

Cable Television and Copyright Liability (CBS, Inc. v. Teleprompter Corp.)

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1973) "Cable Television and Copyright Liability (CBS, Inc. v. Teleprompter Corp.)," *St. John's Law Review*: Vol. 48 : No. 2 , Article 17.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol48/iss2/17>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

COPYRIGHT LAW

CABLE TELEVISION AND COPYRIGHT LIABILITY*

CBS, Inc. v. Teleprompter Corp.

Despite the phenomenal technological developments of the past sixty years, and their impact on artistic property, the Copyright Act of 1909¹ remains the primary source of copyright protection.² Although there have been recent attempts at modernization by Congress,³ none have been productive.⁴ Consequently, the courts have been the vehicle by which the copyright implications of recent advances in technology have been reconciled. While the courts have performed admirably, they have been severely hampered by the obsolescence of the Copyright Act. Perhaps the most striking example of this dilemma occurs in the area of cable television⁵ (CATV).

Essentially, CATV⁶ is a commercial venture which provides a ser-

* This paper was awarded First Prize at St. John's University School of Law in the 1973 Nathan Burkan Memorial Competition sponsored by the American Society of Composers, Authors and Publishers.

¹ 17 U.S.C. § 1 *et seq.* (1970).

² Commenting on the seriousness of the situation, one author noted:

We must have an appropriate study of the relationship between the copyright law and burgeoning new technologies, so that suitable means may be fashioned in this area to achieve proper incentives and rewards to copyright proprietors and optimum dissemination and utilization of their contributions to our culture, knowledge, science and education.

Goldenberg, *Current United States Developments in Copyright Law*, 16 BULL. COPYRIGHT Soc'y 305, 306 (1969) [hereinafter cited as Goldenberg].

³ On April 1, 1967 a general revision of the Copyright Act was passed by the House of Representatives. H.R. REP. NO. 2512, 90th Cong., 1st Sess. (1967). However, no action was taken in the Senate. The Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights refused to act during the pendency of *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). See generally Goldenberg, *supra* note 2. Subsequent efforts to introduce legislation in the Senate were unsuccessful. *Id.*; Letter from Rep. R. W. Kastenmeier, May 3, 1973, on file at *St. John's Law Review*.

⁴ It should be noted, however, that Congress has reacted to the pressing problem of unauthorized copying in the recording industry. 17 U.S.C. § 1(f) (Supp. I, 1971). See generally Note, *The Sound Recording Act of 1971: An End to Piracy on the High C's?* 40 GEO. WASH. L. REV. 964 (1972).

⁵ Mr. Justice Fortas, in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), commented that the courts are asked "to consider whether and how a technical, complex and specific act of Congress . . . enacted in 1909 applies to one of the more recent products of scientific and promotional genius, CATV, a task he likened to "repair[ing] a television set with a mallet." 392 U.S. at 402-03 (dissenting opinion).

⁶ CATV is an acronym for Community Antenna Television. However, this term is more reflective of the early status of cable where systems merely provided a large antenna for improved reception. Realizing the development of cable systems and their potential to augment present communications services, the Federal Communications Commission (FCC) has adopted the term Cable Television in place of Community Antenna Television. See FCC Report: *Cable Television Service; Cable Television Relay Services*, 37 Fed. Reg. 3252 n.9 (1972). See also *CBS, Inc. v. Teleprompter Corp.*, 355 F. Supp. 618, 619 n.1 (S.D. N.Y. 1972). However, the shorthand form CATV remains in common use and both terms are used interchangeably herein.

vice to subscribers for a monthly fee. This consists of carrying to them broadcast signals⁷ via coaxial cables.⁸ Cable television carriage of broadcast signals is accomplished in two ways. In the first, CATV operators receive local broadcast signals "off the air"⁹ via their own antenna and redistribute them, over cable, to their subscribers. In the second, CATV stations receive a "distant signal"¹⁰ at a point outside the reception radius of local antennae and then transmit it¹¹ to the local community.

The early CATV systems received only "off the air" signals. Their primary service was improved reception for subscribers. Accordingly, they were welcomed by copyright holders as a key to new markets. However, the recent innovation of distant signal importation and accompanying emergence of CATV as a major factor in the urban broadcast media have been viewed by copyright holders with apprehension and have precipitated much controversy.¹² Since cable systems

⁷ The carriage of broadcast signals represents only a portion of the services offered by CATV to its subscribers. Most notable among the additional services offered is non-broadcast program origination. There is no technical reason why the signal which the CATV operator transmits must be one it has received from an outside broadcast station. Some systems have taken to originating their own programs, *i.e.*, producing the program and then transmitting it directly over their own cables.

⁸ This characterization of cable television is of course an over-simplification of the electronic wizardry involved. In an exhaustive opinion, the district court in *Fortnightly Corp. v. United Artists Television, Inc.*, 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968), analyzed this complex electronics in order to resolve the copyright implications of CATV operations. 255 F. Supp. at 189-98. This technical analysis was rejected by the Second Circuit Court of Appeals, 377 F.2d at 871, and has gone by the wayside in the face of the "functional" test. *See* 399 U.S. at 397, 399 n.27 and note 22 and accompanying text, *infra*. Although the analogy utilized by the Supreme Court and herein suffer from the defect of simplicity, it remains quite adequate for the purposes of discussion.

⁹ The term "off the air" contemplates "reception of broadcast television signals by means of an antenna or similar receiving equipment." *CBS, Inc. v. Teleprompter Corp.*, 476 F.2d 338, 343 n.5 (2d Cir. 1973).

¹⁰ The term "distant signal" has been given different definitions depending on the purpose of the party defining the term. The FCC, for instance, categorizes signals as "distant" according to the percentage of subscribers who receive an acceptable signal a substantial percentage of the time. 47 C.F.R. 73.683, 73.684 (1972). However, here the FCC is dealing with CATV signal carriage obligation and its definition is inapplicable to copyright matters. *CBS, Inc. v. Teleprompter Corp.*, 476 F.2d at 350. *See* notes 41-43 and accompanying text *infra* for an analysis of the term as used by the Second Circuit.

¹¹ Generally such "distant signals" are imported by microwave links. *CBS, Inc. v. Teleprompter Corp.*, 476 F.2d 388, 343 n.6, 348 n.14, 349 (2d Cir. 1973).

Although microwave and importation are often considered synonymously, the court of appeals correctly pointed out that they merit separate consideration. Microwave is merely one of the methods utilized to achieve importation. Teleprompter, for instance, utilizes microwave in New York to connect its main and two subsidiary antennas. *Id.* at 345.

¹² *See* H.R. REP. NO. 2237, 89th Cong., 1st Sess. 78 (1966). *See* Comment, *CATV — The Continuing Copyright Controversy*, 37 *FORD. L. REV.* 597 (1969).

Cable TV has caused controversy not only in the area of copyrights but has raised questions concerning the scope of FCC jurisdiction. *See* *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). This aspect of the CATV controversy, however, seems to

do not pay broadcasters for the privilege of carrying their signals, they are pejoratively characterized as parasites,¹³ and have been the subject of a considerable amount of copyright litigation¹⁴ and commentary.¹⁵

The basic issue in this area concerns whether a CATV operator

have been resolved in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). There the Supreme Court affirmed the Commission's authority over cable TV as sufficient to support an FCC requirement that CATV systems with over 3500 subscribers originate their own programming, or, in the parlance of the industry, cablecast. 47 C.F.R. 76.201 (1972). However, the FCC temporarily suspended these rules during the *Midwest* litigation and has not yet acted to reinstate them. *CBS, Inc. v. Teleprompter Corp.*, 476 F.2d 338, 348 n.13 (2d Cir. 1973).

¹³ See Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1823-24 (1970).

However, CATV interests contend that their relationship with broadcasters and copyright holders is symbiotic in nature. They reason that CATV viewers are included in considering the size of audience a program attracts, Note, *CATV and Copyright Liability*, 80 HARV. L. REV. 1514, 1522 (1967); therefore a copyright holder can command a higher fee from the broadcast station, which can recoup its expenses through charges based upon its larger audience. It follows, it is argued, that the copyright holder is paid a premium for having his programs reach CATV viewers and that further royalties would constitute double payment. This all presupposes that advertising interests will pay higher figures for the larger audience provided by cable. However, as noted by the broadcasting and copyright interests, much advertising revenue is local in scope and source. Brief for Plaintiff-Appellant at 37-39, *CBS, Inc. v. Teleprompter Corp.*, 476 F.2d 338 (2d Cir. 1973); Brief for Motion Picture Association of America as Amicus Curiae at 16. These advertisers are unwilling to pay greater fees to reach the distant audiences provided by CATV carriage. The Second Circuit noted that there is no evidence that national advertisers will pay higher fees for the relatively slight increase in audience attributed to CATV. 476 F.2d at 342 n.2.

However, for national advertisement at least, it seems likely that the inclusion of CATV audiences increases prospective revenues. Brief for Motion Picture Association of America as Amicus Curiae at 17. On balance, copyright owners still face a potential total revenue loss since licenses are generally granted to networks and later to local stations in smaller secondary markets. See Brief for Plaintiff-Appellant at 37-39, Brief for Motion Picture Association of America as Amicus Curiae at 18. CATV systems, by their carriage into these secondary markets, reduce the potential audience for subsequent broadcasts of network programs over local TV stations. As a result, there is a reduction in the amount such local stations will pay to the copyright holder for the right to carry the programs. It must be conceded that where CATV systems carry into a region where there are no local broadcast stations, the relationship is a true symbiosis and copyright holders are adequately compensated. See Note, *CATV and Copyright Liability*, 80 HARV. L. REV. 1514, 1523-24 (1967). Symbiosis would also exist in the case where the CATV operator is strictly carrying local signals "off the air," see note 32 *infra*, thereby increasing local audience size without a potential adverse effect of future broadcast carriage. It is questionable whether cable interests can legitimately claim more than these limited benefits to the copyright holder. See H.R. REP. No. 2237, 89th Cong., 1st Sess., 78, 79 (1966).

¹⁴ See, e.g., *Walt Disney Prods. v. Alaska Television Network*, 310 F. Supp. 1073 (W.D. Wash. 1969); *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968); *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47 (D. Idaho 1962), *rev'd*, 335 F.2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965).

¹⁵ See, e.g., Note, *Community Antenna TV: Reaction of the Industry*, 40 NOTRE DAME LAW. 311 (1965); Note, *Television Broadcasting and the Copyright Law: The Community Antenna Television Controversy*, 41 ST. JOHN'S L. REV. 225 (1966); Note, *CATV and Copyright Liability: On a Clear Day You Can See Forever*, 52 VA. L. REV. 1505 (1966).

"performs"¹⁶ when he carries a broadcast signal to his subscribers. If the CATV operator is deemed to "perform" a broadcast signal, he is liable to the copyright holder for copyright infringement¹⁷ under the 1909 Act.¹⁸ In 1968 this question came before the United States Supreme Court in *Fortnightly Corp. v. United Artists Television, Inc.*¹⁹ The Court, per Mr. Justice Stewart, held "with due regard to changing technology . . . that CATV operators did not . . . perform the . . . copyrighted works."²⁰ In reaching its determination the Court drew a distinction between the active role of the broadcaster, which results in a performance, and the passive role of the viewer. Relying on this dichotomy, the Court concluded:

CATV . . . falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set.²¹

¹⁶ The Copyright Act grants the holder the "exclusive right . . . to perform or represent the copyrighted work publicly for profit if it be drama . . . and . . . to perform the copyrighted work publicly for profit if it be a musical composition." 17 U.S.C. § 1(d)(e) (1970) (emphasis added).

Attempts to construe the CATV image as a "copy" violative of 17 U.S.C. § 1(a) (1970) would be contrary to the mandate of *White Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908). *White Smith* dealt with an attempt to hold a manufacturer of piano rolls as infringing the musical compositions involved. In construing the Copyright Act of 1897, Act of Mar. 3, 1897, ch. 565, 26 Stat. 1106, the Court reasoned that a copy must be a "written or printed record . . . in intelligible notation," and that the perforated piano rolls were not copies within this meaning. 209 U.S. at 17. Congress, in enacting the 1909 Act, dealt with reproduction of musical works via piano rolls not by revising the definition of the term "copy" but by the addition of a new section, 17 U.S.C. § 1(e) (1970).

Despite its vintage, *White Smith* seems to be an effective bar to CATV copyright liability founded on the "copy" theory. Note, *CATV and Copyright Liability*, 80 HARV. L. REV. 1514, 1515 (1967). For a general commentary on other proffered theories of cable copyright liability see Note, *Community Antenna TV: Reaction of the Industry*, 40 NOTRE DAME LAW. 311 (1965).

¹⁷ The Copyright Act does not grant to the copyright holder a total monopoly over all uses of his work but only gives him exclusive ownership of certain enumerated rights. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393-95 (1968). See also note 16, *supra*. The Copyright Act does not provide an explicit definition of infringement. Infringement, it has been said, occurs only when a person, without the consent of the copyright holder, uses the copyrighted work in violation of one of these exclusive rights. 1 M. NIMMER, COPYRIGHT § 100 (1973).

¹⁸ The Copyright Act, 17 U.S.C. § 1(c)(d) (1970).

¹⁹ 392 U.S. 390 (1968).

²⁰ *Id.* at 402. The Court commented that the "basic function" served by CATV "is little different from that served by the equipment generally furnished by a television viewer." *Id.* at 399.

²¹ *Id.* The Court further distinguished CATV systems from broadcasters on the ground that broadcasters select the programs that they carry while CATV simply carries without editing. Interestingly, the FCC has enacted regulations which require a CATV system to delete programming that duplicates the programming of a local broadcast station if the local station so requests. 47 C.F.R. 76.91 (1972). If the CATV system is so re-

The determining factor was the function²² which CATV played in the entire process, *i.e.*, that of a well-located antenna.

The *Fortnightly* Court declined an invitation to render a compromise decision that would "accommodate the competing considerations of copyright, communications and antitrust policy."²³ Such a broad resolution of the question was, in the Court's view, the province of the legislature.²⁴ As a result of *Fortnightly*, the creation of a comprehensive copyright policy for broadcasters, copyright holders and cable TV was deferred²⁵ to Congress. Unfortunately, Congress failed to answer the challenge.²⁶

Since the *Fortnightly* litigation, the range of cable television services has expanded dramatically. In *CBS, Inc. v. Teleprompter Corp.*,²⁷ the broadcast industry contended that these additional services²⁸ were beyond the ambit of *Fortnightly* and brought suit for copyright infringement against CATV. The district court found no infringement

quired to delete, or has telecasted a program that is primarily of interest only to the local community from which it originated, the system may insert in that time period a program from another station. 47 C.F.R. 76.61 (1972). Even though done with the imprimatur of the FCC this procedure does give the CATV operator some editorial power over the signals transmitted. See 1 M. NIMMER, COPYRIGHT § 107.44 at 414.7 n.222(f)(3) (1973). See also *CBS, Inc. v. Teleprompter Corp.*, 355 F. Supp. 618, 623 (S.D.N.Y. 1972), *aff'd in part & rev'd in part*, 476 F.2d 338 (2d Cir. 1973).

²² The court of appeals in *Fortnightly*, per Judge Lumbard, relied upon a quantitative test of performance. The court viewed the problem as a question of "how much a CATV operator does to bring about the viewing and hearing of a copyrighted work." 377 F.2d at 877. The Supreme Court rejected this reasoning and held that the determining factor is rather the function that the CATV system serves in the total viewing process. 392 U.S. at 397.

²³ 392 U.S. at 401. This invitation came from Solicitor General Griswold as Amicus Curiae. He proposed that the Court recognize the existence of an implied-in-law license for CATV operations. This license would not be unlimited but extend only to "off the air" programming, as defined by the FCC "Grade B Contour." FCC Sixth Report and Order, 17 Fed. Reg. 3905, 3915 (1967). See note 10 *supra*.

²⁴ 392 U.S. at 401.

²⁵ Despite the Court's appeal to Congress, its decision probably stands as a major impediment to development of a revised copyright act. The surprising and complete victory for CATV came during the delicate compromise efforts of 1967-1968 and effectively stymied negotiations between CATV interests and broadcasters. As a result, efforts at producing a copyright bill were thrown into a tailspin from which they have not yet recovered. See Cary, *CATV — The Fortnightly Postlude*, 16 BULL. COPYRIGHT SOC'Y 157 (1968); N.Y. Times, June 18, 1968 at 94, cols. 1-6; note 3 *supra*.

²⁶ See note 3 *supra*.

²⁷ 476 F.2d 338 (2d Cir. 1973), *cert. granted*, 42 U.S.L.W. 1394 (U.S. Oct. 9, 1973) (Nos. 72-1628, 72-1633).

²⁸ The additional services offered by the CATV systems in the instant litigation are the following:

(1) origination of programming on non-broadcast channels, and the sale of commercial time on such non-broadcast programming; (2) interconnection with neighboring CATV systems; (3) use of microwave links in bringing broadcast programming to subscribers; and (4) the importation of distant broadcast signals from outside the area served by the CATV system.

476 F.2d at 346-47.

and dismissed the complaint.²⁹ On appeal the Second Circuit affirmed in part and reversed and remanded in part.³⁰ In so doing the court, per Judge Lumbard, effectuated a reasonable solution to the problem by placing the carriage of distant broadcast signals by CATV within the purview of the 1909 Copyright Act while refusing to impose liability for local signal carriage by a CATV operator.

In order to facilitate the disposition of the suit, the parties stipulated certain situations which ran the gamut of CATV operations, including systems receiving signals "off the air" and those importing signals from a distance of up to 600 miles.³¹ The issue before the Second Circuit was whether these additional services, which had not been considered by the Supreme Court,³² made the cable system the equivalent of a broadcaster under the functional test enunciated in *Fortnightly*.

Judge Lumbard examined each of the appellant's contentions separately.³³ The court rejected all the claims but one, *viz.*, that con-

²⁹ 355 F. Supp. 618 (S.D.N.Y. 1972).

³⁰ 476 F.2d at 354.

³¹ *Id.* at 342. The specific locations and dates of the activities which gave rise to the litigation were "Elmira, New York in November, 1964; Farmington, New Mexico in November, 1964, June, 1969 and March, 1971; Rawlins, Wyoming in June, 1969; Great Falls, Montana in June, 1969; New York City in June, 1969 and March, 1971." *Id.* at 343.

³² 476 F.2d at 348-49. *But see* United States v. Southwestern Cable Co., 392 U.S. 157, 163 (1968), where the Supreme Court noted that CATV systems had been importing distant signals, albeit on a very small scale, as early as 1959. *See also* Botein, *Cable TV and Copyright Liability*, N.Y.L.J., Mar. 30, 1973 at 1, col. 2. However, the *Fortnightly* Court on several occasions did expressly limit the scope of its decision to the off the air systems before it. 392 U.S. at 392 n.6, 399 n.25, 402. Interestingly, there were attempts to consolidate this action, commenced in 1964, with *Fortnightly*. Such attempts were unsuccessful and the parties agreed to stay proceedings pending the *Fortnightly* decision. After *Fortnightly*, supplemental complaints were filed on Dec. 15, 1969 and May 17, 1971. 476 F.2d at 341.

³³ The court considered seriatim and rejected as unpersuasive appellants' other contentions that specific CATV advances rendered *Fortnightly* inapplicable. First, appellants contended that program origination on separate channels converted the entire system into a performer for broadcast signals. The court, however, refused to find such a "spillover" effect. 476 F.2d at 347-48. Appellants next contended that Teleprompter's New York system had interconnected its facilities with those of other CATV systems in the area. This activity, they argued, was analogous to "networking" as done by broadcast stations. Since the interconnection before the court was limited to non-broadcast channels and even then only involved two sporting events, the Second Circuit affirmed the district court, holding that this minimal interconnection did not result in performance. However, the court did not face the question of interconnection involving broadcast of "copyrighted signals" and limited its reasoning to the relatively insubstantial operation before it.

The Second Circuit reasoned that it was "not presently in a position to evaluate what effect interconnection may have on CATV copyright liability if and when it ever reached the point where it is equivalent to a network of CATV systems." 476 F.2d at 348. In view of the court's holding that importation of distant signals would be performance, 476 F.2d at 349-53, one can safely assume that such a network, reaching effectively national proportions, would result in performance if only because such a system would constantly be importing distant signals at some location within the network.

The court also rejected appellant's third contention that point-to-point microwave

cerning the importation of distant signals. This contention proved to be the most persuasive and became the basis upon which *Fortnightly* was distinguished. The court concluded that the importation of distant signals by a CATV operator moved him from the viewer's side of the line to that of the broadcaster.³⁴ By importing and distributing "signals that are beyond the range of local antennas"³⁵ the CATV system becomes the functional equivalent of a broadcaster. The determining factor is not merely "distributing television programming to a new audience that could not otherwise have viewed it,"³⁶ but rather, that the new audience is one that could not view the program even with an advanced antenna.³⁷ In order for this new audience to receive the distant signal, additional "transmitting equipment"³⁸ is required to import it. The process whereby the CATV operator receives a broadcast signal in the community of its origin and then transmits the signal by means of additional equipment to the community he serves, provides the crucial factor which results in "performance" under the *Fortnightly* test.³⁹

transmission constitutes broadcasting. The court considered such microwave transmission as presenting a different question from importation of distant signals. Microwave is often used to import distant signals but is merely a means to achieve this end. It is possible to utilize microwave apart from distant signals. 476 F.2d at 348 n.14. Appellants contended that mere microwave transmission was analogous to broadcasting and required holding the CATV system to be a performer. Rejecting the analogy, the court correctly concluded that such point-to-point microwave transmission is merely a more economical alternative to use of coaxial cable for the same purpose. 476 F.2d at 348-49.

³⁴ 476 F.2d at 349-50.

³⁵ *Id.* at 349.

³⁶ *Id.* at 350. This factor was before the Court in *Fortnightly* and did not induce the Supreme Court to find liability. In *Fortnightly* the CATV operations were not held liable for copyright infringement despite the fact that absent the aid of CATV the subscribers could not receive the programs. 392 U.S. at 391.

³⁷ 476 F.2d at 350.

³⁸ *Id.*

³⁹ *Id.* The appellees argued that they were immune from copyright liability because they had a license implied in law. The essence of this contention is that consent for subsequent distribution can be implied from the consent granted for receiving the original broadcast. The implied license theory was first applied in *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929), where the court held that the licensor "impliedly sanctioned and consented to any 'pick up' out of the air that was possible. . . ." *Id.* at 735. The apparent rationale for this theory is that the primary objective of the Copyright Act is to encourage the dissemination of original works to the public. The reward due the copyright holder is satisfied by the initial license fee paid by the broadcaster and must then yield to the primary policy of maximum distribution.

The license implied-in-law theory was expressly rejected by the Second Circuit in *Fortnightly*. 377 F.2d at 880-84. However, when this decision was reversed, the Supreme Court deliberately refrained from reaching the implied license question. 392 U.S. at 401 n.32.

In response to the appellees' contention in *Teleprompter*, Judge Lumbard adroitly sidestepped the implied license question by declining to re-examine his own prior rejection of this theory in *Fortnightly*. 476 F.2d at 352 n.18.

Having affixed copyright liability to the importation of distant signals, the court attempted to develop a workable formula. Judge Lumbard began by conceding the impossibility of rendering the term "distant signal" to "precise judicial definition."⁴⁰ However, the court resorted to a negative definition which excluded from the term "distant signal,"

any signal *capable* of projecting, without relay or retransmittal, an acceptable image that a CATV system receives off the air during a substantial portion of the time by means of an antenna erected in or adjacent to the CATV community.⁴¹

Next, the court articulated a set of presumptions, placing the burden of coming forward with evidence to establish that he is not importing a distant signal on the cable operator. Thus, if the signal originates from a community different from that of the cable system subscribers or is received by an antenna outside the CATV community,⁴² the CATV entrepreneur must establish that he is within the mandate of *Fortnightly*. Applying this reasoning to the operations of the five CATV systems before it, the court held that two of the five systems were not liable under *Fortnightly* since they only received signals "off the air" and no distant signals were involved.⁴³ However, as to the remaining three systems, the court found presumptive liability and remanded in order to allow the CATV defendants to rebut the presumption by showing that even though "the receiving antenna was located outside the CATV community, the particular signal could have been received in a similar fashion by an equivalent antenna located in or adjacent to the CATV community."⁴⁴

In *Teleprompter*, the Second Circuit has provided a compromise solution to a perplexing problem, thereby restoring the protection offered by the Copyright Act. However, as is often the case with com-

⁴⁰ 476 F.2d at 350. The court rejected the FCC regulations on distant signals which categorized signals as distant or local on the basis of their ability to be received a substantial portion of the time by a substantial amount of the local homes by means of home antennas. See note 11 *supra*. Any copyright standard based on home antenna reception "would fly in the face of the mandate of *Fortnightly*." 476 F.2d at 350.

⁴¹ *Id.* at 351 (emphasis added). Furthermore the court admitted even this negative definition is heavily dependent on developments in "broadcasting and receiving technology." *Id.*

⁴² A CATV community, as defined by the court, is a specific local area served by the cable system and delineated in its franchise. 476 F.2d at 351 n.16.

The Farmington, New Mexico system involved in the instant case, received signals "off the air" via an antenna located 30 miles from Farmington. The court applied the presumption that the antenna was outside, rather than adjacent to, the CATV community.

⁴³ 476 F.2d at 352-54.

⁴⁴ *Id.* at 353.

promises, this decision is subject to question on several crucial points. First, insofar as the resolution of copyright problems hinges on developments in broadcasting and receiving technology, a distinction based on the subscribers' capability of receiving a signal is tenuous at best.⁴⁵ Yet, this distinction is the cornerstone upon which *Fortnightly* is distinguished. In addition, the court fails to define such terms as "acceptable image" or "substantial portion of the time," which are vital to the implementation of its decision. In defense of the court, it should be noted that such detailed guidelines are usually promulgated by an administrative agency. However, in *Teleprompter* the court assumed a regulatory function, albeit by default, and was, therefore, obligated to provide definitions of essential terms.

Although not essential to the determination of the *Teleprompter* appeal, the Second Circuit passed up an excellent opportunity to provide guidelines for damages in light of proposed legislation to limit liability in non-egregious cases and to discuss the merits of compulsory licensing of CATV carriers.⁴⁶

The *Fortnightly* Court was undoubtedly correct in its assertion that a complete resolution of the question requires legislative action. Only a legislative or regulatory body can formulate precise rules which would decisively draw the distinction for each case without the vicissitudes of litigation. However, the Second Circuit was confronted with

⁴⁵ One author characterized the Court's reasoning as formulating "the rather dubious distinction between potentially receivable and theoretically non-receivable signals." Botein, *Cable Television and Copyright Law*, N.Y.L.J., Mar. 30, 1973 at 4, col. 4.

⁴⁶ The Copyright Act contains no provision for compulsory licensing in this area. Accordingly, the broadcasters could extract huge ransoms from the CATV operators in return for licenses to carry the copyrighted material.

Cable interests have long demanded a compulsory licensing arrangement. At one point during the copyright negotiations, the broadcast community indicated that it was amenable to a compulsory license scheme. Cary, *CATV — The Fortnightly Postlude*, 16 BULL. COPYRIGHT SOC'Y 157, 159 (1969). This willingness might of course fade with the Second Circuit's decision and the resulting improvement of the broadcasters' bargaining position.

The revised copyright bill passed by the House of Representatives in 1967 considered the CATV question in light of the potential economic impact of CATV carriage of a signal. H.R. REP. NO. 2512, 90th Cong., 1st Sess. (1967). See note 3 *supra*. Under this bill, cable systems were to be fully liable for carriage of signals in areas where there was full network broadcast coverage and for importation of signals into areas where the broadcast stations possess exclusive licenses and the CATV operator has notice thereof. More limited liability (a reasonable license fee) was to be imposed for CATV carriage in areas that lack full network coverage, unless there were advance notice of an exclusive license. Where the CATV operator performed his more traditional function as a "fill in service to improve reception" there was to be no liability. H.R. REP. NO. 2237, 89th Cong., 2d Sess. 80 *et seq.* (1966).

Although obviously more comprehensive than the Second Circuit's solution, this approach does evidence a similar compromise attitude and generally exempts the traditional CATV carriage that was before the *Fortnightly* Court. See Note, *CATV and Copyright Liability: On a Clear Day You Can See Forever*, 52 VA. L. REV. 1505, 1520-25 (1966).

a situation in which Congress had failed to respond. Although the court did not offer a comprehensive solution, it implemented a palatable decision that should stand in good stead until Congress does provide the complete legislative answer that is required. Despite certain deficiencies, the *Teleprompter* decision recognizes the economic realities⁴⁷ which demand some relief. Accordingly, this decision may have the collateral effect of increasing the efforts of all interests to stimulate congressional action⁴⁸ which would hopefully produce the certainty that is not now present.⁴⁹

⁴⁷ The court's decision reconciles much of the controversy arising from the economic realities of the relationships of the CATV, broadcaster and copyright holder triumvirate. CATV's importation of distant signals provides the greatest potential for economic damage to copyright holders. By imposing liability here and only here the court responds to this danger to copyright holders while not excessively handicapping cable TV. Moreover, the decision is in line with the 1971 CATV, broadcaster and film companies' accord. *Cable TV Accord Sets Its Growth*, N.Y. Times, Nov. 12, 1971 at 1, col. 7. This agreement, strongly encouraged by the White House and implemented by FCC regulation, 47 C.F.R. 76.51 to 76.159 (1972), directs CATV growth toward rural areas by relaxing exclusivity requirements in the second 50 major television markets. 47 C.F.R. 76.63, 76.91 *et seq* (1972). Under the agreement, broadcasters in these markets can only obtain exclusive rights over films for two year periods. N.Y. Times, Nov. 12, 1971 at 95, col. 4. See also N.Y. Times, Nov. 13, 1971 at 67, col. 3-4, for commentary of industry leaders on the agreement. This accord and the general FCC policy on CATV seem aimed at returning cable to its original role of enhancing reception and encouraging development of other unique CATV characteristics through services such as program origination and cable's increased channel capacity. The *Teleprompter* decision brings the law of copyright in line with these goals. See Botein, *Cable Television and Copyright Law*, N.Y.L.J., Mar. 30, 1973 at 1, col. 2.

⁴⁸ Even prior to the Second Circuit decision, cable interests had begun to accept the need for a long term legislative resolution of the copyright question. See 4 NATIONAL JOURNAL, July 15, 1972, at 1160, 1165, remarks by David H. Foster, president of the National Cable Television Association, to the effect that copyright legislation is needed in order to settle the state of flux plaguing the CATV industry.

⁴⁹ A writ of certiorari has been granted by the Supreme Court. 42 U.S.L.W. 3194 (U.S. Oct. 9, 1973) (Nos. 72-1628, 72-1633). It is hoped that the Supreme Court will also respond to the economic exigencies and affirm the Second Circuit decision.

The broad impact of the Second Circuit decision may extend beyond the borders of the United States. In Europe, where CATV is even more widespread and important than in the United States, cable operators are keenly following the *Teleprompter* litigation. Falk, *TV Broadcasting Goes International*, INST. OF ELECTRICAL & ELECTRONICS ENGINEERS SPECTRUM, vol. 10, no. 8, Aug., 1973, at 26, 27.