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Television Broadcasting and Copyright Law: The Community Antenna Televison Controversy

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TELEVISION BROADCASTING AND COPYRIGHT LAW: THE COMMUNITY ANTENNA TELEVISION CONTROVERSY †

A community antenna is one set on high ground within the broadcast range of one or more television stations. The antenna receives a signal from a station, amplifies it, and, by means of coaxial cable, relays it to paying subscribers. Created to bring television to millions of homes where it is normally unavailable due to topographical interference, community antenna television (hereinafter referred to as CATV) has become one of the most prosperous and controversial industries in the communications field.[1] Since the CATV signal reaches the television set by cable, and not through the air, sets not wired for CATV cannot receive it, and conversely, sets wired for CATV ordinarily cannot receive signals from local stations which transmit through the air.

This situation has alarmed both local broadcasters who fear the competition, and network broadcasters who are not able to control the extent of their audience. This latter consideration is particularly important with reference to athletic events, where the broadcaster's contract often calls for the blacking out of a specific area so that local enthusiasts will continue to patronize the box office. In addition, movie producers are concerned about the potential loss in the revenue which is available through licensing agreements with television stations. For example, if a station in city *A* has purchased the rights to a movie, the viewers in city *B* may be able to receive the telecast through CATV facilities. Consequently, the station in city *B* would subsequently pay less for the right to broadcast the movie or even refrain from purchasing the movie, knowing that its local viewers had already seen it.

As a rule, CATV pays nothing to the originating station for use of the signals. Since the system is not licensed by either the broadcasters or the copyright proprietors of the program material, ordinarily a copyright infringement is alleged against the CATV

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[1] FCC, INQUIRY INTO THE IMPACT OF COMMUNITY ANTENNA SYSTEMS, TV TRANSLATORS, TV "SATELLITE" STATIONS, AND TV "REPEATERS" ON THE ORDERLY DEVELOPMENT OF TELEVISION BROADCASTING, 26 F.C.C. 403 (1959).

station broadcasting any given material in an endeavor to secure compensation for the right to send the signals.

It is questionable whether such TV signals are within the traditional protective scope of copyright law. First, it can be argued that once the broadcast signal is released, there is a common-law "publication," thus abandoning all property rights in the television program material. Second, assuming *arguendo* that telecasting does not constitute a "publication," there is no copyright infringement under either common law or statute unless the signal is "reproduced." The first argument will be explored by examining the case law relevant to radio broadcasting, and culling from these cases the criteria applicable to television broadcasting. The question of whether CATV is "reproducing" the signal will be analyzed by examining the leading radio copyright infringement case, whose principles, to some degree, parallel the CATV situation.

Protection by Statutory Copyright

In general, the protection offered television program material by statutory copyright is incomplete. The federal constitution gives Congress power "To promote the Progress of Sciences and useful Arts, by securing for Limited Times to *Authors* . . . the exclusive Right to their respective *Writings*. . . ." [2] When read in conjunction with Section 4 of the Federal Copyright Act,[3] the conclusion is reached that "everything is copyrightable under the act which could constitutionally be made copyrightable." [4] Thus, the statute protects both "authors" and proprietors of certain distinct classes of "writings." [5] When the statute is applied to the television industry, however, a performer, in spite of the novelty of his interpretative rendition, cannot protect his creations, since he is not an "author," [6] although he could still qualify within the category "writing."

In order to warrant protection under the statute, a "writing" must be both original[7] and permanent, *i.e.,* the ideas must be given visible expression.[8] While works such as books, periodicals and newspapers must be published before a statutory copyright is obtained,[9] materials not intended for public sale, *e.g.,* plays, lectures,

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[2] U.S. CONST. art. I, § 8. (Emphasis added.)

[3] 17 U.S.C. § 4 (1964).

[4] WARNER, RADIO AND TELEVISION RIGHTS 40 (1953).

[5] 17 U.S.C. § 5 (1964).

[6] Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 437-38, 194 Atl. 631, 633 (1937).

[7] SPRING, RISKS & RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER 116 (2d ed. 1956).

[8] *Id.* at 75.

[9] 17 U.S.C. §§ 10, 11, 13 (1964).

musical compositions, and radio and television scripts, can be copyrighted without publication.[10] Consequently, it would appear that the statute affords protection to many television programs which fall into one of the statutory classes. Practically, however, statutory protection of "writings" is inadequate for the purposes of the television industry. As to published works, "notice" and "deposit" requirements[11] prevent copyrighting of numerous programs. For example, unless notice to the public were to be broadcast in facsimile by the television station, the work would be in the public domain;[12] in addition, copies of "live" programs cannot be deposited with the Copyright Office.[13] Furthermore, a reproduction for sale, without compliance with deposit requirements, would end all protection for works copyrighted as unpublished. However, certain programs, such as news and sports broadcasts, do not easily fit within any of the statutory classes, either as published or unpublished works. Cognizant of these difficulties, broadcasters have relied on the traditional remedies of unfair competition and common-law copyright.

Protection by Common-law Copyright

The common-law copyright was designed to protect a creator's ideas prior to their publication.[14] It has been characterized as an *absolute property right* which remains with the author as long as the idea is unpublished. Once in the public domain, however, the work can be copied, reproduced or performed without compensating the author.[15]

Based on a comparison with the radio broadcasting industry, and its treatment in the state courts, it is probable that common-law copyright could be used by the television industry to protect programs from appropriations. For example, in *Stanley v. Columbia Broadcasting Sys., Inc.*,[16] a writer brought an action based on implied contract against a radio broadcasting company, alleging

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[10] 17 U.S.C. § 12 (1964).

[11] 17 U.S.C. § 13 (1964); 37 C.F.R. § 202.2 (1949).

[12] SPRING, *op. cit. supra* note 7, at 299-301.

[13] 17 U.S.C. § 12 (1964).

[14] Warner, *Protection of the Content of Radio and Television Programs by Common Law Copyright*, 3 VAND. L. REV. 209 (1949). See Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[15] Frohman v. Ferris, 238 Ill. 430, 435-36, 87 N.E. 327, 328 (1909), *aff'd*, 223 U.S. 424 (1912). Common-law copyright has been preserved under the statute. "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication or use of such unpublished work without his consent, and to obtain damages therefor." 17 U.S.C. § 2 (1964).

[16] 192 P.2d 495 (Cal. Dist. Ct. App. 1948), *aff'd*, 46 Cal. 2d 644, 208 P.2d 9 (1949).

piracy of a program idea. The court noted that both programs had the same title, and the title in each was utilized in the same manner. In addition, in both programs, the master of ceremonies, well known in motion pictures, was introduced by the announcer, a drama was presented, and listeners were asked to express opinions of the play. The court, basing its conclusion on these factors, held that a concrete combination of ideas for a radio program is protectible at common law. Furthermore, this holding appears broad enough to include the basic dramatic core or heart of a play.[17] However, it is believed that copyright protection has not been extended to generalized themes,[18] as opposed to a concrete combination of ideas.

Many works, clearly not "writings" under the federal statute, have been protected by common-law copyright in the state courts. For example, not only has it been held that an orchestra's rendition was secured to an orchestra leader as an artistic work,[19] but also a broadcaster's "voice and style of talking" was considered a form of "art expression" similarly protected by common-law copyright.[20] In addition to protecting "works" or "writings" outside the statutory classes, the courts have also given "authors" a more inclusive meaning. Thus, a band leader, in *Waring v. WDAS Broadcasting Station, Inc.*,[21] and an announcer, in *Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc.*,[22] were held to be "authors." Therefore, it is apparent that common-law copyright affords such creators expansive protection, as opposed to the limited scope of the federal statute.

Although common-law copyright affords a wide range of protection, it has certain inherent disadvantages which become apparent when its protection is employed. Thus, in an infringement action, the author may lack adequate proof of the date and content of his creation, thereby minimizing his chance for recovery. Also, the remedies available in state courts in a common-law action do not afford the same degree of protection as

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[17] See Golding v. RKO Radio Pictures, Inc., 193 P.2d 153 (Cal. Dist. Ct. App. 1948), *aff'd*, 208 P.2d 1 (1949).

[18] It was implied in American Broadcasting Co. v. Wahl Co., 36 F. Supp. 167 (S.D.N.Y. 1940), *rev'd on other grounds*, 121 F.2d 412 (2d Cir. 1941), that plaintiff's "quiz program" known as "Double or Nothing" was not within the protection of the copyright laws. Ostensibly, the system or program idea sought to be protected was one in which contestants were asked questions; they were to be rewarded if they answered correctly and they were permitted to double their earnings at the risk of losing all, by answering the second question.

[19] *Supra* note 6.

[20] Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc., 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964).

[21] *Supra* note 6.

[22] *Supra* note 20.

those available in a federal court under the Copyright Act. Finally, and most significantly, while common-law copyright gives the author a perpetual monopoly, if there is any publication, whether intended or unintended, the protection is permanently lost.[23] It is apparent then, that since many television programs are not protected by the federal statute, the available remedy must be found under common-law copyright. However, this protection is conditioned upon a finding that telecasting does not constitute publication.

Publication

The generally accepted definition of publication is the sale or giving away of copies to the public.[24] A distinction is made between limited and general publication. A limited publication is a communication of material to a select number of people upon condition that it be not further published to the general public.[25] This principle has been applied to the public performance of a play,[26] the public delivery of lectures,[27] and the playing of a song in public.[28] Hence, in the past as long as a communication lacked the necessary element of making copies available to the public, no general publication was found and the protection was not lost.

Though television programs reach an audience of millions, by a parity of reasoning with radio broadcasting, it may be contended that television broadcasting does not constitute a general publication. Since there are no clear-cut decisions to this effect,[29] it will be fruitful to examine the state of the law in the area of radio broadcasting.

Radio

The general principle that radio broadcasting does not constitute general publication was stated in *Uproar Co. v. National Broadcasting Co.*[30] There it was held that "the rendering of the performance before the microphone cannot be held to be an abandonment of ownership to [the public] by the proprietors, or

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[23] SPRING, *op. cit. supra* note 7, at 93.
[24] *Id.* at 111.
[25] *Supra* note 6.
[26] Ferris v. Frohman, 223 U.S. 424, 435 (1912).
[27] Nutt v. National Institute, Inc., 31 F.2d 236 (2d Cir. 1929).
[28] Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946).
[29] See Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc., *supra* note 20, at 727, 248 N.Y.S.2d at 813. It was there stated that a television broadcaster does not lose his common-law copyright in a news announcement. See also King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963).
[30] 8 F. Supp. 358 (D. Mass. 1934), *modified,* 81 F.2d 373 (1st Cir.), *cert. denied,* 298 U.S. 670 (1936).

a dedication of it to the public at large." [31] The appellate tribunal agreed *sub silentio*. Similarly, in a New York case,[32] the defendant was enjoined from recording the Metropolitan Opera's radio broadcasts for subsequent sale on the theory that the plaintiff did not abandon its common-law rights when it performed over the air.

Common-law rights in a literary property have also been upheld in lower court decisions despite communication to an extended audience. For example, *King v. Mister Maestro, Inc.*[33] involved copies of the advanced text which were distributed to the press prior to the presentation of a public speech, the delivery of which was subsequently shown in television newsreels and broadcast over the radio. In a copyright infringement action, the court held that there was no general publication of the author's literary work, nor was the subsequent granting of a copyright prevented. Moreover, in *Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc.*,[34] the defendant recorded a news announcement concerning the assassination of President Kennedy, and incorporated it, without network consent, as part of a phonograph record for commercial distribution. In an action for common-law copyright infringement, the court held that the television and radio news broadcasts were not publications so as to render the announcer's "voice and style" subject to appropriation.

Thus, broadcasters and persons in the public eye have been given broad protection under common-law copyright and seem to have been granted virtual monopolies on their speeches and discourses. However, the validity of these state court holdings has been cast into doubt by two landmark Supreme Court cases which indicate that federal copyright law may have preempted the field.

Effect of Sears and Compco

In *Sears, Roebuck & Co. v. Stiffel Co.*,[35] and *Compco Corp. v. Day-Brite Lighting, Inc.*,[36] the plaintiffs had introduced lighting fixtures of a new and successful design. In a patent infringement action, the district court, while invalidating the patents in each case, held the defendants guilty of unfair competition under Illinois law, and issued injunctions prohibiting them from selling products "identical to or confusingly similar to" those made by the plaintiff.

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[31] *Id.* at 362.

[32] Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951).

[33] King v. Mister Maestro, Inc., *supra* note 29.

[34] *Supra* note 20.

[35] 376 U.S. 225, *reversing* 313 F.2d 115 (1964).

[36] 376 U.S. 234, *reversing* 311 F.2d 26 (1964).

The United States Supreme Court reversed, holding that "because of the federal patent laws a State may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying." [37] The Court reasoned that if something did not merit a patent or copyright, it would not be reasonable to allow a state to keep from the public that which federal law has said belongs in the public domain. While these cases were concerned with patent law and unfair competition, the Court made reference to the preemptive effect of the federal copyright law.[38] Although it seems clear that this preemptive effect applies to works which are capable of protection under statutory copyright (even though protected by state unfair competition laws), it is not clear whether *Sears* and *Compco* will have the effect of overruling those common-law copyright decisions which "give protection of a kind that clashes with the objectives of the federal patent laws." [39] If uniformity is the goal of the Supreme Court in patent and copyright cases, then such a result may well be realized.

Although *Sears* and *Compco* may have an effect on copyright law, they certainly affect the law of unfair competition. Unfair competition has long been a treasured remedy of the broadcasting industry to protect itself against infringement of programs.[40] But, under the Supreme Court's ruling, it would appear that unfair competition laws do not apply unless the material is first copyrighted under the federal statute. Since much program material is not copyrightable by statute, it is possible that this remedy might be unavailable. It is doubtful, however, that the Supreme Court's decisions go this far. A recent New York case [41] interpreted *Sears* and *Compco* in a manner which indicates that these decisions will not act as a bar to common-law copyright relief. It was there alleged that the defendant had exhibited a television program which included a "substantial segment" of a motion picture to which the plaintiff had acquired exclusive rights. The defendant's allegation that, absent copyright protection, the plaintiff had no cause of action was rejected on the ground that "appropriation" not copying was involved.

With regard to *Sears* and *Compco,* it was held that "these recent decisions which involved distinguishable factual situations had not wiped clear the slate of precedent and empowered the

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[37] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 232-33 (1964).
[38] *Id.* at 231 n.7.
[39] *Id.* at 231.
[40] SPRING, RISKS & RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER 232 (2d ed. 1956).
[41] Flamingo Telefilm Sales, Inc. v. United Artist Corp., 141 U.S.P.Q. 461 (N.Y. Sup. Ct.), *rev'd on other grounds,* 22 App. Div. 2d 778, 254 N.Y.S.2d 3 (1st Dep't 1964).

unauthorized appropriation of artistic performances to the profit of others." [42] Thus, it appears that the states will not be inhibited by the preemptive effect of the federal law where deceptive or fraudulent practices occur, *i.e.,* appropriation as opposed to copying.[43]

Although the ultimate effect of these decisions on copyright law is unclear, they express a mood in general opposition to the development or expansion of state remedies for misappropriation in areas touched by federal law. This broad impact has been recognized by the ninth circuit in a case dealing with CATV. In *Cable Vision, Inc. v. KUTV Inc.,*[44] a local television station, in an antitrust suit, interposed a counterclaim alleging unfair competition and tortious interference with contract against the plaintiff, an operator of a community service. The station contended that the plaintiff's simultaneous broadcast of the programs emanating from defendant's network affiliate interfered with its exclusive right to broadcast these programs. The court of appeals held that *unless television stations could demonstrate a protectible interest by virtue of federal copyright laws in network television programs,* CATV did not interfere with any protected right of the defendant under common law. The lower court, in enjoining CATV from duplicating any network or film program to which the local station exercised a right of first run, relied heavily on *International News Serv. v. Associated Press,*[45] (hereinafter referred to as *International News*).

In that case, the United States Supreme Court held that the Associated Press had a "quasi-property right" in news which it had gathered, and that appropriation of the news by the defendant, a competitor, would constitute unfair competition until such time as the news lost its commercial value. The court of appeals distinguished *International News* since, in *Cable Vision,* there was no question of "implied representation" by failing to give the originator the proper credit, and also the television station and CATV were not competitors, as were the litigants in *International News.* In addition, the appellate court, relying on *Sears* and *Compco,* stated that the district court had gone too far in finding

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[42] *Id.* at 462.

[43] "A State of course has power to impose liability upon those who, knowing that the public is relying upon an original manufacturer's reputation for quality and integrity, deceive the public by palming off their copies as the original." Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 238 (1964).

[44] 211 F. Supp. 47 (S.D. Idaho 1962), *rev'd,* 335 F.2d 348 (9th Cir. 1964), *cert. denied,* 379 U.S. 989 (1965). See also Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315 (S.D. Idaho 1961).

[45] 248 U.S. 215 (1918).

a protectible interest not encompassed by the federal copyright law.[46] Although *Cable Vision* has been followed by at least one other court in a CATV case,[47] the question as to whether there exists a protectible interest in program material has not yet been answered.[48]

Infringement

Under the Copyright Act "infringement" is not directly defined, but, according to section 1 (e), a copyright proprietor has the *exclusive* right "to perform the copyrighted work publicly for profit . . . ." [49] This section was applied to radio broadcasts in *Buck v. Jewell-LaSalle Realty Co.*,[50] where a hotel, which had no contractual relationship with any broadcasting station, maintained a master receiving set which was wired to all rooms. Paying guests were thus able to hear radio programs over loudspeakers in public rooms and through headphones in private rooms. An action was brought against the hotel by the holder of a statutory copyright on a popular song which had been played on the air and disseminated by the defendant.

The Supreme Court held that the copyright, in this instance, applied not only to the original rendition on the air but also to receptions for commercial purposes. The hotel's act of receiving radio broadcasts and translating them into audible sound was said to be "not a mere audition of the original program. It is essentially a reproduction." [51] Thus, the acts of the hotel in installing, supplying electric current, and operating the radio receiving set and loudspeakers, caused the guests to hear a reproduction which constituted a public performance for profit within the meaning of the Copyright Act. Hence the Court held there was an infringement.

The typical CATV situation may be distinguished from *Buck*, since, in that case the radio station did not have a license to broadcast the copyrighted material. In general, CATV retransmits the signals of television stations which have already bought such a license from the copyright owner. If the radio station in *Buck* had similarly obtained the right to broadcast the copyrighted

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[46] Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348, 351 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965).

[47] Herald Publishing Co. v. Florida Antennavision, Inc., 173 So. 2d 469 (Fla. Dist. Ct. App. 1965).

[48] See Appendix for a discussion of *United Artists Television, Inc. v. Fortnightly Corp.*, 34 U.S.L. WEEK 2651 (S.D.N.Y. May 23, 1966). That case, which held CATV subject to the copyright law, was decided subsequent to the submission of the article to the award selection committee.

[49] 17 U.S.C. § 1(e) (1964).

[50] 283 U.S. 191 (1931).

[51] *Id.* at 200.

material, a license for its commercial use and distribution by the hotel company might have been implied.[52]

Furthermore, while it may be argued that CATV is relaying broadcasts in the same manner as the hotel in *Buck*, the fact situation may also be distinguishable in that it is not the CATV operator, but the subscriber, who, by activating his set, converts electrical impulses to an intelligible product—the infringing activity in *Buck*. CATV, on the other hand, is involved in an earlier stage of the reception process, *i.e.*, while the radio waves are still "free" in the atmosphere. It is submitted that while CATV may "reproduce" the signal in a technical sense, viz., by receiving dissipated electromagnetic radiations, amplifying them, and transforming them into electrical impulses, they do not reproduce them in the sense that was discussed in *Buck*.

Buck relied heavily on the "multiple performance" doctrine, *i.e.*, that every transmission, reproduction, exhibition or original broadcast constitutes a separate performance. This doctrine finds its greatest application in the case of phonograph records.[53] It is said that one performance occurs at the time the rendition is recorded, and the second occurs if and when the record is played on a phonograph. Unless the common-law copyright has been lost through sale, this playing will constitute an infringement provided it is unauthorized and is both public and for profit.[54] In extending this doctrine to radio broadcasting, the *Buck* Court drew the following analogy:

> The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electric instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance.[55]

This analogy has been severely criticized on conceptual grounds.[56] It is argued that the conclusion that playing a phonograph record constitutes a performance separate and in addition to the recording performance *does* find support in the express language of the Copyright Act conferring upon the copyright owner the exclusive right to "play" and to "perform" a "record."[57] But,

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[52] *Compare* Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931), *with* Buck v. Debaum, 40 F.2d 734 (S.D. Cal. 1929).

[53] Nimmer, *The Nature of the Rights Protected by Copyright*, 10 U.C.L.A.L. REV. 60, 85 (1962).

[54] Irving Berlin, Inc. v. Daigle, 31 F.2d 832 (5th Cir. 1929); Buck v. Heretis, 24 F.2d 876 (E.D.S.C. 1928).

[55] Buck v. Jewell-LaSalle Realty Co., *supra* note 52, at 200-01.

[56] Nimmer, *supra* note 53, at 91-92.

[57] 17 U.S.C. § 1(c)-(e) (1964).

the argument continues, it does not follow that a separate performance occurs when there is a reproduction per se of sound waves, for it can hardly be said, within the meaning of the statute, that a person receiving a radio or television broadcast "performs" any form of record in which the thought of an author may be copyrighted.[58]

Nevertheless, the attempt to distinguish the activity of CATV from that of the hotel in *Buck* is not entirely persuasive. The infringement in *Buck* was held to flow from the reception of radio broadcasts and the translation of them for commercial purposes into audible sound. It can be argued under the *Buck* rationale, as well as in the CATV situation, that a middleman is "reaping what others have sown," and certainly CATV's reception of television signals is more closely related to its business than was the hotel's action in *Buck*.

Since the question of whether CATV operations constitute a reproduction of television broadcasts remains unsettled, it can only be conjectured as to whether the multiple performance doctrine or any other copyright theory [59] will be extended to CATV to render its activities a copyright infringement. There is evidence, however, to indicate that some courts favor the free dissemination of broadcast signals. For example, in *Z Bar Net, Inc. v. Helena Television, Inc.*,[60] a CATV case, it was held, under a *state* copyright statute, that by broadcasting programs on a network station and consenting to the rebroadcasting of such programs by a local station, plaintiffs had intentionally made them public. The court reasoned "that the activities of the defendant . . . *do not* constitute an infringement upon, or a violation of, any rights or privileges of either of the plaintiffs in this action." [61]

Possible Remedies

In evaluating the remedies available to alleviate the CATV copyright problem,[62] it is important to weigh the conflicting in-

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[58] 17 U.S.C. § 1(e) (1964). Professor Nimmer also points to "a difference in kind between . . . situations where the sound waves which transmit the rendition are heard at two different points in time, as with phonograph records, and . . . where the sound waves are heard at the same time at two geographic points, as with radio broadcasts." Nimmer, *supra* note 53, at 88.

[59] CATV operators could use an "implied license" defense, since there may be no express reservation in the station's license against multiple performances. In *Buck*, the broadcasting station itself was not licensed by the copyright proprietor to perform the work. The Court suggested that if the station had been licensed, the defendant-hotel might have been entitled to transmit the additional performance as an implied term of the license. See Nimmer, *supra* note 53, at 90.

[60] 125 U.S.P.Q. 595 (D.C. Mont. 1960).

[61] *Id.* at 596. (Emphasis added.)

[62] H.R. 4347, 89th Cong., 1st Sess. § 106 (1965).

terests of the broadcasters and copyright proprietors, on the one hand, and CATV operators and their subscribers on the other.

The first point which may be argued on behalf of CATV for exemption under the copyright law is that a CATV system does nothing more than provide its subscribers with a service for improving their television reception, since the expense of paying copyright royalties would, of necessity, be passed on to the individual CATV subscribers. A finding that CATV is within the Copyright Act, therefore, would discriminate between those viewers who need no special equipment to get good reception and those who do.

Second, it may be maintained that the content of telecasts relayed to subscribers is impossible to control, and a CATV operator does not know in advance what works will be performed in the telecasts. To obtain blanket clearance in advance would be impossible and the maintenance of a clearing house system large enough to insure against multiple suits for copyright infringement would result in a giant monopoly for copyright owners. Such a monopoly could place CATV at the mercy of capricious proprietors who might unreasonably withhold permission for appropriation.

Finally, it can be contended that copyright proprietors are actually receiving sufficient royalties, since broadcasters now pay performance royalties based on the ultimate size of the audience, which includes CATV subscribers. It is apparent that CATV operators actually benefit copyright owners by increasing the advertising revenue of broadcasters, hence augmenting the royalties payable to the copyright proprietors. To demand additional payment constitutes an unwarranted double reward.

The first point in the argument for inclusion of CATV under the copyright law is that such a system is more than a passive device or service. It is a complicated instrumentality which transmits television programs to the public in the same manner as a broadcaster. It not only takes a "free ride" on what the broadcaster has produced, but makes a direct charge to the public for the reception of its transmissions.

Second, with CATV, it is evident that owners of copyrights cannot control the distribution of their work. In many cases (for example, motion pictures or syndicated series) where the dissemination of a work is intended by the copyright holder for a certain territory and audience, a CATV transmission can mean the loss of a market for the work. Such a loss could be quite imposing when multiplied many times throughout the country.

Finally, it is maintained that there are very many CATV systems prospering, and they neither need nor deserve a "free ride" at the expense of copyright owners, or in competition with local broadcasters, wired music services, and other users who

are forced to pay royalties. It may also be averred that CATV activities constitute a moral wrong similar to the old system of "bicycling" movies from one theater to another to avoid paying for a second license.

In evaluating these conflicting arguments, the House Judiciary Committee recognized that advance clearance for all transmitted program material was a real problem. But, it was concluded that CATV did not warrant exemption. Consequently, a statute was drafted which granted copyright holders the *exclusive right* "to transmit or otherwise communicate a performance or exhibition to the public by means of any device or process." [63] However, in another section the objection of unfair prejudice to those outside ordinary television broadcast range was met by providing an exemption to nonprofit operators who transmit "without altering or adding to the content of the original transmission, without any purpose of direct or indirect commercial advantage, and without charge to the recipients."[64]

This proposed legislation, that would put CATV under the jurisdiction of the copyright statute, seems in general to be equitable. Nevertheless, to impose upon CATV operators, without qualification, the burden of paying royalties might have an adverse effect on the viewing public which relies on profitable CATV operations for television reception.

While the television industry has thus far been largely unsuccessful in its actions against CATV for copyright infringement and unfair competition, relief may be forthcoming from the Federal Communications Commission. Although the FCC cannot resolve the copyright question, as it is not the proper forum for the adjudication of property rights,[65] it is concerned with regulating the broadcasting industry so as to provide for the "public interest." [66] Guided by this objective, the FCC has reversed an earlier decision,[67] and has recently decided to exert jurisdiction over CATV.[68] While the precise effect that FCC control will have on the copyright problem is not yet determinable, it appears that such control might reduce the urgency for instituting copyright infringement actions pending the institution of more effective legislation. In the final analysis, the resolution of this dilemma

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[63] H.R. 4347, 89th Cong., 1st Sess. § 106(b)(3)(B) (1965).

[64] H.R. 4347, 89th Cong., 1st Sess. § 109(5) (1965).

[65] FCC, INQUIRY INTO THE IMPACT OF COMMUNITY ANTENNA SYSTEMS, TV TRANSLATORS, TV "SATELLITE" STATIONS, AND TV BROADCASTING, 26 F.C.C. 403, 430 (1959).

[66] FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

[67] FCC, *supra* note 65.

[68] Docket No. 14895, 30 Fed. Reg. 6038 (1965); Docket No. 15971, 30 Fed. Reg. 6078 (1965). See also Newsweek, Feb. 28, 1966, pp. 67-68.

might lie in coordinating FCC regulations with the copyright law. The effect would be to permit CATV to function unhampered by copyright infringement actions, while at the same time protecting the interests of broadcasters and copyright proprietors through regulations promulgated by the FCC.

Conclusion

While in the past, protection of television program material by statutory copyright has been shunned by the broadcasting industry in favor of common-law protection, with the advent of the *Sears* and *Compco* cases and the drafting of a new copyright law, this form of protection will probably become popular. Traditionally, only "writings" and "authors" were protected by statute, but draftsmen today are considering expanding the protection to include electronic transmissions. If this type of protection is adopted, the question that the Supreme Court in *Buck* had to face would be avoided, viz., whether the alleged infringement constituted a reproduction of the copyright material. Finally, FCC regulations should put the infringement problem into its correct perspective by controlling the range and frequency of CATV broadcasts, thus protecting the interests of the copyright proprietors by eliminating pecuniary losses in connection with licensing agreements and exclusive broadcasts.

Appendix

United Artists Television, Inc., v. Fortnightly Corp.,[69] decided after the initial submission of this note, held that a CATV retransmission of copyrighted motion pictures, leased only for showing on specified television stations, constituted an infringing performance under copyright law.

In arriving at the conclusion that CATV was infringing upon copyrighted works, the Court eschewed technical distinctions between CATV operations and a classical "performance" under the Copyright Act, and relied on the substance of the transmission rather than its form.

The crucial fact, as pointed out by the Court, is that "the CATV system has performed copyrighted works publicly and for profit by the transmission of electromagnetic waves representing the sights and sounds of said works." [70] Since CATV made available to an audience a reproduction of a primary performance, the Court decided that CATV was executing a function so closely

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[69] 34 U.S.L. WEEK 2651 (S.D.N.Y. May 23, 1966).

[70] United Artists Television, Inc. v. Fortnightly Corp., 34 U.S.L. WEEK 2651 (S.D.N.Y. May 23, 1966).

related to the original performance, that the effect should be treated as though there were a "performance" under the Act. "The economic realities demonstrate that the CATV system is in the business of selling television programs to the public." [71]

The Court relied heavily on *Buck v. Jewell-LaSalle Realty Co.*,[72] discussed in detail in the body of the note, which held that "public reception for profit in itself constitutes an infringement of the copyright proprietor's exclusive right to perform." [73] The District Court in *Fortnightly* felt constrained to follow *Buck*, citing the fact that in an era of technological development, courts must be flexible in utilizing dictionary definitions. In addition, the Court struck down the defense of an implied-in-law license for commercial TV reception and distribution of a telecast performance. From the Court's point of view, the issue was not whether an implied-in-law license existed, but rather whether the CATV station should be allowed to profit at the licensee's expense—it decided that it should not. It is interesting to note that in *Buck*, the Supreme Court had pointed out that if the radio station had obtained authorization to broadcast the copyrighted material, the decision might have been different.[74] A lower federal court had held there was no infringement where the initial broadcast was licensed.[75] In holding that such an implied-in-law license should not exist, the Court appears to have made a value judgment based on economic realities rather than judicial interpretation.

The result in this case underscores the flexible approach adopted by the courts in construing Section 1 (c) and (d) of the Copyright Act.[76] In holding CATV liable for infringement, the Court in *Fortnightly* has significantly advanced the broad protective scope of copyright law.

Dissolution of the Close Corporation

Conceived in practical business necessity, but born into the restraint of existing corporate norms, the close corporation stands today as a species of business enterprise finally achieving its rightful place in the legal spectrum. The typical close corporation is formed by several businessmen who otherwise would have

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[71] *Ibid.*
[72] 283 U.S. 191 (1931).
[73] U.S. Const., art. I, § 8.
[74] Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, 199, n.5 (1931).
[75] Buck v. Debaum, 40 F.2d 734 (S.D. Cal. 1929).
[76] 17 U.S.C. § 1(c), (d) (Supp. 1965). The Court by-passed the other charges made by the copyright owner under these sections and limited the decision to the issue of whether CATV had infringed the *performing rights.*