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CABLE TELEVISION COMPULSORY COPYRIGHT LICENSE FEES FOR RETRANSMISSION OF PROGRAMS ON NEW (POST MALRITE) DISTANT BROADCAST SIGNALS

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TABLE OF CONTENTS

Executive Summary..... ii

I. Introduction..... 1

II. Background..... 3

III. FCC Regulation..... 9

IV. Cable Provisions of the Copyright Act of 1976..... 10

V. Copyright Royalty Tribunal New (Post Malrite) Distant Signal Proceeding..... 15

VI. Developments After the CRT's Decision..... 19

VII. Cable Copyright Compulsory License Statutory Reform..... 27

VIII. Conclusion..... 29

EXECUTIVE SUMMARY

Cable systems originally served a function similar to that of a community television antenna in areas where reception on individual home antennas was inadequate. Copyright program owners and broadcasters asserted that cable should pay for the retransmissions of broadcast signals which contained copyrighted programs. The Supreme Court twice ruled that unauthorized retransmissions of broadcast signals containing copyrighted programs did not violate the Copyright Act of 1909.

The new Copyright Act of 1976 extended copyright protection to programs on broadcast signals which are retransmitted by cable systems. Application of copyright protection was was tempered, however, by provisions which established a copyright compulsory license for cable. Upon compliance with registration requirements, cable operators are statutorily guaranteed access to programming carried on broadcast signals in return for payment of a statutorily established fee if the retransmissions comply with applicable FCC regulations. The distribution of collected fees to the copyright owners is determined by the independent Copyright Royalty Tribunal.

The Copyright Act also empowered the Copyright Royalty Tribunal to adjust the statutory fees to take account of, among other things, changes in the signal carriage regulations of the Federal Communications Commission (FCC). Thus the Tribunal proceeded to establish rates for programming newly available to cable systems as a result of the FCC repeal of its limits on which signals cable systems could retransmit and the FCC removal of protection which had been accorded syndicated programs.

The new rates as established by the Copyright Royalty Tribunal were significantly higher than the adjusted statutory rates applicable to programming on previously available signals. Consequently a number of cable systems announced plans to drop the newly authorized programming before the decision goes into effect (which was established as January 1, 1983, by the Tribunal but postponed to March 15, 1983 by Congress).

The National Cable Television Association also appealed the Tribunal's rate decision to the United States Circuit Court of Appeals for the District of Columbia. Cable interests assert, among other arguments, that the rates are impermissibly based upon the hypothetical free marketplace value of the programming rather than the statutorily established rates, and that in any event the rates exceed the true marketplace value to cable and are therefore unreasonable and will result in lessening the diversity of programming available to the American public. Copyright interests, on the other hand, argue that the rates are fully justified and correctly based on the free marketplace value of the programming.

Congress, in addition to considering the particular issue of the Tribunal's new rates, is also examining the entire cable copyright compulsory licensing mechanism in light of cable's improved financial status and viability since the Copyright Act was passed. Cable's improved position is due at least in part to technological innovation which has increased the availability of diverse programming at reasonable rates.

This report analyzes the statutory cable copyright compulsory license mechanism and Tribunal's rate adjustment in response to the FCC's repeal of its distant signal and syndicated program exclusivity rules.

CABLE TELEVISION COMPULSORY COPYRIGHT LICENSE FEES FOR RETRANSMISSION OF PROGRAMS ON NEW (POST MALRITE) DISTANT BROADCAST SIGNALS

I. Introduction

The Copyright Act of 1976 for the first time extended copyright protection of television programs to the cable retransmission of programs carried on broadcast signals. This new cable copyright protection was tempered by complementary statutory provisions which established cable copyright compulsory licenses for the purpose of assuring that cable systems would continue to have access to the programs carried on broadcast signals. There is no charge for the compulsory license to carry local and network programs. The Act provides that cable systems are permitted to carry the non-network programs on distant broadcast signals upon payment of statutorily established fees. This provision eliminates the need for cable systems to obtain permission from either the program copyright owners or the broadcast station operators. Thus if the cable system wishes, it may utilize this mechanism in lieu of purchasing rights to the programs from the programs' copyright owners in the marketplace.

The fees paid by cable systems for this compulsory license are distributed to the copyright claimants by the Copyright Royalty Tribunal (CRT). The CRT is an independent agency established by the Copyright Act of 1976 to perform this and several other copyright-related functions. The CRT is also empowered by the Act to periodically adjust the statutory compulsory license fees based upon inflation (or deflation) and upon changes in the cable carriage rules of the Federal Communications Commission (FCC).

The FCC carriage rules, inter alia, had limited the number of broadcast signals from outside cable systems' local service areas which systems were

permitted to relay and retransmit to cable subscribers. The rules also had required deletion of syndicated programs on permitted distant signals if a local station which had purchased rights to the same programs requested their deletion from the imported distant signal.[1/]

In 1980 the FCC repealed the rules which had limited the number of distant signals which cable systems had been permitted to carry and which also provided for duplication protection of syndicated programs. The repeal became effective on June 25, 1981. Upon FCC repeal of these regulations the CRT proceeded under its statutory authority to establish cable copyright compulsory license rates for the new "post Malrite" distant signals which cable systems for the first time were permitted to carry as a result of the FCC rules change.[2/] The CRT also adjusted the statutory rates to take into account the increase in programming available for carriage by the cable systems as a result of the FCC's repeal of the syndicated program exclusivity rule.

The new CRT rate adjustments were to have gone into effect on January 1, 1983. The new rates, particularly those pertaining to carriage of new "post Malrite" distant signals, were significantly higher than many cable operators felt were justified. A number of systems announced their intention to cease retransmitting the newly-available distant broadcast signals in order to avoid paying the rates established by the CRT for such carriage.

1/ "Syndicated programs" are programs sold by independent producers and suppliers to individual television stations (usually to independent [not network-affiliated] stations) or to cable systems. Such programs may or may not have previously appeared on a broadcast network. See Besen, Manning, & Mitchell, Copyright Liability for Cable Television Compulsory Licensing and the Coase Theorem, 21 J.L.& Econ. 67, 77 (1978).

2/ The FCC's repeal of its distant signal and syndicated program exclusivity rules was judicially upheld in Malrite v. Federal Communications Commission, 652 F.2d 1140 (2d Cir.1981), cert. denied sub nom. National Football League v. Federal Communications Commission, 454 U.S. 1143 (1982).

The National Cable Television Association appealed the CRT's decision to the United States Circuit Court of Appeals for the District of Columbia and requested a stay of the CRT rates during litigation. The Court denied this request. The cable operators thereupon appealed to the Congress, which statutorily delayed the effectiveness of the CRT rates until March 15, 1983, or until a judicial appeal of the rates is decided, whichever occurs first. 3/

This report analyzes the cable copyright compulsory license rate adjustment mechanism.

II. Background

Since inception in the early 1950's, the number, size, and functions of cable systems have significantly increased. While cable systems have been growing and evolving, cable liability for the use of copyrighted programs obtained by retransmitting broadcast signals has constantly been the subject of intense debate before the FCC, the courts, and the Congress.

The original cable television systems, then appropriately known as "community antenna television systems" (CATV), merely picked clear television signals off the air by means of an elaborate antenna. These captured broadcast television signals were then retransmitted to individual cable system subscribers through coaxial cable. The CATV systems first appeared in mountainous and rural areas, where reception by home antennas often was difficult, and generally

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3/ Public Law No. 97-377, § 152, see 128 Cong.Rec. H10575 (daily ed. Dec. 20, 1982).

resulted in weak ("snowy") pictures. The use of a large antenna at the highest possible elevation for reception, followed by directing the received signals to homes by coaxial cable, enabled subscribers to view clear television broadcast pictures where otherwise the television signals would have been too weak to produce an acceptable picture. 4/

During the late 1950's cable systems began importing distant signals to increase programming with which to attract more customers. Distant signals are signals which cannot be received directly off the airwaves. By adding a distant signal or two to the cable, systems were able to attract subscribers located in areas of good local reception who otherwise would not have had reason to subscribe to the cable system.

One of the major legal issues which arose concerning cable retransmission of broadcast signals was the copyright responsibility of the cable systems for their use of the copyrighted programs contained on the retransmitted signals. Cable systems did not pay fees to owners of the copyright in the programs which were being retransmitted.

In the late 1950's and early 1960's, as cable television began to have a significant commercial impact, the issue as to whether cable should be allowed to retransmit broadcast television signals carrying copyrighted programs without paying for the copyright in the programs became the paramount cable regulatory issue. The cable copyright debate intensified when cable systems began importing distant broadcast signals. For example, broadcast stations balked

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4/ See H.R. Report No. 1635, 89th Cong., 2d Sess. 5 - 8 (1966) for a sketch of early CATV development and regulation.

at buying programs from the distributors of copyrighted programs at the normal market prices if the programs had already been shown over cable in the stations' service area, since previous showing would have lessened audience potential and consequentially lowered the advertising rates upon which stations rely to pay for the program rights. Copyright owners and television broadcasters generally agreed that cable operators were unfairly utilizing the copyright owners' property and unfairly competing with local broadcast stations by conveying programs carried on distant signals without making payment for the programs to either the copyright owners or the television broadcasters.[5/] Efforts to resolve this conflict were initiated in the courts and at the FCC and the Congress.

The FCC first regulated cable on an indirect, ad hoc basis by utilizing its powers to grant or deny microwave licenses as a means to review the use of such licenses by cable systems. Since one use for microwave licenses was to relay broadcast signals from a distant broadcast station to the cable community, microwave license proceedings presented an opportunity for the FCC to indirectly regulate cable importation of distant signals. The microwave license would be issued if the FCC agreed that a cable system should be granted the license to import a proposed distant signal. Otherwise the application for a microwave license would be denied.[6/]

5/ Meyer, The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot, 22 N.Y.L.S.L.R. 545 (1977). Unfair competition claims were judicially rejected, see Cable Vision v. KUTV, 211 F.Supp. 47 (D.C.Ida. 1962), reversed, 335 F.2d 348 (9th Cir. 1964).

6/ This indirect manner of regulation was judicially upheld. Carter Mountain Transmission Corp., decision, 32 F.C.C. 459 (1962), aff'd sub nom. Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F.2d 359 (D.C.Cir.), cert. denied, 375 U.S. 951 (1963).

The FCC first promulgated regulations indirectly applicable to cable through requirements imposed upon microwave licensees relaying distant broadcast signals in 1965.[7/] In 1966 the FCC promulgated regulations directly applicable to all cable systems.[8/] In 1968 the Supreme Court upheld the FCC's jurisdiction over cable services, finding that such jurisdiction was authorized by the Communications Act of 1934, as amended,[9/] to the extent that such FCC regulation is "reasonably ancillary to the effective performance of its responsibilities for the regulation of television broadcasting."[10/]

One week after upholding limited FCC jurisdiction over cable, the Supreme Court held that the retransmission of local broadcast signals by cable systems did not constitute infringement of property rights protected by the Copyright Act of 1909. Its decision was based upon the differences in technology and function between cable and broadcast services. Broadcasters are compensated by selling their broadcasting time and facilities to sponsors, and by selecting, procuring, and propagating to the public the programs to be viewed. Cable, on the other hand, is directly compensated by its subscribers for carriage to them of unedited retransmissions of the broadcasters' programs. In their retransmission capacity, cable operators, unlike broadcasters, are not concerned with program content, sponsorship,

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7/ Rules re Microwave-Served CATV, First Report and Order, 38 F.C.C. 683 (1965).

8/ CATV, Second Report and Order, 2 F.C.C.2d 725 (1966).

9/ 47 U.S.C. §§ 151 et seq. (1976).

10/ United States v. Southwestern Cable, 392 U.S. 157 (1968). The "reasonably ancillary" standard was refined in United States v. Midwest Video Corp., 406 U.S. 649 (1972)(Midwest Video I) and Federal Communications Commission v. Midwest Video Corp., 440 U.S. 689 (1979)(Midwest Video II).

or arrangement. Taking these differences into account, the Supreme Court held that the Copyright Act of 1909 did not apply to cable retransmissions because cable systems, in merely retransmitting broadcast signals to those additional viewers who are willing to pay for the retransmission service, did not "perform" the programs they retransmitted within the terms of the Copyright Act of 1909.

The Supreme Court rejected arguments based upon the technical similarities between cable systems and broadcast stations and on cable's impact upon broadcast interests and copyright owners. Instead, the Supreme Court adopted a functional test which led it to its conclusion that at least in regard to the "local signal" question presented in this case, cable operated more as a viewer than as a broadcaster, and therefore did not incur copyright liability for retransmitting local signals to its subscibers. 11/

In 1974 the Supreme Court reaffirmed its 1968 decision and extended its holding to include cable retransmissions of distant signals. The Court held that the act of retransmitting distant as well as local signals without the permission of the program copyright owner or the broadcast station operator did not violate the Copyright Act of 1909. The decision clarified that the Copyright Act of 1909 did not protect programs transmitted on broadcast signals from being retransmitted by cable operators. 12/

11/ Fortnightly Corp. v. United Artists Television, 396 U.S. 390 (1968).

12/ Teleprompter v. Columbia Broadcasting System, 415 U.S. 394 (1974).

Amendment of the Copyright Act to extend protection to broadcasters and copyright owners, whose signals and programs were being widely retransmitted without permission or payment, was considered by the Congress in the context of an already ongoing examination of the copyright laws.

In 1971, an industry consensus agreement was reached by the interested parties themselves through the mediation efforts of the White House Office of Telecommunications Policy with cooperation from the Congress and the FCC. The broadcasters and copyright owners, primarily represented by the National Association of Broadcasters (NAB) and the Motion Picture Association of America (MPAA), and the cable operators, primarily represented by the National Cable Television Association (NCTA), agreed to support both promulgation by the FCC of specific cable carriage rules and enactment by the Congress of specific statutory copyright provisions applicable to cable retransmissions.[13/] The agreement was implemented in substantively the agreed form by subsequent promulgation of rules by the FCC in 1972[14/] and enactment of certain provisions of the Copyright Act in 1976.[15/]

13/ The 1971 "consensus agreement" is set out at 36 F.C.C.2d 284-287 (1972).

14/ Cable Television, Report and Order, 36 F.C.C.2d 143 (1972).

15/ Public Law No. 94-553, 17 U.S.C. §§ 101 et seq. (Supp. V 1981).

III. FCC Regulation

In 1972 the FCC promulgated cable regulations that included rules which in effect implemented part of the 1971 industry consensus agreement. 16/ The subsequent repeal of two of these rules, which became effective in 1981, is at the center of the present controversy. The two are colloquially known as the distant signal rule and the syndicated program exclusivity rule.

The distant signal rule limited the number of signals from distant stations (those outside a cable system's service area) that a cable system could relay into the area and retransmit to its subscribers over the cable. The limit varied according to market size and the number of over-the-air signals available within the market. 17/

The syndicated program exclusivity rules provided that local television stations which had exclusive exhibition rights to a non-network program could, in certain situations, require a local cable system to delete that program from imported distant signals. Copyright owners were also empowered by the FCC regulations to require deletion of their syndicated programs from cable

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16/ See Geller v. Federal Communications Commission, 610 F.2d 973 (D.C.Cir. 1979), holding that the FCC's promulgation of certain cable rules in accord with the 1971 industry consensus agreement was based solely upon the Commission's determination that the public interest would thereby be served because the rules would facilitate passage of new copyright legislation. The Court held that since such legislation had in fact been enacted in 1976, the FCC must re-examine the continued validity of the rules since the original purpose for their adoption had been executed and therefore could not justify their continued application. The FCC thus was under judicial order to determine whether the rules still served the public interest. As a matter of fact, the FCC was already reconsidering the rules when the decision was handed down, see note 17, infra.

17/ 47 C.F.R. §§ 76.59(b)-(e), 76.61(b)-(f), and 76.63 (1980), repealed, CATV Syndicated Program Exclusivity Rules, Report and Order, 79 F.C.C.2d 663 (1980), aff'd sub nom. Malrite v. Federal Communications Commission, 652 F.2d 1140 (2d Cir. 1981), cert. denied sub nom. National Football League v. Federal Communications Commission, 454 U.S. 1143 (1982).

systems for a period of one year from the date that the program was first licensed or sold as a syndicated program to a television station for broadcast.[18/]

IV. Cable Provisions of the Copyright Act of 1976

Enactment of cable provisions as part of the Copyright Act of 1976 completed implementation of the general provisions of the 1971 industry consensus agreement.[19/] The Act's provisions may be viewed as complementary to the FCC carriage regulations promulgated after the agreement, which themselves had been adopted only after consultation with the Congressional committees which had been considering the copyright legislation.[20/]

The Copyright Act of 1976 for the first time extended general copyright protection to programs on broadcast signals which are retransmitted by cable systems. This extension of copyright protection to cable retransmissions was tempered by allowing cable operators the choice of either purchasing rights to the programs from the copyright owners, or paying a statutory copyright royalty fee for a compulsory license to retransmit the programs carried by those broadcast signals which cable operators were permitted to retransmit by the FCC cable carriage regulations. No payments were required for the carriage of programs on local signals and the national networks.

18/ 47 C.F.R. §§ 76.151-76.161 (1980), repealed, see note 17, supra.

19/ See Geller v. Federal Communications Commission, supra note 16, for a detailed discussion concerning implementation of the 1971 industry consensus agreement.

20/ A copy of the official correspondence exchanged between the Chairman of the FCC and the Chairman of the Senate Committee is reproduced at 36 F.C.C.2d 287 (1972).

The independent Copyright Royalty Tribunal (CRT) was established to, inter alia, periodically adjust the statutory fees and to distribute the collected royalty fees to the copyright owners whose works were being retransmitted on cable. The CRT was granted explicit authority to periodically adjust the compulsory license fees to take into account inflation (or deflation), changes in cable system subscriber rates, and changes in FCC carriage regulations.[21/]

In certain specified instances the Copyright Act of 1976 exempted cable retransmission from liability for copyright infringement: when the retransmission was (1) used exclusively within a hotel or similar establishment to retransmit the signals of local broadcasters without direct charge to the recipients; (2) used for certain educational purposes; (3) retransmitted within the business of a passive carrier;[22/] retransmitted by the government or a nonprofit organization not for commercial advantage nor for any charge except that necessary to maintain and operate the service; or (5) carried unaltered to comply with FCC carriage regulations if a pay broadcast signal.[23/]

21/ 17 U.S.C. §§ 111, 801 (Supp. V 1981).

22/ This copyright exception for retransmission by "passive carriers" has been subject to judicial scrutiny in two notable cases involving satellite common carriers engaged in the business of retransmitting broadcast signals from their cities of origin to cable systems all over the nation. See Eastern Microwave v. Doubleday Sports, 691 F.2d 125 (2d Cir. 1982), cert. denied, 51 U.S.L.W. 3611 (Feb. 22, 1983), and WGN v. United Video, 693 F.2d 622, rehearing denied, 693 F.2d 628 (7th Cir. 1982).

23/ 17 U.S.C. § 111(a)(Supp. V 1981).

The cable systems are required to comply with reporting, filing, and fee payment requirements if they choose to retransmit programs carried on broadcast signals under authority of the statutory cable copyright compulsory license. The compuslory license provides for the cable retransmission of the programs on a distant broadcast signal without permission of either the broadcaster of the copyright owner.

> . . .[S]econdary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signal comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.
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> [24/]

The Register of Copyrights collects the cable copyright compulsory license fees and associated registration date.[25/] The CRT, which is an independent Presidentially-appointed agency established by the Copyright Act (and not part of the Copyright Office) annually distributes the royalties among copyright claimants whose works have been used in cable retransmissions of distant non-network broadcast signals containing television programs.[26/] The CRT is also granted limited authority to adjust the statutory cable compulsory

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24/ 17 U.S.C. § 111(c)(1)(Supp. V 1981).

25/ 17 U.S.C. § 111(d)(Supp. V 1981); See implementing regulations at 37 C.F.R. § 201 (1982).

26/ The CRT's first distribution of cable copyright compulsory license royalties was substantially upheld, see National Assoc. of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C.Cir.1982).

license rates to reflect (1) inflation and deflation; (2) changes in average cable rates for their retransmission services; (3) changes in FCC rules to allow additional distant signal importation; and (4) changes in FCC syndicated program and sports program exclusivity rules. 27/

The CRT adjusted cable copyright compulsory license rates in 1981 in accordance with the statutory provisions which authorized and directed the CRT to periodically adjust the statutory carriage rates to take into account (1) inflation (or deflation) and (2) changes in average subscriber rates for cable broadcast signal retransmission service. Its decision was appealed to and affirmed (except for a mathematical error) by the United States Court of Appeals for the District of Columbia. 28/

The present cable copyright compulsory license rates are the statutory rates established by Congress in section 111(d)(2) of the Copyright Act of 1976, as adjusted by the CRT in 1981 (for inflation) and amended by the CRT in 1982 to take into account the mathematical error determined by the Circuit Court of Appeals, supra. The rates are set in terms of a percentage of the systems' basic gross revenues. Basic gross revenues are the revenues collected by the systems for providing "basic" service, i.e., broadcast signal retransmission service. 29/ Smaller systems, defined as those with semiannual basic gross

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27/ 17 U.S.C. § 801(b)(2)(Supp. V 1981).

28/ 1980 Adjustment of the Royalty Rate for Cable Systems, Final Rule, 46 Fed. Reg. 892 (Jan. 5, 1981), substantially upheld, National Cable Television Assoc. v. Copyright Royalty Tribunal, 689 F.2d 1077 (D.C.Cir.1982). In the same proceedings the CRT rejected requests to also adjust the compulsory license rates at the same time to take into account changes in average cable rates for retransmission services.

29/ Therefore, conversely, revenues collected by cable systems for other services, such as pay television programs, carriage of cable networks, videotex and teletext, electronic mail, etc. are not part of the cable copyright fee calculation.

revenues of less than $214,000, pay compulsory license fees calculated as a flat rate based strictly on their basic gross revenues. This fee for smaller systems thus does not take into account the number or type of distant broadcast signals carried by such smaller systems. 30/

The percentage of basic gross revenues charged larger systems (those with over $ 214,000 basic gross revenues semiannually) is a function of the amount of distant, non-network programming carried by such cable systems, measured in units designated "distant signal equivalents" (DSEs). Each distant independent broadcast signal counts as one unit; each network distant signal and each noncommercial educational distant signal counts as one-quarter unit; all three are subject to certain carriage qualifications. 31/

The minimum compulsory license fee for the larger cable systems is 0.799 of 1 per centum of basic cable gross receipts for retransmitting any non-network programming beyond the local service area of the primary transmitter. This mimimum fee may be applied against additional fees, if such are applicable: 0.799 of 1 per centum for the first DSE; 0.503 of 1 per centum for each of the second, third, and fourth DSE; and 0.237 of 1 per centum for the fifth and each additional DSE. 32/

30/ 17 U.S.C. § 111(d)(2)(C),(D)(Supp. V 1981).

31/ 17 U.S.C. § 111(f)(Supp. V 1981).

32/ 17 U.S.C. § 111(d)(2)(B)(Supp. V 1981) as adjusted by the CRT, 1980 Adjustment of the Royalty Rate for Cable Systems, Final Rule, 46 Fed.Reg. 892 (Jan. 5, 1981), substantially upheld, National Cable Television Assoc. v. Copyright Royalty Tribunal, 689 F.2d 1077 (D.C.Cir.1982), adjusted rates amended to accord with decision, 47 Fed.Reg. 44728 (Oct. 12, 1982).

V. Copyright Royalty Tribunal New (Post Malrite) Distant Signal Proceeding

In 1980 the FCC decided to repeal its distant signal carriage and syndicated program exclusivity rules. The rules had been promulgated in part to implement the 1971 industry consensus agreement.[33/] When the FCC repeal of these rules went into effect in June, 1981, cable systems for the first time in the "modern cable era" were permitted to carry any number of distant broadcast signals and were not required to delete from those signals syndicated programs which were duplicated on local signals. The cable systems were, of course, required to pay the cable copyright compulsory license royalty fee in return for carrying the signals, supra.

FCC repeal of the rules resulted in application of the provision of the Copyright Act of 1976 which permits the CRT to adjust the compulsory license royalty fees in the event that the FCC amends its distant signal cable carriage regulations

> to insure that the rates for the additional distant signal equivalents . . . are reasonable in light of the changes effected by the amendment . . . . In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users . . . .
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> [34/]

33/ These rules originated with protections included in FCC CATV rules promulgated in 1965 and 1966, see notes 7 and 8, supra. The rules are defined at pages 9-10, supra.

34/ 17 U.S.C. § 801(b)(2)(B)(Supp. V 1981).

The Copyright Act of 1976 also authorized the CRT to adjust the compulsory license royalty rates if the FCC changes its syndicated program exclusivity regulations

> to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.
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> 35/

After the FCC repealed the distant signal carriage and syndicated program exclusivity rules, the CRT was petitioned by both the copyright owners and the cable interests to initiate a proceeding to adjust rates in accordance with this statutory authorization. The CRT did so, which included twenty three days of hearings during the summer of 1982. The CRT determined that its statutory mandate was limited to fixing copyright compulsory license rates for new distant signals (those which cable systems had been prohibited from carrying before the FCC repealed its rules, also called "post Malrite" signals after the name of the court decision affirming the FCC's action, supra note 2) and for carriage of previously deleted syndicated programs.

In a determination crucial to the rates established by the final decision, the CRT decided that the new rates need not be limited to the rates established in the Copyright Act of 1976 for carriage of distant signals under the FCC's former rules. Rather, the CRT interpreted its authority to require that it consider what the "reasonable compensation" should be for the copyright to the programs carried on the new signals authorized by the rules change. In so doing the CRT rejected assertions made before it that the

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35/ 17 U.S.C. § 801(b)(2)(C)(Supp. V 1981).

statutory fees were directly related to the value of the programs contained on the signals:

> It is also clear from the legislative history that, as a policy matter, we were not expected to look to the statutory schedule for guidance as to the measure of reasonable compensation. Those rates were adopted by the Congress to implement an agreement between the NCTA and MPAA, in which the fee schedule was only one of a number of accommodations reached on cable copyright issues.
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> * * *
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> The Tribunal judged that the current statutory rates could not be considered those that would result from full marketplace conditions if the compulsory license did not exist. The rates were established as a legislative compromise, they are arbitrary, and they were intended to require only a minimum payment on the part of cable operators.
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> 36/

The CRT also explicitly considered statements by the legislative drafters of the Copyright Act's provisions that they had not contemplated the FCC's complete elimination of the rules, but rather, had thought only that the FCC might adjust the rules as marketplace conditions changed. The CRT therefore concluded that its task was the admittedly difficult one of accommodating the statutory language to the unforeseen circumstances of the FCC's complete repeal of the distant signal and syndicated program exclusivity rules.

36/ Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, Final Rule, 47 Fed.Reg. 52152, 52154 (Nov. 19, 1982), appeal pending sub nom. National Cable Television Association v. Copyright Royalty Tribunal, United States Court of Appeals for the District of Columbia, No. 82-2389.

The CRT interpreted its authority to require setting a royalty rate for a cable copyright compulsory license based upon the value of the additional programs available to cable systems as a result of the rules change. The CRT determined that value to be directly related to the programs' worth in the free marketplace, subject to adjustment to take into account the fact that cable operators do not receive advertising revenues for carrying the programs and also do not control selection of the programs. Thus, the CRT reasoned, the programs are worth somewhat less to cable systems than they are worth to broadcast stations. The rate set for new distant signals was established by the CRT at 3.75 per centum of basic gross cable revenues for each distant signal equivalent. The CRT also adjusted the rates to account for the increase in programming on distant signals available as a result of the FCC's repeal of its syndicated program exclusivity regulations.[37/]

The rates for the cable copyright compulsory license for the programs available due to the FCC's repeal of its distant signal rules are set significantly higher than the rates for programming on previously authorized distant broadcast signals. Each new DSE is to cost cable systems 3.75 per centum of its basic gross revenues, compared to the rate schedule beginning at 0.799 per centum and declining to 0.237 per centum per signal for previously authorized signals (which still applies to those signals).[38/]

37/ Id.

38/ See pages 13-14, supra, concerning the present rates for previously authorized signals.

VI. Developments After the CRT's Decision

Cable interests, led by the National Cable Television Association (NCTA), have objected to the CRT-established rates for new DSEs. NCTA appealed the CRT decision to the United States Circuit Court of Apppeals for the District of Columbia, and moved that court for, inter alia, a stay of the CRT's decision. This request was denied by the court on December 14, 1982.[39/]

The NCTA and Ted Turner of the Turner Broadcasting System (owner of WTBS, a "superstation" in Atlanta programmed for national cable carriage) also petitioned Congress for relief from what they view as excessive rates for cable carriage of the new DSEs allowed by the FCC rules change. It is reported that a significant number of NCTA's members have indicated their intention to cease retransmitting, or have already ceased retransmitting, the new DSEs because the programs on the new DSEs are not worth 3.75 per centum of basic gross revenues to the cable operators.[40/] Dropping new DSEs would, it is asserted, lessen the number of information sources available to the public over cable (and, of course, potentially affect demand for cable service). Dropping the new DSEs would also prevent realization of the FCC purpose in repealing its rules insofar as that purpose was to allow increased distribution of distant broadcast signals as a means of increasing the diversity of programs available to the American public. Ted Turner in addition argued from the standpoint that his station's signal would be dropped by some cable systems (which would decrease the station's advertising base) without his being able to directly control the reasons for the drop.

39/ National Cable Television Association v. Copyright Royalty Tribunal, No. 82-2389 (D.C.Cir. Dec. 14, 1982)(order denying motion for stay of CRT rates pending litigation).

40/ See 104 Broadcasting 8 (No. 10, March 7, 1983).

Cable interests first attempted to have a temporary statutory postponement of the CRT decision added to a bill which would have revised the cable compulsory license provisions of the Copyright Act and made related changes to the Communications Act, H.R.5949, 97th Cong., 2d Sess.[41/] This bill had passed the House of Represenatives and was pending in the Senate when the CRT handed down their cable copyright compulsory license rate decision, supra. However, at a joint committee hearing held by the Senate Committee on Commerce, Science, and Transportation and the Senate Committee on the Judiciary on December 3, 1982, it became apparent that the parties to the original compromise embodied in H.R.5949 did not agree on amending the bill to postpone the CRT rate decision. Furthermore, other objections were raised to the bill's provisions by other parties. The result of the disagreement was that the bill was never reported to the Senate floor.

The cable interests thereupon approached the Senate Appropriations Committee, which had before it a continuing appropriations resolution to fund those agencies of the Government for which fiscal year appropriations had not been passed. The cable interests were successful in having their amendment attached to the continuing resolution which, as enacted, delays the effectiveness of the CRT rate decision until March 15, 1983, or until the United States Circuit Court of Appeals for the District of Columbia decides the judicial appeal of the CRT decision, whichever first occurs.[42/]

Cable efforts to have the effect of the statutory postponement extended beyond March 15, 1983, have not been successful as of the date of this

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41/ The provisions of H.R.5949 are discussed infra.

42/ Public Law No. 97-377, § 152, see 128 Cong.Rec. H10575, H10639 (daily ed. Dec. 20, 1982).

report (March 14, 1983). In February, representatives of the cable industry appeared before the Senate Committee on Commerce, Science, and Transportation during hearings on a general cable regulatory bill (S.66, 98th Cong., 1st Sess.) but their suggestion to extend the statutory postponement of the CRT rate decision by amending this bill was rebuffed.[43/]

In a separate move, the NCTA and Turner Broadcasting petitioned the United States Circuit Court of Appeals for the District of Columbia to reconsider its December denial of a stay of the CRT decision. The two petitions argue, inter alia, that the high compulsory license rate for new DSEs is resulting in fewer DSEs in many markets, and the Congress's enactment of a postponement of the CRT decision should be read as an indication of the will of Congress that interim relief pending litigation is appropriate and should be granted.[44/] The Court again declined to issue the requested stay on March 14, 1983.

Since neither Congress nor the court acted to postpone the CRT rate decision, the new rates became effective on March 15, 1983. Cable systems retransmitting distant broadcast signals that would not have been permitted before the FCC repeal of its its distant signal and program exclusivity rules (which went into effect on June 25, 1981) will be required to pay the new rate of 3.75 per centum of their basic gross revenues for a cable copyright compulsory license to retransmit the programs on each newly authorized (post Malrite) DSE. This compares

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43/ 104 Broadcasting 35 (No. 8, Feb. 21, 1983).

44/ Id.

with the rate of 0.799 per centum or less (dependent upon the total number of DSEs carried) for previously authorized DSEs.

The Copyright Act of 1976 directs the Copyright Office to collect the cable copyright compulsory license fees. The Register of Copyrights has announced that fees will be pro-rated for the January 1 to June 30, 1983, accounting period for those systems carrying post Malrite DSEs on or after March 15. Systems dropping post Malrite DSEs on March 14 or before will be liable for the adjusted statutory rate (not the 3.75 per centum rate) for their carriage after January 1, which is due for any carriage whatsoever during the semiannual accounting period. Thus systems which drop post Malrite DSEs will pay the adjusted statutory rate for the entire accounting period.[45/] (Under Copyright Office regulations which provide for the collection of cable copyright compulsory license fees, a cable system is generally liable for the semiannual fee for any distant signal carried during the semiannual accounting period, whether or not the signal was carried for the entire period.[46/]) It is to be emphasized that the new (higher) rate applies only to DSEs which cable systems had been prohibited from retransmitting prior to June 25, 1981, by the former FCC rules.

On February 4, 1983, the Copyright Office issued a notice of inquiry to clarify its interpretation of the CRT decision and its intended application of the Congressionally-enacted postponement.[47/] The Office restated the CRT's determination that the cable copyright compulsory license fees would

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45/ 104 Broadcasting 41 (No. 10, March 7, 1983).

46/ 37 C.F.R. § 201 (1982).

47/ Compulsory License for Cable Systems Inquiry, Notice of Inquiry, 48 Fed.Reg. 6372 (Feb. 11, 1983).

apply to all DSEs

> not represented by the carriage of:
> (1) Any signal which was permitted (or, in the case of cable systems commencing operations after June 24, 1981, which would have been permitted) under the rules and regulations of the Federal Communications Commission in effect on 24, 1981, or
> (2) A signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or
> (3) A signal which was carried pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules were in effect on June 24, 1981.

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The Copyright Office requested comments on a number of technical questions concerning interpretation of the regulations, the CRT decision, the underlying statutory authority, and certain relevant FCC regulations.

The major interpretational question concerns whether substitution at the lower rates will be allowed for "specialty" signals permitted but not carried by cable. The Community Antenna Television Association (CATA) and others argue that prior to repeal of the FCC's distant signal rules all cable systems were permitted to carry the signals of any "specialty station", which was defined in the FCC regulations as a commercial television broadcast station that generally carries foreign language, religious, and/or automated programming for at least one-third of the average broadcast week, including one-third of weekly prime time hours. 49/ It is argued that a specialty station, the signal of which was exempt from the FCC's distant signal carriage limitations, is an "independent station"

48/ 37 C.F.R. § 308.2 (1982), as amended, 47 Fed.Reg. 52146, 52159 (Nov. 19, 1982); see also Copyright Office Notice of Inquiry, supra note 47 at 6373.

49/ 47 C.F.R. §§ 76.5(kk); 76.59(d)(1) (cable systems in smaller television markets); 76.61(e)(1) (cable systems in the top 50 major television markets); 76.63(a) (cable systems in the second fifty major television markets), repealed effective June 25, 1981, see note 2, supra.

as defined by section 111(f) of the Copyright Act: "a commercial television broadcast station other than a network station."[50/]

According to the CATA, there were at least 33 "specialty stations" which were authorized to be carried by all cable systems prior to the FCC's repeal of the distant signal rules. Since these are "independent" stations under the terms of section 111(f) of the Copyright Act, CATA and other cable operators argue that cable systems may carry these thirty-three stations, or substitute other independent signals for them (such as WTBS, WGN, and/or WOR, all of which are already available to cable operators), without being obligated to pay the post Malrite DSE compulsory license fee.

The Copyright Act itself provides that the the CRT, in adjusting rates as a result of an FCC rules change, shall not adjust royalty rates with respect to any DSE represented by

> (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or non-commercial educational) substituted for such permitted signal. (Emphasis added.)
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> [51/]

This language was repeated in the CRT decision, supra page 23, except that the CRT grandfathered carriage under the FCC's rules as of June 24, 1981, instead of April 15, 1976. This difference is significant because the FCC specialty station rules became effective on April 19, 1976.[52/] Thus if the CATA interpretation is ultimately determined to be correct, it would be

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50/ 17 U.S.C. § 111(f) (Supp. V 1981).

51/ 17 U.S.C. § 801(b)(2)(B) (Supp. V 1981).

52/ Cable Television Services, Final Rule, 41 Fed.Reg. 10895 (March 15, 1976).

effective by virtue of the grandfather date in the CRT regulation, not that of the statute. The CRT, of course, may possibly be able to change the date in their regulation to that in the statute.

The CATA interpretation would appear to frustrate the Congressional purpose of the rate adjustment provisions of the Copyright Act of 1976 since the adjusted rates would not apply to any known or likely cable carriage and consequently would have little practical meaning. Allowance for carriage of thirty-three additional distant signals is more than any known cable system would carry. A general rule of statutory construction provides that a court interpreting a statute is not bound even by the literal meaning of words where to give them their usual meaning would lead to an absurd or futile result, or one that would thwart the legislative purpose of the statute.[53/]

It is noteworthy that under the former FCC regulations, cable systems could not have substituted other independent signals for the permitted specialty station signals. Although on its face section 111(f) of the Copyright Act defines "independent station" to encompass stations classified as "specialty stations" by the FCC, the CRT regulation might be interpreted such that the parenthetical listing of three types of signals are mere examples and not necessarily an all-inclusive listing of such signal types. It might also be interpreted to mean that permitted signals actually carried by cable systems are exempt from the new rates, not those which were permitted but not carried. A third possible interpretation is that the definition of independent

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53/ Trans Alaska Pipeline Cases, 436 U.S. 631, 643 (1978), quoting Commissioner v. Brown, 380 U.S. 563, 571 (1965). See also Saginaw Broadcasting v. Federal Communications Commission, 96 F.2d 554, 558 (D.C.Cir.), cert. denied, 305 U.S. 613 (1938).

station in section 111(f) is, by its explicit terms, applicable solely to section 111 and therefore not necessarily applicable to the term "independent station" as that term is used in section 801(b)(2)(B) of the Copyright Act (which is the statutory origination of the language in question).

The Copyright Office, in its notice of inquiry, supra, requested comments on, inter alia, the applicability of the former FCC specialty station regulations to the CRT regulation. In a letter of opinion dated March 11, 1983, the Register of Copyrights expressed the opinion that applying the lesser royalty rate to carriage of independent non specialty stations substituted for specialty stations never carried by a cable system, even though carriage was permitted by the FCC regulations, would be inconsistent with the intent of Congress.

> No royalties were ever paid for nonexistent DSE's for specialty stations never carried; therefore, carriage now of an additional nonspecialty independent station, whose carriage was not permitted under the FCC's former distant signal rules, presumably represents "additional distant signal equivalents" within the meaning of section 801(b)(2)(B), as to which Congress intended that the CRT should establish new reasonable rates.
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The Register also notes:

> As stated in the notice of inquiry, the Copyright Office does not intend to take any steps to implement the October 20, 1982 rate adjustment pending a final decision by the Court of Appeals for the District of Columbia. The Office will, however, accept royalty payments at the levels set by the October 20, 1982 rate determination, and will examine the Statements of Account at an appropriate time.
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> 55/

54/ Letter of opinion from David Ladd, Register of Copyrights, to cable operators, dated March 11, 1983.

55/ Id.

VII. Proposed Amendments to the Cable Copyright Compulsory License Provisions

During the 97th Congress the cable copyright compulsory license provisions of the Copyright Act of 1976 were reviewed in light of changes which have occurred in cable technology and financial soundness since they were enacted. An early bill, H.R.3844, would have repealed the compulsory license for carriage of programs on distant signals, thereby requiring cable to purchase in the marketplace permission to use non-network broadcast programming imported from outside the local service area. Although the Chairman of the FCC, the Register of Copyrights, and the Administration all endorsed this basic approach,[56] ultimately this proposal was rejected by a 4-3 vote of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice.[57] Instead, the Subcommittee, and later the full Committee on the Judiciary and the House of Representatives passed a compromise bill, H.R.5949, which embodied a compromise subscribed to by the copyright owners, cable interests, and broadcasters. H.R.5949 would have continued the basic provisions of the Copyright Act of 1976 encompassing the cable copyright compulsory license mechanism (which cable interests favored), statutorily enacted a modified version of the FCC's "must carry" rules[58] (which broadcasters favored), and statutorily enacted enacted provisions to protect the exclusivity of syndicated programs (which copyright owners favored).

56/ Copyright/Cable Television, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 1st & 2d Sess. 900, 903 (Register of Copyrights), 702 (Assistant Secretary of Commerce)(1981); 102 Broadcasting 38 (No. 5, Feb. 1, 1982)(Chairman of the FCC).

57/ 101 Broadcasting 27-29 (No. 25, Dec. 21, 1981).

58/ The FCC's "must carry" rules require cable systems to carry all local broadcast signals, 47 C.F.R. §§ 76.57-76.65 (1981). A Turner Broadcasting System petition to repeal these rules is pending at the FCC, No. RM-3786.

H.R.5949 was not reported to the Senate floor, however, after joint hearings by the Senate Committee on Commerce, Science and Transportation and the Senate Committee on the Judiciary at which cable interests insisted that a provision to override the CRT post Malrite signal rate decision be added to the bill. The copyright interests would not agree to this addition. Sports interests also expressed opposition to the bill because their particular interests had not been incorporated in the bill when it was before the House of Representatives.

The outlook for enactment of amendments during the 98th Congress to the Copyright Act's compulsory license provisions is unclear. The parties directly affected — the copyright owners, cable system operators, and broadcasters — have failed to reach a compromise agreement on acceptable legislation as of the date of this report (March 14, 1983).

On the House side, H.R.1388, introduced by Representatives Frank and Sawyer (both Members of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice with jurisdiction over copyright matters) would repeal the general cable copyright compulsory license mechanism as of January 1, 1985. All Cable systems would be permitted to carry without payment all local signals and signals containing network programming. In addition, all cable systems serving 2500 or fewer subscribers would be permitted to carry all broadcast signals, whether local, network, or distant, without payment. The bill also would repeal the FCC's must carry regulations, which require cable systems to carry all local broadcast signals. This would permit cable systems to select which local and/or network signals to retransmit (if any). Carriage of independent distant signals would depend upon the cable system obtaining permission for carriage of the programs contained on the signal.

VIII. Conclusion

The debate over whether to amend the statutory provisions of the Copyright Act of 1976 which provide cable systems the option to utilize a copyright compulsory license to retransmit distant broadcast signals is taking place in the context of the generally enhanced financial status and growth of cable systems. The development of satellite transponders with the requisite capacity to relay multiple television signals with minimal signal degradation is the principal technological advance which has simplified the nationwide distribution of distant broadcast signals and permitted the formation of viable cable origination networks which obtain the rights to their programming in the free marketplace (such as Home Box Office (HBO), Cable News Network (CNN), etc.). Such satellites became generally available for these purposes in 1977, the year after the Copyright provisions were enacted. This technology resulted in the increased availability of programming for cable systems at substantially less cost than otherwise would have been possible, which in turn enhanced cable penetration of lucrative urban markets.

Broadcast and program copyright interests assert that these new marketplace conditions have eliminated the need for the cable copyright compulsory license, which was enacted to ensure and foster cable access to diverse program sources at a time when there were no other comparable sources for complete channels of programming On the other hand, cable interests assert that the mechanism is necessary in order for cable to continue to provide a wide range of diverse programming to the public.

The cable copyright compulsory license mechanism was enacted when broadcast signal retransmissions contained the principal (and, on some systems, only) programming on cable systems. The legislative history demonstrates Congressional concern with a perceived inability of cable to bargain with the multitude of

program owners and broadcasters in the marketplace for the right to use the programming. The concerns included fears that the resultant costs would be prohibitive for cable systems and that broadcasters might refuse to deal with a cable, a potential competitor. Copyright interests assert that development of successful cable origination networks, such as HBO and CNN, supra, which purchase their programs in the marketplace, proves the ability of cable to bargain in the marketplace for programming without the governmental intervention of a compulsory license.

These issues highlight a continuing tension between two constitutionally-based principles: that financial interest in the creation of intellectual property should be protected,[59] but that the free flow of information shall be guaranteed.[60]

Congress reconsidered the cable copyright compulsory license during the last (97th) Congress. This reconsideration was in large measure due to the FCC's repeal of its distant signal and syndicated program exclusivity regulations which had been part of the 1971 compromise package encompassed by both the FCC regulations and the cable provisions of the Copyright Act of 1976. As

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59/ U.S. Const., Art. 1, § 8, authorizes Congress to secure "for limited times to authors and inventors the exclusive right to their respective writings."

60/ U.S. Const., Amend. I, prohibits Congress making any law "abridging the freedom of speech, or of the press." This prohibition has been held to be applicable to the States by the due process clause of the Fourteenth Amendment, see for example, Young v. American Mini Theatres, 427 U.S. 50, 52 n.1 (1976), and to encompass the public interest in wide dissemination of diverse viewpoints, see Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 367 (1969).

a result of the FCC repeal of its regulations, the CRT adjusted the cable copyright compulsory license rates for the newly available programming and signals, as authorized by the Copyright Act of 1976. The CRT determined that its statutory authority required it to determine the "free market" value of the additional programming available to cable as a result of the FCC action and to set that value as the fee for the compulsory license to carry such programming.

Cable operators object to the new rates, arguing that the CRT rates for new DSEs are much higher than their worth. A number of cable systems have indicated that they have, or by the March 15 effectiveness of the new rates will, drop carriage of the new DSEs in order to avoid paying the higher charges for the compulsory license for the programs on these signals. The new rates, cable operators assert, contravene the Congressional purpose behind enactment of the cable copyright compulsory license to make available to the public diverse sources of programming. It is also asserted that the intent of the FCC when repealing its former rules to increase the public's access to diverse sources of programming is also being contravened by the high copyright compulsory license rates for the new DSEs. An argument has been made, however, that program diversity is not necessarily sacrificed by the higher compulsory license rates because there exist cable originated networks which individual cable systems could (and are) carrying on channels that otherwise would carry the post Malrite distant broadcast signals. 61/

61/ See Cablevision, January 17, 1983 at 55 for a report that certain cable originated networks are being carried by some cable systems in place of post Malrite DSEs as a result of the CRT's compulsory license rate decision.

Program owners assert their rights to just compensation, arguing that the regular compulsory license rates set by Congress and adjusted by the CRT provide considerably less compensation than would result from free exchange of their creations in the marketplace. An argument is made that cable systems are in a considerably different position than in 1976, pointing to their penetration of the lucrative urban areas, the creation of large multiple system owners (MSOs) in the market, and the availability of multiple cable origination networks which purchase programming in the marketplace and provide it to cable systems in a manner functionally similar to that of the broadcast television networks. It is asserted that the reasons underlying creation of the cable compulsory license no longer exist and that it therefore should be repealed. In any event, the copyright interests express the opinion that the CRT has correctly interpreted its statutory authority to base rates for the programs on post Malrite signals upon the marketplace value of that programming.

Congress postponed application of the CRT decision until March 15, 1983. It is likely that the issues surrounding the CRT rate decision, which is expected to result in deletion of some post Malrite signals from cable systems on that date, will be considered in the context of general reconsideration of the statutory compulsory license mechanism itself. The outcome of this balancing of competing interests is uncertain.

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