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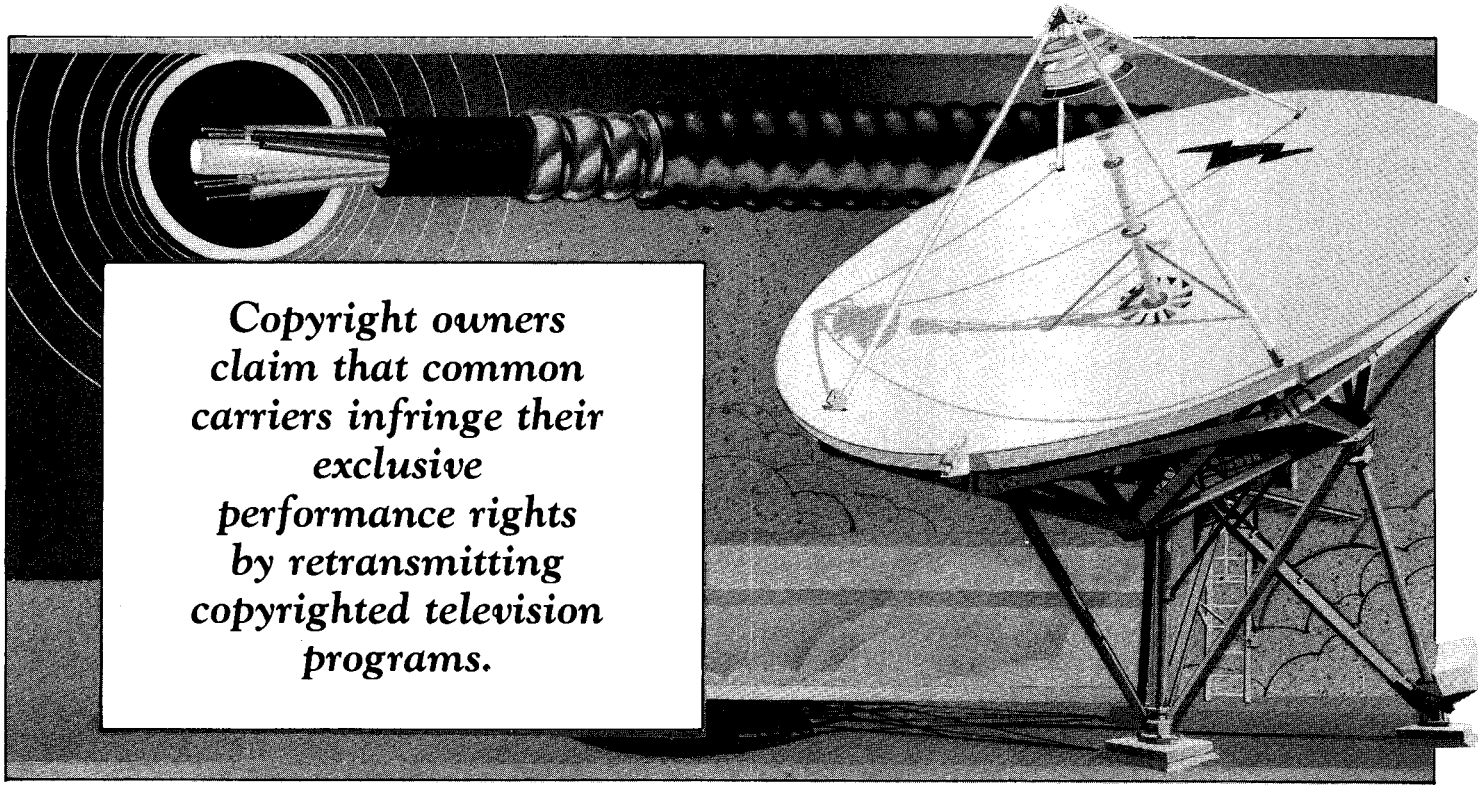
Common Carrier Liability Under the Copyright Act of 1976

By Howard W. Simcox Jr.

In just twenty years, the cable television industry in America has grown from an infant enterprise, serving only isolated communities with limited programming, to a multi-million dollar giant, serving both urban and rural areas alike. In addition to providing communities with distant broadcast signals, cable television now offers round-the-clock movies, sports, news, music, and even exclusive weekly serials. Currently attracting over 250,000 new subscribers each month,[1] cable, or community antenna television (CATV), has proven itself to be a viable alternative to advertiser-supported broadcasting.

The cable industry's rapid growth has not been untroubled, however. Since the early days of cable television, CATV systems prospered, not by originating their own programming,[2] but by distributing the broadcast signals of individual television stations to distant communities that suffered from poor television reception. To improve reception, cable companies would install powerful receiving antennae on the outskirts of subscribing communities. If reception was still poor, then the cable company would hire a communications *common carrier* to receive and strengthen distant broadcast signals and retransmit them to the cable system's main receiving antenna or "headend" for subsequent distribution to the subscribing community via cables running directly into the homes of paying customers. Ordinarily, the common carrier would broadcast television signals without ever obtaining the permission of the television stations and without ever compensating the copyright owners for the right to transmit their programs.[3] This practice infuriated television copyright owners, who realized that cable systems were distributing their programs to viewers for a profit without paying for performance rights.

The copyright owner of a television program profits by licensing television stations to broadcast the program in return for compensation. The amount of compensation often varies with the size of the broadcaster's potential audience. In 1968, the copyright owners of several television programs sued a CATV company for copyright infringement in *Fortnightly Corp. v. United Artists Television.*[4] The copyright owners argued that, under the Copyright Act of 1909[5] then in effect, the CATV systems infringed the owners' exclusive right to "publicly perform" their copyrighted programs. The Supreme Court rejected this argument and held that the CATV systems, in distributing broadcast signals containing copyrighted programs, did not "perform" the copyrighted works and so were not liable for infringement.[6]



Copyright owners claim that common carriers infringe their exclusive performance rights by retransmitting copyrighted television programs.

Eight years later, however, Congress imposed liability for such distributions when it enacted the Copyright Act of 1976 (Act),[7] which contains an exemption from liability for CATV retransmissions of broadcast signals, provided the CATV system pays a compulsory licensing fee to the Copyright Royalty Tribunal.[8] These fees are then apportioned among copyright owners who have established entitlement with the Copyright Royalty Tribunal.[9] Under this scheme, Congress has provided for the continued growth of the cable industry and, at the same time, has ensured compensation to copyright owners.

Recently, copyright problems arose with respect to another party necessary to the cable industry, namely, the communications common carrier. A common carrier is an intermediary paid by CATV systems to receive and transport television signals from distant broadcast stations to the CATV system's main receiving antenna or headend for subsequent distribution to individual subscribers.[10] Copyright owners claim that common carriers infringe their exclusive performance rights by retransmitting copyrighted television programs. This issue was raised in two recent cases involving communications common carriers: *Eastern Microwave, Inc. v. Doubleday Sports, Inc. (EMI)*[11] and *WGN Continental Broadcasting Co. v. United Video, Inc. (WGN)*.[12]

In *EMI*, the United States Court of Appeals for the Second Circuit reversed the United States District Court for the Northern District of New York and found that the carrier was exempt from copyright liability.[13] In *WGN*, the United States Court of Appeals for the Seventh Circuit reversed the lower court and held that the common carrier was *not* exempt from liability under the Act.[14]

This article examines these two cases and the conflicting resolutions by the second and seventh circuits of the carrier exemption issue and concludes that carriers that retransmit broadcast signals to CATV systems should be exempt from liability for copyright infringement.

The Copyright Act of 1976

Section 106(4) of the Copyright Act of 1976 gives a copyright owner the exclusive right to publicly perform copyrighted works. Under the Act's broad definition of "perform,"[15] the showing of a "motion picture or other audiovisual work" is a performance. Thus, the showing of a typical television program, which qualifies as an "audiovisual work,"[16] is a performance under the Act.

Ordinary television broadcasts are considered "primary transmissions," and television stations avoid "public performance" liability under the Act by paying licensing fees directly to copyright owners. CATV systems and carriers that retransmit ordinary television signals to their subscribers are exempted from performance infringement provided they comply with §111 of the Act. Subsections (c), (d) and (e) of §111 apply to CATV systems. These subsections establish the compulsory licensing scheme discussed above. Subsection 111(a)(3) applies to common carriers and contains the so-called *passive carrier exemption*, which states:

Only by maintaining its role as a passive "messenger for hire" can the common carrier avoid copyright liability.

> The secondary transmission of a primary transmission embodying a performance... is not an infringement of copyright if....
> ...
> (3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables or other communications channels for the use of others....[17]

The Act does not define the term "secondary transmission." However, if a carrier can meet the qualifications of this section, then its transmission is not an infringement of copyright. If, however, the carrier (i) exerts control over the content or selection of the original broadcast signal, (ii) exerts control over the recipients of its own retransmission, or (iii) in some manner uses its communications channels for its own purposes, then the exemption is inapplicable and the carrier becomes liable under §106(4) for copyright infringement.

The Passive Carrier Exemption

The primary issue raised in *EMI* and *WGN* was whether the respective common carriers qualified for the passive carrier exemption under §111(a)(3) of the Act. In determining whether the exemption's three requirements were met, the courts examined all of the circumstances surrounding the challenged retransmissions.

In 1982, Eastern Microwave, Inc. (EMI), a licensed communications carrier[18] retransmitting the broadcast signal of WOR-TV in New York City,[19] sought a declaratory judgment against Doubleday Sports, which owned the copyright to the New York Mets' games broadcast seasonally on WOR-TV.[20] The suit sought to establish that EMI's retransmissions qualified for the passive carrier exemption. EMI contended that it had, in retransmitting WOR-TV's broadcast signal, exercised "no control over the content or selection of the primary transmission or over the recipients of the secondary transmission and that its activity is limited to providing wires" and other avenues of communication solely for the use of its customers, the CATV systems.[21]

The lower court found against EMI for several reasons. First, the court found that, by choosing the WOR-TV signal for satellite retransmission, EMI exercised "selection" of the primary transmission.[22] Additionally, the court held that, by contracting with particular CATV systems that wished to receive the retransmissions, EMI exercised "control" over the recipients of its secondary transmission.[23] Finally, the court held that, by aggressively marketing its ability to retransmit WOR-TV's signal by satellite, EMI evidenced that it was not providing its communications channels "solely for the use of others," but was instead "selling" the broadcast signal as a product for its own benefit.[24]

On appeal, the Court of Appeals for the Second Circuit reversed the district court's decision.[25] The appellate court recognized that EMI had the ability to

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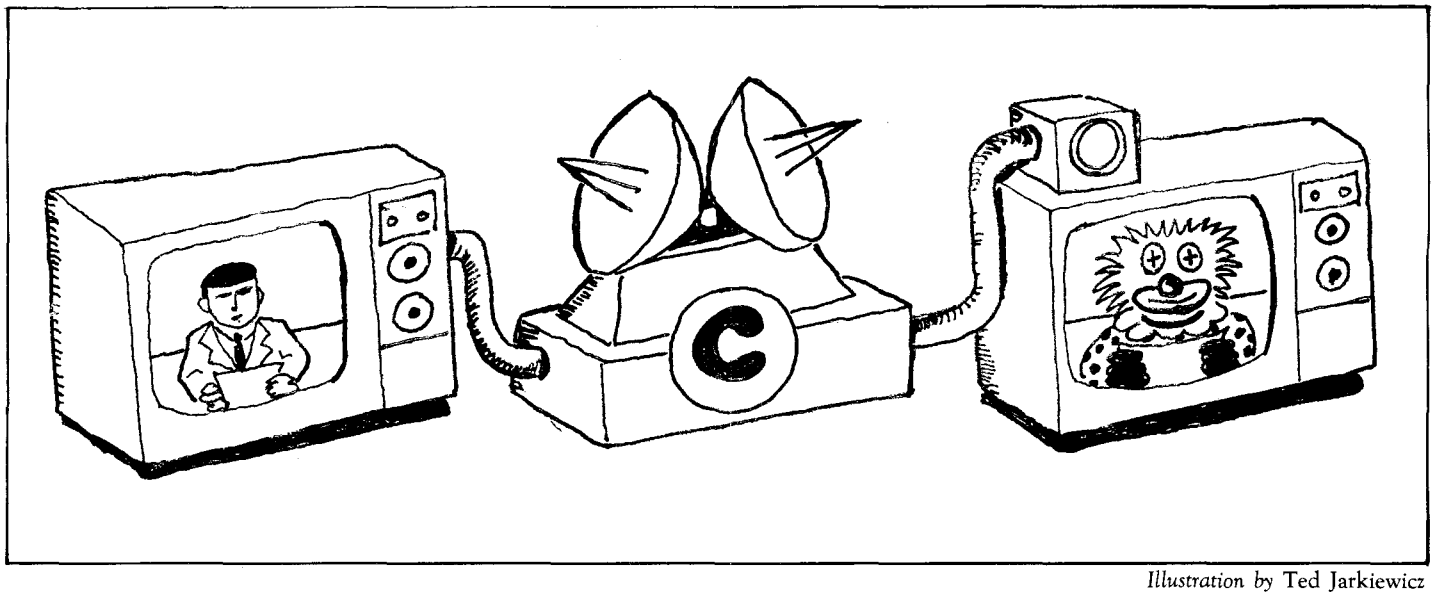

Illustration by Ted Jarkiewicz

retransmit only one signal via satellite and that the "initial, one-time" selection of WOR-TV's signal was not "control over the content and selection of the primary transmission."[26] The court also found that EMI did not exercise "control" over the particular recipients of its retransmission by contracting with various CATV systems. EMI, the court noted, was required, as a licensed communications carrier, to accept all reasonable requests for its service.[27] Finding that "no reasonable requests for its services was ever refused by EMI," the court concluded that there was no showing of "control" within the meaning of the § 111 (a)(3) requirement.[28] As to the third and final requirement under § 111(a)(3), the court found that EMI's advertising of its ability to transmit a particular signal was a "normal business activity,"[29] which did not disrupt the fact that EMI was offering its communications services solely for the use of CATV systems that could not afford their own relay equipment.[30] Accordingly, the court held that EMI's retransmissions were exempt from infringement under § 111(a)(3).[31]

The common carrier exemption, located in the same section of the Act as the cable television compulsory licensing plan,[32] was enacted to further the purposes of the compulsory licensing plan.[33] Congress, in enacting the cable television compulsory licensing scheme, devised a compromise which provided compensation to copyright owners while ensuring the continued growth of the cable industry by removing the need for individual contracts between CATV systems and copyright owners.[34]

In the 1960's, as CATV systems became principally concerned with the importation of distant broadcast signals,[35] their dependency on the common carrier, as the transporter of those signals, increased. Recognizing that the cable industry would not flourish as intended without a continuous supply of broadcast material,[36] Congress created the common carrier exemption, which ensures that qualified carriers will not be subjected to the unwieldy process of negotiating with individual copyright owners for the performance rights to each retransmitted program.[37]

By establishing the particular requirements of the § 111(a)(3) exemption, however, Congress made clear its intention that the carrier's role was to be restricted to that of a non-contributing, passive intermediary between the broadcaster and the CATV system. Thus, a carrier seeking the exemption may not add or subtract material from the broadcaster's primary transmission, or be selective in choosing its customers.[38] Only by maintaining this role as a passive "messenger for hire," can the carrier avoid liability. This scheme ensures a steady variety of broadcast material, which in turn encourages the growth of the cable industry, as Congress intended.[39]

Had the lower court's decision in *EMI* been upheld on appeal, then Congress' intention would have been thwarted.[40] The lower court would have withheld the exemption from EMI for having intially "selected" a particular broadcast signal to retransmit. This ruling would, in effect, have required all carriers to retransmit "every television broadcast of every television station in the country" in order to remain exempt.[41] Additionally, the district court erroneously indicated that a carrier, by offering its services at a rate unaffordable to all CATV companies,[42] would lose the exemption for exercising "selection" over the recipients of its retransmission. Finally, the district court left unresolved the question of what type of advertising by a common carrier to attract customers would exploit a copyrighted program for commercial benefit, rather than provide services "solely for the use of" subscribers.[43]

If carriers risked their exemption by engaging in activities such as choosing a signal, setting particular rates or advertising, then carriers seeking to avoid copyright liability would have only two options left. First, a carrier could attempt to secure licenses from every copyright owner of every retransmitted program. Even if the carrier were successful in obtaining such licenses, licensing fees would amount to a second royalty payment to the copyright owner, even though the number of home viewers remained constant. Since the amount of royalties paid by a CATV system under the Act is designed to fluctuate with the number of home subscribers, additional licensing payments by carriers would disrupt the scheme.[44] Second, a carrier that is unable or unwilling to obtain licenses would have no choice but to cease operations to avoid liability. This would impair the growth of the cable industry, which is the opposite of what Congress intended.[45]

To fully effectuate Congress' intent to maintain the flow of programming to CATV systems, the common carrier exemption must remain available to carriers that initially select a particular

broadcast signal to transmit, contract with all CATV systems able to meet their service rates or advertise their ability to offer a particular signal. Had the carrier in *EMI* added its own communication to a retransmission or selected to serve only particular CATV systems, then a different result might have occurred. These facts, however, were not present in *EMI*.

Control Over The Primary Transmission

In *WGN*,[46] Chicago television station WGN began experimenting with the "vertical blanking interval" (VBI) of its broadcast signal. The VBI is the extremely short period of time needed for television circuitry to reset between frames.[47] During this interval, coded information can be inserted for transmission along with the program material. This added information, known as "teletext," can be viewed on television sets equipped with special decoders.

Teletext can appear as subtitles at the bottom of the television screen (as is done with closed-captions for the hearing impaired) or may be displayed separately as an entire screenful of typed information. WGN's teletext was of the latter variety and consisted of local Chicago news and a program schedule inserted in the VBI of its copyrighted nine o'clock p.m. national news program.[48] Viewers using a decoder could either watch the news program, or switch to the decoded teletext.[49]

Defendant United Video, a common carrier that retransmitted the WGN signal via satellite, began stripping the teletext information out of the broadcast signal and substituting teletext supplied by Dow Jones before retransmitting the signal to CATV systems.[50] WGN sued United Video for copyright infringement and for a permanent injunction to prevent United Video from removing its teletext. The United States District Court for the Northern District of Illinois, Eastern Division denied WGN's motion for injunction and instead granted summary judgment for United Video.[51]

At the trial, WGN argued that its entire broadcast signal (including its teletext) constituted the "primary transmission," and that the removal of any part of that signal, namely WGN's teletext, amounted to "control of the primary transmission," an act that precluded the passive carrier exemption.[52] The district court rejected this argument, however, and held that under §111(a)(3), the "primary transmission" is not the entire broadcast signal, but is limited to "the copyrighted works which are initially broadcast and retransmitted."[53]

This determination compelled a further inquiry. Since the district court defined "primary transmission" as the "copyrighted work," then United Video would be exerting "control over the primary transmission" only if the nine o'clock news and the simultaneously broadcast teletext amounted to a single copyrightable work. If the teletext and news program were copyrightable as separate works, then United Video's refusal to retransmit the teletext would not alter the "passive" character of its retransmission of the nine o'clock news.

In view of the carrier's intended role as a non-interfering message "conduit," Congress could not have meant for the common carrier exemption to apply to a carrier that removes a portion of a broadcaster's message and replaces it with material from another source, as was done in WGN.

The district court, relying on the Act's definition of "audiovisual work" which, in part, requires "a series of related images,"[54] found that the teletext material, which could not be seen together with the nine o'clock news, was not part of the same "series of related images" as the news program.[55] Thus, United Video was entitled to an exemption under §111(a)(3) with regard to the retransmission of the nine o'clock news program.[56]

On appeal, however, the United States Court of Appeals for the Seventh Circuit reversed this decision.[57] Although the appellate court agreed that United Video would be exerting control over the primary transmission "only if WGN's copyright of the nine o'clock news includes the teletext in the vertical blanking intervals," it disputed the district court's finding that the news program and the teletext were not "related images" copyrightable as a single audiovisual work. The court found that the two sources of information amounted to a "two-channel" news program, both channels of which were "intended to be seen by the same viewers" who could switch back and forth between the sources with the decoder. Thus United Video was not an exempt carrier, for in stripping out WGN's teletext, it had exerted control over the copyrighted material constituting the primary transmission.[58]

In view of the carrier's intended role as a non-interfering message "conduit," Congress could not have meant for the common carrier exemption to apply to a carrier that removes a portion of a broadcaster's message and replaces it with material from another source, as was done in *WGN*. Unlike EMI's retransmission, United Video's retransmission was not "passive." Thus, on the facts, *EMI* and *WGN* are distinguishable. However, the two opinions have produced inconsistent definitions of the term, "primary transmission."

In *EMI*, the nature of the carrier's retransmission was not at issue. Both the district and circuit courts defined "primary transmission" as simply "the signal broadcast" by a television station.[59] In *WGN*, however, the addition of teletext to the broadcast signal forced the courts to more closely examine the concept of a "primary transmission." The Act, itself, was of little help. Even though §111(f) purports to define a "primary transmission," the definition focuses only on the word "primary." Section 111(f) defines "primary transmission" as "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service...."[60] Left to its own interpretive resources, the *WGN* district court determined that the phrase, "control over the primary transmission," meant control over the

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copyrighted program,[61] even though the court admitted that the phrase "could easily mean either alteration of the signal or editing of the program."[62]

By defining "primary transmission" as it did, however, the district court (and later, the appellate court) had to determine whether the two works, the news program and the original teletext, constituted a single copyrightable audiovisual work comprised of a "series of related images."[63] This inquiry was also fraught with interpretive problems inasmuch as the Act defines neither "series" nor "related."

The "Same Viewer/Same Time" Test

The district court concluded that the teletext and nine o'clock news "were not intended to be viewed together as a single work by the same viewer at the same time," and thus did not constitute one copyrightable audiovisual work.[64] On appeal, the circuit court applied the same test, but disagreed with the district court's conclusion and held instead that the two works were intended to be seen at the same time by the same viewers. The court hypothesized that if teletext news were broadcast during "a cartoon show for preschoolers," the two works would not then be "related images."[65]

The so-called "same viewer/same time" test applied by both courts in *WGN* is inadequate to determine the copyrightability of teletext and television programs as a single "audiovisual work." By providing no guidelines for determining when two works were "intended to be seen by the same viewers," the test merely invites judicial conjecture. The *WGN* appellate court itself demonstrated the likelihood of widely inconsistent decisions under the test when it announced that WGN's teletext containing local Chicago news and weather was intended to be seen by the same cable viewers as were watching the WGN national news in Albuquerque, New Mexico. Further, the *WGN* same viewer/same time test has the practical effect of forcing a carrier to retransmit all teletext broadcast by a station even if the carrier has no way of knowing if the teletext might unexpectantly become "unrelated" to the main program.

In view of the fact that § 111 secondary transmission exemptions were designed to protect cable television and common carriers, it makes little sense to apply such a "loose and spongy" ex-

emption eligibility test as the one applied in *WGN*.[66] While it is true that Congress intended the Copyright Act of 1976 to be applied to new technologies,[67] teletext broadcasting has raised a carrier exemption problem that cannot be satisfactorily resolved under the Act's current wording and legislative history.

The solution is, of course, a statutory one. Now that the television and cable industries have recognized the potential for teletext broadcasting,[68] so must Congress. If, upon investigation, Congress determines that teletext is as deserving of protection as CATV was, then it should enact new or clarifying legislation to safeguard teletext's future in the competitive broadcast industry. Should Congress determine that common carrier interference substantially threatens the wide-spread development of teletext systems, a simple solution would be to redraft the definition of "primary transmission" to mean "the *entire* broadcast signal," so that *any* carrier interference with the teletext would constitute "control over the primary transmission" under §111(a)(3) of the Act.

On the other hand, should Congress determine that teletext broadcasts are too disruptive of the CATV/carrier copyright scheme to merit special protection, it might add to the Act a definition of the word "series" that does not contemplate two *simultaneously* telecast programs. Congress might also expressly restrict the copyrightability of teletext broadcast simultaneously with a main program to that style of teletext that appears only at the bottom of the television screen during the featured program.

Some congressional action with regard to teletext transmissions is necessary to afford common carriers clear notice of what conduct constitutes impermissible "control of the primary transmission." Such legislation will restore needed stability to the common carrier exemption that was lost after the *WGN* decision.

Conclusion

The passive carrier exemption under §111(a)(3) of the Act should be construed to maximize the free flow of varied program material to CATV systems while ensuring that the carrier is truly a "passive" intermediary that neither adds nor subtracts from the primary transmission and selects its audience only on the basis of legitimate business reasons.[69]

With the introduction of teletext broadcasts into the carrier exemption scheme, a strong need exists for congressional action aimed at clarifying the parameters of carrier "control" over teletext broadcasts. Such clarification will result in more consistent judicial application of the common carrier exemption, which in turn will benefit both carriers and copyright owners alike by providing them with clear operational guidelines.

NOTES

1 Wheeler, *Cable Television: Where It's Been, Where It's Headed*, 56 FLA. B.J. 228 (1982).

2 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 392 n. 6 (1968).

3 United States v. Southwestern Cable Co., 392 U.S. 157, 162 (1968).

4 392 U.S. 390 (1968).

5 Copyright Act, ch. 320, 35 Stat. 1075-1088 (1909), *amended by* 17 U.S.C. §§ 101-810 (1982).

6 Fortnightly, 392 U.S. at 400.

7 17 U.S.C. §§ 101-810 (1982).

8 *Id.* at § 111(c)(d).

9 *Id.* at § 111(d).

10 For a discussion of the distant/local signal distinction, *see* Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974).

11 534 F. Supp. 533 (N.D.N.Y. 1982), *rev'd*, 691 F.2d 125 (1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1232 (1983) [hereinafter cited as EMI].

12 523 F. Supp. 403 (N.D. Ill. 1981), *rev'd*, 693 F.2d 622 (7th Cir. 1982), *reh'g denied*, 693 F.2d 628 (7th Cir. 1982) [hereinafter cited as WGN].

13 EMI, 691 F.2d at 134.

14 WGN, 693 F.2d at 625.

15 Under 17 U.S.C. § 101, "perform" means "in the case of a motion picture or audiovisual work, to show its images in any sequence...."

16 "Audiovisual works" are "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines... or electronic equipment, together with accompanying sounds, if any...." 17 U.S.C. § 101 (1982). *See generally* M. NIMMER, NIMMER ON COPYRIGHT, § 209(a)(b)(c) (1982).

17 17 U.S.C. § 111(a)(3) (1982).

18 *See* 70 F.C.C. REP. 2d 2195 (1979).

19 EMI, 534 F. Supp. at 534.

20 *Id.*

21 *Id.* at 537.

22 *Id.*

23 *Id.* at 538.

24 *Id.*

25 EMI, 691 F.2d 125 (2d Cir. 1982).

26 *Id.* at 130.

27 *Id.* at 131.

28 *Id.*

29 *Id.* at 131, n. 15.

30 *Id.* at 131.

31 *Id.* at 134.

32 17 U.S.C. § 111 (1982).

33 EMI, 691 F.2d at 132.

34 *Id.*

35 United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

36 EMI, 691 F.2d at 132.

37 *Id.*

38 *Id.* at 130.

39 *Id.* at 132.

40 Responses to the district court ruling appeared almost immediately. A bill was introduced in the House of Representatives just twelve days after the EMI district court decision. *See* H.R. 5949, 97th Cong. 2d Sess. (1982).

41 EMI, 691 F.2d at 130.

42 The district court did not identify how EMI selected the recipients of its retransmissions. The appellate court explained that EMI refused to contract with CATV systems that could not meet its FCC approved service rates. 691 F.2d at 131.

43 EMI, 534 F. Supp. at 538.

44 EMI, 691 F.2d at 137.

45 *Id.* at 132.

46 523 F. Supp. 403 (N.D. Ill. 1981).

47 *Id.* at 405.

48 *Id.* at 407.

49 WGN, 693 F.2d at 624 (7th Cir. 1982).

50 WGN, 523 F. Supp. at 407.

51 *Id.* at 405.

52 *Id.* at 409.

53 *Id.* at 411.

54 17 U.S.C. § 101 (1982).

55 WGN, 523 F. Supp. at 412.

56 *Id.* at 413.

57 WGN, 693 F.2d 622.

58 *Id.* at 628.

59 EMI, 534 F. Supp. at 537.

60 17 U.S.C. § 111(f) (1982).

61 WGN, 523 F. Supp. at 410-411.

62 *Id.* at 410.

63 *Id.* at 412.

64 *Id.*

65 WGN, 693 F.2d at 628.

66 *Id.* at 629.

67 *Id.* at 627.

68 Shulman, *Communications and Non-communications Lawyers Beware: The Teletext and Videotex Revolution is Coming*, FED. B. NEWS & J., Nov. 1982, at 409.

69 EMI, 691 F.2d at 130.

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recognize these facts is indicative of the caricature to which they are so powerfully impelled.

Another example of the same perceptual quirk is the belief that law teachers try to hurt students' feelings in class. Many students see their teachers as a self-selected group of the meanest of the legal profession, a group that seems to get a personal thrill out of brow beating students. Every reasonable answer begets just another question, and it is frustrating and embarassing to be put on the spot. But to conclude, because of such feelings, that the teacher is trying to hurt is for the student to confuse his personal reactions with the motives of the professor. It is to ignore the teacher as a person in his own right, with his own objectives. The teacher's aim is to enable the student to respond under pressure, even in situations where at first the student thinks he has no response. The objective is to encourage the student to think and communicate even more precisely and effectively than he thought he could. Law students are in training to be professional advocates and counselors. For a professional, arguments cannot be merely adequate or normal or bright. Lawyers are paid to be always clear and sometimes moving and brilliant in their communications; they must meet this professional obligation even when they feel embarrassed, even when they are distracted, even when at first they think they have no response.

A third example is the belief that the teacher knows everything. I hesitate to mention this particular misperception as it does not normally last past the third week of classes. At first impression this perception seems inconsistent with my model because it appears to acknowledge and enlarge the capacities of the teacher. But the real reason students want to believe their teachers know everything is to justify their conclusion that it is unreasonable to expect them to live up to the standard the teacher appears to set. If a teacher commands a kind of superhuman excellence or perfection, students are excused from paying attention to the standards he is trying to communicate. In short, he can be ignored. In fact, of course, teachers do not normally ask questions if they are sure of the answers. They are ultimately seeking to interest students in questions that they find interesting, important, and difficult to answer. The teacher thinks that the questions he puts are hard questions, that they are worthy of students' attention and thought because they are hard. He surely does not often assume that there are clear answers to the questions, let alone that he holds the answers.

A fourth variation on this theme is the belief that teachers are single-mindedly interested in legal thinking, in legal problems, in law. They have no self doubts, and they arrogantly insist that students master the profession's conventions and skills even when they do not want to. The teacher does not seem to know about other needs, does not recognize that all this seriousness will corrupt pleasant, fun-loving personalities. He does not sense that there is something a bit narrow and even threatening about how lawyers think. In short, the teacher is a reduced person with reduced vision who sees little of the broader world.

The truth is that many teachers are loaded with self-doubts. They have

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already mastered the skills that they are trying to impart and are familiar with the conventions of the profession. They know that putting legal skills into action can do a lot of harm. They have seen legal arguments intensify and even initiate disagreements rather than resolve them; they have seen students who—having just learned to say "inter alia" or divide their arguments into three numbered sections (and even perhaps remember the third part of the argument)—feel that because of these skills they have somehow become superior to other citizens; they have seen first-year law students disdain the "fuzzy" thinking of other citizens and even of their spouses and friends, so that they exhibit an aggresive overconfidence that is sometimes never outgrown; they are well aware of judges who think that some special skill entitles them to a superior place in the resolution of social problems. Teachers may love their craft and the skills of their profession, but they are at least as aware of the limitations as anyone else. They spend a great deal of their academic effort questioning basic assumptions about how law is used, at attempting to locate the limitations of law. They want students to master the techniques and then to transcend them.

Sooner or later (and this misperception tends to last indefinitely) many students come to believe that their teachers know nothing, are not there at all. The most common version of this belief is that teachers are not interested in practical things. Put bluntly, students adopt this attitude because their teachers insist that they continue thinking about problems when they are tired of them. Students and alumni criticize teachers as "too abstract," "too impractical," "too academic," but these are merely euphemisms for exasperation. Most law teachers have practiced law, many still do, and some will go back to the practice full time. Of course, the faculty's academic interests may differ from the students' interests from time to time, but there is no real doubt that the skills being taught are generally the skills needed in practice. Law students are taught to be precise, to develop the capacity to forsee potential weaknesses in their own arguments, to be orderly, to be complete, to be imaginative in the construction of legal arguments. These are the intellectual skills that the practice of law requires.

Another version of the belief that the teacher knows nothing is the distressingly common view that law teachers are trying to convince their students that there are always two sides to every argument. Many law students believe they have seen deeply into the purposes of legal education when they conclude that any one argument is as good as any other, that the important thing is just to be able to come up with an argument. Students might come to this conclusion because teachers tend to raise additional questions in response to most answers. The perceived message is that the student is to learn to make an argument, any argument; one must be as good as another since there are problems with all arguments. This perception is almost completely wrong. Teachers, of course, question answers so that students will learn to discover possible weaknesses in even their strongest arguments. Moreover, most teachers want students to be able to judge quality for themselves. They do not make a habit of telling students when their answers are "right" because a lawyer must learn to judge independently, by his own standards, when an argument is good enough. The point of all those questions is, in fact, to show students how to judge quality in argument, not to urge the view that quality is irrelevant.

I do not mean these observations to be self-serving. There is some truth in all the misperceptions that I have described. Every faculty member has many weaknesses, as does legal education in general. But the misperceptions distort—even oppose—what I think most law teachers know to be true. In this way they illustrate how powerful is the urge that students feel to diminish their teachers. Legal education is still fairly rigorous, and it involves many real frustrations and disappointments. Only some of these are caused by faculty members. To caricature and ultimately to try to eliminate the teacher that stands in front of them is a way for students to make the teacher responsible for all the difficulties associated with becoming educated in law. Law students in this regard only share (and perhaps enlarge) the near universal desire of students to avoid taking responsibility for their own education. Sadly, like any group subject to fairly constant misperception, teachers are under pressure to internalize the distorted image of themselves reflected in their students' eyes. Much of the malaise in legal education today may be as much a consequence of the resulting personal unhappiness as it is of any real ineffectiveness inherent in prevalent teaching techniques.

Collective Bargaining
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NOTES

1 294 Md. 144, 448 A.2d 345 (1982).
2 Md. Ann. Code art. 76A, §§ 7-15 (1980).
3 Md. Ann. Code art. 76A, § 11(a)(8) (1980).
4 Md. Educ. Code Ann. §§ 6-401, 6-411 (1978 & Supp. 1983).
5 Md. Educ. Code Ann. § 6-408 (1978 & Supp. 1983).
6 Md. Ann. Code art. 76A, § 15 (1980).
7 Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 Duq. L. Rev. 357, 376-378 (1972); Md. Educ. Code Ann. § 6-410 (1978).
8 Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 Yale L.J. 805 (1970).
9 Md. Educ. Code Ann. § 6-408(7) (1978).
10 Md. Educ. Code Ann. §§ 6-408(7) and 6-511 (1978).
11 *See, e.g.*, Montgomery County Council of Supporting Services Employees, Inc. v. Board of Education, 277 Md. 343, 354 A.2d 781 (1975); Offutt v. Montgomery County Board of Education, 285 Md. 557, 404 A.2d 281 (1979).
12 NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958).
13 Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 211 (1964) *citing* Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42-43 (1937).
14 Comment, *Collective Bargaining and the California School Teacher*, 21 Stan. L. Rev. 340, 358-359 (1969); Board of Selectmen of Marion v. Labor Relations Commission, 7 Mass. App. Ct. 360, 362, 388 N.E.2d 302, 303 (1979); Talbot v. Concord Union School District, 114 N.H. 532, 535, 323 A.2d 912, 913-914 (1974); NLRB v. Barlett-Collins Co., 639 F.2d 652, 656 (10th Cir. 1981).
15 Carroll County Education Association v. Board of Education of Carroll County, 294 Md. 144, 151, 448 A.2d 345, 352 (1982) (Davidson, J., dissenting).
16 *Id.*
17 Levine, *The Status of State "Sunshine Bargaining" Laws*, 31 Lab. L.J. 709, 713 (1980).
18 Md. Ann. Code art. 76A, § 7 (1980).
19 Levine, *supra* note 17, *citing* 832 Gov't Empl. Rel. Rep. (BNA) 16 (October 15, 1979).
20 *Id.*
21 *Id.*
22 Levine, *supra* note 17, at 709-710.