of the program exclusivity sections will also be appropriately amended to require "same day" nonduplication upon request of a translator station carried on the system.

84. With respect to the second question, whether translators should be required to refrain from duplicating local stations, our present policies and rules are as follows: Pending the outcome of this proceeding, we have been following a policy of conditioning UHF and VHF translator grants with the requirement that the translator, upon request of any station within whose Grade A contour the translator operates, refrain from duplicating the station's programs either simultaneously or within 15 days. Lee Co. TV, Inc., FCC 65–483, 5 Pike and Fischer, R.R. 2d 257; report and order in Docket No. 15858, paragraph 12. Under section 74.732(e)(1) of the rules, the only station-owned VHF translators authorized outside the Grade B contour of the parent station are high power (100 watt) VHF translators operating on assignments in the table of assignments. Moreover, § 74.732(e)(2) of the rules provides that a station-owned VHF translator which is intended to provide reception within the Grade A contour of another station will not be authorized if there is any duplication, unless the translator is intended to improve reception within the principal city contour of the parent station. However, we have waived the provisions of § 74.732(e)(1) and (2) where a nonduplication condition was imposed.

85. Our translator rules and policies are currently in a state of flux. Part II of this proceeding (notice, pars. 61, 64) proposes a reexamination of all of our rules and policies relating to auxiliary services to see if they are holding back or encouraging a variety of off-the-air services. A number of measures were proposed in the comments in Docket No. 14848, which were deemed beyond the scope of that proceeding but may be pertinent to this reexamination. It was suggested that the multiple ownership and duopoly rules be amended to allow potential 100 watt translator operators to convert these to regular stations and to encourage television station licensees to apply for them. Other suggestions included proposals for increased power for existing translators on other channels; removing the restriction in § 74.732(e)(1) on the use of VHF translators by television station licensees beyond their Grade B contour; permitting translators to be used as relay stations (only) where the need exists; permitting multiple RF amplifiers for UHF as well as VHF translators; and permitting UHF stations to use VHF translators within their Grade B contours. Moreover, AMST has recently filed a petition for a comprehensive, affirmative translator program which is being considered as a counter proposal in Docket No. 14229, and will also be considered in our resolution of basic translator policies in Part II of this proceeding.

86. We are not in a position to resolve these questions now. Moreover, we still lack sufficient information to determine the extent to which the rebroadcast consent provisions of section 325(a) may in practice limit duplication by translators.[43] In addition, if translators were required by rule to refrain from duplication within the Grade B contours of regular stations, a question would be presented as to whether the provisions of § 74.732(e)(1) and (2) continue to serve a useful purpose or should be amended. It would be contrary to the public interest to delay a resolution of other portions of Part I of this proceeding pending a thorough reexamination of the translator rules and policies. Nor does it appear advisable to undertake a partial revision of the translator rules at this point merely in order to attempt to equalize the position of translators and CATV's. In the circumstances, we think it best to defer rulemaking action until more basic translator policies have been established.

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[43] Although the notice requested information on the extent to which networks and other program suppliers, through contracts or otherwise, affirmatively restrict duplication by translators, no party except National Broadcasting Co. commented on this subject. NBC states that since 1960 it has followed a general policy of granting consent for rebroadcast of its programs provided that the translator is closer to its originating station than to any other NBC affiliate. In a few recent instances, NBC has given rebroadcast consent where the translator operated in an area served by an NBC affiliate, but only for NBC programs which were not broadcast by the local station. See also, par. 53 of the first report and order; National Broadcasting Co., 20 Pike & Fischer, R.R. 1013; Millers River Translators, Inc., FCC 63–504, 25 R.R. 516, 518, affirmed in Springfield Television Broadcasting Corp. v. FCC, 328 F. 2d 186 (C.A.D.C.).

86a. In the meantime, we will continue to grant waivers of § 74.732(e) (1) and (2) in appropriate instances, and will condition station-owned VHF translator grants with a requirement of "same day" nonduplication within the Grade A contour. In view of our policy of encouraging UHF, we will not impose any nonduplication condition on UHF translator grants for facilities to operate in an all-VHF area. Nor do we believe it appropriate to follow any general policy of requiring a nonduplication condition where the translator applicant is not a broadcast licensee, e.g., a community sponsored translator. It would appear unlikely that such a condition is needed in, or would serve, the public interest. The rebroadcast provisions of section 325(a) may work with greater efficacy in the case of translators not owned by broadcast licensees. Further, the amount of duplication in this type of situation is not likely to be of a substantial nature, since local residents are clearly not apt to undertake the expense and inconvenience of translator operations supported by local assessments or donations unless a substantially different program service is being made available. In these circumstances, we do not think it desirable as a general policy to place any significant barrier, not urgently needed, to the development of such community-type translators. We shall, of course, consider whether additional requirements are appropriate, either upon request or on our own evaluation of a particular situation, and will make all translator grants subject to the outcome of Part II of this proceeding. We will also take into account, where warranted in individual situations, the possible discriminatory effect of our interim translator policy upon any existing CATV system competing with the translator.

4. Educational Television Stations

87. The rules adopted in Docket Nos. 14,895 and 15,233 require the carriage of noncommercial educational stations (ETV), but do not require CATV's to refrain from duplicating their programs. We followed this course because those proceedings were primarily concerned with commercial stations and many of the considerations discussed in the first report and order did not appear to be applicable to ETV. The notice herein recognized, however, that carriage alone might not be sufficient to promote the sound growth of local educational stations. Information was requested in this proceeding as to the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

88. Other than educational interests, most of those commenting on this subject were against extending any nonduplication protection to ETV, for the asserted reason that the widest possible dissemination of educational material is in the public interest. It is further asserted that CATV competition has no economic impact on ETV because it operates on a nonprofit basis. National Educational Television (NET), the National Association of Educational Broadcasters (NAEB), and Eastern Educational Network (EEN) take a sharply different view in their more extensive comments. They claim that local educational stations, though different from commercial stations, have an even greater need for nonduplication and interim protection because CATV undermines the local financial support and other local interest which is vital to ETV operations. In this they are supported by American Broadcasting Co., AMST, and labor unions representing employees in the broadcast, CATV, and associated talent industries.

89. EEN and NAEB stress the importance of local financial support to educational stations. Although Federal grants-in-aid under Public Law 87-477 are available for the construction of educational facilities, the operations of such stations are almost entirely dependent

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upon local financial support. Operating income is derived primarily from (a) schools and universities, (b) local and State governments, and (c) contributions and "subscriptions" from the general public and donations by local industries and businesses. Members of the public and local businesses will have little or no incentive to support the local station if ETV is made available on the cable by CATV's importation of outside educational stations. As EEN puts it (comments, p. 12): "It is wholly unrealistic to expect that the public will be willing to pay twice for educational service—to subscribe to CATV and to 'subscribe' to local ETV." Diversion of funds provided by local and area educational institutions and local and State governments for in-school television would be even more serious, since these sources generally provide over one-half of the financial support for local educational stations.[4] If a distant ETV signal is available on the cable, and can be fitted

[4] "The Financing of Educational Television Stations," report of a study conducted by Educational Television Stations, a division of the National Association of Educational Broadcasters, p. 19 (1965).

into local schedules of instruction, local schools and local and State governments would be much more unlikely to provide the financial support and other interest necessary to start a local educational broadcast service. This would be particularly the case where the CATV offers to wire the urban schools "free." Unlike the local educational station, the CATV is in a position to make such an offer because it does not pay for programs or maintain expensive facilities for local program origination and it can recoup the cost of free school service through subscription fees charged to the general public.

90. Should CATV activity within urbanized areas siphon off sufficient local financial support to preclude the establishment of a local ETV station, the loss would be keenly felt by the public. The existence and viability of local educational broadcast outlets has special significance for ETV because the educational process is geared to local conditions and needs. Local ETV stations are more than mere facilities for delivering educational programs. They are an integral part of the educational and cultural life of a community and area. This is particularly true where ETV is used for in-school instruction. ETV must plan, prepare, and schedule educational programing on the basis of individual school and community needs, whether the basic program material is produced by the station itself or outside sources. The station also provides study guides for use by the teachers in the schools. CATV cannot effectively provide this carefully planned and prepared service by indiscriminately importing signals from distant educational stations located in cities with different needs and interests.

91. Moreover, local educational stations serve not only the schools and populations in the immediate community; they provide service to the surrounding rural area not reached by CATV. NAEB points out (comments, p. 2):

> Indeed, it is the rural area with limited budgets, facilities and pupil concentration which has the most pressing need for the teaching resources of educational television. The specialized language, art, music or science teacher who cannot be supported by a rural school system can, nevertheless, be enjoyed through the pooled resources of educational television.

In this connection we note also comments filed by the American Farm Bureau Federation, National Farmers Union & National Grange stating that rural residents, who often are relatively remote from the entertainment attractions of the city, probably more than other groups of citizens in the country, rely especially on radio and television as a major source of entertainment and information.[45]

92. Accordingly, the educational interests urge that ETV stations be granted nonduplication protection for a period either the same as or much longer than that accorded to commercial stations.[46] Moreover, both NAEB and EEN urge the adoption of procedures to protect communities with educational reservations which have not yet been activated. NAEB requests that the CATV be required to notify local and area school authorities and ETV interests of its proposal to bring in a distant ETV signal. In this way, NAEB states, local ETV interests would be alerted and could bring the matter to the Commission's attention for whatever action or conditions appeared warranted in the circumstances. EEN urges the adoption of interim procedures similar to those proposed for CATV operations in major markets in paragraphs 49 and 50 of the notice.

93. The considerations put forth by the ETV interests are not answered by simply stating that the public interest is served by the widest dissemination of educational material. If CATV operations should prejudice the establishment of new ETV stations on the unused reserved assignments or prevent existing stations from realizing their full potential, the result would be a narrowing of the distribution of educational material—a loss hitting hardest persons residing in rural areas and those unable to afford CATV fees. As in the case of commercial stations, CATV's proper role is to supplement, rather than to supplant, local educational broadcast service. The national policy of encouraging the full development and expansion of ETV is reflected in the grants-in-aid legislation (Public Law 87-477) and has long been a matter of deep concern to the Commission (sixth report and order, pars. 33-49). It would be plainly inconsistent with that policy to accord educational stations less protection than commercial stations if there is any real likelihood of prejudice flowing from CATV importation of outside ETV signals. Considering the continuous financial struggle of ETV and its dependence upon local financial support and interest,

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[45] Apart from ETV, it is stated that rural residents rely especially on local broadcasts giving agricultural information, weather conditions (flood, frost, etc.), pest hazards and current market conditions.

[46] The longer period is sought because of the block distribution process for the NET scheduled service and distribution patterns of regional educational networks like EEN.

we think that the possibility of adverse effect is sufficiently strong to warrant some special protection for ETV.

94. In view of our decision to adopt "same day" nonduplication for commercial stations and since it is asserted that effective nonduplication protection for ETV would require a much longer period, we do not think it appropriate to adopt 15-day before-and-after nonduplication for ETV, as requested by NAEB and ABC. There is no agreement among the educational interests as to what time period would be appropriate, and even an extensive nonduplication period would not solve the problem of achieving adequate operational funds for existing ETV stations. We believe that more effective relief to ETV can be provided by the approach discussed in the succeeding paragraph, than by delayed nonduplication periods such as 15 days before-and-after. Therefore, while recognizing that some measure other than nonduplication may be more suitable for ETV, we shall amend the exclusivity provisions to include educational stations. The rules will thus apply equally to all stations in line with our conclusion (par. 54 above) that they should be the same for all systems. We will, of course, be alert to guard against the possibility that CATV may pose a more acute problem for ETV than presently appears, and would not hesitate to amend the rules should this subsequently prove necessary. ETV interests have indicated their intention to keep us apprised of any worsening developments and are encouraged to do so.

95. Perhaps the most troublesome problem raised by the ETV comments is the possibility that CATV, by bringing outside educational signals into communities where educational assignments have not yet been activated, will siphon off enough local support to preclude the establishment of an educational station. The policy of reserving channels for educational stations is in recognition of the fact that some time may elapse before such stations come into being. While the grants-in-aid legislation has speeded up the process in many areas,[47] the reservations still serve a needed purpose which should not be undercut. CATV provides a valuable service to schools and other subscribers by bringing in ETV which is not yet locally available. But this should not be at the expense of preventing a local service from ever being established. Accordingly, we shall adopt the suggestion of NAEB that local and area ETV interests and school author-

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ities receive advance notice of CATV proposals to bring in outside ETV signals. The attached rules (Appendix D) require the CATV system to give notice of its proposal to bring in a distant ETV signal, at least 30 days prior to commencing service, to the local superintendents of schools and to the area and state educational television agencies (if any). This will enable ETV interests in the area to make objection to the CATV system where a local station is contemplated. Where a local ETV station is reasonably imminent and objection is made to the Commission, we would not ordinarily approve importation of the distant ETV signal unless it has been established after appropriate proceedings that this would not prejudice the establishment or maintenance of a local ETV service.

96. And, finally, it is asserted by NET and NAEB that, where an educational signal is carried on a CATV on a channel partially used for commercial signals, the placement of commercial announcements adjacent to educational material carried on CATV jeopardizes the public image of ETV and prejudices its position with program suppliers and copyright owners who insist upon noncommercial presentation. However, we do not think that a sufficient basis has been shown for the relief requested; i.e., prohibiting commercial announcements adjacent to educational programing or requiring CATV's to devote channels exclusively to educational programing. We cannot undertake to preserve ETV or commercial stations harmless from all conceivable prejudice no matter how slight. Moreover, we are reluctant to interfere with CATV operations any more than necessary in the public interest or to impose requirements not shown to be essential. CATV systems with limited channel capacity and those carrying a large number of commercial signals might find it difficult to devote channels exclusively to ETV. CATV's may also wish to use educational signals to fill in portions of commercial signals which cannot be carried because of the nonduplication requirements. Moreover, since educational stations normally do not have as long a broadcast day as commercial stations, the CATV system may wish to provide its subscribers with other material during the time that the educational station is not broadcasting. In view of the station identification announcements made during the course of the educational programing, it seems to

[47] The number of educational TV applicants in UHF (where most of the unused educational reservations are) has increased from five at the beginning of 1962 to 30 as of the end of 1965; during this period 34 more UHF eduactional stations went on the air.

us that the prejudice to the originating ETV station, if any, would be minimal.

D. PROCEDURAL MATTERS

1. Ad Hoc Procedures

97. It has been suggested in the comments that the Commission should adopt specific rules providing for summary, nonhearing, procedures to handle requests for waiver of the CATV rules or for different treatment or affirmative relief. We think the suggestion has merit. The general provision for waiver of any rule (§ 1.3 of the rules) does not afford an adequate procedure for seeking additional affirmative relief or different treatment. Moreover, such procedures would be useful to handle requests for rulings on complaints or disputes. We recognize that to hold hearings upon each such request relating to carriage, nonduplication and ETV, would be time consuming and burdensome to the CATV systems and stations involved, particularly those in smaller communities. In addition, while such procedures will not apply to the matter of distant signals in the top 100 markets, for which a showing made in evidentiary hearing is required (see par. 141 below), they could be utilized in many instances to resolve distant signal questions in the smaller markets.

98. Accordingly, we have undertaken in § 74.1109 of the attached rules to devise flexible and fair procedures which will generally permit expeditious processing of such requests. The procedures require a written petition with notice to interested persons and afford an opportunity for submission of comments or opposition to any request and for reply. Upon good cause shown, the Commission may shorten the times specified in the rules for the filing of opposition or reply comments. The petition and all other pleadings filed by the petitioner or interested persons must contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon. In the case of complaints or disputes, the steps taken by the parties to resolve their problem must also be set forth. The Commission will, where possible, promptly dispose of the matter on the basis of such written submissions. However, additional procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, may be specified by the Commission if they appear necessary or appropriate after consideration of the pleadings.[48] In the event that the petition involves new service to CATV subscribers, the Commission will expeditiously rule on the matter, either in whole or to the extent of determining whether there should be a stay or other temporary relief pending such additional procedures as may be required (see par. 100 below).

2. Information To Be Filed With the Commission by Existing CATV Systems; Notification by New CATV Operations

99. Pursuant to our authority under section 403 of the Communications Act, all existing CATV operators will be required to submit to the Commission, within 30 days after the effective date of our order herein, the following information with respect to each of their CATV systems: (a) The names, addresses, and business interests of all officers, directors, and persons having substantial legal or beneficial ownership interests in each system;[49] (b) the number of subscribers to each system both currently and as of February 15, 1966; (c) the television stations carried on each system; and (d) the extent of any existing or proposed program origination by each CATV system. Any CATV system which is located within the predicted Grade A contour of a television station in the top 100 television markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market) and which carries the signal of a distant station(s) will also be required to submit a map showing the location of its cable lines being used to serve subscribers on February 15, 1966.[50] It is not practicable to apply the notification provisions set forth below to the present operations of existing systems, and there is no comprehensive or accurate listing of CATV systems available to apprise television station licensees or permittees of all existing CATV operations within their Grade B contours. Indeed, we have noted that while the recent growth of CATV is of

[48] Since petitions under the ad hoc procedures may involve the resolution of controversial issues which in basic fairness should be determined on the pleadings of the parties, we shall amend the ex parte rules to make them applicable to proceedings under § 74.1109, as well as to proceedings under §74.1107. The principles discussed in par. 9 of the report and order in Docket No. 15381, FCC 65-598, 1 FCC 2d 49, will also apply.

[49] In stating the ownership interests in a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

[50] Existing systems in the markets below 100 may subsequently be required to submit a map showing the location of lines as of a specific date in connection with any petition for ad hoc consideration of a geographic extension into new areas.

an impressive nature, there are conflicting estimates as to the precise dimensions of that very substantial growth. The information obtained will assist the Congress in its consideration of the Commission's legislative proposals in the CATV field, and the Commission in its consideration of matters in Part II of the notice and petitions described in paragraph 149 below.

100. New CATV systems will be required to notify the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system will operate and the licensee or permittee of any 100 watt or higher power translator located in the community of the system, with a copy to the Commission, concerning the proposed operation within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities. In no event may new service be commenced until 30 days after notice has been given. The notice shall include the name and address of the system, identification of the community to be served, the television stations to be distributed, and the estimated time for the commencement of operations. Similar notification will be required by existing systems which propose to add new distant signals (at least 30 days prior to commencing service) or to extend lines into obviously new geographic areas (within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities or at least 30 days prior to commencing service where no new local au-

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thorization or contractual arrangement is required). In addition, as already indicated, notice to local and area educational authorities and ETV interests will be required at least 30 days prior to commencing service where carriage of a distant ETV signal is proposed. Such notification will afford the local television stations and other interested persons an opportunity to request carriage and nonduplication under the rules or to petition the Commission for different requirements, before service is commenced and thus avoid disruption to the public. Where a petition for ad hoc consideration is filed with the Commission by any station, CATV system, or other interested person within 30 days after notice, new systems and existing systems proposing to add new distant signals shall not commence new service until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.[51] In the event that an evidentiary hearing is required, the question of whether there should be a stay or other temporary relief pending the hearing will be expeditiously resolved prior to the hearing on the basis of the pleadings of the parties and such additional written submissions as the Commission may request.

3. Form and Enforcement of the New Rules

101. Aside from the obvious distinction that nonmicrowave CATV's do not file applications for licenses with the Commission or use licensed facilities, no special problems of substance or procedure in making the carriage and nonduplication requirements applicable to them have been called to our attention and none is apparent to us. While the substantive requirements will therefore be the same for all systems, some differences in form or procedure are necessary in the case of the nonmicrowave CATV's. First, the obligations will be imposed directly on the CATV system itself, rather than taking the form of conditions on microwave authorizations. Second, enforcement will be through the cease and desist procedures set forth in section 312 (b) and (c), or pursuant to section 502, of the Act and will not include other sanctions applicable to licensees. And, third, some change is required in the provisions requiring notification to all licensees or permittees of television stations placing a Grade B or better signal over the community of the CATV system that a microwave application has been filed or a request has been made of a common carrier for microwave service. (See sec. 2 above.)

4. Retention of the Microwave Rules

102. It is urged by American Telephone & Telegraph Co. and by United States Independent Telephone Association (both in comments in Docket No. 15971 and in its petition for reconsideration of Docket Nos. 14895 and 15233) that the rules governing microwave grants should be deleted when the obligations are imposed on CATV systems directly. We think it best to retain the rules conditioning microwave grants (as revised herein) in their present form for a while longer, until CATV's generally are operating in accordance with the new rules. Pending such compliance, we cannot make the requisite public interest finding for the issuance of the microwave licensee in the absence of a showing that the facilities will be used in accordance

[51] The matter of extension of lines into new geographical areas by existing systems in top 100 markets is discussed in par. 149 below. As already indicated, the ad hoc procedures do not apply to new service involving distant signals in the top 100 markets or obviate the need for evidentiary hearing as set forth in pars. 141–143 below.

with the conditions. Moreover, the requests of AT&T and USITA are primarily grounded in the alleged burden to the common carriers, which will be substantially alleviated in this interim period by the revisions made in the memorandum opinion and order on reconsideration in Docket Nos. 14895 and 15233, 1 FCC 2d 524. However, once widespread CATV compliance with the new rules has been achieved, some modification of the microwave rules would clearly appear to be appropriate and we shall take action toward this end as soon as it is possible to do so.

5. Transition Period

103. In the first report and order (par. 161) and in the notice (par. 34), we stated that we would consider in this proceeding the question of whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and nonmicrowave systems with limited channel capacity. To obtain relevant information, the Commission mailed a questionnaire to every known CATV operator. The questions were designed to elicit specific information with respect to the effective channel capacity of each system, the local television signals which might fall within the carriage provisions of the rules, and the number of channels in use for nonlocal television signals or other purposes. Responses were received from 1031 CATV's, of which 250 were microwave-served and 781 were nonmicrowave.

104. Upon analysis of the responses, it appeared that less than 20 percent of the microwave systems were not in compliance with the carriage provisions, and half of these either had the unused channel capacity to come into compliance, or, in view of plans to expand the system, would shortly be able to comply. Less than 10 percent of the microwave systems could not comply with the rules without having to drop one or more signals currently carried. Accordingly, the Commission, on December 8, 1965, determined that there was no need to afford microwave-served systems a general delay in the application of the rules relating to carriage, and notified all common carrier and Business Radio Service licensees serving CATV's that the rules would be effective on and after February 1, 1966, to renewal applications. We further advised such licensees that the renewal application should contain a request for waiver of the rules relating to carriage, if a waiver were desired, together with the following showing:

The request for waiver should include the petition by the CATV system that the microwave licensee seek the waiver from the Commission; and the system should include a statement that it has served a copy of that petition on any television station to be affected. The request for waiver should demonstrate the hardship to the CATV system, the disruption of service to the customers of the CATV system which would result from immediate compliance with the carriage requirements, the need for the particular length of time for which the waiver is requested, and the future plans to come into compliance. Finally, the request should state whether substitution of the local station's signal on a simultaneous-only basis will be afforded during the period for which any waiver is granted where the local station is not now carried and its programing is duplicated by a more distant signal. See Black Hills Video Corp., 6 Pike & Fischer, R.R. 2d 199, at 201 (par. 9).

105. With respect to the 781 nonmicrowave systems who responded to the questionnaire, it appears that 605 are already in compliance with the carriage requirements of the rules. An additional 87 systems have sufficient unused channel capacity, or are expanding their capacity, and would be able to comply without having to drop any presently carried television signal. Two systems might have to utilize a channel presently carrying FM radio and CATV originated programing, and 10 systems furnished insufficient information for any conclusion as to their situation. There remain 77 systems which would have to drop one or more television signals presently carried in order to add one or more television signals required to be carried by the rules.

106. Thus, as in the case of microwave systems, it appears that only a comparatively small percentage of the nonmicrowave systems could not comply with the carriage provisions without substituting a local for a more distant signal. In the circumstances, we believe that there is no need to provide for a general transition period by rule. The problems of individual systems will be considered on a case-by-case basis, upon a request for waiver making the same showing applicable to microwave systems. Accordingly, the rules will apply immediately to all new CATV systems commencing operations on or after their effective date, and will apply 60 days thereafter to existing systems unless a request for waiver has been filed with the Commission. Our aim is to allow an orderly transition period for the relatively small number of systems with limited channel capacity whose viability might be jeopardized by immediate application of the rules, or

where existing service to CATV subscribers would be unduly disrupted (as against the Black Hills type of protection (6 R.R. 2d 199, at 201 (par. 9)) during the appropriate transition period).

107. The foregoing discussion of the apparent situation with respect to carriage does not take account of 100-watt translators operating in the community of the CATV. Our decision (pars. 82, 83 above) to accord high power translators fourth priority may raise some ad- [*P. 4557*]
ditional channel capacity problems. While this new provision will have the same effective date, waivers may be sought by microwave and nonmicrowave systems either within the 60-day period or upon receipt of any request for translator carriage which gives rise to some problem.

6. Copyright Suits

108. Finally, we shall make brief mention of the copyright matter because, despite our plain statements in paragraph 159 of the first report, there would still appear to be some confusion on the part of some persons as to the effect of our carriage and nonduplication rules upon the pending copyright disputes. We have stated that our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. Thus, the fact that we have given the local station the right to have its signal carried over the CATV system (and not duplicated for a reasonable period), affords no defense to that system in a copyright suit. The station cannot bestow broadcast or transmission rights to programing which it does not own(or as to which it has not obtained a license to do so). See report on rebroadcasting rules, 1 (part 3) Pike and Fischer, R.R. 91:1133, 1134, 1137, where we stated in connection with rebroadcast rights under section 325(a), that the section "may no longer accurately reflect present conditions" since most programs were not owned by the originating station who could not therefore legally grant the rebroadcast permission sought. In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in the first report, have to revise our rules.[51a] We have acted now in light of the present copyright situation, which would appear likely obtain for some substantial period time, and without the slightest intent c affecting the determinations to be mad in the pending suits.

CONCLUSION AS TO PART I

109. The foregoing are the rules whic we believe to be appropriate for all CAT systems at this time. We believe tha they represent a fair balancing of th competing interests, and properly accom modate both industries and thus, th public interest "in the larger and mor effective use of radio" (sec. 303(g)). W recognize further revision may be calle for as we gain experience in their imple mentation. This docket (15971) remain open with this report designated as the second report, and we shall revise th rules, as the public interest requires, ir our consideration of Part II or upon the basis of new information or experience (and, if appropriate, after giving notic of such proposed revisions). Finally, as in the case of all rules, we shall give further guidance through the medium of rulings directed to specific situations.

110. In light of the foregoing, we find that the public interest would be served by modification of the rules previously promulgated for microwave-served CATV systems and the adoption of rules governing all CATV systems, as set forth in the attached Appendix D. Authority for the rules adopted herein is contained in sections 1, 2(a), 3(a), 4 (i) and (j), 303, 307(b), 308, 309, 310, 319, and 403 of the Communications Act of 1934, as amended.

PART II. MAJOR MARKET, DISTANT STATIONS POLICY—PAR. 49–50 OF THE NOTICE

A. THE NOTICE; COMMENTS

111. In the notice, we stated (par. 49, 1 FCC 2d at p. 471):

> • • • pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the area. A like showing must be made in applications for microwave facilities to serve a CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the Grade B contour of such three or more commercial stations), any new UHF television station would be independent in operation.

In paragraph 50, we specifically invited comment:

[51a] And, of course, stations will have to take into account the effect of any copyright decision in making requests for carriage under the present rules.

• • • on whether the foregoing course of action as to applications before the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its Grade B contour into a community with the situation described above (par. 49), without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community.

112. We have considered the comments received on this important aspect. A summary of some of the comments is set out in Appendix B.

B. EVALUATION

113. The discussion in Appendix B gives some of the highlights of the comments submitted on this aspect. The more detailed showings have, however, been considered, and will be referred to in the ensuing discussion. While these showings are pertinent, particularly with respect to the trends which are so important to our evaluation, they do not supply definitive answers to the problems before us; rather, they serve to point up the problems and, in the circumstances, to the procedures called for. We shall develop the underlying considerations at some length, and even with some repetition of the discussion in Part I, because of the great importance of the matter. There are two central grounds for our action—(1) an economic impact ground, based on the trends in the CATV and UHF fields, and (2) a fair competition ground, based on the patently anomalous conditions under which the broadcasting and the CATV industries compete.

1. The Economic Impact Ground

114. The UHF trend: As stated in our notice, we are at a watershed in the development of UHF broadcasting. UHF broadcasting generally suffered a very serious setback in the 1950's and limped along until the passage of the all-channel receiver legislation. In enacting this "unique" legislation in 1962, Congress made the judgment that development of UHF "is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States" (H. Rept. No. 1559, 87th Cong., 2d sess., p. 4; S. Rept. No. 1526, 87th Cong., 2d sess., p. 7). Such a system would "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression," provide "at least three competitive facilities in all medium-sized communities," and make provision "for at least four commercial stations in all large centers of population" (H. Rept. at p. 3). Such a fourth station might make possible a fourth national network or the formation of "FM-type networks" in television, and also would be "valuable particularly for local programing and self-expression"—an important need in many markets "because all of the available stations are network affiliates" (H. Rept. at p. 3; S. Rept. at p. 4). Thus, as shown by the above and the compulsory sale of all-channel sets at the rate of over 9,000,000 a year, Congress and the American public have staked a great deal on the development of UHF.

115. As we pointed out in the notice and our prior discussion, there is every present indication that the all-channel set requirement is having its desired effect, with greatly increased interest in UHF, particularly in the many applications filed for the larger cities. Thus, from the beginning of 1962 to the end of 1965, the number of UHF commercial stations on the air increased from 85 to 100, and, most significant as an indication of the trend, the number of applications pending (with multiple applications for the same channel counted once) increased from 19 to 80. There are now indications of the beginning of a fourth network or of an "FM-type" network, involving UHF and VHF stations in some major markets. With this increased ferment in UHF, we believe that the next few years will supply the critical answer to whether the congressional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved. (See H. Rept. at p. 7; S. Rept. at p. 6.)

116. The CATV trend: The CATV trend is even more pronounced, and has already been noted in our first report, paragraph 65, 38 FCC at p. 709, and in the prior discussion (pars. 31–33). As stated, the

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CATV growth has been explosive and gives every indication of continuing its phenomenal spurt. In 1959, there were about 550 CATV systems, in 1965 at the time of the first report, there were about 1,300 CATV systems, and today—less than a year later—it is estimated that there are 1,565 (Television Digest, Dec. 27, 1965, at p. 3). Further, there are 1,026 CATV franchises which have been recently granted but are not yet operating (ibid.). The number of applications for franchises is even larger—an estimated 1,958.[42] Clearly, there is consider-

[42] As noted, the estimates as to franchises granted and applications vary. See paragraphs 31, 116, supra. NCTA reported recently that 1,500 applications for CATV permits had been filed in the last 12 months and that 1,200 were pending (N.Y. Times, Dec. 19, 1965). By any estimate (e.g., TV Digest, AMST, NCTA), the figures are impressively large.

able substance to the statement of the official of one of the largest CATV groups, quoted in our notice (par. 39, 1 FCC 2d at p. 468):

> The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learned that new CATV systems are being sought or authorized at the rate of one a day. * * *

117. Equally important is the changing nature of the CATV operation. In 1959, the average CATV provided three signals to its subscribers; in 1965 the majority provided five or more signals (par. 65, first report), and the average system built today has 12-channel capacity.[53] There are now 20-channel systems proposed (e.g., the Jerrold proposal in Philadelphia), with industry leaders predicting that in the next 5 years "improved technology will have made the 20-channel CATVs commonplace. * * *" (Television Magazine, Dec. 1965, p. 31). There is greatly increased use of microwave facilities (i.e., from 50 systems using microwave in 1959 to 250 in early 1965 to about 450 today). The distance which signals are taken has also increased greatly (to over 665 miles). Finally, the CATV industry has shifted its attention to the larger communities, and CATV franchises have been granted or are being sought in such cities as Philadelphia, Toledo, Cleveland, San Diego, Dayton, Baltimore, Syracuse, Albany, Sacramento, Pittsburgh, Birmingham, and Fort Wayne. To quote again the large CATV group (par. 39 of the notice):

> First, and of overriding importance, is the shift of CATV strength to a new locus. The centers of the most intense CATV development now are the very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2 percent of the Nation's television population.
>
> But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut, and entire counties such as the 37 cities of Camden County, N.J., all of Montgomery and Chester Counties, Pa., etc. * * *.

The CATV applicant believes that it can be successful in such cities because it will bring better reception (particularly to the color) and, most important, the programing of important independent (e.g., the three New York independents to Philadelphia).

118. It is apparent that these two trends (UHF and CATV) raise a serious question. Both CATV and UHF broadcasting, for example, are entering the larger markets, most often in an effort to bring programing that is not now available in these markets. There are at least 163 communities or areas with UHF stations operating, authorized or applied for, which also have CATV activity. In 68 such communities or areas, there are already operating CATV systems; 29 have CATV systems franchised but not operating, and 66 have CATV applications pending. In the notice, we set out as an example the Philadelphia area, where there are now three commercial UHF stations on the air (and another one authorized) and there are several well financed CATV applicants seeking to bring in the signals of the three New York independents. The most critical question posed in how these two trends mesh in the ensuing years.

119. We have studied the comments carefully in this respect. While they give some indications (see par. 122, infra), the answer remains uncertain. On the one hand, the NCTA, relying largely on the Selden Report, contends that CATV in a large community such as Philadelphia can have little effect on the healthy existence of UHF stations; that if anything, CATV will aid these stations by bringing them into homes where they might not otherwise be received. But we believe that this contention has significant defects.[54] In any

[53] In its reply comments (p. 18), AMST asserts that of 54 systems for which data was available and which began operations in 1965 (through July of 1965), only 5 were 5-channel systems; 44, or 81.5 percent were of 12-channel capacity.

[54] The Selden Report assumed "an optimum" of 50 percent penetration of the Philadelphia market by the CATV (but see pars. 120–123 as to the "optimum" CATV penetration), and then, based on the fact that the three New York independent stations account for 9 percent of the TV homes during prime time, arrived at the conclusion that there would be a diversion from the Philadelphia UHF stations due to CATV of only 61,450 homes out of 1.3 million TV homes in metropolitan Philadelphia (report, pp. 84–86). As already noted (note 19, notice) the report measures the diversion as against the total Philadelphia audience, plainly ignoring the very facts upon which the analysis is based. The point is that whatever criterion is used to measure CATV impact, the same criterion should be used to measure the audience UHF would have without CATV. If, therefore, it is assumed that 9 percent of the CATV subscriber homes would, on the average, be watching the three New York independent stations and would therefore be diverted from the three Philadelphia UHF stations, the resultant figure—61,450 homes—should be related not to the 1.3 million TV homes in metropolitan Philadelphia, but rather to

event, it would appear that a crucial consideration is whether the Seiden Report is correct in its belief that in the large cities, it "is not clear as to what these CATV promoters will offer that makes them think that they gain substantial numbers of subscribers in such areas" (Seiden Rept., p. 84). In his judgment, "potential CATV markets are those areas lying 40 or more miles distance from three full network signals. * * *" (Id. at p. 83.)

120. But very important segments of the CATV industry do not agree with the Seiden Report. They are proposing to invest very large sums of money (including amounts such as $40,000,000) in their belief that CATV, employing 12, 20, or even greater capacity systems, can gain very substantial audiences in these large markets. The leaders of such important CATV groups as Jerrold or Teleprompter believe that "almost all American cities—small and large—will be wired for television * * *" and, in the words of the top official of Teleprompter, "within the next decade, 85 percent of all television sets in the United States may be receiving their programs by cable rather than over the air" (Television Magazine, December 1965, p. 30). Another experienced CATV operator estimated more conservatively that CATV may reach 30 to 35 million households within the next decade (Broadcasting Magazine, July 26, 1965, p. 31).

121. We do not accept the above statements as necessarily correct, any more than we accept Dr. Seiden's assertion to the contrary. The plain fact is that on the record before us, it is not possible to give a definitive answer to the future

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growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets.[55]

122. Indications in the materials before us would appear to indicate substantial growth and substantial impact by CATV in the large markets. Thus, Midwest Television, the licensee of a San Diego station, submitted a study made by an independent research organization in late June 1965, of the San Diego area, the 51st market (ARB ranking on net weekly circulation), with three VHF stations and CATV systems which carry these stations and all seven Los Angeles VHF stations without nonduplication treatment. The study indicated that the CATV systems, with a present total of roughly 10,000, are adding subscribers at a rapid rate. Thus, in one section where CATV had been available for only 3 months, more than 36 percent of the homes had already been wired for CATV; as of late June, 43 percent of the CATV subscribers interviewed had been subscribers for less than 3 months (Midwest comments, Docket Nos. 15971, 14895, and 15233, pp. 24, 28). But this study is oviously too fragmentary to be conclusive on this important question. The study also indicates very considerable impact upon the local stations. See paragraphs 40–41, supra.[56]

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the average number of homes in metropolitan Philadelphia that would be viewing the three UHF stations if there were no CATV. The audience for nonnetwork programing in Philadelphia is certainly no greater than in New York (and indeed would undoubtedly be much smaller in the beginning). If, therefore, 9 percent of the TV homes during prime time were assumed to be the number which, on the average, would be watching the three Philadelphia UHF stations, this would result in a total average audience of less than 120,000 homes against which the impact of a loss of more than 60,000 homes should be measured rather than against 1.3 million TV homes. In short, the Philadelphia audience which would be attracted to the New York independent stations is a very important part of the audience at which any independent Philadelphia UHF station must aim—a critical point ignored by the Seiden Report.

We would also point out several other factors: (i) The potential effect on the UHF independent becomes even more serious when markets smaller than Philadelphia are considered (see footnote 57); (ii) it is unrealistic to assume that UHF independents in such markets will have the financial base to bid for and obtain the same amount of expensive nonnetwork film program as the New York VHF independents, with their much larger population base, and thus, the CATV audience for nonnetwork programing may well not be divided equally between the UHF independents and the distant VHF ones; and (iii) the 20-channel system would permit the importation of the New York network stations which would also contribute to diversion of audience during the 30–45 percent of time these stations are presenting nonnetwork fare.

[55] As stated, the CBS study indicated that it had not included "* * * a group of applications for CATV systems in communities with three more than adequate services [e.g., * * * applications for franchises * * * in places like Albany, Syracuse, Galveston, Philadelphia, and Cleveland * * *]. If these systems are established and thrive, it is clear that the potential for community antenna systems far exceeds anything that we have talked about thus far and, in fact, much of the country could ultimately become CATV territory." (CBS comments, Exhibit A, pp. 16–17.) Thus, CBS focus was on the old or "traditional" CATV and not the new developing trend in the industry.

[56] To the same effect, see the address of Mr. George Blechta of Nielsen at the July

123. There is no doubt as to the seriousness of the question posed. The new UHF stations face a difficult road; we would expect, with the passage of time and thus the buildup of all-channel sets, and related endeavors, that these new operations would be successful. But if a CATV, with 12 or 20 channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50 percent or over), the UHF stations might face a very difficult hurdle. The audience for nonnetwork stations is limited (about a 10 percent share in most markets in the prime time) and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the nonnetwork programing would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of commonsense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive nonnetwork programing. Any gain in better reception of the UHF signals might be far outweighed by the splintering of the limited audience for independent programing. The UHF stations will in any event gain a very substantial audience in these markets, through the operation of the all-channel receiver law. While the CATV might bring them a little sooner or with somewhat better reception into some TV homes, it would appear to do so at the cost of fragmenting greatly the limited audience interested in viewing nonnetwork programing in the prime listening hours. See note 54, analyzing the Philadelphia situation on the basis of a 50 percent CATV penetration.[57] As pointed out, the noduplication provision would afford virtually no relief, since nonnetwork programing is not distributed on anything like a simultaneous nationwide basis.[58] The rise in advertising demand for television time is also pertinent to this question; as noted (footnote 30), there are countervailing considerations which, at the least, require that this fact be considered in the context of the particular situation (e.g., in Philadelphia there are three and possibly four new stations to share the increased advertiser demand). Finally, we point out that it is not just a matter of causing the demise of the independent UHF stations; if these stations' revenues are substantially reduced because of such CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest "in the larger and more effective use of radio" (Communications Act, sec. 303(g)). In short, the problem posed is whether, if CATV succeeds greatly—for example, to the 50 to 85 percent figure predicted by its optimistic proponents—there is correspondingly a grave danger to UHF broadcasting.

124. It has been urged that we simply ignore the problem and let events in the major markets decide between CATV and the UHF broadcast stations. But for reasons already developed, such a course would be inconsistent with our statutory responsibilities and might lead to results inconsistent with public interest in a number of respects:

(i) CATV does not now serve the rural areas, and it has not been established that it can practically do so. If CATV were to undermine the healthy development of UHF, it would mean that people in the urban or more built-up areas would be getting additional service at the expense of those in the rural areas; we think that such a result is patently in-

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1965 NCTA Convention, where Mr. Blechta referred to an eastern television market "where the sample indicated that one-third of the viewers are CATV subscribers and that the local stations have a combined share of audience of 85 percent among non-CATV homes in contrast to a share of 'less than one-half' among CATV homes." (Sponsor Magazine, July 26, 1965, p. 14.)

[57] Further, Philadelphia is the fourth largest market in the country. But in smaller, even though still major, markets, similar analyses raise even more serious question. Thus, in the Sacramento-Stockton market (the 27th in ARB ranking) having 300,400 TV homes in the metropolitan area, 63 percent or about 189,000 metropolitan area homes on the average are watching television in prime time; without CATV, the UHF would do well to get a prime time audience of 15,000 homes. While this audience, on the basis of our experience, would normally appear sufficient to support operation, obviously, significant diversion of the audience by CATV could be a serious matter. Yet CATV systems could bring in the VHF independents from San Francisco and, as we understand, from Los Angeles also. This example, dealing with a major market, could be multiplied many times.

[58] Nor would extension of the UHF station's signal beyond its Grade B contour by CATV systems compensate for fragmentation within that contour by CATV systems having very substantial penetration. We note that CATV systems tend to bring in the distant big city independents (since such stations constitute a better sales point in obtaining subscribers) rather than the new UHF stations. In any event, an independent's source of revenue is the local and national spot business, as to which the metropolitan area rating plays a very significant role. As shown by the above discussion, that rating could be seriously affected in the event of very substantial CATV penetration.

consistent with the public interest and the Act's goals.

(ii) CATV is a form of Pay-TV, in the sense that one must pay to obtain the television service. There are substantial numbers of people who either cannot afford to or do not wish to pay for television.[39] If then the CATV blocks development of UHF broadcasting, it would again mean that some people would be getting additional service at the expense of those who cannot afford or are unwilling to pay for such service.

(iii) Most important, CATV does not serve as an outlet for local self-expression. It does not present local discussions, the local ministers or educators, the local political candidates, etc. If events in the major markets should establish that CATV has prevented the healthy maintenance of UHF broadcasting, it would mean that, for example, New York independents would have been substituted for Philadelphia independents. We think that would be contrary to sound allocation principles, long established in section 307(b) of the Act. It would be a clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia additional broadcast stations to meet the "important needs" for "local programing and self-expression" (par. 41, notice). It would also undermine the goal of a fourth national network built upon these additional stations (par. 41, notice).

125. If the New York independents sought translators to place their signals over the Philadelphia area, it could not seriously be argued that we should grant such applications on the ground that while they may be destructive of congressionally established goals, events in the market place should be allowed to give

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the answer. The matter is not really different here. The Commission has jurisdiction to "establish areas or zones to be served by any station" (303(h)), to make a "fair and equitable distribution of facilities among the several States and communities (sec. 307(b)), and "to perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions" (4(i)). If then we sit back, even though we have the jurisdiction, the authority and the responsibility to carry out the congressional policies, and do not thoroughly explore the serious question posed, we would be simply abdicating our responsibility "to promote the larger and more effective use of radio in the public interest" (sec. 303(g)).

126. To summarize, we have reached no final conclusion in this area—i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and more effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

127. We have focused in the above discussion on the independent UHF station. But as interested parties such as Storer have stated, there is also a problem with respect to the new UHF station in a market with two VHF stations. The UHF station does not necessarily obtain a full line of network programing in such markets; either initially or for a considerable period of time, it may be dependent to a very substantial extent on nonnetwork fare. Further, several parties have expressed the fear that because of CATV, such new UHF stations will not be able to obtain a primary network affiliation. Finally, we note that to a significant degree, whether rightly or wrongly, CATV penetration would appear to have a discouraging effect on entry of new UHF stations (or on the substantial expenditures which must be made for the high tower and power necessary for an effective operation). Permittees of several new stations have set out their fears of the consequence of CATV importation of distant stations from New York, Los Angeles, etc. To give but two examples,

(i) The permittee of the new UHF station in Sacramento has informed the Sacramento City Council that the im-

[39] Thus, even the CATV industry estimates that on an industrywide basis CATV systems now in existence have achieved about 55 percent level of the total number of TV homes in the markets served, and that this figure will ultimately rise to 70 percent (Television Magazine, December 1965, p. 30).

portation of outside signals from San Francisco-Oakland and Los Angeles, as proposed, would make it impossible for the UHF station to survive (joint comments, p. 15).

(ii) "[Regardless of whether Jerrold's proposed Jacksonville CATV system will be subject to carriage and nonduplication], it is your permittee's belief that should Jerrold introduce through its proposed system the programs of the three television networks, it will be impossible for WJKS–TV to obtain the network affiliation required for its survival." (Statement of Rust Craft Broadcasting Co., permittee of UHF Station WJKS–TV, Jacksonville, Fla.; AMST comments, p. 71.)

The above examples are not cited at this point for the correctness of the attitude taken toward CATV penetration in the particular situation, but rather for the attitude.[60] We think it important, in view of the critical period facing UHF, that the UHF entrepreneur be given a forum for thorough exploration of this serious problem.

128. The contentions of some of the parties with respect to Pay-TV are also pertinent here. Several parties (e.g., ABC, Westinghouse AMST) have stated that CATV, particularly if it succeeds in the major cities, can readily branch out into Pay-TV (for example, by providing that one channel will be "original" programing available only for a specific additional charge—a form of Pay-TV somewhat akin to the Bartlesville experiment in 1957–58). The parties assert that whether or not Pay-TV is desirable, it should be initiated only after full consideration in an appropriate proceeding and not "come in the back door" through CATV operations and profits based on the sale of the broadcast industry's product.

129. Whether a form of Pay-TV operation will result from CATV is uncertain and would appear to depend again very largely upon the growth factor, particularly in the larger cities which would naturally be the backbone of any wire Pay-TV operation. But we would agree that in the circumstances its authorization should stem from the Commission (or the Congress), after appropriate proceedings. For, what is involved is not the strictly wire Pay–TV proposals such as recently attempted in California. A hybrid CATV-Pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals (to provide the economic base for the Pay-TV "frosting"), and such use of broadcast signals should be allowed only if it is found to be in the public interest. W have petitions now under consideration, which seek the authorization of Pay-TV on a regular basis using broadcast facilities, perhaps only in the UHF portion of the spectrum. It is clear that until resolution of the very important policy issues, Pay-TV operations based in substantial part on use of broadcast signals is inappropriate. Since here again the critical factor is the growth of CATV in the larger cities, we think that this is added reason for the policy and procedure we have adopted, since that procedure will be especially applicable to such cities. We intend to explore thoroughly the relationship, if any, of proposed CATV operating in the larger markets and the development of pay television in that market. This is a matter which is also involved in Part II of this proceeding, and will be the subject of a specific legislative recommendation of the Commission. See paragraph 153, infra.

130. We believe that the foregoing discussion, showing the serious question posed by the potential effect of very substantial CATV development upon UHF development and the possible adverse consequences to the public interest, demonstrates the need for the major market, distant signals policy which we have adopted. Before discussing that policy (see pt. 3, infra), we shall turn to a second ground which also, in our judgment, supports the need for the policy.

2. Fair Competition

131. We have previously discussed this "fair competition" ground in connection with the nonduplication requirement. See first report, paragraphs 52–57, 28 FCC 683, 703–706. That discussion, which will not be fully repeated, is pertinent here. As shown, the CATV industry is growing at a tremendous pace, with a changing nature (entry into major markets, with 12- or 20-channel systems, bringing the signals of big city independents such as those of New York and Los Angeles). If the CATV should achieve substantial penetration of these communities (50 percent or over), the result might be most serious for the new UHF independents in these same areas. This points up a critical consideration—that the nonduplication requirement will be of virtually no assistance, since what is involved is the establishment and healthy maintenance of independent stations, and nonnetwork syndicated or film programing is not distributed on a simultaneous nationwide basis. We therefore shall reexamine the fair competition

[60] We note also that the contrary opinion has been expressed by some new UHF entrepreneurs (namely, that CATV operation will aid, rather than hurt them).

considerations in the context of the present problem—the CATV and UHF trends and the need to develop a policy or procedure because of these trends.

132. A television station normally obtains the right to exhibit nonnetwork programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station. As we noted, the amount and kind of exclusivity that can be cre-

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ated is restricted by the antitrust laws. But those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process, and this exclusivity is maintained, in large part, through the operation of section 325 of the Communications Act, which forbids the rebroadcasting of any station's signal without the consent of the originating station.

133. We have pointed out how the CATV system presently stands outside of the above program distribution process (pars. 54–55, first report, 38 FCC at p. 704):

> [The CATV] has not been found subject to the requirements of section 325. [footnote omitted] It does not compete for network affiliation, nor for access to syndicated programs, feature films or sports events. It is not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose signal is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier—although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement.
>
> This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product—the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.

134. The anomalies which result from this situation are even more marked in the case of the independent station, particularly in light of the recent CATV trend. Procuring attractive programing which will interest viewers is, of course, the most vital concern of the new UHF independents. For example, such stations may bid for and obtain exclusive rights to an attractive feature film package. No other station in the same market could show these films—but a CATV system, which never entered the bidding, might well bring in these same films from a distant market. If the CATV reaches very significant proportions—50 percent or more, the result is the loss of the exclusive right for which so much was paid and upon which so much may have been staked. And here we stress again that without the financial sustenance from entertainment programs, a station has no adequate economic base to serve as an outlet for local expression for all the people in its service area.

135. When the situation is viewed on an overall basis, rather than from the viewpoint of individual programs, the result is equally anomalous. The CATV seeks to secure as great a number of subscribers as possible in these major markets, aiming for a figure well over 50 percent if possible. Since the people in these markets have three full network services, it seeks to attract such a large number of subscribers, in large part, by bringing in the independent pyrograming of distant big city stations such as the New York or Los Angeles independents. And it obtains such programing by simply paying a common carrier to bring to it the signals of these distant stations (or by itself erecting a tall antenna on an appropriate high elevation to receive the signals and then relay them with suitable amplification along the way to the subscriber). The new UHF station also seeks to attract as wide an audience as possible in these same markets by bringing in attractive nonnetwork programing. But the UHF station cannot, either by means of a common carrier, its own microwave relay, or a tall antenna, decide that the best way to obtain such programing is simply to bring in, in whole or in part, the programing of the New York independents. The established distribution process, given congressional recognition in section 325 (a), proscribes such conduct. See letter to Mr. Martin E. Firestone, dated December 16, 1965, FCC 65–1107.[61] Both

[61] As another example, in 1965, Station KWOA desired to rebroadcast the signal of Station WCCO, to present the play-by-play broadcasts of the Minnesota Twins' baseball

the broadcaster and the CATV thus have the same objective—providing as large a segment of the public as possible in these major markets with access to nonnetwork programs. The question therefore arises why the CATV should operate under one set of competitive rules and the broadcaster under an entirely different set. On its face, this competitive situation would appear to be a most unfair one.

136. Illustrations in the sports area further point up this anomalous situation and are particularly pertinent in view of the importance of sports programing, both to the CATV and broadcasting. The broadcast station (or its network) bids for the rights to exhibit sports programing (see, e.g., $37.6 million bid for CBS for the 2-year right to show NFL football games; Broadcasting Magazine, Jan. 3, 1965, p. 124); even then, those rights are at times circumscribed by blackout requirements (during home games), and other conditions permitted by Congress or the antitrust laws. See, e.g., Public Law 87-331. The broadcaster must operate in accordance with these established industry conditions. But the same sports program that is unavailable to the broadcast station is presently made available to the station's audience by CATV systems. In the words of the President and General Manager of Wisconsin Valley Television Corp. (AMST comments, attachment B, p. 10, quoting the House CATV hearings on H.R. 7715, p. 415):

> Another serious problem: In Wausau, Wis., because of our proximity to Green Bay, WSAU-TV is blacked out of the Green Bay Packers football games. This I can understand on behalf of the National Football League and the Green Bay Packers. * * * I'm not allowed to carry the games. Any cable system can reach to any area and get these games—some via microwave. Then these games can be moved into WSAU-TV's area. Can our station sit on a Sunday without the football game, while the cable system is running big ads in the local newspaper; "Get total television on Cable Television."
>
> Now I would like to deliver total television but because of laws and rules and regulations, I'm not able to give total television. The cable system, with no laws, no rules, no regulations, can deliver to my audience, by FCC definition of tower height and power, much more television than I can deliver to them because of the stricture that I must operate under. * * *

137. The answer is sometimes given that the CATV system is simply a master TV antenna, and therefore on this ground should be allowed such different competitive conditions. But this answer does not withstand analysis. A CATV system which proposes to employ microwave to bring in signals four or five hundred miles away is not a master TV antenna service. It cannot seriously be argued that CATV proposals to bring the New York Independents to Dayton or Los Angeles independents to Dallas-Fort Worth represent master TV antenna arrangements. Nor, whatever its validity in many instances, can the argument appropriately be made when a very tall antenna is employed on a high elevation, with many miles of cable and electronic gear to distribute the distant signals. In any event, the question remains: If the distant signal is freely available for use in the area, as the CATV argues, why is it not just as freely available for use by the broadcast stations in the area (e.g., through a tall antenna on a high elevation). Clearly, however, it is inconsistent with all notions of propriety to say that a Philadelphia or Baltimore UHF station may make whatever use it desires, without permission or payment of the programing carried over the New York independents. See section 325(a), and its legislative history. The result of such "freedom of access" would be gross inequity and chaos.[62]

138. Here again we have reached no final determination but rather have concluded that this is a question warranting thorough exploration in the hearing process. It may be that whatever the

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disparate conditions for operation, there is no need for concern because the CATV will not significantly affect the development or healthy maintenance of UHF television broadcast service. But as stated we cannot make that determination on the record now before us. It

games. Station WCCO refused rebroadcast consent, largely because it placed a good signal into the area in question. This Commission determined that in view of WCCO's response and the particular circumstances, no action was called for. See letter to Mr. James J. Wychor, dated July 22, 1965.

[62] The answer that the CATV does not have a "free ride" in view of the cost of the cable system, misses the point, since the cost of the disseminating system is no basis for exemption from observance of the fundamental distribution process by which the program product is obtained. Both the CATV and the UHF station have substantial costs of construction maintenance, and operation. Thus, the most recent UHF station in Chicago, Ill., had a construction cost of about $3,000,000, with substantial estimated yearly operating expenses, including those sums allocated to programing costs. The UHF station cannot appropriate the programing of the New York independents, without consent or payment, no matter what its costs are.

follows that on this ground also, there is need for a procedure pegged to full exploration of the issue in the context of an evidentiary hearing.

3. The Major Market, Distant Signal Policy and Procedure

139. We have previously found that CATV can make an important contribution to the public interest, and we adhere to that judgment. CATV, along with other auxiliary services, has made a significant contribution to meeting the public demand for television service in areas to small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for good reception of multiple program choices, particularly the three full network services. In thus contributing to the realization of some of the most important goals which have governed our allocations planning, CATV has clearly served the public interest "in the larger and more effective use of radio." And, even in the major market, where there may be no dearth of service (e.g., Philadelphia, with three full-time network services, and four independent UHF stations either on the air or authorized), CATV may, we recognize, increase viewing opportunities, either by bringing in programing not otherwise available or, what is more likely, bringing in programing locally available but at times different from those presented by the local stations. But this contribution (and related ones such as better reception, etc.) should not be made at the expense of healthy maintenance of UHF operations. We have reached no determination on this critical matter. Rather, we have decided that a serious question is presented whether CATV operations in the major markets may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature. We have also indicated our concern with the relationship, if any, of proposed CATV operations on the large markets and the development of pay television in those markets.

140. Our policy and implementing procedure are therefore addressed squarely to these serious questions. The basic thrust of congressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop. Cf. section 309 of the Communications Act. We think that that policy should be applied to this situation. We have determined that we have jurisdiction over CATV necessary to carry out the provisions of the Communications Act (such as sections 1, 4(i), 303 (h), (g), (r), (s), and 307(b)). It is important, we think, to exercise that jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

141. We shall accordingly follow a procedure whereby the signal of a television broadcast station shall not be extended beyond its Grade B into the top 100 major markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market), by a CATV system which has obtained a franchise for operation in such a market, except upon a showing made in an evidentiary hearing that such operation would be consistent with the public interest, and particularly the establishment and healthy maintenance of UHF television broadcast service. In this way, the Commission will be able to explore in depth the details of the proposed CATV operation, the marketing studies which have been made relating to it, by either the CATV or broadcast groups in the area, the present and potential picture as to television broadcasting in the market, the positions and showings of the interested CATV and broadcast parties, the possible plans or potential of the proposed CATV operation for pay television, and other important facets. After such exploration, the Commission will be in a position to make an informed judgment directed to the facts of a particular case.

142. We believe that the procedure which we have adopted is fair and best suited to promote the public interest, taking into account both the development of the broadcast and the CATV industries. It is in line with the urging of several parties that what is needed is full evidentiary hearing. While the hearing urged has usually been one of an overall nature, we believe it best to consider these important matters in the context of the particular request and the particular situation.

143. We recognize that the evidentiary hearing may consume some significant period of time. But as stated, the public interest requires thorough exploration of the very important issues raised; they cannot be sloughed aside or the answers lightly assumed. Further, the requirement for an evidentiary hearing has been confined to the top 100 markets, where there is generally no dearth of service and new UHF services are coming on the air. For example, in Philadelphia, there are three VHF network affiliated stations, three UHF independents on the air, with a fourth authorized. In the markets below 100, where there may be a greater present need for additional television service, the general requirement for evidentiary hearings is inapplicable. See paragraph 146, infra.

144. We have selected the top 100 markets for special attention because it is in these markets that UHF stations or wire Pay-TV based upon CATV operations are most likely to develop and therefore the problems raised are most acute.[43] Further, as noted, any delay in commencement of CATV operation because of the necessity for evidentiary hearings is mitigated by the consideration that these markets generally have a considerable amount of presently available and prospective new service. Finally, the top 100 markets include roughly 90 percent of the television homes in this country. Our policy therefore focuses on the critically important areas.

145. Admittedly, there can be substantial problems affecting the public interest where the CATV system proposes to extend the signals of broadcast stations beyond the Grade B contour into areas below the top 100 markets. But there are differences between the two situations which call for different procedures. In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the nonduplication provision is effective (since network programing will be significantly involved), and protection of a station's network programing should contribute very substantially to insuring its continued viability. It would appear that network programing will continue to be available in such markets; in the unlikely event that such programing becomes unavailable because of CATV impact, there would appear to be other appropriate

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remedial action which can be taken. Further, it is in the markets below 100 that there may be underserved areas where CATV can make its most valuable and traditional contribution. Indeed, the market division which we adopt is really a division between CATV in its traditional sense and the new, revolutionary facet of CATV, as posed by its entry into the major markets. It is the latter which peculiarly requires the most thorough examination in the context of an evidentiary hearing.

146. We think, therefore, that a fair compromise is to draw the line as to special attention (i.e., evidentiary hearings) at the 100th market, and below that point, simply to take such action as may be necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention. See paragraph 98. We shall not necessarily hold evidentiary hearing in connection with such petitions in the smaller markets. Such hearings could be a considerable burden both upon the CATV operation and the broadcaster in these small communities. See paragraph 78, first report, 38 FCC at p. 714. Indeed, the hearing might thwart the initiation of needed service. Therefore, while hearings might be held in some instances, we have devised flexible proce-

[43] Some question may arise as to whether a particular system is located in a market coming within the top 100. For clarification, we have specified that the above provisions are applicable to a CATV located in a community coming within the predicted Grade A contour of any station in one of the top 100 markets. We have employed the Grade A contour of any station since, while stations often are located at different sites or have different powers or heights (and thus different A contours), these Grade A service areas in the same market have a tendency of becoming fairly close to one another over a period of time. In any event, we think that this is an appropriate criterion since it encompasses the essential area upon which new UHF broadcast operations in the market would be based, without including the much larger areas falling within the Grade B contours, as has been urged by some in this proceeding. Because our effort is to carve out such an essential area upon which new UHF development would be vitally based, we have employed the predicted Grade A contour; use of the predicted contour should also have the advantage of definiteness and easier administration. In the unusual instance where the requirement may be inappropriate, waiver can be sought. Where a CATV system is located within the top 100 markets when a hearing is commenced, the hearing will be continued even if these markets change in a subsequent ARB rating. We note that the 1965 ARB listing makes no change in the 1964 listing of the top 100 markets except as to relative standing within the 100.

dures generally to treat expeditiously petitions or requests involving the markets below 100, since we recognize that to hold hearings upon each such petition or request might be burdensome to all parties involved and to the public.[64]

147. The question of grandfathering: On February 15, 1966, we issued a public notice giving the essence of our determination in this respect. Systems not yet in operation on February 15, 1966, and proposing to extend the service of a station beyond its Grade B contour into one of the top 100 markets will come within the scope of our major market procedure, and must make the necessary showing in an evidentiary hearing. In view of the very great desirability of avoiding the disruption stemming from action applicable to an operating system and the strong public interest considerations underlying our policy, we think good cause exists for immediate effectiveness of the major market rules upon their publication, as suggested by some of the parties. A line must be drawn as to "grandfathering," and we believe it appropriate to do so upon the basis of operation on the date of the public notice. A system which has gone into operation by extending signals beyond their Grade B contour to subscribers in the top 100 markets for the first time after that date, would be subject of a cease and desist proceeding.[65] Since we shall not "grandfather" systems coming into operation after February 15, 1966, the effectiveness of our action, practically speaking, is geared to that date. We could follow normal procedure and wait until 30 days after publication in the FEDERAL REGISTER to proceed against systems commencing operation after February 15, 1966, in the top 100 markets. But we do not believe that this hiatus would serve any useful purpose or the public interest. For, in the interval, a system might commence operation after the February 15th date and make "drops" to a significant number of subscribers, all of whose CATV service could be ended when the Commission instituted cease and desist proceedings as to the CATV operation. In the circumstances here, where "grandfathering" is pegged to the February 15th date, we think that orderly procedure and the desirability of avoiding disruption as much as possible call for immediate Commission action, rather than the Commission waiting passively on the side lines for the 30-day period to expire. Good cause therefore exists to make the rules as to the major market procedure effective upon publication, so that we may proceed forthwith against any system operating in contravention of those rules.[66]

148. The essential purpose of our policy is to take hold of the future—to insure a situation where we or the Congress, if it chooses, can make the fundamental decisions in the public interest upon the basis of adequate knowledge. So far as the application of our major market distant signal policy, we do not intend to disrupt the existing situation, by withdrawing from any CATV subscriber any signal which he was receiving as of February 15, 1966, in the top 100 markets or which he is presently receiving in other markets.[67] Based on our experience, we regard such a withdrawal as impractical and, in any event, we note that we have not made any basic policy judgment which would warrant such undue disruption. We therefore shall "grandfather" all systems which were in operation upon February 15, 1966 (the release date of the above-mentioned public notice), to the extent that such systems need not make the showing in § 74.1107 to continue to carry to subscribers signals beyond their Grade B contour, which were being supplied to those subscribers on that date. But any

[64] As previously stated (note 51, first report, 3 FCC at p. 715), we will, as required by the Communications Act and consistently with its procedural specifications (e.g., section 309), examine any question raised in connection with individual microwave applications which bears on the public interest in the particular applications involved.

[65] We recognize that this may catch some systems just prior to the commencement of operation. But this will always be true in the case of any policy in this area, and in any event, if the policy is to be effective and achieve the above described goals, it must be implemented immediately. We also point out that parties have known of the Commission's proposals for a major market procedure since April 23, 1965 (and of the counter-proposals since July 26, 1965). The notice expressly "• • • put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not" (notice, par. 65, 1 FCC 2d at 477). Finally, in the unusual case, we can consider the matter upon petition for waiver.

[66] Similar good cause grounds are applicable to the provision of the rule dealing with markets ranked below the 100th (74.1107(c)), since the public interest would not be served by permitting situations to continue to develop which raise substantial questions and may result in either disruption of service or inability to take an otherwise desirable action because of the factor of disruption. We shall also make effective upon publication the procedural provisions (§§ 74.1105, 74.1109) which relate to § 74.1107.

[67] As to the application of our carriage and nonduplication rules, see paragraphs 49, 68, 106.

addition of a new distant signal on an existing system in the top 100 markets would come within the major market policy.

149. The foregoing dealt with grandfathering. We turn now to the question whether systems extending signals beyond their Grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographical areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing).[88] While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and responses in the particular case, whether such temporary relief is called for, and if so, its nature. In view of the nature of the problem, the Commission will give expedited treatment to petitions in this area. Finally, we wish to stress one important facet: We have previously put all parties on notice as to the pendency of our proposal and have now put parties on notice that there should not be expansion of major market systems from a few thousand subscribers to a very substantial number of subscribers until resolu-

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tion of the public interest issues posed. We expect CATV operators to heed this notice and not to attempt to circumvent orderly consideration of any petition in this respect by an extraordinary effort to wire up the community or a substantial portion of it. In any event, we are requiring the submission of data showing the extent of construction of the system as of February 15, 1966. While we expect the ordinary wiring operations to have continued since that date, any extraordinary wiring efforts or entry into patently new geographical areas (e.g., extension of a system from a suburb into the main community) will be at the risk of the system and will not be accorded weight in the judgment to be made.

150. As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience indicates. The present rules are our best judgment of what the public interest now calls for. We recognize that they may not perfectly fit every situation, and repeat that should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing. United States v. Storer Broadcasting Co., 351 U.S. 192.

151. Finally, we stress that the rules do not halt CATV service or growth. With the possible exception of the applicability of our carriage rules (see par. 66), the CATV viewing public will not be deprived of any distant signal service which it was receiving as of February 15, 1966. CATV will not be precluded from bringing new service to underserved areas or from bringing better reception in cities such as New York. With possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its Grade B contour may freely continue.[89] CATV expansion

[88] And certainly where a new franchise or amendment of an existing franchise after Feb. 15, 1966, to operate or extend the operation of the CATV system in the same general area is involved, the requirement of an evidentiary hearing will be applicable.

[89] If two major markets each fall within one another's Grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise.

into markets below the top 100 may also continue and will be the subject of Commission scrutiny only upon petition in a particular case. Thus, we have confined our special attention to the area of most concern—the top 100 markets where UHF stations are most likely to be coming into existence. And, in line with our present general policy in dealing with microwave applications (see par. 49, notice, 1 FCC 2d at p. 471), we have specified no "freeze" but rather a full exploration of the facts of each case, so that we may make an informed judgment on this most important question. We believe that this is a reasonable way to proceed, and that the public interest requires no less a procedure.

152. Legislative proposals: The foregoing discussion treated matters in Part I and paragraph 50 of the notice of proposed rule making. The remaining matters in Part II of the notice will be considered on the basis of the comments filed in that part and the experience gained. For the reason also, this report is designated as the second report. We turn now to a brief discussion of the legislative proposals which we believe are desirable.

153. There are four areas which we shall urge to the Congress as particularly warranting its attention:

(i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in this field. (See notice, par. 31, 1 FCC 2d at p. 465.)

(ii) We believe that congressional consideration of the Pay-TV aspects of CATV is particularly called for. For the reasons stated in paragraphs 128–129, we shall urge that Congress prohibit the origination of program or other material by a CATV system, with such limitations or exceptions as are deemed appropriate. A hybrid CATV-Pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals, and such use of the broadcast industry's signals would appear to be both inequitable and inconsistent with the public interest. It is inequitable because it is clearly unfair to use the broadcast industry's product as a basis for wire Pay-TV operation which could adversely effect that industry or indeed supplant it. More important, were wire Pay-TV to supplant free television broadcast service, it would be inconsistent with the public interest, since it would mean that the public would receive, at least in large part, the same service it now does, but for a fee. Finally, we are considering petitions seeking the authorization of Pay-TV in the broadcast spectrum.

(iii) We believe that Congress should consider whether there should be a provision similar to section 325(a) applicable to CATV systems (i.e., whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system). We have described the presently anomalous conditions under which the broadcasting and CATV industries compete. See paragraphs 131–138." Several parties such as NBC have urged that a section 325(a)

"The problem is further pointed up by the recent controversy involving the telecasting of certain of the Notre Dame home or away games by Station WNDU–TV, South Bend, Ind. See letter to Mr. Asa S. Bushnell, dated Oct. 28, 1965, public notice, dated Oct. 29, 1965, mimeo 75429. Under the NCAA television regulations, the station was allowed to telecast such games, but permission to do so was temporarily withdrawn because CATV systems, without WNDU–TV's consent, would then pick up the station's signal and carry it to areas not coming within the regulations. The NCAA Television Committee, while it is continuing to study the matter, recently adopted a new regulation stating:

> Any televising privilege granted under Article XIII (a or b), or XV shall apply exclusively to the station or stations specified, and shall be limited to such station or stations. Any extension of such an authorized telecast or its stipulated area of coverage by means of commercial microwave, cable, or community antenna television operation shall be construed as a violation of the rights accorded, and shall preclude favorable consideration of further authorizations of this nature. (Report of the 1965 NCAA Television Committee, Jan. 10–12, 1966, p. 31.)

Under this unusual situation, the local broadcast station could lose the opportunity to present a program of great interest to its area (as the NCAA plan recognizes in its regulations), because CATV systems over which it has no control carry the program beyond the specified local area (conceivably for hundreds of miles).

Indeed, the anomalous conditions could have an adverse effect on development of new program sources. Multiple owners such as Westinghouse or Metromedia have undertaken some development of new programs; this endeavor promotes the public interest by increasing the programs available and diversifying their sources. But, as Westinghouse points out, the undertaking is a difficult one, which might not be sustained if the programs are brought into the major markets by CATV systems of significant size or impact, thus diminishing or ending the opportunity for the sale of the programs in these markets. The same consideration might be pertinent in the case of the development of a fourth network.

approach would obviate the need for much, if not all, of the Commission regulations in this area and would serve the public interest. We are not in a position to state whether a section 325(a) approach would be effective and fully consistent with the public interest. We think that this is a matter warranting congressional (and Commission) consideration, including such aspects as how a "retransmission consent" requirement would function as a practical matter, whether systems in small communities should be dealt with specially, and whether grandfathering is appropriate and the nature of any such grandfathering.

(iv) Finally, Congress will be asked to consider the appropriate relationship of Federal to State-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

CONCLUSION

154. Authority for adoption of these rules is contained in sections 1, 4(i), 303, 307(b), 308, and 309 of the Communications Act. We wish to stress particularly the provisions of section 1 that the general purpose of the Act is to "maintain the control of the United States over all the channels of interstate and foreign radio transmission * * * under licenses granted by federal authority"; of section 303(h), "to establish areas or zones to be served by any station"; of section 307(b), to make "a fair efficient,

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and equitable distribution of radio service" among the several States and communities", section 303(g), to study new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and section 303(s), the "all-channel receiver" section. The rules we adopt here, under the rule making power bestowed upon the Commission in sections 4(i) and 303(r), are designed to "study new uses" and insure future CATV activity and growth consistent with the "larger and more effective use of radio in the public interest." Indeed, the type of situation here involved is the very reason for the creation of this agency as the history of early chaos in the radio field shows. As the Supreme Court has stated, the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" (FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138; see also NBC v. United States, 319 U.S. 190).

155. In this connection, we stress that we are not committed to the status quo—to protecting existing investment against new technological advances. The whole history of this art has been one of great change, from radio to television to perhaps tomorrow satellite broadcasting or laser communication. It may be that CATV, if allowed full, unfettered growth, would prove to be an excellent supplement, bringing additional service and diverse programing to millions of people in built-up areas who can afford it, without detriment to the provision of additional local broadcasting service to the entire nation. If so, the information obtained in the hearing process will provide that indication, and will be the basis for authorizing such growth. But we cannot make that judgment in the record now before us—and, instead of the above picture of wire television as an excellent supplement, there is the possibility that the nation might find itself with a system half wire, half free, which is destructive of the larger goals of additional networks, additional outlets for local expression, and which provides increased service to some in the city at the expense of those in the rural area or those who cannot afford to pay. It is, we think, time to get the facts, and in light of the service presently available, there is time to get the facts.

156. *Accordingly, it is ordered,* This 4th day of March 1966 that the rules contained in Appendix D below are adopted, effective April 18, 1966; *Provided, however,* That the provisions of § 74.1103 are not effective as to existing operations of nonmicrowave CATV systems until sixty (60) days thereafter; *and provided further,* That the provisions of §§ 74.1105, 74.1107, and 74.1109 are effective immediately upon publication in the FEDERAL REGISTER.

It is further ordered, That, pursuant to section 403 of the Communications Act, all CATV systems in operation on April 18, 1966, shall within thirty (30) days thereafter file with the Commission the information described in paragraph 99 of this report.

It is further ordered, That the proceedings in Docket No. 15971 are not terminated and that, in light of the comments on Part II of Docket No. 15971 and/or such further proceedings as the Commission may order, amendments may be made to the rules set forth in Appendix C below or additional rules may be adopted.

It is further ordered, That the proceedings in Docket Nos. 14895 and 15233 are terminated.

Released: March 8, 1966.

FEDERAL COMMUNICATIONS COMMISSION,[11]

[SEAL] BEN F. WAPLE,
Secretary.

APPENDIX A

Comments and/or reply comments on Part I and paragraph 50 of this proceeding were filed by:

AFL-CIO Affiliated Labor Organizations.
Allied Artists Television Corp.
American Broadcasting Co.
American Cable Television, Inc.
American Farm Bureau Federation.
American Telephone and Telegraph Co.
Aroostock Broadcasting Corp.
Association for Competitive Television.
Association of Maximum Service Telecasters, Inc.
Black Canon Broadcasting Co.
Bonneville International Corp.
Clearview of Georgia, Inc.
Columbia Broadcasting System.
D. H. Overmyer.
Entron, Inc.
Eastern Educational Network.
Fuqua Industries, Inc.
GT&E Service Corp.
Houston Post Co.
International Telemeter Corp.
Jack O. Gross, d.b.a.
Gross Broadcasting Co.
Jerrold Electronics Corp.
Journal Co.
Joint Comments of Stations KHOU-TV, KOTV, KXTX, WANE-TV, WAVE-TV, WFIE-TV, WFRV, WISH-TV, WJXT, WMT-TV, WNOK-TV, WTOP-TV.
Meredith Broadcasting Co.
Mesa Verde Broadcasting Co., Inc.
Micro-Relay, Inc.
Midwest Television, Inc.
Mobile Video Tapes, Inc.
National Association of Broadcasters.
National Association of Educational Broadcasters.
National Broadcasting Co.
National Community Television Association, Inc.
National Educational Television.
National Farmers Union.
National Grange.
Phillips, Nizer, Benjamin, Krim & Ballon.
Rogers TV Cable, Inc.
Rust Craft Broadcasting Co.
San Diego Telecasters, Inc.
Smith & Pepper (on behalf of over 150 CATV systems).
Snyder & Associates.
Springfield Television Broadcasting Corp.
Storer Broadcasting Co.
Superior Broadcasting Corp.
Taft Broadcasting Co.
Telerama, Inc.
Triangle Publications, Inc.—
Tri-State TV Translator Association.
Trans Video Corp.
TV Cable Service of Abilene, Inc.
United States Independent Telephone Association.
West Central Broadcasting Co.
Westinghouse Broadcasting Co., Inc.
Western Slope Broadcasting Co., Inc.
WGAL Television, Inc.
WJAC, Inc.
WKBH Television, Inc.
WTVY, Inc.
William L. Fox.

[11] Statements of Commissioners Bartley, Cox, and Loevinger are filed as part of original document.

APPENDIX B

SUMMARY OF COMMENTS ON PAR. 50

National Community Television Association (NCTA) urges that a rule along the lines of the policy adopted in paragraph 49 and proposed in paragraph 50 is "completely arbitrary," "unnecessary," and "would be a virtual prohibition to provide CATV service in such communities" (NCTA comments, pp. 13-14). By way of support NCTA quotes at length (NCTA, exhibit B, pp. 14-22) from the discussion in the Selden Report concerning "CATV in Three-Station Markets" (pp. 84-86) and from the Fisher Report concerning the effect of noncarriage on audience and revenues where there are three or more off-the-air program alternatives (pp. 91-92). NCTA states that the Selden and Fisher conclusions "show conclusively that there is absolutely no basis for allegations of CATV as an adverse factor in the potential development of UHF television in large cities" (NCTA, Exhibit B, pp. 22, 32). NCTA asserts further that there is no criterion for determining whether a CATV system might at some time have the effect of delaying construction of a UHF station in a three-station market (NCTA comments, p. 14, Exhibit B, p. 31). Finally, it states that the existence of a CATV system in a community has not in the past prevented construction of a successful VHF or UHF television station in the community (ibid.).

Other comments on behalf of CATV interests challenge the proposed par. 50 rule principally on the ground of alleged lack of jurisdiction over CATV systems. It is asserted in addition that CATV will help UHF by providing good quality reception to an immediate audience prior to all-channel set saturation. Because of this, some UHF permittees in major cities have indicated no objection to CATV entry. It is further asserted that the success of independents will ultimately depend on their ability to provide a program service which will attract viewers and advertisers. International Telemeter Corp. states that if and when CATV systems are established on a broad base in large metropolitan areas, they may well be utilized for Pay-TV operations as an adjunct to other forms of wire television (Telemeter reply comments, p. 11). But, Telemeter adds (ibid.), "this is not to say that the public interest will not be served by the result * * *"; "the multiplicity of services via wire television systems can only serve, not harm, the public interest."

The comments of the American Broadcasting Co. (ABC) support the proposal. ABC states that a CATV operator in a market

such as Philadelphia could carry the several New York independents to the very serious detriment of the local Philadelphia UHF stations, and that the carriage and nonduplication rules presently adopted by the Commission are not truly responsive to the "unexpected fractionalization of the audience interested in independent programing." ABC therefore believes that the Commission should "establish the areas or zones" normally to be served by television stations and delineate the circumstances under which

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a station's signals may properly be brought to areas not within its normal service area. It asserts that interim rules, pending the adoption of final rules in Part II, are needed because once CATV systems are established in markets that have a potential for independent UHF station development in the reasonably near future, the Commission will find itself in the impossible position of trying to undo what has already been done—of possibly adopting a regulation which would deny to substantial numbers the service which they assumed they would receive and for which they have already paid. ABC therefore urges the adoption of a rule prohibiting any person from transporting the signal of a TV station beyond its Grade B contour into a community within the range of four or more commercial Grade A assignments and receiving Grade A or better service from three or more commercial TV stations (or two such stations with a third station already authorized). ABC states that such a rule would apply basically to all but three of the nation's top 100 markets and therefore to those areas which now or shortly will have three or more local network services and the reasonably immediate likelihood of a fourth commercial service; that with this amount of service, these areas do not have any pressing need for additional service via wire, and they are also the areas which hold the most possibilities for UHF development; that the interim procedure would insure that a significant Pay-TV service would not be established while the Commission is reaching its final decision in this proceeding and in the Pay-TV rule making proceeding that has recently been requested; and that at the same time, the interim procedure will not preclude the development of CATV in these relatively underserved areas where it serves as a needed adjunct to free television service. Above all, ABC stresses that the proposed rule will prevent the establishment of CATV systems in areas and under conditions which the Commission may ultimately conclude would inhibit or prevent the normal development of UHF television.

Westinghouse in its comments takes a position similar to that of ABC. It urges a restriction upon the importation of signals into communities situated within the Grade A coverage of four or more commercial TV assignments and communities within the Grade A coverage of three or more commercial stations actually in operation (with exceptions (i) for two station markets with an outstanding construction permit for a third station where such permit is not activated within 6 months and (ii) to areas within the Grade A coverage of three stations not receiving the full service of the three networks because of the existing network affiliation relations). It asserts that many applicants for CATV franchises in big cities today are promising to deliver such stations as WOR–TV and WNEW–TV, New York and WGN–TV, Chicago; that these are well-established, independent stations in major markets, and, compared with a UHF station just getting started in another city, have a much greater economic base to make major expenditures for programing; and that the local UHF station, competing with these major stations for what is at best a limited audience (i.e. the audience for nonnetwork programing), will be unable to get a large enough share of this audience necessary for it to produce the income needed for the station to buy programing with which it can in fact compete for viewers with the other stations on the system. It states that CATV only brings its service to some viewers—those fortunate enough to live in areas with a large enough local population to furnish an economic base for the laying of CATV cable, and then only those living in such areas who can afford to pay CATV fees. Westinghouse asserts that CATV in big cities also has the obvious potential of transforming itself into pay television, and points to recent news reports that tell of a company which was unsuccessful in its efforts to operate a pay television system in one city in Canada and is now planning to take over a successful major CATV system in another Canadian city and convert it to pay television in whole or in part. Finally, Westinghouse stresses the need for an interim rule, stating that once CATV franchises are granted in the larger markets and construction of the systems is commenced pursuant to those grants, the Commission, from a practical and political viewpoint, will have lost effective control of the situation in those areas.

Storer Broadcasting Co. also supported the proposal because, it asserts, there is a definite probability of serious impact on television development in such cases, and the Commission cannot, through inaction, permit events to occur which jeopardize the goals set by the Congress and the Commission looking toward a competitive nationwide system of intermixed local television facilities. It urges that there is an established immediate need to "hold the line", during the interim period, on importation of distant signals to the major markets where CATV's "present stampede" into these markets might destroy the independent stations' audience potential "through importation of competitive programing on unequal terms" (Storer comments, p. 12). Storer also states that if the policy is to be effective, it should be applied to affiliated as well as independent UHF stations, and that it should be extended to CATV systems in nearby communities upon which the UHF depend for audience circulation. It asserts that a UHF station, although nominally a network affiliate, may still rely largely on independent programing, and that therefore its development requires the same protection as that proposed for independent UHF operators; and that CATV systems in nearby communities "can impose drastic damage on that station's audience

circulation, particularly on a cumulative basis." (Id. at p. 14.)

The Association of Maximum Service Telecasters (AMST), Midwest Television, Inc. (Midwest); and the joint comments of KHOU-TV, KUTV, KXTX, WANE-TV, WAVE-TV, WFLE-TV, WFRV, WJXT, WMT-TV, WNOK-TV, WTOP-TV (joint comments) all urge the adoption of interim procedures going beyond those proposed in paragraph 50. the factual basis of AMST's and Midwest's comments have been described in part (see pars. 31-41). In addition, AMST cites the experiences of the UHF station in Lock Haven, Pa., and of UHF, Station WRLP, Greenfield, Mass., in the face of CATV competition. AMST asserts that the importation of outside large city independent television stations by CATV will be an obstacle to the development of a fourth network, since it will jeopardize the development of the UHF stations in these cities. AMST also states that the entry of CATV into larger cities poses a substantial threat to the development of network UHF service, citing in support statements made to the Commission or to the Congress of Rust Craft Broadcasting Co., permittee of WJKS-TV, Jacksonville, Fla., and WCCB-TV, a new UHF station in Charlotte, N.C. Midwest describes the explosive growth of CATV in the Peoria-La Salle area, the Springfield area, the Champaign-Danville area, the WCIA service area generally, and the San Diego area (see pars. 34, 39-41). The joint comments assert that proposals to bring multiple distant signals into areas such as Fort Wayne, Ind., Columbia, S.C., Jacksonville, Fla., and Indianapolis, Ind., jeopardize or foreclose the development of new UHF stations in these areas. The joint comments point out that in the area served by the existing Sacramento-Stockton stations, CATV systems have been franchised or have commenced operations in at least 31 communities, and applications for franchises have been filed or proposed in at least 18 more—including Sacramento and Stockton themselves; that the total number of households in these cities and communities is more than 250,000, representing a major portion of the audience now served by the three existing Sacramento-Stockton commercial stations and a still more substantial portion of the audience which would be served by KPXL, the newly authorized UHF station on Channel 29 in Sacramento; that as the permittee for the new UHF station in Sacramento has informed the Sacramento City Council, the importation of outside signals from San Francisco-Oakland and Los Angeles stations, as proposed, would make it impossible for the new UHF station to survive.

AMST, Midwest, and the joint comments proposed the interim rule that no CATV system shall be permitted to extend the signal of any television broadcast station beyond its Grade B contour except upon a clear and full showing (a) that there are special circumstances, for example, that the community is remote and isolated and does not have, and cannot be expected to receive in the future, direct off-the-air local or area television service; and (b) that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service in the area. AMST urges that the foregoing rule should be made effective immediately upon its publication and should be made applicable to all CATV systems proposed on or after April 23, 1965, the date of the release of the Commission's first report and order and its notice of inquiry and notice of proposed rule making. It states that an alternative but much less satisfactory approach in view of the CATV activity since April 23 would be to apply the interim rule (a) to all CATV systems which become operative on or after the publication of the rule, regardless of the date of franchise, and (b) to any CATV system operating on the date of publication of the rule which thereafter substantially expands its lines or the number of its subscribers or which increases the number of stations carried.

In reply comments ABC and Westinghouse assert that their interim proposal would better serve the public interest because it has been designed to prohibit the development of CATV in areas where it could adversely affect the overall public interest but not to prohibit its development where it could have little adverse effect upon the public interest and where there may well be a substantial public need for CATV services. In its reply, AMST asserts that its interim procedure would not have the effect of being a complete ban on CATV; that it would leave untouched the further expansion and development of CATV in its historic functions—(a) the providing of service to communities that are remote and isolated and do not have, and cannot be expected to receive in the future, direct off-the-air local or area television service and (b) the providing of fill-in service, improving the off-the-air service of local and area television stations in pockets within their normal coverage contours where for terrain or similar reasons a desirable quality of service is not received. It further argues that if there are indeed situations in which a CATV entrepreneur can show that he will aid rather than threaten the mainte-

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nance or expansion of existing UHF stations and the development of new UHF service, appropriate interim rules and policies will leave it open to the CATV entrepreneur to make such a showing. AMST urges that the ABC and Westinghouse interim procedure are inadequate because they seek at the most to protect only those communities or areas which could ultimately have four television stations; that even as to those communities or areas, three television stations must already be active or two must be active and the third imminent; and that the proposed rule would apply only in the Grade A contours of those existing or imminent stations. AMST states that there is no reason—at least in the interim—to allow CATV to retard UHF development in any market. And that it is entirely possible for CATV systems in dozens of small communities to blanket most of the audience potential in

the station's service area beyond its Grade A contour; and that the area can thus be very effectively denied to a small UHF station—possibly the difference between survival and failure, and at least the difference between effective programing and ineffective programing.

APPENDIX C

COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151), states that the purpose of the Act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152), states that the "provisions of this Act" shall apply to "all interstate communication by wide or radio * * * and to all persons engaged within the United States in such communication * * *." These terms are defined in section 3 of the Act. Section 3(a) defines wire communication as the "transmission of * * * pictures, and sound of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, appartus, and services (among other things, the receipt, forwarding, and delivery of communications), incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire or radio. They transmit "pictures, and sounds * * * by aid of wire" and are "instrumentalities * * * [used for] * * * the receipt, forwarding, and delivery of communications * * * incidental to such transmission," and hence fall within the definition of wire communication under section 3(a).[1] Moreover, CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established * * * as interstate communication." Capital City Telephone Co., 3 FCC 189, 193 (citing Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266).[2] The law is clear that the mere location of communication facilities wholly within one State does not establish that the communication service rendered over such facilities is an intrastate service, and that a communication service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one State. California Interstate Telephone Co. v. FCC, 328 F. 2d 556 (C.A.D.C.); Ward v. Northern Ohio Telephone Co.,.300 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; Pacific Telatronics, Inc., FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, Clarksburg Publishing Co. v. FCC, 225 F. 2d 511, 517 (C.A.D.C.), and hence constitute "interstate communication by wire" to which the provisions of the Act are applicable (secs. 2(a), 3(a)). See American Trucking Association v. United States, 344 U.S. 298, 311.[3]

With respect to the Commission's authority to adopt the rules proposed in the notice of inquiry and proposed rule making; i.e., the "provisions of [the] Act" that are to be applied to CATV systems, there are the following sections: Sections 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the crucial sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (r). As the notice and the report and order in Docket Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under sections 1 and 307(b) (i.e., the sixth report and order).[4] (See Carter Mountain Transmission Corp. v. FCC, 321 F. 2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963).) The Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) to:

Perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions (4(i));

Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act * * * (303(f));

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[1] It can be argued that CATV systems, in receiving, forwarding, and delivering the station's signal to the viewing public, are the instrumentalities incidental to the transmission of the signal and hence fall within the definition of "communication by radio" in section 3(b). However, it is unnecessary to consider this argument in view of the discussion above as to section 3(a) and the scope of the Commission's proposals. Since CATV operations clearly fall within section 3(a) and/or section 3(b), a determination of their precise status is not essential to the question of the Commission's jurisdiction to proceed as proposed in the notice of inquiry and proposed rule making.

[2] Congressional approval of the Capital City doctrine was expressed in connection with the 1960 amendment to section 202(b). See 105 Congressional Record at 6256.

[3] It is, we believe, significant that in sustaining the jurisdiction of the Interstate Commerce Commission in American Trucking the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances, analogous to sections 2 and 3 of the Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 152 and 153 (a) and (b).

[4] In addition, as noted in the notice, there exists the potential to frustrate the purposes of the Act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commission regulations).

Establish areas or zones to be served by any station (303(h)); and make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * * (303(r)),[5]

The foregoing provisions (4(i), 303(f) 303 (h), and 303(r)) give the Commission broad rule making authority to carry out the provisions of this Act (e.g., sections 1 and 307(b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV—section 2(a)). Section 303(h), in particular, was affirmatively designed to assist the Commission in effectuating the fair and equitable distribution of broadcast service called for by section 307(b).[6] The Commission's authority to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (sections 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV—an "interstate communication by wire" to which the Act's provisions are applicable (sections 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rule making power of the Commission (sections 4(i) and 303(r)) includes authority to take necessary action, not inconsistent with the Act or law, to prevent frustration of section 307(b) by CATV. In National Broadcasting Co. v. United States, 319 U.S. 190, 215–220, the Supreme Court citing, inter alia, sections 1, 303(f) and 303(r), stated that:

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * * In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers.

Under such "expansive" and "comprehensive" powers,[7] the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of section 307(b)—to insure that the regulatory scheme embodied in that section (the equitable distribution of service) and section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the Act's provisions are applicable. This authority does not depend on a specific reference to CATV or CATV practices in the Act. United States v. Storer Broadcasting Co., 351 U.S. 192, 203. See also, National Broadcasting Co. v. United States,

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319 U.S. 190, 218–219, where the Supreme Court stated:

True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic * * * While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.[8]

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[5] Secs. 303 (f), (h), and (r) are preceded by the following clause: "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall —".

[6] Section 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to amend the Radio Act of 1912. For the legislative intent, see Hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st sess., pp. 40–41.

[7] See also, Stahlman v. FCC, 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see, e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Congressional Record 8822–23, 10313–14, 10990); 66 Congresisonal Record 5479; S. Rept. 772, 69th Cong., 1st sess., pp. 2, 3.

[8] The Court, in referring to provisions of the Act such as sections 303 (g), and (r), stated (319 U.S. at 217–218):

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Com-

To the same effect in other fields, see Houston, East and West Texas Ry. Co. v. United States, 234 U.S. 342; United States v. Wrightwood Dairy Co., 315 U.S. 110; United States v. Pennsylvania R.R. Co., 323 U.S. 612; American Trucking Association v. United States, 344 U.S. 298; Public Service Commission of State of New York v. Federal Power Commission, 327 F. 2d 893, 897 (C.A.D.C.).[9]

The American Trucking case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After citing sections analogous to section 307(b) in our situation, the Court stated (344 U.S. at 311):

Included in the Act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rule-making power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a)(19).

We point out that section 204(a)(6) of the Motor Carrier Act is substantially similar to sections 303(r) and 4(i) of the Communications Act; while in the circumstances, sections 202(a) and 203(a)(19) of that Act are closely analogous to sections 2(b) and 3(a) of the Act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the Act," stating (at pp. 309–310):

Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the minds of Congress, does not exist. National Broadcasting Co. v United States, 319 U.S. 190, 219–220; * * * Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created * * *.

See, also, Public Service Commission of New York v. FPC, 327 F. 2d 893, 896–97 (C.A.D.C.)

Of course, the rules must be "reasonably necessary and fairly appropriate" for the protection of the regulatory scheme. Colorado Interstate Gas Co., v. Federal Power Commission, 142 F. 2d 943, 952 (C.A. 10). See also, American Trucking Association, v. U.S., 344 U.S., at 314–315; National Broadcasting Co., v. U.S., 319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission").[10] The report and order in Docket Nos. 14895 and 15233 demonstrates the appropriateness and necessity of rules requiring all CATV's to carry local stations without duplication for a reasonable period. Moreover, the Carter Mountain decision establishes the reasonableness of the requirements. In affirming the Commission, the Court stated that "this does not appear to us an unreasonable condition" but rather "a legitimate measure of protection for the local station and the public interest" (321 F. 2d 359, at 363–364). The notice of inquiry and proposed rule making similarly demonstrates the validity of the Commission's concern as to the effect of CATV on independent stations and programing sources, as well as on the development of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not; that there are pertinent provisions of the Act applicable to the exercise of authority over such systems (in particular, sections 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

APPENDIX D

I. Part 21 is amended as follows:

1. In § 21.710, paragraphs (a) and (b) are amended and a new paragraph (i) is added as follows:

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mission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses."

[9] The Public Service Commission case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although section 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of section 16 of that Act which are virtually the same as section 303(r) of the Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation."

[10] The Commission clearly has no jurisdiction over bowling alleys or theaters, for example, as an administrative agency has no greater power than has been conferred by Congress. Stark v. Wickard, 321 U.S. 288; NLRB v. Atlantic Metallic Casket Co., 205 F. 2d 931 (C.A. 5). Cf. Peters v. Hobby, 349 U.S. 331. However, unlike bowling alleys and theaters, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engaged in interstate communcation by wire to which the Act's provisions are expressly applicable.

§ 21.710 Definitions.

As used in §§ 21.712 and 21.714:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74,701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's Grade B contour, shall be deemed an extension of the originating station.

• • • • •

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

2. In § 21.712, paragraphs (b), (c), (d) (3), (e), (g), (h), (i), (j) are amended; paragraphs (i)(4) and (k) are added; and note 2 to § 21.712 is deleted:

[*P. 4569*]

§ 21.712 Authorizations for fixed stations to relay television signals to CATV systems.

• • • • •

(b) *Notification of request for service.* Any such CATV system or other subscriber proposing to utilize such service to relay television signals to any CATV system, either directly or indirectly, shall notify the licensee or permittee of any television broadcast station, within whose predicted Grade B contour the CATV system operates or will operate in whole or in part, and the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, of the request for service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such notice shall include the fact of the request for service, identification of each CATV system to utilize the service requested (either directly or indirectly), identification of the community served or to be served by each CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

(c) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 watts or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the station operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 watt or higher power.

(d) *Exceptions.* • • •

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(e) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the sub-

scriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

* * * * *

(g) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (h) and (i) of this section.

(h) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(i) *Exceptions.* Notwithstanding the the requirements of paragraph (h) of this section,

* * * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(j) *Disputes between television broadcast or translator stations and CATV systems; requests for waiver of the rules or for different treatment.* In the event that a dispute should arise, at any time, between a television broadcast or translator station and a CATV system served under an authorization subject to this section, on the question of whether the CATV system is complying with the applicable requirements, the matter may be referred to the Commission for a ruling pursuant to the provisions of § 74.1109 of this chapter, either by the licensee carrier, or by the station, or CATV system, with notice to the licensee carrier. Where a dispute has been referred to the Commission for a ruling or where a petition for waiver of the rules or for different requirements has been filed under § 74.1109 of this chapter, with notice to the licensee carrier, microwave service to the relevant subscriber shall not be commenced or terminated until thirty (30) days after the Commission' ruling has been received by the licensee carrier.

(k) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

NOTE 1: As used in § 21.712(b), the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

II. Part 74 is amended as follows:

1. In § 74.1, paragraph (c)(4) is deleted, and two new paragraphs (d) and (e) are added to read as follows:

§ 74.1 Services covered by this part.

* * * * *

(d) Community antenna relay stations (Subpart J).

(e) Community antenna television systems (Subpart K).

2. In Section 74.1001(e), subparagraphs (1) and (2) are amended as follows and a new subparagraph (9) is added as follows:

§ 74.1001 Definitions.

* * * * *

(e) As used in §§ 74.1031 and 74.1033.

(1) Community antenna television system. The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(2) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station"

means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's Grade B contour shall be deemed an extension of the originating station.

• • • • •

(9) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

3. Section 74.1031(c) is amended to read as follows:

[*P. 4570*]

§ 74.1031 Eligibility and contents of application.

• • • • •

(c) An application for any authorization subject to § 74.1033 shall contain a statement that the applicant(s) have notified the licensee or permittee of any television station, within whose predicted Grade B contour the CATV system(s) operate or will operate, in whole or in part, and the licensee or permittee of any 100 watts or higher power translator station operating in the community of each such system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or permittees and educational interests. The notice shall include the fact of filing by the applicant(s), identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television, standard broadcast and FM station(s) whose programs will be distributed by each such CATV system.

NOTE 1: As used in § 74.1031(c), the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

4. In § 74.1033, paragraphs (a), (b)(3), (c), (e), and (f) are amended; paragraphs (g)(4) and (h) are added; and the note to § 74.1033 is deleted.

§ 74.1033 Licensing requirements.

• • • • •

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contour the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 watts or higher power.

(b) ***Exceptions.*** • • •

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

• • • • •

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the

manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

5. A new Subpart K is added to read as follows:

Subpart K—Community Antenna Television Systems

Sec.

74.1101 Definitions.
74.1103 Requirements relating to distribution of television signals by community antenna television systems.
74.1105 Notification prior to the commencement of new service.
74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.
74.1109 Procedures applicable to requests for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

AUTHORITY: The provisions of this Subpart K issued under secs. 1, 4, 303, 307, 308, 309, 48 Stat. 1064, 1066, 1082, 1083, 1084, 1085, as amended; 47 U.S.C. 151, 154, 303, 307, 308, 309.

§ 74.1101 Definitions.

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting program broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's Grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685 (a) of this chapter.

(d) *Grade A and Grade B contours.* The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programing.* The term "network programing" means the programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

[*P. 4571*]

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station;

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 watts or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100-watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the

broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1105 Notification prior to the commencement of new service.

No CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of that station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any. The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence. Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service to subscribers shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however,* That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107. The provisions of this section do not apply to any signals which were being supplied to subscribers of the CATV system on March 17, 1966.

[*P. 4572*]

NOTE 1: As used in § 74.1105, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved

by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter.

The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the second report and order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, paragraphs 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public inter-

est. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification of interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect

to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

III. Part 91 is amended as follows:

1. In § 91.557, paragraphs (a) and (b) are amended to read as follows, and a new paragraph (i) is added as follows:

§ 91.557 Definitions.

As used in §§ 91.559 and 91.561,

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's Grade B contour, shall be deemed an extension of the originating station.

* * * * *

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

2. In § 91.559, paragraphs (a), (b)(3), (c), (e), and (f) are amended; paragraphs (g)(4) and (h) are added; and the note to § 91.559 is deleted:

§ 91.559 Authorizations for operational fixed stations to relay television signals to CATV systems.

* * * * *

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry

the signals of operating or subsequently authorized television broadcast and 100 watts or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contour the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 watts or higher power.

(b) *Exceptions.* * * *

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the cable whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

* * * * *

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of any of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* * * *

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

3. Section 91.561 is amended to read as follows:

§ 91.561 Notification by applicant.

An application for any authorization subject to § 91.559 shall contain a statement that the applicant has notified the licensee or permittee of any television broadcast station, within whose predicted Grade B contour the CATV system(s) served or to be served operate or will operate, and the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or permittees and educational interests. The notice shall include the fact of intended filing by the applicant, identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

NOTE: As used in § 91.561, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

(Secs. 1, 4, 303, 307, 308, 309, 48 Stat. 1064, 1066, 1082, 1083, 1084, 1085 as amended; 47 U.S.C. 151, 154, 303, 307, 308, 309)

[F.R. Doc. 66-2564; Filed, Mar. 16, 1966; 8:45 a.m.]

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

(Docket No. 15971 (RM Nos. 636, 672, 742, 755, and 766))

In the Matter of Amendment of Parts 21, 74, and 91 To Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley abstaining from voting; Commissioner Loevinger absent.

1. In the Second Report and Order in Docket Nos. 14895, 15233, and 15971, 2 FCC 2d 725, 31 F.R. 4540, issued on March 8, 1966, the Commission ordered that the rules contained in the attached Appendix D are effective April 18, 1966, provided, however, that the provisions of Section 74.1103 are not effective as to the existing operations of non-microwave CATV systems until 60 days thereafter. This additional 60 day period was designed to afford existing non-microwave systems with limited channel capacity an opportunity to seek a waiver of the carriage provisions of the rules before these requirements become effective (Second Report, par. 106). However, because the requirement for carriage under Section 74.1103(a) operates only "upon the request of the licensee or permittee of the relevant station" and since the rule imposes no time limitation for making any such request, the CATV system will have no occasion to seek a waiver within the 60 day period in the absence of a prior request by a station which gives rise to a channel capacity problem.

2. It was not the intention of the Commission that non-microwave systems should seek contingent waivers within the 60 day period merely in order to preserve their position in event of some possible future request. A petition for waiver of the carriage provisions should be filed only where carriage has been requested and an actual problem is presented. On the other hand, it would appear desirable to resolve as promptly as possible such actual carriage problems as may be immediately occasioned by the effectiveness of Section 74.1103 for existing systems on June 17, 1966. Accordingly, in the interests of orderly procedure and the proper dispatch of the Commission's business, we shall specify the time within which stations may request carriage before June 17, 1966 and the time within which CATV systems may seek a waiver of the carriage provisions where a request for carriage is made after that date.

3. Those licensees or permittees desiring carriage on an existing non-microwave CATV system on or after June 17, 1966 should make a request to the relevant CATV system on or before June 1, 1966, in order to obtain a prompt determination of any channel capacity question which may arise. This will enable the CATV system to seek a waiver, where appropriate, prior to June 17, 1966. A request for carriage on an existing non-microwave system may be made at any time after June 17, 1966, and the CATV system may seek a waiver within 15 days after any such request. Where a petition for waiver of Section 74.1103(a) is filed prior to June 17, 1966 or within 15 days after any subsequent request for carriage, the system need not carry the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures. The Commission will give priority of consideration to petitions for waiver filed prior to June 17, 1966.

4. This order is clarifying, in that it was always understood that a system might not be able immediately to comply with a carriage request, that some period of time was needed, and further that a reasonable opportunity to seek a waiver was to be permitted. We believe that this order, together with the Second Report and Order in Docket Nos. 14895, 15233, and 15971, will specify appropriate procedures and adequately apprise stations and CATV systems as to the times within which to request carriage or a waiver of the carriage provisions prior to June 17, 1966. In order to avoid any future uncertainty as to the situation prevailing after June 17, 1966, we find that the public interest would be served by a clarifying amendment to Section 74.1109 of the rules. Since the amendment is procedural and interpretative, notice is not needed.[1]

[1] In any event, since the amendment is designed to discourage CATV systems from filing contingent petitions for waiver of Section 74.1103(a) on or before June 17, 1966, by making it clear that such action is not necessary to preserve future rights, immediate promulgation is essential if the rule is to serve its purpose. See Section 4(a) of the Administrative Procedure Act, 5 U.S.C. 1003(a).

5. There is another clarifying revision of our rules, which should be effected immediately. In Section 74.1107(d), we stated that temporary relief may be afforded in situations involving the top 100 television markets in the event that an evidentiary hearing is to be held. We specified in Section 74.1109(g) an expedited pleading schedule for requests for temporary relief involving service within the provisions of Section 74.1107(d), which affords 10 days for the filing of oppositions and 5 day for reply. This tight schedule was obviously designed to permit the grant of temporary relief, where appropriate, in a relatively short period of time, and substantially before consideration of the main pleadings (to be filed over a 30–20 day schedule) which determine whether an evidentiary hearing is called for. The grant of such temporary relief on an expedited basis may clearly be necessary in the particular circumstances of some cases (see par. 149, Second Report), and it would not serve the public interest to have before us pleadings making out a case for temporary relief and yet take no action for a substantial period of time until consideration of the main pleadings. Such relief could be afforded pending the consideration of the main pleadings and then a determination could be made whether to continue such relief in the event an evidentiary hearing is found necessary.

6. There is also one other respect in which Section 74.1107(d) needs clarification. The first sentence of that section refers to a "petition filed under Section 74.1109 by a television broadcast station located in the area", while Section 74.1109(a) permits the filing of petitions by "an applicant, permittee, or licensee of a television broadcast * * * station, or by any other interested person * * *." It was not intended that Section 74.1107(d) should be narrower than Section 74.1109(a), and there are obviously situations where a person other than a "television broadcast station", such as an applicant for a UHF facility in the area, could appropriately seek relief under the interlocking provisions of Sections 74.1107(d) and 74.1109.

7. Accordingly, we have decided to clarify these procedural aspects of our rules by eliminating the references to evidentiary hearing in the last sentence of Section 74.1107(d), and by adding the phrase "or other interested person" in the first sentence of that section. We are making this rule amendment effectively immediately upon publication in the Federal Register. The revisions are, we believe, interpretive in nature. In any event, good cause exists for immediate effectiveness, for the reasons set out in paragraph 147 of the Second Report (i.e., that it is necessary to take immediate action to prevent worsening situations that may be contrary to the public interest "in the larger and more effective use of radio" (Section 303(g) of the Communications Act), rather than to have the agency waiting passively on the sidelines for the 30-day period to expire).

8. Authority for the rule amendments adopted herein is contained in Sections 1, 2(a), 3(a), 4 (i) and (j), 303, 307(b), and 403 of the Communications Act of 1934, as amended.

9. Accordingly, IT IS ORDERED, on the Commission's own motion this 20th day of April, 1966, That Part 74 of the Commission's rules and regulations IS AMENDED as set forth in the attached appendix, effective June 17, 1966,; provided, however, that the amendment to Section 74.1107(d) is effective April 26, 1966.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 74 is amended as follows:

1. In § 74.1107, paragraph (d) is amended to read as follows:

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

* * * * * * *

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on Feb-

ruary 15, 1966, a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, pars. 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

2. In § 74.1109, a new paragraph (h) is added as follows:

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

* * * * * * *

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

Mr. HYDE. In the second report, we took into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV.

The second report made clear that our decision was "not intended to affect in any way the pending copyright suits" against CATV systems, but recognized that the outcome of the copyright question could affect our regulations. Our report states in part (paragraph 108):

In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in the first report, have to revise our rules. We have acted now, in light of the present copyright situation, which would appear likely to obtain for some substantial period of time, and without the slightest intent of affecting the determinations to be made in the pending suits.

Therefore, while the Commission's concern with CATV is from the standpoint of the public interest in the Communications Act, our regulations would clearly be affected by a definitive clarification as to the status of CATV under the copyright laws. The precise direction and extent of those regulatory changes cannot now be foreseen, since it will depend to a large extent upon the specifics of the copyright aspect, but we anticipate that they will be quite significant.

Our current CATV program seeks in the interim to meet the pressing communications problems raised by CATV development. To do so, we have adopted three fundamental rules or policies:

(1) That all CATV systems carry without material degradation the signals of all local stations;

(2) That all CATV systems not bring in the same program on a distant station on the same day that program is broadcast by the local station; and

(3) That CATV systems not bring distant signals into 1 of the 100 largest television markets, except upon a showing in a hearing that the operation will be consistent with the public interest and particularly, the establishment and healthy maintenance of television broadcasting service in the area.

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The basis for these and other CATV policies is that of avoiding the adverse and undue impact upon the healthy maintenance and further development of our television system caused by certain aspects of CATV operation that bear upon the public interest in the larger and more effective use of television. Thus, there is clearly an adverse economic impact upon broadcast service if the CATV does not carry the local station and duplicates its programs. Where a local station is not carried on the cable, this means that as a practical matter the station is largely cut off from access to the CATV subscribers—even those in its own community.

This may deprive the local station of a substantial portion of its own home audience. Duplication of the local station's programs from outside stations would, in much the same way, lead to a fractionalization of its audience and thus a likely loss of part of its local audience that may watch the same program on the distant station brought in by CATV.

Thus, the nonduplication requirements bear quite closely on the copyright question. The broadcast industry competes and pays for programing in the open market; it has developed a system of exclusive rights that are bargained and paid for. For example, a station may pay for the right to show a feature film package in its area for a specified period on an exclusive basis. Or, it may enter into an agreement whereby it gets the right of first call on network programs, and, in turn, gives up to the network very considerable compensation in the form of the division of the proceeds from the sale of time on its facilities. These are the fundamental distribution practices of the broadcast industry's program market which have historically been sanctioned by copyright, antitrust, and communications law.

The CATV is essentially dependent on the broadcast system for its product. Yet CATV presently does not compete in the marketplace for the programing which is the commodity it sells to its subscribers. It is not presently bound by those fundamental practices of the broadcast industry just referred to. Therefore, on its distant city signals, the CATV often brings into the local community the film package or the network program for which the local station has bargained and obtained distribution rights.

In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we decided that the public interest would be served by affording the local station exclusivity on the day of its broadcast of the program.

In this way, and to this limited extent, the unfair and potentially destructive competition of the CATV can be avoided.

I turn now to our action dealing with CATV in the 100 largest television markets. The movement of CATV into major communities with the indicated unfair competitive advantage CATV holds under present circumstances, raises a serious question as to its impact on the development of new UHF stations in these areas.

As a result of the all-channel receiver legislation, there has been a substantial increase in the number of UHF stations on the air and in the number of UHF channels applied for—particularly in the larger television markets. The UHF stations and the CATV systems will accordingly both seek to provide programing which is not now available in those markets; that is, nonnetwork programing. Our same

day nonduplication rule has only a limited effect in this respect, since nonnetwork or syndicated film programing is generally not distributed nationally on a simultaneous basis as is network programing.

We have reached no final determination on this question of the impact of proposed CATV operation upon UHF in the major markets. We have concluded, however, that it raises serious public interest questions which call for full Commission exploration in an evidentiary hearing except for the particular situation where waiver may be found appropriate.

I have attempted to set forth the bare essentials of our CATV rules and policies. There are many important facets and refinements which I have not mentioned in this brief presentation.

I turn now to the proposed revision in the copyright law. S. 1006, practically speaking, would make the CATV system fully liable for copyright infringement in all circumstances. The Commission, of course, is not expert on the many facets of copyright law. There are, however, some matters affecting copyright in the CATV field which we believe appropriate to bring to the committee's attention.

First, where the CATV carries local signals, it is bringing programs already paid for by the local station to persons within the prescribed service area of that station. There are instances where the local station cannot provide a good signal to all portions of its normal service area because of terrain factors or manmade structures. This is true in New York City and some other metropolitan areas, within the very community where the TV transmitters are located. CATV helps remedy these situations by providing good reception of the local signal throughout the station's prescribed coverage area. Accordingly, the committee may wish to consider the possible adoption of a provision which generally exempts CATV systems from copyright liability insofar as their carriage of local signals is concerned. We would also point out that such an exemption would be consistent with our requirement for the carriage of local signals.

Another area which the committee may wish to consider concerns that of the underserved areas which do not enjoy multiple television services. The Commission has recognized that CATV makes a valuable contribution to the public when it operates in areas which have no television broadcast service or when it provides multiple signals in areas which are clearly underserved.

Persons in areas with no local station are entirely dependent on CATV or translators for television service. Persons in one and two station markets cannot have access to, for example, three full network services unless distant signals are brought in by CATV or other auxiliary facilities. Those of you familiar with small towns—too far away or too shielded by terrain to receive full network, independent, and educational services from a major metropolitan area—know what a worthwhile contribution CATV can make to those communities. We would suggest that in resolving the copyright question these considerations be kept in mind, and that, if possible, the copyright question be resolved in a manner that will give appropriate recognition to the importance of CATV in providing in areas like the above, television service which the public needs and upon which it has come to rely. At the same time the law could provide appropriate copyright protection to the local broadcast station with respect

to those programs for which the station has obtained the exclusive rights vis-a-vis the CATV system.

We recognize, of course, that there are many other significant aspects of the copyright question. We have just begun our study of some of these questions that may be appropriately considered by us, and have not yet formulated definitive positions. However, I wish to assure the committee that the Commission will make every effort to cooperate and to be of any assistance that we can on this important matter.

Senator BURDICK. Thank you, Mr. Hyde. Your statement has been very helpful and provides some very important background. I notice in your testimony that you seem to recommend exemption in particular areas.

Mr. HYDE. Yes, sir. I particularly mentioned the circumstances where a community antenna would serve entirely as a community antenna service, simply improving the delivery of the signal within the normal service area of the station. In such an area, the station would have purchased copyright privileges, and the improvement in its delivery would not seem to justify the addition of another charge.

Senator BURDICK. And that seems to be consistent with your regulation that the CATV give preference to the local signal.

Mr. HYDE. Yes. Well, actually what our regulations do is require that the local CATV system perform the function of a CATV system and carry the local station signals. Actually, in requiring the CATV system to carry the local stations' signals, we are simply requiring of them that they perform an antenna service, not a distribution service. We do not believe in these circumstances that an additional copyright payment would be required.

Senator BURDICK. And the second area is out in the wide open spaces where you are trying to reach people not now reached.

Mr. HYDE. Yes, sir. In that connection, I was really referring to the same objective that you mentioned in your introductory statement. We have here a matter of protecting the rights of the creative people, the copyright owners, at the same time providing access to their products by the public who have a tremendous interest in their product. A reasonable balance, a reasonable compromise I think is called for.

Senator BURDICK. I think to summarize your testimony, you recommend that there are two areas, one of "white"—let's put it that way, and that the rest is "black."

Mr. HYDE. I think that is an accurate characterization; yes sir.

Senator BURDICK. Now on this question of UHF, you say they don't have a network. Is it possible that UHF might have a network?

Mr. HYDE. Oh, there are a number of UHF television stations which do have network affiliations, but in a typical situation now, where new interest in the establishment of new stations is being created, it would be in a large city where you have network stations already in operation, and the applicant for a UHF station is undertaking an independent operation. Such a station would be dependent upon non-network programing, although they might have access to some limited number of network programs not exhibited by the network stations. But in general and almost on an overall basis, they would be dependent upon independent programing sources.

Our concern is that in the larger markets, where we are hopeful that the UHF stations can succeed, that their ability to obtain pro-

grams would not be jeopardized by the development of CATV systems in a manner which did not take into consideration the requirements of the UHF station.

Our proposal actually is to conduct hearings on applications for CATV systems in these larger markets, to get a basis on which to make a judgment as to what the impact on UHF would be. At this point we are only able to say that there are indications, there are reasons to feel that this may be a serious problem.

We actually have not conducted hearings in any particular case, and we do defer our judgment on that until we have examined the facts in a particular case.

Senator BURDICK. Senator Hart, any questions?

Senator HART. No.

Mr. HYDE. I have been reminded by counsel here that I mentioned only three established networks, and I did say that UHF stations would probably be dependent upon independent programing. In doing this, I overlooked the fact that there is a proposal underway, in fact it is beyond being a mere proposal. An effort is being made to organize a fourth network.

Senator BURDICK. That was my question. Might some day down the road UHF have its own network?

Mr. HYDE. There may very well be. I hope that there will be another network.

Senator BURDICK. But you still have these complicated situations.

Mr. HYDE. We do.

Senator BURDICK. Between UHF, VHF, and now CATV.

Mr. HYDE. That is right, sir. Our whole effort has been to provide a reasonable accommodation between the requirements of television of the conventional kind, and the requirements of CATV systems to give the public the benefit of both so far as we can.

Senator BURDICK. We talked about the "white" and "black" areas. Do you recognize any "gray" area?

Mr. HYDE. Oh, there is always a "gray" area. Nothing is ever either "black" or "white."

Senator BURDICK. You spelled out the "white" and agreed the rest of it is "black," but do you think any of it is slightly "gray"?

Mr. HYDE. Well, I mentioned the areas where there would be two services, and we thought that the public would demand and should have access to more than just two services. I suppose this could be a "gray" area.

Senator BURDICK. That is something for us to work out.

Mr. HYDE. Yes, sir, and we will be very glad to assist you in every way we can. Our professional staff will be at your service.

Senator BURDICK. Mr. Brennan.

Mr. BRENNAN. Thank you, Mr. Chairman. Mr. Hyde, in the underserved areas to which you made reference, would you agree that in order to assure the public access to the variety of television programs that it would be advisable to have a requirement for compulsory licensing or a statutory fee schedule?

Mr. HYDE. I did suggest in my statement that the committee give consideration to the problem of making additional programs reasonably available to residents of such areas. I should say compulsory licensing along the lines mentioned by Mr. Kaminstein might be appropriate for that purpose.

Mr. BRENNAN. If the CATV system is required to pay copyright fees, do you believe there should be any restrictions upon their local live originations of programs?

Mr. HYDE. The Commission hasn't really discussed the situation as you put it. When the Commission made its presentation to the House, it had under consideration the conditions at the moment under which CATV's operate largely outside any copyright limitations which might be found later to apply, and what the Commission had in mind was an operation where a CATV system paid no copyright fees, and yet might undertake to present local originations in competition with the local station, in what the Commission thought would be an unfair competitive situation so the Commission thought that the CATV system should not originate programs except local news and weather, which were mentioned in the Commission's statement to the House.

There was also the possibility of the Commission on a case-by-case basis granting waivers or exemptions for local public service. This type of thing, as you well recognize, does not cover, oh, creative works, films, the sort of thing that the local station might compete for in a program market.

Also the Commission felt that there were rather compelling public interest considerations which would justify the community antenna system carrying local originations of the kind that I have mentioned, notwithstanding the general prohibition.

Mr. BRENNAN. Thank you.

Senator BURDICK. I think I will ask you the same question I asked Mr. Kaminstein. What is the rationalization or justification for granting exemption at all if the copyright is a property right?

Mr. HYDE. Well, my answer would have to be that some reasonable compromise which would give just and reasonable recognition to the copyright owners' ownership interest, and give appropriate recognition to the right of the public to hear and see his product. We think this is a matter in which Congress might very well provide for a just compromise.

Senator BURDICK. You predicate your answer on the public interest.

Mr. HYDE. I do, sir.

Senator BURDICK. In certain areas.

Mr. HYDE. I do, sir.

Senator BURDICK. Senator Hart, any questions?

Senator HART. No. I promised I wouldn't ask a question today until I understood what the subject was all about and I still don't. But this general assumption that where there is a series of competing interests among private parties, let Congress resolve it, assumes that Congress can more prudently negotiate this than the parties themselves.

Why not let them have a fling at it? Now admittedly, I ask this from an enormous background of ignorance.

Mr. HYDE. Well, I hope I haven't given the impression that I think the whole problem should be tossed in the lap of the committees in Congress, without some advisory assistance from the Commission. Actually, we have endeavored to be of assistance here in terms of calling attention to considerations which we think should be recognized in the legislation, and we will help with the details of undertaking the formulation of provisions of law.

Senator HART. I wasn't by implication referring to a role the Commission might play, not even having caught up with your statement yet, but I want your counsel. Just coming in here late and listening to the exchange, again I understand—and I was encouraged by our subcommittee chairman's question—that the law of copyright has developed a concept of the right of property.

Mr. HYDE. Right.

Senator HART. The copyright law, I take it, on some occasions makes exemptions. I take it that the exemptions on behalf of CATV would be that the fellows that argue for it would bear the burden of proof. Your Commission has issued a rule as to carrying this locally.

Mr. HYDE. Yes.

Senator HART. And this creates a problem. Now, having recognized the problem, why is it that you suggest, as I understood you to do, that the way best to resolve it is for Congress to write some formula rather than saying to the parties, "Here again you have a problem with respect to the handling of a property right. Go ahead and handle it."

Mr. HYDE. I would give two answers if I may. In the first instance, of course, I refer to the public interest, and there are many instances where a Government agency must endeavor to point out ways and means of protecting this interest which may not necessarily evolve from the competition between contending parties.

I should also like to state—and this is the second part of my answer—that the Commission became concerned with CATV regulation when the competition between the parties seemed to break down, and when it failed of its purpose. Actually, the community antenna system first beginning just as an assist, an antenna system, burgeoned into a distributing system, and as I point out in my statement, became involved in the carriage of programs from city to city, without regard to the normal distribution system.

The Commission really was brought into the act when community antenna systems came to the Commission applying for licenses for microwaves to carry these programs from one city an another. When we would issue a microwave authorization, we would have to find that the operation would serve the public interest, convenience, and necessity.

Well, how could we find that this served public interest, convenience, and necessity if the resulting operation had an adverse impact upon the normal competitive system where the copyright law had failed to provide protection? This is in general terms the basis on which we got into it, and the reason which I have given was our overall concern for public interest.

Senator HART. I am sure it will be helpful to me as I continue to read these statements that I missed.

Mr. HYDE. This is a most complicated subject. You will find yourself regulating the transmission of programs to people who are hungry for them. You can be very reluctant about any interference with the distribution of an eagerly sought service. On the other hand, you must be concerned about the service being delivered in a way that will not be disruptive or destructive of other service which the public needs.

Senator HART. Thank you.

Senator BURDICK. And the reason why the matter is of immediate concern I presume is because of the decision of Judge Herlands.

Mr. HYDE. Judge Herlands' decision has introduced a very important new consideration in it. Our regulations were issued prior to his decision. As a matter of fact, they were issued when it didn't look very hopeful that we would have any change in the situation then existing under which CATV operated, seemingly in complete disregard of copyright considerations.

Senator BURDICK. Do you know whether that case is on appeal to the circuit court?

Mr. HYDE. I am told that it is on appeal.

Senator BURDICK. Thank you, Mr. Hyde, for your testimony.

Senator Fong?

Senator FONG. I am sorry I was not here to listen to your testimony. I will read your testimony.

Mr. HYDE. Thank you. Thank you, Mr. Chairman.

Senator BURDICK. Mr. Frederick Ford, president of the National Community Antenna Television. Will you introduce your associates.

STATEMENT OF FREDERICK W. FORD, PRESIDENT, NATIONAL COMMUNITY TELEVISION ASSOCIATION, INC.; ACCOMPANIED BY ALFRED R. STERN, CHAIRMAN, BOARD OF DIRECTORS; AND E. STRATFORD SMITH, SPECIAL COUNSEL, NATIONAL COMMUNITY TELEVISION ASSOCIATION, INC.

Mr. FORD. Mr. Chairman, on my right is E. Stratford Smith, who is the special counsel to the National Community Television Association, and on my left is Mr. Alfred R. Stern, who is the chairman of the Board of Directors of the National Community Television Association.

Mr. Chairman, members of the subcommittee, my name is Frederick W. Ford. I am the president of the National Community Television Association, Inc., which is composed of approximately 945 member CATV systems serving roughly 70 percent of the total CATV subscribers in the Nation, and 85 associate members who are engaged in manufacturing, in supplying CATV equipment, or in related activities.

On June 24, 1965, I, together with other representatives of the CATV industry, presented testimony on H.R. 4347 to Subcommittee No. 3 of the Committee on the Judiciary of the House, which is contained in the printed record of those hearings. The legislation now being considered by this committee is identical to that upon which those hearings were held, and since that testimony was presented at great length, it seems a waste of the committee's time to again request that they listen to such an extensive presentation on exactly the same subject. Therefore, I would like to ask that the committee incorporate by reference that testimony in order to avoid its repetition here.

Senator BURDICK. Without objection it is so ordered.

Mr. FORD. That testimony is found on pages 1241 to 1332 in part 2 of the hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, on H.R. 4347. If the committee so desires, I would like to present copies of the statements of each of the witnesses who testified in behalf of the CATV industry

at that time. Those witnesses, in addition to myself, were: Don Corbitt, Arizona Television Association; Tom Creighton, Texas Community Antenna Television Asosciation; Clifton W. Collins, general counsel, Pacific Northwest Community Television Association, Inc.; Thomas J. Whyte, on behalf of the West Virgina & Mid-Atlantic Community Television Association; Robert K. Weary, president, Oklahoma-Kansas Community Television Association; Alfred F. Dougherty, on behalf of the Montana Cable Television Association; and George J. Barco, on behalf of the Pennsylvania Community Antenna Television Association, Inc.

The first community antenna was installed on an experimental basis at Astoria, Oreg., in 1949. The first commercial systems were placed in operation in the mountainous areas of Pennsylvania in late 1949 and early 1950. Today, there are approximately 1,700 CATV systems serving more than 6 million viewers. Some 150 community antenna systems have the facilities to originate programs in local studios. This number is not large but the trend in the direction of furnishing such additional services is increasing, particularly in the field of local public service programs, such as programs on civic and local governmental problems. For a more complete statement of the communications gap which CATV systems can fill, I would like to submit as an exhibit an address which I delivered to the recent convention of our association on June 27, 1966.

CATV systems receive from 1 to 11 stations with the average being about 4. The five-channel system is the most common, representing about 37 percent of the systems and 39 percent of the subscribers. The number of systems is growing rapidly. There are about 1,400 franchises for CATV systems which are not yet operating, and another 1,400 cities are considering franchise applications. Thus, in all, there is in existence, authorized and under consideration CATV systems in some 4,500 communities in the United States.

There have been several significant occurrences between the presentation of the testimony before Subcommittee No. 3 of the Committee on the Judiciary of the House, and the statement that I am delivering today which have affected the industry, its posture and position with respect to copyright. Among these are:

1. The opinion of Judge William B. Herlands of the U.S. District Court for the Southern District of New York in the case of *United Artists Television* v. *Fortnightly Corporation*, holding that reception by community antennas for viewing in private homes of broadcasts embodying copyrighted works, without authorization of the copyright owner, is an infringement of those copyrights;

2. The Federal Communications Commission has asserted jurisdiction to regulate all community antenna systems; and

3. Acting Chairman Kastenmeier of Subcommittee No. 3 of the Committee on the Judiciary of the House has announced substantial modification in the provisions of H.R. 4347, an identical bill with S. 1006, as they apply to CATV.

The bill before you today would confirm the very broad liability imposed by Judge Herlands in his decision, and would, in effect, place the community antenna television industry at the mercy of the copyright owners. It would require CATV systems to obtain copyright clearance for each program they received and distributed to the public

prior to its reception and distribution. This in itself would be almost an insurmountable problem because the programs would be received and distributed in many instances before their nature was known or before copyright clearance could be obtained, thus placing the industry in the position of nearly always dealing as an infringer with the copyright owner—certainly, an unequal bargaining position. At the same time the Commission in asserting jurisdiction has required all CATV systems to receive the signals of local stations which is commonly considered one that places a grade B signal over the CATV system. Under Judge Herlands' decision and under the present bill, CATV systems in carrying out the Commission's mandate would be liable for copyright infringement. Thus, the Government on the one hand would compel the reception of grade B signals, and on the other place the industry in an impossible bargaining position to obtain copyright clearance.

If S. 1006 is enacted in its present form, or if Judge Herlands' decision is affirmed in its wide sweep, the community antenna television industry could very well be forced out of existence to the great injury to the public interest, and with no corresponding benefit to copyright owners, broadcast stations, or the public.

I have had conferences with a number of the interested parties to this legislation and to the litigation in an attempt to arrive at a recommended solution to the problem. This committee has also recognized the seriousness of the situation by calling hearings to determine whether or not any appropriate action with respect to CATV should be taken to preserve the independence and development of the community antenna television industry which serves so well every section of the country.

I have undertaken this series of conferences in an effort to determine whether or not there is a common denominator between the various interests which could serve as a basis for the solution of this very difficult problem for the Congress. Although I have been unable to develop a specific proposal which, in its entirety, commands support from all interested parties, I did find substantial agreement on several points upon which I am confident we can build a satisfactory accommodation between the conflicting viewpoints of the various parties in interest and the public interest.

Thus, I come here today to present to this committee proposals which, we think, represent a fair accommodation of the interest of the viewing public and the private interests of the copyright owner. These proposals in their entirety may satisfy no one—certainly not ourselves—but they are made in good faith and we stand ready to work with this subcommittee, its staff, and all parties having an interest in seeking legislation that will best serve the public interest.

Proposals:

1. There should be no copyright liability imposed or authorization required by CATV or its subscribers or users of other antenna systems, if such systems are within the "normal reception range" of the station broadcasting the program in question as defined by the Federal Communications Commission.

When the copyright owner licenses a television station to broadcast a program, he, in effect, dedicates that program to all persons residing within the "normal reception range" of that station, as defined by the

Federal Communications Commission. There is no consideration of policy which would permit either the broadcaster or the copyright owner to dictate to the residents of that "normal reception range" the means they utilize to receive that program. Insofar as community television systems facilitate the reception without degradation of those unaltered programs by the public to whom they have been dedicated they are performing a public service and should not be required to obtain licenses or authorization from the copyright owner or his successor in interest. Such a provision would be consistent with the regulatory policies of the Federal Communications Commission which now require CATV systems to carry all television stations within whose "normal reception range" (for example grade B contour) the CATV system operates. The proposal I urge would make it possible for the CATV system to comply with this duty as a practical matter by obviating the need for a license from the copyright owner.

2. Where a CATV system is located beyond the normal reception range of a television station carriage is not compulsory under the Commission's rules. Such stations are referred to as "distant stations." In this situation, the CATV system, by definition, is furnishing programs to a group of viewers who are not regarded by the copyright owners as being the normal recipients of the service from the station which has secured a license from the copyright owner. Under these circumstances we are willing to concede that a license from the copyright owner should be required. Nevertheless, there are policy considerations which dictate that under certain conditions a license should be compulsory with provisions for a reasonable license fee defined by statute. For example, some of the areas into which "distant signals" might be imported may be underserved, that is, areas that have no service of their own, or that have an inadequate number of signals. In this instance there are strong public interest considerations for facilitating the importation of "distant signals." This can be done by the requirement in the copyright law providing for compulsory licensing on a reasonable fee basis defined by statute, where "distant signals" are imported into an underserved area, as defined by the Federal Communications Commission, for example, an area which receives grade A signals from fewer than four television stations—stations whose transmitters are located within 40 miles of the main post office in a community in which the CATV system operates. It is our view that an underserved area is an area which receives fewer than the three network programs and an independent signal of grade A quality. The number of "distant signals" to be imported would be determined by the CATV operator. He would, of course, pay the license fee in connection with the importation of each "distant signal," and would have to comply with valid Commission regulations. We recognize that in one type of situation there should be an exception to the blanket license. When a television station is broadcasting a copyrighted program as to which it has obtained an exclusive license in the market, a CATV system in that market, upon notice from either the copyright owner or the station, would be required during the term of the copyright license to refrain from carrying the same program from a "distant station."

3. In those areas that has a plethora of service there should be no objection to requiring CATV system to obtain a license from the copyright owners for each and every copyrighted program obtained from a

"distant station." In this connection it should be permissible for industrywide bargaining for such programs, otherwise a very small CATV system in a rural area of the country would have difficulty in bargaining on an equal basis with the large and powerful copyright owners.

We believe that the statutory fee principle for "distant stations" should apply, also, in the so-called adequately served areas with respect to programs which have been made available by the copyright holder in those areas. There is no reason why only the people who can receive these programs by use of conventional antennas should be preferred over those who are disadvantageously situated because of high buildings or a high hill which prevents proper reception. On the other hand, we do realize that the copyright holder may not have received full compensation for CATV homes, because in an adequately served area both he and the broadcaster are more likely to be aware of the number of homes where good reception is possible. Accordingly, the Congress could consider making the statutory fee to be paid by CATV systems in an adequately served area somewhat higher than in an inadequately served area. This approach would not derogate from the principle that in an adequately served area the CATV operator would have to negotiate on an individual basis for any program which has not been made available in that area and pay what the market will bear or not have the program at all.

4. If the CATV system originates its own programs and makes use of copyrighted material, it must bargain for a license from the copyright owner on the same basis as a broadcast station. No copyright legislation should, in any way, inhibit or prevent studio-type originations over CATV systems so long as CATV has cleared all applicable copyrights. Such a limitation is not a proper function of copyright. It involved serious questions under the first amendment to the Constitution of the United States, and is in no way related to the public policies in the Copyright Act. (See *S. L. Weaver et al.* v. *Frank M. Jordan*, Secretary of State of California, Supreme Court of State of California, Mar. 2, 1966.) If any such legislation is deemed necessary it should be part of the Communications Act, and not the copyright law. Indeed, that subject is now being considered by the House in connection with recommended amendments to the Communications Act.

It is contended that broadcasters build an audience with copyrighted material, and if CATV is permitted to carry these signals free of copyright payments within the "normal service range" of a television station and also originate programs, they would be capitalizing on this audience and diverting it to the injury of the copyright owner.

This is a specious argument in my view. When a new UHF station goes on the air it capitalizes on the television audience built with copyrighted material, and no one claims they should pay the copyright owner of the programs on existing stations for the audience they divert. Nor does anyone claim that a television station should pay copyright owners when they broadcast an uncopyrighted program. The building of an audience, through stimulating the ownership by the public of television sets, certainly does not create a property right in the television audience generally by existing television stations or copyright holders. Nor do I believe that the Government can properly

enact a policy into law which protects and prefers the distribution of copyrighted programs against uncopyrighted programs, as this argument would imply. Broadcasts by political candidates are not copyrighted and under this philosophy, if a CATV system gave time on a local live public service channel to a candidate within 30 days of the reception and distribution of a copyrighted television program, his audience of constituents would have to respond in cash to copyright holders whose programs they did not even watch. Moreover, it would seem to be improper to penalize the public in a given grade B contour, or "normal reception range" by imposing on it the burden of paying the copyright owner twice for the same program. Once, through the advertiser, and second, through the CATV operator—in effect, charging the public for two tickets to the same performance, if that same public receives a program on its television set from a source other than a television station it would be just as logical to prohibit television stations from broadcasting anything but copyrighted programs.

Let us look at it another way. Broadcast stations build large audiences through the use of copyright material and then immediately divert that audience on the same channel to local or national advertising spots for which the broadcasting industry as a whole receives many millions of dollars. The copyright owner does not share in this income, although in a large part his products makes it possible. It is much more reasonable to prohibit these local originations by television stations which, in fact, do capitalize on the copyrighted program audience on the same channel than it is to prohibit an uncopyrighted program on a completely different channel where copyrighted materials are either paid for or not used at all.

5. All music rights in connection with programs received from television stations and distributed by CATV systems should be considered as cleared at the source by the program proprietor, and no further license should be required.

6. Finally, no limitation should be placed on the reception of programs by way of CATV which are not copyrighted or subject to copyright.

We believe that these proposals, translated into statutory language, would be a proper adjustment between the interests of the copyright owners, broadcast stations and the public interest. The proposals would provide the necessary monetary incentive to talented persons to write, produce, publish, and disseminate creative works, at the same time guarding against the danger that these works will not be unduly restricted in their dissemination. The copyright owner would be fully rewarded, but he would not be permitted to subvert the interests of the public in the maximum dissemination of information and to impose artificial restrictions on the use of the television frequencies through which his product is delivered to the public. I am very hopeful that the concessions and proposals which the CATV industry has made here today, although a reversal and departure from its traditional position, will bring about a compromise which the Congress may enact into legislation during the present session.

I thank the committee for the opportunity to present this testimony.

Senator BURDICK. Thank you, Mr. Ford. You have listed six points here in your effort to reach an understanding with all parties and all interests, and you state on page 6 that you have undertaken a series of

conferences in order to determine whether or not there is a common denominator between the various interests. Were all interested parties at the conference?

Mr. FORD. No, sir. I requested an opportunity, just requested an appointment with various people that I knew were interested in the subject. I went to talk to them and tried to find out what their position was and why they had that position. I thought that through the development of that kind of information, maybe I could write something that none of them perhaps would agree to, but would have a basic fundamental principle involved that we could tie to. I think I have tried to develop that basic fundamental principle, which is that where programs are dedicated to the public, whatever facilities the public uses to receive them, they shouldn't have to pay copyright—whether they use a little antenna, a bigger one or a community antenna. But once you get outside of that normal reception range, then the principle is different.

There the copyright owner has not dedicated the program in that area to the public, and consequently other considerations arise. One, that underserved areas should receive adequate service. Thus, we get into the fundamental concept of the copyright law. The absolute property right versus the limited property right. The reward to the copyright owner being secondary to the public interest in having the material available. It is through those two sets of principles that I undertook to construct the proposals that I made here today.

Senator BURDICK. I don't want to simplify too much, but as I understand your testimony, the CATV operations within the normal reception range of the local station should be exempt.

Mr. FORD. Yes, sir.

Senator BURDICK. And those outside of that range would not be exempt.

Mr. FORD. That is right.

Senator BURDICK. And there would be various grades and gradations of license fees.

Mr. FORD. Yes.

Senator BURDICK. It is just that simple.

Mr. FORD. It is just that simple, and we feel that in certain areas the Government has an interest in making service available. Therefore, a compulsory license and some form of statutory fee should be imposed to accomplish that purpose. Now there are several different ways in which that can be done which would tie the income of the copyright owner to an increase in business. There is a great resentment, and I think perhaps maybe Mr. Kaminstein had in mind the problems that the fixed cent or dollar amount had in the record industry, whereas other forms of escalated return on size of system and so on could be developed, I think, with not too much difficulty.

Senator BURDICK. I don't like to characterize your suggestion as a departure from the proposition in the House, but it doesn't seem to go as far as the House proposal. This seems to be more of a concession to the copyright interests proposals.

Mr. FORD. Well, sir, when we come in here with a basic principle, we think we have to stick with that principle. We think that it is a sound principle that the Congress can tie to.

Senator BURDICK. One of your other arguments was that as long as the Federal Communications Commission has ordered you to not infringe upon the local signal, this would be considered, too.

Mr. FORD. That is right. In other words, they have told us, "You have to do it," and some of the stations say, "You have to do it. We request you carry us."

Some of our people say, "Will you protect us against copyright liability?" and so it goes. It is all uncertainty. There is a great deal of uneasiness throughout the community, copyright owners, the broadcasting stations, and many of the CATV owners. Many CATV operators have all of their property and all of their cash tied up in their CATV system.

I think it would be a great service to lay these fears to rest and establish the ground rules so that the business can proceed.

Now, I noticed in Chairman Hyde's statement, reference is made to areas in which there is no signal. There is no grade B signal. There is no market there. Frankly, we would like very much to have that in the public domain, and not pay copyright fees on it. There is roughly 140 systems or 15 percent of the systems in those areas. We thought about that a good bit, and we had considerable controversy about it, but we decided that even though we thought that it might possibly be well in the public interest to include that, we felt that if we were going to come in here on basic principles that that is what we would stick with.

Senator BURDICK. Another characterization, you don't go as far as Mr. Kaminstein or Mr. Hyde in the exemption apparently. Mr. Hyde wanted——

Mr. FORD. No; I didn't.

Senator BURDICK. Is that a fair characterization?

Mr. FORD. I think so.

Senator BURDICK. And this is brought about as a result of your conference with the interested people, to get this consensus?

Mr. FORD. Well, in a large part, yes. For instance, on the question of market exclusivity, this is a very fundamental thing, and there has to be some adjustment made.

For instance, supposing a copyright owner has an extravaganza of some sort, and he wants to sell that to a television station in New York City on an exclusive basis, and he doesn't want that transported to Philadelphia, for example, at any price, because he has tried to sell it in Philadelphia and the Philadelphia stations just won't pay him any money. So he thinks, "Well, I'll sell it to them next year." Unless we took this into account, it would put us in the position to dissipate his property value in Philadelphia before he had the opportunity to exploit it himself, and that is the basis of that exemption.

Senator BURDICK. What is the justification for exemption even within the normal reception range? I have asked this of the other witnesses and I will ask you. What is the justification for an exemption even within the normal reception range?

Mr. FORD. The public interest. I don't think there is any other justification for it. It is the public's interest.

Here a signal goes out. The copyright owner has been paid. There is no impact on his market. He has sold the program. He has gotten the price he has asked. Now the question is this. And the public, within that normal range, through the products they buy, have in effect bought

a ticket to watch that which is broadcast, and broadcasting is intended for reception by the general public, and he knows when he puts that on that he is dedicating that to the public.

Now whenever the public wants to receive that—for instance, if you have an antenna 2 feet long, if you have one on top of your set, one on top of the house or one on top of the hill, it is your choice, the public's choice as to how they will receive that, because it has been dedicated by the copyright owner, and it seems to me that that is the justification, the public's interest in being able to receive clearly the programs dedicated for its use.

Senator BURDICK. Apparently there must be a lot of islands and bad spots in these B contours.

Mr. FORD. Well, sir ,when you understand a grade A contour, it simply is a statistical thing in which a certain signal strength is radiated, but in that area in grade A, about 90 percent of the locations receive an acceptable signal 50 percent of the time.

In the grade B, about 70 percent of the locations receive an acceptable signal 50 percent of the time. So it is a statistical thing.

Now the copyright owner has been paid for 100 percent of those people 100 percent of the time, and if a man is in a disadvantageous location statistically, as he very well could be, and if he wants to subscribe to a cable, this should be his choice.

In other words, what we are saying is that the public should have this opportunity. In New York City, for example, and I am sure that you have tried to watch television in New York City, in which you watch six programs at once because of the ghost. Now CATV in that area would bring that in sharper and clearer. Is that in the public interest, or should you rely on the six ghosts because of terrain? We think that it is in the public interest that such an exception be granted.

Senator BURDICK. Well, you have one "white" area, the normal reception range, and everything else in "black."

Mr. FORD. Everything else? Well, no, the compulsory license area is what would be called "gray," and then when we bring a signal from New York to Philadelphia, for example, where there is a plethora of service in Philadelphia, also in New York, then we call that "black."

Senator BURDICK. But it would be based upon licensing.

Mr. FORD. There is that kind of a situation, we recommend that.

Senator BURDICK. Senator Hart? Senator Fong?

Senator FONG. Thank you, Mr. Chairman. Mr. Ford, has there been an appeal on the *Herlands* decision?

Mr. FORD. Yes, sir; that appeal is pending now in the second circuit.

Senator FONG. So with the present decision now——

Mr. FORD. If it is affirmed, we are living on borrowed time.

Senator FONG. If it is affirmed you will be in trouble, is that right?

Mr. FORD. Very serious trouble, and also our viewers who rely on our services will be in very serious trouble.

Senator FONG. You make a distinction between the stations that are serving people in an area presently, and those that are not being served by the regular broadcasting system?

Mr. FORD. That is right.

Senator FONG. And you feel that for those who are being served now, within the area, but because of your work in giving them a better service, that that group, should not have to pay copyright fees?

Mr. FORD. No, sir. We say that that program has been dedicated to the public in that area.

Senator FONG. And then you say that for the viewers outside of this area, you would be willing to pay a certain fee, to be regulated by the Congress?

Mr. FORD. That is right, and we think there that the copyright policy making it available to the public, compulsory licensing statutory fees, these would apply in some instances and in other instances it wouldn't and we would be placed in the position of bargaining for whatever programs we could bargain for and if we couldn't bargain for them, then we wouldn't have them.

Senator FONG. What percentage of the broadcasting would you say comes under copyrights?

Mr. FORD. Well, certainly most of the evening programs do in prime time, the big popular shows. The motion pictures which comprise a substantial part of the broadcast day of many television stations are copyrighted. There are certain news programs, certain other kinds of programs, on-the-spot spectacles of one sort or another that are not copyrighted. So that on the whole, I would say that 75 percent roughly, that is a very rough guess, but I would say that 75 percent at least are copyrighted programs.

Senator FONG. And you wouldn't know when you are relaying these programs whether the material is copyrighted until after you have seen it.

Mr. FORD. Well, that is right. For instance——

Senator FONG. Or unless you——

Mr. FORD. Unless we had notes.

Senator FONG. Notes of the program?

Mr. FORD. That is right; but then if they switched the programs, we might say, well, this one is not a copyrighted program, and something might happen that they wouldn't put that program on and they put on another program which is copyrighted, and so it is coming over the air and we have it on our sets and we are infringing.

Senator FONG. How many of the 6 million viewers that you have, would you say are outside of the prescribed area where they could catch the programs?

Mr. FORD. Outside of the grade B? The fact that this industry has not been regulated has led to the fact that the statistics and the information—the statistical information—is very scarce. There is about 140 systems at the last statistical effort we made that were outside of any grade B contour, and the average number of people, subscribers, is about 1,200. Now in those areas it might be less than the average, so that if we say 1,000, it would be 140,000 homes.

Senator FONG. 140,000 homes.

Mr. FORD. About.

Senator FONG. That would be outside of the area?

Mr. FORD. Any grade B contour.

Senator FONG. Grade B contour.

Mr. FORD. Yes.

Senator FONG. When you say grade B contour, what do you mean by that?

Mr. FORD. I mean the normal service range of a station.

Senator FONG. Then under your first suggestion, if it is adopted, you would only pay copyright fees for the delivery to 140,000 homes.

Mr. FORD. No; quite the contrary. I was speaking—that 140,000 we are asking compulsory licensing for and a statutory fee, in that 140,000 outside of any grade B, or if there is less than the 3 stations, plus an independent, 3 networks at the present time plus an independent, we would be asking for compulsory licensing to build that up to a normal service, with statutory fees.

Now I think the idea that you probably have in mind is how many people reside within grade B contours that are subscribers to CATV systems. I just don't have any idea. For instance, in some instances a system will be in a city where the grade B will go right through the town. Part of the people are outside the grade B, part of the people are inside the grade B.

I believe that insofar as the customers of CATV systems are concerned, of the 6 million people I am talking about, all but the 140,000 that I have mentioned probably receive at least one grade B signal.

Senator FONG. Yes; and under those circumstances if your proposal were put into effect, you would not be paying copyright fees for all the programs outside of the 140,000 people.

Mr. FORD. No, sir. I don't believe that is quite right, because they only get, we are saying at least one grade B. Now we are saying that normal service is the three networks plus an additional independent, so that on the one grade B, the programs on that are dedicated to the public in that area, we would not pay copyright fees on the grade B. On the others we brought in—less than grade B—we would have a compulsory license, and we would pay copyright fees, on those programs.

Senator FONG. I might rephrase my question. For how many of these 6 million people will you be paying copyright fees and how many will be exempted?

Mr. FORD. I would say that we will pay some form of copyright on all but 140,000.

Senator FONG. All but 140,000.

Mr. FORD. Yes. Well, that is a little error, because on that 140,000 we would be paying copyright fees, on my proposal, on a compulsory license statutory fee basis, because they are outside of any normal service area.

Senator FONG. Then you would be paying fees just for 140,000, also.

Mr. FORD. In that instance we would, but I think actually that we will be paying copyright fees in some form for everybody we serve practically. Now in New York City, the city ordinance provides that you can't bring in a signal other than those that originate in New York City, so that they would be merely an antenna service within the normal range of those signals, but that is a very exceptional situation. In most systems, they bring in a signal from outside of the normal range.

Senator FONG. You start out with a premise saying that if this community is served, then you are not to be called upon to pay a fee because the man who sold his copyright had been paid. You start with that premise, is that correct? So, therefore, those people who are within that area who are being served by you, you would not have to pay anything for them receiving the program.

Mr. FORD. Will you permit Mr. Stern to answer that question?

Senator FONG. Yes.

Mr. STERN. Senator, I think that what you have to bear in mind is the source of the program on which we are paying copyright in the area you were talking about. In other words, we are saying that in those areas of normal service, for those programs already broadcast by the stations, we would not have to pay a fee to the copyright holder, but in that same area, were we to bring in programs from distant stations, then we might have to pay copyright fees and would under this proposal, depending upon the source of those programs as to whether they would be statutory fees or fees negotiated on individual basis. But it could be within the same community that some of the programs would not require us to pay a fee, and on others we would within the same area we are talking about.

Senator FONG. But if you were only to take the program of the stations within that area, then you would not have to pay anything.

Mr. STERN. If it is broadcast by a station in that normal service area, we would not, but with respect to other programs we might well have to pay fees.

Senator FONG. That do not normally serve that area.

Mr. STERN. That is correct.

Senator FONG. Then you would pay.

Mr. STERN. That is correct.

Senator FONG. Thank you.

Senator BURDICK. I wonder if you might supply this committee with a breakdown in numbers, as long as we are in this numbers game right now, as best you can from estimates of those that receive local service only, those that receive local plus distant stations and those outside of this periphery.

Mr. FORD. We will do our best to get that material.

Senator BURDICK. I understand that it would be a guess, but give us some kind of an estimate.

Mr. FORD. We do have some information.

Senator BURDICK. Some kind of an estimate.

Mr. FORD. We will do our best to get that information together.

(The estimates requested follow:)

NATIONAL COMMUNITY TELEVISION ASSOCIATION, INC.,
Washington, D.C., August 23, 1966.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Senate Committee on the Judiciary, New Senate Office Building, Washington, D.C.

MY DEAR MR. CHAIRMAN: On page 261 of the transcript of the hearings on S. 1006, held on August 2, 1966, you requested that I supply the Subcommittee with a breakdown in numbers, as best I could from estimates:

(1) Of CATV systems which receive local service only (i.e., the signals of television stations which place a Grade B or better signal over the community where the CATV system operates).

(2) The CATV systems which receive the signals of both local television stations and the signals of television stations which do not place even a Grade B signal over the CATV community, and

(3) the CATV systems which are beyond the Grade B of all television stations.

In 1964, NCTA undertook a study of all existing CATV systems to determine the characteristics of the industry. Some of the data received in 1964–65 has been up-dated, but basically the information is 18 months old. However, for the present purpose, it is sufficiently valid to provide a good estimate in answer to your questions.

To give you a somewhat clearer picture of our industry, we have arranged the breakdown which follows in six categories instead of three to accommodate the various definitions of "local" station currently in use.

Of 725 systems in sample—

1. 6 systems serving 3,697 homes receive only the stations located in the same community as the system.

2. 10 systems serving 9,424 homes receive only signals from stations within whose predicted Grade A contour the systems are located.

3. 18 systems serving 12,296 homes receive only signals of predicted Grade B intensity.

4. 32 systems serving 53,560 homes receive a combination of predicted Grade A and predicted Grade B signals.

5. 176 systems serving 234,436 homes receive no signals of Grade A or B intensity (although 35 of these are within the predicted A or B contour of one or more stations.)

6. 483 systems serving 777,890 homes receive an assortment of signals including at least one station of less than Grade B predicted intensity, and at least one station of predicted Grade B or greater intensity.

It is reasonable to assume that the carriage patterns of this sample reasonably represent the patterns of the entire industry. Since it is currently estimated that some 1,650 CATV systems are in operation, it is reasonable to multiply the reception patterns above by 2.3 to achieve an estimate of the number of systems in each category.

The same multiple can reasonsably be applied to the number of homes served in each category.

Multiplying the number of homes by 3.3 gives an estimate of the number of people served by the CATV systems.

Therefore converting the above—

1. 14 systems serving 8,493 homes (28,026 people) receive only the stations located in the same community as the system. (Not including New York which, when operational, will also distribute only local signals.)

2. 23 systems serving 21,675 homes (71,528 people) receive only signals from stations within whose predicted Grade A contour the systems are located.

3. 41 systems serving 28,281 homes (93,327 people) receive only signals of predicted Grade B intensity.

4. 74 systems serving 123,188 homes (406,520 people) receive a combination of predicted Grade A and Grade B signals. (Depending on whose definition of "local station" you accept either number 1, the combination of 1 and 2, or 1, 2, 3 and 4 would represent those systems carrying only the local stations.)

5. 405 systems serving 539,203 homes (1,779,370 people) receive no signals of Grade A or Grade B intensity (although 81 of these are within the predicted A or B contour of one or more stations.)

6. 1111 systems serving 1,789,147 homes (5,924,185 people) receive an assortment of signals including at least one station of less than Grade B predicted intensity, and at least one station of predicted Grade B or greater intensity.

The above figures do not include master antenna systems such as are commonly used to serve apartment and hotel installations.

Total people served	8,302,956
Total homes served	2,509,987

Thank you for the opportunity to supply this breakdown. If you desire any further information please do not hesitate to call upon me.

Sincerely,

FREDERICK W. FORD,
President.

Senator BURDICK. Mr. Brennan, any questions?

Mr. BRENNAN. Just one, Mr. Chairman. Mr. Ford, are you acquainted with the proposal of the Westinghouse Broadcasting Co.?

Mr. FORD. Yes.

Mr. BRENNAN. Which would provide that CATV must pay 1 percent of its gross per annum per television channels which it receives and for which it must pay copyright fees?

Mr. FORD. I believe it is one-tenth of 1 percent.

Mr. BRENNAN. One-tenth of 1 percent. Would you care to comment on that?

Mr. FORD. We think that one of the difficulties with the Westinghouse proposal is that they say "whose sole purpose" and they would limit it strictly to a master antenna, and if you wanted to serve the community, the local community with a local live public service, this would not be available to you. So to that extent we wouldn't agree with that. But so far as the formula for statutory fees tied to the income, the gross income of the station, we think it probably has a lot of merit and should be considered.

Senator BURDICK. I want to thank you, Mr. Ford, for the contribution you have made today.

Mr. FORD. Thank you.

Senator BURDICK. The committee will be in recess until 10 o'clock tomorrow morning.

(Whereupon, at 11:45 a.m., the subcommittee recessed until Wednesday, August 3, 1966 at 10 a.m.)

(The exhibit referred to by Mr. Ford is as follows:)

ADDRESS BY FREDERICK W. FORD BEFORE THE 15TH ANNUAL CONVENTION OF THE NATIONAL COMMUNITY TELEVISION ASSOCIATION, INC., MIAMI BEACH, FLA., JUNE 27, 1966

THE PUBLIC SERVICE RESPONSIBILITY OF CATV OPERATORS

Mr. Chairman, distinguished guests, members of the National Community Television Association, and ladies and gentlemen:

I

The growth of the Association since July 1, 1965 to June 1, 1966 has been significant. In the eleven month period since July 1, 1965, our membership has increased from 642 systems in operation and under construction to 937 systems. During the same period our customers have increased from 962,862 to 1,203,991. An increase of 295 member systems and 341,129 subscribers for the eleven month period.[1]

This growth has occurred in the face of the increased opposition by organized broadcasters to the expansion of CATV; the restrictive regulations which the Federal Communications Commission has sought to impose; the crippling legislation reported out of the House Interstate and Foreign Commerce Committee; and the adverse decision by Judge Herlands in the copyright case of *United Artists* v. *Fortnightly Corp.* in the United States District Court for the Southern District of New York.

The most unfair of all the Commission rules with respect to CATV is its failure to adequately "grandfather" existing systems. The most oppressive rule is its top 100 market rule. This rule, in effect, freezes the construction of new CATV systems in the Grade A contour of any station in the top 100 ARB markets until long and costly hearings are held.

The Commission, in these hearings, will impose a negative burden of proof on the CATV operator—an almost impossible burden of showing that receiving a distant signal would be "consistent with the public interest and specifically the establishment and healthy maintenance of television broadcast services in the area." It almost seems as if this rule were designed to force CATV to subsidize UHF, or to prove that any broadcaster could built a UHF station and enjoy a "healthy maintenance of television broadcast service" at any location within the Grade A contour of the top 100 markets where the allocations table happened to drop a UHF assignment.

But, the most astounding action of the Commission is its recommendation, seconded by the House Committee, that it be given the power to prevent you from originating programs. Let me read to you the language of H.R. 13286 which the

[1] In the seventeen months since January 1, 1965, there has been an increase of 417 member systems, and 504,487 subscribers representing a 79% increase in member systems and 63% increase in the number of subscribers.

Commission requested and the House Interstate and Foreign Commerce recommended that the Congress adopt:

> "(b) No community antenna system shall transmit over its system any program or other material other than that which it has received directly or indirectly over the air from a broadcast station, except that the Commission may, upon an express finding that it would serve the public interest, authorize by general rule limited exceptions to permit such transmission without any additional charge to subscribers."

In other words, the Commission in this bill has asked for the power to control by general regulation the free speech of CATV operators. It also would give the Commission power to prevent, if it so desires, the public from receiving any television programs, except as they are fed to them by broadcasters. This power of complete prior restraint on free speech is, we believe, an unconstitutional invasion of the rights of the public to see and hear an electronic voice, other than that of broadcasters. To me, this is a repudiation of the basic principles of the Communications Act.

The basic policy of that Act, frequently recognized by the Commission, is that no small group should be given the power to determine the broadcast fare of this country. This is a function which should be distributed among the greatest number of diverse interests.

II

The throttling of local self-expression implicit in the Commission's action runs counter to the efforts of the Commission from its very inception to foster maximum local self-expression.

Let us begin by looking back at the Second Annual Report of the Federal Radio Commission, transmitted to the Congress in 1928, in which it said:

> "* * * A station which devotes the main portion of its hours of operation to broadcasting * * * phonograph records is not giving the public anything which it cannot readily have without such a station. If * * * the station is located in a city where there are large resources in program material, the continued operation of the station means that some other station is being kept out of existence which might put to use such original program material."

Thus, the idea of local live programming as an important element in the broadcaster's service to his community is not something the Federal Communications Commission initiated. It has been with us for a long, long time. Right from the beginning, as indicated by this quotation, local programs assumed importance in the licensing process and in the policy pronouncements of the regulatory agency.

A year later, 1929, the Radio Commission set forth its program views in some detail. It pointed out that not only entertainment, but "religion, education and instruction, important public events, discussions of public questions, weather, market reports and news, and matters of interest to all members of the family" should find a place in the programming of a broadcast station. The years which followed saw a tremendous growth in network broadcasting and many of the program needs mentioned by the Radio Commission could be fulfilled by material furnished from the networks. Nevertheless, local live programs continued to play an important part in the licensing of broadcast stations.

Perhaps the most striking example during these years occurred in a case in which the Commission denied an application on the ground that no need had been shown for the service proposed. The applicant sought review in the Court of Appeals; and the Court set forth at some length the applicant's local program plans, and found the evidence "overwhelming" that there was a need for the applicant's service. On the strength of this showing, the Commission's denial was set aside as arbitrary.[2]

In 1941, after a comprehensive three-year investigation of the networks, the Commission released its "Report on Chain Broadcasting" prescribing rules to govern network practices found to be detrimental to the public interest. Notwithstanding the preponderance of network programs on the schedules of many stations and the general public acceptance they have achieved, the Commission, once again, affirmed the importance of local programming as a significant element of the public interest. The emphasis now, however, was a clear affirmation that network programs, too, served an important purpose. The Report states:

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[2] *Courier Post Pub. Co.* v. *F.C.C.*, 104 F. 2d 213, 215–216.

"If radio broadcasting is to serve its full function of disseminating information, opinion, and entertainment it must bring to the people of the nation a diversified program service. There must be, on the one hand, programs of local self-expression, whereby matters of local interest and benefit are brought to the communities served by broadcast stations. There must be, on the other hand, access to events of national and regional interest and to programs of a type which cannot be originated by local communities. *Neither type of program service should be subordinated to the other.*" (italic supplied)

In particular, the Commission pointed to option time as a device which tended to inhibit the development of local programs. In adopting a rule restricting the use of option time, the Commission supported its determination in the following terms (later to be cited by the Supreme Court in its decision affirming the network rules) : [3]

"A Station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest."

In 1946, the Commission issued its report on the *Public Service Responsibility of Broadcast Licensees*, more commonly known as the "bluebook." The "bluebook" reiterated the Commission's long-standing concern with the local programs and noted that "in particular, public interest requires that such programs should not be crowded out of the best listening hours." The interesting thing about this "bluebook" discussion, however, was not the reaffirmance of the doctrine of "local self-expression" but rather the change in emphasis which accompanied it. The Report warned that without a local live program service of some kind and without an affirmative effort to provide time and encourage talent, stations would become nothing more than common carriers, piping in program material from outside the community.

However, the Commission acknowledged, possibly for the first time, that it had put "in some cases perhaps an undue emphasis on the carrying of local live programs." Recognizing the merit of network programs (as the Chain Broadcasting Report had done) the "bluebook" noted also that records and transcriptions, which had usually been regarded as inferior program sources, could also play a significant and salutary role in the station's programming.

Now, let us span the gap from the early radio days to the era of television. It almost goes without saying that a television station is most certainly an outlet for local expression. In fact it has become an accepted principle that television, combining as it does the media of sight and sound with the impact of immediacy and sense of presence on the scene, constitutes the most effective medium of mass communications yet devised.

Of the 70-odd television hearings that have been held for television permits, the local live programs proposed by the applicants have received careful scrutiny. However, higher costs, increased requirements in terms of talent and creativity and the attractiveness and general acceptance of non-local programming, have tended to hinder the development of local programming, and minimize the television station's role as an outlet for local self-expression. At the same time, through the networks, film, tape and from other sources, television more vividly than any medium which preceded it has brought the outside world into the community.

In July of 1960, after extensive hearings the Commission brought up to date its policies with respect to television. At that time, the Commission issued its Report and Statement of Policy with respect to programming. The Commission stated that "the principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his community or service area."

Throughout the various pronouncements to which I have referred—from the reports of the old Radio Commission to the 1960 report—one theme recurs again and again. Broadcast stations in a community are obligated to provide a program fare which is of interest to all the people in that community, and that obligation will ordinarily require reliance on something more than programs, all, or nearly all, of which originate outside the community.

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[3] *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 203.

How many of the local stations that you carry make more than a token effort to present local live public service programs? How many of them really do anything of this kind for any community other than the city in which they are located? I will venture to guess that, in most cases, your answer will be "None."

III

The television broadcaster, and particularly the network affiliate, has not discharged this important responsibility for local live public service programming, and for a very good reason. He can't! There are literally hundreds of communities, in fact, 4,699 communities with a population of more than 2,500 throughout the United States. There are only some 612 television stations to serve their local needs and interests. How can such a limited number of television stations serve the purely local interests of more than 4,600 communities without trespassing on the time of uninterested viewers? How can such a limited number of stations serve the churches, the civic, religious, educational and cultural interests, and provide time for the discussion of public issues, and the political campaigns of all of these communities? How can they serve as a show case for all of these communities? Television cannot do the job. Cablecasters can do the job in the 4,389 communities where there are operating systems, franchises granted, or applications pending. You can do it, but the broadcaster cannot.

Furthermore, television broadcasters are faced with a very difficult and perplexing problem in providing public service for the total areas they serve. Although a television station is assigned to a principal city, the Commission has held that it is responsible for providing public service to the entire area covered by its signal—an area in which it claims to be the "local station." Since the broadcaster's only saleable commodity is time on one channel, he is faced with a dilemma in allocating time for public service use, sufficient to serve his area, while retaining most of his broadcast time to serve his commercial interests.

In looking at a few typical markets in the country some interesting problems present themselves. For example, the broadcaster in Joplin, Missouri, KODE–TV, Channel 12, in addition to the city of Joplin, covers all or part of thirteen Missouri counties, all or part of six Kansas counties, all or part of five Oklahoma counties, and all or part of two Arkansas counties—a total of twenty-six counties or portions thereof in four different states. In addition to the city of assignment, Joplin, there are numerous other sizable communities within this twenty-six county area. The station faces an insurmountable problem in attempting to provide local public service for such an area.

Television station WHBQ, Channel 13, Memphis, Tennessee, covers all or parts of twelve Tennessee counties, all or part of thirteen Mississippi counties, all or part of ten Arkansas counties, and parts of two Missouri counties. Again, an example of a major market television station which has within its coverage area parts of four different states and a total of thirty-seven different counties.

We have observed that in such cases the typical pattern is for the broadcaster to give some attention to providing for the public service needs of his city of assignment, which, of course, he imposes on the rest of the communities in his vast service area. For the balance of his coverage area the broadcaster typically adopts an area concept and provides public service programming or spot announcements to serve those areas beyond his principal city—in a general way only, if at all.

Turning now to another field of endeavor, most stations make an effort to keep their audiences advised of the progress of election campaigns, and particularly on election night strive to keep their audience abreast of the trends established by the returns as they are tabulated at their election headquarters. Again, it is convenient for the station to cover its city of assignment, but quite inconvenient to cover in detail the outcome of elections in the surrounding areas. Insofar as returns from outlying areas affect major races of statewide or regional interests, an effort is made by statewide news services to provide this information, and in some cases station personnel are assigned to other areas to gather this information. However, for offices of local interest only, such as City Council, Assemblymen, Mayors and other elected local officials, information is not usually available until the next day, and quite often only in the newspaper.

Again, this is pointed out not to chastise the broadcaster, but to call attention to the fact that the area in which he is assigned a specific responsibility to serve the public interest is in many instances too vast for a single broadcast organization to cover.

In the case of the Memphis station and others which serve portions of four or more states, a considerable inconvenience to its audience is involved whenever a candidate for any office, short of the office of President or Vice President, is afforded time on the station. Residents of four states are involved in the coverage area of the Memphis station. In three of the four states the residents have no opportunity to vote for a candidate appearing on the station, and little interest in hearing what he has to say with respect to a campaign in another state. If time is made available for candidates from states other than the state in which the station is located, the station is imposing its commercial opportunity on residents of its city of assignment even though the political race involved has no interest to the people of that community.

IV

The CATV industry, as it is being rebuilt into 12-channel systems, has the capacity, the channel availability, the integrated area coverage, and the desire to perform this great public service that the broadcaster cannot perform. Almost 150 systems presently originate programs of some type. We are not and will not be competing with the broadcaster for this programming. It would appear that he actually wants very little of it. With some notable exceptions, the television programs of a local nature are largely kiddie shows, news, weather and sports. Non-local shows are usually provided by the networks. They are the best that they can devise for the entertainment and information of the public. But these programs do not satisfy the public need for local live public service programs in the various communities in the United States, be they rural or metropolitan.

Nevertheless, your opponents do not want YOU to serve that very interest which they do not and cannot serve. They do not want YOU to cablecast the proceedings of the local City Council. They do not want YOU to cablecast the discussion of public issues. They do not want YOU to cablecast the local public service programs. Why? Because they do not want even a small portion of the public to be drawn away from their commercial programs. They call it fractionalization of audience. I call it freedom of the public to choose without let or hindrance from the government.

Our industry was born in public service. This industry will be reborn because of an even greater need for its public service programs. Originations of local, live, public service programming is our responsibility. It is a responsibility that we must discharge. How can service of this type to the public be denied?

I urge each of you, if it is at all technically and economically feasible, to immediately institute on one channel of your systems programs designed to serve the needs, desires and interests of the community of which you are a part. Some of your franchises, in fact, require you to originate programming. Why? Because the local communities, the grass roots of the United States want to see and hear their local talent and other matters of purely local interest. This is a public service. This will be costly. This will not be immediately profitable, but it is essential in carrying out the public service responsibility of the community antenna television industry. When this has been done, you will gain a place in the good will of your subscribers that ALL of the adverse propaganda of the detractors of CATV cannot dislodge.

Let us unite to fight the encroachment of H.R. 13286 on the constitutional rights of the American people to see and hear a diversity of programs. Let us fight in the communities, in the states, in the Congress, before the Commission, in the courts. Let us fight to fully serve this area of public interest so long underserved. The interests that would prohibit you from communicating with the public, that would build a fence around themselves so that they alone can reach the public, must be opposed with all of the vigor that this industry possesses. And I am sure that if we bring to bear the full forces of our efforts, we will be successful in defeating the imposition of this crippling legislation and of these restrictive rules on our industry.

Let us continue our service to the public as master antennas for the improvement of the reception of television signals by the public. Let us also assume

our public service responsibility to the communities in which we operate to the end that the hopes and dreams of the framers of our broadcast system, as an instrument for public service, will be realized through our cable systems in a way which has not and cannot be achieved by a television frequency system alone.

Thank you.

(The following was subsequently received and by order of the Chairman printed at this place in the record:)

ADDITIONAL STATEMENT OF FREDERICK W. FORD, PRESIDENT, NATIONAL COMMUNITY TELEVISION ASSOCIATION, INC., BEFORE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, SEPTEMBER 6, 1966

In my appearance before this Committee on August 2, 1966, I presented a series of specific proposals which I sincerely believe represent a fair accommodation of the interests of CATV operators, coypright owners, broadcast stations, and the public. I have studied with care the presentations made to this Committee by the other witnesses. I remain convinced that the proposals which I advanced represent a reasonable accommodation of the various interests and at the same time protect the rights of the public to reasonable access to a diversified television fare.

I appreciate the opportunity afforded by the Committee to submit an additional statement, commenting on the views which have been expressed by the other witnesses. The following principal points warrant discussion:

1. Should there be (a) blanket copyright coverage of all CATV systems; or (b) blanket exemption of all CATV systems; or (c) a compromise between these points of view?
2. Should there be a system of compulsory licensing and statutory fees for the importation of distant signals into underserved areas?
3. Should there be any limitation in the copyright law concerning origination of programs by CATV systems?
4. Should there be other conditions imposed on the operation of CATV systems?
5. Should there be legislation protecting the blackout of professional sports as against CATV?

I shall discuss each point in turn.

I

At the hearing, the copyright owners took the position that the present law subjects all CATV operations to full copyright liability and no change should be made in that law. The Department of Justice disagreed. In its opinion, it is very much an open question as to whether the present copyright law subjects any CATV operation to liability for distributing programs received from a broadcast station. In any event, the Department urged that the matter is an appropriate subject for legislative action. It strongly recommended that the copyright law should specifically provide that no CATV operation is subject to the Copyright Act. It based its recommendation on two grounds. First, it showed that copyright liability of CATV operations is not essential to the protection of the legitimate interests of copyright owners. Second, it is of the opinion that if CATV operations are subjected to copyright law liability, serious harmful anti-competitive consequences can result. It is the position of the Department of Justice that the problems which have arisen with respect to CATV operations are communications-related and not copyright-related and should be handled by F.C.C. flexible regulations, uninhibited by copyright liability.

It should be pointed out that the NCTA position has historically coincided with that expressed by the Department of Justice. We have always believed—and still assert—that the present copyright law does not apply to CATV operations. Furthermore, we have heretofore urged that the public interests would best be served by specifically amending the copyright law to spell out the non-applicability of that law to CATV operations so as to remove all doubts on that score. However, in an effort to arrive at an agreed-upon solution, NCTA has come forward with a specific proposal which accommodates both the copyright and communications aspect of CATV operations. NCTA abides by its compromise proposal.

A compromise solution has also been recommended by the Register of Copyrights, the Federal Communications Commission, and representatives of the broadcast industry. There is no agreement on all the details of the compromise, but there is a consensus on the following points:

1. No copyright liability should attach to those operations of CATV which consist of distributing signals from a broadcast station to a community which is located within the normal reception range of the station (i.e. local signals).

2. If a distant signal (i.e. non-local) is imported, some copyright liability should attach. NCTA and the Register of Copyrights believe that if the distant signal is imported into an underserved area, there should be provision for compulsory licensing at a reasonable fee.[1] F.C.C. did not express an opinion on this question, but it is fair to deduce from its regulatory philosophy and from its statements elsewhere that it would favor compulsory licensing in this type of situation. The broadcast representatives did not support the idea of compulsory licensing.

3. If the CATV system imports distant signals into an adequately served area, full copyright liability would attach to the distribution of such distant signals.

4. If the CATV system originates its own programs, full copyright liability would attach to the distribution of such programs. All of the parties support this aspect of the proposal. The broadcast representatives however, would go one step further. They would deprive the CATV operator of the copyright exemption for the carrying of local signals if the CATV system originated any of its own programs. The Register of Copyrights and the F.C.C. would not go that far. They would permit a certain amount of origination by CATV operators but would restrict the type of material which could so be originated.

The Register of Copyrights would limit origination to news and weather. The F.C.C. would go further to permit local live public service type programming. If any other type of programming were originated by the CATV operator, the CATV system would lose its copyright exemption for local signals.

The issue is clearly joined. The copyright interests alone urge a policy of blanket copyright coverage of CATV operations. There is no justification for this position. In the first place, the weight of logic and policy is against this extreme position. Clearly, when a CATV system operates within the Grade B contour of a television station, it is merely performing the function of making it more convenient for the viewers to obtain signals that are dedicated to their use. When the license is granted to a broadcast station, the licensee is required by the Communications Act to serve an area prescribed by the Federal Communications Commission and to make its signal available to all persons residing within that area. No further permission or authority is required by the viewer in order to enjoy that signal. By the same token, when a copyright owner licenses his program to a broadcast station, he knows that by that act of licensing the broadcast station must make the program available to all persons residing within the station's service area.

The conventional way in which a viewer obtains programs is by buying his own set, installing his own antenna, and then enjoying the program. But the viewer may resort to other methods to enjoy his local station. If, instead of buying his set outright, the viewer chose to rent it from a company which agreed to keep it in good condition, there would be no reason in policy or logic why this act should bring into play different copyright consequences from those which obtain when the viewer owns his set outright. Similarly, the viewer might receive his local programs by means of an indoor antenna, a simple outdoor antenna, or a motor-driven rotating antenna. Certainly the copyright owner could not license a program to a broadcast station on the condition that it be available only to those viewers who use non-rotor antennas, etc. The same reasoning is applicable where the viewer chooses to receive the local program by means of a CATV connection rather than installing his own antenna. Why should the viewing of a program by means of a conventional antenna involve only the payment of one royalty whereas the viewing of the same local program by means of a

[1] NCTA concedes that even in an underserved area, the compulsory license would not be operative as against a local station which had been granted exclusive copyrights as against CATV in the underserved market—provided notice of such exclusivity is given to the CATV system. It is not clear what position the Register of Copyrights takes on this issue.

community antenna television connection involves the payment of two royalties? Since a broadcast program is dedicated to all the viewers within the reception area of the station, why should it make any difference to the copyright owner if the viewer does the entire job for himself or chooses to permit someone else to do part of the job?

We have an analogy where newspaper readers are free to buy their daily newspaper on the street or at the newspaper office or of having it delivered to their home. If the reader is willing to pay an extra fee for the convenience of having the newspaper delivered to his home, should persons having copyrighted material in the newspaper be permitted to charge a second copyright fee for that service? No such claim has ever been made, nor could one be sustained. The same considerations of policy and logic are applicable to CATV systems distributing local television signals.

In the second place, there is no need from an economic point of view for providing a separate royalty for the copyright owner when the CATV system distributes local signals. When a copyright owner licenses a program to a station, he bargains for the best price he can obtain from the station. A station's ability to pay for the program depends on circulation. A CATV system which expands the local audience of the television station enhances the station's circulation and hence the ability of the television station to pay a royalty for a copyrighted program.

In the third place, considerations of anti-competitive consequences warrant an exemption from copyright for the CATV distribution of local signals. The Department of Justice has made a strong showing as to the anti-competitive effects which can result from a blanket coverage of CATV operation. There is one aspect, however, that the Department of Justice did not mention which is worth stressing. When CATV systems first started, they were welcomed both by the broadcast stations and by copyright owners. Broadcast stations and copyright owners recognized in CATV systems a method of expanding the audience of stations to the benefit of both the stations and the copyright owners. No suit was filed against these systems, and no point was made that their operation was subject to copyright liability. At this early stage, no objection was made to the activities by CATV operators; if anything, their activities were encouraged, tacitly if not explicitly. But now the copyright owners would like to change the situation. They want to collect royalties from all future CATV operations and to exact penalties for past operations. If their position is sustained, the copyright owners could either force the CATV systems completely out of business or could exact such a high price for a settlement that they could become the virtual controllers of the whole CATV industry. This would be catastrophic for our free enterprise system.

The copyright owners argue that CATV is anticipating problems. They state that they regard CATV as good customers and will be reasonable in their demands. Unfortunately, there can be no fair bargaining between copyright owners and CATV systems. In the case of CATV, we do not have the usual type of situation where there are willing and able buyers on the one hand and willing and able sellers on the other hand. In that type of situation, the buyer is able to protect himself. If the copyright owner demands too high a price for his product, the user can refuse to buy and can go elsewhere. In the case of a CATV operator, however, no such option is available. By F.C.C. requirement he must carry the programs of all local stations; indeed, he would not be performing the function of a CATV system if he failed to do so. What position is he in to bargain with the copyright owner? The copyright owner knows that all he has to do is sit back and wait and the CATV operator must pay whatever price the copyright owner demands. The CATV operator must carry the local signal. He does not choose the signal; he does not decide what programs go over the station. He distributes to his community whatever programs are available on the local stations. If the CATV operator determined not to carry the particular local programs, he would be in violation of the F.C.C. rules and regulations and would not be performing the true function of a CATV system. Therefore, the CATV operator must meet the terms which the copyright owner imposes.

We do not doubt the good faith of the copyright owners in their testimony in stating that they have no intention of charging excessive royalties. We recognize that at the outset it is entirely possible that the copyright owners would make modest demands for copyright licenses. However, copyright owners are normal business people. As time goes on, there is every incentive on their

part to maximize profits. Once CATV systems have been built and in operation, there is nothing to prevent the copyright owners from exacting whatever price they can obtain. The exigencies of the market place will drive their prices higher and higher. With such a weapon, domination of the CATV industry by copyright owners is inevitable.

The conclusion is clear. The extreme measure urged by the copyright owners—blanket applicability of copyright to CATV operations—is unsound, unworkable and unfair. As a minimum matter, there must be an exemption for those CATV operations which consist of distributing local television signals.

II

Under the compromise solution recommended by NCTA, CATV operations will have no copyright exemptions beyond the function of CATV in distributing local signals. All parties except the Department of Justice are in agreement on this point. There is, however, a difference of opinion as to how the copyrights are to be administered. Two different type situations must be considered.[2] First is the situation where the CATV system imports distant signals into communities that are adequately served. Here, NCTA agrees that the CATV operator should bargain for copyright in the same way as the broadcaster. Again, all the parties except the Department of Justice subscribe to this point of view.

Secondly, is the situation where distant signals are imported into a market that is underserved. In that type of situation, it is the position of NCTA, the Register of Copyrights, and presumably the F.C.C. that there should be a compulsory license. The copyright owners and representatives of the broadcast industry object to compulsory licensing.

The need for a system of compulsory licensing is compelling. In underserved areas, the CATV operator concededly performs a vital function by importing distant signals. Public policy requires that he be enabled to carry out this function. From what has previously been said, it is obvious that a CATV operator is not in the same position as the ordinary user of copyright material in being able to bargain with the copyright owners. In a normal type of situation—e.g. when a broadcast station is involved—the user does its own scheduling and is in a position to pick and choose the programs it will produce. If a copyright owner demands an excessive royalty, the user can refuse to produce that particular program.

The CATV operator has no such alternative. He does not schedule the programs which his system distributes. He does not book the programs which are broadcast by the stations carried over his system. The CATV operator merely distributes the programs which he receives from the station. He has no first-hand information as to who the copyright owners are or when the material is scheduled to appear. As a practical matter, the CATV operator is in no position to resist the demands of the copyright owners if he must deal with them directly. The function of a CATV system is to furnish subscribers on a regular basis the programs of television stations. Hence he cannot stay in business if he is required to delete a substantial number of programs of the stations carried on his system. If that should happen, he would no longer be performing a true CATV service. A system of compulsory licensing is, therefore, necessary if the CATV systems are to be enabled to perform their functions.

Even with a system of compulsory licensing, there remains the question as to how the fee is to be determined. Normal bargaining conditions cannot work here. NCTA urges that a statutory, defined fee is the only feasible solution.

Copyright owners are reluctant to agree to a statutory fee. They point to the experience of the 1909 Act, where a two-cent statutory fee was provided for use of records. Events have long since outstripped the two-cent royalty. NCTA recognizes the inequity of the type of fixed statutory fee set forth in the 1909 Act. It has two recommendations for dealing with this problem. In the first place, the statutory fee recommended by NCTA is not a flat sum, but is a percentage of gross revenues resulting from CATV operations and are payable to the copyright owners whose programs are broadcast over the distant signals imported by the CATV system into an underserved area. As the CATV industry expands and its receipts increase, so will the revenues of copyright owners. This feature, therefore, has an element of growth automatically built into it. Sec-

[2] A third situation relates to the origination of programs by CATV systems. This is being treated separately under III.

ondly, NCTA suggests a procedure whereby the percentage figure can be adjusted every five years. In order to accomplish this objective, NCTA recommends that Congress by statute provide that every five years the Register of Copyrights should appoint a panel of three experts for the purpose of considering revisions in the percentages paid by CATV operators under compulsory license. In making his appointments, the Register would be required to select one member from a group nominated by the copyright owners, a second from a group nominated by CATV operators, and the third would be a representative of the public designated by the Register of Copyrights. This group would receive expert evidence and would then render a final decision setting the percentage rates for the following five years, subject to appropriate judicial review limited to the questions whether the decision is supported by substantiated evidence.

III

A great deal of controversy has centered around the subject of CATV origination of its own programs. NCTA has always conceded that this phase of its activities should be fully subject to copyright liability in exactly the same manner as a broadcaster. On this point there is complete agreement between the CATV industry and the copyright owners.

Representatives of the broadcast industry, however, are reluctant to have CATV systems originate programs. They urge that if a CATV system does originate its own program, it should lose its copyright exemption involved in the distribution of local programs. The Register of Copyrights does not go this far. He recommends that CATV be permitted to originate news and weather type of programs. Apparently, he would recommend that if CATV originated other types of programs, the CATV system should lose its exemption for carrying local signals.

NCTA vigorously opposes this suggestion. It believes that the public interest is served by having a maximum number of entities providing program service to the public. It sees no reason why CATV systems should be precluded from being a source for such programs.

The carrying of such programs is certainly not unfair to the copyright owners. The copyright owners should be anxious for CATV systems to originate programs because this would be an additional source of income for them. It is difficult to see what public purpose would be served by depriving copyright owners of the opportunity of selling their programs for local origination by CATV systems. In any event, NCTA urges that the question as to whether CATV systems should be permitted to originate local programs is a communications matter and has nothing to do with the copyright law. It is difficult to see what sense there is from a copyright point of view in telling the copyright owner that he is not entitled to a royalty from a CATV system which is distributing local signals, but then turning around and awarding royalties to the copyright owner if the CATV system deigns to originate its own programs. This is using the copyright law not for the purpose of providing an incentive for authors, but for punitive purposes or to further other policies of a non-copyright nature. By analogy, no one would contend that Congress, for example, should provide that a CATV system would lose its exemption for carrying a local signal if it engaged in unfair labor practices. In that case everyone would agree that the remedy against unfair labor practices should be the subject of proceedings before the appropriate labor relations agency. No one would argue that the copyright law should be a weapon to help administer labor relations policy. By the same token the copyright law should not be utilized as a punitive weapon, or as a means of protecting broadcast stations against competition.

The broadcast representatives, however, argue that there is an element of unfairness to them in permitting CATV systems to obtain revenue from the carrying of their local signals and then proceeding to compete with the broadcast stations by originating programs. This argument should be rejected for two reasons. In the first place, if there is any such communications policy involved, it should be the subject of legislation in communications law and not in copyright law. Secondly, upon analysis, there is no element of unfairness to the broadcaster. When a CATV operator distributes local signals over his CATV system, he is merely enabling the television station to do the job that he is required by law to do. This activity helps the local station and does not hurt it. Why, therefore, should this activity be penalized if the CATV system decides to go into the added activity of furnishing programs to viewers. When the CATV system does this job, it competes for programs in exactly the same way as does

a broadcast station. The broadcast station is not entitled to protection against competition.

NCTA admits that when a CATV system distributes local signals, it obtains revenue thereby. But it does not do this at the expense of a local station. It is performing a service for customers that they themselves are capable of doing for themselves. If they pay a CATV operator to perform this function, it is because they believe that it is in their interest to do so. Both their interests and those of the local television station are advanced by the distribution of the local signals over CATV systems. The broadcaster is no more entitled to be protected against CATV systems competing with them for audience by means of programs distributed over the CATV wire than it would be if the CATV system utilized revenues obtained from its operation in building a local motion picture theatre which might divert audience from the broadcast station.

The argument of the broadcast industry is analogous to the situation that could arise if television networks were to insist that the local affiliated stations should not be permitted to originate their own local programs. No one can doubt that when a network furnishes programs to an affiliated station, it enables that station to build an audience not only for the network programs but also for the sale of spot announcements, syndicated programs and local programs. The broadcast of syndicated programs and local programs by the network's affiliate is competitive with the network and diverts audience therefrom. The ability of the station to program high quality syndicated programs and local programs depends in large part upon its network affiliation. No serious argument could be made that public policy would be served by the networks conditioning their affiliation with the local station upon the local station refraining from carrying syndicated programs and local programs. The network is not entitled to this type of protection. Neither are broadcast stations entitled to protection against CATV systems originating their own programs.

IV

CBS in its statement has recommended that the copyright exemption for the carrying of local programs by CATV should be subject to six conditions. Each one will be discussed in turn.

The first condition is that a CATV system should be required to carry during its hours of operation and subject to applicable F.C.C. regulations the entire schedule of the station whose broadcasts it retransmits. NCTA agrees with this recommendation in principle. When a CATV system has sufficient channel capacity to carry all desired stations, it should carry the programming of the stations in their entirety subject of course to applicable governmental regulations. There are, however, situations where existing CATV systems have limited channel capacity and therefore are unable to accommodate all desired stations. Moreover, in many areas, there are so many Grade B signals available that they exceed the channel capacity of even broad band systems. Finally, government regulations require the blackout of certain programs. When any of these situations exist, a CATV system should have the privilege, subject to applicable regulations, to carry programs of stations not regularly distributed over the system in order to avoid blacked out channels or to promote diversity by eliminating duplication.

The second condition is that CATV systems should not be permitted to originate local programming. This point has already been commented upon at length under III.

Third, CBS recommends that the limits of the normal coverage area in which the copyright exemption would apply should be capable of being determined with precision by reference to a map or chart showing such area. NCTA agrees with this recommendation. However, it believes that this matter should be left for administrative determination by the agency entrusted with administering the exemption.

The fourth condition is that CATV systems should not be permitted to make any separate or direct charge for a particular program. This is obviously an attempt to prevent CATV from being utilized for pay television purposes. NCTA does not agree that this is an appropriate subject for inclusion in a copyright statute. The whole subject of pay-TV is pending before the F.C.C. and before the appropriate legislative committees with supervisory jurisdiction over the Commission. No final policy has yet been adopted on that subject. When such a policy is adopted, appropriate consideration will of course be given to what restrictions, if any, should apply to CATV attempting to operate on a pay-TV basis.

The fifth condition is that the transmissions which may be carried by CATV should be limited to those encompassed by the term "broadcasting." What CBS fears is that CATV systems might intercept and carry on the CATV system signals sent from a communications satellite to an earth station for relay to and transmission by regular commercial television station. NCTA does not believe that this condition is necessary. Under Section 605 of the Communications Act, a CATV system would not be permitted to intercept such signals any more than it could signals sent by one AT&T microwave station to another microwave relay station for network purposes.[3]

The sixth condition is that the copyright exemption should extend only to retransmission to private homes and apartments and to private guest rooms of hotels and similar public establishments. It is the CBS position that any other changes in the provisions of existing law concerning the treatment of hotels and public establishments should wait enactment of legislation providing for a general revision of the copyright law. NCTA had no objection to this recommendation.

V

The professional sports interests in their appearance before the Committee have objected to the CATV importation of distant signals in violation of the blackout of the program in that market so far as conventional broadcasting is concerned. NCTA admits that the complaint has some merit, but it does not believe that the solution lies in the copyright law. The same subject matter came up during the hearings before the House Commerce Committee in connection with suggested amendments to the Communications Act. NCTA did not object to the provisions of that legislation which would protect the blackout privileges which have been granted to professional sports. Moreover, although NCTA has not taken a formal position with respect to sports, it is expected to cooperate and not object to provisions consistent with present law in appropriate legislation.

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[3] Some reference was made during the hearing to the situation that might obtain if and when satellites are utilized for broadcasting as distinguished from relaying. If and when that happens, the signals so broadcast would be available to all people of the United States. The CATV system, if it distributed such signals would simply be doing for the viewer what he could do for himself. It would be performing a true CATV function of making signals available to viewers in the area of normal reception of the station. The company broadcasting by means of a satellite would have to obtain a license from copyright owners based upon coverage of the entire country. The networks at the present time obtain such a license, and when the program is retransmitted by the affiliated station, no separate royalty is paid. The royalty which the networks pay cover coverage of the entire country. The same situation would exist if a broadcast satellite were utilized rather than land based stations.

COPYRIGHT LAW REVISION—CATV

WEDNESDAY, AUGUST 3, 1966

U.S. SENATE,
SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room 1318, New Senate Office Building, Senator Quentin N. Burdick, presiding.

Present: Senators Burdick (presiding), and Hart.

Also present: Thomas C. Brennan, chief counsel; Edd N. Williams, Jr., assistant counsel; Stephen G. Haaser, chief clerk, Subcommittee on Patents, Trademarks, and Copyrights; and George S. Green, professional staff member, full committee.

Senator BURDICK. The committee will come to order.

The first witness this morning will be Mr. Douglas A. Anello, National Association of Broadcasters.

STATEMENT OF DOUGLAS A. ANELLO, GENERAL COUNSEL, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. ANELLO. Mr. Chairman, members of the committee, my name is Douglas A. Anello, and I am general counsel of the National Association of Broadcasters, the trade association of the broadcasting industry. The membership of the association consists of 2,215 AM stations, 1,000 FM stations, 488 television stations and the four national radio networks and the three national television networks.

Additionally, I have served on the panel of consultants appointed by the Librarian of Congress to work with the Registrar of Copyrights on the general revision of the copyright law, and am a member of Committee 304 of the American Bar Association charged with the same task. The National Association of Broadcasters is grateful for this opportunity to present its view on S. 1006, as it relates to the copyright implications of community antenna television systems (CATV).

The interest of broadcasters in copyright matters is primarily that of a user. Since a line of court decisions have held a broadcast of a copyrighted work to be a public performance for profit, we have had to bargain for our program material from the very beginning.

The decision of the District Court for the Southern District of New York in *United Artists Television, Inc.* v. *Forthnightly Corporation*, now places CATV in a similar position. We assume, therefore, that one of the purposes of this hearing is the possibility of some form of legislative relief which would exempt CATV systems from copyright liability under certain circumstances.

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I will not burden this committee with a description of CATV operations because these are well known to it. I would like, however, to quote a paragraph from Judge Herlands' decision because I believe this puts the problem in proper perspective.

> Two preliminary observations will place the issues and the record in sharper focus. The term "community antenna," as used by defendant for self-description, is a misnomer and reflects a fundamental misconception. Defendant's two systems are not "community" ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures. Nor are defendant's operations simply that of passive "antennas" used only to receive telecasts. In fact, defendant's two systems, among other processes, receive, electronically reproduce and amplify, relay, transmit, and distribute television programs—operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas.

CATV started as an auxiliary "fill-in" device designed to bring television into communities which could not receive it off the air either because the communities were too distant from television broadcast stations or because terrain made reception difficult or impossible. In this respect, CATV fulfilled an important function as a supplement to free broadcasting. As Judge Herlands' decision has indicated, however, this picture has changed radically.

Today, through the use of microwave relay facilities, CATV is capable of bringing multiple television and radio signals from large metropolitan centers over vast distances to practically any city in the United States, large or small. There are approximately 1,600 CATV systems currently in operation, 1,400 franchises granted but not yet in operation, applications pending for some 2,600 more. Many of these are located in major cities where multiple television services already exist. Involved are investments of hundreds of millions of dollars. Indeed, persons familiar with the CATV industry state that in the not too distant future every American city will be wired for CATV. It is little wonder that many no longer think of CATV in its traditional role of a supplement to free broadcasting, but as a substitute for it.

It is apparent, therefore, that if any balancing of interests is forthcoming, it should take cognizance of the fact that broadcasters pay performance rights and unless there is compelling logic to the contrary, CATV systems who not only perform a function similar to broadcasting, but are actually in competition with it should be equally liable. Nevertheless, because the first concern of broadcasters must always be the public interest, we are desirous of seeking a fair resolution of the interests of CATV operators, copyright owners, and broadcasters.

Before getting to the merits, however, I would like to state that we do not subscribe to the belief expressed by the National Community Television Association that affirmation of the *Herlands* decision would result in literal chaos in the CATV industry with a consequent substantial and unwarranted disruption of the television viewing of millions of Americans, including principally those who have the least and poorest television service. To us, such a belief presupposes that copyright proprietors will be arbitrary and unreasonable in their dealings with CATV operators. There is nothing to indicate copy-

right fees will be any more of a problem to CATV than they are in TV and radio. Broadcasters have learned to live with them, so can CATV.

Turning now to the possibility of some legislative relief for CATV systems.

At the outset, it should be kept in mind that our free system of TV broadcasting depends, to a large extent, upon exclusivity of program rights. Size of audience and the amount of revenue that can be obtained from advertisers are directly related to the ability of the station to obtain exclusive rights in the area it serves. A program that has been shown will, of necessity, draw a smaller audience than when its showing in the area is unique or exclusive. Hence, we find first runs broadcast during the prime evening hours and reruns at times when there is a smaller potential audience and the rates to advertisers are less. Accordingly, any discussion of possible legislative relief from copyright liability for CATV systems must be predicated upon the maintenance of program exclusivity for broadcasting both as a concept and as a reality.

It is for this reason that we do not favor the principle of compulsory license. The usual business practice is for a film producer or syndicator to grant a TV station the exclusive rights to a program series in the station's market. If a producer sells a package to a station in Philadelphia neither he nor the station wants a prior showing of the same pictures by means of a CATV system bringing them in from a New York station. Exhibition in Philadelphia under these circumstances diminishes the value of what the station has bargained and paid for. To permit a CATV system upon payment of a nominal fee to retransmit a program broadcast by one station into an area served by another station that has the right to broadcast the same program would effectively preclude the possibility of exclusive licenses. This would have a serious impact upon the local station.

In this connection, Mr. Chairman, I would like to advert briefly to the testimony of Mr. Ford. As I read page 10, he would permit a CATV station located in Philadelphia to pick up a program in New York upon payment of a nominal license fee. We believe this would be basically unfair to the Philadelphia TV station who has had to negotiate his copyright fees over the bargaining table.

Nor would the nonduplication rules of the FCC materially affect the situation. As this committee is aware, the Commission's rules in effect provide that a CATV system may not duplicate any program broadcast by a local station on the same day it is broadcast by the station. Since, except for programs originated at the network level, it would be sheer coincidence to have two stations broadcast the same feature film on the same day, it is readily apparent that protection from this source is minimal.

Thus, we believe it is essential that any law that may be enacted preserves the principle of market exclusivity.

Another suggestion made is for a blanket exemption from copyright liability for CATV systems retransmitting signals within a station's normal coverage area. This would ordinarily be the grade B contour. The theory behind this suggestion is that the station has already paid the copyright owner for a license and there shouldn't be two tickets for one performance. On the surface this sounds plausible and may work

in certain cases; that is, where the CATV system receives only grade B signals. In this case, since all signals received are of equal priority, none is entitled to exclusivity.

There are many areas of the country, however, where a substantial number of grade B signals overlap the grade A contours of TV stations in another community. (Baltimore-Washington; Boston-Providence; Chicago-Milwaukee; Cincinnati-Dayton; Los Angeles-San Diego, just to name a few.) If a CATV system may import a program from one community into another, free of copyright liability or upon the payment of a compulsory license, the program supplier cannot give the station an effective exclusive license.

It is our belief that the most equitable resolution revolves around a system of signal priorities and the principle of program exclusivity. We believe the grant to a station of the exclusive right to broadcast a particular program should carry with it protection against the importation of that program from a more distant station by any system of retransmission, be it CATV, translators or boosters.

Exclusive licenses are in the public interest. They are of value to both the copyright owner and the licensee, hence they stimulate the creation of new works and thus foster and promote the progress of the arts. This is a basic purpose of copyright protection.

Accordingly, the integrity of the license granted to a station by the copyright owners should be protected. The exclusive right to broadcast a work should carry with it the right to permit the retransmission of that work by a CATV system located within the station's grade A contour and to prevent the importation of that work from a more distant station.

Such a solution would protect both the copyright owner and the person holding the exclusive license. It would not, in our opinion, be detrimental to the CATV system since those programs for which the local station had contracts could be carried by receipt of the signal of the local station and those for which it did not have the rights could be imported by the CATV system through negotiations with the copyright owner.

To facilitate implementation of this plan, we would anticipate that the local station would furnish the CATV operator with the titles of all motion pictures and network programs to which he has an exclusive license. From these advance schedules then a CATV operator could determine which programs will be broadcast at which time. This will permit him to obtain necessary clearances.

It has been suggested that it would be difficult for CATV systems to afford this type of program protection because they have no control over the broadcasts they retransmit. This is not so. A CATV operator does control the programs he will or will not carry since he has the technical capability of cutting off any particular program on any particular channel at any particular time. This technical capability is required if he is to comply with the Commission's nonduplication rules.

Finally, we believe any copyright exemption should be limited to those CATV systems whose service consists solely of the receipt and simultaneous retransmission of broadcasts without insertions or deletions, except as necessary to comply with the nonduplication requirements of the Commission. A CATV system derives its revenues from

the taking of free TV signals out of the air and retransmitting them to subscribers for a fee. It would be most unfair to give CATV an exemption from copyright liability for these free signals and permit them to originate programing on its own even though it would seek to pay for this privilege. The combination of pay and free would soon undermine the entire structure of our free broadcast system.

Mr. Chairman, in this connection, I would like to amplify this caveat against program originations to include the type of application that is now pending before the Federal Communications Commission. This is an application for a microwave system which would serve only CATV systems in the Texas, Arkansas, and Oklahoma area. It would originate programing in Dallas, and these programs would be transmitted by a cable and microwave to various CATV systems located in the southwestern portion of the country.

This is a type of program origination which could soon be as harmful as any other type. We would include in our caveat that any relief from copyright liability be limited to those systems that receive and retransmit only programs which are picked up off the air and fed simultaneously into its distribution system.

Thank you, Mr. Chairman.

I would like also to speak a moment to two of Mr. Ford's proposals of yesterday. In No. 2, he spoke of underserved areas. These are those with less than four grade A's. We have run a check, Mr. Chairman, and this would include 210 television markets on the basis that there are currently in existence 243 television markets. If you took out of that figure those with four or more grade A signals, you would have left over 200 television markets.

Now, in these areas, which represent a considerable portion of the country, Mr. Ford would permit a compulsory license except where a station has exclusivity, in which case a full fee. But if the program is not available in the area, then he would get a compulsory license.

I would suggest that this places an unfair burden on, for example, a UHF station that may wish to come into that market. If a UHF station has to pay full copyright fees in one of these underserved markets, I fail to see the logic for any special privilege by a CATV system that wants to bring the same program in from a distant station.

With respect to adequately served areas, which in Mr. Ford's proposal No. 3, there he would pay a compulsory license in all cases, if the program is already there, full fee if the program is not available. Thus, the only time the NCTA would honor exclusivity would be in an underserved market. It would not honor the exclusivity of program contracts in markets, for example, such as Philadelphia or New York, or Baltimore, or Washington. That is one of the problems we have with Mr. Ford's proposal, among others.

Thank you, sir.

Senator BURDICK. The committee appreciates your appearance this morning, Mr. Anello. The chairman personally appreciates it, having worked with you prior to coming to Congress in matters affecting the television industry.

This is a complex question, as you know.

Mr. ANELLO. Almost as much as the one we resolved many years ago.

Senator BURDICK. There is an area, then, that you agree should perhaps be exempt. Would you define it again?

Mr. ANELLO. Yes, sir. The area that we would exempt would be where there is a station and a CATV system located in the same community, or in the grade A contour of that station. If under the rules of the Commission, the CATV system must carry the signals of that television station, we would say, then, that the two are so closely tied together that a CATV system operating within the grade A contour of a television station should not be forced to pay copyright fees for those programs it picks up from the local station.

Or another case for statutory exemption might include those areas of the country where there are only grade B signals. Under the Commission's rules, none of these are entitled to any priorities over the other. All, then, are theoretically receivable by any CATV system within those grade B contours. In those situations a similar logic would prevail. We would support the principle of no additional copyright payment for those systems that are located solely within the grade B contours and do not carry grade A or distant signals.

Senator BURDICK. How would you contrast that view with Mr. Ford's proposal No. 1?

Mr. ANELLO. It is comparable to Mr. Ford's. I do not have too much quarrel with Mr. Ford's No. 1 proposal, except that as I read Mr. Ford's proposal, he would mix grade A's and B's. In other words, if there are A and B signals, he would feel at liberty to carry the programs of both grade A and grade B without payment of copyright fees.

Our difference with him is that the grade A is entitled to a greater priority. The Commission recognizes this. Hence we would not want the grade B signal bringing the same program into the grade A contour.

For example, let us take Washington and Baltimore. Let us assume a CATV system located in the city of Washington. Under Mr. Ford's proposal, forgetting the top 100 market rule of the Commission, under Mr. Ford's proposal, the CATV system in Washington could import the same program from Baltimore that the television station in Washington has under exclusive contract, on the theory that it is already receivable. This, in our opinion, would destroy the value of that product to the local station because, as I indicated, if the Baltimore station broadcasts a feature film 24 hours in advance of the time it is to be broadcast by the Washingon station, there would be no protection whatsoever to the Washington station. This would, in the long run, have a very serious effect upon the local station's ability to sell this program which in turn would affect his ability to operate in the overall public interest. That is our basic difference with Mr. Ford's No. 1 proposal.

Senator BURDICK. In other words, except for this overlapping arrangement, you are pretty much in agreement?

Mr. ANELLO. Yes, sir.

Senator BURDICK. Mr. Ford testified yesterday substantially, or to the effect that if the exemption is not granted, it could greatly affect their operations and they might go out of business. If that were true, are there any plans in the broadcasting industry to take care of these islands where the reception is poor?

Mr. ANELLO. Oh, yes, sir. Unfortunately, CATV has come along a little too fast. I think that in a few years there would have been very

few islands, very few areas in the country that do not receive the full network services of all three networks, and if we have a fourth network, the four network services. This would have been accomplished through the use of translators and an expanding UHF service.

Today the Commission will permit translators to use 100 watts of power across the board. Previously they were much more limited. This will make much more extended coverage possible.

We can anticipate that the Commission would also permit the microwaving of programs to translators, just as they permit the microwaving of programs to CATV systems. For the life of me, I have never been able to see the Commission's logic which tells a CATV system, "You may relay programs by microwave," but tells the translator, "You may not relay the same programs by microwave to a translator." This just does not make sense.

Secondly, UHF is just now starting to come into its own. We estimate that by 1970 there will be close to 300 UHF stations on the air. The all-channel legislation passed by the Congress has stimulated the growth of UHF. I believe that in a few years the vast majority of receivers will be UHF equipped.

Now, with these receivers in the hands of the public, people will be more interested in risking capital in some of these underserved areas. I do believe that while there will probably be an island or two, they will not be of any substantial nature.

More important, sir, is the fact that I do not anticipate the chaos that Mr. Ford anticipates if the CATV systems have to pay for what they have been getting free. I guess it is just the thought of having to pay for something that you once received free that becomes a little appalling. But I am sure that the NCTA people are resourceful and they will be able to survive any requirement that they have to pay for what they use. I think this is a normal business way of life.

Senator BURDICK. Do you not think some consideration ought to be given to people who spend large sums of money in providing cables and expensive transmission systems to fill in these voids when no one else at that time was going to?

Mr. ANELLO. Certainly, sir; but they are not eleemosynary institutions. They are doing this at roughly $6 a month, and you get a cable system of 12 to 1,500 subscribers, that is $750,000 to $90,000 a month. I think you can make a pretty good living on that and pay a nominal copyright fee to boot.

These people are good businessmen. It is an excellent business and more and more broadcasters are getting into it because it is such an excellent business.

They perform a public service just like the broadcasters. The broadcaster is in business to make money so that he can serve the public; so is CATV. I just do not see where they should have any more consideration than the broadcaster; that is all.

Senator BURDICK. The only thing is, apparently, the broadcasting stations did not cover their normal range, because they have these holes and these pockets in places where there is poor reception. These people stepped in and piped in some good reception. There must have been a reason for it, because people are paying for it.

Mr. ANELLO. That is right, sir, and we have no quarrel with 95 percent of the CATV systems as they exist today. That is true community

antenna; as for example, where they bring in a signal to an underserved area or where there are poor signals or possibly no service at all. But we are not talking about that kind of CATV today. We are talking about New York, Philadelphia, Baltimore, Toledo, Cleveland, Detroit, Cincinnati, Dayton, Fresno, Los Angeles, San Diego. Nobody can say that these are underserved areas. There is a plethora of television signals there.

Senator BURDICK. Apparently, it is not the television signals; it is those special isolated locations behind buildings and things of that nature, I understand.

Mr. ANELLO. Well, that is partially true. In New York, there is not any question but that reception, direct reception, is poor because of the canyons. Again, this is a true CATV system, and the city of New York limits the franchise to New York signals. I do not think they ought to pay any copyright fees.

However, sir, there is this consideration. Let us assume now that Tele Prompter—I think they have one of the franchises—or Sterling, whatever it might be, wires up 500,000 homes and apartments at $6 a month. That is $3 million a month, $36 million a year. What is to prevent them, then, from starting to originate programing and having pay television systems built up upon the strength of these free broadcast signals? That is why we believe that when a person uses free broadcast signals, he should be limited to that usage.

Senator BURDICK. I want you to elaborate a little bit more on this secondary point you touched upon. I think it applies to the wide open spaces where I come from. Would you provide some exemptions in the areas that cannot presently be reached?

Mr. ANELLO. I just cannot see the logic for exempting a CATV system from copyright liability when it imports a signal into a community where there is little or no service. If a UHF station went into that area, he would pay copyright fees. If a CATV system goes into that area and brings in a signal outside of the grade B contour, why should he not pay a copyright fee?

Senator BURDICK. I am referring to some areas up along the Canadian border, where they receive very poor or no reception even yet. There is no UHF in the country either, and this just kicks it over to those people. Do you think there should be copyright fees paid there?

Mr. ANELLO. Yes, sir. They are making money out of somebody else's property and I do not see why they should not pay for it.

Senator BURDICK. What about the public interest? If they are not there, why should not they receive service?

Mr. ANELLO. Does public interest dictate that you use somebody else's property? I do not think so.

Senator BURDICK. Should those people go without service?

Mr. ANELLO. No; they should not and will not. My point is, Mr. Chairman, that you can pay copyright fees, provide service, and still make money. That is all. I do not think that the payment of a copyright fee will preclude the establishment of any CATV system. As a matter of fact, one of their leaders, who is also a broadcaster, recently stated that he saw nothing wrong in the payment of copyright fees. Broadcasters have to pay them; so should CATV.

I think the argument that they cannot live with copyright fees presupposes an arbitrary action on the part of the copyright owner. If this takes place then that would be the time for the Government to step in either on antitrust or conspiracy, or some other ground, and seek to alleviate the situation. But to give a blanket exemption merely because somebody does not believe that he should have to pay for something, I think, is bad economic philosophy.

Senator BURDICK. If the existing broadcasting stations do not extend their coverage, and there is no UHF station in the area and the cable company would think it is not economically feasible to build cables in an area like that, we just go without service?

Mr. ANELLO. No, sir. I would hope that through one of the auxiliary devices, boosters, translators, or satellite—by satellite, I do not mean the up-in-the-sky satellite. I mean a television satellite—through one of these means, you would have service. I think everybody in the United States is entitled to the national network programing at a very minimum. And I think the time will come when either by translator or satellite for a station in Fargo, for example, to bring all Minneapolis programs up to—what is the town north, Great Falls?

Senator BURDICK. Grand Forks.

Mr. ANELLO. Grand Forks. Fine, I think the Commission is headed this way. I think the Commission could help materially if it would permit the translator or the broadcaster to feed the translator by way of microwave. If the Commission does this, I think it will alleviate conditions in almost 99 percent of these underserved areas. You can build a translator for less than $10,000 and it operates automatically. True, you need one for each channel, but the signal is free. It serves people without pay.

More important, Senator, the CATV system will find it difficult to serve the very areas that you speak of simply because it thrives where the population is fairly dense. A CATV operator cannot afford to string a mile of cable for one customer. Economics preclude it, whether he pays copyright fees or not. But by the use of translators the broadcast signal will get out to all the people, farmers as well as city dwellers. That is why I think translators are the answer to the rural problem. I do not think a translator would be any good in New York. That is where the cable system should be.

Senator BURDICK. I want to thank you for giving us some light on this very complex question.

Mr. ANELLO. I want to say, Mr. Chairman, we thank you and if we can help in any way, we are willing to sit down with anybody to try to iron this thing out. If you ever get to the point where you feel like specific legislation should be drafted; we would be more than glad to cooperate.

Senator BURDICK. Thank you for your offer, and we may use your services again.

Mr. ANELLO. Thank you.

Senator BURDICK. The next witness will be Mr. Ernest W. Jennes on behalf of the Association of Maximum Service Telecasters.

STATEMENT OF ERNEST W. JENNES, ON BEHALF OF ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.

Mr. JENNES. Thank you, Mr. Chairman.

I am Ernest W. Jennes, a member of the law firm of Covington & Burling, Washington, D.C., general counsel to the Association of Maximum Service Telecasters, Inc. (MST). MST's membership includes approximately 150 VHF and UHF, commercial and educational television stations, serving small, medium-sized, and large cities throughout the country.

In accordance with the letter from Chief Counsel Brennan, my testimony will deal principally with the implications of S. 1006 as it bears on the relationship between copyright and the operations of so-called community antenna televisions systems (CATV). There are, however, some matters which cannot be considered solely in relation to CATV but must be considered in the broader context of the application of copyright to television broadcastnig.

It is fair to say that the most basic and serious issues to be faced in considering the relationship between copyright and CATV operations result from recent efforts to make a drastic change in the nature of CATV and to expand this new form of CATV throughout the United States without regard to the size of the communities involved or the extent of the existing and potential—and I do want to stress potential—local and area television broadcast service that is or can be provided to those communities. The impact of these developments on the system of television broadcasting which has been supplied free to the American people can be profoundly serious and adverse.

MST participated actively in the proceedings before the Federal Communications Commission resulting in the issuance of its second report and order which, in turn, established regulations dealing with various facets of CATV within the jurisdiction of the FCC. MST also testified in support of H.R. 13286, the bill to clarify and confirm the power of the FCC to regulate CATV, which was reported favorably by the Committee on Interstate and Foreign Commerce on June 17. However, very important and basic CATV problems fall squarely within the copyright area. The FCC has expressly disclaimed jurisdiction over these problems, and H.R. 13286 does not deal with them either.

It is important to recognize at the outset that television broadcasters require and use enormous quantities of copyrightable materials. This fact becomes dramatically clear when you realize that a single television station will normally operate 6,000 or more hours a year. And with two, three, four, or more television stations operating in a particular market, the hours of programing provided the public become quite astronomical—12,000 to 25,000, and as much as 60,000 a year with 10 stations operating in the market.

For analytical purposes it may be helpful to recognize that the programs required and used by television stations fall into at least four different categories.

The first general category of television programing consists of programs which are locally created and which the station itself owns—for example, local entertainment programs or documentaries. How-

ever, there is an increasing tendency to record these programs for later distribution and sale to other television stations in other markets.

The second general category consists of locally created programs which are owned by others but which are produced by the television station under exclusive territorial licenses; a common example is a play-by-play sports program.

The third category includes recorded non-network programs for which a television station purchases broadcast rights which are almost invariably exclusive as against other television stations in the market for a specified period of time; two principal examples are moving picture feature film released for television broadcast and programs or program series which are produced initially for television and distributed either on a one-time basis or as part of a daily or weekly series that may continue for an entire year or longer.

The fourth category is that of network programs which include not only the programs of the three well-known national networks but also programs of regional networks and of specialized networks; these programs may be either live or recorded and the television station obtains geographical exclusivity both by contract and network practice.

For the present purposes it is essential to recognize that, as to each of the foregoing types of programs, our free system of television broadcasting depends upon exclusivity of television program rights. This is commonly recognized in the case of network programs because network advertisers simply will not pay twice for the same coverage. Since the vast preponderance of national network programing is distributed on a simultaneous or same day basis, these facts of television life are readily apparent.

What I fear is not so readily apparent, although it is just as true, is that exclusivity is critical in the case of programing which is not distributed on a simultaneous or same-day basis. A television station exists by virtue of its capacity to sell advertising. There is a complete interrelationship as among the amount of revenue that can be obtained from advertisers, the size of a station's audience, the ability of the station to obtain that audience, and the programs it has to offer.

Every one of these factors is directly affected by whether the station has exclusive rights to the programs it broadcasts. Every time a program is aired, a large portion of the audience potential in the particular market disappears. In this respect television differs significantly from other media such as motion pictures and the theater.

It seems to us, therefore, that of critical importance among the issues the committee is exploring at this stage is the ability of the television program owner or distributor to provide and of the television station to obtain exclusive rights to expose particular television programs to the public. Without exclusivity, the value of the program and the inducement to produce a program, to distribute it, and to purchase it are lessened, the supply of programs is diminished and the capacity of free television broadcasting to serve the public is impaired. The question, therefore, is—how does CATV affect this situation? The answer to this question is affected by the fact that there is not just one kind of CATV but there are different kinds of CATV.

Numerous CATV systems perform essentially a supplementary function within the normal service areas of television stations. They may do so by improving the quality of service within the outer reaches of the normal coverage area of television stations to members of the public who normally watch those stations and thus receive better reception from the very same television stations which they would otherwise watch. Or a CATV system may be located within the principal cities or communities served by television stations and offer an alternative to individual outside antennas. Or it may place a receiving antenna on a mountain and bring nearby television signals into valleys which are shielded from direct signals. Even this kind of CATV system utilizes elaborate receiving and retransmission facilities and reproduces or performs copyrighted programs for profit. But so long as CATV merely performs the supplementary function of improving the reception of the stations which would be watched in any event under normal circumstances and does not alter normal viewing and market patterns, we do not believe that the application of the copyright laws presents significant practical problems for CATV, for the program producers and distributors or for the television broadcast stations under existing copyright law. Nor should it do so in connection with any revision of the copyright laws.

There is still another type of CATV system whose operations are somewhat different but could also be said to perform essentially a supplemental function. I am referring to the type of CATV system that extends broadcast signals into small communities in remote and thinly populated areas which are beyond the range of any off-the-air broadcast signal and where it is most unlikely that regular television stations will provide service in the future. The copyright implications of this kind of transmission may be somewhat different from that of the "fill-in" type of CATV system, but these small community, remote area CATV systems are performing essentially the same kind of function which is performed by so-called television broadcast translator stations which similary retransmit signals into communities in remote areas, and there has simply been no copyright problem as a practical matter with respect to these translators even though they have been operating for many years.

There is a quite new and entirely different type of CATV which has recently come into being. The so-called CATV copyright problem, in my judgment, really revolves around these CATV systems which we call CATV Unlimited. These CATV systems want to bring multiple outside stations into cities and towns of all sizes throughout the country where reception of local and area broadcast stations is excellent and often where there is every prospect that new television stations will come into being if CATV Unlimited does not make this impossible. Many of these new and newly proposed CATV systems want to import outside stations from great distances—many hundreds of miles or even half the continent. Many other of these CATV systems want to carry relatively closer stations—Indianapolis and Chicago stations into the Fort Wayne or South Bend market, Los Angeles stations into the San Diego market, Cleveland or Chicago stations into the Detroit or Grand Rapids market. There has been an enormous increase in proposals to provide this kind of CATV service and CATV promoters have predicted that they will take over 85 percent of all

television homes in the United States—in virtually every city and town in the country.

I would like to emphasize that when I refer to market, television market, I am not referring just to the particular central community; that is, Fort Wayne or South Bend, Detroit or Grand Rapids, but I am referring to the total television market served by the stations in the central communities.

This type of CATV has capabilities, potentialities, and implications vis-a-vis copyright that simply have nothing to do with the types of CATV systems to which I referred earlier.

CATV of this new type is a threat to the public interest in free, diverse, and competitive local and area television broadcast service. This threat derives from the ability of such a CATV system to import multiple television signals from outside stations into communities which already have multiple local and area television service and which have the potentiality of greater service as UHF develops. It is simply indefensible to suggest that one Little Rock, Ark., station may obtain exclusivity as to the programs it carries against the other Little Rock stations, or one Scranton/Wilkes-Barre station against the other Scranton/Wilkes-Barre stations, or I might say, Mr. Chairman, one Fargo-Grand Forks station against the other two, but that neither one of these will be able to obtain exclusivity against CATV's importation of the very same programs from Los Angeles or New York City by carriage of Los Angeles or New York television stations. The viewing of a program on an imported channel destroys the exclusivity for which the local station has bargained to the damage of the local station, to the damage of the copyright owner and ultimately to the damage of the public in precisely the same way as would be the case if another local station pirated the program and broadcast it locally. When CATV subscribers watch programs imported from outside stations and equalized by elaboratee CATV retransmission devices with local signals, the local viewing audience is fragmented and the local stations are deprived of advertising support whether the importation is from great distances or from other markets which may be located 70 or 50 or even 40 miles away.

Here I would like to emphasize that this entire concept, this interrelated problem, applies not only to existing television stations, but to potential stations. Mr. Brennan, I believe, yesterday asked about multiple musical performances and related this to the interest in a variety of reception channels. But that is the danger of CATV. In city after city throughout the United States, the number of local newspapers has dwindled and dwindled. The number of means of local communication, of dissemination of information, has dwindled. The whole concept of the Commission's policy under its table of allocations and of the Congress of the United States when it passed the all-channel-receiver legislation was to maximize the number of local and area television stations, for two purposes: To have local and area television stations in as many communities throughout the United States as possible and to have as many of these in each community as possible.

So the question is, Mr. Brennan, when you talk about multiple-reception channels or multiple-transmission channels, which way do you want to do it? Do you want to end up in a situation where we

have multiple channels in the sense of 10 or 12 signals emanating out of New York or Los Angeles and Chicago and feeding the entire United States, with very few local and area television stations, or do we want to have copyright concepts which are oriented toward the production and the development of programs and the feeding of such programs to local and area television stations throughout this country so that we can have as many voices throughout this country as possible.

Let me point out also that these new multiple-channel CATV unlimited systems carry vast quantities of program material over as many as 12 channels. Indeed, CATV systems with as many as 20 or 30 or 40 channels are being planned. If these CATV systems were to go out into the marketplace to purchase rights to broadcast materials, the cost to them would be substantial. But these potential giants are being built on the premise that the programs which they transmit should cost them nothing or should cost them some nominal fee while the television stations whose programs they duplicate and whose audiences they increasingly fragment pay huge sums of money to produce or purchase the very same programs.

The Federal Communications Commission has indeed taken several important actions with respect to CATV, but what the Commission has done in no way relates to copyright. The Commission's action relates only to the proper role of CATV under the Federal Communications Act and the all-channel-receiver legislation. The Commission has expressly emphasized that copyright matters fall entirely beyond its jurisdiction, that its actions do not rest on any theory concerning copyright and, indeed, that it in no way is attempting to provide a substitute for copyright.

Accordingly, neither the actions of the Federal Communications Commission with respect to CATV nor the pendency of the bill reported out by the House Committee on Interstate and Foreign Commerce is any substitute for the proper application of copyright to CATV. S. 1006 should clearly provide that transmission of copyrighted television programs is subject to copyright. The decision of the U.S. District Court for the Southern District of New York in *United Artists Television, Inc.* v. *Fortnightly Corp.*, 149 U.S.P.Q. 758 (S.D. N.Y. 1966), a few months ago is wholly consistent with classic copyright concepts. So, too, the application of the revised copyright statute to CATV is wholly justified under classic copyright concepts. CATV takes a given copyrighted work and distributes it to members of the public, to CATV's own financial advantage. Under the 1909 act the Supreme Court held as early as 1917 that a performance was for profit even though no separate charge was made for the particular performance. *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917). In the famous *Jewell-LaSalle Realty Co.* case 15 years later, the Supreme Court, again unanimously, held that "the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests" constituted a public performance for profit. *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).

Moreover, there is still a public performance notwithstanding the guest's ability to select in his hotel room among the signals of more

than one station carried on the system. *SESAC* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937); see also *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129, 135 (E.D. Pa. 1958), *aff'd sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959). CATV is even more clearly a public performance under classic concepts. It not only tunes in on a broadcast station—as did the hotel proprietor in *Jewell-LaSalle*—but it also converts, amplifies and relays the signal over an elaborate system beyond its own premises to places in which, in most cases, the signals would not otherwise be received. These performances are not less public because each viewer sees the performance within the confines of his own home. It has been established law for 40 years that "a performance * * * is no less public because the listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some * * * public place." *Remick & Co.* v. *American Automobile Acc. Co.*, 5 F. 2d 411, 412 (6th Cir. 1925), *cert. den.*, 269 U.S. 556 (1925). I would like to add one quotation to the *Remick* case, which is to be found in the paragraph ending at the top of page 11, where the court said, "Nor can a performance be deemed private because each listener can enjoy it alone in his own room."'

It is imperative, Mr. Chairman, that any copyright bill enacted by the Congress deal with the CATV problem in a clear and unambiguous manner. It is conceivable that the problem of preserving exclusivity as to program material may fall solely within the boundaries of Federal copyright law and that there may be no alternative remedy available should Congress intent be misunderstood by the courts. The difficulties are underscored not only by the preemptive language in section 301 of S. 1006, but by the Supreme Court's recent decisions in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 236 (1964). The U.S. Court of Appeals for the Ninth Circuit, in *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F. 2d 348 (1964), a suit between a CATV system and a local television station serving the same community, read *Sears* and *Compco* as preventing it from protecting the rights of the local station in programs save within the confines of the copyright law.

MST respectfully submits that the new statute must include effective remedies against those CATV operators who would pick up a television station's programs and transmit them into the market area served by another station, irrespective of the second station's right of broadcast exclusivity—a right procured at appreciable cost from the program owner. In other words, the bill must not only assure that a television station can obtain an exclusive license with respect to particular copyrighted programs against other television stations in the same market but must also make clear that the station can in addition bargain for an agreement from the copyright owner against CATV transmission of the same programs in the station's market by carriage of the signals of television stations located in other markets.

We also urge that the bill should clearly apply to live television broadcasts.

Many works of authorship are first disseminated by live television broadcasts. The public can and does perceive a work of authorship. Live telecasts represent as great a contribution to public knowledge,

public information, and public culture as works which are disseminated in printed form or by motion pictures or which are first recorded and then broadcast. Accordingly, works of authorship disseminated by live telecasts should receive copyright protection equivalent to that afforded works of authorship disseminated in tangible form or from tangible copies.

As written, it is uncertain whether the bill affords Federal copyright protection against unauthorized performance or exhibition of a live television work which is simultaneously recorded on video-tape or film. Yet, if the program is taped, the broadcast delayed for a few seconds and then the tape broadcast over the air, the broadcast would clearly be afforded protection under the bill as drafted.

This apparent incongruity exists because it is possible that under the bill an infringement would occur only when the work or authorship is "copied" from a tangible copy. The work must be fixed in a tangible medium of expression under section 102. I think it is. You can touch the television screen. The medium of expression is tangible but fleeting. It does persist. But if there is any question about this and if the incongruity does exist, it would fail to take into account the basic importance of the intangible artistic conception or work of authorship as distinguished from the tangible medium from which it can be perceived. It would contradict the bill's intent to separate "the 'original work' which is the product of the author's creative intellect and which is the real subject of copyright protection and 'copies' or 'phonorecords' (which are the material objects embodying the work)." (Supplemental Report of the Register, committee print, p. 4, 1965.) A work of authorship which is presented live should, at the very least, be fully protected if it becomes fixed in a tangible medium of expression, as required in section 102, concurrently with its transmission. This uncertainty of interpretation is particularly important as to sports programs, which are almost always televised live.

There is another point in this connection, and that is since registration cannot occur until after a live broadcast as a physical matter, an appropriate remedy should be provided to prevent threatened infringement before it occurs. Otherwise, there would be a right under the statute but no remedy provided.

Finally, registration procedures for copyrighting locally produced television programs should be simplified.

Section 407(b) of the bill requires, as a condition of copyright registration for "unpublished works," the deposit of one complete copy of each work. This provision would apply to most programs produced locally by television stations themselves. Such a requirement could be unduly burdensome. The expense to a television station of blank videotape alone—before anything is done with it—is more than $200 per hour. For some stations, depending on their programing, the expense could be very large.

A deposit of the entire program would normally serve no useful purpose. It is not necessary to deposit the entire program in order to identify the copyrighted program. Would not, for example, the telecast of a baseball game be suitably identified by filing a description embodying the date and time, location, teams, and line scores of the game? We thus favor section 407(c) which authorizes the Register of Copyrights to permit particular classes of works to be registered by the deposit of identifying material rather than actual copies.

We would hope that with the passage of the bill and with the inclusion of section 407(c), this would be implemented.

Needless to say, MST appreciates the opportunity to have testified on this important matter and will be happy to cooperate with the subcommittee in any way it can.

Senator BURDICK. Mr. Jennes, I would like to thank you for your contribution this morning. I just have a few questions.

I believe you testified that as far as a community antenna system picking up merely the local signals and within the normal reception range of that local station, you see no problem?

Mr. JENNES. That is right, sir.

Senator BURDICK. You would extend the exemption to that area?

Mr. JENNES. I would answer the question this way, sir. I do not see any real problem today; I do not see a problem that even requires an exemption. The reason why I say that is that I am unaware of any situation of the CATV system which is performing this function which has asked program producers for licenses either at a wholly nominal figure or indeed for permission to retransmit without paying anything and heard of such a request being turned down. I do not think that there is any record of a serious problem that has been presented.

Speaking only in terms of conversations which I have had with people representing program distributors in connection with contracts involving particular broadcast clients, I have never obtained from them any indication of any desire or inclination to, in effect, levy a further charge where the local signal is being carried. And what I am saying is that I do not think it is a serious problem. I agree with Mr. Anello. Mr. Ford painted a rather gory picture, but I do not believe that there is going to be an enormous crackdown, with heavy charges being levied on CATV systems.

At the same time, if, when the committee comes to finalize legislation, although I do not believe there is a serious problem now for CATV under the *United Artists* decision in this type of situation, I do not see, personally, any problem with working out some sort of special treatment for those circumstances if the committee concludes that it is required.

Senator BURDICK. Are you aware of the attitude of the copyright owners?

Mr. JENNES. Well, in the context of the kind of broadcast we are talking about?

Senator BURDICK. Yes.

Mr. JENNES. I suspect there may be a different attitude in two different kinds of situations. I think if we are talking about the CATV system operating in Scranton or Wilkes-Barre and providing a fill-in in a hill there or a CATV system which is operating in Phoenix and carrying only the Phoenix stations, taking into account the size of the system, the potentiality of its revenues and the like, it is very difficult for me to believe that copyright owners are going to be seriously concerned about this.

Mr. Anello this morning gave a rather striking illustration of the CATV system operating in New York. Let's assume that it did nothing but carry the New York signals. With the potentiality of $20 or $30 or $40 million a year in revenues, I could well see the copyright

owners saying, well, up to now we have been bargaining for what we can obtain as a consequence of what the television station can obtain through the sale of advertising. But if to this pot is going to be added another $30, $40, $50 or $60 million a year in a city like New York or in a city like Detroit or a city like Chicago or a city like Los Angeles, I can well see their concern. And I must say that, although from the point of view of the broadcaster, this is not the broadcaster's problem, I think there is something to be said on the side of the copyright owners. This is a personal view, however.

Senator BURDICK. You understand that Mr. Anello, I think inadvertently, admitted the fact that you do not break up those city streets and lay cables for nothing. There is some expense involved, too.

Mr. JENNES. This is true. I do not think anyone gets into any business for nothing. But the extraordinary thing about the CATV business is that it is the only business I know of where the product that is being sold is not paid for.

Senator BURDICK. Would your answer be the same in your second illustration about the areas out of reach of the existing stations?

Mr. JENNES. Yes, my answer would be exactly the same, with one more caveat, however.

If we can hypothesize a situation which is really remote and where the population is thin but there are some relatively small centers of population, communities, of 2,000, 3,000, 4,000, 5,000, 6,000, which will make CATV feasible but where the total population in the area is so thin that it is unlikely there will ever be any development of local and area television stations, my answer would be the same, although I would say, as Mr. Anello says, that the probability is that we are going to have translators and satellites providing service there.

What I am concerned about, what I would think this committee would be very concerned about, is being sure that there is going to be no potentiality for real local and area television stations coming into being.

Senator BURDICK. That leads to my next question.

I was a little bit startled when I saw the figure that you claim the CATV industry is going to try to capture, 85 percent of all the television markets?

Mr. JENNES. Yes, sir. I can supply the quotation for you if you wish. I do not have it here. I think it was Mr. Irving Kahn of Teleprompter, if I am not mistaken, who is one of the foremost CATV people in the country. I have seen other estimates which are in accord.

Senator BURDICK. I can well see the problem if that is the case.

Mr. JENNES. This is why we are concerned.

Senator BURDICK. One more question.

You cast [illegible] another problem, live broadcasts, and suggest the ways by which it might be handled. Now, Mr. Anello in his testimony thought that the CATV operator could be furnished with notice of programs when we have movies and things of that nature which are already prepared. But how would you give notice on a live broadcast?

Mr. JENNES. Well, I think that the kind of live broadcast which I believe would be copyrightable would be the kind of live broadcast as to which it would not be difficult to give sufficient advance notice. For example, the schedules of the baseball clubs and the football clubs are well known in advance and the fact that a station is going to carry

them—it knows. The variety program, the Ed Sullivan type of program, whether it is a network program or a local program, is a regularly scheduled program. If we are talking about, for example, the unexpected program that comes in to carry an on-the-spot coverage of some event of great importance, this does not happen very often and certainly, it could be exempted——

Senator BURDICK. An airplane disaster, for example, with on-the-spot coverage.

Mr. JENNES. I would say an exemption with respect to this would present no problems at all. But that is the tail in relation to the dog and the dog itself is something as to which there is complete and total notice beforehand, well in advance.

Senator BURDICK. Senator Hart, any questions?

Senator Hart is a very valuable member of the committee.

Senator HART. That is not true. I still have not caught up with this problem. I am trying to.

Senator BURDICK. It is still true that you are a valuable member of the committee.

Mr. JENNES. Again, if we can be of any assistance, we will be glad to try.

Senator BURDICK. Thank you for the offer.

(The following was subsequently received and by order of the Chairman printed at this place in the record:)

AMPLIFICATION OF STATEMENT OF ERNEST W. JENNES ON BEHALF OF ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.

I would like to amplify my previous remarks in two respects: (1) to make sure that there is no misunderstanding as to the scope of the situation as to which I indicated that I do not foresee any serious controversy between CATV operators and broadcasters either in accommodating to the *United Artists* decision or in connection with a revision of the copyright laws and (2) to comment briefly on the statement of Acting Assistant Attorney General Zimmerman to the Committee after I testified.

First, I stated that, when a CATV system provides a reception service within the normal coverage area of a television station to members of the public who *normally* watch that station or who would normally do so except for some accident of topography and hence *does not alter normal viewing and market patterns*, we see no serious problem. In response to questions from Senator Burdick I stated that, in such a situation, I do not see a problem today, I do not see any need for any special statutory treatment but, if the Congress concludes that some sort of special treatment is necessary, I think it can be worked out. I do want to emphasize, however, that this should not be taken as meaning that CATV should receive exemption from copyright liability in every situation where it transmits the programs of a station anywhere within its signal contour. There should not be any special treatment where CATV transmits the signal of a station which primarily serves one market into another market where it is possible to view the more distant station off the air but where, in fact, it is not significantly viewed off the air because there are other closer stations which provide stronger or clearer signals.

There are important situations where stations located 60 or more miles away put Grade B signals into a city served by its own television stations. The Grade B signals may be watchable off the air, but they just won't be watched as a practical matter under these circumstances. So, too, the Grade B and Grade A contours of stations in different markets may overlap, and in some cases even the Grade A and the principal community contours may overlap. A good example of this extreme situation is Baltimore and Washington, which are two entirely separate television markets, although there is considerable overlap of various contours of the stations in the two markets. Despite these overlaps, the same copyrighted programs can be and are sold on an exclusive basis in both markets because they are basically different television markets and are treated as such

both by the viewing and the advertising public. The Washington stations are entitled to copyright exclusivity on CATV systems primarily within the Washington market, and the Baltimore stations are entitled to copyright exclusivity on CATV systems primarily within the Baltimore market. Such programs exclusivity on CATV systems is necessary because of CATV's equalizing effect, *i.e.*, it is the CATV system that makes the signals of the more distant stations virtually as strong and clear as the signals of the local stations. Without copyright protection the normal viewing patterns in CATV communities would be distorted, and the exclusive television rights bargained and paid for by the stations would be seriously impaired. There is a range of such situations throughout the country, and in each case a station should be able to bargain for, pay for, and receive effective exclusivity within its primary market—exclusivity unimpaired by the importation via CATV of more distant stations.

If some sort of special treatment is to be given carriage of local stations via CATV in the new statute, *i.e.*, if the Committee feels that there should not be general copyright applicability to CATV with the industry left to work out the details on a practical basis, the ability of the copyright proprietor to give exclusive television rights in each television market must in any event be preserved. Under no circumstances should a CATV system be given a statutory license or copyright immunity to carry all programs of a given station within that station's Grade B contour if such a statutory license would destroy the practical exclusivity of another station within whose primary—and I am using primary in a relative sense—market the CATV community lies. In short, the copyright owner must be able to agree with a local station to refuse to permit a CATV system to import a program by carrying a Grade B signal into a community within the Grade A or principal community contour of another station, or by carrying a Grade A signal into a community within the principal community contour of another station, or by carrying a principal community signal into the metropolitan area of another station.

Let me also stress that, even as to a station which has priority in the CATV community, the copyright licensor must retain the right to agree to prohibit carriage by CATV of a given program, if the CATV's carriage would degrade the quality of the picture or sound as transmitted by the television station.

One further comment on this first point. Certainly, in the interest of fairness, no sort of special treatment ought to be afforded by statute to a CATV system which also orginates copyrightable programs. For the new statute to afford special treatment in such cases would allow a television station's programs to be used free to sustain a competitor in the market for the acquistion of rights to originate programs.

* * * * * * *

Secondly, I should like to refer briefly to the statement of Acting Assistant Attorney General Zimmerman submitted to this Committee on August 25. Mr. Zimmerman's conclusion that S. 1006's provisions subjecting CATV's to copyright liability are unwise seems to be based on an unrealistic approach to the facts of television program distribution and the economics of television broadcasting.

Mr. Zimmerman expressed concern over possible monopolistic consequences he fears might result if the proprietors of copyrights in television programs withheld licenses from CATV systems in order to monopolize the CATV industry. But he ignored the far more real monopolistic dangers that could result if CATV is permitted to transmit programs by importation of the signals of a handful of huge metropolitan area television stations to communities throughout the country without regard to the exclusive program rights of hundreds of present and potential smaller market stations. Indeed, Mr. Zimmerman goes so far as to state that "allowing CATV system to retransmit television programs royalty-free may not decrease significantly the amount of money paid to copyright holders" because "we also believe it probable that in the long run the stations transmitted over CATV should be able to adjust advertising rates, and pay more for programs, according to their new widespread audience." All this means is that the large would become larger and the small smaller, for, if present CATV trends are permitted to continue, it would be the New York, Los Angeles, Chicago and similar stations that would ultimately be carried by CATV throughout the United States.

Mr. Zimmerman also suggests that exclusion of CATV from copyright coverage would not be detrimental to the basic operation of the copyright law. Mr. Zimmerman contends that there is nothing wrong with CATV's benefiting from the author's creative effort without payment. Leaving aside the moral question,

which is by no means irrelevant, the first question is whether the incentive to the author should be decreased, that is, should the proprietor by copyright law exemption be wholly excluded from the CATV market. I submit that the answer is particularly obvious in the case of CATV, whose basic stock in trade is copyrighted programming.

A much more crucial question, however, is presented by the adverse effect of CATV on the price which program proprietors can obtain from the television broadcasters for their programs. As I pointed out in my testimony before a subcommittee of the House Judiciary Committee last year:

> "The entire fabric of our free system of television programming depends on the exclusivity of television program rights. The ability of a television network to persuade an advertiser to include a particular station on the network lineup and the revenues which the network and the station will receive depend upon whether that station is the exclusive outlet for the network in the particular city, since a network advertiser will usually not pay twice for the same coverage.
>
> "In the case of non-network programming, the ability of a station to obtain audience, the size of that audience and the amount of revenue that can be obtained from advertisers are all interrelated and directly affected by whether the station has exclusive rights to the programs it broadcasts.
>
> "Each time a program is viewed, a portion of the audience potential disappears; because of the nature of television, a single broadcast of a program over a station will be seen by a large portion of the homes in its market. It is for such reasons that programs are generally licensed exclusively to a single television station for use in a specific market area during a specified period of time. Without such exclusivity, the value of the program to the broadcaster and, hence, the amount he would be willing or able to pay—directly or indirectly—for television broadcast rights, would be greatly lessened. In such event, the producer's inducement to produce the program in the first place would be greatly lessened or would be nonexistent." (2 Copyright Law Revision 1223, 1224 [1965]).

If CATV did not cause a serious erosion of exclusivity in the past, it is only because historical CATV operated principally in small and remote communities. But CATV has now begun to focus on the larger markets, and its long range purpose is to import copyrighted programs from the very largest metropolitan markets into what are now regarded as major and medium-sized markets. This exposure via CATV will decrease the amount that stations in the local market can pay for rights to the program. Thus, CATV operations pose not merely the question of whether CATV should reap where it has not sown, but, to mix a metaphor, whether it should be allowed to bite the hand that feeds it.

Moreover, we are just at the beginning of the anticipated great expansion of television station operations which is expected from the development of the UHF. The country already has an enormous investment in all-channel receivers which are being distributed as a consequence of the Federal statute intended to permit the long range development of new television stations in the UHF portion of the spectrum. These UHF stations are expected to become operative in many cities throughout the United States. They are also expected to provide a demand for large quantities of new television programs. Yet, if these new stations are not able to acquire program exclusivity as against the importation of the same programs by CATV carriage of outside signals, the future of these new television stations and the prospects of new program sources will be very bleak, indeed.

Mr. Zimmerman's suggestion that the originating station will pay more for the copyrighted property because of its increased circulation via CATV in distant markets not only misses the basic point but at best is only partially so. First, as already indicated, the local station will lose viewers and revenues by reason of the importation of the program from the large metropolitan market. Second, to the extent a particular station is both subject to CATV importation in its own market and is carried by CATV in other markets, a local viewer is worth more in terms of advertising revenue than a distant viewer, since many of its advertisers will have no interest in the circulation in the outside market, indeed, may not even do business there. Third, the fractionalizing of the local market means that the local station can offer less complete penetration of its home market in competition with other media; this is highly disadvantageous in the majority of cases where advertisers are buying "markets" and not just "heads." And the foregong are among the reasons, it should be noted, why the

CATV subscriber is not paying twice for the programs. His "head" counts less than one in the numbers game. In fact, he may not pay at all since in many cases the same program will be supported by wholly different lineups of advertisers in different markets. Thus, Mr. Zimmerman has failed to give weight to the complexities of the marketplace from which the author draws his reward.

Perhaps in the final analysis Mr. Zimmerman and I stand not too far apart. The key to Mr. Zimmerman's position seems to be that there should be no blanket liability for performance via CATV, and that effective FCC regulation would be a more appropriate device to deal with CATV than copyright. From the testimony before this subcommittee and the House subcommittee, it should be clear that copyright liabilty would be enforced only where necessary to protect the value of the copyrighted work. As for effective FCC regulation as an alternative, the Commission itself has expressly disclaimed any intention of regulating the relationship between the owner and the consumer of copyrighted programs. It is far better that this bill settle the basic relationships between the copyright proprietor and all the users of his work and leave to the Commission the regulation of the relationship between broadcaster and the CATV system. Otherwise we shall have the Commission controlling the financial aspects of the production of programs, which is beyond the scheme of regulation contemplated by the Communications Act of 1934. In short, regulation by the FCC is directed toward different but related objectives. It should be in addition to, rather than a substitute for, the copyright law.

Mr. Zimmerman suggests that copyright liability may unjustifiably interfere with sound regulatory policies, but the only specific which he cites is the hypothesis that the copyright statute "may allow the networks or other copyright holders to control CATV." Suffice it to say that any such tendency toward monopolization would be met in its incipiency by Mr. Zimmerman's colleagues with the ample statutory tools at their disposal.

Finally, I trust that Mr. Zimmerman will recognize that the possible adverse effects of copyright liability would be less than his statement envisions and that the possible adverse effects of no liability could be far more anticompetitive and lead toward a concentration of television broadcast stations operations in the very largest metropolitan markets.

Senator BURDICK. Our next witness is Mr. Herman Finkelstein, of the American Society of Composers, Authors, & Publishers, commonly known as ASCAP.

STATEMENT OF HERMAN FINKELSTEIN, GENERAL COUNSEL, AMERICAN SOCIETY OF COMPOSERS, AUTHORS, & PUBLISHERS (ASCAP)

Mr. FINKELSTEIN. Mr. Chairman, members of the committee, my name is Herman Finkelstein. I am a member of the New York and Connecticut bars. I reside in New York City. I appear here as counsel for the American Society of Composers, Authors & Publishers.

That society, an unincorporated association, consists of 8,469 composers and authors and 2,788 publishers.

I have a prepared statement that I have submitted to the committee. I would like the privilege of having that statement placed in the record and making a brief summary of the statement and then attempting to answer some of the questions that I believe have been bothering the committee or endeavoring to answer them. If I may proceed in that way, Mr. Chairman.

Senator BURDICK. The procedure you suggest is very welcome to the committee. The statement will be received in full and made a part of the record and you may summarize.

Mr. FINKELSTEIN. Thank you.

I should like to point out, Mr. Chairman, that in appearing for the composers and authors of musical works, we have something that is quite different from the kind of program that the last witness testified

about. The program that requires exclusivity in the field of music performances can occur at any time. There are blanket clearances of the whole repertoirc, whether it is the ASCAP repertoire or the other repertoire. No separate permissions are obtained, nobody gets an exclusive right. The ASCAP rates are subject to regulation by the Federal court. So that although the coypright laws give exclusive rights to composers and authors, in fact, because they must operate in combination, the prices they charge are subject to regulation and of necessity must be open and fair and reasonable and nondiscriminatory. So that the community antenna people, so-called, do not have a problem of clearance here, nor do they have a problem of price and we have not heard a word so far in these hearings about any such difficulty.

Now, first, I would like to call the committee's attention to the true nature of the business of the so-called CATV operators. Mr. Anello quoted a statement of Judge Herlands that I have in my prepared statement. I shall not read it all, but I would like to call to the committee's attention that Judge Herlands pointed out that these are not community ventures and that these systems function as wire television systems, only one of whose structural components consists of antennas.

Now, of course, they like to call themselves community antennas because in the early days of the development of this kind of thing, people in a community got together and put up a high antenna that was available to anybody in the community without any separate charge. It was a public cooperative venture and the present so-called CATV people liked to appear as if they were in some kind of a community antenna venture.

How do they really describe themselves when they get into litigation, when there is an effort to regulate them as a public utility? This, is their own description of who they are and what they do. I quote from a brief filed by the Association of CATV Operators in a case in which the Philadelphia Television Broadcasting Co. tried to get into the community antenna field. This is what these people said about their own operation:

> Community antennas do not hold themselves out to render service to the public at large. At this point, it should be recalled that a community antenna does not obligate itself to receive any and all channels available at its antenna site. The agreement with a customer may be to receive certain channels, but not such broadcast signals as the customer may specify. Thus, community antennas provide a specialized service for a limited part of the public under special contracts.

For a limited part of the public under special contracts.

> Since the community antenna serves only particular persons within a class under special contracts and limits the signals it will receive—

They do not say "and transmit," which, of course, they do—

> to those broadcast by certain stations rather than all stations capable of reception, it is not a common carrier.

Now, that is a quote from the community antenna people themselves.

So we find that it is a private enterprise, it is not a public enterprise, it is not a community enterprise, it is not community antenna, it is wire television, just another branch of television.

And you have heard about the proportions of this private industry. Today it receives well over $100 million a year in subscription fees from their subscribers. That comes out of the public's pocket. I

think we have every reason to believe what we have heard so far. They are just beginning and it will not be any time before this is a billion-dollar industry as we find in radio and television.

So we find that the so-called CATV operators are in fact another breed of television operators.

Now, the third thing I would like to mention is that the court has already held that these wired music operators are engaged in giving public performances of copyrighted works for profit in violation of the existing Federal copyright law.

Now, this is not unusual, to have multiple liability at the point of each new public performance.

Let us take the case of a symphony orchestra which has its program broadcast. The performance takes place in the auditorium of the symphony orchestra. That symphony orchestra pays a royalty for the music it performs commensurate with the audience it has, and the fact that it is in a hall and that kind of thing. And then it is picked up by a broadcaster. Another royalty is paid by the broadcaster. Now, how is the royalty for each determined? The symphony orchestra, in determining that royalty, you take into consideration the fact that every symphony orchestra loses money. But the symphony orchestras understand that they will not have composers to create works for them unless they make it possible for the composers to be encouraged. And the composers do not ask for a Federal subsidy or a State subsidy or local subsidy; they ask only that when their works are performed that they be paid, and that the payment be keyed to the value of the performance and the ability of the organization engaged in the performance to pay for it.

Let us take the performance between the halves in a football game. The football team pays a very nominal license fee. I think it is about $50 for all the music they have—but for that stadium only. Now, the network comes along and picks up that performance and broadcasts it throughout the Nation. The network makes a payment related to what the sponsor of that football game, the commercial advertiser, pays the network for the performance.

Now, if the network did another thing, if the network also collected money from subscribers, from the people who have the home receiving sets, that would be another factor in determining the price. But of course it is not. Somebody else does that, the people that call themselves community antenna operators, they collect that money. And there is no way that the copyright owner has to compel the broadcaster to take a license for somebody else's use, or to key the payment to what somebody else may get out of it. That is not done in other areas. There is no way for the copyright owner to say to the broadcaster, "We will not give you a license unless you also take a license for the subsequent user, the wire television operator."

I should like to point out that there is nothing unique about the CATV operators except their desire to have a free ride. That is unique among the commercial users.

They are not new in this, however, in making the attempt. The jukebox operators got it in 1909. Now, at that time this was a relatively new industry. Technology had developed to the point where people who entered entertainment parlors were willing to drop a penny in a device that was able to reproduce music. And Congress had before

it the question of whether that should be something for which payment should be made. And a music publisher who was present at the hearings said, "Oh, well, we consider that as advertising—our major income is from sheet music, and that is just a minor use. It is just an incidental type of use. And we all give it away."

But today the jukebox industry is the largest single user of music in America, and pays nothing. And CATV threatens to be the largest single purveyor of entertainment. If we can foresee the days—there has been nothing said in these hearings about it so far—when you have communication satellites, communication satellites whose programs would not be received directly in the homes. You cannot receive a program from the Early Bird satellite today on your home receiving set. There is a ground apparatus that converts this into the kind of thing that can be heard in the home. And this is what these community antenna boys are going to get into. And there is really a power play between the broadcasters who have these communication channels and some strangers with large capital who want to move in on the enterprise by way of wire television.

And then the solution offered for part of this whole thing is that authors be called upon, particularly music authors, to just give their rights away.

Now, that is not new. It happened in 1909. In 1909, apart from the coin machines, there were phonograph records and music rolls which had become very popular. The U.S. Supreme Court had held in *White Smith* v. *Apollo* in 1909 that the right to make a copy, which the copyright law gave, did not include the right to make a record, because nobody, by looking at a record—no matter how expert he was—could tell what was on that record. And so the making of a record was not the making of a copy, and since it was not the making of a copy it violated no right that Congress had given.

Well, that did not seem right. This was a new industry. The composers of music ought to get something for it. Congress was aware of that.

So Congress gave the right to record.

But then it put a little string on the grant. It said that as a condition for granting this right—as a condition, whenever the work is once recorded, any other manufacturer shall have the right to make a record on paying 2 cents to the copyright owner.

Now, why did they feel they had to do that? Not because the manufacturers needed that kind of license; not because the authors had done anything wrong, but there was one manufacturer, the Aeolian Co., that had gotten a monopoly on all these rights in anticipation of the passage of this provision. And so the other manufacturers came in and said, "If we do not have a compulsory license here binding upon the composers, the Aeolian Co. will walk off with all the business."

And so that is the origin of the compulsory license provision. And, Mr. Chairman, you have raised the question of, how do you justify——

Senator BURDICK. You should know that the committee has under consideration right now the jukebox question.

Mr. FINKELSTEIN. Yes, Mr. Chairman, I understand that. But I mentioned it mainly because I should like to warn the committee that these things all start innocently and do not mean very much. And you try to help somebody, and somehow or other the composer has been

the one who has always gotten hurt, whether it is because there are so few of them, or music is considered so inconsequential, or they have been so good natured in the past, I do not know. But the composer has been singled out in the copyright law as one whose rights are invaded, the only one whose performing right is limited, the right of performance does not exist unless it is made publicly, and for profit, which does not apply anywhere else.

And then we come to this CATV proposal. And this is what Mr. Ford said. He says Congress ought to indulge in a fiction of clearance at the source of these rights and in that way deprive the author of any rights.

Now, that was not a new idea of his. The way the jukebox exemption is worded in the law is this, that a performance by means of a coin-operated machine "shall not be deemed a public performance for profit unless a fee is charged for admission to the place where [the] reproduction or rendition occurs"; and by that fiction—that it "shall not be deemed a public performance for profit," an exemption is deemed to be written in the law.

And this is Mr. Ford's number "5" (p. 89 of his statement):

5. All music rights in connection with programs received from TV stations and distributed by CATV systems should be considered as cleared at the source by the program proprietor, and no further license should be required.

Now, it makes no difference whether there has been any payment or not. But they will be considered—he did not want to use the word "deemed," because you could see where he got it—but it would be considered as cleared at the source, just a pure fiction.

Now, I had thought that if jurisprudence had gotten anywhere in the past half century, that we had gotten away from fictions, that we had learned to recognize a fiction when we saw one, and we tore the veil aside and said, "This is what we are doing, and let us do it frankly and openly." And I do not think that if the 1909 Congress were sitting today that they would have said that a public performance for profit which takes place in the jukebox situation, which is quite obviously public and quite obviously for profit, shall not be deemed to be a public performance for profit. I do not think they would do that. And I do not think this committee is going to say that it believes that "All music rights in connection with programs received from television stations and distributed by CATV systems should be considered as cleared at the source by the program proprietor and no further license fee should be required," which is the language they use.

Now, as the chairman has observed, if wire music operators assert a claim to use another's property without payment, the burden is on them to justify the claim. Certainly resort to a fictitious clearance does not constitute justification.

My next point is that the exempion if granted will spread beyond CATV. It will be resorted to by those who now pay for the use of music. Muzak, the wired music people, the people who carry an FM music service into stores or homes or supermarkets, or whatever. Royalties from that source now amount to well over $1 million. Why should they pay royalties if a community antenna can pick up the program of an FM station? Now, the FM station has very few advertisers, and therefore pays very little in royalties. The CATV opera-

tors could pick up those programs not encumbered by a lot of advertising, and therefore having no basis for paying the copyright owner, and deliver those programs at $5 a month to these subscribers. The Muzak operators are complaining to us that the CATV operators are unfairly competing with them. And they say, "Why have you not been collecting from the CATV operators?" Well, we have been waiting for the decision of the Federal court. There has now been a favorable decision. And now the CATV people say that, having lost in the courts, they want Congress to bail them out.

These are the questions, as I see them, Mr. Chairman. The first: Is copyright a property right? You asked that of several witnesses. And I would like to take a whack at that.

Secondly, if it is a property right, how can a law take that property from one person, the author, and give a right of free use to another, the wire television operator.

Third, if that can be done, is it not the burden of justifying the taking on him who asserts the right of free use?

And of course, finally, has that burden been discharged.

Now, it has been suggested that the present situation calls for a compromise between the wire TV operators and the copyright owners. And to quote the Chairman, "Why should the problem be dumped in our laps?" Well, their answer to that is, they have been negotiating with the copyright interests, I think Mr. Hyde and Mr. Ford both indicated that they have had these talks. But I have not been asked to sit down with anybody, and I think that I represent a substantial group of writers and publishers of musical works, and I think I would know if any of them had been asked to sit down with these people.

So that they must think that the composer is just an easy mark, that if you bypass him, after all, his rights were taken away in 1909, why should it be any different in 1966.

Well, let me try to give my answers to these questions that the committee has raised.

One, is copyright a property right? The Founding Fathers left no doubt about the answer to that question. The Constitution empowers Congress to secure to authors rights that are exclusive. The Constitution provides that Congress shall have the power to secure to authors and inventors the exclusive rights in their respective writings and discoveries for a limited period of time. So that the right must be exclusive, but the time may be limited.

Now, when Congress used that language it was not just used in a vacuum. Each—12 of the 13 States had their own copyright laws before the Constitution was adopted. And some of those States, including my own native State of Connecticut, provided that if the author did not have enough copies of his work available to meet the demand, or if the price was too high, the court could fix a reasonable rate and grant others the right to print the work.

Now, that was the background against which the constitutional provision was written, that the rights shall be exclusive. When the Federal Government took over the rights that the States had previously exercised and the charter of congressional power was put in there, it was the power to secure to authors exclusive rights. And then there was a limitation, yes, for limited periods of time.

Now, you might ask, how does it happen, then, if these limitations are unconstitutional, that no question has been raised about the compulsory licensing of phonograph records in the 1909 law. It was just this simple.

There again words did it. When Congress granted the new right, the law had this provision: "And as a condition of extending the copyright control to such mechanical reproductions"—first, the author was finally given the right to control the mechanical reproduction—and then the law says: "And as a condition of extending the copyright control to such mechanical reproduction"—and then you have this compulsory license.

So that if an author came into court and questioned the constitutionality of that provision, the right itself might fall with the condition. And so nobody came in and tested the condition for fear that he would lose the new right that he got.

But the 50 or almost 60 years that have elapsed since 1909 do not hallow that invasion of right. And I do not think that it should be continued now with these private people who call themselves community antenna television operators coming in and asking for it.

Now, I think that applies whether it be the Teleprompter Co. and these other large interests coming into New York City and threatening to rip up our streets with underground wires of their own, because they do not want to pay fees to American Tel & Tel, or whoever owns those tubes, they tear up our streets, as they have on several occasions—I do not think it makes any difference whether it is these large companies that come into New York, or someone in a remote area. It is just a question of price. If the symphony orchestra can pay for the use of music, why cannot these other private commercial interests do it? They do not say the charge is too great, they do not say there would be any impediment, in the case of music at least. And I am only talking about those copyrights that are made available to everybody on a prestated basis, and on a basis that nobody claims is unreasonable. I am not talking about those exclusive grants where the motion picture company can say to the telecaster, "We will not give you the right unless you pay an amount that is equal to what we ought to be getting from the community antenna operator." I am not talking about that. I am only talking about this kind of thing.

We go to the broadcaster and say, "We think that a rate of 2 percent, or whatever it is, of what you get from your advertisers for the sale of this package of entertainment is a reasonable rate considering what you get."

Now, the broadcaster says, "Oh, we think that is too much." And so he goes to court, under a decree that we have, acting collectively as we do. He takes us to the Federal court, and he says, "I want the court to lower these rates."

And what evidence do we submit to the court?

Well, we talk about what the use of music is, and what income these broadcasters have.

Now, if the broadcaster were engaging in selling the subscription service to the subscribers, we would take that into consideration as part of his income. But if Congress should write into the law that that particular performance—and it now has been held to be a performance—that that performance is exempt, we cannot under any circum-

stances say to a court, "You must take into consideration the value of a right that Congress has said is exempt." That is a contradiction in terms. If it is exempted it is not a right. And so we cannot be paid for it. We cannot charge the broadcaster. It may be that because he gets a free license from the U.S. Government for this channel that nobody else can occupy, he may come in here and say, "As far as we are concerned, we are not going to use our power to squelch the poor little CATV fellow, in on area where he takes just our local programs." In resolving that argument that the two of them have, whatever compromises they may be willing to make among themselves, I do not think the composer should be squeezed out. I think he should have the opportunity to be considered, bearing in mind what the history has been, and considering that in this whole picture the author is the only one that creates anything of value—the other boys, they are just delivering a package, and why they should be able to come in and say, "We do not want to pay you for the thing that makes our package salable." As I say, I can only understand it in the light of history—because the authors have been pushed around so much in the past.

Now, I want to save the committee's time and skip as much as I can here. Let me in summary say this. We now find history repeating itself. Wire television operators are afraid that broadcasters may use the exclusive channels assigned to them by the FCC in a manner that will jeopardize the hundred million dollars that these operators expect to collect from the public annually in subscription fees. There can be no doubt that wire television is here to stay regardless of what this committee does. The only question is, Who will own these private enterprises and reap the enormous profit which will inure to the owners? The contending forces are broadcasters against other powerful financial interests who are attracted to the television media.

I appear for the composers and authors, whose music plays a large part in making these television enterprises profitable. The Constitution says that the Congress shall encourage them by securing exclusive rights to them, albeit for limited times. This subcommittee is entrusted with the consideration of legislation in that domain. You are asked to take away from authors certain rights that the law now gives them. Those who call upon you to do this have not given any reason why distinguished men and women, the composers of America, should lose their property rights. They do not charge that it is difficult to secure licenses from them. There is no claim that the rates charged for the use of copyrighting music are out of line. The only excuse given is that in 1909 Congress sanctioned an invasion of rights of composers to solve a dispute among manufacturers of piano rolls.

The fact is that no exemption whatever is justified whether the wire television service is in New York or elsewhere. I have already covered that.

Let me point out, as the previous witness did, that if a small UHF station pays for the use of copyrights, certainly the large CATV operator should do so.

And really concluding, Mr. Chairman, I should like to say, the principle should be recognized that, as one of the early statutes said, New Hampshire, I believe, no property is more peculiarly a man's own than the product of his brain. I should think the CATV people

would recognize this, and that they at least would have come around and said, "Cannot we work something out before coming to this committee for relief?"

Thank you, Mr. Chairman.

(The statement of Herman Finkelstein follows:)

STATEMENT OF HERMAN FINKELSTEIN ON BEHALF OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP) CONCERNING S. 1006 (USE OF COPYRIGHTED MUSIC BY CATV SYSTEMS)

Mr. Chairman, my name is Herman Finkelstein. I reside in New York City and am a member of the New York and Connecticut Bars. I appreciate the invitation of this Committee to appear here on behalf of the American Society of Composers, Authors and Publishers commonly known as ASCAP.

The members of ASCAP (8,469 composers and authors and 2,788 publishers) have a vital interest in the pending bills to revise our copyright laws. They are the men and women who write the nation's outstanding musical works—such household names as Harold Arlen, Samuel Barber, Irving Berlin, Richard Rodgers, Leonard Bernstein, Ira Gershwin, Johnny Mercer, Harry Warren, who have had long and successful careers in music and many who are just starting on their musical careers. The membership includes the widows, children and estates of such deceased writers as George Gershwin, Oscar Hammerstein, Victor Herbert, Jerome Kern, Cole Porter, John Philip Sousa. Their music will live long after their copyrights expire. Some writers reach fame and popular appeal at a relatively early age, such as Bob Dylan, the leader of a new type of music sometimes called "folk-rock," which swept the nation and has been taken up by young people all over the world. Others achieve posthumous fame after lives of sacrifice and privation.

I have mentioned only a few of the thousands who have devoted their whole lives to the music profession. It is in the nation's best interest to encourage all who possess the rare talent that is needed to write the nation's music, and the willingness to face the many disappointments that are the common experience of those who follow this calling. The story of any generation is best told by its songs. Unlike so many others engaged in advancing the cultural life of the nation, those who write these songs do not ask for a subsidy; they merely want the property rights in their works safeguarded when those works are used by others who present public performances of their works or are active commercial participants in bringing those performances to the public.

Mr. Chairman, the issue before this Committee is one of vital importance to our nation. You must decide whether a single economically powerful pressure group—the operators of subscription television systems known as "CATV"—shall be permitted to have free use of the works of the world's authors (for authorship knows no national boundaries) notwithstanding that—so far as music is concerned—their works are readily available at modest nondiscriminatory rates which do not require lengthy individual bargaining or possible interference with a particular use.

The business of so-called CATV operators is essentially a wire television system. As Judge Herlands recently pointed out in a decision holding two CATV systems liable for infringement of certain copyrighted motion pictures:*

> "The terms 'community antenna,' as used by defendant for self-description, is [sic] a misnomer and reflects a fundamental misconception. Defendant's two systems are not 'community' ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures. Nor are defendant's operations simply that of passive 'antennas' used only to receive telecasts. In fact, defendant's two systems, among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs—operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas."

All members of ASCAP are required by federal court order to permit any of their works to be used at any time by such users as the CATV operators at a single price for access to the whole repertory—or, at the option of the user, separate licenses may be negotiated with the individual members. If the

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*_United Artists Television, Inc._ v. _Fortnightly Corp._ (S.D.N.Y., May 23, 1966).

used chooses the full repertory type of license and he is dissatisfied with the rate quoted by ASCAP, he may apply to the federal court for a determination of reasonable rates. Like the radio and television broadcasters, the CATV operators are well organized, and any such rate litigation would be conducted for them on an industry-wide basis.

So, Mr. Chairman, you can see that the clearance of music does not present a real problem to the CATV operators.

As opposed to the writers and publishers of music, whose works are available to all at prescribed rates which, in the public interest, must be fair and nondiscriminatory, the CATV operators can furnish or refuse the programs of any stations. They are the sole judges, and make the decision wholly in their own self interest. To quote from a statement made by their trade association—National Community Television Association, Inc.—in a recent court case:

> "Community antennas [CATV operators] do not hold themselves out to render service to the public at large * * *. At this point it should be recalled that a community antenna does not obligate itself to receive [and transmit] any and all channels available at its antenna site * * *. The agreement with the customer may be to receive certain channels, but not such broadcast signals as the customer may specify. Thus community antennas provide a specialized service for a limited part of the public under special contracts. Since the community antenna serves only particular persons within a class under special contracts and limits the signals it will receive [and transmit] to those broadcast by certain stations rather than all stations capable of reception, it is not a common carrier."

Thus, any exemption of CATV operators would amount to a taking of the author's property rights for the benefit of a purely private group. It would result in grave injustice to the writers and publishers of musical works without any justification in terms of the public interest. Even when property is normally taken in the public interest, the laws of eminent domain prescribe fair compensation. The CATV operators cannot justify their attempted confiscation of the property rights of authors.

The CATV operators can afford to pay for the copyrighted music they use. They do not assert that the royalty rates for music are out of line. It is an axiom in determining a fair rate for the use of music that the rate must be keyed to the income of the user. Thus, a UHF television station with a few sponsors or advertisers—or a so-called educational television station—may pay little or nothing. But if their programs are picked up by a commercial enterprise such as a CATV operators and delieverd at a price, a payment should be made at this point commensurate with the value of the music to that operator.

Let us take an example of a symphony orchestra which performs a composer's work in its auditorium. The performance is broadcast by a UHF station. A CATV operator then picks up the performance and makes it available to subscribers. Under present arrangements, the symphony orchestra pays the composer an amount related to the economics of the orchestra, which of course is very small considering that practically all symphony orchestras operate at a deficit. The UHF station pays another small amount—it, too, has serious economic problems. Then the work is carried by a prosperous CATV operator to subscribers who pay a fee for the privilege of witnessing the performance. After all, if the CATV operators did not deliver entertainment they would not be in business. They are certainly as much involved in this performance as is the UHF station whose facilities they use. This has already been established as a matter of law (*United Artists Television, Inc.* v. *Fortnightly Corp., supra.*)

The television networks and stations pay composers a royalty based on the revenues that the networks and stations collect from advertisers—they do not pay composers anything based on the additional revenues CATV operators collect from their subscribers.

No one can claim that composers are in better financial position to forego payment for their works than the CATV operators are to make such payments. Even if there were any doubt about this, the fact is that but for their use of the composer's property (and properties of other authors) the CATV operators would have nothing to sell.

The Constitution recognizes the importance of encouraging authorship by enactment of federal laws safeguarding their exclusive rights.* Unlike other

*Article 1, Sec. 8, Ch. 8 of the U.S. Constitution provides: "The Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

forms of property, the rights of authors are enjoyed only for a limited period. During that period their rights must be exclusive. Any statutory exemption in favor of CATV operators would do violence to the whole spirit of the constitutional mandate.

If the public interest demands that CATV operators be accorded certain protection as against possible abuses by the owners of the broadcasting stations whose programs they pick up, that should be a matter for regulation of broadcasters under the Federal Communications Act rather than copyright legislation legalizing the appropriation of the copyright owner's property for private purposes.

Broadcasters receive from the United States a valuable license giving them exclusive rights to use certain international highways (wave lengths) for the communication of intelligence and entertainment. They pay nothing for those exclusive privileges, but may sell them for millions of dollars when ownership of the station (*i.e.*, the right to use the particular channel) changes hands. If Congress should feel that the CATV operators have a claim on these broadcasters to make their programs available to them, then Congress may empower the Federal Communications Commission (F.C.C.) to deny broadcasting licenses to any broadcaster who fails to acquire such rights for the CATV operator. If there were such a requirement, ASCAP would grant all broadcasters the right to authorize CATV operators to use the musical compositions of its members in their subscription service. If a price for this license could not be agreed upon, it would be fixed by the Federal Court. Such a system would recognize the property rights of authors and fully safeguard any legitimate interest of CATV operators.

One may ask: If authors are willing to grant a license to broadcasters which will clear rights for CATV operators, why do they object to a statutory exemption of the CATV use? The answer seems clear: In a judicial proceeding to determine a fair rate for the broadcaster's use of copyrighted music, the court may not assign any value to a use (CATV) which is exempted from application of the United States Copyright Law. On the other hand, if the property right is recognized under the copyright law, but a statute relating to federal communications imposes upon the broadcaster an obligation to acquire CATV rights for all of its programs, then the author's property rights are respected and the burden of clearance is placed where Congress specifies. We are not concerned with that problem here. It should be taken up as a communications problem, not as a copyright problem.

We have seen what may happen when an exemption is given to a particular special interest. In 1909, an exemption was given to owners of coin-operated machines. That was in the days when the machines which the Committee considered were located in "penny parlors." The charge per play was one cent. The coin machines were phonographs with earphones; the records played were reproduced mechanically rather than electrically; the attraction lay more in the novelty than in the music reproduced; the industry was small, and the use peripheral. Today, juke boxes account for over $500 million dollars in receipts from playing copyrighted music. It is the largest single user of that music. Yet it pays nothing at a time when all who have analyzed the situation objectively feel that the exemption should be repealed. But it is not easy to bring laws down to date. There never should have been an exemption in the first place; nor should there be an exemption for CATV. Any such exemption would establish another unjust provision in our copyright law.

At the present time we know the injustices that may result from any exemption in favor of CATV operators. If they may legally pick up visual images of TV stations, logically they will be permitted to pick up the transmission of sound from AM and FM radio stations. The programs of these stations consist mainly of music—playing phonograph records or albums. That is the same fare that is supplied by background music services such as MUZAK. If CATV operators may use this music without payment, they will drive out such independent users as MUZAK and other similar users; or MUZAK will be driven to convert to a secondary music service, thus depriving musical composers of a very important market and source of income.

Unlike other works, such as motion pictures and dramatic programs which may range in time from a half hour to two hours, each song may be rendered in two or three minutes. It may be preceded or followed by a commercial announcement, but the announcement is not made during the rendition of the song. Payment by the originating station, however, is based on receipts from the ad-

vertising message. If only the song is picked up and no payment is made by the "secondary" user, the latter will receive a free ride which cannot be justified on any basis; the primary broadcaster cannot collect from an advertiser for a commercial message that does not reach a CATV subscriber's set. Actually, all these sets are removed from the possibility of being used to view those programs or those messages that are not carried by the CATV operator.

When communication satellites are used, the CATV operator may replace the present-day network affiliate. In that event, local television stations may occupy a subordinate position. Yet the only possible income of music writers and publishers from programs transmitted to the public will be from the networks and local stations, both of which will be able to argue that their markets are limited because the public no longer has *direct* access to their broadcasts. Perhaps that is why the networks and broadcasters are buying up so many CATV enterprises.

Ultimately it is the public that pays for delivery of the commercial message which accompanies or precedes or follows a program of entertainment. In part, the public pays by a charge for the commercial product being advertised, and in part it pays a CATV operator directly. The indirect charge (in the price of the commodity) represents the advertiser's payment to a broadcaster. The proportion of the amount paid by the public directly to owners of CATV enterprises is constantly increasing. The public thus pays for the entertainment it receives.

Unlike most other works, the primary market for musical compositions is in the field of performance. The commercial users who benefit most from those performances today are broadcasters, CATV operators and juke box operators. There is no reason for exempting any of them. If there is a clearance problem, Congress may set up clearance machinery if voluntary arrangements fail. But there is no reason for an outright exemption of a commercial user. This is contrary to the spirit of the Constitutional mandate which recognizes that copyright owners should be given "exclusive rights."

CONCLUSION

It is unsound to exempt any group of commercial users of music, particularly those who profit from performances originated by others.

We join with other writers and publishers in encouraging newly evolving technology and the rapid access to musical works which it makes possible. Just as the manufacturers, suppliers and users of this machinery are paid, so we believe there should be adequate rewards to the authors whose works supply the raw material which makes the use of this machinery profitable. Simple systems of obtaining licenses for the use of copyrighted music are as readily available to so-called "secondary" transmitters as they are to others. There is no reason to grant them an exemption that other commercial users do not enjoy.

Senator BURDICK. Thank you.

Senator Hart.

Senator HART. I think I speak for the committee in expressing the wish that the negotiations had avoided this topic. I have no idea whether they could have or not.

Mr. FINKELSTEIN. Our doors are open.

Senator HART. If I seem to be in disagreement with you, it is only to help me understand. I buy your basic theme that if my mind can create something which is enjoyable and somebody can package it for profit I should be remunerated. But would it not be true that your royalty would increase even though you do not get directly to CATV, because of the fact that the network advertising rate depends on the total of the audience, and as that audience is increased through the use of CATV, so is the fee to ASCAP increased?

Mr. FINKELSTEIN. There may be something in that, Senator Hart. But let me say this. Suppose the telecaster—suppose the network furnished that subscription service and collected those hundreds of million of dollars a year. That would be a factor in addition to what they get from advertisers in determining how much they ought to pay for the use of that music. Now, I think it is the same difference as

having a balcony seat and watching a play or having a seat in the orchestra. You see it better, you pay more money for it—the author gets his royalties, he gets his 6 percent or whatever it is of the box office, and the more that is paid for admission the more he gets. And if you have a play in a straw hat theater where the seats are hard and the stage is small and the actors are secondary, the royalties are lower. But if there is something to furnish a plush reproduction by means of this privately organized and operated wire television system that can bring more money in for only one thing, entertainment, then the composer should be in a position to share it. The amount from the advertiser should not be the sole test. There is no law that says only receipts from advertisers shall determine what authors get. What we are saying is that if there is other income—which there is not to the telecaster—if there is other income to someone else that is engaged in giving a public performance, that income should be subject to payment, some payment. That should be a factor to be taken into consideration in determining what is a fair amount to be paid to the author.

Now, the author is indifferent about whether it be the community antenna operator who makes the payment or the broadcaster whose program is picked up. But if you should enact a law that says that the performance is exempt when it gets beyond the broadcasting point, and whoever picked it up, for what the House subcommittee called the secondary transmission, that that shall be exempt, then that could not be considered as something that can be taken into consideration when the author says, "This is a royalty that I am entitled to," and where he has the habit, in the case of play, or in the case of music, of having the royalty fixed as a percentage of something, I say the base ought to include what the community antenna people get from their subscribers.

Senator HART. Thank you. I think also it is well that you refreshed our recollection of the long-term result of an action which Congress took in 1909, seeming to respond reasonably and prudently to an immediate problem. But what disturbs a good many of us is the possibility that in responding to a very appealing or obvious dilemma, trying to resolve an obvious dilemma here, or some kind of tailored schedule of exemptions, we would be setting ourselves on a course that would create in the long haul some weird results undesirable to everybody, many of whom at the moment think that they know exactly what we should do at this time.

Mr. FINKELSTEIN. I am not among those, Senator Hart. I do not think that I know exactly what you want to do. But I do think this, that there are certain principles that must guide us in whatever we do. And the minute you depart from those principles you do not know where it may lead you. In other words, expediency is not a safe guide when it seems to clash with principle. This is something that I think we have learned from history. And we can avoid it.

Senator BURDICK. Let me pursue this discussion just a bit more. You have been in the hearing room today, and you have heard that there is some agreement between the CATV people and the broadcasters as to two particular areas. One characterizes it as with no difficulty, and the others as deserving of an exemption, words of that nature. Let us take a case where we have a B contour, and station

X has the license to broadcast into that area. That is their normal receiving area. But there are some canyons and there are some high buildings, and there are some difficulties. So CATV, let us call them A, comes in to fill in those spaces. So when you negotiate a contract for music with X, heretofore you charged, let us say, $100 for a particular performance, but now since the CATV people are in there you say, "Wait a minute, I have this property right, and someone else is using it, so I think the fee this year should be $110 instead of $100 to take care of that extra charge."

I am sure these things are not realistic. I am just using it as an example.

Then suppose that CATV finds it difficult to operate because of the charges, and they cease to operate, and station X takes over the job of filling in those spaces. Would you charge them the $100, or $110?

Mr. FINKELSTEIN. Mr. Chairman, it would depend upon how station X took it over. If they put a booster setup and charged nothing extra to the public, then their sole income would be from advertisers, and they would be paying only the $100.

That $100 would be computed as a percentage of what they get from advertisers, not a flat fee. Now, if instead of putting up this booster station, or whatever you call that antenna, they decided that they are going to take over the wired television business, and charge something now to the subscribers, then they would have an additional source of income. And I would say that that should be a factor in determining how much they pay. And if it is $10, that would be the amount.

Senator BURDICK. Is it not a fact that when you made the original contract with X for $100 that that was to include all the population in contour B?

Mr. FINKELSTEIN. No, Mr. Chairman, quite the contrary. The contract expressly provides—and this is the contract worked out with the broadcasters—he buys and pays for only his own transmission, and the contract expressly provides that he does not buy or pay for the right to authorize anybody else to make a new transmission. He could buy them.

Senator BURDICK. I know. But X got the right from FCC to have exclusive jurisdiction in this area of, say, a 40-mile radius, they have got the exclusive right to do this. And you sold them these rights that you have in certain music productions to broadcast in that area. And when they made that contract did they not have the whole area?

Mr. FINKELSTEIN. You see, the area is the same. The basis of the charge is only what they get from advertisers. That is the basis. That is how the charge is computed. And then the contract says that all you buy for this particular rate is the right to transmit the program yourself over your own wavelength and nothing else. Now, the broadcasters——

Senator BURDICK. The basis of your charge is not area or people, it is based upon business?

Mr. FINKELSTEIN. Based on business, but not people, because if the broadcaster wants to give a bargain to the advertiser, that is his privilege. In one place the rate may be lower for a greater number of people, and in another one higher for a smaller number of people.

Now, if Congress were to say that the broadcaster, in consideration of having this exclusive license to use a certain wavelength, must ac-

quire not only the right for himself but for these community antenna people under given circumstances, that would be quite a different thing. Then when the broadcaster comes in to bargain for a license, or applies to the Federal court for the determination of a rate, the amount that the community antenna operator takes in could be a factor in determining what a reasonable rate is.

You see, Mr. Chairman, I think your question is premised on this, that the only way to determine a rate is by what advertisers pay. But that is just a yardstick that we have adopted, because that has been the only source of income. If there have been other sources of income for this performance, then I submit that the composer ought to be able to get an amount that is related to whatever the public pays and to whomever the public pays that money when the money is paid for the performance, public performance for profit.

Senator BURDICK. Is that the rule you use in your negotiations?

Mr. FINKELSTEIN. Yes, exactly. In the Federal court proceedings—there are proceedings now pending to determine how much the radio industry and how much the television industry shall pay for the use of music. And in that proceeding the broadcasters could apply for a license that would include community antenna. But if you should—if Congress would pass a law that says that that is exempt, then they would not have to apply for that, and nobody would be paying for it. And that is really the bone of contention.

Senator BURDICK. Well, to summarize your testimony—and we appreciate it—all areas are black.

Mr. FINKELSTEIN. Well, I think all areas should be paid for.

Senator BURDICK. The same thing.

Mr. FINKELSTEIN. When property rights are used.

Senator BURDICK. Thank you.

The next witness is Mr. Albert F. Ciancimino.

STATEMENT OF ALBERT F. CIANCIMINO, HOUSE COUNSEL, SESAC, INC.

Mr. CIANCIMINO. Mr. Chairman and members of the committee, my name is Albert F. Ciancimino. I am an attorney admitted to the bar of the State of New York and appear here as house counsel of SESAC, Inc., of New York City.

SESAC, Inc., was founded in 1931 by Mr. Paul Heinecke and is a music rights licensing organization duly organized and incorporated under the laws of the State of New York. We are the second oldest music rights organization in the United States representing more than 300 publisher catalogs whose names and addresses are listed in the schedule A which is herewith submitted to the committee as part of this statement.[1] The SESAC repertory consists of approximately 100,000 musical compositions representing just about every type of music performed by the music industry.

The value of the SESAC repertory to the music industry is reflected in the more than 6,000 performance licenses issued by SESAC to AM, FM, and TV stations, representing a licensing factor of about 98 percent of the entire broadcast industry in the United States. In addition, thousands of performance licenses have been issued to hotels,

[1] The schedule A referred to is contained in the committee's files.

nightclubs, professional athletic teams, symphony orchestras, ballet companies, background music service companies, foreign performance rights organizations, and others. Moreover, a great many licenses have been issued free of charge by SESAC to governmental, religious, and charitable organizations such as the Veterans' Administration, the U.S. Information Agency, U.S. Marine Band, the U.S. Armed Forces, the Heart Fund, Salvation Army, et cetera.

We are also proud of the fact that during World War II, the U.S. Treasury Department designated SESAC as the official liaison organization between the radio industry and the Treasury Department in promoting the War Savings Radio Campaign. SESAC enthusiastically accepted this opportunity to serve the public and made the services of its entire field staff available to the Government as a contribution to the war effort.

We now come before this committee specifically to state our views with regard to the use of copyrighted musical compositions by a particular segment of the music industry; namely, the community antenna television systems. I believe it is a historical fact that every segment of the music industry initially resisted the concept of paying for the right to profitably use music which has been created and is owned by another. Somehow, the intangibility of the right to perform music creates, in the mind of the user, an entirely different concept than, for example, paying rent for the use of a home or apartment. It should, however, be quite self-evident that the right to own and perform music is just as valuable a right as the right to own any other type of personal property. And here, Mr. Chairman, I might add that this portion of my testimony, I believe, answers one of the questions that you have asked previous witnesses as to whether or not it is a property right.

This initial reluctance on the part of the various segments in the industry has, to be sure, been overcome by the passage of legislation and judicial decisions interpreting the law's applicability to the various music users. Therefore, the resistance on the part of the community antenna television systems to the payment of copyright royalties follows a clearly defined historical pattern. It should also be noted that the segment of S. 1006 which includes the right of transmission within the meaning of "perform or exhibit a work publicly" also follows a traditional historical pattern by legislating in effect, compensation to the copyright proprietor for the right to perform his copyrighted music in public. SESAC fully supports this concept that the community antenna television systems should be required to pay for the use of their stock in trade which includes this right to publicly perform musical compositions.

We see no justification in placing the community antenna television systems in a position different from that which presently applies to the radio and television broadcaster. It is the current practice of SESAC to offer the broadcaster a choice of either a blanket license or a per-piece license. Under the former, the broadcaster, for a flat annual fee, is authorized to use as much music contained in the SESAC repertory as he wishes. And here, Mr. Chairman, I would like to interject that the fee is based upon what SESAC considers to be the profit potential of the user, which includes consideration of the station's power, their hours of operation, advertising rates, and then the

size of the market area served. And the size of the market area will determine whether or not that station's rates fall into a minimum, average, or maximum breakdown.

Senator BURDICK. You have eliminated the factor of income to the station?

Mr. CIANCIMINO. That is correct.

Senator BURDICK. Is that a factor?

Mr. CIANCIMINO. No, it is not. It is a factor indirectly, insofar as in general the advertising rates of the station will be geared to the size of the audience that it can reach, and the larger the power of a station, generally speaking, the more the advertising rates would be.

Senator BURDICK. Did you hear the questions I put to the last witness, in the example?

Mr. CIANCIMINO. Yes, I did.

Senator BURDICK. Would your answers be different, then?

Mr. CIANCIMINO. Our answer would be, Mr. Chairman, that if the broadcast facility would need an increase in power, or increase its advertising rates by virtue of the fact that it is now serving homes which formerly would be served by cable, then the fee would be increased. But if such is not the case, the fee would remain the same.

Senator BURDICK. Then if their coverage and their income were the same whether CATV was operating or not, your fee would remain constantly the same?

Mr. CIANCIMINO. If their advertising rates remain the same, yes; and their market area remains the same, the fee would remain the same.

Senator BURDICK. Then what does CATV take away?

Mr. CIANCIMINO. CATV does not take away anything, really, but rather what CATV does is make another use of the author's right to publicly perform. And as pointed out by the previous witness——

Senator BURDICK. The rate that X has to pay, you have just said is based upon the coverage and the power of the station.

Mr. CIANCIMINO. That is correct.

Senator BURDICK. And all CATV does is fill in the island, and so forth?

Mr. CIANCIMINO. That is correct.

Senator BURDICK. The station still has everything it had to start with.

Mr. CIANCIMINO. That is right. But the license granted by SESAC to that station is for the transmission over that particular station's facilities. If there is another interjection, another user who comes into the picture, even though the same market area would be served, another use is being made of the product. And the same type of situation, I think, is pointed out by Mr. Finkelstein, where you have a football team playing a game, they pay for their performance. And there is another user that comes into the picture. The telecaster picks up that game and transmits it. And that is another public performance of the copyright work, which entitles the copyright proprietor to compensation. If further along the line the cable operator comes in and picks up that transmission and further performs it publicly for profit, then that is an additional use of the copyrighter's work.

Senator BURDICK. I thought you just testified that you based your fees on the power of the station and the amount of advertising. You did not take into consideration the amount of income?

Mr. CIANCIMINO. We do not charge based on a percentage of the station's income; that is correct.

Senator BURDICK. Well, the station's income would be the same whether the CATV operated or not, would it not?

Mr. CIANCIMINO. I would not think so.

Senator BURDICK. Station X is not getting any of the income from the cable company, their income would be the same whether the cable company was operating or not, wouldn't it?

Mr. CIANCIMINO. Perhaps I misunderstood your question, Mr. Chairman.

Senator BURDICK. My question is, the mere fact that CATV comes into this regular listening area does not change the income of station X at any time, in other words, their income has not been decreased or increased.

Mr. CIANCIMINO. Correct.

Senator BURDICK. Now, if you do not consider income, how does the rebroadcast or the use by the cable company of this material affect you?

Mr. CIANCIMINO. If the cable company were not operating in this area, Mr. Chairman, I think it would be reasonable to suppose that the broadcaster himself would fill the gaps involved in reaching the audience that is now reached by the cable operator. And in so doing, Mr. Chairman, it would seem to me that their advertising rates, which is a factor which touches upon income, would have to be increased accordingly. And it is here, if the advertising rates are increased—and it would seem to be a practical necessity for them to do so if they undergo the expense which is now undertaken by the cable operator—if the rate is increased, then the SESAC rate would be increased. But if the broadcaster can, with the same rate schedules that he has for his advertisers, if he can with those rates continue to fill the gaps which were previously served by the cable operator, and the market classification within which they are, remains the same, then the fee charged by SESAC would not increase.

Senator BURDICK. Proceed.

Mr. CIANCIMINO. Under the per piece type of license the broadcaster may apply to SESAC for a license to perform a specific musical composition or specific musical compositions. Under the blanket type of license, as I said before, the broadcaster for a flat annual fee is authorized to use as much music, either 1, 10, 100, or 1,000 compositions as is contained in the SESAC repertoire.

It has been our experience that the overwhelming majority of broadcasters choose the blanket type of performance license since it avoids the time and expense required to obtain clearance each time the broadcaster wishes to perform a work contained in the SESAC repertory. It would seem that the community antenna television systems would also find it practicable as well as economical to choose the blanket type license in the operation of its business. This, of course, would answer many of the objections raised by CATV interests regarding the impossibility of prior clearance due to the fact that the CATV owner does not necessarily know in advance what type of copyrighted material is contained on the original broadcast which the CATV owner is further transmitting to his subscribers. Should the further argument be presented that such a procedure would deny the

CATV owner the choice of per piece or blanket type of licenses, our reply would be that the denial of this choice has not been brought about by SESAC, but by the very nature of the CATV service. Should there be some method by which the CATV owner could determined beforehand the content of his transmission, SESAC would, of course, be quite willing to grant him the same choice of a per piece license for the use of specific musical compositions contained in the SESAC repertory.

In short, to summarize our position with regard to the CATV aspects of S. 1006, we fully support these provisions as currently set forth therein and do not feel it desirable to have Congress further legislate on this matter. To be sure, the copyright proprietor or his representative and the community antenna television systems will, as in the area of other segments of the music industry, arrive by voluntary negotiations at reasonable performance fees to the mutual satisfaction of all parties concerned. May I simply point out that the broadcasting and motion picture industries, to cite just a couple of examples, have not suffered, nor has their growth been stunted by the payment of just fees to the creative artist or his representative. I firmly believe that the same would also hold true with regard to the community antenna television systems.

Having set forth our position above with regard to full support of the CATV aspects of S. 1006 as presently constituted, it would necessarily follow that the attempt at legislative compromise promulgated by House Subcommittee No. 3 of the Committee on the Judiciary under the able Congressman Robert W. Kastenmeier, does not meet with our approval.

We do not agree that any secondary transmission which amounts to a public performance for profit should be a limitation on the exclusive right to transmit granted to the copyright proprietor under S. 1006 as presently constituted and also, in our opinion, granted to the copyright proprietor under interpretation of the presently existing Copyright Act of 1909. In connection with the currently existing state of the law which regard to community antenna television systems, may I simply refer to the recent opinion by the Honorable William B. Herlands in the case of *United Artist Television Inc.*, v. *Fortnightly Corporation* in the U.S. District Court, Southern District of New York, a case which, needless to say, has been read with great enthusiasm by those representing copyright owners. Concerning the concept of a public performance, it would seem to have no relevancy whatsoever whether or not the secondary transmission is made for reception solely within the limits of the area normally encompassed by the primary transmission. The ultimate destination of the secondary transmission does not make the public performance of a copyright proprietor's work less valuable either to the secondary transmitter or to the copyright proprietor. To be sure, the CATV customer, within the limits of the primary transmission, must still pay his regular fee to the community antenna television service for the type of retransmission, which under the House subcommittee's proposal would be exempted from performance fees.

We also do not agree to granting an exemption to secondary transmissions which consist entirely of relaying the primary transmission to the private rooms of a hotel or other public establishment in instances

where no direct charge is made to the occupants of the private rooms to see or hear the secondary transmission. This exemption to CATV operators parallels that given in section 109(6) of S. 1006 to a hotel transmitting performances or exhibitions of a work to its private rooms, unless the hotel alters the content of the transmission or makes a separate charge to its guests to see or hear the transmission. In our testimony on H.R. 4347 before the Subcommittee No. 3, we pointed out two salient facts. Firstly, any exemption granted to any type of performance, be it a primary or secondary transmission, received in private rooms of a hotel, in our opinion, imposes limitations on the copyright owner which do not exist under the present status of the law. May I cite our own case in support of this proposition, *SESAC Inc.* v. *New York Hotel Statler Co.* (18 F. Supp. 1, 34 U.S.P.Q. 6 (1937)). The *SESAC* case cited at length by Judge Herlands in the recent *United Artists* decision, held the hotel responsible as a copyright infringer for its act of installing a receiving set which, by means of a cable and loudspeakers in the guest rooms, enables a guest, by manipulating a switch, to hear radio broadcasts. Secondly, such an exemption may, in due time by virtue of certain advancements in technology and science, create unforeseen and unanticipated hardships to the copyright owner. In this regard, might I simply refer to the present anomaly concerning the jukebox exemption in our 1909 statute.

However, in our testimony on H.R. 4347, SESAC's position basically was that we were quite willing to forgo any suggested modifications of H.R. 4347 in order to expedite and encourage a favorable report on the entire H.R. 4347 as originally constituted. Our position remains the same today with regard to S. 1006.

Commenting further upon the proposed legislative compromise by House Subcommittee No. 3, it is completely impracticable and unworkable to require a copyright owner to give written notice to the secondary transmitter, at least 10 days before the primary transmission, that the copyright owner's authorization is necessary for the secondary transmission. As I have already testified, in the majority of instances, primary transmitters, for example, broadcasters, hold blanket authorization to perform any one or more musical compositions contained in the SESAC repertory. I believe the same holds true for ASCAP and BMI. Accordingly, there is no reason for the primary transmitter to advise the copyright owner that he intends to use his work since he knows that he has blanket authorization to do so. In short, how is the copyright owner able to fulfill the prerequisite of notice which alone would allow him to classify an act as an infringement, when in most instances, he is not even aware of the use of his work by the primary transmitter? In answer to the rebuttal argument that if the copyright owner does not know his work is being used, how does the secondary transmitter know if he will infringe upon the copyright owner's work, may we again point out that there presently exists accepted procedures in most other segments of the music industry today for the obtaining, at a reasonable fee, of blanket authorization to use the works contained in the repertory of a performing rights organization. Again, in instances where the secondary transmitter does know beforehand of particular uses, he does have the option to apply for a per piece license.

Rather than comment on additional segments of House Subcommittee No. 3's proposed legislation, may I simply state that SESAC is in full opposition to this and any other type of legislation which grants CATV operators an exemption in the so-called white areas which I've already mentioned and imposes upon copyright proprietors such impracticable recommendations as notice to the CATV operator in order to bring about a use which comes within the so-called black area of fully actionable infringement.

In conclusion, SESAC feels that the CATV aspects of S. 1006, as originally constituted, presents the most practical and reasonable solution to the CATV problem and, as such, deserves the favorable consideration of this subcommittee.

Thank you.

Senator BURDICK. Thank you for your testimony.

Senator Hart.

Senator HART. No questions.

Senator BURDICK. I think I have already asked you all the questions I had in mind. The committee will be in recess until 2 o'clock.

(Thereupon, at 12:10 p.m., the committee recessed, to resume at 2 p.m., same day.)

AFTERNOON SESSION

Senator BURDICK. The next witness will be Mr. Sydney Kaye, BMI.

STATEMENT OF SYDNEY M. KAYE, BROADCAST MUSIC, INC. (BMI), CHAIRMAN OF THE BOARD AND GENERAL COUNSEL

Mr. KAYE. My name is Sydney Kaye. I am a member of the New York bar and I appear here on behalf of Broadcast Music, Inc., commonly known as BMI, of which I am chairman of the board and general counsel. Much of the material contained in my statement has already been covered. If I may have the privilege of having it inserted in the record at this point. I will undertake to be brief.

Senator BURDICK. That statement the chairman appreciates no end. Your statement will be made a part of the record.

Mr. KAYE. BMI is engaged solely in licensing the right publicly to perform music for profit. It represents the music of over 10,000 independent writers and thousands of independent publishers. It has a large and greatly used repertoire, which includes the majority of currently popular compositions and the full range of all other music, including the music of many winners of Pulitzer Prizes for serious music. BMI was organized to bring competition into the field of music licensing and it has successfully done so.

Certainly, there are no special problems for CATV relating to the performance of music. The machinery for clearing rights is already fully available and it is utilized by everyone from the largest television stations to the smallest restaurants making use of music. The normal contract between BMI and the television station is a so-called blanket license, which gives a station the unrestricted right to make use of BMI's repertoire as it sees fit. The fee charged is a fraction of 1 percent of the revenue of the station from the sale of time. CATV can handle such licensing as well as the thousands of small local enterprises of every kind that are now complying with the copyright law.

I should add that CATV's appearance before this committee was certainly prior to any negotiation or conference with BMI.

Mr. Ford's rather bold proposal was for the expropriation of music Mr. Ford suggested that all music should be deemed cleared at the source. As Mr. Finkelstein pointed out, the payment made by a small station could not conceivably pay for national coverage by CATV of the entire country. I add to that that the initial performance might have been on an educational television station which, under the present law, need make no payment at all and that the entire use of the composers' work for commercial purposes would therefore be uncompensated.

It seems to me that the position of CATV is analogous to that of a commercial fisherman who cries out that unless he is permitted to fish with somebody else's bait without paying for it, the fishing industry will be destroyed. That contention arises, I am sure, from inexperience and not from contact with reality. In the whole history of industry, no industry has ever been put out of business because it recognized the rights of authors, as other people do in this country and in all of the free countries of the world.

It seems to me quite peculiar to say that if a man gets a piece of music over the air, the transmission of that music to him should be the subject of compensation, while, in the case of his neighbor down the road, 50 feet lower down, who gets the music by wire, the transmission to him is free.

If it is really in the public interest to have an exemption from copyright liability and to have price fixing for the benefit of wire transmission, then by every principle and rule of logic, this should be equally true for the local radio station, the local TV station, for wired music, which is paying now, and for theaters. The reason why that is not in the public interest is given in our Constitution and is recognized in the copyright law of every civilized country. To reward creators of intellectual property is necessary, in the words of the Constitution, to promote progress. It is necessary for the spiritual, moral, and cultural interests of the country.

The only way successfully to encourage authorship is to permit the collection of royalties, as royalties are collected in every field of use, from the people who make a profit from the use of the creations of the author.

The copyright law is a law of the broadest possible impact. It affects millions of authors, both in this country and all over the world. It is a law which has proved to be difficult to amend and change. If any special problems exist with respect to CATV, they must exist only in the relationship between CATV and the TV broadcasters, less than a thousand in number. We respectfully suggest that, if such problems exist, they should not be taken care of by means of the copyright law, but by some law of narrower application which will relate specifically to the rights and duties of the people in those fields.

Let me give an example of that, as to which, I regret to say, my statement is not clear, and which I am glad to clarify. If we take the traditional old-time CATV system that carries signals down to the valley in some small town from a local station within that station's local area, and does nothing else, we have a situation which the chairman has inquired about. I might say that Mr. Ford has made it clear

that this is not where the future destiny of CATV lies. Perhaps the local station should not be allowed to insist on the carriage of its local programs unless it has all the rights in the programs for that area. But that is something that does not have to be taken care of in the copyright law. In the small town, limited CATV operation that I have described, it may very well be that the contract between the broadcaster and the person supplying copyrighted material will take the burden in certain instances. But perhaps much of the profit is going to come from the performance of the work by CATV, and as I have pointed out, the author has to get his royalties where the profits are made. If the copyright proprietor cannot charge his royalties where the profit is made, he cannot be adequately paid. He cannot ask the man who is not making the profits to make the payment. So that, if wire transmission is exempted in the copyright law, no one would have to pay. This is, in effect, confiscatory.

Before we confiscate private property, before we fix prices, the equities certainly have to be balanced, and as has been pointed out, there would be a heavy burden of proof on CATV to show that the public interest requires any such action, requires different treatment than is accorded to anyone else who similarly communicates music and other copyrighted works to the public. By this test, both Mr. Ford's proposal and the House subcommittee proposal fall to the ground. That burden of proof has not been met.

I have analyzed the House subcommittee's proposals in my statement and I will not repeat that analysis here. I do want to point out, however, that, however well intended it was, the House subcommittee proposal amounts, for numerous reasons, to an outright confiscation of music rights.

I also want to call attention to the broad language used. The definitions of the proposal are not limited to CATV as we know it today, some organization that picks up by wire a signal from a local television station with a limited coverage area. It applies, for no reason that has ever been assigned, to radio as well as television. It would kill the market for wired music. It applies not only to the situation that exists today but to the satellite, and CATV may be the main, indeed the only way of bringing to many homes copyrighted material originating in every part of the world. It applies, indeed, to transmission by wire and by air, both. It does not limit itself to wire transmission.

That points out very well, it seems to me, the dangers of trying to modify a law in an area which is both technologically and economically fluid, a danger which we have seen exemplified in the jukebox exemption.

Certainly, as far as the copyright law is concerned, it should continue to meet the standards of the framers of our Constitution, to encourage authorship. It should conform to the principles recognized in the copyright laws of all free countries. We respectfully submit that, in a free society, there should not be a derogation of the rights of intellectual creation for the benefit of private gain.

Thank you, Mr. Chairman.

(Mr. Kaye's prepared statement follows:)

STATEMENT OF SYDNEY M. KAYE BEFORE THE SUBCOMMITTEE ON PATENTS TRADEMARKS, AND COPYRIGHTS OF THE SENATE JUDICIARY COMMITTEE, AUGUST 3, 1966

Mr. Chairman and Members of the Subcommittee: My name is Sydney M. Kaye I am a member of the firm of Rosenman Colin Kaye Petschek and Freund i New York City. I appear on behalf of Broadcast Music Inc., commonly know as BMI, of which I am Chairman of the Board and General Counsel.

BMI is engaged solely in licensing the right publicly to perform music for profi on behalf of 10,000 independent writers and 7,000 independent publishers, locate in every part of the United States. All copyrights and all rights other than per forming rights in the music remain the property of the writers and publisher and are exercised solely by them. All of the money that BMI collects, other tha operating expenses and reserves, is distributed by BMI to these publishers an writers. BMI licenses performing rights to television stations, radio stations hotels, restaurants and other establishments which use music for profit.

BMI has a large repertory of music of every kind. It licenses a high proportion of the popular compositions listed in the music trade papers. It licenses a large part of the country and western music, which is America's folk music. It license serious music and has many Pulitzer prize winners among its writers. It license music created especially for television and motion picture use. BMI was organized 25 years ago to bring competition into the field of music licensing and it has done so.

BMI's contracts with television stations are normally on a basis whereby the station has a so-called blanket license which gives it the unrestricted right to utilize the full BMI repertory as it sees fit. The license fee is a fraction of one percent of the station's gross revenue from the sale of time.

Article I, Section 8 of our Constitution gives Congress the power to promote the progress of art by securing for authors, for limited terms, the exclusive rights to their writings. You will note that the framers of our Constitution felt that compensation to the author was necessary to promote progress and, indeed, this is the keystone, not only for our copyright law, but of every copyright law in the world. The only way that authorship can be encouraged is to permit author to collect royalties from the persons who profit from the use of their creations.

Section 109(5) of S. 1006 exempts non-profit CATV operation from all copyright liability. This goes further than the present law, which exempts only non-profit performances of non-dramatic literary and musical works. BMI favors the provisions of S. 1006 and urges that any further exemption for the benefit of CATV would be seriously detrimental to the public interest.

The argument that it would be in the public interest to exempt CATV as a form of communication to the public, both from control by the copyright proprietor and from payment to the copyright proprietor, could be made with equal superficial plausibility with respect to every other form of communication of copyrighted works to the public for profit. If it would really be in the public interest to allow CATV to carry copyrighted works without payment, this would also be true with respect to communication by broadcasting stations. Exempting a user for profit of copyrighted works from liability must, in the long run, prove destructive to the highest cultural, moral and spiritual interests of our nation. I should point out that communication by wire is well developed in many other countries and that no country has ever even seriously considered such an exemption. It is difficult to see why the transmission of a piece of music to someone over the air should be subject to copyright liability, while the same transmission by means of wire to his neighbor down the road should be exempt.

Because of the uncertainty as to the effect of the copyright law, CATV has, for a time escaped copyright liability. The difficulties which it envisions arise as the result of inexperience rather than from contact with reality. No industry has ever been crippled because it had to recognize the rights of authors. Certainly CATV has no problems which require special consideration in the field of music. The machinery for clearing the right to make public performance for profit of musical compositions is fully available. It is presently being utilized by everyone from the largest television station down to the smallest hotel and restaurant which use music for profit. The ability of CATV to deal with the problem will be no less than that of thousands of restaurants, background music services, hotels and ballrooms that operate locally in every section of our country.

The pattern for payment for musical programing rights by television broadcasters is well established. These stations have blanket licenses which call for the payment of small percentages of their proceeds from the sale of advertising time. CATV operators need not anticipate that they would be asked to assume licenses more onerous in terms than those in effect for the television stations whose signals they carry and disseminate.

The copyright law has applicability to many millions of authors and copyright proprietors located throughout this country and in the other countries of the world. It is a law which is not readily subject to change or amendment. It is a law which should adhere to the generally recognized principles of copyright protection. If there are special problems in the field of CATV, they must exist solely in the relationship between CATV and the television broadcasters of the United States, less than a thousand in number. If any such problems are not already covered by existing laws and regulations, including the antitrust laws, it is respectfully submitted that they should be approached upon a far narrower basis than amendment of the copyright law would involve. They should relate only to the rights and liabilities of CATV systems and television stations respectively.

Where a CATV system acts only as an antenna system to carry the programs of a local station to portions of the local area which are disadvantageously situated because of geographical or other factors, and does nothing else, the operation of normal economic principles should suffice. The right of a local station to compel the CATV operator to carry his local programs within its local coverage area could be dependent upon the acquisition of any rights involved by the local broadcaster. In such case, the compensation paid to BMI under its present form of contracts would suffice. If, however, carrying the program by wire is made exempt from liability, no one would have to pay, and the performance of music for profit would, in effect, be subject to expropriation.

I cannot refrain from adding that I understand that you will hear rational and persuasive arguments that the proprietors of sports events should be permitted to preserve the exclusivity of their programs. What will we think of ourselves and what will others think of us if we do not extend the same protection to the composer of an opera or a symphony?

However well intended, the proposal circulated by the Subcommittee of the Committee on the Judiciary of the House of Representatives amounts to nothing less than the confiscation of the property rights of composers. Indeed, Mr. Ford, in his statement, boldly suggested such confiscation and said, "All music rights in connection with programs received from television stations and distributed by CATV systems should be considered as cleared at the source by the program proprietor and no further licenses should be required." In other words, if a composer permitted a local station to perform a piece of music or, indeed, if a musical composition were performed by an educational television station, which, under the present law, is required to make no payment at all, it could be carried all over the country for profit purposes without a penny of compensation to the composer. This is not the "monetary incentive to talented persons" of which Mr. Ford boasted.

I shall give some of the reasons why the House Subcommittee proposal would destroy the rights of the composers of music.

1. The responsibility of the CATV operator is conditioned upon his receiving notice "at least 10 days before the primary transmission that the copyright owner's authorization is necessary for the secondary transmission." The publishers of musical compositions never know when their compositions are to be performed on television. The decision to utilize a composition may be made only at the time of broadcast or on the preceding day. The copyright proprietor would not know until after it had been performed, if then, that it had been used. The notice on which liability depends could not, in the case of the performance of music, be given.

2. Under the House Subcommittee proposal, the sole remedy of the copyright proprietor, in the case of an unauthorized use of material subject to payment, is to sue for copyright infringement and to recover, as a maximum, three times the reasonable license fee. BMI's repertory is so large and the use made of it so extensive that the fees charged by it to television stations may amount to only a few cents for an individual performance. If it be assumed that a reasonable fee to CATV operators would bear a relationship to the fee charged to broadcasters, the recovery of three times such a fee would not pay the cost of obtaining a copy of the certificate of copyright registration and photocopying it for attachment to the complaint, much less the expenses incident to litigation.

3. The House Subcommittee's proposal is not couched in terms of CATV. It applies to "primary transmission" and "secondary transmission" of all copyrighted material. It applies, for no reason which has been stated, to radio broadcasting as well as to television. Except for the provisions of the Federal Communications Act, it applies to transmission by broadcasting as well as to transmission by wire. Composers are presently being paid for the transmission by wire of performances of music by background music services. The proposal would kill this market.

4. The proposal applies not only to the television stations with limited coverage areas, as we know them today, but to transmission from a satellite theoretically capable of directly reaching homes in every part of the United States with signals that originate in every part of the world. CATV may be the only method used to bring such signals to disadvantaged areas. The division of the country into "black," "white" and "gray" areas is not helpful as far as music is concerned. There is no area of our country in which there are not many persons authorized publicly to perform all of the music licensed by BMI. Under the proposal's definitions, all of these media would originate "primary transmission."

5. A popular musical composition can be performed in a few minutes. The House Subcommittee's proposal provides that "the content of the particular primary transmission" should not be altered. This permits the deletion of the material, which precedes and follows the music, including the commercial announcements which constitute the only source of income from which the composer can be paid. The CATV operator is permitted, under the proposal, to originate news and weather programs. Mr. Ford has made it clear that CATV operators intend to originate many other programs as well. To the extent that CATV operators get free use of music, they will be fishing with somebody else's bait without paying for it. They will attract and hold their subscribers through musical programs for which they do not pay, and will generate additional profits from programs using no music, which would otherwise result in revenue to copyright proprietors of musical compositions.

BMI stands firmly on the proposal that the laborer is worthy of his hire. Every argument for the "public interest" that has been made in favor of some type of exemption for CATV would apply equally to every other form of communication. CATV is at no greater disadvantage with respect to acquisition of music rights than any of the other persons who use music for profit and whose businesses have flourished despite their recognition of the basic rights of copyright owners.

We believe that the true public interest was stated by the authors of our Constitution. The country's intellectual and moral stature depends, in large part, upon its encouragement of the development of the arts. We do not believe that, in a free society, there should be what amounts to confiscation of the rights of composers for the benefit of profit enterprises. There is still wisdom in continuing to encourage the efforts of the men who write the nation's songs.

Senator BURDICK. I want to thank you for your testimony. I just want to ask you one or two questions.

The copyright is not in all cases an absolute right, is it?

Mr. KAYE. That is correct.

Senator BURDICK. There have been times when Congress in its wisdom has made some exceptions?

Mr. KAYE. The exceptions have been in the case of the jukebox, which at the time, seems to me very excusable, because it did not give a public performance at that time. I am of an age where I was a patron of the jukebox before 1909, with two little earphones, like a stethoscope, that you put into your ears and you put in your penny and only one person could hear it at a time.

But except for that, the only exceptions that have been made are in the area of nonprofit use, and in the case of the phonograph record, where a peculiar situation existed at the time because one person had acquired all the rights. Other than that, I should say the general principle is well recognized that at least public performance for profit is compensable in all cases.

Senator BURDICK. Thank you very kindly for your contribution.

The next witness is Mr. Pete Rozelle, Commissioner of the National Football League.

STATEMENT OF PETE ROZELLE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE; ACCOMPANIED BY HAMILTON CAROTHERS, COUNSEL

Mr. ROZELLE. Mr. Chairman, members of the committee, my name is Pete Rozelle. I am commissioner of the National Football League and will be commissioner of the expanded nationwide professional football league which has recently been announced. I am therefore speaking not only for the 15 member clubs of the National Football League but for the 9 clubs of the American Football League which will shortly be joining us in the expanded league. This league will include professional football franchises in Atlanta, Baltimore, Chicago, Cleveland, Dallas, Detroit, Green Bay, Los Angeles, Minnesota, New York, Philadelphia, Pittsburgh, St. Louis, San Francisco, Washington, Boston, Buffalo, Denver, Houston, Kansas City, Miami, Oakland, and San Diego. Two additional cities will be brought into the league before 1968 and probably additional cities after 1970.

I wish today to direct myself to the copyright implications of community antenna television operations as they affect professional football.

Professional football and all other professional sports are confronted with a growing problem. There has been a steady proliferation of CATV systems throughout the country. These systems make major use of professional sports telecasts as a device for enrolling new subscribers. They appropriate our game telecasts in a fashion which directly damages our own interests. They do so without our consent and over our objection. If they are permitted to continue to do so, they will damage our own ticket sales and reduce the sales value of our own television rights. Ultimately they may destroy our present patterns of free home television of all away games of each home team

Some background is necessary for an understanding of how this problem comes about and why copyright protection for professional football telecasts is both proper and necessary. In particular, the league urges that whatever bill is reported by the committee make explicit that live sports telecasts are to be afforded copyright protection.

The member clubs of the National and American Football Leagues stage professional football contests at very considerable expense to themselves in player payrolls, stadium rentals, travel costs, game expenses, and a host of other items. Their return from these efforts comes from the sale of tickets to their games and through the sale of rights to televise them. While television has become an increasingly important source of income in recent years, and the National Football League is interested in bringing its games to the widest possible television audience, the major objective of every National Football League club must be to keep its stadium filled with interested fans. The National Football League does not choose to follow the path of professional boxing and have its teams play in comparatively empty arenas before national television audiences.

In order to preserve its game attendance, the National Football League has found it necessary to prevent the simultaneous telecasting of home games within the home territory of league clubs. The league's right to impose this limited restriction has been upheld by court decision, and has been specifically affirmed by the Congress. Public Law 87-331, enacted in 1961, authorizes the National Football League to restrict telecasts in the home territory of a member club when the club is playing a home game. The NFL plans, on an experimental basis, to bring outside games into blacked out home territories this fall, but it will do so on a carefully controlled basis and under no circumstances will it permit the same game being played in the home territory to be carried on home television sets.

Notwithstanding specific judicial and congressional approval of this limited restriction on simultaneous telecasts of league games, the protections for home game attendance are being jeopardized by CATV systems that pick up the home game broadcast from a distant television station and carry it back into the heart of the home team's territory. They do this without the consent of the home team, the league, the television station whose signal is picked up, or the network that purchased the original television rights to the telecasting of the game. They simply pay no attention to our contract restrictions, our own interests, or the interests of the networks which have purchased our rights.

For example, a CATV system in the suburbs of Cleveland has announced its intention to carry the Cleveland Browns' home games by picking up the television signals of the games from distant stations outside the home territory. This is but one example. CATV systems are mushrooming all over the country and at the present rate, it will not be long before CATV systems are operating in the home territories of all 24 present professional football clubs. In Buffalo, for example, a local CATV is advertising that for only 16 cents a day the Buffalo Bills' home games can be seen at home without the trouble and expense of visiting the stadium. The effect is going to be direct damage to home game attendance, and the impact will be felt most quickly by the less successful clubs in both leagues.

But the impact of these practices by CATV's is not limited simply to home game attendance problems. Unauthorized CATV appropriation of our game telecasts directly interferes with many other objectives sought to be advanced in our league television contracts. These objectives are closely identified with the interests of the fans as well as of our clubs.

First, the rights sold by the league to the purchasing network are exclusive, as they need to be if they are to have significant value. CATV destroys this exclusivity by importing distant and competitive games and therefore impairs the value of the television rights purchased by the network.

Second, the NFL television contracts require the purchasing network to carry away games of each NFL club back to that club's home territory, regardless of the economic factors involved or the purchasing network's preferences. This insures that hometown fans of each team have access to all of the team's away games. To implement this requirement, regional networks are established each week for each league game. CATV importation of other games threatens to break

down this regional network structure. A purchasing network will be placed under considerable economic pressure to resist paying the heavy tieline charges and other costs necessary to bring every away game of each home team back to the hometown if CATV's can compete with the local stations without such costs.

Third, as required by Federal legislation, the league's contracts prohibit the telecasting of league games in direct conflict with college games during the regular college season. CATV importation of distant signals ignores these restrictions and makes it impossible for the league to honor the congressional directive. We not only cannot protect our own interests; we cannot even protect the interests of the colleges.

In short, CATV activity threatens to deprive sports leagues, such as the NFL, of all control of the manner in which their sports events are televised. This is an unfair and unwarranted situation. The member clubs of the National Football League incur great expense to produce their games. They are entitled to copyright protection if they are to protect their performance rights and their game investments from appropriation by total strangers that now pay nothing and whose activities reduce the value of their television rights. Moreover, as a result of the present situation, we lose the very privileges Congress specifically accorded us in the 1961 act.

In terms of the copyright principles involved, live sports telecasts are a form of entertainment similar to motion pictures. Indeed, video tapes of sports telecasts fall squarely within the definition of motion pictures in S. 1006, the copyright revision bill. The critical problem is presented, however, by the fact that CATV systems appropriate and sell commercially our game telecasts simultaneously with their transmission by the broadcasting stations. We urge that the Congress make explicit that this form of appropriation, like appropriation of taped sports events, constitutes infringement of a copyright. This can be done by amendment to the definition of "motion pictures" in section 101 of the copyright revision bill to include within that term live sports telecasts recorded simultaneously with their original transmission.

We believe we have enforcible rights against CATV systems under common law copyright principles. But section 301 of the copyright revision bill would appear to preempt common law copyright to the extent of works subject to the Federal copyright statute. The present bill might, therefore, move us backward. The answer lies in recognizing the property rights of producers of live sports telecasts by making the Federal statute explicit in providing copyright protections for live sports telecasts. This would be consistent with the 1961 act of Congress and with the public interest in widespread telecasting of sports events.

There is also a need to clarify the remedies available for CATV infringement of sports program copyrights. Questions may be raised whether the original telecasts of these programs constitute a "publication" within the meaning of section 411 of S. 1006. If they are not, the award of statutory damages and attorneys' fees, as authorized by sections 504 and 505 of the bill, may not be available to the holders of sports program copyrights. Consideration should be given to amend-

ment of section 411 to permit the award of statutory damages in instances where there is an infringement of a sports program copyright occurring simultaneously with the original transmission.

I much appreciate the opportunity to appear before you. There is attached to my statement a brief appendix setting forth the two amendments to S. 1006 that we request be given consideration by this committee.

(The appendix to Mr. Rozelle's statement follows:)

APPENDIX TO TESTIMONY OF PETE ROZELLE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE, BEFORE THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE JUDICIARY COMMITTEE ON S. 1006

1. The definition of "motion pictures" in section 101 should be amended to read as follows:

"'Motion pictures' are works that consist of a series of images which, when shown in succession, impart an impression of motion, together with any accompanying sounds, regardless of the nature of the material objects, such as films or tapes, in which they are embodied, *and specifically include television broadcasts of sporting contests simultaneous with the conduct of the contest which are recorded simultaneously with their transmission.*"

2. Section 411 should be amended in the following manner:

"In any action under this title, no award of statutory damages or of attorney's fees, as provided by section 504 or 505, shall be made for (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration *unless, in the event of a television broadcast of a sporting contest simultaneous with the conduct of the contest, such registration is made within three months after its original transmission; * * *.*"

Senator BURDICK. Mr. Rozelle, I want to thank you for your contribution to the committee. I can understand your problem. It is your purpose to try to encourage live bodies at the stadium and give the benefit of the game to those within the immediate area of the city. You control this or try to control it by contracts with the various broadcasting companies. But you cannot control the pickups the CATV take from distant stations?

Mr. ROZELLE. Yes, sir.

Senator BURDICK. Is that about the size of the problem?

Mr. ROZELLE. That is correct. The other problem is that of exclusivity, the problem of fractionating audiences by having CATV bring in as many as four or five games at the same time.

Senator BURDICK. Is this problem that you have described threatening or is it in being? Is it happening right now?

Mr. ROZELLE. It is happening now.

Senator BURDICK. Have games been broadcast in the blackout area on CATV?

Mr. ROZELLE. I think this has occurred in the past, but the problem is growing. Starting the latter part of August in Cleveland, and apparently throughout this coming season in Cleveland, it will be done extensively.

Senator BURDICK. And you think it may be done more extensively as days go on?

Mr. ROZELLE. And as more CATV subscribers are enrolled in some of these areas; yes, sir.

Senator BURDICK. You have no objection to CATV as such, but you prefer to have the control through the broadcasting stations and they in turn license the CATV if they are carrying it? Would that help?

Mr. ROZELLE. We simply want our contracts honored with the network. We support the original purpose of CATV in bringing our telecasts to the so-called pocket areas, areas in which it is difficult to get adequate reception, or where they have no local station. We are certainly in accord with having the greatest possible exposure of our football telecasts. But we do have deep concern about violation of our blackout practices, as these have proven so successful in developing the popularity of professional football.

Senator BURDICK. Well, I think you have presented the committee with a real problem and you may be sure we will give it great consideration.

Thank you.

Mr. ROZELLE. Thank you very much, sir.

I would also like to introduce Mr. Harold Lovre, who has been representing the American Football League and I believe has just a few brief comments.

Senator BURDICK. I would certainly like to welcome my neighbor from South Dakota, a former Member of the House of Representatives.

STATEMENT OF HAROLD O. LOVRE, WASHINGTON COUNSEL FOR THE AMERICAN FOOTBALL LEAGUE

Mr. LOVRE. Thank you very kindly.

Senator BURDICK. Off the record.

(Discussion off the record.)

Senator BURDICK. Please proceed, Mr. Lovre.

Mr. LOVRE. Mr. Chairman, I am appearing on behalf of the American Football League. I have asked for this time merely for the purpose of entering an appearance for the American Football League, because Commissioner Pete Rozelle has spoken for both leagues. We subscribe wholly to the statement and the testimony as presented by Commissioner Rozelle.

Now, Mr. Chairman, relative to the question you have directed to Commissioner Rozelle, whether or not CATV is threatening the income or gate receipts received by clubs. Last year, when we appeared before the Subcommittee No. 3 of the Judiciary in the House of Representatives on a similar bill, I had with me and introduced into the record two ads that appeared in the Buffalo Courier Express on Sunday, August 1, 1965, and another ad on Wednesday, August 18, 1965, by the Courier Cable Co., which ads you will find on pages 1835 and 1836 of the printed hearings of the subcommittee. I think that those ads, which I refer to by reference, give you a complete answer to the question that you directed to Commissioner Rozelle. The first one, "CATV Is Coming." It is a one-page ad. I am not going to read it because——

Senator BURDICK. Where did this appear in a newspaper?

Mr. LOVRE. In a newspaper. It appeared in the Buffalo Courier Express on the two dates I mentioned.

The second ad, which appeared on Wednesday, August 18, 1965, starts out with "Do you live on one of these streets in Buffalo?" Then it lists a number of streets. "If you do, sign up now for cable television. Save $15 on the installation fee. Enjoy nine more channels on your TV set. Triple your viewing pleasure."

Then it goes on to say, "What is it? What does it give me? What does it cost? How do I subscribe?"

Then, in the body—I had to write this out because the printing is so small I could not read it, it states:

It is the best entertainment buy available anywhere in western New York. For instance—

Then it says:

One pack of cigarettes per day, 30 cents. Courier Cable CATV, less than 16 cents per day.

I am quoting from the ad.

Then farther down in the ad, and this is very difficult for me to read:

Cheapest ticket for Buffalo professional football game, $3 end zone. Courier Cable CATV today, 16 cents, 50 yard line.

You cannot beat that, Mr. Chairman.

Then here is another paragraph that says, "Sports." This corroborates the testimony of Commissioner Rozelle. They are using this as a gimmick to get subscribers. Then I quote:

Hockey from Canada, at-home pro football, Buffalo * * * no more driving to Erie to watch blacked out Bills' games played at home.

and so forth.

Mr. Chairman, I think that speaks for itself.

Senator BURDICK. These broadcasts have not started yet, have they?

Mr. LOVRE. To my knowledge, that I cannot answer.

Senator BURDICK. But you would say they are imminent?

Mr. LOVRE. They are very imminent. These ads appeared last year, 1965. If my memory serves me correctly, when we appeared early this spring on a like bill, but before Interstate and Foreign Commerce in the House we had another ad at that time which we inserted in the record.

Mr. Chairman, thank you very kindly. I did not mean to take this much time, but I thought I should corroborate the testimony of Mr. Rozelle.

(Mr. Lovre's prepared statement follows:)

Mr. Chairman, my name is Harold O. Lovre and I am Washington counsel for The American Football League. I appear here today in support of any legislation which would assure black-out protection to professional football from encroachment by CATV systems outside our franchised cities.

In 1961, Congress enacted Public Law 87-331 (15 SSC 1291) which provided among other things that professional team sports could black out their home territory when the team was playing at home. This merely confirmed the ruling of Judge Grim in 1953 holding that such black outs did not violate the Sherman Act.

Since this right has been granted to us by the Congress and the courts, we feel that we are entitled to protection of this right when infringement appears. Currently, CATV systems are infringing in some of our areas and we expect there will be further infringements unless positive action is taken by the Congress.

To take an example, a new CATV system in Buffalo, New York has advertised extensively that Buffalo residents can sit at home and see Bills games on Community Antenna Systems even when the team is playing at home. The signal is brought back into Buffalo by Community Antenna from non-blacked out areas.

In advertising, the Buffalo CATV station stated:

"Hockey from Canada, at home pro football, Buffalo * * * no more driving to Erie to watch blacked-out Bills games played at home. Basketball, baseball, horse racing. You name it * * *."

It then goes on the point that the cheapest ticket for Buffalo professional football games is $3.00 for an end zone seat, whereas with the Courier Cable Company service you can get a seat on the 50-yard line for only 16 cents a day which is their daily service charge.

The American Football League has been fighting against this encroachment for several years and has had witnesses before both the House Judiciary Subcommittee on Patents and Copyrights and the House Committee on Interstate and Foreign Commerce.

We fully subscribe to the statement of Commissioner Rozelle for The National Football League and the American Football League and urge the members of this Subcommittee to give us protection in this most vital area.

Senator BURDICK. Thank you very much.

I direct that Mr. Paul Porter's statement be included in the record.

(Mr. Porter's statement follows:)

STATEMENT OF PAUL A. PORTER ON BEHALF OF ORGANIZED BASEBALL

This statement is submitted on behalf of the Commissioner of Baseball, Lt. Gen. William D. Eckert, Ret.

Baseball's interest in S. 1006 relates to a narrow and specific question: whether live, play-by-play broadcasts of sports events will be protected from unconsented retransmission by community antenna television systems.

We understand that the Copyright Office's position is that there is some question whether the bill, as now drafted, extends copyright protection to live broadcasts of sports events, even though the Copyright Office acknowledges that all prerecorded, taped, or otherwise copyrighted broadcasts will receive protection against CATV retransmission. Further, we understand that the doubt and ambiguity is founded essentially on conceptual grounds: whether there can be copyright infringement under section 102 of the bill in circumstances where CATV retransmits a *live* sports broadcast since there is no copying of a work which has been reduced, in the terms of section 102, to a "tangible medium of expression."

To distinguish between live and prescripted or prerecorded broadcast would mean that a tape of the San Francisco Giants playing the Tokyo Giants which is replayed on a sports spectacular cannot be picked up by CATV without infringement. However, in contrast, a live, play-by-play transmission of a contest between the San Francisco Giants and the Los Angeles Dodgers is fair game for CATV.

For the reasons set forth below, we believe that any such artificial and economically meaningless distinction should be rejected and that this subcommittee should explicitly extend the scope of copyright protection to cover CATV's retransmission of live sports broadcasts.

One of the commendable elements which runs generally throughout the draft of the copyright bill is the constant effort to deal with the commercial realities of the modern world of ideas and communications. It was the recognition of CATV's impact upon the producers of television shows, television broadcasters, and local stations which led the Copyright Office to propose that CATV tranmission constitutes a copyright infringement. We endorse those findings and this proposal inasmuch as they are particularly applicable to organized baseball. The Congress is well aware that only through the investment of great sums of money, time, and effort—extending over the course of decades—has baseball attained the status of the national pastime. In such circumstances, it is grossly unequitable to give CATV a free ride and to permit CATV to broadcast, without consent or compensation, any game which they please.

Thus, solely upon conceptual grounds, the entire area of live sports broadcasts—which involves millions of dollars of revenue annually—might have been left unprotected by the bill from expropriation by CATV. Significantly, to date, there was no justification whatever presented to Subcommittee No. 3 of the House Committee on the Judiciary when it held hearings on H.R. 4347 which would support—as a matter of policy—the failure to extend protection to live sports broadcasts.

This omission can cause serious and substantial problems for baseball. Revenues from the sale of television rights are a major source of income for the teams in the American and National Leagues. Of course, it is the ability to control live sports broadcasts which makes this such a valuable asset.

This year's total broadcast revenues from all sources will exceed $25 million. On a league basis NBC–TV is paying $6 million to 19 major league clubs to broadcast "The Game of the Week." The Philadelphia Phillies are not included in the package because of a $3.9 million, three-year contract now in its second year. Further, the other individual major league clubs have contracts for broadcasting their games within their local areas for substantial amounts, in some cases exceeding $1 million.

These figures demonstrate the value that sponsors attach to the rights to broadcast live sports contests. However, baseball will be able to realize these revenues only as long as the member teams or the league possess exclusive control over such broadcasts. Congress has recognized this fact of life in 1961 in the sports broadcast bill when it specifically exempted from the anti-trust laws a league package TV contract which provided that the concerned network would not broadcast "The Game of the Week" into "the home territory of a member club of the league on a day when such club is playing a game at home," although such a requirement is not currently being imposed on NBC–TV.

This valuable right to control the broadcasting of sports performances may well be destroyed unless the copyright bill is expanded to protect live sports performances from expropriation by CATV. CATV will be able to wreak havoc in a home team's market. For example, many teams—Washington is one—have decided to keep at a minimum televising their home games so as to protect gate attendance. Assuming Washington is playing the Yankees here at the District of Columbia Stadium and that the game is being broadcast back to New York City, under the bill as now drafted, it is possible that CATV could—without any financial obligation—bring into Washington that very game, as well as any number of competing games, which all could substantially cut into the Senators' box office attendance.

Further, CATV will threten the potential TV revenues in circumstances where a team decides to broadcast all its games. As an example, Atlantic Refining has contracted to pay the Philadelphia Phillies a very substantial sum—running into the millions—for the exclusive right to broadcast in the Philadelphia market. However, if CATV is permitted to bring into Philadelphia all Yankee and Mets games from New York City without regulation or control, necessarily the amount Atlantic Refining will be willing to pay in this diluted market for sponsorship of the Phillies will plummet. Further, neither the Mets nor the Yankees would be compensated for the unconsented use of their broadcasts.

These examples could be repeated in all the cities presently housing major league baseball teams for, as the Congress is well aware, CATV applications presently are blanketing all the major metropolitan markets.

Moreover, CATV poses a threat to the continued vitality of minor league clubs. These minor league clubs are, of course, the proving grounds for most major league players. However, unregulated expropriation of live major league games by CATV could decimate minor league gate attendance, and organized baseball would be powerless to respond in any fashion. As illustrative of the problem which CATV causes minor league clubs, there is attached an editorial by C. C. Johnson Spink, from the July 2, 1966, edition of *The Sporting News* (of which Mr. Spink is Editor and Publisher). Mr. Spink asserts that:

> "With the baseball blanketing provided by [a Williamsport, Pennsylvania CATV] company, its a wonder that the Williamsport (Eastern) Mets have anyone at their games. As a matter of fact, the club's crowds have been slim, averaging 960 for the first 20 home dates this year. On non-promotional nights, it has been even less, 375 to 400 paid."

Baseball must have the right to control in a proper fashion the broadcast of its games in order to protect such minor league teams.

In sum, one of baseball's most valuable economic assets—its revenue from the sale of TV rights—can be substantially destroyed by unregulated expropriation by CATV. This very situation has prompted the Register of Copyrights to

recommend broad CATV protection in S. 1006 which will extend to all taped or prerecorded programs. However, the Register's proposed bill apparently stops short of protecting live sport broadcasts.

This artifical concept of the Register could force equally artifical responses on the part of baseball, its individual teams, and the networks to protect their product. For example, conceivably, every live sports event could be placed on tape and rebroadcast a few seconds later. The program would then unquestionably be protected against CATV expropriation. But, this procedure is extremely complicated and expensive.

Further, the language of the bill, as now proposed, produces this curious result: should CATV pick up "The Game of the Week," those portions of the game which are broadcast live would fall without any copyright protection. However, under the interpretation suggested by the Copyright Office, if there would be a video tape replay immediately following any given play, CATV could not pick up that portion without infringement because the play has been reduced to a tangible medium of expression, which was rebroadcast by the station. We assert that this illogical, fragmented result does not comport with the regulatory purposes of this bill which attempt to protect broadly and generally, for good and sufficient reasons, against unconsented retransmission by CATV.

In order to remedy this serious defect in the bill now before the subcommittee, baseball supports the amendments which have been proposed by the National Football league. By redefining "motion pictures" in section 101, to provide that: "The term 'motion pictures' includes live telecasts of sports events which are recorded simultaneously with their original transmission," this critical defect in the bill can be cured. We urge adoption of these amendments.

"We Believe"

(By C. C. Johnson Spink, July 2, 1966 edition of The Sporting News)

COMPETITION BY CABLE

The inundation of minor league cities by major league telecasts has reached its height at Williamsport, Pa., where a community antenna television service recently advertised that it would carry over 350 games this season.

The ad of the Citizens Cable Co. listed a schedule that included 61 Phillies' games, 125 Mets' games, 115 Yankee games and 52 Orioles' games, plus "others as they develop and the Games of the Week."

The Williamsport CATV company is the largest in the country. Its gigantic antenna picks up TV signals from stations in the big eastern cities, strengthens them electronically and sends them by cable to some 20,000 homes.

With the baseball blanketing provided by the company, it's a wonder that the Williamsport (Eastern) Mets have anyone at their games. As a matter of fact, the club's crowds have been slim, averaging 960 for the first 20 home dates this year. On nonpromotional nights, it has been even less, 375 to 400 paid.

ACTION ON THREE FRONTS

Unfortunately, there is nothing baseball can do, at the moment, to prevent the unregulated competition from hurting the live performance. But we hope that the commissioner's office does not sit by while the whole CATV problem is being fought out in the courts, before the Federal Communications Commission and in Congress.

A movie company's subsidiary, United Artists Television, carried the ball for everyone with a suit that charged a West Virginia cable company with infringing on its copyright by transmission of a motion picture without authorization. After six years of litigation, United Artists recently won its case in New York Federal District Court. Left in the air, however, was the question whether picking up of live telecasts of sports events represented an infringement under copyright law.

Meanwhile, the FCC has stepped into the situation with regulations of CATV operations and has asked Congress to give it greater authority in the area of cable transmission. The House Commerce Committee has given its okay to such a bill, but it is headed for a floor fight that may result in amendments favorable to CATV interests.

LIMITED RESTRICTION PROPOSED

The bill has one section dealing with sports. It provides that the FCC, if requested by the professional leagues, should see to it that pro sports events are not carried by cable into blackout areas.

This section does not go far enough because it does not consider CATV's impact on minor league games. Williamsport is not an isolated case. At least two other Eastern League cities, Elmira and Pittsfield, also have cable service.

CATV is undergoing a boom because some companies can bring in 10, 12 or more channels, giving TV fans a variety of entertainment in cities where there may be only one regular station or even none.

Baseball is committed to a policy of wide dissemiantion of major league telecasts, but that does not mean that minor league games should be overwhelmed, as is being done in Williamsport. There should be some way to let the minors operate without fear of death from the magnified eye of television.

CLEVELAND INDIANS, INC.,
Cleveland, Ohio, July 26, 1966.

TELERAMA, INC.,
23980 Mercantile,
Beachwood, Ohio.

GENTLEMEN: It has come to our attention that you are distributing in the Cleveland area telecasts of Cleveland Indians' games originating in Cleveland Municipal Stadium, without the consent of Cleveland Indians, Inc.

We have a property right in the telecast of all Indians' games played in Cleveland Municipal Stadium and have granted these rights to certain networks and television stations by contract. Your distribution of telecasts of Cleveland Indians' home games is a tortious interference with these contract rights. Furthermore, your distribution of said telecasts is nothing less than a pirating of television rights and constitutes unfair competition.

We hereby demand that you cease and desist the distribution of telecasts of Cleveland Indians' games. If you do not, we will take all steps legally available to prohibit you from said distribution.

Very truly yours,

GABRIEL PAUL,
President.

Senator BURDICK. We will recess until tomorrow morning at 10 a.m.

(Whereupon, at 2:45 p.m., the subcommittee recessed, to reconvene, at 10 a.m., Thursday, August 4, 1966.)

COPYRIGHT LAW REVISION—CATV

THURSDAY, AUGUST 4, 1966

U.S. SENATE,
SUBCOMMITTEE ON PATENTS,
TRADEMARKS, AND COPYRIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:45 a.m., in room 1318, New Senate Office Building, Senator Quentin N. Burdick presiding.

Present: Senator Burdick (presiding).

Also present: Thomas C. Brennan, chief counsel; Edd N. Williams, Jr., assistant counsel; Stephen G. Haaser, chief clerk, Subcommittee on Patents, Trademarks and Copyrights; and George S. Green, professional staff member, full committee.

Senator BURDICK. This morning we are a little bit pressed for time because of an unusual situation on the floor. And therefore I would ask all witnesses to be as brief as possible. If they have prepared statements they will be made a part of the record in full.

Our first witnesses this morning are Mr. Louis Nizer, general counsel of the Motion Picture Association, and Mr. Arthur Krim, president of the United Artists Corp.

You gentlemen may proceed in any order you wish.

STATEMENT OF ARTHUR KRIM, PRESIDENT, UNITED ARTISTS CORP.

Mr. KRIM. Thank you, Mr. Chairman.

I am Arthur Krim, and I am president of the United Artists Corp.

We have a subsidiary which is known as United Artists Television Corp. which produces programs for television, and therefore has a deep interest in the subject matter before this committee.

I am grateful to you for giving me this opportunity to testify. And I apologize to the committee for not having a prepared statement at this time. But we do want our statement when it is submitted to be responsive to the statement made by Commissioner Ford 2 days ago. And so I ask your permission, Mr. Chairman, to file that statement in the near future.

Senator BURDICK. Your statement may be made a part of the record when filed.

(The statement of Arthur Krim follows:)

UNITED ARTISTS CORPORATION,
New York, N.Y., August 17, 1966.

Hon. QUENTIN N. BURDICK,
Acting Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: During my testimony before your subcommittee on the morning of August 4, 1966, I requested the opportunity to submit a prepared statement at a later date. You were gracious enough to consent.

Now upon reading the transcript of my testimony and that of Louis Nizer, I feel that we have been substantially responsive to the statement offered by Commissioner Ford on August 2, 1966. Since that was the chief purpose of my request for permission to file a prepared statement. I do not feel that any additional prepared statement is required at this time.

Under those circumstances I hope I may be permitted under your previous consent, after the resumption of the hearings, to submit such additional statement as may then be appropriate.

I am grateful to you and the staff of the subcommittee for the opportunity to testify and for the courtesies which have been shown to us.

Sincerely yours,

ARTHUR B. KRIM, *President.*

Mr. KRIM. Thank you, sir.

At this time I would like to incorporate into this record, in order to avoid duplication, the statement which I made before the House subcommittee of the Judiciary Committee on June 24, 1965, which appears at pages 1332 to 1353 of the record of those proceedings.

Senator BURDICK. Without objection it will be included in the record.

(The statement referred to follows:)

Mr. KASTENMEIER. The last witnesses today will be represented by two very eminent Americans, Mr. Arthur B. Krim, and Mr. Louis Nizer, both eminent in their own fields, in behalf of the motion picture industry and television producing companies.

Gentlemen, you are both, together with your colleagues, welcome to this committee.

STATEMENT OF ARTHUR B. KRIM, PRESIDENT, UNITED ARTISTS CORP.; ACCOMPANIED BY JOHN SINN, PRESIDENT, UNITED ARTISTS TELEVISION, INC.

Mr. KRIM. Thank you, Mr. Chairman and members of the committee. I am Arthur Krim, president of United Artists Corp. We operate a wholly owned subsidiary in the television field, United Artists Television, Inc. The president of that subsidiary is at my right here, Mr. John Sinn, and he will be available for such questions as I may not be in a position to answer.

I represent, for this purpose only, a group of companies engaged in the production of films for television and, in a subsidiary way, engaged in the sale to television of feature films which had originally been made for exhibition in theaters—but the principal business of these companies insofar as my appearance here on their behalf is concerned is that of producing films directly for television transmission. Those companies are: Allied Artists Television Corp.; Danny Thomas Enterprises, Inc.; Desilu Productions, Inc.; Embassy Pictures Corp.; Independent Television Corp.; Metro-Goldwyn-Mayer, Inc.; Wolper Productions; Screen Gems, Inc.; Seven Arts Productions, Inc.; Twentieth Century-Fox Television, Inc.; United Artists Television, Inc.; Universal Pictures, Inc.; Walt Disney Productions, Inc.; and Warner Brothers Pictures, Inc.

I think, gentlemen, that this group of companies which, as you can see, numbers 14, represents in excess of 75 percent of the copyrighted material which is going over the airwaves today. I would venture the further guess that if we were to add to these 14 another number, certainly not more than 14, and of course including the three networks, we would cover so close to 100 percent of the copyrighted material which is going over the airwaves that the exceptions would be relatively minor in nature.

I think you will recognize that this has some significance to a number of the problems that have been raised as specters, which have to do with the difficulty of bargaining for these rights.

We are here to support the administration bill. We ask for nothing other than that the bill be passed as recommended to this subcommittee.

But we feel that in doing that we are not in any sense asking for a change in the law. Mr. Poff had some questions before about the lawsuits that are testing this issue. We are clear enough in respect to those cases to say that there is no doubt about the fact that the law has covered transmission through CATV in these past few years—not even deep down in the hearts of the CATV operators themselves—so that we are not asking for a change in the law. Naturally there have been technological differences, television among them, since the 1909 bill, and naturally there is some need for new language, but if it weren't for this extraordinary request of the CATV people for an exemption, which violates every tradition of American property ownership, we wouldn't have to spend this day here today on this unusual mission to fight against this kind of a trespass on our clear property rights.

All we are asking for is a very simple thing, that people who now take our property for nothing, pay for it. We are trying to stop piracy and I don't think there is any lesser word to describe it. I think there are harsher words which would fit it.

I have a rather lengthy memorandum which, with your blessing, Mr. Chairman, I would like to incorporate in full without reading any part of it, if I may at this time be permitted some general observations.

Mr. KASTENMEIER. Without objection your statement will be received and made part of the record, and you may proceed.

(The memorandum referred to follows:)

"STATEMENT OF ARTHUR B. KRIM

"My name is Arthur B. Krim. I am president of United Artists Corp. United Artists Television, Inc., a wholly owned subsidiary of our parent company, produces and distributes copyrighted television programs on film, here and abroad. Mr. John Sinn, the president of that company, is here with me today.

"I am here not only as president of United Artists, but also as the spokesman for a group of other producers and distributors of copyrighted television film programs who have a common interest in the copyright revision bill insofar as it affects community antenna TV systems. The producers and distributors for whom I am authorized to speak, in this limited area, are:

Allied Artists Television Corp.
Danny Thomas Enterprises, Inc.
Desilu Productions, Inc.
Embassy Pictures Corp.
Independent Television Corp.
Metro-Goldwyn-Mayer, Inc.
Wolper Productions, Inc.
Screen Gems, Inc.
Seven Arts Productions, Inc.
Twentieth Century-Fox Television. Inc.
United Artists Television, Inc.
Universal Pictures, Inc.
Walt Disney Productions, Inc.
Warner Bros. Pictures, Inc.

"I am grateful to the committee for the privilege of testifying today and for the opportunity to state the position of copyright owners.

"Our position, simply stated, is as follows:

"We strongly support the proposed copyright revision bill, H.R. 4347, insofar as it concerns CATV. We believe that CATV operators should pay a fair compensation for the privilege of using our copyrighted property in their business for profit. There is no valid reason for carving out of the basic U.S. copyright statute a special exemption for commercial community antenna systems.

"The only reason we are here today is the claim by the National Community Television Association (NCTA) that CATV should be given such an exemption. They argue that a CATV system does nothing more than improve the television reception of home TV viewers; they maintain that the royalties paid by television stations for copyright licenses already include compensation for anticipated transmission to CATV subscribers; and finally they contend that a notice and clearance system would be difficult to administer.

"Each of these claims is without merit.

"1. THE OPERATIONAL FACTS

"CATV is not a passive rooftop or 'rabbit-ear' antenna. It is, on the contrary, a highly sophisticated electronic system that not only receives but also transmits. In some instances, it even converts the signals into different channels. The antenna is a relatively unimportant part of a complex arrangement for amplifying, feeding, piping, distributing and converting the original signals. As you will see from the brief Mr. Nizer will submit to you today, both the Federal court and the Federal Communications Commission have found that there are essential differences between CATV and the passive antenna.

"The plain fact of the matter is that CATV receives the broadcast and then pipes it by wire to its customer's home for a price—and at a profit. The result is essentially the same as if CATV were to pipe its broadcast to a theater and charge admission there to see a show. Commercially, CATV republishes and sells our copyrighted products. There is no reason why CATV or any other exploiter for gain of a copyrighted work, should not be required to secure the copyright owner's license, and to pay him compensation for the use of his property.

"When CATV began, its purpose was to serve towns far distant from the site of television stations or isolated by mountainous terrain. By building high towers or locating its antennas on high locations, CATV systems sought originally to reach out to obtain signals in fringe areas and in locations normally outside the contour boundaries allocated by the FCC to the television station. Later, by using microwave and other relay facilities, they brought programs from even more distant television stations.

"CATV has now proliferated into a vast and powerful industry. It operates even in areas where TV stations are already in existence or where the population is large enough to support them. For example, an application is currently pending in Philadelphia for the creation of a CATV system which proposes to bring to that city the programs of the three independent New York TV channels. If this were to be carried to its logical conclusion, the multiple channels of New York and Los Angeles could be relayed and piped into any television set in the country. Yet the license agreements entered into between the copyright owners and television stations in all parts of the country, including Philadelphia, provide for exclusivity in each geographical area. As I shall explain, the continued growth of CATV, if not subject to copyright, would upset the nationwide FCC system of contour area allocations, make a mockery of the exclusive license agreements between copyright owners and television stations and seriously damage the property interests of both.

"Unlike the typical rooftop or 'rabbit-ear' device, unlike the master antenna atop an apartment building, CATV serves the same function as the local television station; to distribute entertainment to the public in any area where signals telecast from the other television stations cannot be received. Local television stations do no originate most of their own programs; they relay most of them from networks or other originating stations. In this respect CATV is like the local television station but with one highly significant difference: the TV station must pay for its programs and CATV is asking this committee to recommend a statutory exemption by which it would be relieved of this obligation.

"2. THE ECONOMIC FACTS

"CATV charges a price, calculated to produce a profit, for the distribution of television programs to its customers. Except for the fact that the TV station collects its revenue from advertisers rather than from its audiences, here again it resembles the local TV station. The fact that the programs are distributed by wire rather than through airwaves cannot change the basic function of CATV as a distributor of programs, many of them the copyrighted works of the companies for whom I speak today.

"Nor is CATV a small factor in the communications picture. The Copyright Office has testified that there are already about 1,600 such systems and that their number is growing rapidly. They now bring the programs of more than 400 television stations to well over a million and a half subscribers. The revenue of the CATV industry was reported last year to be in excess of $100 million. In individual cases, CATV systems serve larger numbers of viewers than local television stations. The recent CATV application for a franchise in Philadelphia reveals that the installation would involve an initial investment

of $37 million and would serve 200,000 customers. By any relevant economic criteria, CATV must be regarded as a major method of exploiting television programs.

"If it is permitted to make use of copyrighted work without compensation CATV will have a devastatingly destructive effect upon the business of producing and distributing television programs.

"Before analyzing that effect it may be appropriate to refer briefly to the structure of television film program distribution. There are basically tw methods: network and syndication. Network selling involves a license to network or sponsor for what is tantamount to a single nationwide broadcast. Syndication involves the licensing of programs locally to stations or advertiser on a city-by-city basis.

"Programs first released through syndication are not thereafter broadcas nationally on a network basis but programs first released on a network basis are distributed later in syndication. The rising cost of production and the highl competitive nature of the business normally preclude any profit on a single network run of any program. Producers and distributors look more and more to post-network syndication to make a profit or even to break even.

"The highest price is always paid for first-run product. When the bloom is off the rose, its value drops precipitously. Although there is no fixed ratio, each succeeding run generally yields far less than the preceding run.

"The usual license contract in syndication does not grant the right tc authorize the telecast of our programs over additional stations and prevents the licensee station or sponsor from authorizing a community antenna to perform the program. These restrictions are in keeping with the underlying principle of geographical limitation that is central to all television release. The station that 'buys' the Chicago area is limited to the Chicago area; all TV licenses are related to the broadcast contours regulated by the Federal Communications Commission and well known to licensors, stations, and advertisers.

"In this framework, it can readily be seen that when a CATV system brings programs from a distant city, it plays havoc with every existing licensing system and either seriously downgrades or utterly destroys the property of the copyright owner. Two illustrations—one in a large city, the other in a small one—may make this clearer.

"Programs syndicated in New York are licensed concurrently in Philadelphia. If CATV were to operate in Philadelphia it would bring into that city the programs of the independent stations in New York. Philadelphia would be completely lost to copyright owners as a first-run market unless CATV operators pay a fair license fee. After a CATV performance in Philadelphia taken from a New York TV station (and for purposes of later sale this would constitute a run) the subsequent value of the program in Philadelphia would be substantially diminished. If CATV expands from city to city, syndication outside New York and Los Angeles will fall sharply and tend to vanish; New York and Los Angeles have more independent stations than any other cities.

"In small cities where there are both a television station and a CATV, copyright owners are faced with the same dilemma: they are unable to sell to the local TV station because the same program is being picked up from afar by CATV. And as far as subsequent run broadcasts are concerned, they face the same destructive price breakdown.

"In a small town where there is no TV station, it cannot be validly maintained that the copyright owner is not damaged by CATV on the supposed ground that he would not have sold his program anyway. TV producers and distribuotrs, before undertaking to pay the high costs involved in production, have always looked forward to the time when some method of communication would be established within every geographical area in the United States and a fair price would be negotiated for such coverage. It might be a UHF station; or it might be a satellite, or booster, or translator operating under the authority of a mother station. If it is a CATV system, fine—but why should CATV be permitted to sell a copyrighted program without paying compensation to the owner of the copyright?

"I am informed by the sales executives of our own company that, as a practical matter, it is not possible to compensate for this economic loss simply by charging higher fees to television stations in recognition of the fact that their signals are or may be carried by one or more CATV systems. The processes of pricing in this highly competitive industry bring many other factors into play. TV stations and networks will not pay higher prices for film programs merely be-

cause they are being used freely by CATV operators. Certainly no TV station is willing to pay for programs shown outside its own market area. Local advertisers are not willing to pay premiums for advertising their products in markets where there are no facilities to sell them. National advertisers will not pay for duplicated coverage. Where CATV systems compete with existing TV stations in the same city there certainly can be no question of double payment.

"If CATV were now to bring the programs of independent New York or Los Angeles stations to other cities without any obligation to negotiate and pay for programs the result would be marketing chaos—and the double payment argument obviously specious.

"A special word is in order with respect to UHF. The producers of film series for television have always had a special stake in the establishment of UHF stations. As the cost of films increased and the producers looked forward hopefully to more television outlets, their hopes were nourished by the policy of the FCC in encouraging UHF and by the action of Congress in passing the all channel receiver bill. If CATV can appropriate these properties without payment, it can unfairly compete with any comparable UHF installation. Even if duplication is avoided by some mechanical rule, the the value to a UHF station of any program already shown on CATV would, as I have explained, be sharply diminished. The testimony of Mr. Marlowe of WWLP–TV of Springfield, Mass., who is here today, will make this situation abundantly clear.

"3. THE ALLEGED BOOKKEEPING PROBLEM

"CATV operators have argued that since there are several hundred copyright owners, the mechanics of notice, clearance, and licensing would present a 'bookkeeping nightmare.' Mr. Cary, the Deputy Register, also regards this as a difficulty and suggests that the copyright owners come forward with suggestions for a solution.

"It seems to me that anyone who wants to perform or otherwise to use my property should assume the responsibility for obtaining the appropriate license. Mr. Cary himself has testified that a CATV performance 'results in a profit which in all fairness the copyright owner should share' and that 'unless he is compensated, the performance could have damaging effects upon the value of the particular copyright.' This being so, is it fair to place upon the damaged party the burden of solving the detailed mechanical problems?

"But the problem is not a real one. Television stations have no difficulty in working out license arrangements and, as has already been said, many CATV systems are bigger, more prosperous, and better staffed than many TV stations. Moreover, it is not necessary to deal with 'several hundred copyright holders.' The owners of the copyrights are represented by program distributors who are willing sellers in a fiercely competitive market. There are, all told, no more than 25 to 30 such distributors. The great mass of copyright material is handled by no more than a dozen companies.

"Practically all telecasts, whether television series, 'specials,' or feature films, are the subject of very advance publicity. Schedules of all stations are made up well ahead of broadcast dates, to provide for ordinary publicity and promotion, and to make it possible for distributors to meet scheduled broadcast deadlines. The FCC has already proposed a notice procedure for CATV serviced by microwave which it presumably considers workable. There is no reason why a CATV operator cannot know which company controls the distribution rights to any projected program in plenty of time to obtain the appropriate license.

"CATV systems will be given all the notice they need and appropriate arrangements can be made for entering into license agreements for any programs they wish to transmit. I cannot believe that this committee would consider taking away from copyright owners the protection of the law merely because of the fear of alleged—and nonexistent—administrative problems.

"4. THE LAW

"We are satisfied that under the existing Copyright Act the unlicensed transmission by CATV operators of television programs constitutes the infringement of validly secured copyrights. There are two actions now pending in the U.S. District Court for the Southern District of New York, in which this legal proposition will be tested and confirmed. The defendants in those actions have interposed a number of affirmative defenses in no way relevant to the copyright question. Only within the last few weeks Judge Herlands has decided to try the copyright question first and separately from the other unrelated issues.

"You will hear today from Mr. Louis Nizer, who is the attorney for the plaintiff in one of those actions. He will explain why, under the present law, the operations of CATV systems must be regarded as coming within the area protected by copyright. He will also demonstrate why this must be restated clearly and confirmed in the new act. He speaks here for the same producing and distributing companies that have asked me to outline the business aspects of the matter to you.

"One additional point should be made here regarding the pending lawsuits. The earlier of these actions was commenced in the U.S. District Court for the Southern District of New York several years ago. CATV was then a burgeoning but still an infant industry. The investors of the many millions of dollars that have since gone into the creation of CATV facilities cannot now be heard to complain that the clear language of the proposed copyright revision bill causes them any undue hardship. Their investments were made with full knowledge that my company, at least, had already taken a firm and unequivocal position to protect its valid copyrights.

"In summary, the owners of copyrights urge the following propositions upon this committee:

"CATV is not a passive, or rabbit-ear, or rooftop device; it involves complex and large-scale transmission for a price and at a profit.

"The unlicensed transmission of television programs by CATV seriously diminishes the value of our copyrights.

"Producers and distributors of TV programs have had every reason to anticipate that new methods of exploiting programs would result in additional fair compensation and an increased chance of recouping increased costs.

"With a willing buyer and many willing sellers in a highly competitive industry there should be no difficulty in providing whatever notice and clearance may be necessary in the marketplace.

"Producers and distributors own programs and valid copyrights which CATV systems perform and for which they should pay a fair negotiated price; no special statutory exemption for CATV is justified.

"The provisions of H.R. 4347 insofar as they affect CATV should be adopted by the Congress in the form submitted by the Register."

Mr. KRIM. Thank you.

The memorandum examines three arguments and by this time you gentlemen have been pretty well briefed on all of them. I may say that the memorandum has anticipated the various arguments that have been put forward here today so there is nothing new that needs to be added.

Those three arguments which the memo covers are, first, this argument that all that is being done here is the same as the use of a master antenna on a roof, and in that respect may I say that the evidence is overwhelming—and part of it is in our papers, part of it will be referred to by Mr. Nizer, who is going to follow me in this presentation—so overwhelming that electronically what we are talking about here is a repeated broadcast, a transmission in every sense, and not the mere reception improvement which is represented by a master antenna on a roof. I am not sure the minutes will show this, but I thought that Mr. Ford said that translators do repeat and rebroadcast, and then followed it up by saying that translators do not deal with us for copyright rights. If he didn't say it, I apologize for answering it, but I feel he did say that in two separate points. The fact is we do deal with translators and we are ready to submit to this committee the proof that as far as we know we are selling specifically to translators. If any translator operation is taking programs off the air without our blessing, then they are doing this with the same onus as the CATV operator.

The second section of the memorandum deals with this question which has come up so often today, that we would be paid twice, and here, too, there is just no validity to the argument and in these general remarks in a few moments I would like to come back to that.

The third section is this big emphasis on the impossibility of administering this and the fact that we would by exercise of copyright privileges make it impossible for CATV to operate.

Before I elaborate in a general way on these points, I want to make a general comment, because I have been puzzled by the need to be here, as I said at the beginning, and yet the need is there.

Mr. Jennes referred to it as a curious situation. I refer to it as a shocking situation, one of the saddest episodes in our whole economic history.

What has happened is because of the lure of profits—and I am going to have something to say about how big the profits are here—the lure of profits, which

started in one way, in a small way, this business of getting the signal over mountains and through canals, which incidentally is all that the witnesses here had to refer to, not what is happening in CATV today—because of the lure of profits we have responsible companies—this is what makes it so shocking—becoming a part of this taking of property without paying for it. These companies privately acknowledge this, and this I can say safely because it has been acknowledged to me. Some of our own banks, who support us, apologetically report that they are supporting these new and large CATV operations with the knowledge that they are doing a wrong, but with the expectation that some way they will work themselves out of it. And the shocking thing to me is that they come here for that help to you gentlemen. This is immoral.

It is unreal in our economic pattern for somebody who is stealing our property to come in here and ask for sanctions for his actions. He is doing it not only without having to defend himself, because that hasn't been the way this has been proceeding either here or before other committees in Congress, but, having gone into this with full knowledge of the risks, he comes here for relief.

There has been no secret. Our lawsuit has been on for 4 or 5 years. Mr. Tenzer asked whether there has been proliferation to any greater extent in the last 4 or 5 years. It has been in the last 5 years, since our lawsuit started, that this has gone on, that they have gone on with the risk, with knowledge of what they are doing; and then they come here and instead of being put on the defensive, the FCC—and I do not say this at all in criticism of the FCC, rather in praise of it, the FCC—has to say:

"Because of what you are doing to local programing we want you to take local programs, but in doing that we have to accept the state of facts as they exist today. We are not passing on the copyright laws."

In other words, "What is the good of us in the FCC saying you can't do that because you are taking somebody else's property and not paying for it? The fact is that you are doing it. The fact is that your municipalities are giving you franchises to do it. We have to accept that fact and live with it, and our best solution is to say that you must take those local programs from the air."

And Mr. Ford's presentation, particularly the last part of his document, implies that CATV has a vested interest in a continuation of this practice, so much so that in a sense we are put on the defensive because we are threatening a business with extinction.

In one sense it is the old story of the defendant who has killed his parents and then pleads for leniency on the ground that he is an orphan. It is a legitimate analogy if you follow it through to its logical conclusion.

However going beyond that, and here is another important facet, we are put on the defensive with the impression that we are against CATV, and we are not. We are very much in favor of CATV. We love new customers. We are against CATV if they take our property and don't pay for it. We are ready to back CATV to the limit. We are in a treacherous business. We have great difficulty navigating on a profit basis in the manufacture of films for TV. We in our company haven't yet solved it. We are working at it. But our profits come from all of our other operations, not from this phase of our operations. Who more than we would like to have a new customer like CATV to help us and in turn help all of the creative artists who supply their material to us? So let us not confuse my attack on the way this is being done with any attack on CATV as such.

You gentlemen are part of a whole machinery in Government, both in the executive branch as well as Congress, who are trying to learn all the implications of this new and extraordinary development, and you have a task that is related to what we are here to advocate. You have a task of fitting this into the announced congressional policy and the announced executive policy of support for local programing.

You have passed an all-channel law here which was intended to assist expansion of UHF programing, which was intended to bring to the local level the means of transmitting local programs, whether it be so that the candidates in local campaigns could be heard, or whether it be so that the board of education could do things to improve the educational standards of the community, or health programs, or the like. Any of a number of local programs were intended to be made more available by the congressional statement of policy.

The executive branch on its part has supported that policy, instigated the legislation, and has in turn announced another policy, and that is that no one owner can control or, rather, can have an influence in more than five markets. Need I elaborate on the reason for that when we are dealing with a medium of this tremendous influence on public thinking?

Now, examine in the light of those two objectives the possibilities here.

We can't deal with what CATV is today. If we had been before you 5 years ago we would have all dismissed it as of not enough importance to warrant this kind of a hearing. Today it is of more importance. But what bothers us is the threat of what it will be tomorrow, if the CATV operators are able to take property without paying for it and compete with stations that do have to pay for it.

The logical extension of what is happening in CATV today—well, let me not say the word "logical" because I don't think this will happen—let me say the potential extension in the extreme would be to have but one station in this country. This is theoretically possible with the kind of leapfrogging that is being asked for in CATV applications today. Those were not mentioned to you and we can give you, I think, maybe a thousand of them—applications to take New York into Philadelphia, to take New York into Ohio, to take California into Colorado. I mean, name your States and we will be able to give you the information on those applications. There is nothing to prevent a CATV operation that would take every station in the New York spectrum and bring it to every other place in the country. What happens to local programing if that were to happen? I am giving you the extreme. You can narrow it down, but narrow it wherever you will and this has to destroy the local programing hopes of the administration. Look how hard the FCC is trying to protect that today by this provision that they must take the local program off the air. This is an effort, and it is a laudable effort, to protect the local programing of the existing stations, but it can't conceivably help with the development of new stations which is being retarded by the threat of CATV. So that you are in a position where you have to examine what you are being asked to do here today against that other objective of building up local programing.

As far as the five markets are concerned there is nothing to prevent any of the companies that are now in the five markets to extend their area of influence through CATV, extensions of their present TV station ownerships.

And they are doing it, and I may say that the ones who are doing it would be the first to sit next to me and say, "We are doing it defensively. We believe in what you are arguing, but we are still going into CATV because nobody seems to be worried about it and it has become a way of life"—and as Mr. Nizer says; I was going to come to that in a moment—again there is the lure of the huge profits.

That is your problem. Our problem is for us equally serious, and that is the destruction of our markets that we have been relying on in our TV production operation. This extension of CATV as far as we are concerned would mark the death knell of UHF. The loss of UHF means the loss to us of revenues that we need, not for profits, although that is true in some cases, but basically we need that revenue to survive in this field.

There are very few programs, gentlemen, very few that make a profit on network distribution. The big hope of getting back costs and making a profit is in syndication which follows network distributon, and of course there is the other field which is not very large today which is direct syndication to the individual stations.

Take away that follow-up revenue, take that away and CATV will do it just as sure as we are sitting here, take that away and we won't be able to pay the creators for the fruits of their efforts.

This is part of the public interest that you have to weigh against the public interest that has been stressed here in these mountainous regions. Take that away and the intent of this Congress since 1909, which has been supported by court decision after court decision as new developments have occurred in communications, take that away and the whole spirit of protection of copyright ownership for our creators will have been set back in a very, very serious way.

I have before me a quotation which I would like to read to you to show how Mr. Ford felt 1 year ago on this issue that I am speaking about today. I need say nothing other than that we would like to have this incorporated as our testimony before you, gentlemen. This was a speech that he made last June when he was a member of the Commission:

"Finally, I would like to discuss the competitive impact which CATV could have on television. For example, in single station markets which for the most part are relatively small markets, a CATV system may bring into the urban area as many as 10 program choices to compete with the television station for viewers. It is contended that only about 10 percent of the station's listeners are involved; however, it does not take much imagination to visualize this 10

percent growing much larger. If other communities in the station's service area are wired and if advertisers in those communities stop buying advertising on the local station the economic consequences to the local station are obvious. Ultimately the ability of the station to adequately serve the public or even survive could become questionable."

In respect to the other premise—

Mr. TENZER. Excuse me, Mr. Chairman. Will the witness permit further identification of the date and place that speech was made and what Commission are you referring to?

Mr. KRIM. Yes. Mr. Ford was a Commissioner of the Federal Communications Commission at the time of this address before the 13th Annual Convention of the National Community Television Association, Bellevue Stratford Hotel, Philadelphia, Pa., June 18, 1964.

Mr. KASTENMEIER. Will you leave the entire speech for the record?

Mr. KRIM. Yes. Actually, I haven't read the entire speech, but I will be glad to offer the entire speech.

Mr. KASTENMEIER. The Chair will receive it and without objection it will be made part of the record.

(The document referred to follows:)

"ADDRESS BY FREDERICK W. FORD, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION, BEFORE THE 13TH ANNUAL CONVENTION OF THE NATIONAL COMMUNITY TELEVISION ASSOCIATION, PHILADELPHIA, PA., JUNE 18, 1964

"TELEVISION: DIVIDED OR UNITED—SOME PROBLEMS IN TELEVISION GROWTH

"I

"Television has had many problems since the first commercial television station was authorized by the Commission in 1941, only a few of which were solved by the Sixth Report and Order[1] of 1952. In fact, it appears that even though our television system as we know it today stems from that report, barely 12 years old, the problems of television seem to increase the older, more popular and universal it becomes. I would like to talk to you today about one of these problems which is almost as old as commercial television itself and that is the impact upon our broadcast television structure of a system whereby the public pays for its television service. It has a number of names such as phonevision, toll vision, pay TV, fee V, subscription television, and your own community antenna television. The mention of any of these names arouses what appears to be a torrent of emotion and fear on the part of many traditional television broadcasters and their spokesmen. This fear is easy to understand, but I believe it is unjustified. I have no doubt that those who espouse these various newer forms of television react in support of them with equal emotion.

"It is my purpose here today to undertake an analysis of this problem and to delineate the most important issues presented and their relationship to our national objective, which in the language of the Communications Act is, 'to make available so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communications service * * *.'[2]

"Before proceeding further I think it would be desirable to define a few terms.

"First, I would like to classify under the term 'pay TV' all forms of television broadcast service in which some system is employed whereby the public in order to receive the program must pay a fee either at a flat rate, by program, or a combination of both.

"Second, I would like to classify arbitrarily as subscription television—'STV'—all systems using wire for distribution of programs from the local point of program origination to the point of reception for which a fee is charged at a flat rate or by program or a combination of both.[3]

"Third, I would like to classify as 'CATV'[4] all systems which receive programs broadcast by licensed television stations and distribute them by wire to individual consumers at a flat rate.

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[1] Sixth Report and Order, Apr. 14, 1952, 1 Pike & Fischer RR 91 : 620 (1952).
[2] 47 United States Code, sec. 151.
[3] See "Prospectus of Subscription Television, Inc.," Oct. 30, 1963, for a description of this business.
[4] See *Clarksburg Publishing Co.* v. *F.C.C.*, 225 F. 2d 511, 517, n. 16 (1955), for definition of CATV, also see S. 2653, 86th Cong., 1st sess. (1959).

"Fourth, I would like to classify as 'cablecasting' the distribution over a CATV system of programs that are originated in some manner other than by a broadcast, payment for which is made at a flat rate or for each program accepted. From time to time I will refer to STV, CATV, and cablecasting as 'wire television.'

"Fifth, I would like to refer to the television broadcast service licensed to use channels 2 through 83, excluding pay TV experimental authorizations, translators, and satellites, as 'television.'

"Aside from the early experiments authorized by the Commission in pay TV with limited facilities,[5] there were no actual experimental pay TV systems authorized until the General Tire Co. was given an experimental authorization on WHCT in Hartford, Conn., on February 24, 1961.[6] On October 3, 1962, the Commission granted authority for the second public pay TV test on KCTO, channel 2, Denver. Colo. On May 1, 1964, the permittee advised the Commission that it would not seek a further extension of time in which to commence operation.

"Subscription television or STV on the other hand is just getting started in Los Angeles and San Francisco and little is known about what its success or impact will be. Its proponents have great confidence in its success as an intrastate service free from the jurisdiction of the Federal Government. If STV is initially successful I doubt that it can grow and prosper outside the total national television system as a completely intrastate operation beyond the reach of congressional regulation.

"During the early phases of television another form of delivering television programs came into existence. The public in unserved areas and fringe reception areas were impatient for television service during the 1948–52 'freeze' on television grants and American ingenuity as usual supplied the demand by devising a common antenna system at a favorable site many miles away.

"The first community antenna was installed on an experimental basis at Astoria, Oreg., in 1949 and the first commercial system at Lansford, Pa., in 1950. Today there are 1,295 CATV systems serving an estimated 3,300,000 viewers in something over 1 million homes, creating a $51 million industry.[7] Of the 1,295 systems, about 250 use a microwave service to bring signals to their systems which cannot be received satisfactorily off the air.

"These microwave services are furnished by independent common carriers, by affiliated common carrier and by private microwave. Some of these systems have the facilities to originate programs. Most systems receive from 1 to 10 stations with an average of about 4. I am told that the number of systems is growing rapidly. It is worthy of note that CATV is the only television service which grew up in the 'grassroots.' All other forms of television have been or are being developed in the great population centers.

"For several years CATV systems operated in many communities without any great amount of friction. Beginning in 1957, however, it appeared that a number of sharp conflicts were developing between local TV stations and the CATV system operating in the same or a nearby community. These conflicts led to a hearing before the Subcommittee on Communications and Power of the Senate Interstate and Foreign Commerce Committee in 1958, and the Commission's own inquiry into the impact of community antenna systems, TV translators, TV satellite stations, and TV 'repeaters' on the orderly development of television broadcasting.[8] In the report and order issued in 1959 on that inquiry, the Commission concluded that '* * * it would not constitute a legally valid exercise of regulatory jurisdiction over common carriers to deny authorization for common carrier microwave, wire, or cable transmission of television programs to CATV systems on the ground that such facilities would abet the creation of adverse competitive impact by the CATV on the construction or successful operation of local or nearby stations.'[9]

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[5] These early systems were the Skiatron system which was tested in New York City over WOR–TV in 1950, the Telemeter system which was tested over KTLA–TV in Los Angeles in 1951 and the Zenith system which was tested over its own experimental station in Chicago the same year.

[6] In re application of Hartford Phonevision Co., docket No. 13814.

[7] "Community Antenna Television: Survey of a Regulatory Problem," by Palmer, Smith, and Wade, 52 Georgetown Law Journal 136 (fall 1963). I have also used the figures furnished by A. D. Ring & Associates to the NCTA. These figures are contained in their comments on dockets Nos. 14895 and 15233. Cf. figures contained in the June 15, 1964, issue of "Television Digest" which are slightly higher.

[8] Docket No. 12443.

[9] 24 Fed. Reg. 3004, 18 Pike & Fischer RR 1573 (Apr. 14, 1959), par. 77.

"On February 16, 1962, the Commission denied the application of Carter Mountain Transmission Corp.[10] for a microwave facility on the ground that improved service to the CATV would probably force the local TV station off the air. The denial was without prejudice to refiling the application when the applicant was able to show that the CATV would not duplicate the programs of the local TV station and would carry that station on its CATV system. On appeal the Court found that the Commission was fully warranted in its action.[11] On December 12, 1962, the Commission issued its proposed rulemaking in the Business Radio Service[12] relating to the duplication of programs and carrying the local stations on the CATV systems. Pending applications would be held until the conclusion of the proceeding. Exceptions would be made, however, where applicants voluntarily accepted the contemplated conditions. On December 13, 1963, a further notice was issued with respect to the Business Radio Service and a new notice of proposed rulemaking[13] was issued in the Common Carrier Service used to relay television broadcast signals to CATV systems, proposing substantially the same rules for this service.

"On October 3, 1963, an application was filed for consent to the transfer of control of H. & B. Microwave Corp. from H. & B. American Corp. to Video Independent Theaters, Inc., a wholly owned subsidiary of RKO General, Inc. H. & B. Microwave Corp. owns 37 CATV systems in 12 States and at least an additional 8 systems under construction. RKO through subsidiaries now owns 27 CATV systems. Moreover, RKO General, Inc., already owns four VHF and one UHF television station in the United States and one VHF station in Canada which serves Detroit, Mich.[14]

"As a result of this application and other matters the Commission issued its notice of inquiry on April 15, 1964, entitled 'In the Matter of: Acquisitions of Community Antenna Television Systems by Television Broadcast Licensees.'[15] It there stated that 'Before it acquiesces in the formation of such an entity, the Commission believes it to be necessary to seek a basis for estimating the impact that acquisitions such as that contemplated by RKO General might have on its multiple ownership policies and on the television broadcast structure as a whole, as well as the impact on more specialized problems.'

"Finally, the Commission now has under consideration the question of allocating spectrum space to a CATV microwave service. These discussions are not sufficiently crystallized at this time to warrant more than recognizing that they are in progress.

"Although Congress has shown a continuing interest in pay TV and CATV, no legislation has been enacted. Bills were introduced in 1959 to regulate CATV and, after hearings, the Communications Subcommittee of the Senate Interstate and Foreign Commerce Committee introduced its own bill S. 2653[16] which was defeated. Following that, I suggested a bill[17] which the Commission sponsored, but no action was taken on it.[18] Recently, however, Congressman Walter Rogers indicated that the problems of pay TV, STV, and CATV 'must come before the Congress in the not too distant future and will pose some most serious problems.'[19] Moreover, representatives of the Commission, your association, and the National Association of Broadcasters have had a series of discussions in recent months looking toward legislation, but no draft bills have been agreed upon at this time.

"This completes a brief description on where we are today and how we got here.

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[10] 22 Pike & Fischer RR 193 (1962). It is interesting to note that the grant to Carter Mountain had been set aside on July 29, 1959, on a protest by Station KWRB–TV a little over 2 months after the final report and order in docket No. 12443.

[11] *Carter Mountain Transmission Corporation* v. *F.C.C.*, 321 F. 2d 359 (May 23, 1963).

[12] Docket No. 14895.

[13] Docket No. 15233.

[14] WOR–TV, New York; WNAC–TV, Boston; KHJ–TV, Los Angeles; WHBQ–TV, Memphis, Tenn.; WHCT–TV, Hartford, Conn.; CKLW–TV, Windsor, Ont.

[15] Docket No. 15415.

[16] 86th Cong., 1st sess. (1959).

[17] Address before Eastern Regional Management Conference, NCTA, Shoreham Hotel, Jan. 9, 1961.

[18] S. 1044, 87th Cong., 1st sess., 1961. H.R. 6840, 87th Cong., 1st sess., 1961.

[19] Address before the Station Representatives Association, Apr. 28, 1964.

"II

"Our country is growing rapidly and with it is growing the demand for improved television service in communities across the land. The basic problem which the Commission and the communications industry faced in 1941 and still faces today is how that demand is to be best satisfied.

"In seeking to satisfy this need must we consider only the use of radio frequencies or should we follow literally the national policy of providing an '* * * efficient, nationwide, * * * wire and radio service'?

"It is my belief that an adequate nationwide competitive television system with an increased choice of program service can only be achieved by an integrated and federally regulated system of both wire and radio.

"It is clear to me that the priority set forth in the sixth report and order for the assignment of at least one television station to each community can never be realized by the use of the allocated frequencies alone. The radio spectrum neither can be nor should be expected to satisfy that objective. In the first place it is not physically possible with the present state of the art to assign 82 channels to the 4,699 communities with a population of more than 2,500 each in the United States. There are now 536 VHF stations and 118 UHF stations on the air in 365 communities. Even with a recent proposal to expand the assignments contained in the sixth report and order to about 700 VHF stations and 1,980 UHF stations to 1,294 communities, the priority on its face is not attainable.

"Even if it were possible to add enough additional spectrum space to provide one television station to each community in the United States, I do not believe that sound frequency management would permit such an inefficient use of this valuable national resource, to say nothing of the economic unsoundness of making such an attempt. I have reference here to the basic principles followed by the Commission in making the overall frequency allocation in its major allocations proceedings in 1945, docket 6651. You will recall that this was the proceeding that established the uses of the radio spectrum by various services that is still in effect today. It must be remembered that because the demand for frequency space far exceeded the space available the primary principle that guided the Commission in making its determination was, 'The dependence of the service on radio rather than wire lines.' In fact the report stated in section 4:

"There were six general principles that guided the Commission in making this determination. In the first place, the Commission examined each request to determine whether the service in question really required the use of radio or whether wire lines were a practicable substitute. Obviously, with the severe shortage of frequencies, it would not be in the public interest to assign a portion of the spectrum to a service which could utilize wire lines instead. The Commission's determination was not limited to technical considerations but also took into account economic and social factors and considerations of national policy. For example, while fixed point-to-point service between countries could be carried on by cable as well as by radio, the great disparity in costs between the two types of service and considerations of national policy clearly required the assignment at least at this time of frequencies for such fixed point-to-point service.'

"This principle was not applied to television and I would not suggest that any dogmatic application of this principle would be proper now. I am concerned here only with satisfying the need for expanded television service over and above what can be provided by the present allocation. As I view it this expanding need can and should be satisfied by the use of the alternate means, namely wire.

"The CATV industry has demonstrated that it has the capacity, desire, and ability to furnish that additional service in the public interest. They have done it and undoubtedly will continue to do it on an ever-increasing basis.

"III

"Let us now turn our attention to a consideration of whether Federal regulation of wire television is necessary or desirable. At the outset the touchstone of our judgments must be the same for all forms of television. This guiding principle is our present statutory standard of the 'public interest, convenience, and

necessity.'[20] Regulation of wire television is only appropriate if it is necessary to serve the public interest. It would appear that such regulation is essential if the congressional policy of providing a rapid efficient nationwide wire and radio communications service is not to be frustrated.

"The purpose of the Commission's efforts to regulate wire television has been based solely on the impact which it may have on the television stations which it has licensed. At the same time the Commission recognizes the desirability of urban areas having the widest choices of service possible unless that choice destroys television service to rural areas, and perhaps prevents the full development of a competitive nationwide television service. Arguments have been made that regulation is also necessary to insure the effectuation of our allocations of frequencies to the television service. It is also contended that in our attempts to regulate about one-fifth of the CATV systems, that is, those requiring microwave licenses, we create unfair competitive conditions as a result of the uniform application of our policies. The more I have studied these problems, the more I am inclined to doubt the wisdom of trying to regulate one-fifth of an industry through a technical legal device rather than by seeking legislation to subject the entire industry to regulation. CATV systems are engaged in interstate commerce since, thus far at least, they are basically extensions of the interstate service of the television broadcast stations whose signals they carry.

"As time passes and the problems of wire television become more complex, it is becoming clear that regulation of a service which has the potential impact that wire television has on television should not be left to 50 diverse State jurisdictions and countless cities. The very nature of a nationwide television service, even if radio frequencies were not involved, dictates that we could not have 50 different systems and 50 different ways of meeting the problems of a nationwide service.

"One of the purposes of the Communications Act of 1934 was to secure 'a more effective execution of [national] policy by centralizing authority' in a single agency. The time has come, it seems to me, to recognize the development of wired television as a significant national force and to establish a comprehensive regulatory scheme that will provide one fully integrated and unified television system. In short, pre-emption of this field by the Federal Government is essential.

"IV

"In any Federal system for the regulation of wire television the form of that regulation presents many problems. The formula for the solution of these problems will depend to some extent on whether it is determined that wire television is a supplemental service or whether it is a new service. Will this industry be content to fill in the gaps of television coverage or has a new force come into existence, the ramifications of which have not yet become clearly defined? Will your industry continue as an antenna service or will you begin cablecasting local programs on at least one channel, and in the course of events seek interconnection with other systems and finally become a nationwide multiple program service competing for national program product as well as a conduit for television stations to home receivers?

"In any case questions will arise on the type of authority to be issued. Should CATV or other types of wire systems be licensed, issued certificates of public convenience and necessity, franchises, or some other form of authority? Should whatever form of authorization is used be on the basis of geographical or political areas? Should the term of such authority be unlimited? What should be done about mutually exclusive applications for franchises? Should comparative hearing procedures and criteria similar to that used by the Commission be adopted or some other form of selection process provided? What should be done about the limitation on holding and transfer of licenses or certificates of authority? Should some standards of legal, technical, financial, and other qualifications be considered necessary? What sanctions, if any, should be available to the regulatory authority? What reports and other types of information should the regulatory agency be authorized to require? Is any type of program review such as that presently exercised by the Commission appropriate or reasonable? Should such things as political broadcasts, announcements of sponsorship identification, and the "fairness doctrine" be matters of regulatory concern? What will the role of networks be? Should they not be permitted to gain know-

[20] See "The Meaning of the 'Public Interest, Convenience, or Necessity'", Journal of Broadcasting (summer 1961), p. 205.

how in the wire television field to the extent perhaps of owning systems, or affiliating with individual systems which do not otherwise receive their program service?

"Although the reasons for the Communications Act specifically declaring that 'a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier,'[21] would seem to be equally applicable to wire television,[22] at least as to the origination of programs, should the rates charged the public nevertheless be subject to some type of regulation such as now contained in some city ordinances? Should some provision be incorporated requiring the extension of service or furnishing of service on a nondisriminatory basis to the public? If so, what, if anything, can or should be provided relating to the use of telephone or power poles for wire systems? Should the consent of television stations for the use of programs be required? If so, should the regulatory authority be empowered to order consent and on what basis in view of the conflict over property rights in programs? Should there be authority to order a station on a system or off a system? If cablecasting becomes common on one channel of a CATV system should advertising be permitted in order to boost the local economy? Should there be authority to impose technical standards, type approval of equipment to minimize interference to the reception of signals off the air, and inspections of installations?

"Each of these questions deserves far more careful and complete analysis than would be possible here. I have posed them only for the purpose of trying to stimulate organized research and thought about them. These and many more questions must be faced and resolved in one fashion or another in deciding what form Federal regulation will or will not take.

"With the growth and increasing importance of wire television a question has arisen with respect to the multiple ownership of wire systems and television stations, and cross ownership between them. The Commission's rules on the limitation of the multiple ownership of television and radio stations[23] is based on the fundamental theory of the Communications Act that the public interest is best served by a diversity of opinion and voices in this powerful medium rather than concentration of control. Therefore, to the extent that wire television has the possibility of engaging in cablecasting rather than merely delivering programs from multiple voices the same underlying principle would apply.

It is my present belief that the Commission's multiple ownership rules are adequate in most respects for television, but that they are not adequate for wire television. One of the deficiencies of our rules is that five VHF stations in small markets reaching a minimum number of viewers are equated with the five largest markets in the country which could reach more than 25 percent of our population. I am told that all 1,295 CATV systems on the other hand

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[21] 47 U.S.C. 153h.

[22] I am informed that the attorneys general of the following States have rules that CATV systems are not public utilities: New Mexico (1954), Washington (1954), Utah (1956), Arizona (1955). The Pennsylvania Public Utility Commission ruled in 1964 that CATV is not a public utility. The District Court for the First Judicial District of Wyoming ruled that CATV was not a public utility (1958). The Supreme Court of California decided that CATV was not a public utility (1956). Eleven State legislatures in the past 6 years have considered the regulation of CATV but have not enacted laws. In 1963 Connecticut enacted a law permitting the Public Utility Commission to grant franchises to CATV although the latter were not public utilities.

[23] Sec. 73.636 of the Commission's rules provides that (*a*) no license for a television broadcast station shall be granted to any party (including all parties under common control) if (1) such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or (2) such party, or any stockholder, officer, or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent, and location of area served, the number of people served, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience, or necessity for any party or any of its stockholders, officers, or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band. (*b*) Par. (a) of this section is not applicable to noncommercial educational stations.

NOTE 1.—The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2.—In applying the provisions of par. (2) of this section to thhe stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

reach only 2 percent of the population. I do not mean to suggest that one person could own all existing CATV systems but I do suggest that the same multiple ownership rules now in effect for television would be unrealistic if applied literally to wire television. For example, ownership of five average-sized CATV systems would deliver a signal to 4,000 homes or roughly 12,000 viewers which would seem minimal when compared with the population in the grade B contour of most television stations. The multiple ownership problem of CATV systems would, therefore, be a completely different problem than that of television stations and should be solved in a different way. I am not prepared to offer a solution today, but the number of systems owned, population served, other services available, and political and geographical areas involved, are factors which should be considered in finding a solution. Whatever the solution may be if cablecasting becomes an important service there probably will be some kind of limitation on the multiple ownership of wire systems in any Federal regulation of the industry.

Another factor that may affect the multiple ownership principle is that of joint or common ownership of wire and radio television systems. At the time that I was Chief of the Hearing Division of the Broadcast Bureau, when our first comparative television cases were being tried in 1952, I took the position that pioneer radio broadcasters should receive credit for their past performance. If this were not done, the Commission in effect would be telling radio broadcasters that as a reward for their efforts and experience in building the radio industry, a new group would be selected to bring television to our country.

"It seems to me that the exclusion of television broadcasters from your industry or you from the television industry may likewise be unfair. In that way we may in ultimate effect be excluding those well-qualified individuals who risked their money to develop television and wire television from participation in the final forms that it may take. At this time, therefore, I would not discourage television broadcasters from entering your field as many have already done,[24] nor would I discourage you from seeking television licenses. Eventually, however, the cross ownership or common ownership of television stations and CATV systems may have a bearing on the expansion of individual companies. It is possible that the results would depend on whether the common ownership was in the same or different markets. If common ownership were in the same market the service could very well be offered to fill in the gaps of coverage whereas if it were in different markets the question of diversification might control. If in the same market the question of area concentration of control may be involved depending on the form wire television takes, whereas this question would not be in issue if different markets were involved. From these observations it is apparent that this is a basic and difficult question which should be resolved. To this end, the Commission instituted its inquiry to which I have referred. It is now under study and we are seeking all the information possible to enable us to determine what, if any, action or recommendations for legislation that we should make.

"VI

"Finally, I would like to discuss the competitive impact which CATV could have on television. For example, in single station markets which for the most part are relatively small markets, a CATV system may bring into the urban area as many as 10 program choices to compete with the television station for viewers. It is contended that only about 10 percent of a station's listeners are involved; however, it does not take much imagination to visualize this 10 percent growing much larger. If other communities in the station's service area are wired and if advertisers in those communities stop buying advertising on the local station the economic consequences to the local station are obvious. Ultimately, the ability of the station to adequately serve the public or even survive could become questionable.

"It should be observed that wire systems are not yet ready to serve all of the people served by a television facility. Rural areas still depend on television stations for their service. This is in large part the basis for the protection we have given television stations. This position would probably be revised if the technical developments should permit the delivery of a television signal to all

[24] The June 8, 1964, issue of Sponsor magazine reports that there are 43 instances of joint broadcaster-CATV interests. Only 22 occur in the same market and only 6 involve 100-percent ownership of the station and CATV system.

by CATV systems on an economical basis so that the public would not suffer. The competitive factors then would not be of such concern to the Commission. Therefore, until such time as wire systems are able to deliver to a reasonable degree the service that a television station can furnish, it is likely that some form of protection to a television station in a singe station market will be afforded if the facts justify it.

"Considerable stress has been placed on the limitation or containment of CATV in order to stimulate the full development of UHF and give the all-channel receiver legislation an opportunity to develop an adequate nationwide competitive television system. It is argued that, if microwave authorizations are issued to bring programs to communities where UHF stations are authorized or assignments made, this will prevent the development of UHF stations and frustrate the Commission's allocation and assignment policies to the detriment of the public. It is also argued that UHF needs this protection from competition to survive economically. This is still an open question because it might well be argued that in some instances UHF needs CATV at this point in order to reach an audience in being and to survive.

"Let me pose to you what very well may be a solution to one of the basic problems we face of giving urban areas a choice of service with no loss of service to rural areas. How many of you would establish UHF stations and carry them on your CATV systems, if the Commission rules permitted it? Where assignments are available you may do this today. I have in mind, however, the possible modification of the Commission's rules on assignment, height, power, and a liberalization on the number of UHF stations permitted one owner for this purpose. Would such modification of its rules on the part of the Commission result in the immediate construction of hundreds of UHF stations and help achieve the priorities of the sixth report and order and the all-channel receiver law? I think it would if such changes were properly designed. Thus, I must ask, are the CATV industry and the television industry really basically divided? I submit that the answer is 'No'—they are both a part of the same industry and I see no reason why they should not be unified if both are equitably and fairly regulated by the same agency. In achieving this result, however, these problems must be approached objectively and dispassionately by all including the Government with the one common purpose of seeking solutions which will give the best service to the public.

"VII

"In conclusion, I would like to make two suggestions.

"First, that a separate division be established in the Commission's Broadcast Bureau whose primary function would be to study the future of television, to accumulate technical data, to serve as a point of contact for industry and the interested public concerned with the various new television systems, to develop information on the issues presented, to study the technical, legal, and policy problems in pay TV, STV, and CATV, to plan for the orderly development of television and to keep the Commission informed of the technical, legal, ethical, social, and economic problems in this field.

"Second, that an ad hoc committee be formed composed of representatives of pay TV, STV, CATV, broadcasters, manufacturers, networks, and other interested groups to study all of the technical, legal, social, economic, and political questions arising from the developments in this field, and to make recommendations for the future orderly growth of a total television system in the United States including perhaps a revision of our allocation table for lower powered UHF stations, multiple ownership rules and concepts relating to the concentration of control of mass media; in short, to study and make recommendations on what form the regulation of wire television should take.

"I do not pretend to know what the future of television will be. I do know that wire television is becoming increasingly important in our national scheme. I doubt that it will ever replace broadcasting, but I cannot be sure even of that. This is perhaps the most dynamic, powerful, and influential of all the means of mass media in existence today. In the United States we have developed the greatest television system in the world. I think it will become greater, but it will require skill and wisdom in the years to come to keep television the servant of the people.

"I have no preconceived notions of what the optimum system should be except that it should provide the greatest service to the greatest number of people. I am firmly convinced that all forms of television must constitute a unified

and integrated system—that it should be united, not divided in its objectives. I am also convinced that out of the caldron of conflict and uncertainty that exists today will emerge a total system best suited to serve the public interest, convenience, and necessity.

Mr. KASTENMEIER. Mr. Ford has reserved the right to have the committee receive a later statement and I am sure he will want to attempt to answer in that connection.

Mr. KRIM. Yes, of course.

I also in this same connection want to refer to the other premise which is the one that has emphasized the need for CATV to service rural areas and these mountainous regions and so forth, and I point again to remarks of Commissioner Ford. Here I am afraid I do not have the date, but it was before the subcommittee dealing with the Harris bill. That would be very recently, I should think. Oh, here it is. June 2, before the House Committee on Interstate and Foreign Commerce, 1965—"that CATV is now confined to areas where the population is relatively concentrated because it cannot at present service the sparsely populated rural aras economically."

Now I would like to refer to two letters out of many that we have, that is, out of many oral and written communications that we have which we can supplement if the committee so desires, to indicate what is happening to us with the development as contrasted with this argument of double payment. Reading from a letter that we got a few months ago, February 1965, from a Mr. Joe L. Smith, of Joe L. Smith, Inc., Beckley, W. Va. This letter was addressed to our salesman who had West Virginia under his jurisdiction, a Mr. Paul Kalvin. It says:

"DEAR PAUL: It was nice to talk with you this afternoon concerning our plans for UHF at WKNA–TV, Charleston. I am sorry that I could not give you a more definite timetable, but our plans must remain flexible until this CATV matter is resolved. As we probably will be an independent in a reasonably small market we would hope to be the only independent. If the CATV problems are resolved to allow the CATV operator to bring in the big city industry I am afraid that we shall decide our market is too small to finance competitive programing against outside nonaffiliated stations."

That is one customer lost.

A letter from Philadelphia, Mr. Leonard B. Stevens, executive vice president of WPHL–TV:

"The New York IND's may represent damaging competition to Philadelphia UHF stations should their programing be admitted to this market. We, therefore, must ask that any film purchases permit WPHL–TV options for cancellations without penalty in the event the same film shows are available from New York IND's via local cable systems. I am sure you will understand that this measure is a necessity."

That is another customer lost.

An interoffice memo with reference to WCMC–TV, channel 40, a new UHF station which had been granted a construction permit for Wildwood, N.J.:

"The station verbally offered to purchase our Popeye cartoons for $17,130. They later rescinded their offer because the South Jersey TV & Cable Co., of Wildwood, a CATV system that picks up the WFIL–TV Philadelphia signal, delivers the same cartoons into the Wildwood area every day from 4:30 to 5:30 p.m."

There are no mountains between Philadelphia and Wildwood. However, that is another customer lost.

Mr. Tenzer asked the question—and I think both Mr. St. Onge and Mr. Edwards referred to it—on this master antenna and CATV relationship.

The applicant for CATV in Philadelphia, which is pending today, that man didn't come here to present his testimony. The application which is before them today states that the expenditure for their "master antenna" will be $37 million.

Can you envision a master antenna on top of an apartment house which costs $37 million? Can you imagine that this is such an unsophisticated piece of equipment that all it does is the same as a master antenna? That is a matter now of public record in Philadelphia and it is that application, that applicant, who wants to bring the signals in from New York to Philadelphia and destroy our customers in Philadelphia and in effect just made it more and more impossible for us to continue to produce in this field.

Now this business of double payment. Let's examine first the area of potential loss, which I have already talked about. There is no double payment when we don't get any payment at all. Nobody referred to that area. The fact is that in locality after locality UHF stations which would otherwise be built are not being

built and we are not getting anything in those areas. Our revenue is being taken away from us. There is no double payment in all the situations, and I took three different kinds of situations in these letters that I read to you. There is no payment at all. We lose out in the local community because he can't compete with his local CATV. We lose out in Philadelphia because he is afraid New York is going to bring the programs into Philadelphia. We lose out in Wildwood because our cartoons are already there through this kind of taking without payment. This certainly can't be called double payment because we are not even getting single payment.

The double-payment argument is as fallacious on its own two feet. Reference was made by one of the witnesses to a CATV which goes from Spokane to some community in Montana. The advertiser who is ready to pay for that transmission in Spokane is not going to pay for Montana. If he wants to pay for Montana he will do it in Montana. He may not be set up for his sales results in Montana. If it were as easy as that, where an adviser can grab the benefit of all these fringes in other areas, there would be a lot more regional and national advertising than there is, and less local advertising. Many sales drives are set up for specific confinement in local areas. The advertiser isn't going to complain about that exposure in Montana but he is not going to pay for it, so this double payment falls down there.

When it comes to a national broadcast, and here let us put aside for a minute the whole argument of unjust enrichment which is also a premise in the Copyright Act with which you gentlemen are dealing, forgetting unjust enrichment, which is to say the millions that the CATV people are making by using copyrighted material without permission, forgetting that, the fact is that there is no way in our dealing with a network for us to get a specific additional amount because of some addition of an audience through CATV. Yet if we didn't have this additional audience through CATV those particular areas would be virgin and when the programs became available there they would not be off network and at a greatly reduced value; and in many of these areas, instead of your constituents having to pay $5 a month, or $6 a month, they would be getting the programs free because of the natural development of local TV stations that would then be the case.

Now the subject of profits ties in with this whole business of how difficult it is to pay for the copyrighted material. Mr. Ford referred to Mr. Seiden, who is one of the consultants I believe to the Commission. The Commission's Seiden study of 28 CATV systems showns an average profit margin of 57 percent, after an average return rate to capital of 30 percent per annum, without taking into account the recoupment of capital costs from initial installation charges.

Recently at hearings before the Connecticut Public Utilities Commission upon applications to the commission for certificates of public convenience and necessity authorizing CATV, an applicant was forced to concede an expected 400 percent return on investment within 8 years. The Waterbury Republican had this to say, and I quote:

"The community antenna television scheme looks like a once-in-a-lifetime investment potential. It looks, in fact, too good to be permitted, at least the way it has been proposed to the State public utilities commission. A Philadelphia firm conceded to the PUC the other day verbally and in a submitted financial statement that the percentage of return after 8 years of actual operation would total 400 percent. Annually this would be only 50 percent, but compared to the maximum of 8 percent allowed utilities in Connecticut it is a fantastic return."

Business Week, December 12, 1964, referring to CATV applications, stated:

"QUICK PROFITS

"The lure of CATV of course is money, money machine. A Manhattan system could make money and lots of it. Assuming a capital investment of $10 million return on invested capital would be 15 percent, but CATV systems are highly leveraged. Generally 50 percent of capital is in bank loans. Another 25 percent is in subordinated debt. That leaves $2.5 million in invested capital or a net return of 60 percent. Even figuring net after payment of 6 percent interest and perhaps payments of $100,000 on subordinated debt, return is a healthy 44 percent."

On May 1, 1965, Business Week asked this question:

"What is it that towers hundreds of feet into the air, mints money, and sells what television stations give away free?"

This is the group that is coming here and saying they cannot pay for a copyrighted material, and there has been much said about the fact that if they are required to pay for it there can be no CATV.

Need I say more about an industry where there are these profits, and there are these profits to this extent because they are not paying for programing, and they have come here to ask that you weigh that license to mint money as more important than the professed interest of all of the framers of our copyright legislation in protecting the works of our creative talents.

There are many ways in which these payments could be worked out. Nobody has ever come to us. I heard the next to the last witness say here one of the biggest proofs of the fact that this can't be done is that we have never come forward with a program or with a formula for doing it. Nobody has ever come to the owners of the properties and tried to buy them.

I can't tell you today the exact form that this will take, but I can give you certain facts. One, as I said at the very outset, there are only a handful of copyright owners, 30. If you find a few more it won't be much more than that.

Two, that these copyright owners have fierce competition between themselves and are anxious to sell, and if one of them tries to ask for an unreasonable price somebody else is going to move right into that vacuum.

It is no different from any other aspect of our free enterprise system. The broadcasters have to do it.

The argument is made that the CATV people can't do it because they are locked into what the broadcasters have bought and therefore don't have the same opportunity. We will gladly give every CATV operator 60 to 90 days notice of every program that will be appearing on one of the stations from whom they draw their programs and gladly set up a machinery where there could be one place, if necessary, that they could come to set the price and if they do not set a price which is acceptable to one of us let them buy something from the other.

There is no rule which says CATV has to show something on all 20 channels, and if they can't buy a United Artists program off CBS let them buy a Warner Bros. program off NBC at the same time. Both of us need the money and we are not going to force them to black out just out of any kind of spite, and if we do it through any kind of conspiracy we are all experienced in what the Government can do about that, and so I just don't get this argument. This is part of that Alice in Wonderland that we are living in in this particular area.

Lastly, there is no problem in monitoring programs. That has come out very clearly in this FCC provision about the 15-day duplication. There is no problem in CATV spending the money to have one man to watch what programs are coming off the air and check list those that he has bought and those that he hasn't, and those that he has bought he sends out over the air and those that he hasn't he doesn't.

This will put him in the position of competing fairly with the local station owner, and once a local station owner knows that, you are going to have much more local station construction through this country.

I apologize particularly at this late hour for having gotten wound up this way. I had hoped to be much more brief than I have been, but this is of great importance to us and I hope you will forgive me for the length of my statement.

Mr. KASTENMEIER. You have been very enlightening. Now would you care to have Mr. Nizer proceed, and then maybe there will be questions?

Mr. Nizer, you may proceed.

Mr. KRIM. There are many thousands of creative talents whose interests are involved in this proceeding. However, those creative talents in their relationships with television deal through no more than 30 companies. And for the purpose of making this statement, Mr. Chairman, I am authorized to speak for most of those 30 companies. The names will be submitted to you together with Mr. Nizer's statement. I think the fact that there are only 30 companies is of some relevance when we come to the arguments that have been advanced by the CATV companies that the administration of any bargain and sale in the marketplace for these rights is unwieldly and difficult because of the vast number of copyright owners. The fact is that such bargain and sale would only be a matter between the CATV

company and no more than 30 distributors, just as is the case in any dealings on the part of any TV broadcaster when it comes to the matter of purchase of copyrighted material.

What we are dealing with here, Mr. Chairman, in dealing with copyright, is in fact the lifeblood of these creative talents. It is what motivates their energies, it is what puts programs into the pipeline. It is the wellspring of all that we see on television.

Mr. Nizer will have something more to say about the efforts that have been made generally by the Copyright Office working with the committees of the Congress to protect and preserve and nourish the talents of creative artists. I believe these efforts have extended over a 10-year period, more than a 10-year period in an attempt to draft definitive copyright legislation.

And what we want to say brifly at this time is that in any case it would be extraordinary for the Senate to enter into the area of the trade between buyers and sellers. In any case it would be extraordinary for the Senate to compel a property owner to sell his property without having the opportunity to having pricing reach its own level in the marketplace. But in this case, where there has been these 10 years of intensive study, it seems to us that it is most unusual for the Senate now to have to take on the burden of hasty, piecemeal legislation, carving out a special place for the CATV interests in the Copyright Act. We feel that this involves the Senate in innumerable complexities and difficulties which really belong in the pure matter of trade between a property owner and a property buyer.

We think further that it would involve the Senate in impossible avenues of prophecy, because what is a contour today may very well not be one tomorrow, with all of the technological changes which are occurring in broadcasting every day, with the promise of satellite communication in the near future. Such satellite broadcasting may change all concepts of contours. This and many other factors which we are not wise enough to prophesy today would have to be incorporated in any statute, whereas they belong, in our opinion, in the area of background for the normal give and take of trade between enterprises engaged in the pursuit of profit.

Let me make a few basic observations, and hopefully very briefly in the light of your special circumstances here.

The first is that we, meaning all of the companies engaged in the distribution of programs to television, and all of the creative talents whose works they distribute, are for CATV. We welcome CATV as a new customer. We would like to see CATV flourish. And we feel that it can flourish by conducting its operations on the same legal footing as does every other purchaser of TV programing.

The reason why there has been a great deal of vehemence in the past, and a great deal of frustration and a great deal of outrage, has been that for some time CATV operations have in our view been based upon two premises which are completely antithetical to our economic and moral structure.

The first of these is the premise that one can take another's property for commercial profit without paying for it. And the second is that one commercial operation which does not pay for programing should be permitted to compete with other operations in the same marketplace which do have to pay for programing.

These two premises, of taking property without compensation and of unfair competition in this sense, have been the basis for CATV operations up to this point, and have been the cause of the vehemence in the controversy between the CATV interests and the copyright owners.

For our part, we have been in effect fighting for our commercial lives in this area of activity. Our values, the values of all TV programing in the long run depend on two factors:

First, the free development of new broadcasting station facilities around the country, which is to say the hoped-for development of UHF stations in many areas of the country where they do not exist today.

Second, the principle of exclusivity, our right as owners of copyrighted material to sell that material to one customer, with a right to that customer to show it under the terms and conditions of the license, and with a warranty to that customer that no one else will dilute his values by being able to show that same program in violation of the license which we are granting to him.

I am not going to take the time today to elaborate on why I make the statement that this is as essential to our good health as it is. I do want to say, Mr. Chairman, that there are very few exceptions to the fact that most programs which are made for television are sold to the networks on a basis where, if that were the only sale made, those programs would show a substantial loss. And most of the programs which you have seen and which everybody around this country has seen these past few years have not recouped their costs or come close to recouping their costs. The hope of the copyright owners, the hope of the companies distributing those programs, is that over the next years new television stations will be constructed which will become customers for those same programs when they are put into syndication, which is to say when they are sold to the individual stations around the country for local broadcasting. And unless there is that market in the future through these new stations, which hopefully will be built these programs will never recoup their costs. The syndication business will continue on a loss basis, and ultimately there will also be a different loss through the drying up of creative talents which will be just as harmful to the CATV interests as it will be to everybody else in this business.

The same is true of exclusivity. If we cannot sell exclusivity we in effect have nothing to sell. And there has been a great deal of misconception about exclusivity. I would merely like to say that exclusivity does not have to do with a single exposure. In other words, we have to have exclusivity to protect our rights just as much after the first showing on the network or after the second showing over a local station as we do in the first showing. In other words, every run to us has to be an exclusive run if we are going to have something to sell in the marketplace. And every dilution of that exclusivity is a destruction of our property values.

Up until now there has been no recognition on the part of the CATV interests of these basic principles. Until 2 days ago every public statement and every private statement on the part of the CATV interests, has not recognized the rights of copyright owners but has sought to emphasize that all that CATV is really involved

in is bringing programing to areas which would not otherwise be served, the so-called rural area emphasis of classical CATV. They have also taken the position that CATV is not able to be a free purchaser of programing because the CATV station is captive to what goes over the air from the originating stations, and that there is no ability on the part of the CATV operator to monitor out those programs which he is not able to buy.

This has been the history up until now.

Then after 6 years of litigation we had Judge Herland's decision in the *Fortnightly* case. And now for the first time, 2 days ago, the CATV industry, speaking through Commissioner Ford, has recognized that property rights are involved in CATV broadcasts. There is now a lesser emphasis, although there is still talk about it, a lesser emphasis on the fact that CATV is solely "a public service" into the rural areas. There is more recognition now of the fact that CATV has become big business in the larger communities, and wants to become bigger business throughout all of the larger communities in this country, so that there is more recognition of the fact that this is no longer community antenna television but commercial antenna television. And there is complete recognition in the Commissioner's statement of the ability of the CATV operator to monitor out those programs which he is not able to purchase.

Having now recognized these property rights and these other principles, we again become very troubled that instead of the CATV interests following along the path of their own recognition to the suggestion that we sit down as any buyer and seller in the marketplace and trade. Instead of that here we are again being asked to accept an unusual situation in this whole area, and that is that this extraordinary legislation be enacted so that we would be compelled to put our property out without the opportunity to trade in the marketplace as we do with every other purchaser.

And, Mr. Chairman, the Senate is being asked to do this before any foundation for the necessity of such extraordinary action has been laid.

We say that for the first time an important hurdle has been overcome. We now, I believe, are in the marketplace. We have a willing seller, that I can assure you. And we should have a willing buyer. And it seems to me that the place for all of these complicated issues which have been presented to you to be resolved is in the trade between the willing buyer and the willing seller.

I should like to say that in our view CATV is not at all threatened by being directed to the marketplace where this whole situation belongs. And I would like to elaborate on that for a moment.

In the first place, most of the programing in prime time, Mr. Chairman, is network programing. Most of the programs that are going out over CATV in the important time segments of the day are taken off the networks by CATV. Certainly in the foreseeable future the trade for those programs is going to be between the networks and the CATV interests. And the networks—or at least one of them, and I am sure the others will shortly speak up—have indicated that they are prepared to license those programs to the CATV interests on a most modest basis.

This in itself covers a very broad segment of the programing that goes out over the air.

Then I would like to say with respect to the rural areas that there is no threat to CATV. We are not talking here, Mr. Chairman, about those areas which, were it not for CATV, would not have the benefits of television in the home. As a matter of fact, the CATV of today doesn't get into those rural areas very much itself, as witness the testimony of Mr. Ford from which I quoted before the House to the effect that "CATV is now confined to areas where the population is relatively concentrated because it cannot at present service the sparsely populated rural areas economically."

Here, speaking for our company, and, I am sure, speaking for all of the companies whom we are authorized to represent, we would gladly provide licenses to any CATV operation in any area which is not served by any other television broadcaster at no charge whatsoever. We are mindful of the public interest in that kind of coverage, so mindful that I should feel that if CATV interests do not themselves undertake to get into those areas, maybe the Congress through REA or any other instrument could encourage real cooperatives in those areas. And I can assure you that those cooperatives in areas of that sort would very quickly receive licenses at no fee from the copyright owners.

So that we are not talking in any sense which threatens CATV, with respect either to the network programing or in those remote areas which could not otherwise be served.

We are talking about one basic, broad area, and that is the area that we call syndication, which is our distribution of our programs to the individual stations either before or after network broadcasts.

And therefore, Mr. Chairman, we feel that all of our property rights should be recognized and preserved without any qualification whatsoever. We believe that in those areas which have been described in different ways here, but for ready identification let me say those areas which have been described as the white areas under Mr. Kastenmeier's proposal, we believe that there is no justification for any special exemption in that situation. To us, once it is determined that CATV is a broadcaster, as Judge Herlands has determined, and as we are confident the court on appeal will determine, there is no reason to distinguish a CATV broadcaster from any other broadcaster when it comes to his relations with property owners. You might just as well say that if we permit a program to go out over channel 9 in New York that channel 7 has the right to broadcast the same program, because, after all, they are reaching the same homes—not to mention the whole factor of unjust enrichment. There is no justification for a commercial operation to make large profits under any circumstances through the use of property without adequate compensation for it. And we are of the firm opinion that around the bargaining table there will be no difficulty for CATV to purchase practically all of these programs. There is fierce competition among the sellers, and there will be little or no injury to the CATV if with respect to those programs which they cannot purchase, they have the obligation of blacking them out, monitoring them out, and broadcasting only those as to which they have been able to obtain permission.

And then when it comes to syndication in distant areas, in areas other than the normal broadcasting area of the originating station, it seems to me that this is the area we must look to if we are to have any

chance of surviving as a healthy industry in the supplying of programs.

In addition to our need here for the principle of exclusivity, there is without question in my mind the inconsistency between any legislation which would compel the property owners to make their property available—for example, if a CATV leapfrogs from one station into another area when there is another station, and we are compelled to permit the broadcast of our program from station No. 1 either before we have sold it to station No. 2 in the second area, or after we have sold it to station No. 2, but before we have had an opportunity to sell it for an additional run on an exclusive basis—there is an inconsistency here with all the purposes of the all-channel legislation, Mr. Chairman. I do not think there is any doubt—certainly there was not in Commissioner Ford's mind before he became the spokesman for the CATV industry—that any grant to CATV which would permit them to purchase programs under those circumstances on a more favorable basis than a local broadcaster would ultimately mean the end of local broadcasting. Certainly it would retard such local broadcasting.

When Commissioner Ford was a member of the Commission in 1964 he made the following statement:

> Finally I would like to discuss the competitive impact which CATV could have on television. For example, in single station markets, which for the most part are relatively small markets, a CATV system may bring into the urban area as many as 10 program choices to compete with the television station for viewers. It is contended that only about 10 percent of the station's listeners are involved. However, it does not take much imagination to visualize this 10 percent growing much larger. If other communities in the station's service area are wired, and if advertisers in those communities stop buying advertisements on the local station, the economic consequences to the local station are obvious. Ultimately the ability of the station to adequately service the public or even survive could become questionable.

So that what the Congress is being asked to do here is quite inconsistent with all of the emphasis the Congress placed on the encouragement of local programing when it enacted the all-channel legislation.

I see I have overstepped my time, Mr. Chairman. Thank you.

Senator BURDICK. I want to thank you for your testimony. It is very helpful.

Just one quick question. Your thesis is that copyright is a property right, and there is no basis at this time for making any exemptions?

Mr. KRIM. That is right, sir.

Senator BURDICK. Mr. Nizer, would you care to testify?

STATEMENT OF LOUIS NIZER, GENERAL COUNSEL, MOTION PICTURE ASSOCIATION

Mr. NIZER. Out of appreciation for your graciousness for hearing us under these emergency conditions, I feel a responsibility to be very brief. And I shall, sir.

I represent the Motion Picture Association of America, Inc., whose members include the companies generally known by the following trade names: Allied Artists, Columbia, MGM, Paramount, 20th Century-Fox, United Artists, Universal, and Warner Bros.

I also speak for the Association of Motion Picture & Television Producers, Inc., of Hollywood, Calif., whose member companies are as follows: Ashland Productions, Mayberry Enterprises, Three F

Productions, Thomas-Speling Productions, Bing Crosby Productions, Columbia Pictures Corp., Desilu Productions, Inc., Four-Star Television, Jack Chertok TV, Inc., Metro-Goldwyn Mayer, Inc., Paramount Pictures Corp., 20th Century-Fox Film Corp., Universal Pictures Co., Inc., Universal City Studios, Inc., Walt Disney Productions, Warner Bros. Pictures, Inc., and Wrather Corp.

In addition, I represent a number of independent production and distribution companies, many of whom are members of the association. but some of whom are not, including: Danny Thomas Enterprises. Inc., Embassy Pictures Corp., Independent Television Corp., Seven Arts Productions, Inc., and Wolper Productions, Inc.

The purpose of the Copyright Act, Mr. Chairman, has always been to protect the creator of those works which emanate from the mind and skills of artists, which are ephemeral in that they very often are not packaged, but are in terms of words, art, depiction. And ever since 1909, whenever an attempt was made, as it is here made now, to limit that protection, it has been defeated, I would say, uniformly. Every court has protected the copyright stringently. Every interpretation has been to strengthen the copyright, not to defeat it as it is here attempted to be done by an exemption.

Indeed, even though the Copyright Act of 1909 was passed at a time when the various arts were not in existence, such as motion picture, radio, television, and now CATV, whenever the argument was made that therefore the Congress could not have intended to protect this particular art, and we should have an exemption from the act, the Court, the U.S. Supreme Court uniformly, in a series of decisions—which I have set forth in my statement before the House committee, and which I ask permission to incorporate into this record, as you have given permission to Mr. Krim to do so—the courts have uniformly extended by "interpretation" the statute so that the philosophy of the statute is effectuated.

Now, a revision of that——

Senator BURDICK. At this point, Mr. Nizer, the courts have made no exception to what the Congress has done itself, is that true?

Mr. NIZER. And Congress has by and large made no exceptions, rather, it has strengthened the fact. For example, the new revision——

Senator BURDICK. The jukebox, for example.

Mr. NIZER. The only two compulsory licenses—as Mr. Finkelstein, as I understood, explained, so I will not go into the *Apollo* case—indicate the danger of hastily improvised exemptions in circumstances which did not foresee the developments. And indeed it is significant that the Copyright Office through Mr. Cary, the Deputy Register, has now recommended that the jukebox exemption be eliminated from the present revision, on the ground that there is no justification for it, and that they ought not to be in a better position than other music producers.

This is, I think, an illustration of what happens when one goes contrary to the real philosophy of the act.

Now, there has been a 10-year study made of the revision, again, to enlarge the purpose of the protection. For example, it is now proposed that the term "copyright" be extended to 50 years after the death of the proprietor, which really make 75 years approximately

instead of 56 years as previously. And there have been extensive studies made as to how to secure the protection of authors and artists without leaving any loopholes. Chairman Celler of the House Judiciary Committee said that all of the material of these studies, collected in five parts and published by the Copyright Office, together with the copyright law revision studies which preceded the Register's report of July 1961, represent all together almost 10 years of work and serve as the basis for the preparation of H.R. 4347 and its companion bill, S. 1006. There have been 35 studies by panels composed of many experts—none of them recommending gray or white areas or anything of the kind—and there were hearings before the Subcommittee of the Judiciary of the House of Representatives for 22 days, at which 142 statements were submitted, and over 100 witnesses testified.

Now, after a judicial determination of one of the basic legal questions involved, an attempt is made to carve out of that immense work of attempted revision to strengthen the act, a special statute to exempt one entire segment.

You are being asked as the Senate to undertake a task which is contrary to the entire history and philosophy of the act.

Why did all this come about? Why the hasty attempt to get a special statute instead of going through the revision of a 10-year study of the main act?

Well, because this was a determination by the Court after 5 weeks of trial, and 2 months of consideration by the judge to write an opinion. And I ask leave to file that opinion with you, Mr. Chairman, and the committee. But I just want to make one or two observations about that opinion orally.

The Court said, "community antenna" is a misnomer, it is neither a community venture nor is it a passive antenna. This is a wire service for commercial purpose and profit, and the Court equated by careful analysis CATV with TV and found that it competes with the local TV stations, whether UHF or VHF, and is just another broadcasting medium. There is no community service involved at all. Indeed in the case we tried, Mr. Chairman, you will be interested to know that there was one local TV station called WBOY in Clarksburg, W. Va., and that station could not stand the competition of the CATV and was ultimately absorbed by the CATV company in that very case.

And the Court went further to indicate that the CATV company understood its property right—when somebody tapped its wire and took its transmission to obtain a criminal conviction, it went after that little fellow and got him convicted. And the Court referred to that fact on page 21 of its opinion. And the CATV also protested when the local TV station became a subscriber to CATV and rebroadcast the signal of another station's programs carried on the CATV and said, "You have no right to do it, you are limited to that one exhibition."

So they understood their property rights. And the Court made a full analysis of it.

We are not dealing here, Mr. Chairman, with some poor undernourished enterprise. Mr. Krim has made clear that if that were the consideration, we also understand the public interest, and there is no company that can be an enlightened industrial enterprise today that ignores it. We would cooperate, even with free licenses in those areas. That is not what we are involved with here. That little Clarksburg

station, the testimony showed, had 665 miles of cables, in that little town, and had $1 million of reproduction cost value without the head-end equipment. And in the new application made in Philadelphia recently, one applicant said it would invest $37 million. This is no passive antenna on a rooftop. And the largest companies in America, which are very responsive people, are going, quite properly, into this enterprise, and incidentally, I believe, recognizing that they want to go into it properly. They say they want to pay a license fee as every other station does. And indeed, if they do not, Mr. Chairman, we are sounding the death knell of many small local TV stations which cannot compete with a competitor that brings in 12 channels, and now they are going into 20 channels, and at the same time they wish some special exemption from you so that they get a special compulsory license while the competitor bargains at the table in the regular way.

There is an appeal pending from the decision, Mr. Chairman. And it has been traditional that the Congress does not act on a matter sub judice anyhow. But I would not base our objection to this effort of the CATV companies on the basis of that technical ground.

An improvised statute is being asked for here. And the nature of its improvisation is clear from the fact that its proponents differ with each other, because it is so hastily done. One provides that there should be no exclusivity. Commissioner Ford, out of a larger knowledge of the industry, admits in his statement, as I read it, that there must be exclusivity.

The variations and the variance of the compulsory license are stupendous. May I just indicate, even under the brevity of these circumstances, a few of the considerations. A compulsory license would completely discourage excellence. There is no reason to make a better motion picture or a better program if there is going to be the same license fee paid under a complsory license. It also would discourage considerations of prime time and nonprime time. It also would ignore the variations of population receptivity. A western may be good in one part of the country, and a social drama better in another part of the country. And if all this is attempted to be solved by a series of escalating variables, which is the ultimate result of this kind of an adjustment, of a patchwork of sudden solution to a specialized problem of CATV, the result would be an administrative headache the like of which we have never seen before. Who would administer all these variables in a compulsory license arrangement such as is suggested? And then, of course, there would be resort to the courts. And the courts would be flooded with a subject matter which ought not to clog the calendars. And further than that, the difficulties that can be envisic ' in such an arrangement are infinite. The technology is impro A satellite kind of broadcast transmission may come about whic. .nay change all A and B contour areas and change the entire distribution system. How would we go about to do this? I call your attention, Mr. Chairman, to the time when Congress was attempting to fix railroad rates and found soon enough what an impossible burden this was, an encroachment on its normal duties. There is no reason, therefore, for such a revolutionary technique as has here been suggested.

Where the parties bargain, as they can here, as is normal, they will reach a more normal price, a fairer arrangement than can be imposed by Government fiat, or by legislative imposition of compulsory licenses.

It goes against the entire American tradition and experience to attempt to fix prices in any way, and to undermine the free competitive forces and the tug and pull of buyer and seller. Here we have anxious sellers. Mr. Krim has only touched upon the fact that this is a losing phase of the industry. They cannot recoup their costs in many instances, while at the same time, mind you, the people who are asking an exemption, according to testimony quoted in our House of Representatives testimony, are making 35 to 40 percent profit. Business Week made a sarcastic comment about "What is it that towers hundreds of feet into the air, mints money, and sells what television stations give away free?" There is testimony that some companies make 400 percent profit. Of course, there is nothing wrong with that if they pay for their program material. It will still be a very profitable business, and it is now attracting General Electric and all the big companies, quite properly.

Senator BURDICK. You disagree with Mr. Ford when he says that to pay fees for this copyright use may affect their business?

Mr. NIZER. I violently disagree with that. First of all, he could absorb that from the profits they are making better than any other enterprise.

Second, it cannot drive them out of business because the large network programs would be given to them almost on a nominal price basis, according to the voluntary statement of the largest networks.

Senator BURDICK. The Senate has convened. As you know, we are really setting illegally from this point on. We have to stop. I thank you both for your contribution here this morning, and I assure you the committee will consider this question carefully.

(Subsequently the following was received and by order of the chairman is printed at this place in the record.)

SEPTEMBER 9, 1966.

HON. QUENTIN N. BURDICK,
Acting Chairman, Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am grateful for this opportunity to submit a supplemental statement in response to the testimony given on August 25, 1966, by the Antitrust Division of the Department of Justice. Since we have been informed that a letter along the lines of this testimony has recently been sent by the Department of Justice to Chairman Celler of the House Judiciary Committee, we are taking the liberty of requesting that Committee to incorporate this supplemental statement into its record as well.

Meaningful interest by the Department in competition as it exists in the market place for television programming is, of course, welcome to the copyright owners. We are, after all, sellers in a buyers' market. However, as sensitive as we may be, we are unable to recognize the relevance of the presentation made by the Antitrust Division either to the legislation pending or to the state of the market place as it now functions.

The Department has neither offered nor sought to offer, any evidence that "harmful anti-competitive consequences" would result from continued copyright liability of CATV. Since it is our position that the historic rights protected by present law should remain undisturbed, we are confident that the Subcommittee will agree that it would be inappropriate, if not impossible, for us to undertake to respond to the vague generalities expressed by the Department.

It is entirely proper that the Department express its concern about the possible anti-competitive effects of any proposed legislation when there is a factual basis for its concern. If such circumstances were here present, it would, of course, be appropriate for the Subcommittee to reopen the proceedings and to initiate a full exploration of the question. We are certain that our clients and a host of other witnesses would demonstrate to the Subcommittee that the premises on which the Department's hypothesis is constructed, reflect a less than fully informed understanding of the television industry.

Also, if it is the desire of the Subcommittee to put aside historical copyright principles—and to reopen all the many questions involved in the context of the Department's suggestion that all copyrights are likely to be "monopolistic"—in such event we would want time to prepare responsive testimony and evidence. For what this would involve, would represent a sharp, almost total break with traditional copyright concepts, and would necessarily be a matter of the greatest gravity to us.

The position now taken by the Department is entirely novel and is a position—or, more accurately, a series of observations—never heretofore advanced by it or from any other quarter. It comes after all parties interested in the various aspects of copyright law have delved deeply into the many needs for general copyright law revision. The Register of Copyrights, the officer of the Executive Branch charged with the administrative interpretation and application of the Copyright Act, on the basis of extensive studies testified before you and the corresponding Subcommittee of the House: "that what CATV is doing is a public performance that should be subject to copyright control and [that he] therefore drafted S. 1006 in terms of full CATV liability."

In his testimony before this Subcommittee on August 2, 1966, Register Kaminstein referred to certain proposals before the House Subcommittee considering the Bill, to amend it in various respects. To complete the record, there is herewith enclosed a copy of a communication we addressed to counsel for the House Subcommittee on July 1, 1966, with respect thereto. It should be emphasized that we strongly favor the enactment of the portions of the Bill affecting CATV as they now stand, and that our willingness or failure to comment on any particular portions of the proposed amendments should not be interpreted as signifying agreement on our part to the amendments or any part thereof.

I am happy to point out that the proceedings before your Subcommittee brought out a clear indication of a new willingness on the part of all interested parties to establish working arrangements that would make any radical departure from S. 1006 unnecessary as well as unwise. This development hopefully clears the way for Congress to conclude its revision of the Copyright Law, so long pending, in a manner that will be beneficial to all the "useful Arts" and the industries to which they relate.

I regret that the statement by the Department of Justice representative comes so late. Since it rests upon so many demonstrably inaccurate assumptions concerning the operations of the television market and since the Department is unable to establish any injury to competition that would follow from preserving copyright liability on the part of CATV systems, I respectfully suggest that the Subcommittee will best serve the public interest by taking no action to amend S. 1006 insofar as it relates to CATV.

I am speaking for the copyright owners—the producers and distributors of copyrighted TV programs—not for the networks. I am joined by representatives of all the guilds—the actors, writers, composers, directors and other creative artists. We provide television with its life blood. Every broadcaster is our potential customer—and we are anxious to have CATV systems as customers. But in a free market economy, suppliers cannot have two classes of competing users of a product: one which pays, and the other which is exempted from paying by statute.

Respectfully yours,

LOUIS NIZER
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON.

JULY 1, 1966.

HERBERT FUCHS, Esq.
Counsel, Subcommittee No. 3, Committee on the Judiciary, House of Representatives, Rayburn Building, Washington, D.C.

DEAR MR. FUCHS: Reference is made to the meeting on May 26 at the office of the Register of Copyrights, attended by you and Messrs. Kaminstein, Carey, Goldman, Peyser, Meyer and Phillips, and Miss Ringer and the writer. At that meeting your attention, and that of the representatives of the Copyright Office, was directed to certain aspects of the proposed amendments to H.R. 4347, the Copyright Revision Bill, set out in Acting Chairman Rosenstein's letter of May 3 to Chairman Staggers of the House Committee on Interstate and Foreign Commerce, which are of grave and particular concern to our clients. As you

suggested, we have now prepared, and there is herewith transmitted, a memorandum of the views which we expressed at the meeting with respect to such proposed amendments.

Our clients, of course, continue to support, and to favor the enactment of the provisions of H.R. 4347 applicable to the retransmission by CATV of the copyrighted content of TV broadcasts, without amendment, and in this connection reference is made to the testimony at the Subcommittee's hearings on the Bill, of Mr. Arthur B. Krim, Mr. John Sinn and Mr. Louis Nizer.

We trust that the enclosed is self-explanatory. If there should be any question about it, or if the desirability of a further meeting, with Subcommittee members or others, should be indicated, please advise the undersigned.

I take the occasion to express, on our behalf and that of our clients, our deep appreciation for your courtesy and consideration.

Sincerely yours,

LAWRENCE S. LESSER
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON.

MEMORANDUM

I

This Memorandum is submitted to Subcommittee No. 3 of the House Judiciary Committee on behalf of the producers and distributors of copyrighted TV film programs named by Mr. Arthur B. Krim in his testimony before the Subcommittee on June 24, 1965, at page 1333 of the print of the Subcommittee's Hearings on H.R. 4347, etc., the Copyright Revision Bill. Certain aspects of the proposed amendments to H.R. 4347, set out in the attachment to Acting Chairman Kastenmeier's letter of May 5, 1966, to Chairman Staggers of the House Commerce Committee, are of grave and particular concern to such producers and distributors. It is to such aspects of the proposed amendments that this Memorandum is addressed. At a meeting held on May 26, 1966, the views expressed in this Memorandum were, in general, made known to the Subcommittee's counsel and the Register of Copyrights.

As the Acting Chairman points out in his letter to Congressman Staggers, under H.R. 4347, as it is now written, commercial CATV systems would be fully liable for infringement whenever they retransmitted the copyrighted content of a TV broadcast without first securing the permission of the copyright owner. Such full liability would be in complete accord with existing law, as demonstrated by the decision handed down by United States District Court for the Southern District of New York on May 23, 1966, in *United Artists Television, Inc. v. Fortnightly Corporation*, 149 USPQ 758. A copy of the Court's opinion in that case is herewith submitted.

The proposed amendments to H.R. 4347 would deprive the owners of copyrighted TV film programs of certain important rights which they now enjoy under present copyright law. Such owners feel strongly that their deprivation of certain of these rights would work intolerable hardship, and would be wholly inequitable in the light of circumstances which, it is believed, have been overlooked by the proponents of the proposed amendments. In the following portions of this Memorandum these matters will be discussed separately.

II

If amended as proposed, the Bill would, in effect, delineate three areas, which the Acting Chairman has called "white", "gray" and "black". In the "gray" area, the unlicensed transmission of the copyrighted content of a TV broadcast would be an infringement, but the infringer would be liable only for a "reasonable" license fee, relieved of the liability for damages and the accounting for profits now imposed by law. This proposed partial—but most substantial—exemption would include:

(A) The retransmission of a TV station's program by CATV for reception in an area already served by a TV station which has a license to carry the same program on the date of such transmission regardless of whether the latter actually broadcasts such program on such date; and

(B) The retransmission of a TV station's program by CATV for reception in an area not served by any TV station.

This proposed partial exemption would be in substantial derogation of the rights under existing law of owners of copyrighted TV film programs, and would visit them with the most serious adverse economic consequences. Indeed, the

application of this proposed partial exemption to the situation described above under A, would in large measure destroy the value of copyrighted TV film programs, and would make a virtual anarchy of television program distribution. Furthermore, while its application to the situation described above under B would have no immediate out-of-pocket impact on owners of copyrighted TV film programs, it would in the not too distant future do them substantial economic injury. For, the premise on which this aspect of the proposed partial exemption obviously rests, fails to take into consideration the economic fact that copyrighted TV film programs retransmitted by CATV for reception in areas not now served by TV will, as a result of such retransmissions, lose a large part of their value to TV stations hereafter constructed in such areas, and will, accordingly, produce substantially less in royalties for their owners than would be the case if they had not been so transmitted.

Patently, a program depreciates greatly in its licensing value for an area once it has been shown there. Nor is the injury posited a mere remote possibility: with CATV's unfair competitive advantage a thing of the past, whether under existing copyright law as determined in *United Artists Television Inc.* v. *Fortnightly Corporation*, or H.R. 4347 as now written, or, at least, somewhat lessened as by H.R. 4347, amended as now proposed, it is not unreasonable to assume that the construction of a great many new UHF stations will soon be undertaken, as contemplated by the national channel allocation plan of the Federal Communications Commission.

However that may be, in its application to the first of the situations described above under A, the proposed partial exemption is by far more objectionable. It is, also by far, the most objectionable of the proposed amendments to the Bill. For a "reasonable" fee set by a court if the parties should be unable to agree, this provision would allow the retransmission of a copyrighted TV film program by CATV for reception in an area served by a TV station other than that broadcasting the program, if such other station is licensed to broadcast such program on the day of the retransmission, whether or not it actually broadcasts it that day. In his letter to Congresman Staggers, Acting Chairman Kastenmeier says in explanation of this provision:

"* * * where the copyright owner has already licensed the use of the work in the area * * * there is no direct loss of market exclusivity."

But nothing could be farther afield! If by law, should the proposed amendment be adopted, and the Bill thus amended be enacted into law, CATV were allowed to retransmit a copyrighted TV film program broadcast by one TV station, into any area served by another TV station licensed by its owner to broadcast the same program, by that very token alone, the owners of such programs would be stripped of all possibility of granting any exclusive license, and no TV broadcaster could acquire, or would pay for, exclusivity. Such result would be inevitable in view of the fact that exclusive license contracts between TV stations and film program distributors, which are for a limited number of "runs", are made well, and sometimes, years in advance of the actual showings, and frequently pertain to a whole series of programs or whole "film libraries". If the granting of such exclusive licenses to TV stations would throw their market areas open for unlimited "runs" of the same programs by CATV, there would not only be a "direct loss of market exclusivity", but market exclusivity, both as a concept and as a reality would be utterly destroyed.

So far as concerns owners of copyrighted TV film programs, this provision cries havoc. It does hardly less for TV broadcasters. A program that has been shown in an area before, or is being shown simultaneously in the same area by another, or that will be shown in the area soon again, will, of course, draw a smaller audience than when its showing in the area is unique or exclusive. In consequence, sponsors will pay a TV station less for a non-exclusive program than for one that is exclusive. Under this provision, owners of copyrighted TV film programs would receive substantially less for their programs by way of royalties from TV stations, TV stations would receive substantially less from sponsors of their broadcasts, and CATV would continue to reap its profits, for which it would be accountable to no one.

The loss in value which results where there is no exclusivity, cannot, of course, be computed with mathematical precision, but the FCC's findings, after exhaustive investigation, leaves no room for doubt that exclusivity is considered by all a most important element in the value of television programs. First Report and Order, Par. No. 53, Docket Nos. 14895, 15233; FCC 65-335; 66174, April 23, 1965. Thus, the FCC said:

"In dealing with program suppliers, stations usually obtain the exclusive right to exhibit programs within a particular geographic area and for a particular length of time. This exclusivity reflects, among other things, the judgment that duplication of the program within the station's market—either simultaneously or within some period of time—reduces the audience and the value of the program to the station."

The loss to owners of copyrighted TV film programs which would result from their inability to grant exclusive licenses might be so great as to exceed CATV's total gross receipts from subscribers. While this may at first seem paradoxical, yet it is, of course, commonplace that the detriment to one, and the benefit to another, which result from any given set of circumstances, are not necessarily equal.

Thus, it is recognized that a TV station's audience for a program is fragmentized, and the value of the program to it and its sponsoring advertisers, is depreciated if such program should be exhibited in the area normally served by such station, simultaneously with its exhibition of it, or within periods of time before and after such exhibition. Where the programs, as retransmitted from elsewhere by CATV for reception in an area served by a TV station licensed to broadcast the same program, carries one or more commercials of advertisers other than those sponsoring or who might sponsor, the local station's exhibition of the same program, the substantial damage to the local station is clear. Obviously, if by law, TV stations would at all times be faced with the possibility of such fragmentation of their audiences, non-exclusivity rather than exclusivity would become the rule, and program values would drop substantially.

A TV station whose programs are retransmitted by CATV into areas served by other stations, would not pay the program owners more for their programs on account of its extended coverage. A station in New York City, for example, would not pay more because its programs were being transmitted by CATV for reception in Cleveland, nor would a station in Los Angeles pay more, because its programs were to be shown by CATV in Salt Lake City. Many commercials are local in character, and the department stores, theaters, newspapers and supermarkets in one market area, would hardly pay for the showing of their commercials beyond the area in which the customers and potential customers are located. Nor would national advertisers pay for the duplication of their commercials. See FCC First Report and Order, Par. 69, Docket Nos. 14895, 15233, *cit. supra*, where the Commission said:

"Advertisers normally view duplication as a waste for which they will not pay, and network affiliations and rates are based on the amount of unduplicated coverage a station can provide."

Moreover, in many cases, when TV stations negotiate and contract for licenses to broadcast copyrighted TV film programs, they do not yet have their sponsors "lined up". Accordingly, neither the station whose exhibition of such programs will be retransmitted by CATV, nor the station into whose area such programs will be retransmitted by CATV could, in negotiating the price for such licenses, take into account the advertising goals of their eventual sponsors.

Thus, it is utterly without validity to suggest that this proposed amendment would not prejudice owners of copyrighted TV film programs because there would be "no direct loss of market exclusivity" in any case where they had already sold licenses to exhibit their programs to TV stations serving areas in which CATV retransmitted such programs from elsewhere.

Conclusion.—This proposed amendment, as applied to areas in which owners of copyrighted TV film programs have already licensed a program to a TV station serving the area into which such program is retransmitted by CATV, should be abandoned in is entirety.

III

The "white" area of the proposed amendments, in which the unlicensed retransmission of the copyrighted content of a TV broadcast would *not* be an infringement, would include the retransmission of a TV station's broadcast by CATV "for reception solely within the limits of the area normally encompassed" by such TV station's broadcasts. Such an exemption would, of course, permit commercial CATV to profit by the exploitation of the property of others, representing substantial investments, wholly without compensating them therefor. The inequity to copyright owners, and the unjust enrichment of CATV, which any such "accommodation" would necessarily work, are patent. Nor, regardless of its validity, would any premise that it is in the public interest to permit, or even to require CATV to make such transmissions, lessen one whit the plain

inequity to the copyright owner, or the obvious unjust enrichment of CATV which this proposed amendment would entail. That the public interest would be served by such retransmissions, does not require that the copyright owner be made to bear the burden, and CATV allowed to reap the profits of such service. It is, of course, no answer that the TV station broadcasting the program has already paid the copyright owner for a license authorizing it to exploit the copyrighted property commercially. For, CATV is nonetheless unjustly enriched, if it may, without paying for that privilege, also exploit the copyrighted property commercially.

It is, moreover, a matter of the gravest concern to producers and distributors of copyrighted TV film programs, that in his letter to Congressman Staggers, the Acting Chairman would interpret the proposed amendment as meaning that CATV could, without license or infringement, retransmit a TV station's signals for reception anywhere "in effect" within such station's "Grade B contour". In other words, the Acting Chairman would equate the phrase "the limits of the area normally encompassed by the" TV station's broadcasts, as used in § (a) (3) and defined in § (d) (3) of the proposed amendment, with the outer limits of the TV station's Grade B contour. This would pose very serious problems for producers and distributors of copyrighted TV film programs, and their TV licensees, for the following reasons:

A TV station's Grade B contour area is defined by the Federal Communications Commission as "one in which a good picture may be expected for 90 per cent of the time at 50 per cent of the locations". *Clarksburg Pub. Co.* v. *F.C.C.*, 225 F. 2d 511, 515, fn. 12 (D.C. Cir. 1955). The standard measurements for determining the Grade B contour are based upon the use of rooftop antennas 30 feet high. In consequence, and as a practical matter, only a minority of home television receivers in a TV station's Grade B contour can in fact, or actually do receive a good picture from its signals, even when rooftop antennas are used. And, just because a TV station's coverage of its Grade B contour area is inadequate, under the national channel allocation plan reflected by the Table of Assignments adopted by the Federal Communications Commission in its Sixth Report and Order, Docket Nos. 8736, 8975, 9175, 8976 (1952), a substantial number of VHF and UHF channels have been spaced so as to provide Grade A contour service in communities in the Grade B contour areas of other stations. And, for one reason or another, there are throughout the United States a substantial number of situations where the Grade B contour, and even the Grade A contours, of TV stations in one community are overlapped by the Grade A contours of TV stations in another community. Familiar examples, we are informed, are Baltimore and Washington, the northern suburbs of Philadelphia and New York, Boston and Providence, Chicago and Milwaukee, Cleveland and Akron, Toledo and Detroit, Cincinnati and Dayton, Sacramento and San Francisco, Los Angeles and San Diego, Pensacola and Mobile, Indianapolis and Muncie, Harrisburg and Lancaster, Scranton/Wilkes-Barre and Binghamton, and Richmond and Portsmouth/Norfolk/Newport News. Thus, there is an area of about 1,000 square miles within the Grade A contour of Philadelphia TV stations which is also in the Grade B contour of New York TV stations. In such area, two municipal franchises have recently been granted for the construction of CATV systems and in at least eight other locations within the area, CATV franchises have been applied for. The proposed amendment would permit these CATV systems, without license or infringement to retransmit from New York for reception in the prime areas served by Philadelphia TV stations, the very same programs which the copyright owners have licensed, or expect to license, to a Philadelphia TV station on an exclusive basis. Obviously, if CATV may freely import such a program in the Philadelphia area, the copyright owner cannot give a Philadelphia TV station an effective exclusive license, and the Philadelphia TV station, obviously, will not pay for what it cannot get.

All other things being equal, or substantially so, viewers in an area within the Grade A contours of TV stations in one community and the Grade B contours of those in another, may generally be expected to watch the programs of the former rather than those of the latter. This is so, both because of the better reception, and because they are more likely to live in or closer to, and to have economic and social ties with the community in which such stations are located, and, accordingly, to have a greater interest in the local news and other local items included in their broadcasts. As the result of these inadequacies in TV stations' coverage of their Grade B contour areas, television advertising market areas, in respect of both national and local advertisers, and program licensing exclusivity patterns have in general developed in conformity with, and are geared to Grade A, and not Grade B, contour areas.

The effect of the proposed amendment, as interpreted by Acting Chairman Kastenmeier in his letter to Congressman Staggers, would be to destroy the ability of the owner of a copyrighted TV film program effectively to grant an exclusive license covering such program to a TV station whose Grade A contour is overlapped by the Grade B contour of a TV station already licensed, or which he hopes to license to show the same program. For, exclusivity encompasses the right to present a program to the audience in the licensee's Grade A contour area without its being presented by any other (whether TV or CATV) in such area for whatever period of time may be agreed upon. It is not, however, for one or both of the reasons indicated above, considered an impingement on a licensee's Grade A contour exclusivity that the program may possibly be picked up in the Grade B contour overlap of another licensee.

But, any retransmission of the latter's broadcast of the program, and the possibility that it might be retransmitted expressly for reception by CATV subscribers who are members of the audience in the former's Grade A contour area, in large measure theretofore unable or unlikely to watch programs broadcast by the latter, would be wholly incompatible with the former's enjoyment of exclusivity.

Exclusivity is a very important factor in television broadcasting, and TV stations will pay substantially more for exclusive licenses than they will for non-exclusive licenses, if, indeed, TV stations will buy non-exclusive licenses at all. The proposed amendment, as interpreted by Acting Chairman Kastenmeier, would thus be very costly to producers and distributors of copyrighted TV film programs. It would be wholly inequitable to make it lawful, and not an infringement, for CATV, without permission of the copyright owner, to retransmit a copyrighted TV film program for reception in any part of the Grade B contour of the TV station broadcasting the program, that overlaps the Grade A contour of any TV station in another community constituting a separate market area.

A similar problem is raised by the proposed amendment when there is overlapping between the Grade A contours of TV stations in different communities, each of which is a separate market area. In such instances, the audience tends generally to become divided into two groups, each favoring the program of the station in the community, normally the closer, with which they have their respective economic and social ties. In any such case, and for the reasons given above, CATV should not be exempted from infringement where, without the permission of the copyright owner, it retransmits a copyrighted TV film program for reception outside the metropolitan area of the TV station broadcasting it.

Conclusion.—This proposed amendment to H.R. 4347 would permit commercial CATV to profit by the exploitation of copyrighted TV film programs, without any compensation to the copyright owner. It would deprive the copyright owner of substantial rights under present law, and would unjustly enrich CATV. The exemption provided by this proposed amendment should be expressly and clearly limited to retransmission by CATV of a TV station's broadcast where—

> Such retransmission is made for reception solely within such portions of the geographic area within its Grade A contour as are *not:*
>
> A. Reached effectively by such TV station's signal because of terrain, structures, or other physical or technical barriers; *and are not*
>
> B. Within the Grade A contour area of a TV station broadcasting from a community other than that from which the TV station whose signal is being retransmitted broadcasts, unless such retransmission is for reception only at locations within the metropolitan area of the community in which the TV station whose signal is being retransmitted broadcasts, and such retransmission was requested by the TV station whose signal is being so retransmitted.

IV

There is, of course, no objection to exempting secondary transmissions by *bona fide* common carriers. However, the broad language of the proposed amendment which would grant such exemption, gives some cause for pause in view of the traditional CATV contention that it has "no direct or indirect control over the content or selection of the primary transmission", and the possibility that it might contend that it "has no direct or indirect control * * * over the particular recipients of the secondary transmission", particularly where state statutes or municipal franchises require them to serve all members of the public in their cable areas without discrimination. The proposed amendment, in its present form, might well induce CATV to reverse its traditional position that it is not a common carrier, and to encourage the insertion of provisions in state statutes and municipal franchises calculated to bring it within the category of common carriers as defined in the proposed amendment.

Apart from all else, the feature which distinguishes CATV retransmissions of TV programs, from their carriage by common carriers, is that CATV retransmits such programs for direct reception by members of the viewing public, while common carriers do not. For purposes of clarification, this criterion should be included in the proposed amendment.

Conclusion.—This proposed amendment should be expanded by deleting the period after the word "others", substituting a comma therefor, and adding the following words:

"and do not include any further transmission of such secondary transmission by it to the public."

V

The provisions of the proposed amendments in regard to the notice to be given by copyright owners to CATV operators who have recorded their identities with the Copyright Office, is basically unobjectionable. In most instances, license agreements between owners of copyrighted TV film programs, and TV stations are made far in advance of the showing, and rarely less than ten days prior thereto. Accordingly, the giving of notice to a CATV system which has recorded its identity, and the identities of the TV stations whose programs it restransmits, would not be unduly burdensome. However, when it comes to what information can be included in the notice, and when such notice can be given in terms of the date of CATV's carriage of the programs of a particular TV station, a variety of factors come into play. We recognize that the proposed amendment does not particularize in this connection, but leaves such matters to government by regulations of the Copyright Office. Nevertheless, it would appear appropriate at this time to indicate the problems that would arise if copyright owners should be required to give notice not only that on a certain date a particular program was licensed for a particular period to a specific TV station, but that such program would be broadcast on a certain day at a particular time.

When a license agreement is made, the *date and hour* of the showing of the program by the TV station, is as yet undetermined. In the case of most motion pictures, the date becomes first known to the distribtuor, when the TV station "books" a print, i.e., when it requests the distributor actually to ship the print to it in time to be available for telecasting on a certain date. In many other situations, and, in particular, in so-called "library deals", the TV station obtains the print for multiple showings, without any obligation to return the print to the distributor during the intervals between showings. We are advised by one of the largest distributors of copyrighted TV film programs, that approximately 35% of its business is done on the "library deal" basis. In "library deal" situations, the date and time of showing is determined solely by the TV station which does not communicate such information to the distributor. It is, therefore, only the TV station, and not the distributor, who could in present circumstances notify CATV of the particulars in these respects.

It is believed, however, that not many TV stations would be willing to assume the administrative burden of giving such notice to CATV. It is to be noted in this connection that the TV station which would have to give such notice, is not the TV station which is in competition with CATV, and therefore has an incentive to cooperate with the copyright owner, but is, rather, the TV station whose signal is retransmitted by CATV, and which has no economic interest to protect in the other station's exclusivity.

While the giving of specific notice as to the date and time of the broadcast is impracticable for the copyright owner, it is not essential to the protection of the CATV system against innocent infringements. Indeed, all TV stations disseminate as widely as they can, to the public in their areas, information as to the date and hour when particular programs are to be shown by them. Such information is available in local newspapers, and in magazines such as TV Guide. Once a CATV system has received a general notice from the copyright owner that a copyright program has been licensed to a specific TV station carried by the CATV system, it would, on balance, be much easier and quicker for the CATV system, than the copyright owner to become informed as to precisely when the program will be broadcast by such TV station.

It has been suggested, that a TV station having a "library deal" license could notify the copyright owner of the date and hour of the showing, and that the copyright owner could forward such notice to the CATV system. However,

even if the TV station should be cooperative, 10 days specific notice would be impossible. We are informed that the earliest the date and hour of a show is determined by the TV station in regard to "library deal" films, is about two weeks prior to the showing. A mailing of such notice, by the TV station to the copyright owner, and processing and mailing of such notice by the copyright owner to the CATV system, could not possibly be accomplished within 10 days prior to the showing.

The content and timing of the notice to be given are subjects that require further exploration, with the practicalities well in mind.

Respectfully submitted.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON.

Senator BURDICK. We are going to take some statements from those who cannot appear this morning, and who would like to appear personally, we feel this is so important that we will sit another day, and give notice of it before this session is over. We regret that we are caught in this time bind. But for those who want to file statements we will take them this morning for the record.

The statement of Mr. Marlowe will be received for the record.

(The statement referred to follows:)

STATEMENT OF JAMES O. MARLOWE, VICE PRESIDENT, SPRINGFIELD TELEVISION BROADCASTING CORP.

My name is James O. Marlowe. I am Vice President of Springfield Television Broadcasting Corp., operators of UHF television stations in Springfield, Worcester and Greenfield, Massachusetts, and Dayton, Ohio.

For two years I managed the company station in Greenfield which served the Greenfield, Mass., Keene, N. H., and Brattleboro, Vermont, areas, which, incidentally, is a mountainous and semi-sparsley populated region.

With me is Martin Firestone, counsel for Springfield Television Broadcasting. For seven years our Greenfield station was operated as a full service local station with local news, inteviews, and full schedule of public service programs and announcements. That is all over now. We were squeezed right out of business by a number of factors, all attributable to the splintering of our potential audience by CATV. Some 16 CATV's operate within the normal coverage area of our Greenfield station representing some 45,000 CATV viewers. These CATV's pirated our signal and duplicated our programs by carrying distant stations which scheduled the same network and some of the same local film shows as we.

Our audience and thereby our revenue was reduced until it was no longer feasible to operate as a local station. Therefore, we ceased local programming and the communities involved lost a source of local news, an important vehicle for the expression of local ideas, politics, and opinions.

In addition, local merchants lost a valuable advertising media. Storekeepers in the town served by the station could no longer expose their products or services on television. At the same time they suffered by having to compete with larger merchants in distant cities whose television advertising was brought into the communities by CATV. Thus the local entrepreneur was sacrificed to his larger volume competitors in the bigger cities within driving or mail-order distance from his town.

This resulted not only in loss of revenue to the local merchants—it will be threatening their survival—but also loss of jobs and income to the community.

In addition, and not to be overlooked, was the loss of jobs to those who were formerly employed by the station itself. In our case we were the only source of viewable free television to a major portion of the local population. This local free service to the community has now been silenced by the unregulated and unfair competition of CATV. When a television station makes arrangements for showing motion pictures, syndicated films, or any other program prepared by a group or person not directly in his employe, he purchases with it normally the right to show or expose to the public these motion pictures or programs exclusively and for a predetermined fee.

The amount of the fee is determined by the potential number of people who are able to view these programs. This is called a television station's audience.

When one or more of these programs are broadcast by a distant station not located within or near the same community, picked up by a CATV system and retransmitted to homes throughout the area where the station has purchased the above-mentioned exclusivity, the station is damaged financially by the reduction of its audience for that particular program. Station revenues are clearly and directly commensurate with the size of the audience for each program.

The financial damage is accentuated when the cable transmits a program before the time the station had planned to show it. This is as clear a violation of the rights of the stations, the broadcasters of the programs, and the copyright holders, as other cases outlined. When this summary appropriation of a station's program is extended to a large portion of the broadcast day, as is frequently the case where CATV exists and carries a large number of stations, financial ruin is the inevitable result to the television station.

What is has to sell, its program, has been retransmitted without its consent, without any consideration to the harm it may cause to the station, and resold for profit by a company which performs all of the functions of the television station except those which have been promulgated by the Federal Communications Commission to protect the interests of and provide service to the public. Thus the station has a competitor without regulation while its standards of performance in all fields from programming through technical areas are rigidly controlled by a Federal Commission.

This constitutes unfair competition. I do not feel that it would be the interest of the public to reduce the amount of regulation of these factors as regards television stations.

Proper recourse would be to provide regulations for operators of CATV which would protect the stations from unwarranted usurpation of their rights, particularly in regard to copyrighted material.

There is at present no explicit copyright protection for the programs produced by a local station such as its own documentaries, news programs, weather forecases, even commercials produced by the station. Picking up and retransmitting these programs is as serious a copyright violation as the other areas mentioned, because the cable operators at present need not even secure the permission of the originating station.

In short, it has been my experience that cable operators who are unregulated do as they please, when they please, why they please, without regard to the rights of any individual station operator, network, program producer or anyone else, and they do this for profit without regard even to the rights of the public to free publice service television.

As an operator of a small market UHF station ruthlessly forced out of business by CATV, which competed against us for viewers, and which had none of the usual costs of programming, I can tell you that this unfair competition as it exists today is a threat to the hoped-for expansion of UHF broadcasting, and in order to allay this threat we have reluctantly entered the CATV business ourselves. We have done so because without effective FCC regulation and copyright protection we feel it is the only way to protect and thereby continue effective free local and public service television. It would be foolhardy for anyone from a business standpoint to enter the broadcast field in a small market under the conditions I have outlined. An important part of all stations' cost is directly attributable to program expense.

The usual portion of programming to the total cost varies from 30 to 40 per cent. Incidentally, as was brought out earlier in testimony, the CATV profit is estimated at about 57 per cent. Average station profit is about 27 per cent. CATV's under present conditions spend not one cent for programs. Since we and the CATV's compete for viewing audience our cost disadvantage resulted in our being forced to abandon local service. The fact that the CATV's paid nothing for programs permitted them to spend money to attract larger and larger audiences. They engage in advertising and public relations counsel while we were investing in programs designed to serve the local interests.

What happened to us in Greenfield is a microcosm of what is happening and what will happen throughout the country whenever a television station is forced to compete on these grounds with CATV. We learned the hard way and the viewing public, the public that legitimate broadcasters are bound to serve, are the real losers. They lose the opportunity for local expression through television in all fields of endeavor from political through the arts and entertainment.

(Whereupon, at 10:30 a.m. the committee adjourned, subject to the call of the Chair.)

AFTERNOON SESSION

The subcommittee met, pursuant to call, at 2:30 p.m., in room 1318, New Senate Office Building, Senator Quentin N. Burdick presiding.

Present: Senator Burdick (presiding).

Also present: Thomas C. Brennan, chief counsel; Edd N. Williams, Jr., assistant counsel; Stephen G. Haaser, chief clerk, Subcommittee on Patents, Trademarks, and Copyrights; and George S. Green, professional staff member, full committee.

Senator BURDICK. The next witness will be Mr. Charlton Heston, on behalf of the Screen Actors Guild, Inc.

Mr. Heston, your formal statement will be made a part of the record. You may proceed, and we will hear your testimony.

STATEMENT OF CHARLTON HESTON, GUILD PRESIDENT, SCREEN ACTORS GUILD

Mr. HESTON. Thank you, Senator. I will try to summarize the opinions expressed in this statement made here on behalf of the Screen Actors Guild.

Let me begin by thanking you on behalf of the Screen Actors Guild for giving my guild, which I am here representing today, a chance to express our views on this subject of the CATV industry's pleas to have the copyright laws amended in their behalf.

I would like to begin by clarifying a point about our membership. I think people in general tend to regard actors as a rich group of mountebanks lounging around fur-lined swimming pools. I would like to point out that the Screen Actors Guild is a labor union, and that it represents not such a group of affluent citizens, but on the contrary, 16,000 members of not a very lucrative profession. Acting is never a secure way of making a living. The public's attention is called always to that minority that do make a lot of money.

But the union of which I am president has 16,000 members whose average income is well under $3,000 a year. And the union is not primarily concerned with those few members who make a great deal more than that. And I do not appear on their behalf. We are concerned with what we call the minimum player, who is paid the standard wages for which we negotiate our contracts.

Those collective bargaining contracts we have negotiated over the years are with all the motion picture companies, and with the television networks and others who produce for television. Television programs today bring in the bulk of the revenue for screen actors. Far less than half, only about a third of the moneys paid to film actors, come from theatrical film. Television is by far the largest source of revenue for the members of my union.

And therefore what happens in television is of enormous concern to the membership of the Screen Actors Guild.

We have a series of very complicated formulas which we arrived at over the years, and by means of which actors are compensated. After a series of negotiations extended over several contracts we finally achieved something we have fought for for a long time. And that was that actors would be compensated additionally for each re-run of a television program. As you may know many are re-run many, many

times. So now a very important factor in the economy of the film actor is the fact that if a program in which he appears is run a number of times, or indeed more than once, he is additionally compensated. For the minimum player this compensation can amount eventually to more than he was originally paid. Without it, he would not earn even the $3,000 annual average he now does.

In short, the compensation which actors receive from the television showing of their theatrical pictures is a very important part of their total living. The heart of this entire system, of course, is the protection which the owner of the film has under the copyright laws. To our regret, copyright laws do not extend to cover actors and similar creative artists. So whatever derivative rights we have are precisely that, derivatively obtained. And if the film companies and television networks are deprived of any part of the property protection that they now have under the copyright laws, the members of the Screen Actors Guild will suffer a loss in earnings. If the CATV companies are successful in their petition to have legislation enacted that would exempt them from any part of or all of the provisions of the copyright laws, obviously members of the Screen Actors Guild will necessarily suffer a very severe financial loss.

Senator BURDICK. Would you elaborate on that?

Mr. HESTON. If a program, a television program is shown over a community antenna system in a market where it is not paid for, then the actors will not get the fees which they now will get if a motion picture company sells a picture to a television station or if one of the networks runs a program. The community antenna system picks the program out of the air, without any compensation to anyone, including the people who originally made the program. In addition, for example, if programs from New York were picked up by a community antenna system in Philadelphia and shown in the Philadelphia market, then obviously the local television station in Philadelphia would not be inclined to buy those same programs and exhibit them in the normal manner, and thus the moving picture companies who made them and subsequently the actors who performed in the programs would receive no compensation from them.

Our position, Senator, is really very simple. Congress is usually surrounded by petitioners asking that laws be passed. Our position is that we feel the existing copyright law provides us with justice, and that we do not feel that it would be justice to have any special exemption for anybody for the reasons I have outlined. I speak, as I said, on behalf of the members of my union, and we hope that Congress will see fit to leave the copyright law as it has been drafted without exemption for special interests.

Senator BURDICK. This is the official position of your union?

Mr. HESTON. Indeed it is, sir.

Senator BURDICK. And I presume quite unanimous?

Mr. HESTON. Well, to the extent that 16,000 people can be said to agree on anything, if there is one thing on which they can agree it is something which affects their pocketbooks. And actors are, as I said, not long on money. This whole matter has been a subject of great preoccupation for the Screen Actors Guild for some years. We all understand how copyright affects us. Theatrical production of film has, of course, declined as television production has increased.

Television has now in large measure replaced film as a mass entertainment media. And screen actors now depend, as I said, for the bulk of their livelihood on television. And this market is a constantly expanding one. There is an immense amount of money to be made in it. In my view, the screen actors perhaps do not get their fair share of that. But that is no part of our present concern here before you. We feel that the protection of the copyright laws should remain just as the Court in a recent decision decided. The decision protects our rights too. And we most earnestly petition that this committee arrive in its deliberations at the same conclusion.

Senator BURDICK. I was interested in what you had to say about the number of times a picture may be shown. And the more times it is run it redounds to the benefit of the performers in that picture?

Mr. HESTON. Yes; indeed it does. The actor is paid a certain fee—we have attached a schedule outlining those fees at the conclusion of my statement—for the original work he does, his original performance. But if that picture is rerun he is paid a certain proportion of his original base salary. Again, mind you, I am speaking of the minimum player in what we call the scale of players. And each time the show is rerun after that, up to six times, he is paid still additional amounts. And the total of rerun compensation can amount to more than he was originally paid in the first place. Most screen actors work very irregularly, and they depend on the rerun checks that come in to pay their bills, their rent, and electric lights and groceries, and milk for their kids. Since we began getting rerun checks for our members, something like 10 years ago, our 16,000 members have received many millions of dollars. And as I said, this is an enormously important part of the actors' livelihood, and anything that would diminish this income attacks him where it really hurts him.

Senator BURDICK. And when CATV runs a program it is not counted as a rerun?

Mr. HESTON. It just does not exist at all as far as the actor is concerned; he doesn't get a nickle from it.

Senator BURDICK. Your thesis is that that represents a loss to the actor?

Mr. HESTON. It takes it right out of his pocket, because if the CATV were required to establish a normal commercial relationship with the people who made the program, as all other distributors of television programs are, that would count as a rerun, and a proportion of the money paid to the network or motion picture studio that originally made the program would eventually, through the channels of Screen Actors Guild, go directly into the pocket of the performer who acted in the film. As I said, concurrently in a market where regular TV stations must compete with CATV systems, any show that is shown on CATV obviously will not be bought subsequently by the TV station. So there is a kind of a double loss there—we not only lose the CATV revenue but we lose the chance to get revenue from any other source in that market.

Senator BURDICK. In other words, you think CATV should have the same standing and be in the same position as any other TV broadcasting station?

Mr. HESTON. It seems to me reasonable to expect so. Most of American society has in the past tended to look with suspicion on special in-

terests and special exemptions for however persuasive the reasons seem to be. In this case we at the guild cannot see that the reasons for CATV exemption are even persuasive.

Senator BURDICK. In other words, there is no area of the industry that you can think of now where exemptions would be justified?

Mr. HESTON. In my view, no, and that is the view of the guild I represent today.

(The statement of Charlton Heston follows:)

STATEMENT OF CHARLTON HESTON ON BEHALF OF SCREEN ACTORS GUILD, INC.

On behalf of the Screen Actors Guild, of which I am President, I wish to thank the Committee for according me this opportunity to appear before it and express the views of Screen Actors Guild on the subject of the operations of CATV companies under the Copyright Laws.

Screen Actors Guild is a labor union affiliated with the AFL–CIO and comprises over 16,000 actors who render services in the production of theatrical and television motion pictures.

Screen Actors Guild has had in effect for many years collective bargaining contracts with all of the major motion picture producing companies and independent motion picture producers, as well as with the television networks or their subsidiary companies engaged in the production of television motion pictures, which provide minimum compensation and working conditions for motion picture actors. These contracts provide a formula for the payment of additional compensation to actors when theatrical motion pictures are exhibited on television. For motion pictures produced in the period between August 1, 1960 and January 31, 1966, this formula requires the payment of a percentage of the world-wide gross receipts derived from the television exhibition of such motion pictures, for ratable distribution among the actors performing in such motion pictures.

For pictures produced subsequent to January 31, 1966, payments are to be made under a formula providing for the payment to each actor appearing in a motion picture, of certain percentages of a base fee, when such motion picture is first telecast and additional percentages when the distributor's gross receipts from such television exhibition reach certain stated amounts.

For example, a free lance actor (actor engaged for a single picture) who works in a motion picture for a period of one week, is entitled to be paid 30% of a base fee of $300, or $90, when such motion picture is first exhibited on television. When the distributor's gross receipts from television reach the sum of $125,000, an additional 12½% of such base fee becomes payable. Similarly, when such gross receipts reach certain additional amounts, further percentages of such base fee becomes payable to the actor. For your information there is attached to this Statement as Exhibit "A" a copy of the complete formula providing for such payments.

In addition, some actors and other creative artists who have the requisite bargaining power, enter into individual employment contracts with producers of motion pictures whereby they receive a percentage of the profits, or of the gross receipts, derived from the exhibition of the motion pictures in which they appear, including television exhibition. But the overwhelming majority of journeymen actors are unable to bargain for individual compensation and must rely entirely on the Guild's collective bargaining contracts for compensation for their television performances.

Actors who perform in motion pictures made primarily for television exhibition are likewise entitled to be paid additional compensation called "rerun fees" each time a motion picture is retelecast up to a total of six telecasts. Such rerun fees may aggregate up to an additional 165% of the actor's initial minimum applicable scale. Additional amounts equal to 5% of such rerun fees are also payable to the Producer-Screen Actors Guild Pension and Welfare Fund to provide pension and welfare benefits to such actors.

In short, the compensation which actors receive from the television exhibition of the pictures in which they appear is directly geared either to the producer's gross receipts from such television exhibition or to the number of times the film

is replayed on television. Many years of study and effort have been expended by the Screen Actors Guild in negotiations with motion picture producers to establish this system of compensation which has proven to be the fairest and most equitable way of compensating actors for their creative services in the television field. As you will no doubt be advised, other important creative groups in the motion picture industry have collective bargaining contracts containing similar provisions for compensation for their members.

The heart of this entire system of compensation is the protection which producers have under the present Copyright Laws against the unauthorized reproduction of their motion pictures on television. Unfortunately, the Copyright Laws of the United States do not extend copyright protection to an actor in his performance or the interpretation of his role in a motion picture; consequently, actors have had to rely entirely on derivative rights established by contract with the producers to secure just compensation for the exploitation of their performances on television. It is the license fees which motion picture producers and distributors receive from television stations for the use of such copyrights that generate the funds from which actors are paid.

If CATV companies were to be permitted to pick up and reproduce for their paying subscribers, copyrighted motion pictures broadcast by television stations that have been licensed to make such broadcasts, without making any payment to the producer or distributor, members of the Screen Actors Guild would necessarily suffer a substantial financial loss. In the first place it would give to CATV companies, which are commercial enterprises operated for profit, a "free ride" on the coattails of the licensed telecasters. Such "free ride", by denying to producers and distributors revenue in the form of license fees from such CATV companies, would have the direct effect of depriving actors of compensation since it would reduce the funds out of which such compensation is paid.

Moreover, if motion pictures can be seen over a CATV system in a community whose residents would not otherwise be able to receive such programs, it is obvious that local stations in such community would not pay for the privilege of telecasting such motion pictures. Hence, the license fees which otherwise might have been obtained from such local telecasters will not be paid and the actors appearing in such pictures will be deprived of compensation to which they are justly entitled for their performances in such city.

It is fair to say, therefore, that exemption of the operations of CATV companies from the Copyright Laws would have the immediate and direct effect of depriving thousands of motion picture actors of the fruits of their artistic endeavors.

The Screen Actors Guild is therefore opposed in principle to any change in the present Copyright Laws which would exempt CATV companies from liability for infringement when, without authorization from the copyright owner, they pick up and send out to their subscribers copyrighted television programs. In engaging in such activities CATV companies are, in effect, television stations and should, we submit, stand on the same footing as other television stations which seek the right to telecast copyrighted television programs. They should compete in the market place for such product and pay whatever license fees may be negotiated between them and the copyright owners for the rights they seek to acquire. We are unable to see any basis on which CATV companies are entitled to special treatment in this area.

We therefore respectfully urge that no change be made in the present Copyright Laws with respect to their application to the operations of CATV companies.

EXHIBIT A

1. Television Exhibition of Theatrical Motion Pictures the Principal Photography of which Commenced after January 31, 1966

(a) *Schedule of Payments.*—With respect to each theatrical motion picture produced hereunder, the principal photography of which commences after January 31, 1966, which is released by Producer for exhibition on free television anywhere in the world, Producer agrees to pay to each actor whose services are included in such motion picture when telecast, compensation not less than the amounts provided herein. The term "actor" means those persons covered by the Basic Agreement and includes actors, singers, stuntmen and airplane pilots.

Said compensation herein called "television fees" shall be computed on the following amounts (hereinafter referred to as base amounts) for the applicable length of engagement:

(1) Actors employed by the day

Number of Days Worked or Guaranteed, whichever is Longer:	*Base amount*
One (1) day	$100
Two (2) days	150
Three (3) days	200
Four (4) days	250

NOTE.—Five or more days shall be covered by the schedule below for all other actors.

All other actors

Number of Weeks Worked or Guaranteed, whichever is Longer:	*Base amount*
One (1) week [1]	$300
Two (2) weeks [1]	400
Three (3) weeks or more	500

[1] In applying the foregoing schedule an actor who works or is guaranteed a fractional week in excess of one week or two weeks shall be deemed to have worked a full additional week.

(2) Television fees shall be computed on foregoing base amounts

	Percent
When such theatrical motion picture is initially exhibited on free television anywhere in the world, the following percentage of the applicable base amount shall be due	30
When Distributor's gross receipts (as defined in subsection (b) below) from the distribution on free television of such motion picture amount to *$125,000*, the following additional percentage of the base amount shall be due	12½
When such gross receipts from the distribution on free television of such motion picture amount to *$200,000*, the following additional percentage of the base amount shall be due	25
When such gross receipts from the distribution on free television of such motion picture amount to *$300,000*, the following additional percentage of the base amount shall be due	22½
When such gross receipts from the distribution on free television of such motion picture amount to *$400,000*, the following additional percentage of the base amount shall be due	22½
When such gross receipts from the distribution on free television of such motion picture amount to *$500,000*, the following additional percentage of the base amount shall be due	20
After each additional full increment of *$100,000* of such gross receipts in excess of *$500,000* the follow additional percentage of the base amount shall be due	10

Senator BURDICK. Mr. Heston, I want to thank you. You have given the committee some very important testimony. It has been a great contribution, and we will consider CATC carefully. And thank you for your time in coming.

Mr. HESTON. Senator Burdick, I appreciate the time that the committee has given me.

(Whereupon, at 3:45 p.m., the subcommittee recessed, subject to call of the Chair.)

COPYRIGHT LAW REVISION—CATV

THURSDAY, AUGUST 25, 1966

U.S. SENATE,
SUBCOMMITTEE ON PATENTS,
TRADEMARKS, AND COPYRIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:57 a.m., in room 1318, New Senate Office Building, Senator Quentin N. Burdick presiding.

Present: Senator Burdick.

Also present: Thomas C. Brennan, chief counsel; Stephen G. Haaser, chief clerk, Subcommittee on Patents, Trademarks, and Copyrights; and George S. Green, professional staff member, full committee.

Senator BURDICK. The first witness this morning will be Mr. Edwin M. Zimmerman, Acting Assistant Attorney General. Will you identify your assistants for the record, please.

STATEMENT OF EDWIN M. ZIMMERMAN, ACTING ASSISTANT ATTORNEY GENERAL; ACCOMPANIED BY STEPHEN G. BREYER AND LIONEL KESTENBAUM OF THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION

Mr. ZIMMERMAN. Thank you, Senator. On my right is Lionel Kestenbaum of the Department of Justice Antitrust Division and on my left is Stephen Breyer of the Antitrust Division.

I am pleased to have the opportunity to discuss with you a proposal contained in a bill now being considered by this committee, S. 1006, which comprehensively revises existing copyright law.

I might interject that this is my second attempt to testify and, in the intervening period, we have received a number of presentations from the different interests involved.

We have attempted to educate ourselves to the extent that it was possible for us to do so and we have incorporated that education into this testimony, although I might add that we come out the same way. The proposal would subject CATV systems to copyright liability. As a result of enactment of the proposal, CATV systems would have to secure the permission of copyright owners in order to transmit copyrighted material.

The Department of Justice believes that enactment of this proposal would be unwise. It believes that this explicit and blanket extension [1]

[1] Whether or not CATV systems are subject to copyright liability under present law is, in our view, an open question. A Federal district court in New York has held that CATV systems must pay copyright royalties, but the Court of Appeals for the Second Circuit has agreed to review the decision.

of copyright liability to CATV systems raises possibilities of harmful anticompetitive consequences and that this extension is not justified by valid considerations of the right to copyright protection. The Department has reached these conclusions after considering the probable effects of the proposal upon competition and upon broadcasting regulation, and the extent to which it furthers interests protected by the copyright law.

I

I wish first to indicate the anticompetitive possibilities that may follow from this provision. I shall then explain why I believe that the interests of copyright protection do not appear to warrant running the risk of these anticompetitive consequences.

Enactment of the provision may harm competition in at least three significant respects. First, the nature and composition of the CATV industry may be transformed should the provision be enacted. Ownership and control of copyrights is highly concentrated in the networks, movie studios, and other television producers.[2] The CATV industry by contrast has been growing rapidly and has a large number of new entrants, mostly composed of firms not otherwise in the broadcast field.[3]

Given the power to subject CATV systems to copyright liability, the networks or the other large copyright holders might withhold permission to rebroadcast their programs and thereby seek to reserve the CATV market for themselves. We recognize that no individual copyright holder could operate an effective CATV system without obtaining licenses from other copyright holders, and that efforts of copyright holders to monopolize CATV or to eliminate desirable CATV services may be countered by FCC rule or antitrust enforcement. Nonetheless, the temptation to use the copyright as a lever to assure entry must be high and the advantages over the propective CATV operator who is without copyright interests may be considerable. Moreover, were the copyright owners to achieve control of a substantial portion of the CATV business, they could impede entry of other independent operators into the field by refusing to allow such potential competitors to carry their programs.

A second possible anticompetitive development could arise if Congress or the Federal Communications Commission should decide to allow CATV systems to originate their own programs. CATV then could compete with existing networks, providing an additional market for program producers and an important channel for reaching the viewing public apart from the existing major networks. Assuming the potential development of such competition, it would be clearly undesirable to allow networks to use their ownership or control of

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[2] Statistics derived from the FCC rulemaking proceeding on network programing, docket No. 12782, indicate that the networks own copyrights on the programs developed by them in-house, which comprise about 10 percent of network prime time entertainment, about 20 percent of all network prime time programs (including news, public service, etc.) and they have an exclusive license for the first run of all programs which they transmit over the network, including particularly the evening prime time hours. The networks also own a substantial share of the programs available for syndication, which are licensed to stations for nonnetwork showing.

[3] Though the first commercial CATV system was established in 1950, by 1964 more than 1,200 such systems were serving 1,200,000 homes. Seiden, An Economic Analysis of Community Antenna Television Systems, 50. New subscribers are buying CATV service at the rate of 15,000 per month. ABC–TV Research Department Marketing Services of the CATV Industry, 10 (1964).

program copyrights to extend their power into ownership of CATV facilities, or to limit the independence of CATV operators. Yet the present proposal may allow them to do so. I do not mean to express any view on the question whether CATV systems should be allowed to compete with networks, but that question should be decided by a public agency, not by copyright owners.

Finally, CATV systems run a second communications cable into each house that they serve. This cable may in the future also provide access to many new electronic service industries. If the present bill does have the effect we fear and causes a few large copyright holders directly or indirectly to control this second wire, it may discourage the development of competition in these prospective industries.

II

I now wish to explain why the Department does not believe that this proposal is so essential to the legitimate interests protected by the copyright law that the possible anticompetitive consequences I have just described can be disregarded.

Copyright protection imposes a toll upon the use of the copyrighted material. The toll is not designed to compensate the copyright owner for the costs associated with the particular use of the material, which may be small, or as in the case of CATV use, nonexistent. Nor is it the purpose of the copyright to insure that the creator automatically participates in every profit derived from his creation. Our economic life is filled with instances in which the creator of a good idea watches others profit from it. The man who invents an efficient method of organizing his business cannot prevent others from imitating that method to their profit. And I might add that this has a great deal to do with our strong economic development. Moreover, even as basic a property right as that possessed by a homeowner does not extend indefinitely. For example, I doubt the owner of a historic house can require the passing sightseeing bus that points it out to pay him a portion of the fees received from tourists.

Rather, the primary consideration behind the copyright toll is to provide incentive to authors to write. A second major consideration is that the costs of providing that incentive be fairly assessed.

To turn to the issue here, the argument is made that since CATV's profit from the transmission of television programs, it is only fair that they should have to share the profit with the holders of the program's copyrights. But, stated another way, the question really is that of how far a copyright monoply should extend. There is a great range of persons and enterprises who can be said to benefit in one way or another from the copyrighted materials—beginning with the producer of the program, and extending through the television set manufacturers, whose ability to sell sets is contingent on the existence of programs, and others. The copyright law always has had to distinguish among beneficiaries. This has been done through the definition of "publication" or "performance" and through assessing the "performer" with copyright costs. But here these criteria lead only to extended controversy, with conflicting descriptions of the CATV as a "nonperforming" antenna service for the subscribing viewer or as a "performing" broadcasting business. In our judgment, the question

is sufficiently close so that the CATV liability provided by this bill cannot be said to be required by traditional principles of copyright law. There is room for legislative judgment, to which the competitive implications I have discussed are relevant.

In a more practical vein, it is argued that copyright liability for CATV's is needed to provide a basis for compensating the copyright holders, and thus to encourage them to create programs. We note, however, that up to now the television broadcasting industry has had no difficulty in obtaining programing material, and paying for it through the sale of advertising—and this despite the growth of a CATV industry which has not paid copyright royalties and has not been otherwise restricted by copyright holders. Indeed, there is little reason to think that injury to copyright holders should have resulted from CATV expansion. A CATV system increases the number of viewers of a station. Since the advertising sponsors who bear the cost of television programing pay the station a fee which usually increases as the size of the audience grows, the existence of CATV transmission should increase the amount paid by sponsors and this should increase the royalties paid for the programs even though the CATV system itself pays no royalty.

It has been urged that while this may be a fair description of what occurs when the CATV system serves persons within or near the normal marketing area of the station, it is not applicable when CATV transmits to a distant market already served by other stations. It is argued that such transmission spoils an essential part of the market for copyright holders and, as a consequence, the nonnetwork producers of television programs will be driven out of business. It is also argued that as a result of such transmission local stations will decline and that local advertisers will find themselves without outlets. These asserted consequences of this extension of CATV, however, do not necessarily provide support for the blanket liability sought to be imposed by this legislation on all aspects of CATV. Moreover, in our view, effective FCC regulation would be a more appropriate device to deal with such developments than broad extension of the copyright monopoly. Finally, while we believe that the factual questions involved in estimating the possibility of disincentive effects on copyright holders are difficult and merit the careful examination and evaluation of the committee, we also believe it probable that in the long run the stations transmitted over CATV should be able to adjust advertising rates, and pay more for programs, according to their new widespread audience. For this reason, allowing CATV systems to retrainsmit television programs royalty free may not decrease significantly the amount of money paid to copyright holders.

Finally, the CATV liability here proposed would in fact be a departure from the system by which copyright holders are now compensated. Generally speaking, the television viewer in effect now pays for the television programing indirectly, by buying the products of the sponsors, since the sponsors' payments for advertising include royalties for the copyright holders. We do not believe that the television viewer via CATV should in addition, make direct royalty payments to the copyright holder through his CATV subscription and, indeed, think it may be inequitable to require him to do so. To summarize, it is far from clear that the case for the blanket copyright

liability has been made in terms of its necessity as an incentive to crea tion, and some inequitable treatment of CATV viewers may well re sult. For these reasons, we do not believe that copyright policy neces sitates the proposal here made.

III

I wish to make it clear that we are not arguing that CATV create: no problem. On the contrary, we believe that sound regulation o. CATV is necessary. Regardless of the resolution of the copyrigh' issue, there will be important roles to be played by FCC policy, anc perhaps by antitrust enforcement. Our concern, however, is that blanket provision subjecting all CATV systems to copyright liability may unjustifiably interfere with sound regulatory policies. Such a law would apply to all CATV systems, whether they bring local programs to persons without adequate reception, or distant programs into areas with no stations, areas with only one or two stations, or into major cities served by a substantial number of stations. The complexity of the problem would seem to call for discriminating rules finely tailored to meet particular situations. A law requiring all CATV operators to secure the permission of the networks or other copyright owners may stand in the way of needed regulation, either now or in the future. It would seem preferable to leave the FCC free to regulate CATV in terms of the public interest than to require it to regulate within the framework of a statute that may allow the networks or other copyright holders to control CATV.

IV

In conclusion, we believe that this copyright proposal may have harmful anticompetitive consequences. Moreover, we do not believe that it is compelled by any important interest underlying the copyright law. Finally, we believe that the problems with which it attempts to deal may be better handled through flexible regulation by the FCC uninhibited by a blanket copyright liability. For these reasons, the Department of Justice opposes the proposed provision in S. 1006 which would subject CATV systems to blanket copyright liability. If, however, there is to be legislation which relies on copyright liability to resolve problems that we believe belong basically to the realm of communications policy, the copyright revision should at the least take account of communications policy and distinguish between different CATV operations for the purpose of copyright liability.

Senator BURDICK. Thank you, Mr. Zimmerman.

Your testimony raises some questions in my mind. On page 1 you say you "believe that this explicit and blanket extension of copyright liability to CATV systems raises possibilities of harmful anticompetitive consequences."

On the top of page 2 you say "I wish first to indicate the anticompetitive possibilities that may follow from this provision."

I would like to have you direct your answer to the general proposition, does not the copyright itself, being a right, give some advantage to copyright holders that are noncompetitive in general?

Mr. ZIMMERMAN. Certainly, Senator, and the problem, I take it, that we are dealing with is whether to give, by law, this right to a monopoly, and whether to extend, by law, this right to a monopoly to this new situation.

Senator BURDICK. Well, if I write a book and I have it copyrighted, do I not have a monopoly?

Mr. ZIMMERMAN. Certainly.

Senator BURDICK. Would you change——

Mr. ZIMMERMAN. A limited monopoly.

Senator BURDICK. Would you change that?

Mr. ZIMMERMAN. No, because this——

Senator BURDICK. This has caused me to wonder about this noncompetitive situation. That is, it follows from the copyright, does it not?

Mr. ZIMMERMAN. Yes, sir, Senator, but our point here is that unlike the problem of whether you have any copyright protection at all, the problem here is whether copyright holders who are already compensated, who already have a monopoly, should be permitted to extend that monopoly. The question is not whether they get any copyright protection at all. They do. They do get compensated. They have been writing books and writing programs.

The question here is how much compensation they should have and how far they should carry their right to compensation.

Senator BURDICK. The actors guild came before this committee and testified that the actors get a certain royalty for the number of times a program or a movie is shown and that when it is played and replayed over CATV, that it is not counted as a replay for these actors. So in that respect, these actors are not compensated as much as if they were played over regular stations.

Mr. ZIMMERMAN. I quite agree they are not compensated as much. I quite agree that the issue here is how much should they be compensated. But our basic point is that the copyright law is not intended to maximize all possible compensation. The copyright law is designed to give the man enough to do his job and to create. Once you start extending the copyright protection indefinitely, you are doing more than is necessary to get him to create and you are raising the possibilities of adverse consequences.

The question is not whether he gets any compensation. He does. The question is does he have the right to wring every last penny out of what he does and, there, I think, you have to consider the consequences and who else is hurt by it.

Senator BURDICK. I am not arguing about that. I am just saying that if a copyright is a vested right in an individual, has he not a right to control it as to what it is worth?

Mr. ZIMMERMAN. He does not have a right to control what it is worth without regard to every consequence of that control.

Senator BURDICK. I own a house and lot. It is in my name. Do I not have a right to put a value on it?

Mr. ZIMMERMAN. Yes.

Senator BURDICK. Where is the distinction?

Mr. ZIMMERMAN. The distinction is that this is a protection which is accorded to the creator by law and law defines the scope of the protection. The very fact that there is litigation as to the question whether the CATV stations need pay the copyright indicates that it is by no means clear that this particular extension of the right to recoup funds is clear cut.

For example, the copyright holder, the creator of the program, undoubtedly makes it possible for television set manufacturers to have a demand for their product. Yet, if you take the position that the owner of the idea should be able to get every possible compensation for that idea, one could argue that he should be able to collect a royalty from the manufacturer; but we do not do that. There are always limitations on what you can ultimately expect from your copyright.

Senator BURDICK. Well, it is an interesting observation anyway.

On page 4 you make the statement:

Copyright protection imposes a toll upon the use of copyrighted material.

Is that not true in all cases of copyrights?

Mr. ZIMMERMAN. No, because as I indicated, the television set manufacturer is in a sense using copyrighted material. The CATV owner is using copyrighted material and up until now has not been paying a toll, and that is now in the process of litigation.

The hotel which broadcasts a radio program to its rooms is using copyrighted material and under the law, heavily relied on by the district court, has been held subject to copyright liability; and, very interestingly, this very bill which seeks to impose copyright liability on CATV is saying that the hotel does not have to pay copyright fees.

So I think the law is always discontinuous, is always drawing fine distinctions, and there is no absolute requirement to pay for any and every use of the copyrighted material. The law has to decide where the obligation to pay ends, and we think that the way you decide that is to ask yourself what is the copyright all about? And the reason that you have a copyright is to encourage the creation of programs or books.

Senator BURDICK. The staff just called to my attention a distinction in your example, that whereas a hotel that furnishes its guests with music charges no fee for it——

Mr. ZIMMERMAN. The hotel—excuse me.

Senator BURDICK (continuing). Whereas the CATV system charges the subscribers.

Mr. ZIMMERMAN. Senator, the Supreme Court case which dealt with that, and which is the predicate for the decision below, addressed itself to the point of specific fee charging and noted that, of course, a hotel does charge a fee in the sense that this is one of the services it provides in return for the nightly lodging bill. Just because the fee is not pulled out does not mean that this is not one of the things you are paying for. The Supreme Court so held. So I would hold the cases are not distinguishable.

Senator BURDICK. But this sentence on page 4 where you say:

Copyright protection imposes a toll on the use of copyrighted material.

Certainly a copyrighted piece of sheet music or a copyrighted book takes a toll, does it not, for its use?

Mr. ZIMMERMAN. Yes; and the toll has been paid here.

Senator BURDICK. Well, has it?

Mr. ZIMMERMAN. Why, yes. The broadcasting station has charged its sponsor for the program; and the sponsor has paid for the program, and the TV viewer has paid the sponsor; and they paid enough to get the thing created. So the copyright law has done its job.

Senator BURDICK. Suppose a magazine buys my rights on a book, and it is serialized in a national magazine that is circulated throughout the country——

Mr. ZIMMERMAN. Yes.

Senator BURDICK (continuing). And the magazine pays for those rights. Does that give the right of another magazine to publish it without paying for it?

Mr. ZIMMERMAN. Clearly "No." You are being compensated through the magazine and through its ability to charge the reader, just as the television program creator is being compensated by the television viewer; and all readers who enjoy the book should pay for it. All television viewers already pay for the programs they enjoy.

The proposal here would make the CATV viewers pay twice. They have already paid when they buy the sponsor's product.

Senator BURDICK. Well, the testimony has some contradictions in it and I am sure that your views are appreciated.

Well, the thesis of what you are proceeding on this morning is simply this, as I see it, that you do not think that this committee should do anything about the question of liability and we should leave the problem in the hands of the FCC.

Mr. ZIMMERMAN. Well, I think something should be done. I think that two things probably ought to be done.

I think that we ought to get the copyright question out of this problem and that we ought to get FCC regulation into this problem. I think that what Congress should do should be to make it clear that copyright does not apply and should make it clear that the FCC has the power it needs to handle on a regulatory basis problems raised by the CATV. That is what I think is the preferred solution.

We indicate that if you are committed to the role of using copyright as your means of handling what is to us a regulatory problem, we certainly think you should not do it this way—in terms of a blanket copyright liability—and that at the very least, you should attempt to distinguish among situations and tailor the copyright liability according to the regulatory problems. But we do not think that is a preferred solution.

Senator BURDICK. Well, let us get this straight again. The preferred solution is that we as a committee do nothing about the copyright.

Mr. ZIMMERMAN. No. I think that the preferred solution would be to clarify that there is no copyright liability and, at the same time, to insure that the FCC goes forward and regulates.

Senator BURDICK. Well, all we can deal with in this committee is the copyright question.

Now, do you want us to have copyright liability or not have copyright liability?

Mr. ZIMMERMAN. Very clearly we prefer that you do not have copyright liability.

Senator BURDICK. At any time.

Mr. ZIMMERMAN. That is right. But contingent on that is the notion of strong FCC regulation.

Senator BURDICK. Our problem is copyrights.

Mr. BRENNAN. Just one or two questions, Mr. Chairman.

Is not ASCAP at the present time regulated by a Federal antitrust consent decree?

Mr. ZIMMERMAN. Yes, it is.

Mr. BRENNAN. With respect to their rates?

Mr. ZIMMERMAN. Yes.

Mr. BRENNAN. Is there a need for an exemption from copyright liability with respect to copyright works which already are regulated by the antitrust consent decree?

Mr. ZIMMERMAN. I do not know of any such need.

Mr. BRENNAN. That is all.

Senator BURDICK. Do any of you other gentlemen have anything to offer at this time? I want to thank you very much.

Mr. ZIMMERMAN. Thank you very much.

Senator BURDICK. The next witness will be Richard Jencks.

STATEMENT OF RICHARD W. JENCKS, DEPUTY GENERAL COUNSEL, CBS, INC.

Mr. JENCKS. Mr. Chairman, members of the subcommittee, I am Richard W. Jencks, deputy general counsel of the Columbia Broadcasting System, Inc. I am here at your invitation to discuss with you the current position of CBS with respect to the possibility, suggested in a letter from Subcommittee Counsel Thomas C. Brennan, dated June 16, that your committee may wish to consider in this session copyright legislation limited to CATV systems.

I am pleased to have the opportunity to appear before you today and to submit a statement of the position of CBS with respect to this important matter.

As the committee knows, it has been judicially determined in *United Artists Television, Inc.* v. *Fortnightly Corporation* that the unauthorized retransmission of copyrighted material by a CATV system constitutes an infringing performance within the meaning of the present copyright statute. We believe that this case vindicates the basic philosophy of our system of copyright. That philosophy, expressed in article I, section 8, clause 8 of the Constitution, is 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries * * *."

It seems to us that the encouragement of authorship can be achieved only through the protection of the opportunity to license copyrighted works under the free marketing conditions which have evolved to form the natural economic backbone for the growth of mass communications in the 20th century. I might digress at this point briefly from my prepared statement to note that on a free marketing basis of bargaining between users and copyright proprietors, in the television and radio field, more than 800 television stations and more than 5,700 radio stations are constantly utilizing copyrighted material under licenses obtained under free marketing conditions and without the intervention of any scheme of regulation, finely honed or otherwise, designed to regulate traffic in rights in copyrighted material.

In thus supporting the constitutional objective of the copyright law we believe that this committee may also properly give due weight to the need for maintaining the uniquely American system of free television broadcasting and to the need to provide acceptable television reception for people living within the normal coverage areas of stations but who cannot be reached by the ordinary techniques of over-the-air television transmission.

CBS believes that these objectives can be met by legislation which would grant to CATV systems an exemption from copyright infringement for retransmissions of television broadcasts to subscribers within the normal coverage area of the television station initiating such broadcasts. The rationale for this proposal is that a copyright owner who licenses his work for television broadcast by a particular station can reasonably expect his work to be seen by all persons who live within the normal coverage area of that station. In this fact situation the copyright owner can be fully compensated by the royalties he receives for his licensing of broadcasting rights whether the audience sees the performance of his work on a television set connected to a conventional antenna or on a television set which can receive a CATV system's retransmission. Our endorsement of such a proposal for copyright exemption for CATV retransmissions for subscribers within a station's normal coverage area is subject to the following conditions with which a CATV system ought to be required to comply in order to qualify for the exemption:

(1) In order to be entitled to such an exemption a CATV system should be required to carry, during its hours of operation and subject to applicable FCC regulations, the entire schedule of the station whose broadcasts it retransmits. It seems clear that a special copyright privilege should not be granted to a CATV system which can pick and choose those portions of a station's schedule to be offered to the system's subscribers. The basis for the exemption is to make all programs of such station available to members of the public who otherwise cannot adequately receive them.

(2) In order to be entitled to such an exemption a CATV systems service should be limited to the retransmission of broadcast programing. CBS believes that it is fundamentally sound that CATV systems who desire a special copyright privilege to retransmit the broadcasts of stations should not originate programing which competes with such stations and which, by diverting the broadcast audience, is economically harmful to the copyright proprietor. In addition, it would seem that program origination is historically, as well as logically, contrary to the CATV industry's own view that its function is the supplementary one of providing optimum television reception to poor reception areas.

(3) The limits of the normal coverage area in which the copyright exemption would apply should be capable of being determined with precision by reference to a map or chart showing such area. Compliance with the civil and criminal penalties of the copyright laws should not rest on technical measurements which are difficult or expensive to ascertain and which can be disputed. Such a precise designation of the normal coverage area will eliminate the uncertainties and disputes which have already arisen in establishing broadcast contours under the present regulations of the Federal Communications Commission relating to CATV.

(4) The exemption should not apply to any CATV system which makes any separate or direct charge for any particular retransmission or which otherwise bases its charges to subscribers in whole or part on program content. Such charges should be limited to a periodic charge—usually now made by CATV systems on a monthly basis—for the retransmission service rendered by the CATV system, together with an appropriate installation charge.

(5) Transmissions which may be retransmitted under the exemption should be limited to those encompassed by the term "broadcasting" as defined in the Communications Act; that is, "communications intended to be received by the public." If not so limited, CATV systems would be permitted to pick up off the air and freely utilize types of signals which are clearly not intended for CATV retransmission such as, for example, signals sent from a communications satellite to an earth station for relay to and transmission by regular commercial television stations.

(6) Exemption from liability for copyright infringement should extend only to retransmission to private homes and apartments. However, if desired—and subject to the same conditions—the exemption might be extended to private guestrooms only of hotels and similar public establishments. Any other change in the provisions of existing law concerning the treatment of hotels and public establishments should await enactment of legislation providing for a general revision of the copyright law.

These six conditions are the minimum we believe necessary to create and maintain a policy which permits a limited exemption for CATV operations and at the same time conforms to the previously stated principles.

Some proposals have been made for legislative relief for CATV systems which desire to retransmit the signals of stations to subscribers located beyond the stations' normal coverage areas. We believe that legislative relief for such extension of a station's signal is both premature and unnecessary. Legislative relief which would permit CATV systems to extend the signals of stations beyond their normal coverage area would be destructive of the very essence of copyright—the right of the creator of literary and artistic works to receive the full economic benefit of his labors. We see no reason to believe that copyright proprietors will be arbitrary and unreasonable in their dealings and we believe that it would be a wise legislative policy to permit an actual period of CATV licensing by copyright proprietors before deciding that any legislative action is necessary other than the exemption for the retransmission of local station signals which I have discussed above.

Finally, we want to make it clear that CBS neither seeks nor desires to control the community antenna industry through the exercise of its rights in copyrighted programs. Indeed, the fact is that with respect to most of its program schedule, the rights of CBS are dependent upon negotiations with a multitude of independent copyright proprietors and, in addition, are subject to contract restrictions imposed by various program participants as well as by unions and guilds under collective bargaining agreements. It will therefore be seen that the interests of CBS are not necessarily identical with those of copyright proprietors generally, and that CBS to a large degree occupies a middle position in which it finds itself in a crossfire between the competing interests of CATV systems on the one hand and those of copyright proprietors, program participants, and unions and guilds on the other.

CBS intends to use its best efforts to obtain CATV rights from copyright proprietors and others with whom it deals. CBS has publicly stated that, to the extent it is able to acquire such rights, its intention is to grant CATV systems permission to use its network tele-

vision programs when those systems are the only means by which satisfactory television service will be available. In such circumstances, CBS will ask only a fee sufficient to cover actual costs incurred by it. CBS reaffirms this position.

We have here stated what we consider the best general approach to an intricate problem. We recognize that it does not go as far in offering legislative relief to CATV systems as many proposals which have been made. We believe, however, that the proposal is simple, workable, and fair. We believe that no more extensive proposal is necessary or desirable or can be harmonized with the basic principles of copyright law in this country.

Mr. Chairman, I would like to ask leave, if I may, to submit after this hearing a written statement in response to or commenting upon the testimony of Mr. Zimmerman this morning.

Senator BURDICK. Without objection, so ordered.

Thank you, Mr. Jencks.

Your suggestion is, in general, to allow an exemption to CATV systems that receive the signal and retransmit in the normal listening range of the radio station or TV station.

Mr. JENCKS. Of the normal viewing area of the television station.

Senator BURDICK. This can be——

Mr. JENCKS. We do not believe that any copyright relief for CATV systems is called for or is desirable with respect to radio.

Senator BURDICK. You make some limitations in that (1) you want the CATV to carry the entire program.

Mr. JENCKS. That is correct, sir.

Senator BURDICK. And the other principal limitation is that it must be within a defined area.

Mr. JENCKS. That is correct.

Senator BURDICK. B contour, would that be a defined area?

Mr. JENCKS. That would be certainly a possible area to choose, Mr. Chairman. We have not indicated in this statement how we think the normal coverage area might be arrived at. It could be an area delineated by a committee of experts who might take into account both technical characteristics of the station's signal and possibly economic characteristics of the station's market area. We have no particular suggestion as to how the area would be determined but we do not think it would be an unduly difficult problem.

Senator BURDICK. Then, if the CATV rebroadcast is limited to the normal viewing area of station X and would carry the total programs, you would have no objection.

Mr. JENCKS. We have no objection in that limited situation of the CATV system having a copyright exemption under the conditions we have specified.

Senator BURDICK. And that is as far as you would recommend, as far as you would go.

Mr. JENCKS. Yes, sir, because, as I indicated in my statement, we see no reason to believe that it will be impossible or difficult for the normal market conditions to operate in other kinds of situations. For our own part, in the so-called underserved areas where the CBS network program service is not being adequately received, we are eager to see that it be adequately received. And we think other similarly situated networks, stations, and copyright proprietors will likewise

be eager to cover areas and to reach viewers, and we believe that marketplace will establish reasonable terms and conditions for such licensing.

Senator BURDICK. This hearing has developed testimony from one extreme to the other. We have had witnesses testifying there should be total liability. You heard the preceding witness say that there should be no liability. But there seems to be a general consensus, even in the TV industry, that the exemption you refer to would be accepted.

Mr. JENCKS. Yes, sir.

Senator BURDICK. Is that a fair statement?

Mr. JENCKS. I would not—I do not know whether I would characterize it, sir, as the consensus. I think there has been considerable sentiment expressed in that direction; yes.

Senator BURDICK. That is another way of stating it, that there is considerable sentiment.

Well, again, thank you, Mr. Jencks. And the record will be held open for a period of 10 days for additional statements.

Mr. JENCKS. Thank you very much.

(The following was subseqeuntly received and by order of the chairman is printed at this place in the record.)

COLUMBIA BROADCASTING SYSTEM, INC.,
New York, N.Y., September 2, 1966.

Re Hearing held on August 25, 1966, before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: In testifying in the above hearing I requested, and was granted, permission to file with the Subcommittee a supplementary statement responding specifically to the testimony given on the same date by Edwin M. Zimmerman, Acting Assistant Attorney General, on behalf of the Department of Justice. This letter will serve as such supplementary statement and I respectfully ask that it be made a part of the record.

While the Department of Justice is properly concerned with any potential anti-competitive developments in the vital communications field, we believe that its testimony in this proceeding reflects certain misapprehensions concerning the ownership and control of the copyrighted material in the broadcasting field, and the application of the copyright law to the broadcasting and CATV industries.

We note at the outset that the Department's testimony is framed in terms of opposition to "explicit and blanket *extension* of copyright liability to CATV systems * * *." Since a Federal District Court has held (in *United Artists Television, Inc.* v. *Fortnightly Corporation*) that CATV systems infringe copyright under existing copyright law when they retransmit broadcasts to their subscribers without permission from the copyright proprietors, the testimony may perhaps more properly be characterized as urging that the court's decision, if not reversed by a higher court, be overruled by legislation which would make CATV systems immune to copyright liability.

The Department has concluded that anti-competitive consequences will flow from the imposition of copyright liability on CATV systems and that these consequences outweigh the interests served by copyright protection. The grounds for its belief that copyright proprietors have the power to bring about such consequences are succinctly set forth in the following testimony:

"Ownership and control of copyrights is highly concentrated in the networks, movie studios and other television producers. The CATV industry by contrast has been growing rapidly and has a large number of new entrants, mostly composed of firms not otherwise in the broadcast field. Given the power to subject CATV systems to copyright liability, the networks or the other large copyright holders might withhold permission to rebroadcast their programs and thereby seek to reserve the CATV market for themselves."

We believe the Department misapprehends the facts, both as to the power and as to the motive of copyright proprietors to bring about the anti-competitive consequences which it fears. The group in which copyright ownership and control is alleged to be concentrated is obviously a very large group to start with. In fact, far from being highly concentrated, the ownership and control of copyright material licensed to television and radio stations is highly dispersed. Indeed, the principal complaint of CATV interests has not been that control over copyrights is concentrated but that it would be burdensome and expensive for them to secure clearance from a great multiplicity of copyright owners.[1]

Certainly neither the number of copyright proprietors,[2] nor the great mass of copyright material involved, suggests concentration of control in any normal sense of that term and we do not understand the Department to have suggested, nor has the slightest evidence been adduced, that such proprietors act in concert. In the field of network programing there are three nationwide commercial networks which compete vigorously with each other in procuring programs and in attracting audience, togther with a national network of educational stations. During each year in the period from 1957 to 1964, first-run programing for the commercial networks was supplied by 65 to 76 active program producers, with an average of 20 new production entities selling programs to the networks each year.[3] The data shows no evidence of dominance by any single producer or group of producers. Turning specifically to the CBS Television Network, a recent survey of a typical week showed that about 53% of the network broadcast time was occupied by programs which were not copyrighted and which, therefore, CBS had no power under copyright to withhold from CATV systems.[4] It showed that CBS owned the copyright on programs occupying less than 10% of the broadcast time in its total network schedule. And it showed that CBS obtained its copyrighted programing during that week from 33 different copyright proprietors.

Of course, the claim of concentration of copyright ownership and control was made with respect to the broadcasting industry generally and not merely as to the networks. In the broadcasting field as a whole, the concentration of control of copyrighted material is even less marked than it is in the case of network programming. In 1965, there were 148 different distributors of programs available for syndication to United States television stations.[5] The most recent figures compiled by Broadcast Information Bureau, Inc. show that 12,485 feature films and more than 64,000 half-hour and one-hour television episodes are currently available for television broadcast in the United States.[6] Even if the distributors of this material were themselves invariably copyright proprietors of the programs distributed by them—which they are not—a claim of concentration in the ownership and control of copyrights could hardly be supported. Nor is there evidence of dominance among these distributors. Indeed, the domestic television distribution market is marked by dynamic competition, a decline in concentration, and by ease of entry for new competitors.[7] With respect to the reference in the Department's testimony that "The networks own a substantial share of the programs available for syndication . . ." the data

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[1] Fredrick W. Ford, President of the National Community Television Association, Inc., made the following statement in Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 89th Congress, First Session, at p. 1253: "Reference to standard trade publications illustrates that there are several hundred copyright proprietors claiming rights in television programs, and the problem of exaggerated royalty demands from many such copyright proprietors would impose an impossible burden on the community antenna operator and the viewing public."

[2] Industry statistics on copyright proprietorship *per se* are not available, but the Department has relied, in the footnotes to its testimony, on statistics derived from the FCC rule-making proceeding on network programming, Docket No. 12782. We will likewise refer to that proceeding and particularly to data contained in the Report entitled *Television Program Production, Procurement and Syndication*, filed in that proceeding, which was commissioned by the three networks and prepared by Arthur D. Little, Inc. (herein cited as "ADL Report").

[3] Source: ADL Report, Tables 29, 31.

[4] In the figures cited by it to support concentration of copyright control, the Department referred to and included "news" and "public service" programs. Most of these are uncopyrighted, although CBS may possess rights under applicable state law relating to unfair competition.

[5] ADL Report, Table 64.

[6] *TV Feature Film Source Book*, Vol. 7, 1966 and *Series Serials & Packages*, Vol. 6, 1966, both published by Broadcast Information Bureau, Inc. These figures do not, of course, include local programming done by individual television stations and not made available for syndication, although, of course, retransmitted by CATV systems.

[7] ADL Report, p. 72; ADL Tables 60–67.

shows that the share of the three networks in the domestic syndication market has been a steadily declining one in recent years and in 1964 was a combined total of no more than 7%.[8] By no means all of the programs syndicated by the networks are copyrighted by, or "owned" by, the networks.

The Department may also have intended to suggest that, even though ownership of copyrights be highly dispersed, control is concentrated in the networks through the exclusive licenses obtained by them from copyright proprietors. The facts already cited show that this control is a minor factor in the field of non-network syndicated programming. They also show, in the case of CBS, that as to the more than half of its network schedule which is uncopyrighted, CBS has no power whatsoever under copyright, as a licensee or otherwise, to withhold programs from CATV systems. It is true that the networks seek and obtain exclusive network broadcasting rights from copyright proprietors as to the copyrighted portion of their schedules. The acquisition of such rights is essential to the business of networking. It should not be assumed from this, as the Department's testimony does, that a grant of broadcasting rights automatically carries with it a grant of CATV rights.[9] Nor should it be assumed that networks will readily acquire CATV rights in the future now that the *United Artists* case has encouraged all copyright proprietors to believe that such rights constitute a separate element of bargaining.

The suggestion that the acquisition of network licenses results in an undue concentration of copyright control places CBS and other networks in an unenviable dilemma. If they fail to secure CATV rights from the copyright proprietors with whom they deal, and consequently are unable to grant such rights to CATV systems, it may be argued that such failure is due to a desire to withhold broadcast programing from CATV. On the other hand, if they are successful in bargaining with packagers and other copyright proprietors so as to obtain CATV rights, it may be suggested (as it was in the FCC's rule-making proceeding in Docket 12782 with respect to other categories of rights) that subsidiary rights are being exacted which are tangential to the network broadcasting business and which should have been reserved by the packagers. Despite this dilemma, it has been the belief of CBS that, in the public interest, it should use its best efforts to obtain CATV rights with the express purpose of making its network programs available to CATV systems which serve subscribers who would not otherwise adequately receive CBS Television Network program service. CBS so announced its intention in response to a proposal by the Deputy Register of Copyrights that copyright owners come forward with suggestions for solving what he called the "obvious difficulty" facing CATV systems in obtaining copyright clearances.[10] We think it appropriate to adhere to that policy unless persuaded that we are wrong in doing so.

Having asserted that the networks and other copyright proprietors of broadcast material have the *power* through copyright to withhold from CATV systems permission to retransmit their programs—an assertion which we believe is not supported by the available facts—the Department suggests that motivation exists to bring about anti-competitive consequences. One such consequence is that the networks and other copyright proprietors might thereby seek to "reserve the CATV market for themselves." Certainly nothing that has occurred to date provides a basis for such a prediction.[11] While CBS is obviously interested in this field, and while CBS and other networks may proceed in the future to acquire additional CATV systems, the existence of a motivation to withhold copyright clearance from CATV systems is inconsistent with the principal objective of networking, which is to maximize the circulation of network programs. It is fair

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[8] ADL Report, Table 59.

[9] As only one example, CBS' music performing rights licenses from ASCAP and BMI do not convey CATV rights, even as to music contained in programs copyrighted by CBS, such rights being reserved by the those performing rights societies. As Mr. Herman Finkelstein, General Counsel of ASCAP, pointed out in his testimony (Tr. p. 438), the granting of performing rights by ASCAP to CATV systems would be governed by the existing consent decree.

[10] Letter, dated August 30, 1965, from Leon R. Brooks, General Counsel of CBS, to the Honorable Edwin E. Willis, Chairman of the Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives.

[11] One CATV system, located in Kingston, New York, is now owned by NBC. A minority interest in a system in San Francisco, serving about 2,000 subscribers, is under option to CBS. About a third of all operating CATV systems are owned by television and radio broadcast licensees (See *Television Factbook*, 1966 Edition, p. 214c) but the Department's testimony—correctly, we believe—does not cite such licensees as a part of the group in which copyright control is said to be concentrated.

to note that CATV systems to date have not sought to obtain licenses, either from the networks or from other copyright proprietors or licensees, apparently pursuant to policies laid down by their national association.

As another possible anti-competitive effect, the Department suggests that if CATV systems are allowed by the Congress or by the FCC to originate programs,[12] they should be allowed to compete with networks and that under the circumstances of such competition it would be "clearly undesirable to allow networks to use their ownership or control of program copyrights to extend their power into ownership of CATV facilities, or to limit the independents of CATV operators." CBS has never asked to be protected against fair competition from another medium and, indeed, filed comments in FCC Docket 15971 opposing CATV regulation on the ground, among others, that broadcasters were not entitled to erect "electronic tariff walls" against CATV competition.[13] But the competition must be fair competition. No television station in any community is allowed the privilege of competing with any other station in that community by utilizing the other station's programs, without compensation, to build circulation for its own programs. There is no copyright question as to whether or not CATV systems should be allowed to originate programming. No copyright legislation should prohibit them from doing so. The question is under what circumstances they shall be allowed a copyright exemption. If they desire an exemption so as to be free of the obligation of compensating a copyright proprietor for programs *retransmitted* by them, it seems to us reasonable that they should not use the savings so realized in order to compensate another copyright proprietor for programs *originated* by them which compete for audience attention.

The Department also argues that copyright liability for CATV systems is not essential to the legitimate interests of copyright proprietors. It states that CATV transmission should increase royalties paid for programs even if CATV systems pay no royalty, and urges that the imposition of liability would force CATV viewers, in effect, to pay authors twice for the same programs. To the extent that this statement has any validity, we think its underlying objectives are adequately met by the copyright exemption proposal which we advanced in our principal testimony. The argument has little validity, however, with respect to the local programming of television stations. It must be borne in mind that the most characteristic type of program which CATV systems seek to import from distant communities, is the programming of independent (non-network) stations, as well as the non-network local programming of distanst network affiliates.[14] In this situation, where the signals of a station are imported by a CATV which is 50, 100 or more miles away, the local sponsor often does not desire or pay for circulation in the distant CATV community. A Los Angeles automobile dealer gets no advantage from having his program seen on a CATV system in New Mexico. Nor does the author's royalty, deriving from such automobile dealer's sponsorship, take into account the circulation achieved in a New Mexico community. Indeed, the author anticipates that his work will subsequently be licensed to a television station in the New Mexico area and he may even anticipate licensing it directly for CATV system origination there if no local stations are available.

CBS recognizes that the licensing of CATV systems to retransmit copyrighted material is not free from antitrust problems. But it does not believe that an amendment of the copyright law is needed in order to effectively enforce the antitrust laws in this area of activity, any more than such is required in any other area of activity dealing with the licensing of copyrights to entertainment and information media. In this connection, we note that the 100 UHF television stations as a group, according to the recent official compilation released by the FCC, showed a net loss in 1965, nor do all VHF stations yet show a profit from their operations. If a CATV system in such a market is to be permitted free use of copyrighted material imported from distant stations, it is difficult to see why, on the same reasoning, stations in such a market, particularly those which are economically marginal, should not have a similar privilege.

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[12] Many CATV systems now originate programs and some license feature motion pictures and other copyrighted material direct from copyright proprietors for such origination.

[13] CBS also stated that "it is an unwise policy for the Federal government to intervene and abort the normal processes of the free competitive marketplace to protect one group of businesses against the competition of another group." Comments of CBS in FCC Docket No. 15971, July 22, 1965.

[14] The great majority of communities where CATV systems are located receive some local service, usually including network service from local network affiliates. CBS' proposal for CATV copyright exemption would free CATV systems of any copyright liability for retransmission of the signals of local stations.

In essence, the Department recommends that CATV systems should be treated as unique, that they should obtain a complete exemption from the copyright law and that any maladjustment resulting from this should be corrected by FCC rules "finely tailored to meet particular situations," not by operation of the marketplace.

We would like to suggest that a free market in copyrighted material has contributed greatly to the strength and growth of the entertainment and informational media in this country generally. In the broadcast industry in particular, it has served to furnish more than 800 television stations and more than 5,700 radio stations with copyrighted material without any prior suggestion, so far as we know, that copyright proprietors serving this field were abusing the copyright monopoly—save only in the case of small performing rights in music where the Department of Justice sought and obtained a consent order under which a unique copyright pool concerned with music rights has been regulated by the courts. There is nothing in this experience to suggest that the Department of Justice is or would be helpless to prevent abuses of the copyright monopoly.

In any event, we believe that the proposal which CBS has made in these hearings for a limited copyright exemption for CATV systems meets the basic requirement, advanced by the Justice Department, that copyright revision should "take account of communications policy and distinguish between different CATV operations for the purpose of copyright liability."

Sincerely,

R. W. JENCKS.

Senator BURDICK. Miss Evelyn F. Burkey of the Writers Guild of America.

STATEMENT OF MISS EVELYN F. BURKEY OF THE WRITERS GUILD OF AMERICA

Miss BURKEY. My name is Evelyn F. Burkey. I am the executive director of the Writers Guild of America, East, Inc. The Writers Guild of America, East, Inc., and the Writers Guild of America, West, Inc., are separate membership corporations but for other than administrative purposes they act together nationally as the collective bargaining representative for writers in the fields of motion pictures, television, and radio. They have been jointly certified by the National Labor Relations Board.

The guild has negotiated minimum basic agreements with motion picture and television producers which establish the framework for the relationship between the writer and the producer. Individual contracts are negotiated by the writer or his agent with representatives of the producer.

A writer must have copyright protection for the works which he creates if he is to earn a living as a writer. He needs copyright protection even when he writes a script for motion pictures or television under the "for hire" provisions of the act.

The compensation which the writer receives, whether at the minimum rate or a higher rate because of his talent and professional standing, bears a direct relationship to the producer's expected return from the exploitation of the property resulting from the motion picture or television production of the writer's script. The writer receives a specified initial payment at the time he performs his writing services. He is also entitled to receive deferred payments which are contingent on additional or different uses of the material which he created. The professional writer counts on the probability of receiving these deferred payments as part of his expected annual income.

For example, for a script for a motion picture costing $250,000 or more, the writer's minimum initial compensation would be $4,504.50.

He would also expect to receive additional compensation if there were uses other than theatrical exhibition. Thus if a motion picture were released for television use, an additional payment would be due to the writer amounting to 2 percent of the producer's accountable receipts (as defined in the basic agreement).

With respect to a script written for television, the writer's minimum initial payment would be $2,402 for a 1-hour film costing $50,250 or more. There would also be additional compensation for television re-runs, geared to subsequent uses on the same station or in the same city, with specified amounts payable for each of these subsequent uses. These payments could reach a total of 150 percent of the intial payment.

Writers depend on rerun payments in order to arrive at an overall total of compensation which would make it possible for them to continue writing in this medium.

It is not economically feasible for producers to make initial payments which would take into consideration all possible contingent uses. It is a practical approach to make these payments as the additional uses occur and the producer thus has additional income resulting from such uses.

A producer's ability to grant exclusive licenses and to control exhibitions in market areas determines to a most important extent the amount of income which he may expect to receive. As noted, the amount of income received by a producer affects the amount received by the writer.

To permit CATV companies to operate outside the restrictions of either the present Copyright Act or as originally proposed in H.R. 4347, would be to undermine the financial structure of motion picture and television productions. It is our belief that the proposed amendments to H.R. 4347, which would divide CATV activities into three broad categories with differing copyright provisions, would create many problems of enforcement in addition to diminishing the copyright protection afforded writers.

On behalf of the Writers Guild of America and its members, I wish to express our appreciation for being given the opportunity to be heard here today.

I should also like to ask for permission to submit a reply or comment on some of the statements made by Mr. Zimmerman. At the risk of being too facetious, I might state that for a while I felt like I was Alice in Wonderland.

Senator BURDICK. Thank you for your testimony. As I stated before, the record will remain open for 10 days for your statement and other statements.

Miss BURKEY. Thank you.

Senator BURDICK. What would you recommend this committee do?

Miss BURKEY. Our recommendation is to continue the copyright protection. Going back to the early days of CATV, the authors have granted all the incidental rights necessary for the public to be able to receive the programs which are broadcast or exhibited. There is no reason to believe that they would change that position.

We do differentiate between reception in the home and rebroadcast or retransmission by persons who are receiving money for carrying programs in areas other than those for which they were intended. And I believe that our collective bargaining agreements indicate this.

We have granted this incidental use to the stations and the networks to be able to use the supplemental means of affording programs to the public.

Senator BURDICK. Could I characterize your answer by saying that you want no exemption?

Miss BURKEY. We do not believe a formal exemption is necessary. We believe that the networks, the stations, anyone else who is transmitting, will try to get as wide an audience as possible consistent with the market area they are serving and with reference to the sponsors, they definitely are interested in market areas and in exclusivity within market areas.

Senator BURDICK. Mr. Zimmerman of the Justice Department made the case substantially as follows, as I recall it, that since station X has a viewing area that it fills, that it has paid for all copyrighted material and that any rebroadcast within that area by CATV would be a double payment. Would you care to comment on that?

Miss BURKEY. I do not believe it would be a double payment because the station itself may not have paid for the program. It may be getting some share of proceeds which someone else is receiving based on that operation or that broadcast.

I think also you have to distinguish, as Mr. Jencks did, between a CATV operation which is picking up and retransmitting for physical reasons or otherwise within exactly the same area and carrying the program to people who would not otherwise be able to receive it. There is no direct cost attributed to a sponsor's product that is being paid by the consumer which is a statement that was made in this sense, because you may have regional sponsors, you may have local sponsors, you may have no sponsor for many of the programs for which the writer gets paid.

Senator BURDICK. Let us take the hypothetical case here right down to station X again, where station X has paid for a copyright.

Miss BURKEY. Yes.

Senator BURDICK. They show a movie, for example. And they show that movie in their regular viewing area. Z, as CATV, picks up that signal on rebroadcast. The contention of Mr. Zimmerman is that station X has already paid for the use of that copyright, and it should not be paid for another time by Z.

Miss BURKEY. The amount which the station paid would have been relative to its own broadcast and the number of persons reached by its own broadcast.

Senator BURDICK. Well, station X has the right to broadcast in, we call it contour B, for example, a certain physical area. They have the right to place their signal in that area.

Miss BURKEY. But they also would know how many homes they are able to reach in that area, and if the CATV people are duplicating their facilities, you are not reaching a different audience. You are reaching the same audience.

Senator BURDICK. In other words, then, you disagree with Mr. Zimmerman on that point?

Miss BURKEY. Yes, Senator; I do.

Senator BURDICK. Even though station X has the right to reach every person in that area.

Miss BURKEY. Yes; they do, but if the listeners, the viewers in that area are going to the cable system instead, they are not watching the station that is paying for the right to perform.

Senator BURDICK. This is just for the purpose of getting information.

Miss BURKEY. And sponsors are interested in how many people are watching the station where they are paying for the product, not some other station.

Senator BURDICK. Is it not station X's responsibility to see that they cover their viewers in that area?

Miss BURKEY. It might well be. Perhaps——

Senator BURDICK. That is why they have a license to broadcast, is it not?

Miss BURKEY. That is why they were licensed to broadcast, but the premise, Senator, was that CATV is reaching other people or different people than the station's facilities made it possible for them to reach. If not, you have a duplication of services for which there would appear to be no need.

Senator BURDICK. Well, it is not quite that clear. As I understand the testimony before this committee there are many areas in this specific territory that do not receive good signals and that it is an improvement of signals rather than new service.

Miss BURKEY. But that should be an extension of services in some way, it seems to me, of the station if the station is supposed to be paying for those viewers.

Senator BURDICK. In other words, you do not agree with Mr. Zimmerman that the copyright has already been paid for.

Miss BURKEY. The copyright has been paid for for certain uses at certain times in certain areas but not indefinitely and not forever and not everywhere.

Senator BURDICK. Thank you for your testimony.

This concludes the scheduled witnesses. I want to inform you that the chairman of the subcommittee, Senator McClellan, has received a letter from Mr. Herman Finkelstein, general counsel of ASCAP, requesting the opportunity to respond to certain testimony.

Although Mr. Finkelstein has already appeared in these proceedings, it is agreeable to Chairman McClellan and myself that he be allowed this opportunity.

I have been informed by the committee counsel that the opportunity of making a rebuttal statement has been offered to the CATV representatives but they did not desire at this time to add to their previous testimony.

Is Mr. Finkelstein present?

STATEMENT OF HERMAN FINKELSTEIN, GENERAL COUNSEL OF ASCAP

Mr. FINKELSTEIN. Mr. Chairman, I greatly appreciate this opportunity to appear here in rebuttal. I felt that it was necessary to appear because I think ASCAP (the writers and publishers whom I represent) is in a unique position of having its rates regulated under Federal antitrust decrees.

If I may, Mr. Chairman, I should like to attempt to answer some of the specific points made in Mr. Zimmerman's statement this morning.

First, he argued that the networks or other large copyright holders might withhold permission to rebroadcast their programs and thereby seek to reserve the CATV market for themselves.

Now, ASCAP and its members cannot withhold a license. Under a decree entered in 1950 in the U.S. District Court for the Southern District of New York, there is this provision, article IX of that judgment:

> Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon license fee within 60 days from the date when such application is received by ASCAP, the applicant, therfore, may forthwith apply to this court—Southern District of New York—for the determination of a reasonable fee, and ASCAP shall upon receipt of notice of the filing of such application promptly give notice thereof to the Attorney General.
>
> In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some, or all of the compositions in the ASCAP repertory to which its application pertains without payment of any fee or other compensation but subject to the provisions of subdivision (B) and the final order of judgment entered by this Court in such proceeding.

So that a CATV operator desiring to use any or all of the music in the ASCAP repertory need merely write a letter to ASCAP asking what the fee will be for such a license. He thereupon has the right to use the music for 60 days. There will be negotiations in the meantime and if at the expiration of that 60-day period a satisfactory agreement with CATV has not been arrived at, he may file a proceeding in the Federal court for the determination of rates.

Now, that is not an idle provision. At this moment there are pending in the Federal court in the Southern District of New York proceedings by the entire radio industry and the entire television industry to determine what rates they shall pay ASCAP. They seek a reduction in rates. That reduction was not agreed to. And they filed a proceeding in the Federal forum. And, of course, the Attorney General has been given notice of that proceeding.

So it seems strange to me that the Attorney General would be coming in here and asking Congress under the copyright laws to grant an exemption from the right of public performance for profit, which this clearly is and has been held to be by the Federal court, and saying nothing about the fact that the public interest is already protected by a provision that insures payment of reasonable rates.

There is no possibility that any member of ASCAP can ask for more than a court might find to be reasonable.

The second point in Mr. Zimmerman's statement that I should like to comment on. On page 4 he says "copyright protection imposes a toll upon the use of copyrighted material."

Now, you know when you read a statement like that and you call a charge a "toll" or you call copyright a "monopoly," that you just do not like the idea of this kind of thing being property because we never talk about the rent that you pay your landlord as being a toll or the ownership of real estate being a monopoly, but of course, these are synonymous terms. However, when you single out the word "toll" to express the payment for use of property, then I think you have a preconceived notion that there is something wrong with people having this kind of property. And I think at that point that it is fair to suggest that in the United States at this moment, we should be urging that there is no property more sacred than what a person creates out

of his own mind and that certainly that ought to be entitled to at least the same respect as what the bankers can come up with in terms of money or the utility companies who are buying these very CATV systems—these are not small people. Less than 25 of them control more than 550 of these CATV systems. That goes for General Electric which just came into the thing in November, now has 15 franchises and 20 applications, and the giant General Tire & Rubber Co., which has over 70 alone or in combination with others, and on down the line. These are big people.

Take Seattle, for example. Who are the CATV people? The three television stations there get together and apply for a CATV franchise. Now, if this bill, this proposal of the Department of Justice, were to become law, then it would mean this, that three television stations in Seattle, when they use these copyrights in this music to reach the public by way of toll television, which is this—if Mr. Zimmerman wanted to use the word "toll," I think he could quite properly use it where it has been used, to call this "toll television" and not CATV which, of course, Judge Herlands has already said it is not. The Cox stations are in CATV and Mr. Reinsch, the president, says he sees nothing wrong with copyright royalties for CATV. He is accustomed to it as a broadcaster.

But this exemption, if enacted, would mean that the broadcasters in order to avoid payment of copyright royalties on some part of what the public pays would be impelled to get into CATV because there they would be exempt from paying on part of the money they collect from the public.

Now, Mr. Zimmerman says that there is a time-honored practice of having the viewer pay by the extra charge that the advertiser makes when he sells soap or whatever it might be. But that is not just the viewer that is making that payment. You and I pay it whether we watch the show or not. But on cable or toll television, only those people make the payment who actually watch the program and it would seem to me that whatever the past practice has been, that when you want properly to assess a public charge, a charge on the consumer, that you charge those consumers who enjoy the benefit of whatever the product is.

The next thing that I should like to point out is Mr. Zimmerman's statement, that you ought not to be able to collect for every use of a copyrighted work and what he cites is this. He says—he puts it in parenthesis but nevertheless this is the thrust of his whole point there—"our economic life is filled with instances in which the creator of a good idea watches others profit from it."

Now, Mr. Zimmerman has not read the copyright law. A copyright does not protect the idea at all. If I write something and I have a new idea, anybody can take that idea without infringing. A copyright protects only the author's means of expressing the idea. The idea itself is free to the world and here lies the great difference between a copyright and a patent. So that the right that the author gets is only the right to control something that he uniquely created, those words that he uses to express the idea, but the idea he gives to the public. He does not come here and ask for any right to control it. So I do not think that Mr. Zimmerman's statement that others share their ideas with the public and do not benefit from it is any authority for granting exemptions here.

Next, I should like to point to his statement that the copyright law has always distinguished among beneficiaries. He says this has been done through definition of "publication" or "performance" and assessing the performer with copyright costs.

I do not know what he is talking about. I do not know where in the copyright law there is a definition of "publication" and, of course, there is not one in the law, I do not know what he read or what he dreamed up as something in the definition of "publication" that chooses among beneficiaries. True, there is something with respect to performance, where there is a choice among beneficiaries. The jukebox people are given an exemption and I think Mr. Zimmerman correctly says that the CATV proposal is another proposal like the jukebox exemption. It meant nothing in 1909; today it means an exemption of an industry taking in $500 million a year for music.

We do not know where CATV is going. We do not know whether the future of broadcasting is going to be entirely in the realm of CATV. Most of the financial people who downgraded CATV just a year ago are saying that this may supplant both network broadcasting and the local affiliated station, particularly when—not if, but when—the main means of disseminating programs is by communication satellites. When the waves carrying a program from a satellite reach the ground, the best means of disseminating the program is going to be through the wired CATV channels.

Let us look at those channels—they are not going to just merely have television programs. When you buy your television set, if you really want to make the maximum use out of it you pay the few dollars that the CATV people will charge and you will be able to go and push a button and order your groceries from the grocer. You push another button and find out the time or weather—you do not have to call the telephone company for the information. You push a button for that. You want to get some information and you push another button and there will be a wire channel for that. You want to have a burglar alarm. You push another button and there is a channel for that.

With a 20-channel system—we now have 12 as the standard thing now—20 is coming in right at this moment, and they say that it will not be long before there will be 83 or 84 channels—you pay the extra little amount that CATV people charge and you have the privilege of making the maximum use of that television set for which you paid a very substantial sum.

That will be the television of the future. There is not a bit of doubt about it. And if that should happen, then this great use of copyrighted works would be exempt.

Now, the same arguments that Mr. Zimmerman made this morning, that this is a new thing and that this is an extra toll that the writer wants to get—this is a repetition of the very argument the broadcasters made both in these legislative halls and in the courts. They wanted an exemption. They said they did not perform—that if they did perform, it was not public because all they did was to have an artist sing or play in this little private studio not much larger than a telephone booth in those days, that the listeners were separated, they were not in a single public place, and if people were in 10,000 homes, each one separated and each one private, that that could not be held to be a public performance. And then they said it was not for profit because in the

early days they merely used it to advertise their wares like station WOR owned by the Bamberger Co. in Newark, N.J., which at the end of each program would announce, "L. Bamberger & Co., One of America's great stores," and the judge in that case said that he commended them for their public spirit but it was passing strange that every time they made this great public gesture they ended up by saying they were one of America's great stores, and that was held to be a performance for profit. The arguments were all made then by broadcasters—the same arguments we hear now.

Let us say a broadcaster today, a radio broadcaster, goes out and buys a phonograph record. The work has already been performed pursuant to the author's agreement with the record company. He has gotten his 2 cents. There is nothing new here. There is merely a broadcasting of the recorded performance. The broadcaster pays his good money for the record, puts it on, spins it, and before and after that whirl of the record there is an advertising announcement. The author has not done anything new. Why should he get another payment?

If Mr. Zimmerman's logic is sound, then it is unsound to require the broadcaster to pay anything when he spins a record. If that is unsound, however, then 80 percent of the author's money today goes right down the drain because that is where the 80 percent comes from.

Now, do the authors get too much? Here is the experience in ASCAP. The serious composers get so little in America when their works are used—there is so little opportunity for commercial use—that the writers of popular music do this: Whenever ASCAP collects a dollar from a concert or a symphony orchestra, the popular writers add $14 more, so that the serious composer will have enough money to encourage him to continue to devote his life to writing serious music.

Now, someone asked Richard Rodgers what the gimmick was, how he justified a thing like that, and Rodgers said, "Well, now, if we were a large commercial corporation, we would set aside a certain percentage of our receipts for research. We popular writers feel that the people that write serious music are doing our research for us and in our own selfish interest we want to see that they continue writing music." This is clearly in the public interest. It certainly cannot be that the serious composer or any composer is already getting too much money or enough money if some of the writers have to dig into their jeans to make money available to other writers.

I do not think that it is asking too much to say to the CATV people, when you use this music and you get money from it directly from the public for no other purpose except to deliver entertainment, that you just pay an amount to authors commensurate with your receipts from the use of their copyrighted material.

Now, the next point that Mr. Zimmerman makes, he says, "up to now"—page 5—"the television broadcasting industry has had no difficulty in obtaining programing material".

I do not think Mr. Zimmerman either watches television or reads comments on it or ever reads a criticism. If he read Broadcasting this week, he would find that the broadcasters have such a dearth of material in the United States they are going to Europe for material. Television has a voracious appetite. It has used up almost all the old movies. They say they cannot get enough writers of talent to write

and I am sure there is enough talent in America if the money is there and if television and community antenna are willing to pay the money. I am sure that there is enough talent in America to satisfy the needs of television, but at this moment they say there is not. They go to Europe for it, and I think they go to Europe because they can get a cheaper product. They are more interested in quantity than quality.

I do not think that that indicates that the American author is getting too much today or that he is living off the fat of the land. The average income of a writer, whether it be a member of ASCAP or a member of the Authors League, the novelist or dramatist, is under $3,000 a year. Yes, we hear of unusually successful people like Richard Rodgers and Irving Berlin, the late Cole Porter, but you do not compare them with the people in U.S. Steel or the Texas tycoons, and yet I think that they make as great a contribution as anyone in America to the enrichment of the life of our Nation.

It seems passing strange that authors should be singled out by the Department of Justice coming in here and saying they get enough, and should not charge poor General Electric, which has all these CATV systems and all the applications, and other owners of CATV systems—the great utilities and the Teleprompter Co., and all these collective broadcasting stations and networks owning CATV systems who come in here and say they are willing to give copyrights away for the contour A area—you know, they may be talking as if they were copyright owners. In truth they are CATV owners. CBS is a large owner in Canada. It has several options for CATV systems in the United States. RCA is a CATV owner and is just waiting to see how it will enlarge its interests. The other network, ABC, is going to try it through a different route, through the communication satellite, now that it has been purchased by I.T. & T. which plans a satellite operation. There is where your networks lie, and how the Department of Justice can assimilate the networks to the copyright owners is a great mystery to me.

Now let us turn to Mr. Zimmerman's statement on page 6: "The existence of CATV transmission should increase the amount paid by sponsors."

What would happen in a case like this? A CATV owner decides he is going to bring in something unique for his viewers. He gets a UHF license—and you know how many of them are hanging around—nobody takes them, but a CATV operator could take up a UHF license, could put entertainment material on it, with very little advertising, and then say to his CATV subscribers, "Here is what I am bringing you, program material not interrupted by advertising."

What would the author get out of that station? Those in ASCAP would get 2⅛ percent of what would be almost nothing—if based on what the advertising pays—but the CATV operator who would own that station would get a very substantial sum in toll charges to CATV subscribers. It would attract more and more subscribers to that station. That is something that the person, the telecaster in the VHF business, broadcasting without the CATV arm, could not afford to do. And every time that you increase that kind of programing—there is only one set, they can only have one program on at a time—if the viewer is glued to that program without advertising, he is not glued to the program with advertising and the advertiser is going to pay less and not more.

I just do not think Mr. Zimmerman has looked at the economics of this industry and its possibilities. I looked all over in his statement for mention of the communications satellite which everybody knows is right around the corner. The Ford Foundation wants to jump in. Comsat is up there already. I.T. & T. wants to come in. RCA wants it. All are scrambling for this thing. And one day we will all wake up like the day we woke up and found that Russia had the atomic bomb. One day we will wake up and find there it is, that nobody ever anticipated this thing happening to television, that suddenly television is not what it was when this bill came before this committee. It is sure to happen. It is not just an idle dream.

Now, the next point that Mr. Zimmerman makes is that, "Finally the CATV liability here proposed would in fact be a departure from the system by which copyright holders are now compensated. Generally speaking, the television viewer in effect now pays for the television programing indirectly, by buying the products of the sponsors."

Well, I have already mentioned that actually the nonviewer pays as well as the viewer but if you charge CATV only the viewer will pay. That seems much fairer. Besides, it will improve the programs that people at home get and if there is more money available for authorship, I think that will be a service to the public and not a disservice.

Finally, Mr. Zimmerman says: "In conclusion we believe that this copyright proposal may have harmful anticompetitive consequences."

Now, I do not know how payment to the writers and publishers in ASCAP can have anticompetitive consequences and when Mr. Zimmerman was asked what about it, he did not know of any need for an exemption of CATV in a case where copyright rates are regulated by an antitrust consent decree, as in the case of ASCAP.

When I was here before, Mr. Chairman, you asked whether I believed in the white, black, and gray areas and I said I thought they all should pay and you said, "You think it is all black," and I think we agreed that was my position.

I certainly appreciate the opportunity to come here and comment on Mr. Zimmerman's remarks. I am sorry I could not have done better but I have just heard the remarks and got the copy and this is the best I could do under the circumstances.

Senator BURDICK. In other words, it is still black?

Mr. FINKELSTEIN. I think so, Mr. Chairman.

Senator BURDICK. Thank you.

Mr. FINKELSTEIN. Thank you very much.

(The following was subsequently received and by order of the chairman printed at this place in the record:)

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
New York, N.Y., September 6, 1966.

Re S. 1006, supplement to statement of August 25, 1966.

Hon. QUENTIN N. BURDICK,
Acting Chairman, Committee on Patents, Trademarks, and Copyrights, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: When I appeared before the Committee in rebuttal on August 25, I emphasized the financial power of the CATV operators for whom the Department of Justice was seeking an exemption from the requirements of the Federal Copyright Laws. Attached is a survey showing that only 25 group owners of CATV systems own in the aggregate over 650 CATV franchises and have applications pending for almost 400 more.

I also mentioned that J. Leonard Reinsch, President of the Cox Broadcasting Corporation, and Retiring Director of the National Community Antenna Association had referred to copyright fees as "a normal cost of doing business." His entire statement on this subject reads as follows (National Community Television Association Bulletin, July 18, 1966):

"THE COPYRIGHT QUESTION

"A recent court ruling, currently subject to appeal, implies that CATV operators may be required to pay fees for the privilege of transmitting copyrighted material to cable television subscribers. It has been suggested that this would impose a critical financial burden on the operators. In our opinion, the alarm is not warranted. Copyright fees are a normal cost of doing business in many fields. As in radio and television today, they would constitute a relatively small element in the total cost of providing a service desired by the public."

In addition, I should like to call the Committee's attention to a similar statement in a current prospectus of the Teleprompter Company, indicating that they can pay such royalties without any materially adverse effect on the company, even though Teleprompter's "principal activity is the ownership and operation of community antenna television (CATV) systems in sixteen communities throughout the United States." Referring to the case of *United Artists Television, Inc.* v. *Fortnightly Corp.* (and a similar case pending against Teleprompter) the prospectus states:

"Even if plaintiffs ultimately prevail in either or both actions, management of the Corporation believes that the effect on the Corporation will not be materially adverse."

In any event, as the Department of Justice concedes, where rates of copyright owners are already regulated under the antitrust laws, as in the case of ASCAP, there is no need of granting a copyright exemption to CATV.

It is submitted that if any concession is to be made to CATV, it should be done under the *Commerce* clause of the Constitution, and not the *Copyright* clause. The Commerce clause enables the FCC, if deemed necessary, to require stations holding a television license, to obtain rights for CATV operators for their contour "A" area; it also enables the Department of Justice to insist on rate regulation in cases of collective licensing. These avenues are open if resort to them is needed.

No case has been made for an exemption of CATV—a commercial operation—under the copyright law. The rights of authors should not be made subservient to the claims of private commercial interests. This was done in 1909 with respect to coin-operated machines. The precedent should never have been established. It is unsound and is not likely to be continued. It certainly should not be extended.

I appreciate the permission extended by the Committee to appear in rebuttal, and this further opportunity to supplement my extemporaneous remarks.

Respectfully submitted.

HERMAN FINKELSTEIN.

25 group owners of CATV systems—Number of franchises, franchise applications pending, and ownership of TV and radio stations

	Number of franchises	Number of applications pending	Ownership of TV and radio stations			
			TV		Radio	
			UHF	VHF	AM	FM
General Tire & Rubber Co.[1]			WHCT	WOR	WOR	WOR
Vumore (Oklahoma City, Okla.) 100 percent.	35	2		WNAC	WNAC	WRKO
H & B Communications (Beverly Hills, Calif.) 30 percent.	37	4		KHJ	FKRC	KFRC
				WHBQ	WHBQ	WQMS
					WQMS	CKLW
					CKLW	
Jerrold Corp. (Lehigh, Pa.)	41	51				
Cox Cablevision Corp. (Dayton, Ohio).	15	13		WSB	WSB	WSB
Trans Video Corp. (17 percent) (El Cajon, Calif.).	10	1		WSOC	WSOC	WSOC
Finer Living, Inc. (25 percent).	1	5		WHIO	WHIO	WIOD
Columbus Communication Corp. (Columbus, Ohio).	3	1		KTVU	WIOD	
Buckeye Cablevision (45 percent).	4	2		WIIC		
Cleveland Area TV (45 percent).	3	2				
Georgia Cablevision Corp. (80 percent).	4					
Capital Cablevision		6				
American Cable TV, Inc. (Phoenix, Ariz.).	30	9				
Also interest in and operates Community TV Reception Co. (Sherman Oaks, Calif.).	5					
Also interest in:						
Savannah TV Cable Co	1					
Cable-Vista, Inc	1					
Telesystem Corp. (Glenside, Pa)	29	21				
Also interest in Pioneer Valley Cablevision (Keene, N.H.).	7	34				
Telesis Corp. (Chicago, Ill.)	13	19				
Minnesota All Channel Cablevision (80 percent).	8	26				
Russell, Kans. franchises (80 percent).	1					
Telesis Engineering (100 percent).	13	9				
Nebraska City Cable TV, Inc.		1				
Gregg Cablevision, Inc. (Lin Broadcasting Co.) (Nashville, Tenn.).	30	8	WTVP		WMAK	
					WAKY	
					KEEL	
					KAAY	
United Utilities (Kansas City, Mo.).	29	11				
Television Communications Corp. (New York, N.Y.).	26					
Community TV, Inc. (Bozeman, Mont.).	26	1				
American Cablevision Co. (Beverly Hills, Calif.).	25	1				
New England Video Co		1				
Teleprompter Corp. (New York, N.Y.).	25	2				
Jefferson-Carolina Corp. (North Carolina).	25	42		WBTV	WBT	WBT
				WBTW	WBIG	
				WFMY		
General Telephone & Electronics Corp. (New York, N.Y.).	24	13				
Triangle Publications, Inc. (Philadelphia, Pa.).	23	12	WLYH	WFIL	WFIL	WFIL
			KFRE	WFBG	WFBG	WFBG
				WNBF	WNBF	WNBF
				WNHC	WNHC	WNHC
					KFRE	KFRE

See footnotes at end of table.

25 group owners of CATV systems—Number of franchises, franchise applications pending, and ownership of TV and radio stations—Continued

	Number of franchises	Number of applications pending	Ownership of TV and radio stations			
			TV		Radio	
			UHF	VHF	AM	FM
Video Cable Systems, Inc. (Huntsville, Ala.).	21					
Meredith-Avco (New York, N.Y.).	15	28				
Shared with Jerrold Corp.	3			WHEN	KPHO	WWDC
Through Tennessee Cablevision.	3			WLW-T WLW-C WLW-I WOAI WOW KPHO KCMO WLW-D	WLW WWDC WOAI WHEN WOW KCMO KYA	WOAI WOW KCMO KOIT
Central California Communications Corp. (Salinas, Calif.).	20	4		KSBW	KSBW	KSBW
Shared franchise with Vumore.	1			KSBY	KNGS	KSBY
General Electric Cablevision Corp. (Schenectady, N.Y.).	21	27		WRGB WSIX	WGY WSIX	WGFM WSIX
Reeves Broadcasting Corp. (Charleston, S.C.).	21	6		WUSN WHTN	WKEE WITH	WKEE WITH
National Transvideo, Inc. (Dallas, Tex.).	17	1				
Newchannels Corp. (Newhouse Broadcasting).	17	24	WSYE WTPA	WSYR WTVI WAPI KOIN	WSYR WAPI KOIN	WSYR WAPI KOIN WTPA
Tower Antenna, Inc. (Coshocton, Ohio).	14	7				
Skagit TV Cable Co., Inc. (Seattle, Wash.).	12					
Long Island Cablevision Corp. (Riverhead, N.Y.).	12					
Total	671	394				

[1] In addition to owning 16 radio and TV stations, General Tire & Rubber Co. owns the Yankee radio network.

Senator BURDICK. Does anybody from the CATV interests care to testify in surrebuttal? If not, that will be all.

At this time we will, without objection, include at the appropriate place in the record the testimony of Mr. Charlton Heston who gave it informally, together with his prepared statement. The record will be open for additional statements for a period of 10 days as I announced before. I might state to the contending parties that the parties are in closer agreement today than they were when the matter was before the House and I would hope that they would still explore the possibilities of getting closer yet in the future. We will determine that when and if the hearings are resumed.

So in the meantime I hope that some efforts could be made among the parties because this is a difficult question—that is one thing we can agree on—and perhaps resolve some of these problems.

With that this committee will be in recess, subject to the call of the Chair.

(Whereupon, at 11:30 a.m., the hearing was recessed.)

APPENDIX

SEPTEMBER 6, 1966.

STATEMENT OF IRWIN KARP ON BEHALF OF THE AUTHORS LEAGUE OF AMERICA, INC. ON THE COPYRIGHT LAW AND THE "COMMUNITY ANTENNA" TELEVISION INDUSTRY

My name is Irwin Karp. I am counsel to the Authors League of America, a national society of professional writers and dramatists. I submit this statement on the League's behalf and request it be incorporated in the record.

The Authors League appreciates this opportunity to state its views on requests that the "Community Antenna" television industry's status under the Copyright Act (and Revision Bill) be changed. Authors are vitally concerned; the requested changes would have a drastic impact on their rights and income. Plays, novels and non-fiction works are performed on television; are adapted for television programs; and are the source material for many motion pictures which are later shown on television. An author's compensation for the use of his work on a television program depends, directly, or indirectly, on the income the program earns for its initial performance, and from re-run and syndication fees paid by television stations for the right to rebroadcast it.

Mr. Ford's testimony has narrowed the issues. Only the Department of Justice now makes the Draconian Proposal that the law should be changed to permit the CATV industry to make unauthorized (and uncompensated) uses of copyrighted programs and films broadcast by television stations. The CATV industry itself recognizes, as the Department does not, that the films and programs it sells and retransmits to its customers were created by others and that basic principles of fairness and morality require that it obtain permission and pay reasonable compensation for the right to use these staples of its business.

However, the CATV industry and Subcommittee #3 of the House Judiciary Committee have proposed that the present law (and the Revision Bill) be changed to establish systems of compulsory licensing under which CATV operators would be permitted, under certain circumstances, to retransmit programs broadcast by "distant stations". The industry proposal calls for fees to be fixed in the Copyright Act. Under the system proposed by Subcommittee #3, fees would be fixed through the medium of private law suits, in the District Courts. For reasons indicated below, we believe that the two proposals should not be adopted.

The basic issue, we believe, involves the retransmission, by CATV systems, of programs broadcast by "distant stations", rather than the retransmission by a CATV system of all programs broadcast by all stations located in, and reaching the immediate local area in which the CATV system's customers reside. The CATV industry and Subcommittee #3 propose an exemption permitting CATV systems to retransmit television programs to customers within the "normal reception range" of the initiating station (or "for reception solely within the limits of the area normally encompassed by the primary transmission").

We believe that a properly limited exemption to permit this type of local retransmission would be acceptable. However, we submit that the exemption should be carefully defined to limit it to situations where a CATV system is truly functioning as a "roof antenna"—retransmitting television programs to customers located within the normal coverage area of the station initiating the broadcast of the program. We believe that an exemption should: (i) establish a precise definition of the normal coverage area—preferably in terms of mileage from the initiating station; (ii) be available only if the CATV system carries without alteration, all programs broadcast by all stations located within the area; (iii) be limited to broadcasts of television programs intended to be received by the public; (iv) be limited to retransmissions to private residences; (v) be limited to CATV systems which furnish their entire retransmission service on a periodic fee basis; and (vi) be limited to CATV systems which do not originate programming.

Before considering the proposals for compulsory licensing, we would like to comment on the recommendation by the Department of Justice that the law be changed to grant the CATV industry the absolute right to make unauthorized and uncompensated uses of television programs. The Department argues that this radical departure from both copyright law and principles of equity is desirable: (i) to prevent restrictive practices and monopolization in the CATV industry and (ii) because owners of copyrights in television programs have enough "incentive" and do not need any more, i.e., in the form of payments from the CATV industry.

As to the first ground, the prevention of possible or suspected restrictive practices—we submit that appropriation of property and the denial of all compensation for the use of one's work product constitute a rather harsh prophylactic treatment for preventing *anticipated* antitrust ailments. To our knowledge, the treatment has not been prescribed or applied in other areas where antitrust infection had not only been suspected but detected. Nor should it be. The Sherman Act, Clayton Act, Robinson-Patman Act and Federal Trade Commission Act provide adequate remedies for restrictive practices, refusals to deal with CATV operators, price discrimination or other conduct that violates the antitrust laws.

We believe that the films and other programs broadcast on television will compete for acceptance in the rapidly expanding CATV marketplace as they do in the broadcast television marketplace; or as films do in the theatrical marketplace. If competition is improperly restricted, conventional antitrust remedies can be applied. If a monopoly of product develops, then conventional regulatory devices are available—as is the case with rail, telephone, electric, gas or other services and utilities provided under non-competitive conditions.

The Department of Justice also argues that the CATV industry should be exempted because owners of copyrights in television programs have enough "incentive" already (payment from advertisers or networks)—and, therefore, the "Copyright Monopoly" [1] should not be "extended". The argument seems to rest on the premise that the copyright law is only intended to provide a measured dosage of "incentive" and when that has been achieved, other users are entitled to a "free ride"—to free use of the literary or dramatic property that the copyright owner has created. This is not the kind of "incentive" that statutory copyright was intended to furnish. The Constitution authorized Congress to secure to the author the "exclusive right" in his writings—the exclusive right to present the work he has created by the various means, and in the various marketplaces, that are available. He also has these rights under common law (where they are termed "absolute property rights") because he created the work. In short, the Constitution, like the common law, grants exclusive rights in fruits of one's creation as the means of encouraging creativity and productivity—the basic social purpose of all private property under our system of law. A theory of "limited incentive" is not consistent with these basic principles.

Congress has granted exemptions, for certain non-profit performances of copyrighted works—which simply emphasizes that the CATV is not entitled to an exemption. The industry consists of private businesses, operated for profit; and engaged in charging customers fees for bringing them films, dramas, musical and variety shows, and other program materials created by motion picture companies, independent producers, television networks, football and baseball teams and others. In short, a CATV system is in the business of bringing entertainment to its customers—just as are motion picture theatres or local television stations. The fact that it does not create the entertainment, but merely retransmits it, does not entitle it to an exemption—a motion picture theatre merely retransmits films to its audience; most television stations spend most of their time retransmitting television programs created by others, often by relaying the initial broadcast.

We submit that the creators of program materials used by CATV systems are entitled to be paid for such uses and to determine when they can be made. Destruction of these rights would be contrary to basic principles of copyright law and equity; it would affect not only the producers of these materials, but

[1] We should note that there is no such thing as a "copyright monopoly". A copyright, per se, is not a "monopoly" in the antitrust sense of the word. A copyright, like any other property right, simply gives its owner the exclusive rights to use the particular thing he has created or purchased.

also the writers, actors, directors, musicians and other artists and craftsmen who create these programs and whose compensation is determined by the income which the producer can derive from uses of the program.

The CATV industry and Subcommittee #3 recognize that (with the exception of a local program exemption) copyright owners are entitled to be paid when their works are used by CATV systems. However, both the industry and the Subcommittee propose that in some instances permission to use be made automatic, and the copyright owner's fee be established under a system of compulsory licensing.

We submit that compulsory licensing is unworkable and unfair. The CATV proposal envisions statutory fees. No statute could provide a schedule of fees that could account for the difference in value of a Bridge On the River Kwai and a 1935 Western Movie, or between a two hour documentary and an animated cartoon, or between a current, highly successful situation comedy and an unsuccessful "pilot" film shown on a summer replacement program. No statutory licensing scheme could determine the reasonable compensation for each work in each marketplace—the fee charged a system with 200,000 customers would be too high for a system with 5,000 customers, and vice versa.

Subcommittee #3's "white-black-and-gray" plan envisions a form of compulsory licensing in the "gray" area which would make programs available for CATV use (in that area) without permission, leaving the fee to be determined by litigation in each instance. We do not think this is a desirable approach. It would produce a flood of litigation—with both producers and users choosing to sue or be sued, rather than capitulate to the other's demands, for different tactical considerations. It leaves the determination of fees to District Court judges—without providing them with the necessary business expertise to deal with the various factors that enter into the determination of a reasonable fee. In balance, we think that the plan would induce users not to pay voluntarily. In many CATV markets the reasonable fee will be modest—the costs of bringing suit heavy (especially since the producer will usually have to sue in a foreign jurisdiction—and recovery limited to three times the reasonable fee. Faced with these odds, producers will have to reduce fees, even though eminently reasonable, rather than carry the heavy burden of suing for small fees (especially with the risk of losing everything if a District Court judge disagrees with their estimate of reasonableness).

Moreover, the Subcommittee's plan would deny copyright owners the right of determining whether a CATV system should, or should not, be permitted to use a program broadcast by a "distant station." This would prevent the copyright owner from granting an exclusive license to a television station to broadcast its program in a given area—which might, in turn, deny it the opportunity of granting any license in that area. The CATV proposal makes a limited adjustment to take account of this difficulty—but not one that gives the copyright owner the same rights he now possesses, or requires. The CATV proposal on exclusive licenses would not, for example, allow the creator of a sports program—a football or baseball game—to prevent its retransmission from a "distant station" into a blacked-out television market; it would not allow the author of a play to prevent the retransmission of a telecast into the blacked-out television market where the play was being performed live. In many instances, given the choice between losing a live audience or withholding his work from television altogether, the copyright owner would be forced to make the latter choice.

We submit that compulsory licensing is not necessary to assure that CATV systems will have an adequate supply of program materials. Existing statutes, as recent decisions have demonstrated, serve that purpose. We submit that compulsory licensing cannot produce reasonable prices for the great variety of television materials; indeed, it can only establish a ceiling (which would be frozen into the law for years) below which CATV systems will be free to bargain—and their bargaining power will continue to increase as they capture more and more of the television market.

We submit that the licensing of television programs in the CATV marketplace can be accomplished most fairly and easily under a free enterprise approach. Subcommittee No. 3 accepts the free enterprise approach for its "black" market area. The CATV industry proposal accepts the free enterprise approach for retransmissions to areas that are not "underserved". We believe the free enterprise approach should be adopted in all market areas.

Various systems could be worked out by the CATV industry and producers of television programs under which price and clearance information for each program would be collected and made available to the CATV industry and under which licenses could be granted automatically in most, if not all, situations.

* * * * * * *

The Authors League is grateful for this opportunity to present its views to the Committee.

STATEMENT OF DIRECTORS GUILD OF AMERICA, INC., AUGUST 4, 1966

The Directors Guild of America, Inc. is an organization consisting of over 3,300 members who perform services in connection with the production of theatrical motion pictures and motion pictures designed for television broadcasting.

For those members of the Subcommittee who may not be too familiar with the motion picture industry or with the function of a Director, I will read the definition of a Director contained in Article III of our Constitution and By-Laws:

Article III, Section B provides in part as follows:

"*Definition of a Director:* A Director is a creative individual engaged in the making of motion pictures, television programs * * * or other units of entertainment or information which may be photographed and recorded in celluloid, or tape, or any other medium, and projected on various screens, or may be performed on television or on any other new instrument of communication and exhibition now known or hereafter devised * * *".

The Director's professional function called "Directing" or "Direction" is unique and all-embracing. He preconceives the particular entertainment or information form as it will appear in its entirely and vitally participates in all the phases of its preparation and execution.

He is closely associated with all other creative talents and crafts involved in the production of the unit and one of his major aims is to extract the utmost values from these talents and crafts and to present them to the public at their very best.

He works directly with all of the elements which constitute the variegated texture of a unit of entertainment or information: story, acting, dialogue, movement, music, song, dance, camera, photography, sound recording, scenery, costumes, props, make-up, etc.

The Director's task is to contribute creatively to all these elements and to guide, mold, and integrate them into one cohesive dramatic and aesthetic whole.

The Director's main concern is with spiritual values like: story, characters, moods, ideas and emotions. His purpose is to enlighten, uplift, entertain, inform, and give high pleasure to the audience. And, finally, the measure of a Director's achievement is the extent to which any form of entertainment or information directed by him appeals to the heart and the mind of the audience and, thus, through tears or laughter, enriches and ennobles the spectator's spirit.

While Director members of the Directors Guild are not necessarily copyright proprietors, their creative and artistic endeavors contribute in no small way to the finished theatrical and television motion pictures to which copyright protection is granted. The artistic and creative efforts of Directors which are necessarily included in the finished product which is the subject of copyright protection, make it essential for the Guild to oppose any change in the copyright laws of the United States designed to permit commercial entrepreneurs to pirate the results of such artistic and creative efforts without the payment of any copyright license fee whatever. The position of CATV operators in requesting exemption from the copyright laws is basically inequitable in that it involves an enterprise established for the sole purpose of picking up television signals and transmitting them to areas where the signals could not have otherwise been received, for substantial economic benefits. CATV operators would gain substantial profits for themselves without paying any license fee whatever to the copyright proprietor of the artistic material which in effect is being pirated.

Director members of the Guild have a substantial economic interest in this matter as well as their interest from the creative and artistic standpoint. Under the Collective Bargaining Agreement negotiated by the Directors Guild

with the producers of theatrical motion pictures, a percentage of the receipts realized by the distributor from licensing a copyrighted motion picture for exhibition on television is paid by the distributor directly to the "Directors Guild of America, Inc.—Producers Pension Plan" which is managed jointly by trustees designated by the Directors Guild and trustees designated by representatives of the motion picture and television industry. Payments from the Plan are, of course, made to qualified retired members of the Directors Guild and are also made in certain instances to the surviving spouse and/or dependent children of deceased members of the Directors Guild. The pickup by CATV Systems of telecasts of copyrighted motion pictures made by a television station which has paid the requisite copyright license fee to telecast the same and the transmission of such motion pictures by CATV operators to paying subscribers without the payment of a copyright license fee would thereby deprive the Plan and its beneficiaries of substantial funds.

Not only the Plan but also individual members of the Directors Guild would be deprived of substantial funds by CATV transmission of theatrical and television motion pictures without the payment of a copyright license fee. Directors of films made primarily for television exhibition are, under all collective bargaining agreements, entitled to additional compensation each time the film is rebroadcast. Compensation from reruns can aggregate up to an additional 165% of the Director's initial fixed compensation. Moreover, many Directors enter into individual employment contracts with producers of theatrical and television motion pictures whereby in addition to their fixed compensation, the Directors also receive a percentage of the profits or of the gross receipts realized from exhibition of the film, including television exhibition. An additional 5% of such rerun fees and, subject to certain limitations, an additional 5% of such profit participation or gross receipt participation payments are payable to the Pension Plan, so the Plan is also being deprived of substantial funds from this source as well.

While as pointed out heretofore, the members of the Directors Guild are not necessarily copyright proprietors, they have a vital artistic interest in the motion pictures they create. The copyright laws as they presently exist adequately protect the Director's interest in the completed film. The Directors Guild of America, Inc., therefore desires to go on record against any change in the copyright laws which would create an exemption for operators of CATV Systems which would have the effect of allowing them to utilize the artistic and creative work of others without paying any compensation whatever.

STATEMENT OF NATIONAL BROADCASTING CO., INC., ON S. 1006

NBC submits this statement for consideration by the Subcommittee in its hearings on the necessity of special copyright legislation affecting CATV systems.

We urge, in general, that the development and growth of CATV systems and the public and private interest in broadcasting will best be served through the negotiation of copyright licenses within the traditional framework of the copyright laws. NBC specifically opposes, therefore, the imposition of compulsory licensing or the grant of any royalty-free statutory exemption from the copyright laws for CATV systems.

No necessity exists at this time for such legislation. Creating for one area of CATV operation a royalty-free license and leaving other areas to negotiation or compulsory licensing may result in an artificial and perhaps rigid structure which will adversely affect both the growth of CATV systems and broadcast stations, and their ability to serve the public interest.

We believe it fair to say that until recently CATV systems had no serious interest in obtaining licenses for their transmission of copyrighted material. Therefore, copyright proprietors, including networks and stations, had little or no incentive to organize or administer the grant of such licenses.

The recent decision of a Federal District Court, in a carefully reasoned and comprehensive analysis of CATV systems and their operations, concluded that under long-recognized copyright principles the use by CATV systems of copyrighted material infringed upon the rights of copyright owners. The right of authors to license for royalties their copyrighted works for CATV performance was, for the first time, specifically and explicitly confirmed.

This decision has prompted CATV systems to propose special legislation to grant to the CATV industry complete or partial immunity from the copyright laws.

Certainly there is nothing about CATV which would make it more in the public interest for copyright exemptions to be granted in that industry while regular broadcast stations, licensed by the Federal Communications Commission in the public interest and serving many more people than are served by CATV systems, are required to obtain their own copyright licenses.

As a practical matter, we believe that if the copyright problems were left to the normal market-place and if CATV systems turned their efforts to negotiating licenses in the same way as other copyright users, an equitable licensing system would emerge.

For example, we do not believe that CATV systems will have any difficulty in obtaining licenses to carry the programs of stations within whose regular market areas they are located. Such a license would be in the common interest of the stations and the networks, and within the original contemplation of the copyright owner or program supplier.

Similarly, we do not believe there will be insurmountable difficulties for networks, in the normal market-place, to obtain the CATV rights to a large majority of the programs they carry, so as to be able in turn to re-grant those rights to CATV systems which supplement the service of their regular broadcast affiliates. Network program suppliers intend the networks to have the television rights throughout the United States.

The problems involved in CATV systems extending the normal market areas of the stations they carry could be solved in much the same way as various other industries deal with such problems—negotiation and agreement. Once the patterns and procedures of obtaining rights and granting licenses to CATV systems are established, licensing will become a normal business practice. For example, a network may grant blanket licenses authorizing carriage of the entire network schedule with stated exceptions for those programs, if any, for which the requisite rights have not been obtained; a station could grant similar licenses for its non-network programs with stated exceptions, if any, for the same reason.

The exemption proposals presented to the Subcommittee, including the plan suggested by the House Subcommittee, do not negate the need for development of a licensing system. Although they would exempt CATV systems located in the basic service area of a station, they assume that a licensing plan will work for systems in other areas. We believe that a licensing plan can be developed and made to work more readily and with greater equity if applicable to all CATV systems for all areas rather than if developed just for systems located outside the basic service area of a station.

There is no basis, we believe, for the suggestion that licenses for CATV systems should be treated differently, in principle, under the antitrust laws than those in any other part of the broadcasting industry. In this connection, we take sharp issue with the statement of the Department of Justice. Further, it seems to us beyond question that in light of the service and economic interests of broadcasters in reaching the largest possible audience for their programming, the speculation expressed by the Department of Justice that copyright licenses will be improperly withheld from CATV systems or improperly granted, has no substance.

Regulation of CATV systems by the Federal Communications Commission provides no basis for any special treatment of CATV systems insofar as copyright is concerned, just as it has provided no basis for special treatment of broadcast stations.

One final fact deserves emphasis. CATV systems have been in operation well over ten years. The number of such systems has reached some 1,700, with ever increasing growth in subscribers and service. Copyright holders have not demonstrated any interest in putting CATV systems out of business or hampering their growth by copyright infringement actions.

The fact of the matter is that CATV systems are not threatened with extinction or crippling license proposals. Certainly this Subcommittee does not have before it any picture whatsoever of an industry beset by infringement suits harassed by licensors seeking unreasonable terms or at the point of financial collapse which might otherwise prompt the Subcommittee now to grant some extraordinary legislative relief.

We cannot now tell what licensing system or structure may evolve in the course of negotiations, assuming such negotiations go forward on a meaningful basis. But we believe the course of free and unrestricted licensing negotiations will afford the most realistic and desirable approach to providing for the growth of CATV systems and the interests of the public, broadcasters and copyright owners.

Until such serious and sustained negotiation attempts are made in good faith and the results of such negotiations are seen, legislation exempting CATV systems wholly or partially from the copyright laws is, we believe, neither necessary nor desirable.

INTERCOLLEGIATE CONFERENCE,
OFFICE OF COMMISSIONER OF ATHLETICS,
Chicago, Ill., August 16, 1966.

Senator JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, Old Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: Because of the effect of Community Antenna Television Systems upon the television programming and interests of its members, the National Collegiate Athletic Association (NCAA) has followed with interest your subcommittee's consideration of S. 1006 with respect to the applicability of the copyright laws to television broadcasts appropriated for simultaneous transmission via CATV.

The views expressed herein represent the position of the NCAA in this matter and on behalf of the Association it would be greatly appreciated if this letter could be included in and considered a part of your subcommittee's hearing record on S. 1006.

The NCAA is a voluntary association of more than 625 of the nation's universities, colleges and affiliated organizations. The NCAA is devoted to the sound administration of intercollegiate athletics in all its phases as a vital national resource and as an integral feature of the system of higher education in this country.

Through representative devices such as its annual convention and by referendum among the membership, the NCAA from time to time has adopted regulatory programs in various areas such as eligibility, recruiting of prospective student-athletes, and the award of financial aid to student-athletes. One of its most important regulatory programs is in the area of televising football games.

As early as 1949 the NCAA recognized the potentially devastating effects of unrestricted televising of its members' football games upon the in-person attendance at college football games which in the main provide financial support for the broad intercollegiate sports programs and related intramural, physical education and recreational activities. Concerns as to these effects were sustained and documented by extensive research, and as a consequence there was instituted in 1951 a series of television control plans developed by, approved by, and operative upon the Association's institutional members.

The stated purposes of the current plan, corresponding to like declarations in preceding years, are "to reduce insofar as possible the adverse effects of live television upon football game attendance and, in turn, upon the athletic and physical education programs dependent upon the proceeds from that attendance; to spread television participation among as many colleges as practicable; to seek in all appropriate ways possible the promotion of intercollegiate football through the use of television as a means of advancing the over-all interests of intercollegiate athletics; and to provide football television to the public to the extent compatible with the other objecives."

The plan governs all forms of simultaneous telecasts of football contests by NCAA members for the regular football season (in 1966, from September 9 through December 11). Its central feature is the offering by a national network of fourteen college football programs on thirteen specified Saturday afternoons and on Thanksgiving Day. On eight of these dates the programs consist of a single game, carried nationally, and on the remaining six dates the programs include four games, each of which is carried by the network on a regional basis. Provision is made for the geographic diversification of the televised games and rotation of the institutions appearing in the series. The design is to promote college football through nation-wide television exposure, with direct guarantee to television viewers in various parts of the nation of frequent opportunity to see teams from their own territories in action on television. At the same time

there is an effort to reduce, through diversification, the impact which persistent televising of games of great local interest would have upon other games being played concurrently.

The limited exceptions to this format include an opportunity for local televising of games of great interest in a particular college community under these circumstances:

1. A game for which tickets of admission are not available for public sale, i.e., a sell-out game, may be telecast in the local television station areas of the home and visiting colleges; and

2. a game played more than 400 miles away from a visiting team's campus may be televised in the visiting team's home television area; but

3. games may be televised under these conditions only if no appreciable damage will be done to any concurrently conducted college game. "Appreciable damage" is considered to be created by the existence of another concurrent game to which admission is charged, not itself televised or "sold-out", within 120 miles of the transmitter if it is to be telecast by a VHF station or within a 45-mile radius if a UHF station is involved.

It will be recognized that the thrust of the NCAA plan and program format, made graphic in the case of the local telecast exceptions and the "appreciable damage rule", is to provide for the measured impact of live televising upon in-person attendance at other concurrent games. The success of these control measures is attested by the overwhelming support of the program by the diversified NCAA membership and by clear evidence that record attendance at college football games (24.7 million in 1965) would not have been possible without the controls represented by the NCAA Television Plan.

The emergence of CATV systems, with a vast coverage potential, casts a distinct cloud over the effectiveness of this control program to the extent that these systems can and do appropriate the authorized telecasts for proliferated transmission into areas where only measured impact of game telecasts upon games in progress is contemplated by the control plan.

These effects are realized whenever a CATV system transmits into another region the telecast of a game otherwise limited in its authorized release to one regional network. The premises of the exceptions granted for local telecasting and the principle of the "appreciable damage rule" are completely vitiated when a CATV system appropriates the signal of the authorized local telecast and carries it into other areas where games are being played.

Although CATV may be said to be in its infancy, the NCAA already has had experience with these effects, notably in breaches of its exceptions for local televising of "sell-out" games. The Association is gravely concerned that the capacity of CATV systems to embrace broader and broader areas of coverage to the point of blanketing the nation can thwart the purposes of its protective plan.

The NCAA believes that these effects can and should be regulated through protections against unauthorized appropriation and transmission of telecasts afforded by the copyright laws. To this end we urge that S. 1006 make it explicit that live sports telecasts are subject to copyright regulation.

To accomplish this it is suggested that the clear analogy between motion pictures and electronic recordings of live sports events be fully developed by amending the definition of motion pictures in S. 1006 to include specifically television broadcasts of sports events which are recorded simultaneously with the conduct of the event and the transmission of the telecast.

Yours sincerely,

WILLIAM R. REED,
NCAA Legislative Committee.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
New York, N.Y., July 8, 1966.

THOMAS C. BRENNAN, Esquire,
Chief Counsel, United States Senate, Committee on the Judiciary, Subcommittee on Patents, Trademarks, and Copyrights, Washington, D.C.

DEAR MR. BRENNAN: In accordance with our telephone conversation, and in response to your letter of June 22, the Westinghouse Broadcasting Company, Inc. (Group W) herewith submits its proposal (draft attached) for resolution of the CATV/copyright problem. Under this proposal CATV operators in underserved areas (less than three television stations) would receive an automatic license, under copyright, to carry copyrighted works upon payment of a fee established by the statute.

Group W is licensed to operate the following radio and television stations:

WINS	New York City
WBZ/AM/FM/TV	Boston
KDKA/AM/FM/TV	Pittsburgh
KYW/AM/TV	Philadelphia
WOWO	Fort Wayne
WIND	Chicago
WJZ-TV	Baltimore
KPIX-TV	San Francisco

Two other Group W companies, Clearview of Georgia, Inc. and Micro-Relay, Inc., respectively own and operate several community antenna television systems (CATV) in Georgia and a microwave relay system serving Clearview of Georgia and other CATV systems not owned by Group W. In addition, WBC Productions, Inc. and WBC Program Sales, Inc., also Group W companies, produce television programs and syndicate them to television stations throughout the country. The undersigned is Vice President of the Westinghouse Broadcasting Company, Inc. and President of Clearview of Georgia, Inc. and Micro-Relay, Inc.

As can be seen from the foregoing, Group W has a strong interest in seeking a reasonable resolution of the CATV/copyright problem as a station operator, CATV operator and copyright owner of syndicated television programs. Group W is of the strong opinion that its proposal represents a fair resolution of the interests of the three major contending groups (CATV operators, copyright owners and broadcasters), while at the same time protecting that segment of the public which, from the viewpoint of the public interest, is not receiving what is generally conceded to be at least the minimum acceptable level of television programming—locally originated programming plus full network service.

The first concern, of course, is the public interest. It is generally agreed that television, in both its entertainment and informational aspects, satisfies a real public need. It is also generally agreed that the public interest requires Americans to have readily available to them, as a minimum, substantially the full programming of the three television networks plus locally originated programming of one or more local television stations. By and large the overwhelming majority of Americans has at least this minimum level of programming available to it at a cost of no more than the price of a television set and, occasionally, a simple outdoor antenna. For many Americans, however, this is not the case. The great majority of this latter group live in small towns which; a) are too far removed from any television station for satisfactory reception; or, b) are limited to only one or two nearby stations; or, c) are of such distance from stations as to make the technical quality of the reception inferior and completely unsatisfactory; or, d) represents a combination of the last two cases. Often residents of those communities pay as much as $200–$300 for a small tower, antenna and rotor (a price beyond the reach of many) to improve picture quality. CATV has been able to satisfy the needs of this substantial but comparatively small segment of the public (there are approximately 2,000,000 families presently subscribing to CATV) at a price which most of them can afford to pay.

Looking at the CATV/copyright issue in terms of the public interest in having a minimum acceptable level of television programming available to as much of the public as possible, there appear to be three issues: (i) if carriage of a copyrighted work on CATV is to be considered "performance" for purposes of the Copyright Act, will this ultimately result in a material reduction in the availability of this minimum level of programming to any substantial segment of the public; (ii) if the answer to (i) is yes, should the rights of the copyright owner then be restricted; and (iii) if the answers to (i) and (ii) are yes, what form should that restriction take?

In terms of television programming available to the public off the air, the economic viability of the average television station, and thus its ability to broadcast television programs to the public, has not been under any stress because the television station operator must bargain for his filmed programming in an open market. In practice the television operator is generally on a bargaining parity with the film syndicator, with the result that not only is he able to obtain programming at a price which permits him to operate at a profit, but more important, to do so without any adverse effect on the viewers in the area served by his station.

However, families which are able to receive the minimum acceptable level of television service only by paying a monthly fee to a CATV system will be directly

affected by payments which the CATV operator must make to program owners. The CATV operator cannot recapture his costs by raising rates to advertisers; he can only raise his rates to his subscribers. If his costs become too high, he may be forced to eliminate many programs or go out of business or, if he stays in business, his rates may become so high that many families will not be able to afford the service. This raises the question of the ability of the CATV operator to obtain the right to carry copyrighted works at a fair price. The average small town CATV operator simply has no bargaining parity whatsoever with the program owners, either alone or as a member of an association bargaining for him. He is unable to pick and choose among programs offered to him on a competitive basis; he must either carry the programs selected by the television stations he carries or "black out." Absolute dollars available to pay are extremely limited in comparison with the revenues of the typical film syndicator, so that he cannot use the weight of money to improve his bargaining position. (For example, most CATV systems in Chairman McClellan's home state serve less than 1,000 homes each. At an average feel of $5/month this gives a CATV operator with 1,000 subscribers a *gross* annual revenue of $60,000—not much when dealing with a major film syndication company.) Furthermore, the variety of factors involved (number of CATV systems [over 1,600 today], number of CATV subscribers, the great number of different programs broadcast on television each week, the varying number of prior runs of the different television programs, comparative value of the different programs, black and white or color, number of syndicators, etc., etc.) make any group resolution of the problem impossible.

The CATV operator would face some of these same problems when dealing with networks and local stations for the rights to carry their originally produced programming. To further complicate the issue, the networks do not control CATV rights to all of the programs they broadcast.

In short, there is no doubt that the people in small communities served primarily by CATV systems will lose even the minimum programming service because the CATV operator will be unable to obtain the right to carry many television programs at a price that he or his subscribers can afford.

Turning to issue (ii) and with respect especially to residents of these small towns it seems clear from the foregoing that the public interest requires some restriction on the rights of the copyright owner, particularly since a restriction applicable to small towns only would have such a very limited impact on his rights. (In this connection, it is very much worthy of note that although CATV has been in existence for fifteen years, film syndicators, networks and other copyright owners, apparently feeling that they were not suffering any material damage from CATV, took no action against CATV until it started to move out of the small towns into major markets. As of this date only one network (CBS) and one syndicator (United Artists) have filed actions under the present Copyright Act alleging violation of copyright.)

Group W's recommendation is for an automatic license for CATV systems operating in areas now receiving less than three Grade A signals from commercial television stations, on condition that the system pay a specified fee as provided in the attached proposal. (We recommend no fee be payable by systems carrying local stations only, on the theory that the copyright owner has already been compensated for the right of the viewers to watch his program in this situation.) In our judgment, all parties would benefit from such an arrangement. The copyright owner would be completely free to bargain for the best price he could get for his property in all markets with three or more television stations (this includes almost all of the top one-hundred markets in the country, from which the average film syndicator now derives well over 90% of his revenue). Overall we would not expect such an arrangement to have any unduly serious effect on the average film syndicator's revenue in markets below the top one-hundred, and he would now receive new revenue from CATV systems as well as recognition of his copyright by CATV. The small town CATV operator would be free to continue operating, paying for the right to carry copyrighted works at a price which is not prohibitive instead of being left at the mercy of the film syndicators whose primary interests and major sources of revenue do not and cannot include small town CATV. (With over 1,600 CATV systems in operation today, and the wide variety of factors [noted above] applicable in various combinations to each situation, it is clear that the courts could not possibly act as arbiters of an appropriate fee.) Television

stations will be left in their current satisfactory status quo. Finally, and most important, the average small town resident will be able to receive the minimum acceptable level of television programming at a price he can afford. Such a solution would seem to be clearly in the public interest.

As I indicated to you in our telephone conversation, it is my very strong impression that with perhaps a little modification here and there, the Group W proposal in fact could serve as the basis of a compromise which the various conflicting interests would find satisfactory or at least not unduly objectionable. I would be most pleased to discuss this with you further, and in any event, Group W would be happy to cooperate with the Subcommittee in any way in resolving this problem.

Yours very truly,

CHARLES C. WOODARD, Jr.,
Vice President.

I. AUTOMATIC LICENSE FOR CATV

(A) LICENSE

A community antenna television system (CATV) operating in an "inadequately served area" shall automatically have a license to carry the programs broadcast by any television station whose signal the CATV carries, concurrently with the broadcast of such programs, on condition that such CATV shall pay to such station, on a quarterly basis, that station's "television payment," and no payment to the copyright owner or other proprietor of such programs shall be required of the CATV.

Notwithstanding the foregoing provision, a CATV, wherever located, whose sole function is the distribution of the signals of "local television stations", shall automatically have a license to carry the programs broadcast by such local television stations concurrently with the broadcast thereof, and no payment to the television stations, copyright owners or other proprietors of such programs shall be required of the CATV.

(B) DEFINITIONS

1. "*Television Payment.*"—The "television payment" for any station for any quarter shall be a sum equal to 1/10 of 1% of that CATV's gross revenue from service fees (excluding installation fees) for the quarter for which payment is made.

2. "*Inadequately Served Area.*"—An "inadequately served area" is any area over which, on the date CATV service is first made available to a substantial number of residents of the area, less than three commercial television stations radiate a signal strength of 2,500 microvolts or more (whether or not residents of that area are, in fact, able to receive such signals on their home television receivers).

3. "*Local Television Station.*"—A "local television station", with respect to any area served by a CATV system, shall be a station which, on the date CATV service is first made available in such area, radiates a signal strength of 1,500 microvolts or more over such area, whether or not residents of that area are in fact able to receive such signal on their home television receivers.

II. PAYMENT ALLOCATION

(A) ALLOCATION

Each television station receiving a television payment from a CATV shall divide the money so received into a "station payment," "syndication payment" and "network payment."

(B) DEFINITIONS

1. The "station payment" shall be that sum which bears the same proportion to the television payment for the period for which allocation is made (the "accounting period") as the number of hours of programs produced by the station and broadcast by it during the accounting period bears to the total number of hours of programs broadcast by the station during the accounting period.

2. The "syndication payment" shall be that sum which bears the same proportion to the television payment for the accounting period as the number of hours of syndicated programs broadcast by the station during the accounting period bears to the total number of hours of programs broadcast by the station during the accounting period.

3. The "network payment" shall be that sum which bears the same proportion to the television payment for the accounting period as the number of hours of network programs broadcast by the station during the accounting period bears to the total number of hours of programs broadcast by the station during the accounting period.

III. Payment by Station

(A) The station shall retain the station payment.

(B) The station shall pay the network payment to the network whose programs it carried during the accounting period, or, if the station carried the programs of more than one network during the accounting period, shall divide the network payment among the networks in proportion to the amount of broadcast time devoted by the station to the programs of the respective networks during the accounting period.

(C) The station shall distribute a share of the syndication payment to each licensor of syndicated programs broadcast on the station during the accounting period on the following basis:

(1) Such amount as the station and such licensor may agree; or, if the parties are unable to reach agreement;

(2) That sum which bears the same proportion to the syndication payment for the accounting period as the amortized value (amortized in accordance with standard practice for that station) of the syndicated programs licensed to the station by such licensor and broadcast during the accounting period bears to the aggregate amortized value of all syndicated programs broadcast by the station during the accounting period.

(D) The station may, prior to making the computations specified in Paragraph II hereof, reduce the television payment in an amount equal to 2% thereof and retain such amount as reimbursement for overhead costs incurred in complying with the requirements of this provision.

(E) Payment of the syndication payment and network payment by a station shall be made on such periodic basis as the station may elect, but not less often than once per year.

IV. Restriction on License

Notwithstanding the provisions of Paragraph I hereof, the owner of any television program (including owners of live programs such as sports events) may prohibit the presentation of such program on CATV *and* television in a specified area or areas, (i) as part of a generally applied plan of limited exposure of the program, or (ii) to avoid undue exposure to liability for defamation or invasion of the right of privacy, or (iii) to comply with the so-called sports "blackout" rule; provided, that such restriction may not be imposed primarily for the purpose of avoiding the automatic licensing provisions of this Act. If, pursuant to this provision, a program is prohibited from being presented in an area which is less than the entire area of the State in which such prohibited area is located, then and in such event, unless such prohibition is imposed in compliance with the "blackout" rule, the burden of proof that the purpose of the prohibition is not to avoid the automatic licensing provisions of this Act shall rest on the party imposing the prohibition.

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