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Copyright Law—CATV—A Plea for Legislative Revision

A community antenna television system (CATV) is a sophisticated television receiving antenna through which signals, once received, are instantaneously amplified, separated, and relayed by coaxial cable or microwave facilities to the homes of subscribers, who pay an installation fee plus a monthly rate unrelated to the number of shows viewed. Technically a "mere adjunct of the television receiving sets [the service] enables a set disadvantageously located to operate like an ordinary set." Originally it was designed to service television sets that could not receive clear signals due to mountains or distance from regular television stations. In recent years, because of clearer reception and greater program variety, CATV has encompassed many new markets. Hence, complex questions have arisen concerning its proper relationship to the television broadcasting industry, for until recently only the latter has been subject to regulation by the Federal Communications Commission.

Local stations first became concerned over the competition for audience viewing time because CATV did not carry the local stations. The
FCC now requires CATV to relay the local station's broadcasts. However, the national television networks and the local stations, who had to obtain copyright licenses for their broadcasts, desired further protection from CATV as it received their programs free of charge. The copyright holders feared the potential loss of revenue when CATV sold copyrighted programs to its subscribers without paying for the programs. These parties initially sought to attack CATV in actions for unfair competition, since the object of CATV was to take a share of the audience's time. The courts, however, were unanimous in refusing relief on that basis. For instance, in Cable Vision, Inc. v. KUTV, Inc., a local station counterclaimed for damages from a CATV operator on two theories: unfair competition and tortious interference with contractual relations. The court held that the landmark cases, Sears, Roebuck & Co. v. Stiffel Co. and Compco Corp. v. Day-Brite Lighting, Inc., would not permit using common law tort theories to protect what was in fact a copyright interest. "[O]nly actions for copyright infringement or such common law actions as are consistent with the primary right of public access to all in the public domain will lie." An action against CATV on the basis of television station is the threat of competition—the threat that there may be some penetration of the competitive insulation which television stations have heretofore enjoyed. . . .

Id. at 77.

For a thorough treatment of the origins and developments of the law of unfair competition, see generally Chafee, Unfair Competition, 53 Harv. L. Rev. 1289 (1940). Actions for unfair competition typically involve a seller of goods attempting to convince the consumer that his merchandise was that of a competitor, i.e., "palming off." Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901). See 2 R. Callmann, Unfair Competition and Trademarks § 60 (2d ed. 1950); Callmann, What is Unfair Competition?, 28 Geo. L. J. 585 (1940). The landmark cases of Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964), and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964), held that a state unfair competition law cannot impose liability for, or prohibit, the copying of an article not protected by a patent or copyright. The Court thereby announced a firm policy of free access to anything in the public domain. For an exhaustive study of these two cases, see Bender, Brown, Derenberg, Handler & Leeds, Product Simulation: A Right or Wrong?, 64 Colum. L. Rev. 1178 (1964).


11 335 F.2d at 350.

[CATV may] freely and with impunity avail [itself] of such works to any extent [it] may desire and for any purpose whatever subject only to the
of copyright infringement seemed to be the only private remedy for stopping its allegedly unfair practices.

There followed an effort to require CATV to obtain copyright licenses. In *Fortnightly Corp. v. United Artists Television, Inc.*, the respondent, United Artists, had given a limited license for five of its copyrighted motion pictures to several television stations, which the petitioner, Fortnightly, a CATV system, had received and retransmitted to its subscribers. These subscribers could not receive any of the five television stations with ordinary antennas. At no time did the petitioner obtain any license under the copyrights from United Artists or from any of the five television stations. The respondent claimed that Fortnightly had infringed its exclusive right under the Copyright Act of 1909 to "perform . . . in public for profit" nondramatic literary works and its right to "perform . . . publicly" dramatic works. Fortnightly responded that its system did not "perform" the copyrighted works at all. The district court found for United Artists, and the court of appeals affirmed. The Supreme Court reversed, holding that the CATV system of Fortnightly did not infringe the respondent's copyright.

Generally a copyright holder is not granted control over all uses of his copyrighted work by the Copyright Act, but rather is given certain enumerated "exclusive rights." Hence, any party, without authorization from the copyright holder, infringes the copyright when he puts a copyrighted work to a use within the scope of one of these exclusive rights.

qualification that [it] does not steal good will, or, perhaps more accurately stated, deceive others in thinking the creations represent [its] own work. *Id.* at 351.

14 17 U.S.C. § 1 (1964) in pertinent part grants the copyright holder the exclusive right:

(c) To deliver, authorize delivery of . . . or present the copyrighted work in public for profit if it be a . . . nondramatic literary work . . . and to play or perform it in public for profit . . . in any manner or by any method whatsoever . . .

(d) To perform . . . the copyrighted work publicly if it be a drama . . . and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever . . .


United Artists was granted an exclusive right to "perform in public" the five motion pictures. Thus, the main issue for determination was whether Fortnightly had performed these copyrighted works and then whether that performance was in public thereby infringing United Artists' copyright.

The *Fortnightly* case was one of first impression. The main problem for the courts at each stage of the litigation was how to apply the Copyright Act, which was virtually unchanged since 1909 and had a legislative history demonstrating that problems of radio and television broadcasts were, of course, never considered. The district court in *Fortnightly*, relying upon a rather technical electronic analysis, reasoned that CATV rendered a public performance of the copyrighted motion pictures, as it applied energy from its own sources to reproduce and amplify the signals received from the various television broadcasts. This technical approach was rejected by the court of appeals and the Supreme Court. To determine whether *Fortnightly* had "performed in public" the copyrighted material, these latter courts reviewed prior case law. These earlier cases, applying the Act to modern broadcasting methods, revealed basically three theories. These theories can conveniently be labelled the public performance, implied license, and performance theories.

The theory of public performance within the meaning of the Copyright Act was expounded in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, where it was held that an unlicensed radio broadcast of a copyrighted musical composition constituted a public performance al-

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17 Previously no court had found retransmission by CATV constituted a performance. CATV was merely providing a signal and it was the subscribers themselves who were transcribing and reproducing the signal. Keller, *Is Community Antenna Television a Copyright Infringer?*, 43 U. Det. L.J. 367, 371 (1966); Note, *Community Antenna Television: Survey of a Regulatory Problem*, 52 Geo. L.J. 136, 157 (1963). Turning on a radio in one's home is considered to be a private act and therefore a non-infringing use of copyrighted material. See generally *Herbert v. Shanley Co.*, 242 U.S. 591 (1917), on the requirement that the performance be for profit.

19 The legislative history shows that the attention of Congress was directed to the situation where the dialogue of a play is transcribed by a member of the audience, and thereafter the play is produced by another with the aid of the transcript. 392 U.S. at 395 n.15.


20 For detailed discussions of the technical aspects of this process, see Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514, 1519 n.32 (1967); Note, *On a Clear Day* 1505; Note, *CATV Not Copyright Infringement* 857 n.12.

though the listeners enjoyed it separately and in the privacy of their homes. Reaching a large audience then constituted a public performance. A later case indicated that absent an actual broadcast, “one who enables another to hear” a performance—for example, playing a radio in a bar—would not be liable.22 Consequently, *Fortnightly* insisted that even if it did perform, it did not do so publicly.23 But since the petitioner reached over seventy percent of the people in the viewing area, its “rebroadcast” could not be considered private within the meaning of the public performance theory.24 In any event, the court of appeals in *Fortnightly* dismissed this argument, stating that “it is settled that a broadcast or other transmission of a work to the public . . . results in a public performance although each individual who chooses [sic] to enjoy it does so in private.”25

The second theory, implied license, later limited the public performance theory. In *Buck v. Debaum,*26 the copyright licensor was seen as giving an “implied license in law” to permit any subsequent reception and playing of the broadcast. When a copyright holder licenses a broadcaster to perform a copyrighted work, he also grants an implied license in law to receive and play the work to anyone who can do so, even though economic gain may be derived from it.27 Hence, if an original radio broadcast were licensed, the mere playing of that radio broadcast in public would not, under the implied license theory, constitute infringement.28 One writer asserted that the theory of implied license lies at “the heart of the question of CATV copyright liability.”29 However, the court of appeals in *Fortnightly* rejected this implied license theory, feeling that the copyright holder should have practically absolute control over his work, as the primary purpose of the Copyright Act is the protection of the holder’s economic rights.30 Still, the Solicitor General, in an amicus curiae brief

25 United Artists Telev., Inc. v. Fortnightly Corp., 377 F.2d 872, 879 (2d Cir. 1967).
26 40 F.2d 734 (S.D. Cal. 1929).
27 Id. at 736. See Note, *CATV Not Copyright Infringement* 859.
30 The court reasoned that in the age of television and motion pictures the theory
to the Supreme Court in *Fortnightly*, proposed the implied license theory as a compromise in order to accommodate "competing considerations of copyright, communications, and antitrust policy."\(^{31}\) Nevertheless, the Supreme Court in *Fortnightly* also declined to adopt the implied license theory, stating that the "job is for Congress,"\(^{32}\) thus indicating the Court's reticence to legislate by judicial decision, at least in this area.

The third theory, the performance concept, was defined in *Buck v. Jewell-LaSalle Realty Co.*\(^{33}\) and *Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co.*\(^{34}\) These cases establish the "multiple performance doctrine"—that even though the original broadcast is licensed, any other person who employs mechanical means to extend the original broadcast to a larger audience than the broadcast would otherwise command, may also be considered to have "performed" the copyrighted work.\(^{35}\) The court of appeals in *Fortnightly* adopted this quantitative contribution test by asking, "[H]ow much did the [petitioner] do to bring about the viewing and hearing of a copyrighted work?"\(^{36}\) It reasoned that CATV did much more than the hotel intercoms in *Jewell-LaSalle* and *SESAC* to increase audience size by mechanical means, so CATV clearly rendered an infringing performance.\(^{37}\) The Supreme Court in *Fortnightly* rejected this multiple performance or quantitative contribution of implied license was clearly inconsistent with the "self-evident" right of a copyright holder to limit licenses to perform his works in public to defined periods, areas, and audiences. 377 F.2d at 877.

\(^{31}\) 392 U.S. 390, 401 (1968).

\(^{32}\) Id.

\(^{33}\) 283 U.S. 191 (1930). A hotel was held liable for copyright infringement for an unauthorized public performance when it provided its guests with radio entertainment through a master radio set wired to loudspeakers or headphones throughout the building. The hotel rendered an independent performance when it received and played through this system a musical radio broadcast by a local radio station that had not obtained a license from the copyright holder to make the broadcasts.

\(^{34}\) 19 F. Supp. 1 (S.D.N.Y. 1937). A hotel had installed in its rooms loudspeakers capable of receiving two stations. Even though a guest could choose between the two stations and even though the original broadcast was licensed, the hotel was found guilty of infringement. Although "the reception of a broadcast program by one who listens to it is not any part of the performance thereof," the court concluded that where a hotel "does as much as is done in the Hotel Pennsylvania to promote the reproduction . . . of a broadcast program received by it, it must be considered as giving a performance. . . ." Id. at 4.

\(^{35}\) *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198, 199 n.7 (1930); Note, *CATV Not Copyright Infringement* 858.

\(^{36}\) 377 F.2d at 877.

\(^{37}\) The court noted the expense involved in installing antennas, cables, and connections to subscribers' television sets and that such installation was the primary business of CATV. 377 F.2d at 878.
ution test. In a footnote the Supreme Court stated that Jewell-LaSalle was limited to its own facts, urging that if the original broadcast by the hotel had been licensed then the rebroadcast by the hotel might not be an infringement due to the implied license in law. The Supreme Court concluded that unlike Jewell-LaSalle the original broadcast in Fortnightly had been authorized, and therefore Jewell-LaSalle could not be controlling.

All three theories and the electronic analysis of the district court were rejected by the Supreme Court in Fortnightly. The Supreme Court stated that "resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception." Traditionally, broadcasters have been deemed exhibitors, and viewers members of the theater audience. This general functional test seeks to determine where CATV falls within the framework of this broadcaster-viewer dichotomy; that is, does CATV have more in common with broadcasting or with viewing?

When CATV is considered in this framework, we conclude that it 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. It is true that CATV system plays an "active" role in making reception possible in a given area, but so do ordinary sets and antennas.

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13 392 U.S. at 399.

38 "[M]ere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting." 392 U.S. at 397.

39 392 U.S. 390, 396 n.18 (1968). Mr. Justice Brandeis in Jewell-LaSalle, referring to Buck v. Debaum, 40 F.2d 734 (S.D. Cal. 1929), suggested that "[i]f the copyrighted composition had been broadcast ... with the plaintiffs' consent, a license for its commercial reception and distribution ... might possibly have been implied." 283 U.S. at 199 n.5. The Supreme Court in Fortnightly stated that "existing 'business relationships' would hardly be preserved by extending a questionable 35 year-old decision that in actual practice has not been applied outside its own factual context." 392 U.S. at 401 n.30.

40 Some uncertainty remains in the area of multiple performance as the Court in Fortnightly did not discuss or distinguish SESAC, a case in which an infringement was found even though the original broadcast was licensed. See 392 U.S. at 405.

41 Mr. Justice Fortas argued, in dissent, that Jewell-LaSalle should control and that the footnote relied upon by the majority was too vague to serve as a basis for distinction. "[T]he interpretation of the term 'perform' cannot logically turn on the question whether the material used is licensed or not licensed." 392 U.S. at 406-07 n.5.

42 392 U.S. at 397.

43 392 U.S. at 399. Although the Supreme Court used broad language in respect to CATV, there is some qualification: "While we speak in this opinion generally
The Court found that CATV rendered no performance within the meaning of the Copyright Act, viewing the primary purpose of the Copyright Act as encouraging the dissemination of copyrighted works to the public; the protection of the economic rights of the copyright holder in the fruits of his creativity was seen only as a secondary aim. Copyright and unfair competition suits have thus been discarded by the courts as a means of regulating CATV. Yet the local stations and the copyright holder seem still in need of protection. CATV is no longer an infant industry that needs to be nurtured. In fact, CATV hinders the growth of new local stations. Copyright holders do not receive anything from CATV when it utilizes copyrighted broadcasts. CATV has an important place in the future of the television industry, but it cannot assume its proper position without paying for its use of copyrighted works. It is clearly unfair to allow CATV "to reap where it has not sown." Neither the full imposition of copyright liability in all cases nor the complete denial of copyright liability are satisfactory answers. The final determination of the requirements for CATV must be left to Congress and the FCC, as the Supreme Court intimated. In a recent case decided a few weeks before *Fortnightly—United States v. Southwestern Cable Co.*, the FCC was given very broad authority to regulate CATV, with no
congressional mandate necessary. The FCC's previous controls over CATV have proven unsatisfactory.\(^6\) The FCC, since 1966 when it assumed jurisdiction over CATV systems has requested clarifying guidelines from Congress, but Congress has refused.\(^61\) Moreover, Congress deleted the provision relating to CATV in its present revision of the 1909 Copyright Act.\(^62\) The FCC, with or without congressional guidelines, is the logical governmental agency to resolve most adequately and amicably the competing private, public, and economic interests involved in CATV transmission of copyrighted works. In light of the inaction of Congress and the *Southwestern Cable* decision, the FCC should adopt its own policies to protect the small local stations, the copyright holder, and CATV, thereby accommodating the growth of CATV and of new stations in local areas.

**Eric Mills Holmes**

### Federal Jurisdiction—Expansion of the Civil Rights Act of 1871

The Civil Rights Act of 1871\(^1\) creates a federal cause of action for persons who are deprived of constitutionally guaranteed rights by anyone acting under color of state law. Notwithstanding the broad language,\(^2\) courts have generally restricted the use of this statute to members of minority groups who encounter difficulty in receiving a fair hearing in state courts.\(^3\) As a result, the unlawful actions that most often have been

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\(^6\) For excellent discussions of this aspect of the CATV dilemma see Note, *The Wire Mire: The FCC and CATV*, 79 Harv. L. Rev. 366 (1965); Note, *On a Clear Day* 1505. The authority of the FCC to act is unclear, and requests for clarifying guidelines from Congress have, to date, received no final action. *Rucker* 178.

\(^61\) It has been most difficult to get Congress to act because of the pressure from broadcasters and CATV lobbies. Note, *CATV Not Copyright Infringement*, 863 n.45. One writer stated that the "reason for all the delays . . . was because nearly a third of the Senate had at least remote financial interests in CATV." Comment, *The Final Decision* 406.

\(^62\) For a summary of the present state of the copyright revision bill, see 392 U.S. at 396 n.17.


\(^2\) Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*Id.*

\(^3\) See, e.g., *Lee v. Washington*, 390 U.S. 333 (1968) (Negroes); *CORE v.*