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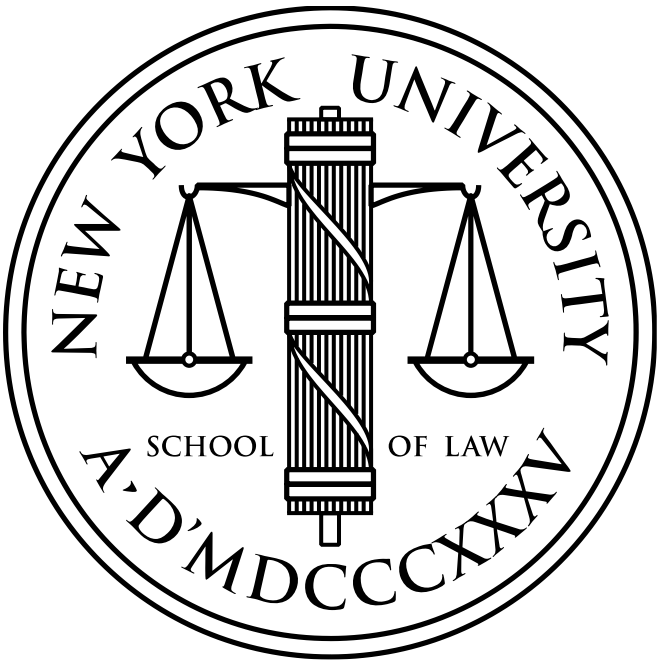

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LOCAST AND THE LEGISLATIVE HISTORY OF 17 U.S.C. § 111(a)(5)

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'The American people have given you something really valuable, the airways, for free,' he said, talking about the broadcasters, his eyes popping at the word 'free.' Slowing down for emphasis, he added: 'So shouldn't we get something back for free? Which is great television. That's the social contract, right?'[1]

- *David Goodfriend (January 31, 2019)*

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[1] Edmund Lee, *Locast, a Free App Streaming Network TV, Would Love to Get Sued*, N.Y. TIMES, Feb. 3, 2019, at BU1 (emphasis added).

INTRODUCTION

David Goodfriend is the founder of the broadcast television retransmission service "Locast." The industry's latest creative destructor that has made itself available to a majority of the United States in less than three years.[2] Using antennas placed atop high altitudes, Locast seizes and retransmits over-the-air live broadcast signals to "almost any digital device, at any time, in pristine quality" using a digital stream.[3] Its mobile app and website operate much like a TV on-demand service; in some areas, users can scroll through approximately 50 live feeds. Locast does so, however, without the consent of any of the content's owners or broadcasters.[4]

[2] LOCAST, https://www.locast.org/ (last visited Apr. 26, 2021) (advertising that Locast retransmission signals were available to 51.7% of the U.S. population as of the date visited).

[3] Lee, *supra* note 1; *Live TV Guide*, LOCAST, https://www.locast.org/cities/501 (last visited Feb. 21, 2021) (in the New York market alone, approximately 50 live fees are available, including: CBS, NBC, FOX, ABC, and PBS).

[4] Lee, *supra* note 1.

Nonetheless, Goodfriend challenged the likes of ABC, NBC, CBS, and FOX to sue him in an interview with the *New York Times* in early 2019.[5]

Goodfriend's dare has since been answered. Ten of the largest media companies in the world have filed a joint complaint against Goodfriend in the Southern District of New York.[6] They argue that Locast's unconsented retransmissions infringe their exclusive public performance rights under the Copyright Act of 1976.[7] Given relevant precedent, they have every right to be confident. After all, in 2014 a widely publicized company named Aereo offered an identical service lacking the same consent from these same plaintiffs.[8] And Aereo failed in dramatic fashion. Five months after a 6-3 Supreme Court concluded that its internet-based retransmissions were "public performances" within the meaning of section 106(4),[9] Aereo declared bankruptcy.[10] Therefore, the broadcasters argue that Locast is "simply Aereo 2.0 . . . ."[11] But this characterization fails to capture what makes Locast unique and legally complicated: It operates as a registered nonprofit.[12]

Locast's funding model parallels that of Wikipedia. During live feeds, Locast users are solicited to donate to the organization through an interruption of the

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[5] *See id.* ("Mr. Goodfriend said he would welcome a legal challenge from the networks.").

[6] Amended Complaint, ABC, Inc. v. Goodfriend, No. 19-cv-7136 (S.D.N.Y. Oct. 30, 2020) (named plaintiffs include: ABC, Disney, Twentieth Century Fox Film, CBS Broadcasting, CBS Studios, FOX Television Stations, FOX Broadcasting Company, NBCUniversal Media, Universal Television, and Open 4 Business Productions).

[7] *Id.* at 7; *see also* 17 U.S.C. § 106(5) (2012).

[8] Aereo, like Locast, used antenna technology capable of seizing over-the-air broadcasting signals and translating these signals into "streamable" data for digital devices. ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 436 (2014). However, unlike Locast, Aereo's system was made up of "thousands of dime-sized antennas housed in a central warehouse." *Id.* ABC, CBS, NBC, FOX, and other major broadcast companies filed suit in response. Warren Richey, *Aereo Internet Service v. TV Broadcasters: US Supreme Court to Decide*, THE CHRISTIAN SCIENCE MONITOR, Apr. 20, 2014, https://www.csmonitor.com/USA/Justice/2014/0420/Aereo-Internet-service-vs.-TV-broadcasters-US-Supreme-Court-to-decide.

[9] *See Aereo, Inc.*, 573 U.S. at 451.

[10] Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES, Nov. 22, 2014, at B2, https://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html.

[11] Janko Roettgers, *Major Broadcasters Sue TV Streaming Nonprofit Locast*, VARIETY, July 31, 2019, https://variety.com/2019/digital/news/major-broadcasters-sue-tv-streaming-nonprofit-locast-1203286487/.

[12] LOCAST, *supra* note 2.

retransmitted signal.[13] Despite this, continued access to the live feed does not depend on whether a user donates. They are free to disregard the "ask" and continue watching. Goodfriend contends that this quality earns Locast immunity under the Copyright Act's nonprofit retransmission exception.[14] If true, Locast avoids the same compulsory fees that cable providers are otherwise statutorily required to pay.[15] More importantly, the media landscape could forever change. The plaintiffs in the present case have previously asserted that their "very existence" depends on these fees.[16] And if Locast is legal, cable and dish providers may see this as an opportunity to avoid paying their own fee obligations by offering broadcast to their subscribers via the Locast app (as opposed to entering retransmission agreements directly with the networks). Notably, this "parade of horribles" has already begun to march. AT&T recently donated $500,000 to the organization,[17] and Sling TV (a wholly owned subsidiary of Dish Network) currently makes Locast available for download on its user interface.[18] Therefore, the future of Locast (and possibly the media industry itself) depend on how the federal courts interpret a section of the Copyright Act that has neither been adjudicated nor analyzed in published academia.[19] Its language can be found below:

> § 111. Limitations on exclusive rights: Secondary transmissions.
>
> (a) CERTAIN SECONDARY TRANSMISSION EXEMPTED. – The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if –
>
> (5) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose

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[13] *See id.*

[14] *See* Answer to Amended Complaint at 2, *ABC, Inc.* (No. 19-cv-07136); *see also* 17 U.S.C. § 111(a)(5) (2012).

[15] *See* 17 U.S.C. § 111 (enumerating the retransmission compulsory licensing fee scheme).

[16] *Aereo, Inc.*, 573 U.S. at 462 (Scalia, J., dissenting) (citing to the network-petitioners' brief).

[17] Ben Munson, *Donating to Locast is the 'Single Smartest Move' Any MVPD/vMVPD Can Make – Analyst,* FIERCE VIDEO, July 9, 2019, https://www.fiercevideo.com/video/donating-to-locast-single-smartest-move-any-mvpd-vmvpd-can-make-analyst.

[18] Ben Munson, *Sling TV Guide Now Integrates Locast on the AirTV Mini*, FIERCE VIDEO, Feb. 10, 2021, https://www.fiercevideo.com/video/sling-tv-guide-now-integrates-locast-airtv-mini.

[19] To the extent that Section 111(a)(5) has been cited, the author has found it briefly mentioned in a single footnote of a published article. Lydia Pallas Loren, *The Evolving Role of "For Profit" Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUT. & HIGH TECH. L.J. 255, 279 n.138 (2010).

> of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs maintaining and operating the secondary transmission service.[20]

This note analyzes whether the nature of Locast is consistent with the text and legislative history of section 111(a)(5). And through this analysis, the author has discovered conflicting answers. Although Locast plainly falls within the above text (absent further discovery), section 111(a)(5)'s legislative history may lead to the opposite conclusion.

At the time of adoption, Congress considered section 111 to be the most contentious subject of the new copyright law. Through it, the legislative branch sought to apply copyright to the era's then-creative destructor: Community antenna television ("CATV") (a.k.a. cable).[21] Like boosters and translators,[22] CATV enhanced the distributive capacity of broadcast signals. However, its operative method differed in one key respect: Boosters and translators retransmitted the signal over-the-air; CATV retransmitted using cable. This difference allowed the latter to become a profitable enterprise. Through the use of cable, CATV operators could exclude users who refused to pay a monthly subscription by disconnecting them from the system altogether. Booster and translators, on the other hand, had no such ability. Once a signal was retransmitted over-the-air, nothing could prevent a television owner from seizing access using their set's "rabbit ears."[23]

Despite its profit potential, the beginnings of CATV were humble. Its earliest adopters primarily chose to operate in rural communities where broadcast service was otherwise poor or non-existent.[24] The technology was also primitive, as CATV

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[20] 17 U.S.C. § 111(a)(5) (2012).

[21] *See Aereo, Inc.*, 573 U.S. at 442 (discussing Section 111 and Congress's aims for addressing the rise of cable television and its relationship to copyright law).

[22] *See* discussion *infra* Section II.C.

[23] *See* Thorin Klosowski, *Set Up Your Rabbit Ears for Maximum Reception*, Life Hacker (Jan. 16, 2012, 9:00AM), https://lifehacker.com/set-up-your-rabbit-ears-for-maximum-reception-5876388 (discussing how standard, television antenna works (a.k.a. "rabbit ears")).

[24] *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 1225 (1965), *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT LAW: COPYRIGHT LAW REVISION (rev. ed. 2020) [hereinafter *1965 House Hearings*] (statement of Ernest W. Jennes.

was only capable of retransmitting 1-5 channels at a time.[25] Therefore, this "historic" version of CATV acted as a mere "supplement" to the nation's system of free broadcast.[26] Its use was narrowly tailored to the boosting of signals so that local stations' news, sports, and weather reports could reach more of their dedicated geographical markets. In other words, "historic" CATV served an identical role as the boosters and translators of the day: It was a signal strengthener. Nothing more. But this changed as CATV's technological capabilities improved and its operators grew more ambitious.

Over time, CATV became capable of retransmitting 20-40 signals simultaneously.[27] Further, owners began to use multi-hop microwave relays to import broadcast signals containing popular content from distant cities into rural areas where the signal was never intended to travel.[28] Finally (and most importantly), CATV owners began to plant operations in markets already served to directly compete against the local stations. Soon, these developments created industry-wide disruption.

After all, the foundation of the broadcasting industry was based on market exclusivity. The major networks (e.g., NBC, CBS, and ABC) created or acquired copyrighted content, then granted their affiliated stations the right to broadcast said content within exclusive geographies. This exclusivity was necessary for the continued existence of the affiliated local stations because—like boosters and translators—they retransmitted broadcasts over-the-air. Unable to charge a subscription fee to their viewers, the stations relied on advertising as their primary source of revenue. Market exclusivity was therefore quintessential for the continuing flow of revenue because higher viewership meant a more attractive product for

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Counsel, Maximum Service Telecaster, Inc.) ("CATV originally did and still does operate in areas of poor television reception where it provides only the signals of local and area television broadcast stations which CATV subscribers within the service areas of these stations would not otherwise be able to receive adequately because of terrain or other factors. Such CATV systems, for example, place a receiving antenna on a mountain and bring the nearby local and area television signals down the mountainside by cable to communities shielded from direct signals."). These modest beginnings are exemplified by Leroy "Ed" Parsons and his early work on the technology. *See* discussion *infra* Section II.C.

[25] *See id.* ("Early systems had one to three channels. Even in 1964, 70 percent of the CATV systems carried five or fewer channels.").

[26] *Id.*

[27] *See id.* ("But new systems already carry up to 12 stations, and systems with 20, 30 or 40 channels are planned.").

[28] *See id.* ("There are no geographical bounds for 'CATV unlimited.' Increasingly, multi-hop microwave relays are being sought or planned to import stations from metropolitan centers across many hundreds of miles and several States.").

advertisers to invest in. But viewership became split as CATV occupied these markets. And two specific traits made CATV the better of the competitors:

First, CATV owners disrupted the local stations' content exclusivity. They imported transmissions into the local stations' areas from stations belonging to the same parent network (or, they simply retransmitted the signal originating from the local station itself).[29] Thus, CATV made available the same content the local stations were already providing, albeit on competing channels. Second, CATV also imported popular content that was otherwise unavailable to these communities–specifically, from major urban markets. The combination of these traits meant that CATV was often able to offer the same, plus more, content to rural localities for a nominal fee.

Moreover, CATV's growth was not constrained to middle America. It had a similar disruptive effect even in more populated, urban markets. As an illustration: In 1955 (when section 111(a)(5) began serious development), the second most popular show in the United States was "I Love Lucy."[30] The sitcom's broadcaster was CBS.[31] Because of the show's popularity, the size of the dedicated market, and the promise of exclusivity, WBBM-TV (CBS' dedicated Chicago station) likely commanded a high price for ads during its time slot. But if a Chicago-based CATV

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[29] *See id.* at 1226 ("As CATV's purpose and operations expand beyond providing an *auxiliary* service, CATV becomes a threat to the public interest in free, diverse, and competitive, local and area television broadcast services. In essence, this threat derives from CATV's ability to import multiple television signals from many distant stations into cities where local and area television stations are already reaching the viewing public. Because the same television programs are broadcast in many different markets, the importation by CATV into such well-served "cities of the signals from stations in other markets means that the exclusivity of the local station as to many—if not most—of its programs will be destroyed. To the extent that a program is viewed on an imported channel, the benefit of exclusivity, for which the local station has bargained, is destroyed—to the damage of the local station, the copyright owner and, ultimately, the public. For, when CATV subscribers watch network programs, feature films, or syndicated film programs imported from distant stations, the local viewing audience is fractionated and the local station is deprived of advertiser support, since it can no longer offer to advertisers as large an audience of local viewers. The resulting decrease in advertising revenue means at least that programing must be curtailed and at worst that the local station will be forced off the air. With either result, those persons unable or unwilling to pay to hook onto the CATV transmission cable or living in rural or other thinly populated areas which CATV cannot afford to serve will receive off the air a degraded service or none at all.").

[30] *1950s TV Shows: What Did People Watch?*, RETROWASTE, https://www.retrowaste.com/1950s/tv-shows-in-the-1950s/ (last visited Mar. 23, 2021).

[31] *Id.*

retransmitted "I Love Lucy" into the city, along with other signals that Chicagoans had trouble accessing because of distance or physical obstruction (e.g., the height of the skyscrapers), then WBBM-TV's ability to maintain viewership could be seriously threatened. And for affiliated stations such as WBBM-TV, this problem grew exponentially. By 1965, CATV was on pace to capture approximately 85% of the national television market.[32]

The broadcasters and copyright owners responded by lobbying Congress to amend the Copyright Act to stop CATV's rise. Their efforts came to fruition with the adoption of section 111(a)(5). However, the section's authoring required two decades of studies, subcommittee hearings, floor debates, and private negotiations amongst the industry's key players.[33] Over the course of these developments, parties split into three philosophical camps: (1) those who believed that *all* categories of retransmission technology deserved immunity from copyright liability;[34] (2) those who believed that *some* deserved immunity;[35] and (3) those who believed that *none*

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[32] *See 1965 House Hearings*, *supra* note 24, at 1226 ("The surge of CATV has reached explosive proportions. Applications are pending for CATV systems in more than 1,000 communities and new applications are being filed at the rate of about 3 every day. CATV promoters have predicted they will take over 85 percent of all television sets in the United States, in virtually every city and town in the country.").

[33] Many of which, ironically, included the plaintiffs suing Locast. *See* discussion *infra* Section III.

[34] *See, e.g.*, HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSION AND COMMENTS ON THE DRAFT 424 (Comm. Print 1964), *reprinted in* 15 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT LAW: COPYRIGHT LAW REVISION (rev. ed. 2020) [hereinafter CLR PART 3] (comment of George Schiffer) ("I wish to make plain that community antennas, boosters, translators and rooftop antennas should all be treated identically and should all be exempted from the operation of the Copyright Act. . . . The paramount interest is the public's. The public's interest is to have the greatest amount of television service at the lowest possible cost.").

[35] This included the Copyright Office, which—in their 1963 preliminary draft of the Copyright Act—first assumed the stance that boosters and CATV deserved different treatment under the Act. *See id.* at 239 ("The second of the four problems that we see here is the rather interesting question of rebroadcasting or retransmission. And here, of course, there is a vast amount of technology and a vast amount of ignorance, probably on our part as much as anybody else's. But essentially, as we see it, there are two situations where money is involved: (1) the community antenna or CATV system, where the broadcast is picked up and retransmitted over wires to a special receiving set, and where the subscriber pays for the service; and (2) the booster system, where the signal is merely magnified and where anybody in the vicinity can pick the broadcast up. That's the second problem: rebroadcasting or rediffusion. . . . With respect to rebroadcasting . . . we felt it desirable to exempt relay boosters . . . [but] we did not feel that a commercial [CATV] . . . should be exempted . . . .").

deserved special treatment.[36] As we now know, the middle path was followed.[37] All forms of CATV—whether for-profit or not—became subject to copyright liability.[38] While boosters and translators were given the opportunity to earn immunity by operating as non-profits.[39]

After studying Section 111(a)(5)'s legislative history, the author concludes that nonprofit CATV was treated disparately for two central reasons: (1) unlike boosters and translators, CATV was used to fragment market viewership by providing content that was both available and unavailable to consumers in geographical areas already served by local stations;[40] and (2) unlike the networks

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[36] A representative of the National Association of Broadcasters ("NAB") proclaimed it "illogical" to distinguish between CATV and other retransmission services. *Id.* at 254.

[37] *See* 17 U.S.C. § 111 (2012) (subjecting cable system retransmissions to copyright liability, while immunizing nonprofit retransmission services).

[38] *See id.*

[39] *See* 17 U.S.C. § 111(a)(5).

[40] This concern is confirmed by many statements made by the various stakeholders who testified on the matter through the section's development. *1965 House Hearings*, *supra* note 24, at 1226 (statement of Ernest W. Jennes, General Counsel, Maximum Service Telecaster, Inc.) ("Because the same television programs are broadcast in many different markets, the importation by CATV into such well-served cities of the signals from stations in other markets means that the exclusivity of the local stations to many—if not most—of its programs, will be destroyed. To the extent that a program is viewed on imported channel, the benefit of exclusivity, for which the local station has bargained, is destroyed—to the damage of the local station, the copyright owner and, ultimately, the public."); *Copyright Law Revision: Hearing on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 89th Cong. 171 (1966), *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT LAW: COPYRIGHT LAW REVISION (rev. ed. 2020) [hereinafter *1966 Senate Hearings*] (statement of Arthur B. Krim, President, United Artists Group) ("The usual [network] license contract in syndication does not grant the right to authorize the telecast of our programs over additional stations and prevent the licensee station or sponsor from authorizing a community antenna to perform the program. These restrictions are in keeping with the underlying principle of geographical limitation that is central to all television release. . . . [I]t can readily be seen [then] that when a CATV system brings programs from a distant city, it plays havoc with every existing licensing system and either seriously downgrades or utterly destroys the property of the copyright owner."). It should also be noted that members of the Motion Picture Association, Inc. ("MPA") additionally expressed reservations about their work being shown in geographies not originally approved. *1965 House Hearings*, *supra* note 24, at 1008 (statement of Adolph Schimel, Chairman of Law Committee, Motion Picture Association of America, Inc.) ("Our TV performance license fees depend on the coverage of potential viewers, the timing of the broadcast, the priority and exclusivity of performing rights which we can grant for the area, and other factors in the licensee's area. . . . We

and affiliated stations, CATV was free to retransmit this copyrighted content without having to pay the copyright owners.[41] In summary, the authors of section 111(a)(5) intended for its scope of immunity to only extend to nonprofit retransmission devices

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feel strongly that our copyrights should not be freely transmitted, and thereby publicly performed, without our prior license, in this CATV manner. Our license for the original TV broadcast in other cities which the CATV operator captures and re-transmits from the air, does not expressly or impliedly license any further transmission by the CATV operator.").

[41] Section 111 would exempt completely from any copyright law provisions secondary transmissions when made at cost by either governmental bodies or nonprofit organizations. . . . [T]his provision was concerned with the operations of "nonprofit 'translators' or 'boosters' *which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception* … ." These translators and boosters have always been subject to FCC regulation and require retransmission consent of the originating station under § 325(a) of the Federal Communications Act.

However, the language of the exemption as formulated in § 111 would be equally applicable to cable systems which are operated by governmental bodies or nonprofit organizations. . . . There are a large number of nonprofit organizations in the United States. Many of them operate big enterprises. Moreover, there are already in existence at least 15 municipally-owned CATV systems and there is an increasing drive across the country for municipal ownership of cable systems. . . . The copyright owners are concerned that increasing governmental or non-profit ownership of cable systems may deprive them of license fees for the use of their product.

A free ride for these entities cannot be squared with the achievement of the public purpose which underlies the copyright system. That purpose is to promote the useful arts by granting compensation adequate to foster creativity. A legal requirement that copyrighted film programs be available to nonprofit and governmental users for free is no less repugnant to the purpose of the copyright system because the user does not intend to make a profit.

Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 93d Cong. 303 (1973), *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT LAW: COPYRIGHT LAW REVISION (rev. ed. 2020) [hereinafter *1973 Senate Hearings*] (statement of Jack Valenti, President, Motion Picture Association of America, Inc.) (emphasis added). *See also 1965 House Hearings* at 1226 (statement of Ernest W. Jennes, General Counsel, Maximum Service Telecaster, Inc.) ("Besides the destruction of program exclusivity, [CATV] is unfair and inequitable. These multiple-channel CATV systems carry vast quantities of program material. If these systems went out into the marketplace to purchase rights to program material, the cost to the CATV's—and the corresponding return to the copyright owners—would be substantial."); *see also* James J. Popham, *The 1971 Consensus Agreement: The Perils of Unkept Promises*, 24 CATH. U. L. REV. 813 (1975) ("[B]ecause the cable television industry's promise to support specific copyright legislation has not been fulfilled, cable television systems still pay nothing for the broadcast programming for which broadcast stations and networks pay millions of dollars each year.").

which were *passive*, i.e., devices that merely strengthened broadcast signals and did not split viewership within the dedicated markets of the local stations by impinging upon their market exclusivity. This understanding is reflected in the below italicized language of the House Report of the Copyright Act of 1976:

> [The clause] would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit "translators" or "boosters," *which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception*, would be exempt if there is no "purpose of direct or indirect commercial advantage," and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service." This exemption does not apply to a cable television system.[42]

The plaintiffs in this suit accuse Locast, amongst other things, of importing signals into well-served urban areas and stripping the signals' Nielsen watermarks.[43] If either allegation is proven, then the author concludes that Locast conflicts with the purpose behind section 111(a)(5). Specifically, if the former is true, then Locast would be doing the exact thing that the authors of section 111(a)(5) sought to prevent: The impingement of the market exclusivity of local stations. If the latter is true, then originating stations would have no way of tracking the ultimate viewership of their transmitted signals because any user viewing the retransmission through Locast would not be counted towards station viewership statistics. Thus, Locast would effectively split viewership akin to how CATV split the viewership of local station transmissions.

To develop these conclusions, the note begins with a brief textual analysis of 111(a)(5) in Section I. Upon concluding that Locast fits squarely within this language (absent further discovery), the author provides a comprehensive analysis of the section's legislative history. This requires an initial discussion of the invention of broadcasting, its rise in popularity, and the invention of retransmission technologies in Section II. Thereafter, the note traces the development of 111(a)(5)

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[42] H.R. Rep. No. 94-1476, at 92 (emphasis added).

[43] Amended Complaint, *supra* note 6, at ¶ 12.i-iii ("Locast departs from the activities of a mere booster of broadcast signals in a variety of ways. Among other things, Locast . . . strips from the over-the-air broadcast signals the Nielsen watermarks that measure viewing for local and national advertisers, thereby endangering broadcasters' advertising revenue.").

over the course of "more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of 20 years" in Section III.[44] Next, the author provides an analysis of Locast's legality given currently known facts in Section IV. Finally, a conclusion in Section V.

I
TEXTUAL ANALYSIS OF § 111(A)(5)

For convenience I reiterate the language of Section 111(a)(5) below:

> § 111. Limitations on exclusive rights: Secondary transmissions.
>
> (a) CERTAIN SECONDARY TRANSMISSION EXEMPTED. – The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if –
>
> (5) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs maintaining and operating the secondary transmission service.[45]

Goodfriend argues that "Locast's system falls squarely within" the above text.[46] The author suggests that he is likely correct. Addressing 111(a)(5) line-by-line: First, Locast's internet-based retransmissions are "secondary transmissions" within the meaning of the section.[47] Second, Locast is not a "cable system" within

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[44] Jessica D. Litman *Copyright Compromise and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987).

[45] 17 U.S.C. § 111(a)(5) (2012).

[46] Answer to Amended Complaint, *supra* note 14, at 2.

[47] The Copyright Act defines "secondary transmission" as follows:

> [T]he further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a cable system not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: Provided, however, That a nonsimultaneous further transmission by a cable system

the meaning of the section.[48] Third, both parties appear to concede that Locast is a registered nonprofit.[49] However, as for whether Goodfriend is directly or indirectly attaining a "commercial advantage" through Locast, the parties currently disagree.[50] The major network plaintiffs allege that Goodfriend is using Locast to further his lobbying efforts on behalf of DISH Network.[51] Goodfriend denies these

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> located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

17 U.S.C. § 111(f)(2) (2012). Because Locast further transmits primary transmissions simultaneously with their original transmission (via their originating station), it meets the first clause. The second clause is inapplicable because Locast is not a cable system (addressed below).

[48] The Copyright Act defines "cable system" as follows:

> [A] facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

17 U.S.C. § 111(f)(3) (2012). Because Locast is neither a subscription-based service nor a serve that requires payment, it does not meet this definition. *See also* Dimitry Dymarsky, *FilmOn and the Copyright Act Section 111 Compulsory Licensing*, A.B.A., https://www.americanbar.org/groups/litigation/committees/intellectual-property/practice/2015/filmon-copyright-act-section-111-compulsory-licensing/ (last visited Feb. 22, 2021) (discussing the recent case of *Fox Television Stations, Inc. v. FilmOn X LLC* and the federal court's conclusion that internet streaming technologies are not "cable television systems" within the meaning of Section 111. *See* Fox Television Stations, Inc. v. FilmON X LLC, No. 13-758-RMC (D.D.C. Nov. 12, 2015) (opinion under seal)).

[49] Answer to Amended Complaint, *supra* note 14, at ¶ 137 ("As a threshold matter, the broadcasters do not challenge [Locast's] status as a non-profit . . . ."); Amended Complaint, *supra* note 6 (failing to challenge Locast's status as a registered nonprofit; rather, challenging its specific operations as not being consistent with a nonprofit).

[50] *See* Answer to Amended Complaint, *supra* note 14.

[51] Notably, David Goodfriend remains a consultant for DISH. *See id.* at ¶ 9.

accusations.[52] Therefore, the author must assume—for the sake of further analysis—that this point will not be sufficiently persuasive for the court to outright conclude that section 111(a)(5) is inapplicable.

For some, this means the end of the inquiry.[53] As Justice Blackmun once stated, "[w]here, as here, the statute's language is plain, the sole function of the Court is to enforce it according to its terms,"[54] regardless of whether the interpretation "make[s] perfect sense [for] the statute's overall policy."[55] Suffice to say, this approach to statutory understanding has had a dominating presence in the courts and academia.[56] And with it, its fair share of criticism.[57] Nonetheless, the author chooses not to delve deeply into this philosophical mud puddle. This brief textual analysis of 111(a)(5) serves only to display the disparities between it and the subsequent analysis of the section's legislative history.

II
PRE-HISTORY: THE RISE OF BROADCAST AND RETRANSMISSION TECHNOLOGIES

A. 1887-1927: Development of a National Broadcasting Vision and Policy

Heinrich Hertz's experiments on the wave structure of electromagnetic radiation in 1887 became the catalyst for electronic communication.[58] Engineers and physicists began to understand that information—including the sound of a voice or a picture—could be encoded on sine waves by modulating the wave itself. Innovation was swift. By 1901, the first wireless telegraph signal was successfully transmitted across the Atlantic Ocean.[59] However, the creation of a centralized authority responsible for allocating the radio wave spectrum was needed before it could ever be put to mass use.

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[52] *Id.* at ¶ 8; *see also* Amended Complaint, *supra* note 6, at ¶ 8.

[53] *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 4 n.5 (2001) (discussing the philosophy of textualism and the Court's then-leading proponents of the philosophy, Justices Antonin Scalia and Clarence Thomas).

[54] United States v. Ron Pair Enters., 449 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)).

[55] Manning, *supra* note 53, at 4.

[56] An excellent analysis of both may be found in Jonathan T. Molot's "The Rise and Fall of Textualism." 106 COLUM. L. REV. 1 (2006).

[57] *See id.*

[58] HUGH R. SLOTTEN, RADIO AND TELEVISION REGULATION – BROADCAST TECHNOLOGY IN THE UNITED STATES: 1920-1960 3 (2000).

[59] *Id.* (discussing Italian inventor Marchese Guglielmo Marconi's cross-Atlantic wireless telegraph transmission in 1901).

To illustrate, assume that you live in New York City and you want to listen to WOR 710 AM. The station's corresponding number signifies that it transmits audio signals using an amplitude modulation (i.e. "AM") of 710,000 herz.[60] This means that the DJ's voice is being modulated to an electronic sine wave by varying the amplitude of the wave itself 710,000 times per second.[61] The station takes this modulated wave and distributes it using a transmitter tower.[62] As the transmitted modulated wave scours the horizon, your radio is looking to receive it. To instruct your radio set to receive the wave, you turn your tuner knob to the corresponding herz number. Thus, by turning your knob to 710 AM, you instruct your set to *only* receive sine waves that modulate at 710,000 herz. Once the wave is received, your radio clips off the part of the wave that contains the DJ's voice and sends it directly to your speakers for your listening pleasure.

But what happens if a second radio station transmits using an identical hertz frequency within reach of your set? Unfortunately, receivers are incapable of differentiating between the two.[63] Your radio will receive both, resulting in "interference" as the two transmissions battle for reception dominance.[64] Making matters worse, there is a limited number of adequate frequencies available for quality

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[60] *See How Radio Works*, GA. ST. UNIV. LIBR., https://exhibits.library.gsu.edu/current/exhibits/show/georgiaradio/radio1920s/howradioworks (last visited Feb. 24, 2021).

[61] *See id.*

[62] *See id.*

[63] *See AM, FM and Sound*, CYBER COLL. INTERNET CAMPUS (May 28, 2013), https://www.cybercollege.com/frtv/frtv017.htm (“First, you can't put stations on the same frequency that are too close together in a geographic area. They will interfere with each other. And for the same reason you can't have two stations close together in frequency . . . in the same area.”).

[64] *See Interference with Radio, TV, and Cordless Telephone Signals*, FEDERAL COMMUNICATIONS COMMISSION, https://www.fcc.gov/consumers/guides/interference-radio-tv-and-telephone-signals (last visited Feb. 24, 2021) (“Interference occurs when unwanted radio frequency signals disrupt the use of your television, radio or cordless telephone. Interference may prevent reception altogether, may cause only a temporary loss of a signal, or may affect the quality of the sound or picture produced by your equipment. The two most common causes of interference are transmitters and electrical equipment.”).

modulation.[65] Thus, by the 1920s, Congress realized that the spectrum presented a "Tragedy of the Commons"[66] scenario:

> [R]adio policy in the United States was grounded in the conviction that the spectrum belonged to the public. Everyone should have a right to obtain a license and use the spectrum. However . . . policy makers increasingly viewed the radio spectrum as a finite resource. At any one time, only a limited band of frequencies was available for wireless, and interference among stations (often using poorly tuned equipment) limited the number that could transmit at any one time. *All citizens might own the ether, but if everyone tried to use it its value would be destroyed*. Throughout the early history of radio (at least until 1927), radio policy in the United States had to deal with a potential contradiction. Decision makers wanted everyone to have a right to use the spectrum, but they increasingly came to the conclusion that the government would have to place limits on access to the radio spectrum to avoid overexploitation, or in other words, destructive interference.[67]

Despite the obvious need for regulation, Congress remained slow to adapt.[68] And in the midst of this legislative malaise, the country experienced a boom in amateur radio.[69] By 1912, the *New York Times* estimated that several hundred thousand amateur operations existed across the country.[70] Their homemade equipment broadcasted music, entertainment, and even pranks.[71] Professor Hugh R.

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[65] For AM radio, this range is limited to 540 kHz to 1,600 kHz. *The Electromagnetic Spectrum*, Lumen, http://hyperphysics.phy-astr.gsu.edu/hbase/ems2.html (last visited Feb. 24, 2021). For television, however, because "the waves must carry a great deal of visual as well as audio information, each channel requires a larger range of frequencies than simple radio transmission. TV channels utilize frequencies in the range of 45 to 88 MHz and 174 to MHz." *Id.* In all, the FCC has only allocated frequency bands between 9 kHz and 275 GHz. *Interference with Radio, TV, and Cordless Telephone Signals*, FCC, https://www.fcc.gov/consumers/guides/interference-radio-tv-and-telephone-signals (last visited Feb. 24, 2021).

[66] "[T]ragedy of the commons is an analogy that shows how individuals driven by self-interest can end up destroying the resource upon which they all depend.". Daniel J. Rankin et al., *The Tragedy of the Commons in Evolutionary Biology*, 22 Trends in Ecology & Evolution 643 (2007).

[67] SLOTTEN, *supra* note 58, at 6 (emphasis added).

[68] *See id.*

[69] *See id.* at 6–7.

[70] *Id.* at 7.

[71] A common escapade for young amateur radio operators was to send out fake distress calls to the United States Navy. *See id.* at 7. This prank was so abundant that military personnel lobbied Congress to transfer control over the spectrum from lay users to the military. *See* SUSAN J. DOUGLAS, INVENTING BROADCASTING 1899-1922, 207–210 (1987) (discussing the navy's qualms

Slotten of the University of Otago describes this early period of broadcasting as romantic in nature:

> [A] new, wide-open frontier, akin to the American West, where men could pursue individual interests free from repressive authoritarian and hierarchical institutions. [The amateur operators] resented attempts by the navy and private companies to monopolize the spectrum for commercial or military gain.[72]

Then, in 1912, the Titanic sank in the North Atlantic.[73] In the aftermath of the disaster, the press alleged that rescue efforts were hampered by radio interference caused by amateurs.[74] Four months later, Congress responded to these revelations by adopting the Radio Act of 1912 and declared the government the sole authority over the wave spectrum's allocation.[75] Broadcasting was no longer the romantic frontier where individualism roamed free (as Professor Slotten described). Now, the act of transmission was a privilege available only to those who earned a license.

In the beginning, the Department of Commerce assumed power over this licensing. Whereupon it "divided up . . . the spectrum by assigning specific frequencies to different groups."[76] Be that as it may, the Department handled its application duties haphazardly. Their licensing scheme was based on a singular criterion: Whether granting a license would cause interference. This proved to be too relaxed of a standard for a medium skyrocketing in popularity. From 1921 to 1922, the number of licensed radio operations increased from approximately 50,000 to 600,000.[77] And by 1926, the federal government began to panic. The Radio Act of 1912 had failed to bring order to a spectrum that was growing more congested every

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with early, amateur radio operators and their lobbying efforts to take away the spectrum from such operators).

[72] SLOTTEN, *supra* note 58, at 7.

[73] *Titanic Sinks*, HISTORY, https://www.history.com/this-day-in-history/titanic-sinks (last updated Apr. 13, 2020).

[74] *See* SLOTTEN, *supra* note 58, at 7; Erin Blakemore, *Why Titanic's First Call for Help Wasn't an SOS Signal*, NAT'L GEOGRAPHIC (May 28, 2020), https://www.nationalgeographic.com/history/article/why-titanic-first-call-help-not-sos-signal.

[75] *See* Radio Act of 1912, 44 Stat. 1162 (1912), *amended by* Radio Act of 1927, 44 Stat. 1162 (1927).

[76] *See* SLOTTEN, *supra* note 58, at 8.

[77] *Id.* at 15.

time a license was issued.[78] Making matters worse, two federal court opinions simultaneously stripped the Secretary of Commerce of the authority to deny licenses *and* the power to file claims against illegal radio operations.[79] In 1927, Congress was compelled to amend the Act to overrule these decisions.[80]

To do so, the Radio Act of 1927 shifted spectrum allocation authority from the Department of Commerce to a newly created agency: The Federal Radio Commission ("FRC")[81]–initially tasked with developing "a new rationalized allocation system . . . ."[82] At the same time, members of Congress used the Act as an opportunity to make vast, philosophical declarations for the future of broadcasting. In his closing remarks on the Senate floor, co-author Senator Wallace H. White, Jr. declared that broadcast was a national "right."[83] Several additional officers—including Secretary of Commerce Herbert Hoover and Senator Ewin L. Davis—followed suit.[84] This collective vision for broadcasting as a public good was eventually written into the Act itself: The FRC was instructed to issue licenses only if the "*public interest* . . . would be served by the granting thereof . . . ."[85]

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[78] *See* David Moss et. al., *Regulating Radio in the Age of Broadcasting*, HARV. BUS. SCH. CASE 716-043 (2017) ("By 1927, more than 700 stations were battling over 96 available frequencies. This crowding of the broadcast spectrum substantially diminished the quality of radio listening. In fact, the airwaves were so full of interference that many citizens complained that it was often impossible to tune into any station clearly.").

[79] Hoover v. Intercity Radio Co., 286 F. 1003 (1923), *appeal dismissed per stipulation*, 266 U.S. 636 (1924) (holding that the Secretary of Commerce had no discretion over the issuance of radio licenses); United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926) (denying the Secretary of Commerce's power to file claims against illegal operators).

[80] *See* Radio Act of 1927, 44 Stat. 1162 (1927).

[81] *See* SLOTTEN, *supra* note 58, at 43; *see also* Radio Act of 1927, 44 Stat. 1162 (1927).

[82] *See* SLOTTEN, *supra* note 58, at 43.

[83] 68 CONG. REC. 2580 (1927) (statement of Sen. Wallace H. White, Jr.) ("We have recognized in that compromise provision that it is not the right of a community to demand a station, not a right of a particular State to demand a station, but it was the right of the entire people to service that should determine the distribution of those stations; and it is written here in express language that it shall be the duty of this commission, this regulatory authority, to make such a distribution of stations, licenses, and power as will give all the communities and States fair and equitable service, and that is the sound basis on which legislation of this character should be founded.").

[84] Hoover's remarks were distributed to Congress during debate. In it, Hoover outlined a national plan for broadcast access. *See id.* at 2576 (statement of Sen. Edwin L. Davis) ("I am advised, Secretary Hoover, that the best broadcasting service can be rendered to the whole country by a few large stations. However, such a view utterly ignores the *rights* of the different sections and the desire of the citizens of different sections to have information and other programs of a sectional, State, or local character broadcast." (emphasis added)).

[85] Radio Act of 1927, 44 Stat. 1162, 1167 (1927) (emphasis added).

Later that year, Secretary Hoover was invited to participate in a demonstration that would prophesize another seismic shift in electronic communications: Broadcast television.

B. 1927-1934: Invention of Broadcast Television and Creation of the FCC

On April 7, 1927, Bell Telephone invited Secretary Hoover to its Washington D.C. laboratory.[86] Hoover was instructed to sit in front of—what we would now call—a broadcast camera and give a pre-written speech.[87] His image and voice were captured and transmitted across 200 miles to an audience of newspaper reporters and dignitaries gathered in a New York City-based auditorium.[88] Those in attendance witnessed the first long-distance use of television broadcasting in history.[89] And they would hear Hoover utter the following words: "Today we have, in a sense, the transmission of sight for the first time in the world's history. Human genius has now destroyed the impediment of distance in a new respect, and in a manner hitherto unknown."[90]

Within twenty years, the following occurred: The government issued the first commercial television station license,[91] President Franklin D. Roosevelt delivered the first live broadcast of a Presidential speech in American history,[92] and many of the named plaintiffs in the Locast complaint began investing into television's commercial potential.[93] But before any of these developments, the federal

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[86] Amy Norcross, *Hoover Joins 1st American Demo of Long-Distance TV, April 7, 1927*, EDN (Apr. 7, 2019), https://www.edn.com/hoover-joins-1st-american-demo-of-long-distance-tv-april-7-1927/.

[87] *Id.*

[88] *See id.*

[89] *See id.*

[90] *Id.*

[91] Suzanne Deffree, *1st American TV Station Begins Broadcasting, July 2, 1928*, EDN (July 2, 2019), https://www.edn.com/1st-american-tv-station-begins-broadcasting-july-2-1928/.

[92] Roosevelt's speech was delivered at the New York World's Fair in 1939. In contrast to his famous "fireside chats" on national radio and President Truman's first televised address from the White House in 1947, this early broadcast only reached receivers at the Fair and in Manhattan. *Harry Truman Delivers First-Ever Presidential Speech on TV*, HISTORY, https://www.history.com/this-day-in-history/first-presidential-speech-on-tv (last updated Oct. 2, 2021).

[93] *See Our History*, NBCUNIVERSAL, https://www.nbcuniversal.com/history (last visited Feb. 24, 2021) (discussing NBC's television beginnings in the early 1930s); Ed Reitan, *CBS Color Television System Chronology*, NOVIA, (2006),

government was again tasked with authoring legislation aimed at encouraging a new medium's proliferation while preventing signal interference.

Sensing the need for a coherent regulatory voice, President Franklin D. Roosevelt requested Secretary of Commerce Daniel C. Roper to appoint an interdepartmental committee for studying the future of electronic communication.[94] The committee concluded:

> Although the cable, telegraph, telephone, and radio are inextricably intertwined in communication, the Federal regulation of these agencies, in our country, is not centered in one governmental body. The responsibility for regulation is scattered. *This scattering of the regulatory power of the Government has not been in the interest of the most economical or efficient service*.[95]

Roosevelt thereafter requested Congress to create a common regulatory body responsible for all such technologies. The body responded by adopting the Communications Act of 1934 and through it, creating the Federal Communications Commission ("FCC").[96] Importantly, the same philosophical underpinnings found in the debate over the Radio Act of 1927 were repeated in the Communication Act's opening text:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, *so far as possible, to all the people of the United States* . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . .[97]

To achieve Congress's vision for broadcast access, the Communications Act vested the FCC with rule-making authority over the development of national

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https://web.archive.org/web/20130922013759/http://www.novia.net/~ereitan/CBS_Chronology_rev_h_edit.htm (discussing CBS' early experimentations with television in 1940); Keith Gluck, *The Genesis of Disney Television*, WALT DISNEY FAMILY MUSEUM (July 23, 2013, 2:00PM), https://www.waltdisney.org/blog/genesis-disney-television (discussing Walt Disney's early investment in television in late 1935).

[94] *See* S. COMM. ON INTERSTATE COM., 73D CONG., STUDY OF COMMUNICATIONS BY AN INTERDEPARTMENTAL COMMITTEE: LETTER FROM THE PRESIDENT OF THE UNITED STATES TO THE CHAIRMAN OF THE COMMITTEE ON INTERSTATE COMMERCE (Comm. Print 1934).

[95] *Id.* at 6 (emphasis added).

[96] Communications Act of 1934, 47 U.S.C. § 151 (1934).

[97] *Id.* (emphasis added).

standards, infrastructure, and distribution.[98] But just as the FRC struggled, the FCC would as well.

Television's growth had barely begun before it was interrupted by World War II.[99] Thus, broadcasting-related innovation stalled until the late 1940s when the war ended.[100] Upon its conclusion, Americans began to demand television in unprecedented numbers. In 1945, it is estimated that fewer than 10,000 television sets were in use.[101] In 1948, these estimates rose to 35,000.[102] By 1950, they skyrocketed to approximately six million,[103] with over seven million sets manufactured in that year alone.[104] We also saw growth in the production of popular content. As early as 1952, Americans enjoyed Lucille Ball's comedic talents on "I Love Lucy" and watched the Yankees defeat the Dodgers in Game 7.[105] With its commercial potential in plain view, hundreds of wannabe broadcasters sought permits to construct their own television stations.[106] But just as television was gaining national acceptance, the FCC issued a "freeze order" on all new or pending applications from 1948-1952.[107] The FCC feared that the existing channel allotment strategy was not capable of handling this hike in demand.[108] Years of hearings were hosted in response. However, its freeze did nothing to quench the nation's thirst for broadcast. Television enthusiasts began to thaw the freeze through innovation. It was during this time that the television retransmission evolution began.

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[98] *See id.* (discussing the consolidation of communications policy authority to the FCC).

[99] STAFF OF THE FED. COMM. COMM'N, BC DOCKET NO. 78-253, REPORT AND RECOMMENDATION IN THE LOW POWER TELEVISION INQUIRY, 5 (1980).

[100] *See id.*

[101] Adam Lefky, *Number of Televisions in the US*, PHYSICS FACTBOOK (2007), https://hypertextbook.com/facts/2007/TamaraTamazashvili.shtml (citing figures from *The World Book Encyclopedia*).

[102] *Id.* (citing figures from *The Encyclopedia Americana*).

[103] *Id.* (citing figures from *The World Book Encyclopedia*).

[104] STAFF OF THE FED. COMM. COMM'N, *supra* note 99, at 5.

[105] *See I Love Lucy: An American Legend*, LIBR. OF CONG., https://www.loc.gov/exhibits/i-love-lucy/legacy.html (last visited Feb. 24, 2021) (providing a timeline for "I Love Lucy," beginning in the early 1950s); David B. Wilkerson, *The Hunt for TV's Lost Baseball Treasures*, MARKETWATCH (Oct. 27, 3:36PM), https://www.marketwatch.com/story/the-hunt-for-tvs-lost-baseball-treasures-2010-10-27.

[106] STAFF OF THE FED. COMM. COMM'N, *supra* note 99, at 5.

[107] *Id.* at 107.

[108] *Id.* at 107-08.

The author begins discussion of this period by describing the modest, early versions of CATV—along with the invention of boosters and translators—in order to convey precisely why Congress saw these retransmission devices as *passive*. Next, the author describes CATV's growth from modest signal booster to direct competitor to the networks and their affiliated stations. Finally, he relates the adversarial response by the television networks and copyright owners.

C. 1934-1955: Invention of Retransmission Technologies and CATV

In 1948, Leroy "Ed" Parsons lived in Astoria, Oregon.[109] Astoria was the quintessential rural community shunned by the broadcasting world: It had a population of 10,000 and the nearest television station was located in Seattle—at least 150 miles away.[110] Because of this distance, the mountainous terrain between Astoria and Seattle, and the freeze order, no viewable broadcast signal could reach Astoria and its citizens.[111] Nonetheless, Parsons found a way. An engineer by trade, Parsons placed an antenna on top of the roof of a local hotel where the distant Seattle-based transmissions were weak but nevertheless receivable.[112] He then installed an amplifier that "boosted" the signal and strung a cable from the device to the adjacent building where he lived.[113] As the boosted signal travelled through the cable and into his television set, the broadcast was rendered watchable. In doing so, Ed Parsons unknowingly invented cable television.[114]

When the surrounding citizenry received word of what Parsons accomplished, chaos ensued. Hundreds of strangers visited his home to glimpse the electronic medium they had heard so much about.[115] As Parsons retells it:

> The first problem was too many people coming into our apartment or penthouse. We literally lost our home. People would drive for hundreds of miles to see television. We had gotten considerable publicity . . . when people drove down from Portland or came from The Dalles or from Klamath Falls to see television, you couldn't tell them no. So I approached the hotel manager and suggested that it would be a simple

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[109] Richard Burton, Interview with Leroy "Ed" Parsons, THE CABLE CTR.: THE HAUSER ORAL HIST. PROJECT (June 19, 1986), https://www.cablecenter.org/programs/the-hauser-oral-history-project/p-q-listings/leroy-ed-parsons.html.

[110] *See id.*

[111] *See id.*

[112] *Id.*

[113] *See id.*

[114] Cablefax Staff, *Ed Parsons Brings Cable to Astoria*, CABLEFAX (2015), https://www.cablefax.com/cablefax_viewpoint/ed-parsons-brings-cable-astoria.

[115] *See id.*

> matter to drop a cable down the elevator shaft and put a set in the lobby of the hotel. He thought that was a wonderful idea. So we did. A short time later, he asked me to remove the set because the lobby was so full people couldn't get in to register.[116]

Parsons failed to realize the profit potential for his invention.[117] Nonetheless, it would not take long for others to derive revenue from his ingenuity. In 1950, Robert Tarlton created the first widely publicized commercial cable system by installing his own master antennas in rural towns around the country.[118] Hundreds at a time could connect to Tarlton's systems with access dependent on whether the user timely paid a monthly subscription fee.[119] Thus, Tartlton was among the first to understand that CATV could attain profitability by excluding users who refused to pay a fee by disconnecting them from the system entirely. Formally named "community antenna television systems" ("CATVs"), others followed in Tarlton's footsteps. So quickly, that by 1952, 14,000 Americans relied on CATV for broadcast access.[120] However, CATV was not always the most convenient mode of retransmission. Installation costs were high and community housing patterns had to be dense enough to justify stringing cables to individual homes. In response to these inconveniences, alternative retransmission devices were invented: Boosters and translators.

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[116] *Id.*

[117] *Id.* ("Ed said he never really made any money in cable television because it did not occur to him that he could turn it into a steady income. . . . Ed charged an installation fee based on his expenses, typically $125, but it did not occur to him to charge a monthly fee for his service.").

[118] Loran Rasmussen, Interview with Robert Tarlton, THE CABLE CTR.: THE HAUSER ORAL HIST. PROJECT (June 27, 1986), https://www.cablecenter.org/programs/the-hauser-oral-history-project/t-v-listings/robert-tarlton-penn-state-collection.html.

[119] *See id.* ("I designed so that we'd figure, well, about 200 people can afford to buy service and that's what I designed the thing for. Little did I know within a month's time the 200 people would be compounded. People clamoring for service."). Tartlon charged a $100 installation fee with a $3/month maintenance fee. *Id.*

[120] *The Cable History Timeline*, THE CABLE CTR. 1, https://www.cablecenter.org/images/files/pdf/CableHistory/CableTimelineFall2015.pdf (last visited Feb. 24, 2021).

Some speculate that boosters and translators were also invented by Ed Parsons.[121] Although they performed the same function as CATV, boosters and translators were less expensive to install.[122] However, because they retransmitted signals over-the-air (as opposed to cable), their profit potential was comparatively weak. This fact made them a much less attractive business ventures compared to CATV. Communities often found themselves forced to form nonprofit organizations to fund their construction.[123] Thus, boosters and translators were viewed as signal strengthening devices rather than legitimate commercial enterprises.

The FCC's freeze order was lifted through the issuance of its Sixth Report and Order in 1952.[124] The Order's spectrum allotment scheme prioritized metropolitan areas[125] in the hopes that urban station signals would reach surrounding rural communities without the need for additional infrastructure. However, the scheme's central assumption—that the signals would successfully travel these vast distances—rested on a highly simplified physical terrain model that "predicted coverage in a smooth radius from the transmitter location outward."[126] This thinking defies physics for two reasons: (1) radio waves are affected by the natural curvature of the Earth. Therefore, the farther the distance, the less likely the signal will reach

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[121] STAFF OF THE FED. COMM. COMM'N, *supra* note 99, at 6 ("According to E.B. Craney, a pioneer in the field of low-power television, the first booster probably was established in 1948, by Ed Parsons to reach homes beyond the range of his cable TV system in Astoria.").

[122] *Id.* at 4.

[123] *Id.* at 30 ("The earliest translators often were financed by individuals who wanted television service for themselves and found that other members of the community would provide contributions to help cover the operating costs.").

[124] 18 FED. COMM. COMM'N ANN. REP. 107 (1952).

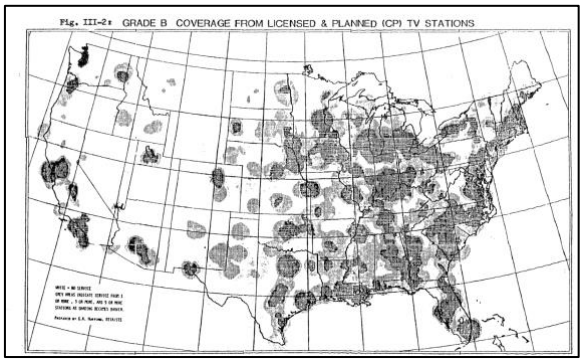
[125] K.M. Richards, *Translators: The Complete Story*, UHF TELEVISION, http://www.uhftelevision.com/articles/translators.html [https://web.archive.org/web/20190911011955/http://www.uhftelevision.com/articles/translators.html]. The below is the proposed channel allotment strategy in the Sixth Report and Order:

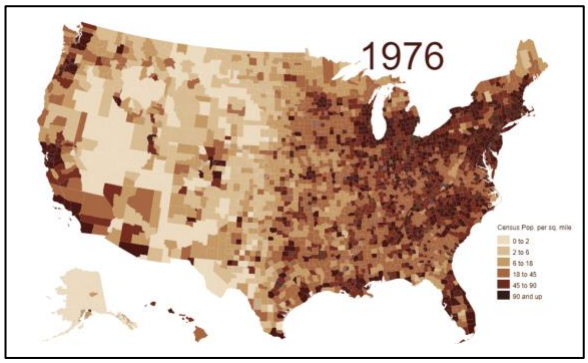
Population of Central City	Number of Channels
1,000,000 and above	6 to 10
250,000 – 1,000,000	4 to 6
50,000 – 250,000	2 to 4
Under 50,000	1 to 2

STAFF OF THE FED. COMM. COMM'N, *supra* note 99, at 56.

[126] Richards, *supra* note 125.

its destination;[127] and (2) large physical structures (e.g. mountains) inevitably obstructed the waves' path as it travelled vast distances.[128] In other words, the FCC's strategy accidentally reinforced the same inequities that the agency wanted to avoid. Populated, urban communities were favored at the expense of their rural counterparts. And this had devastating long-term effects.[129] The left of the two maps depicts the areas of the country reachable by broadcast signals in 1976. The right shows the most populated areas of the country that same year.[130] A comparison between the two demonstrates a strong correlation with population density and broadcast access:





A side effect of this misstep, however, was the alteration of the media landscape itself. With less station licenses, rural Americans sought retransmission technologies to gain access to broadcast. In particular, CATV. And as demand for

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[127] *Radio Waves*, SCI. ENCYC., https://science.jrank.org/pages/5675/Radio-Waves-Propagation-radio-waves.html (last visited Feb. 25, 2021).

[128] *See* Mark D. Casciato, Radio Wave Diffraction and Scattering Models for Wireless Channel Simulation 1 (2001) (Ph.D. dissertation, University of Michigan), http://www.eecs.umich.edu/radlab/html/NEWDISS/Casciato.pdf ("The propagation of a radio wave through some physical environment is effected by various mechanisms which affect the fidelity of the received signal. . . . These effects can include shadowing and diffraction caused by obstacles along the propagation path, such as hills or mountains in a rural area, or buildings in more urban environment.").

[129] STAFF OF THE FED. COMM. COMM'N, *supra* note 99, at 38.

[130] Jeff Desjardins, *Visualizing 200 Years of U.S. Population Density*, VISUAL CAPITALIST (Feb. 28, 2019), https://www.visualcapitalist.com/visualizing-200-years-of-u-s-population-density/ (displaying an animated map created by Vivid Maps, based on U.S. census data and Jonathan Schroeder's county-level decadal estimates for population).

CATV increased,[131] its technological capabilities improved. By the early 1950s, CATV was able to retransmit multiple channels simultaneously using split-band amplifiers.[132] Reception also improved through the construction and development of multi-hop microwave relay infrastructure—allowing for the importation of signals originating from distant metropolitan areas.[133] Suddenly, CATV owners began to root their operations in communities already served by local stations in an effort to capture larger subscriber bases—thus, directly competing against the local stations in their supposedly exclusive markets. The FCC and major networks watched in both glee and horror.

Regarding boosters and translators, the FCC initially labelled them illegal out of fear that their proliferation would cause signal interference.[134] This was met with tremendous resistance from underserved communities.[135] In response, the FCC engaged in further inquiries on whether they should create a licensing scheme dedicated to booster and translator operations.[136] On the other hand, the networks and stations generally supported their use. As Ernest W. Jennes—speaking on behalf of more than 160 stations—later explained to Congress on June 24, 1965: Boosters and translators were beneficial to their business because they helped signals reach the rest of their dedicated geography (and thus, increase viewership).[137]

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[131] Hundreds of operations were erected as the decade passed. *Cable Television, History of*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/media/encyclopedias-almanacs-transcripts-and-maps/cable-television-history (last visited Mar. 31, 2021).

[132] *See* Burton, *supra* note 109 (Leroy "Ed" Parsons discussing the Jerrold amplifier in the 1950s, designed for retransmitting four channels simultaneously).

[133] During the 1950s, AT&T Long Lines built a transcontinental system of microwave relay links across the United States that grew to carry the majority of American television network signal traffic. "*Sugar Scoop" Antenna Catches Microwaves*, POPULAR MECHS., Feb. 1955, at 87. *See also 1965 House Hearings*, *supra* note 24 (statement of Ernest W. Jennes. Counsel, Maximum Service Telecaster, Inc.) ("There are no geographical bounds for 'CATV unlimited.' Increasingly, multi-hop microwave relays are being sought or planned to import stations from metropolitan centers across many hundreds of miles and several States.").

[134] STAFF OF THE FED. COMM. COMM'N, *supra* note 99, at 7–8.

[135] One particular incident involved Governor Ed Johnson of Colorado—former Chairman of the Senate Commerce Committee—who issued an open challenge to the FCC to sue the state as he granted licenses to *all* persons seeking a booster license. *Id.* at 7. A similar incident involved an Oregon Senator who resisted the shutting down of a local booster operation in the Okanogan Valley. *Id.* at 6–7.

[136] *See id.* at 8.

[137] Robert Kastenmeier, Register of Copyright.

> Actually, don't the stations commercially benefit by this, in the sense that translator stations, booster stations, add to viewership? I would think that the stations

In regards to CATV, the FCC was ambivalent.[138] But the broadcasters feared and resisted its rise:

> In essence, this threat derives from CATV's ability to import multiple television signals from many distant stations into cities where local and area television stations are already reaching the viewing public. Because the same television programs are broadcast in many different markets, the importation by CATV into such well-served cities of the signals from stations in other markets *means that the exclusivity of the local station as to many—if not most—of its programs will be destroyed*. To the extent that a program is viewed on an imported channel, the benefit of exclusivity, for which the local station has bargained, is destroyed—to the damage of the local station, the copyright owner and, ultimately, the public. For, when CATV subscribers watch network programs, feature films, or syndicated film programs imported from distant stations, the local viewing audience is fractionated and the local station is deprived of advertiser support, since it can no longer offer to advertisers as large an audience of local viewers. The resulting decrease in advertising revenue means at least

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> involved whose signals were being thus picked up and translated would stand to benefit and be able to commercially improve their rate structure as far as advertising is concerned."

Ernest W. Jennes.

> Well, if you take the situation—and we are talking apparently about translators now and not CATV systems—where the service is being provided by a translator, the extension of the service is being provided free. Where the stations is able to increase the number of people it serves by virtue of a translator, it is to that extent benefiting its own circulation. This is in sharp contrast to the CATV situation where you have outside signals being brought in by CATV into the areas served by the station and fractionating the audience of the station.

1965 House Hearings, supra note 24, at 8.

[138] *See* Daniel J. Smith, Note, *Stay the Course: A History of the FCC's Response to Change in the Cable Industry*, 13 J.L. & POLITICS 715, 726–727 (1997) (discussing the FCC's rejection of jurisdiction for CATV issues).

> that programing must be curtailed and at worst that the local station will be forced off the air.[139]

In response, the broadcasters sought to secure protective legislation from Congress, demanded intervention from the FCC, and challenged CATV's actions in federal court.[140] But "by the end of the 1950's the CATV industry had rebuffed these challenges; Congress had not acted, the [FCC] had not intervened, and no judicial decisions favorable to the broadcasts had been obtained."[141] Helpless, the major copyright owners, networks, and their local stations sought to stop CATV's rise through another mode of attack: Amending the Copyright Act. Their efforts lasted 20 years. It is against this backdrop that Section 111(a)(5) must be read.

III
LEGISLATIVE HISTORY OF COPYRIGHT ACT § 111(a)(5)

A. Addressing the Complexity of the Act's Legislative History

The legal community has long used legislative history to interpret statutory language.[142] However, this approach to interpretation proves uniquely difficult to apply for the Copyright Act of 1976. After all, the Act's legislative record spans more than 30 studies, three Register reports, four committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills (the history of section 111 alone spans 22 congressional

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[139] *1965 House Hearings, supra* note 24, at 3 (statement of Ernest W. Jennes, General Counsel, Maximum Service Telecasters, Inc.).

[140] Jacob W. Mayer, Book Review, 16 WM & MARY L. REV. 1033 (1974) (reviewing DON R. LE DUC, CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL (1973)).

[141] *Id.* at 1035.

[142] *See, e.g.*, Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754 (1966).

sessions[143]).[144] Yet, "one can read this history in its entirety and find no evidence that any member of Congress intended anything in particular to follow from many provisions of the statute."[145] Compounding this difficulty, "[m]ost of the [Copyright Act] was not drafted by members of Congress . . . [i]nstead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines."[146] Therefore, Professor Jessica Litman of Michigan Law characterizes the Act's development as "reflect[ing] an anomalous legislative process designed to force special interest groups to negotiate with one another."[147] And as will be discussed below, section 111(a)(5)'s development was more than consistent with Litman's characterization; involved were some of the largest media entities in the world, including: NBC, ABC, CBS, Disney, Universal Pictures, Twentieth Century Fox, the NFL, MLB, the Motion Picture Association, and the Screen Actors Guild.[148]

Nevertheless, these complexities should not be treated as an excuse to disregard the informational richness that this history provides for the present inquiry. As Professor Litman further states:

> [I]t would be a mistake to conclude that simply because the statutory language and legislative history are difficult to interpret, they convey nothing about what the 1976 Act intended to accomplish. The statute

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[143] As early as 1932, Senator Clarence Dill (D-WA) proposed a revision to the 1909 Act that would have explicitly recognized radio broadcasting as a protected "public performance." SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDIES, *Limitations on Performance Rights,* STUDY NO. 16, at 99 (Comm. Print 1960), *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT LAW: COPYRIGHT LAW REVISION (rev. ed. 2020) [hereinafter CLR STUDY] ("That the use of a machine, instrument, or instruments serving to reproduce mechanically and/or electrically such work or works, except where such reproduction is by radio or wireless broadcast, shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs: *Provided further*, That the provisions of this Act shall not apply to the reception of any work by the use of a radio-receiving set or other receiving apparatus unless a specific admission or operating fee is charged therefor by the owner or operator of such radio-receiving set or other receiving apparatus.").

[144] Litman, *supra* note 44, at 865.

[145] *Id.*

[146] *Id.* at 860–61.

[147] *Id.* at 862.

[148] *Infra* III.C.

> was a complicated and delicate compromise, but the nature of most aspects to that compromise is possible to unearth.[149]

In fact, the Supreme Court has searched the Act's legislative history for linguistic meaning on multiple prior occasions.[150] Thus, the author proceeds to do the same. And in doing so, he traces each version of section 111(a)(5) up until its adoption in 1976. This begins in 1955 when Congress first approached the Copyright Office for assistance in their amendment efforts.[151] Every published, proposed draft is compared along the real-time thoughts and criticisms of the economic actors. By comparing their statements on the drafts with the subsequent changes made to the language, we discover what viewpoints motivated the section's development and thus, arrive at the true authorial intent behind section 111(a)(5).

B. 1955-1965: Birth of the Nonprofit Booster/Translator Exception

By 1955, Congress had been quarreling over whether public performance copyright liability should extend to radio and television broadcast retransmissions for nearly 30 years.[152] After decades of dead bills and failed initiatives, Congress

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[149] Litman, *supra* note 44, at 861.

[150] *See*, *e.g.*, Mills Music v. Snyder, 469 U.S. 153, 165 (1985) (analyzing the legislative history of Section 304(c)).

[151] SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDIES, *Foreword*, at III (Comm. Print 1960), *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT LAW: COPYRIGHT LAW REVISION (rev. ed. 2020) [hereinafter CLR FOREWORD] ("Beginning in 1955, the Copyright office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting studies of the copyright law and practices. . . . The subcommittee believes that these studies will be a valuable contribution to a better understanding of copyright law and practice and will be extremely useful in considering the problems involved in proposals to revise the copyright law.").

[152] The exclusive right of public performance has existed since 1856. *See* CLR STUDY, *supra* note 143, at 81. In the beginning, the right extended only to public performances of dramatic works. By 1897, it was expanded to musical works and public speeches. The early version of the law, however, enumerated no exceptions. *Id.* This changed with the Copyright Act of 1909, which exempted—for the first time—public performance done for a nonprofit purpose. Copyright Act of 1909, 17 U.S.C. §1(e) (1909) (amended 1976). Supposedly, this change was motivated by congressional fears that an absolute public performance right could stifle the "free enjoyment of music." CLR STUDY, *supra* note 143, at 82. Their attempt at protecting live musical performances, however, was rendered futile by their failure to define the term "public performance" in the Act itself. *See* 17 U.S.C. §1(e). This definitional gap became the frequent subject of legal disputes across the country as musical composition owners began to file claims against parties publicly playing their music to paying and nonpaying audiences using radio technology. So much so that by 1916, the Supreme Court granted certiorari to attempt to define the right of public performance. Herbert v. Shanley Co., 242 U.S. 591 (1916). The Court later attempted to clarify this definition

sought the help of the Copyright Office. Funds were appropriated for the creation of a special committee of copyright experts, entitled the Subcommittee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights.[153] Arthur Fisher, then-Register of Copyrights for the Library of Congress, assumed its lead.[154] However, Fisher feared that the subcommittee—occupied by multiple representatives of the various special interest groups– would endlessly quarrel and thus, stall the amendment efforts.[155] He responded to these fears by insisting that the Copyright Office be solely responsible for putting forward any future statutory recommendations; rendering the members of the newly created subcommittee as mere advisors.[156] Therefore, the ultimate proposal put forward by Fisher's Office in 1961 lacked sufficient industry compromise.[157] This proved to be catastrophic, and allowed the special interests to capitalize and force their influence on the Office's revisionary efforts. Therefore (and rather, ironically), Fisher's avoidance of the special interests incidentally provided them with a larger platform for section 111(a)(5)'s eventual development.

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in the case of *Buck v. Jewell-La Salle Realty Co.*, where—for the first time—the Court extended the public performance right to broadcast retransmissions. 283 U.S. 191, 197-98 (1931). Soon thereafter, multiple members of Congress introduced amendments to the copyright law seeking to adapt to broadcast. *See* S. 3985, 72d Cong. (1st Sess. 1932) ("That the use of a machine, instrument, or instruments serving to reproduce mechanically and/or electrically such work or works, except where such reproduction is by radio or wireless broadcast, shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs; *Provided further*, That the provisions of this Act shall not apply to the reception of any work by the use of a radio-receiving set or other receiving apparatus unless a specific admission or operating fee is charged therefor by the owner or operator of such radio-receiving set or other receiving apparatus."); H.R. 10364, 72d Cong. (1st Sess. 1932) (exempting "the reception of any copyright work by the use of a radio receiving set or other receiving, reproducing, or distributing apparatus, except where admission fees, cover charges, operating charges, or similar made."); S. 3047, 74th Cong. (1st Sess. 1935) (seeking to extend the 1909 Act's nonprofit exception to all broadcast performances).

[153] *See* CLR FOREWORD, *supra* note 151, at III; *see also* Legislative Appropriations Act of 1956, Pub. L. No. 242, 69 Stat. 499.

[154] Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 309 (1989) ("Fisher hoped to keep the policy making process insulated within the Copyright Office to avoid the partisan wrangling that infected prior legislation.").

[155] *See id.*

[156] *See id.* at 308–09.

[157] *Id.* at 309.

Fisher's 1961 report proposed: "The statute should exempt the mere reception of broadcasts from public performance right, except where the receiver makes a charge to the public for reception."[158] Interpreted broadly, it would cast liability on all unauthorized forms of broadcast retransmissions containing copyrighted material. In other words, all retransmission technologies (including boosters, translators, and CATV) would be infringing regardless of their profit motive. Interpreted narrowly (i.e., that broadcast reception is the *only* form of broadcast interaction that copyright law is concerned with), the proposal would immunize every form of retransmission. Multiple public comments were filed in opposition.[159] Herman Finkelstein, on behalf of the American Society of Composers, Authors and Publishers ("ASCAP") and Chairman of the ABA's Committee on Program for Copyright Revision, went so far as to call the draft "evil."[160] A number of ABA members echoed Finkelstein's sentiments, and "insisted that they would prefer the current outmoded statute."[161] This vitriol forced the Copyright Office to start from scratch and prolong the revision process. The next tentative draft wouldn't be

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[158] H. COMM ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 31 (Comm. Print 1961).

[159] Those opposed included: (1) The American Guild of Authors and Composers. HOUSE COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON THE REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 235 (Comm. Print 1963), *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT LAW: COPYRIGHT LAW REVISION (rev. ed. 2020) (statement of Leon Kellman, Counsel, The Copyright Committee of American Guild of Authors and Composers) ("The use and enjoyment of creative works, by the public, involves many services and commodities. Actors, musicians, directors, electricians, designers, seamstress, carpenters, stagehands, ticket sellers . . . must be hired. . . . All this is true *regardless* of whether the production or enterprise is a commercial one or whether it is conducted by a nonprofit organization." (emphasis added)). (2) ASCAP. *Id.* at 47 (statement of Herman Finkelstein, Counsel, American Society of composers, Authors and Publishers) ("I applaud the suggestion of the report that with respect to motion pictures the right of public performance be enlarged, without the 'for profit' limitation; I would support making the same extension to choreographic works, after recognizing them."). And (3) the Writers Guild of America. *Id.* at 413 (statement of Richard B. Jablow, Counsel, Writers Guild of America) ("It is the guild's position that the reception of broadcasts in every case constitutes a public performance.").

[160] *Id.* at 283 (statement of Herman Finkelstein, Counsel, American Society of Composers, Authors and Publishers) ("The proposed exemption is wholly unwarranted. It would appropriate the creation of authorship for the benefit of a special class of commercial users. The *evil* might ultimately be as far reaching as the present jukebox exemption." (emphasis added)).

[161] Litman, *supra* note 154, at 310–11.

circulated until 1963.[162] By this time, Fisher would pass away[163] and at least 650,000 Americans would be hooked to cable.[164]

Replacing Fisher as Register of Copyrights was Abraham L. Kaminstein.[165] Contrary to Fisher's approach, Kaminstein insisted that the Copyright Office seek industry input. After analyzing the comments regarding the previous 1961 revision, the Copyright Office proposed—for the first time—that boosters and translators should be exempt from public performance liability.[166] However, they refused to extend immunity to CATV operations.[167] Barbara A. Ringer, Chief of the Copyright

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[162] 2 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976, at 162 (Alan Latman & James F. Lightstone, eds., 1982) [hereinafter KAMINSTEIN].

[163] *Arthur Fisher, 1951-1960*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/registers/fisher/fisher.html (last visited Feb. 27, 2021).

[164] *The Rise of Cable Television*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/arts/news-wires-white-papers-and-books/rise-cable-television (last visited Mar. 19, 2021).

[165] *Abraham L Kaminstein, 1960-1971*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/registers/kaminstein/kaminstein.html (last visited Feb. 27, 2021).

[166] *See* Preliminary Draft for Revised U.S. Copyright Law: § 13(a), *reprinted in* CLR PART 3, *supra* note 34, at 13.

[167] The full text of the statute can be found below. The office's extension of immunity to boosters and translators can be found in subsection (a). Its refusal to immunize CATV is found in subsection (b):

> §13. Scope of exclusive rights with respect to broadcasting and diffusion
>
> Subject to the limitations specified in subsection (b), the exclusive right to perform a work publicly under section 5(c) shall, with respect to a program incorporating a performance of the work, include the right to transmit the program by broadcasting, rebroadcasting, diffusing, rediffusing, or otherwise publicly communicating it.
>
> The exclusive rights . . . shall not include the right to prevent:
>
> (2) Rebroadcasting or rediffusision of the program, over wires or otherwise, for reception on ordinary home receiving sets, where the broadcast signals are merely being strengthened in power without being altered in wavelength or content, and where the program is not being transmitted to the subscribers to a rediffusion service.

KAMINSTEIN, *supra* note 162, at 162.

Office's Examining Division, introduced the language to many of the same parties who opposed the previous draft (and the current plaintiffs in the Locast suit).[168] Ringer rationalized the Office's discriminatory treatment of CATV as follows:

> [The problem] that we see here is the rather interesting question of rebroadcasting or retransmission. And here, of course, there is a vast amount of technology and a vast amount of ignorance, probably on our part as much as anybody else's. But essentially, as we see it, there are two situations where money is involved: (1) the community antenna or CATV system, where the broadcast is picked up and retransmitted over wires to a special receiving set, and where the subscriber pays for the service; and (2) the booster system, where the signal is merely magnified and where anybody in the vicinity can pick the broadcast up.
>
> . . .
>
> With respect to rebroadcasting or rediffusion, we felt it desirable to exempt relays, boosters, master antennas on apartment house roofs, and the like. But, on the basis of the representations that have been made to us, we did not feel that a commercial community antenna system, which installs special equipment on a subscriber's receiving set and charges him for operating the set, should be exempted, and it is not exempted under this draft provision. *On the basis of our knowledge, which is far from perfect, we felt that there is a distinction between a system of this sort—where, from what we have been told, people are really operating for profit—and the situation where somebody puts an antenna up on a hill and lets everybody have the benefit of their largesse, wherever the money comes from*. Now we don't know all we should about this, and we are anxious to be educated.[169]

Ringer's statement contains three notable elements: (1) the Office admitted their ignorance regarding rebroadcasting technology, and requested the assistance

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[168] In addition to the American Publisher's Council, American Textbook Publishers Institute, American Guild of Authors and Composers, ASCAP, and Writers Guild of America, the 1964 commentators included many representatives of plaintiffs in the *Locast* suit, including: Twentieth Century-Fox Film Corp., CBS, Universal Pictures, Walt Disney Productions, and ABC. H. COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 33–36 (Comm. Print 1965), *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT LAW: COPYRIGHT LAW REVISION (rev. ed. 2020) [hereinafter CLR PART 5].

[169] CLR PART 3, *supra* note 34, at 239–240 (statement of Barbara Ringer, United States Copyright Office, Chief of Examining Division) (emphasis added).

from the major industry leaders in the drafting effort; (2) the Office chose not to distinguish between retransmission devices based on the technological method of retransmission; rather, (3) for the first time, they distinguished between booster, translators, and CATV on the basis of the latter's profit-making capabilities and purpose. In the meantime, however, the Copyright Office unknowingly started a war.

George Schiffer, on behalf of the National Community Television Association ("NCTA") (today, named the Internet & Television Association), fiercely opposed the Office's stance.[170] In a comment filed to the Committee, Schiffer reasoned:

> I wish to make plain that community antennas, boosters, translators and rooftop antennas should all be treated identically and should all be exempted from the operation of the Copyright Act. . . . The paramount interest is the public's. The public's interest is to have the greatest amount of television service at the lowest possible cost.
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> . . .
>
> If and so long as the public is to have free television service, [they] must have the correlative right to select the equipment which is most efficient and most adapted to particular needs. . . . Those who manufacture, sell, lease or install reception equipment, whether it be sets, boosters, translators, community antennas, master antennas or rooftop antennas are all in the same business. They do not sell time. They do not sell programs. They do seek to make a profit by dealing in equipment. Without doubt, there would be no market for reception equipment if there were not broadcasts of copyrighted materials. . . . There is simply no "performance," if that word still has a meaning, in the passing of an electric current through tubes and wires-which is all a community antenna accomplishes. The irrelevancy of "performance" is shown by the draft's exemption of boosters, which are as much broadcasting devices as any television station.[171]

Of course, many opposed Schiffer's statements. Douglas Anello, general counsel for the National Association of Broadcasters ("NAB"), argued that CATV deserved different treatment from boosters and translators because it contrarily had

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[170] *See id.* at 419–433 (statement of George Schiffer, National Community Television Association).

[171] *Id.* at 424, 426.

the ability to insert foreign programming into the retransmission."[172] Harry J. Olsson Jr. of ABC acknowledged the need for wider coverage,[173] but contended that it was unfair for CATV to enjoy immunity while earning profits.[174] Even Robert D. Greenburg, commissioner of the FCC (and frequent opponent of the networks), agreed with Olsson's sentiments.[175] At the same time, others argued that *all* retransmission technologies were undeserving of immunity. Sydney M. Kaye, counsel for the NAB, reasoned that differentiating between CATV, booster, and translator was "doomed to failure."[176] Annello agreed, calling it "illogical" to draw a meaningful distinction.[177] Finally, NBC, ABC, and CBS went on to propose new statutory language which refused *any* immunity to retransmission devices.[178] These disagreements left the Copyright Office responsible for authoring a middle ground.

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[172] *Id.* at 245 (statement of Douglas Anello, General Counsel, National Association of Broadcasters) ("Finally, the community antenna operator, in contradistinction to the apartment-house antenna operator, can insert—and does in fact insert—his own programming from time to time. In other words, he has control over the transmission that each subscriber to that system receives.").

[173] *Id.* at 248 (statement of Harry J. Olsson Jr., Counsel, American Broadcasting Company) ("I would like to comment on several things that Mr. Schiffer has said. I think the first of his two main points was that there's a need for adequate TV reception in the public. I think everybody in the room will probably agree that there is.").

[174] *Id.* at 248–249 (statement of Harry J. Olsson, Jr., Counsel, American Broadcasting Company) ("The broadcasters satisfy that need as well as they can, and they now reach something over 90% of the population in the country. . . . But we don't, as a consequence, plead for freedom from paying copyright royalties, despite the fact that we are satisfying the need. . . . I don't think that's an adequate basis on which to plead for an exemption. . . . The CATV system is selling programs, or it's selling the right to receive copyrighted material. . . . Subscribers pay to be able to receive the programs which contain the copyrighted material. I think it [sic] just to say that the CATVs charge an electronic admissions fee. In a sense, they have a pay-television system in operation.").

[175] *Id.* at 251 (statement of Robert D. Greenburg, Commissioner, Federal Communications Commission ("I really have very little to add to what some of the broadcasters have said, except that I couldn't resist the opportunity to align myself for once with the industry. [Laughter]").

[176] *Id.* at 244 (statement of Sydney M. Kaye., Counsel, National Association of Broadcasting).

[177] *Id.* at 254 (statement of Douglas Anello, General Counsel, National Association of Broadcasters) ("Well, I am a broadcaster, and I say it's illogical to draw a distinction for copyright purposes between transmissions by CATV systems, transmissions by a booster, transmission by a translator, and transmission by a regular broadcast.").

[178] Their proposed language can be found below:

> § 13. Scope of Exclusive Rights with Respect to Transmission of Performance by Wire or Radio Communication
>
> "The exclusive right to perform a work publicly under Section 5(c) shall include the right to transmit a performance of a work to the public by wire or radio

Kaminstein's 1964 draft contains two sections relevant to boosters, translators, and CATV: Section 8(4) and section 13.[179] This author, however, is of

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> (including television) communication; provided that such communication of a performance of a work to a specific group of persons limited in number and assembled to see or hear the performance in an office, classroom, or other place not open to the public at that time, or to the occupants of one or more apartment buildings by means of a facility owned or controlled by the owner of such building or buildings, shall not constitute a public performance under Section 5(c)."

Id. at 361 (statement of Robert V. Evans, Assistant General Attorney, Columbia Broadcasting Systems, Inc.).

[179] Section 8(4) and Section 13 state as follows:

> § 8. Limitations on exclusive rights: exemption of certain performances and exhibitions.
>
> Notwithstanding the provision of section 5, the performance of nondramatic literary or musical work, or the exhibition of a pictorial, graphic, or sculptural work, is not an infringement of copyright in any of the following cases:
>
> . . .
>
> (4) performance of the work, otherwise than in a broadcast to the public, without any purpose of direct or indirect commercial advantage and without payment of any salary, fee, or other compensation to the performers, if:
>
> (A) There is no direct or indirect admission charge, or
>
> (B) The proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain.
>
> § 13. Scope of exclusive rights: public communications of broadcasts.
>
> Notwithstanding the provision of section 5, the following are not infringements of the exclusive right to perform or exhibit a copyrighted work:
>
> communication of a broadcast embodying a performance or exhibition of the work to the private rooms of a public establishment by means of a system of loudspeakers, *unless the person responsible for the communication or the operator of the establishment alters or adds to the content of the material included in the broadcast;*
>
> reception of a broadcast embodying a performance or exhibition of the work on a single receiving apparatus of a kind commonly used in private homes, unless a direct admission fee is charged to see or hear the broadcast, or unless the receiving apparatus is coin-operated.

CLR PART 5, *supra* note 168, at 6, 9. Section 13(1) appears to prohibit the insertion of content on top of retransmitted signals. *See id.* at 9.

the opinion that analyzing the language of the 1964 version is practically useless because of its incomprehensibility. On the one hand, section 8(4) suggests that a nonprofit CATV operation would be immunized.[180] On the other hand, representatives of the Copyright Office repeatedly stated—in public comments for the bill—that they did not intend for such a reading.[181] Eventually, this became a point of embarrassment for the Office's draftsmen. Robert Evans, counsel for CBS, pointed out a number of ambiguities in the language and requested clarification.[182] When Register Robert Kaminstein asked Evans if he interpreted the language as exempting CATV, Evans replied: "I am not certain, Mr. Chairman. I'd like your assurance. [Laughter]."[183]

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[180] CLR PART 5, *supra* note 168, at 6.

[181] George Schiffer, on behalf of CATV interests: "I gather that the intent was not to exempt community antennas, albeit we approve of the effect of this provision." *Id.* at 117 (statement on George Schiffer, National Community Television Association). Robert Kaminstein responded: "That's right. I think it would be a dangerous assumption otherwise, Mr. Schiffer. [Laughter]." *Id*. (statement of Robert Kaminstein, Register, United States Copyright Office).

[182] Mr. Chairman, there seems to be some uncertainty as to the exact meaning of section 13. Mr. Schiffer has suggested that clause (2) would give an exemption to community antenna systems, and he made the same observation with respect to section 8(4). I think this may be due to some of the language which appears there. Looking at it, the operative words seem to be "communication of a broadcast embodying a performance …"

> In trying to discover what this means, I think it's fair to look back to section 5, because section 13 is intended to limit section 5. Turning back there, I find three other very similar clauses. I find "broadcast a performance," "transmit … a broadcast of [a] performance," and "communicate a performance." I am sure that something different is meant by each of these four clauses, but I confess I am not quite sure what is meant exactly by each one. For example, under which section could a broadcaster in a proper case sue a community antenna system for infringement? I think it would be helpful if you or someone on your staff could tell us precisely what situation each of these words is intended to apply to.
>
> Finally, I think it would be helpful, and would clarify this whole thing if we had a definition of the word "broadcast," which appears in section 13, in section 5, and also in section 8. I'd suggest as a definition: "To broadcast, means to transmit a performance or exhibition of a work to the public by wire or radio communication, including television." This would be based on sections 3(a) and (b) of the Communications Act of 1934, and therefore has an already-established meaning. Thank you, Mr. Chairman.

Id. at 129 (statement of Robert V. Evans, Counsel, Columbia Broadcasting Systems, Inc.).

[183] *Id.* at 130.

If anything is to be learned from the 1964 draft's language and debate, it is that CATV was (again) refused immunity. This intention was maintained and clarified in the 1965 revision draft—the first introduced to Congress. And with it, the modern nonprofit retransmission exception began to develop.

C. 1965-1966: Debate & Authorship of the Provision in House Subcomm. No. 3

After a decade of hearings and multiple drafts, Abraham Kaminstein introduced a proposal for a new Copyright Act to Congress on February 4, 1965.[184] Its version of the nonprofit retransmission exception was as follows:

> § 109. Limitations on exclusive rights: Exemption of certain performances and exhibitions
>
> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> (5) the further transmitting to the public of a transmission embodying a performance or exhibition of a work, if the further transmission is made 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 of the further transmission;[185]

House Subcommittee No. 3 of the Committee on the Judiciary held 22 public hearings over the course of four months to consider the 1965 version's language.[186] Each hearing was narrowly focused on one or more industries to be potentially impacted by the legislation. This allowed trade representatives to voice their support or opposition (and sometimes, propose amendments to the draft). For example, the

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[184] Bill for the General Revision of the Copyright Law, H.R. 4347, 89th Cong. (1965). *See also* H. COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 1965 REVISION BILL, at v (Comm. Print 1965), *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT LAW: COPYRIGHT LAW REVISION (rev. ed. 2020) [hereinafter CLR PART 6].

[185] H.R. 4347, § 109, *as reprinted in* KAMINSTEIN, *supra* note 162, at 175.

[186] Hearings began on May 26, 1965 and ended on September 2 of the same year. *1965 House Hearings*, *supra* note 24, at i.

first of these hearings—held on May 26, 1965—focused on publishing.[187] Thus, representatives from the Authors Guild, Authors League of America, and American Book Publishers Council were invited to testify and file comments.[188] The tenth meeting—held on September 1, 1965—was mostly dedicated to live television broadcasting as representatives of various professional sports leagues testified on the subject of public performance protection.[189] The eighth—hosted on June 24, 1965—focused on the retransmission debate.[190] Whereupon major copyright owners, CATV operators, trade groups, and the major networks were invited to testify on the nonprofit retransmission exception (amongst other provisions).[191] However, because of the importance of the CATV issue across various industries, many of the other hearings included testimony relevant to section 111(a)(5). In fact, the first comment addressing the section's intent is found as early as the Copyright Office's opening statement during the subcommittee's first hearing.

George D. Cary, Deputy Register of Copyrights, introduced the nonprofit retransmission exception to Congress on May 26, 1965.[192] Notably, Cary began his remarks by labelling the CATV issue as "controversial."[193] He acknowledged that CATV furthered Congress's goal of nationwide television access.[194] However, Cary highlighted a number of CATV attributes that his Office found disturbing, including: (1) CATV was no longer a "passive" device; instead, it was an "extremely complex transmission system" that operated just like a broadcaster;[195] (2) most of these CATV systems were operated as commercial enterprises and successfully earned a profit, thus their operators "neither need[ed] nor deserve[d] a free ride at the expense of copyright owners or in competition with local broadcasters, wired music services, and other users who must pay royalties for similar uses;"[196] and (3) CATV

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[187] *Id.* at 1–154.

[188] *Id.* at iii.

[189] Testimony included the representatives of the National Football League, the American Football League (now defunct), and various baseball organizations. *Id*. at 1823.

[190] *Id*. at 1223.

[191] *Id.*

[192] *Id.* at 29–60 (statement of George D. Cary, Deputy Register, United States Copyright Office).

[193] *Id.* at 34 ("The next *controversial* issue involves the problem of community antenna television, or CATV as its commonly known." (emphasis added)).

[194] *See id.* at 34–35 ("CATV started out after World War II as an aid to those television viewers who were located in mountain valleys or other unfavorable locations where the television signal could not be adequately received, if it could be received at all. . . . It may be added that these early cables were able to carry at the most about three television channels.").

[195] *See id.* at 36.

[196] *Id.*

retransmissions impeded upon the market exclusivity of local stations by retransmitting signals into communities already served, resulting in viewership split which hindered the stations' ability to attract advertisers.[197]

With these considerations in mind, the Copyright Office sided with the right holders and networks on the issue.[198] They explained their decision with the following testimony:

> [T]here is no exemption in this bill for community antenna television operations. . . . . The number of the systems, which in early January of this year totaled around 1,600, has been growing very rapidly at the rate of approximately 40 systems per month. They now bring the broadcast of more than 400 television stations to well over a million and a half subscribers. The industry is reported to have garnered income last year in excess of $100 million and the anticipation for the future is even rosier.
>
> . . .
>
> In our view, there may be valid arguments on both sides of this entire question. . . . *On balance, however, it is our view that the CATV operators are making a performance to the public of a copyright owner's work. This performance results in a profit which in all fairness the copyright owner should share. Unless he is compensated, the performance can have damaging effects upon the value of the particular copyright. For these reasons, therefore, we have not included an exemption for commercial community antenna systems in the bill*.[199]

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[197] *See id.* ("CATV systems effectively deprive the copyright owner of control over his work. In many cases, for example, motion pictures or syndicated series, where the broadcasting of a work is licensed for particular limited territory and audience, a CATV retransmission of a broadcast to subscribers in another area can mean the actual loss of the market for broadcasts in that other area. Multiplied many times throughout the country this loss can be very serious.").

[198] *Id.* ("On balance, however, it is our view that the CATV operators are making a performance to the public of a copyright owner's work. This performance results in a profit which in all fairness the copyright owner should share. Unless he is compensated, the performance can have damaging effects upon the value of the particular copyright. For these reasons, therefore, we have not included an exemption for commercial community antenna systems in the bill.").

[199] *Id.* at 35–36.

The majority of copyright owners and networks applauded the Office's stance. This included many of the same plaintiffs in the present case.[200] On behalf of Disney, Universal Pictures, and Twentieth Century Fox Television, Arthur B. Krim echoed Cary's thoughts: He urged Congress not to think of commercial CATV as a mere signal strengthener.[201] Rather, he characterized the rising technology as a "vast and powerful industry" whose players actively impinged upon the market exclusivity of the local stations.[202] CATV was no longer serving the same nonprofit purpose that Ed Parsons pursued.[203] Instead, Krim argued that commercial CATV unfairly competed against the stations by providing the same content while avoiding copyright clearance obligations.[204] Ernest W. Jennes, counsel for the Association of Maximum Service Telecaster Inc. (whose membership included more than 160 television stations), focused his comments on the market exclusivity concern.[205] Below, the author provides a lengthy quote from Jennes primarily because it beautifully summarizes the importance of the issue for the stations and the future of broadcasting:

> The entire fabric of our free system of television programming depends on the exclusivity of television program rights. The ability of a television network to persuade an advertiser to include a particular station on the network lineup and the revenues which the network and the station will receive depend upon whether [*sic*] that station is the

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[200] Walt Disney Productions, Inc., Twentieth Century-Fox Television, Inc., and Universal Pictures were represented at this hearing by the president of United Artists Corp. and that of its subsidiary, United Artists Television, Inc. *1965 House Hearings*, *supra* note 24, at 1332 (statement of Arthur B. Krim, President, United Artists Corp.)

[201] *See id.* at 1334. (statement of Arthur B. Krim, President, United Artists Corp.) ("When CATV began, its purpose was to serve towns far distant from the site of television stations or isolated by mountainous terrain. . . . As I shall explain, the continued growth of CATV, if not subject to copyright, would upset the nationwide FCC system of contour area allocations, make a mockery of the exclusive license agreements between copyright owners and television stations and seriously damage the property interests of both. . . . [It] has now proliferated into a vast and powerful industry. It operates even in areas where TV stations are already in existence or where the population is large enough to support them.").

[202] *Id.*

[203] *See id.* ("When CATV began, its purpose was to serve towns far distant from the site of television stations or isolated by mountainous terrain. . . . As I shall explain, the continued growth of CATV, if not subject to copyright, would upset the nationwide FCC system of contour area allocations, make a mockery of the exclusive license agreements between copyright owners and television stations and seriously damage the property interests of both.").

[204] *See id.*

[205] *See id.* at 1224 (statement of Ernest W. Jennes, Counsel, Association of Maximum Service Telecaster Inc.

exclusive outlet for the network in the particular city, since a network advertiser will usually not pay twice for the same coverage.

. . .

Exclusivity, that is, the ability of the program owner to control its exposure to the public, is thus essential to a continuing supply of television programs which, in turn, is essential to the survival of television itself. . . . As an inducement, to the production and broadcast of television programs, there is no realistic substitute for exclusivity.

. . .

CATV originally did and still does operate in areas of poor television reception . . . [i]n its historic role, CATV has fulfilled an important function as a supplement to our system of free television . . . More recently, [however], an entirely different type of CATV has been emerging. . . . There are no geographical bounds for 'CATV unlimited.' Increasingly, multi-hop microwave relays are being sought or planned to import stations from metropolitan centers across many hundreds of miles and several States. *These multi-channel systems, importing distant stations both off the air and by microwave, are trying to mushroom into cities and towns of all sizes where reception of local and area broadcasting stations is excellent*.

. . .

In short, 'CATV unlimited' is a new type of CATV with capabilities and operations only faintly resembling historic CATV. As CATV's purpose and operations expand beyond providing an *auxiliary* service, CATV becomes a threat to the public interest in free, diverse, and competitive, local and area television broadcast services. In essence, this threat derives from CATV's ability to import multiple television signals from many distant stations into cities where local and area television stations are already reaching the viewing public. Because the same television programs are broadcast in many different markets, the importation by CATV into such well-served "cities of the signals from stations in other markets means that the

> exclusivity of the local station as to many—if not most—of its programs will be destroyed.[206]

And these sentiments were largely echoed by ABC,[207] CBS,[208] NBC,[209] and the NFL.[210] To the extent that all parties were concerned about CATV's *technological* nature, it stretched only to CATV's increasing ability to retransmit multiple channels.[211]

Thus, the record demonstrates that the major copyright owners and broadcasters opposed immunization of commercial CATV for two primary reasons: (1) Unlike boosters/translators, commercial CATV retransmissions destroyed the market exclusivity of broadcasting stations by retransmitting signals into

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[206] *Id.* at 1224–26 (emphasis added).

[207] *Id.* at 1880–81 (statement of Harry R. Olson, Jr., General Attorney, American Broadcasting Company) ("Insofar as the CATV's merely receive television signals their arguments are sound enough. However, the CATV's do more than merely receive signals. They transmit and furnish for a charge broadcast material, including copyright material, to their subscribers. . . . [They] have proliferated at an amazing rate; many are prosperous and many perform a socially useful function but no other industry using such material, it seems to us, makes a more direct charge to its customers for the privilege of seeing and hearing copyright works.").

[208] *See id.* at 1892 (statement of Leon R. Brooks, Vice President and General Counsel, Columbia Broadcasting Systems) ("At the outset we want to affirm our support of those provisions . . . which make CATV systems subject to the copyright law thereby, in our opinion, codifying the law as it presently exists.").

[209] *See id.* at 1918 (statement of Thomas E. Ervin, Vice President and General Attorney, National Broadcasting Company) ("NBC has proposed for many years that the broadcast station whose programs are being distributed by a CATV system be the focal point for rights clearances. If the station desires to permit its programs to be carried on a particular system, the station can negotiate with the holder of the rights for such CATV distribution when it acquires the right to broadcast the program.").

[210] *Id.* at 1825 (statement of Pete Rozelle, commissioner, National Football League) ("Moreover, by reason of CATV, leagues such as the NFL can no longer guarantee exclusivity of freedom from unlicensed competition to stations or networks which purchase the television rights to sports contests. Television values can therefore be expected to go down.").

[211] *See, e.g.*, *id.* at 1225 (statement of Ernest W. Jennes, Counsel, Association of Maximum Service Telecasters, Inc.) ("The number of channels carried is increasing rapidly. Early systems had one to three channels. Even in 1964, 70 percent of the CATV systems carried five or fewer channels. But new systems already carry up to 12 stations, and systems with 20, 30, or 40 channels are planned.").

communities already served;[212] and (2) Unlike the broadcasters, commercial CATV was not forced to pay for the copyrighted material.[213]

On the other hand, *nonprofit* CATV, boosters, and translators failed to incite the same divisiveness. Multiple parties—including the FCC and the Air Force—approved of the draft's treatment of nonprofit retransmission devices.[214] However,

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[212] *Id.* at 1226 (statement of Ernest W. Jennes, Counsel, Association of Maximum Service Telecasters, Inc.) ("Because the same television programs are broadcast in many different markets, the importation by CATV into such well-served cities of the signals from stations in other markets means that the exclusivity of the local station as to many—if not most—of its programs, will be destroyed. To the extent that a program is viewed on an imported channel, the benefit of exclusivity, for which the local station has bargained, is destroyed—to the damage of the local station, the copyright owner and, ultimately, the public."). *See also id* at 1335 (statement of Arthur B. Krim, President, United Artists Group) ("The usual [network] license contract in syndication does not grant the right to authorize the telecast of our programs over additional stations and prevents the licensee station or sponsor from authorizing a community antenna to perform the program. These restrictions are in keeping with the underlying principle of geographical limitation that is central to all television release. . . . [I]t can readily be seen [then] that when a CATV system brings programs from a distant city, it plays havoc with every existing licensing system and either seriously downgrades or utterly destroys the property of the copyright owner."); *id.* at 1008 (statement of Adolph Schimel, Vice President and General Counsel, Universal Pictures Col, Inc.) ("Our TV performance license fees depend on the coverage of potential viewers, the timing of the broadcast, the priority and exclusivity of performing rights which we can grant for the area, and other factors in the licensee's area. . . . We feel strongly that our copyrights should not be freely transmitted, and thereby publicly performed, without our prior license, in this CATV manner. Our license for the original TV broadcast in other cities which the CATV operator captures and re-transmits from the air, does not expressly or impliedly license any further transmission by the CATV operator.").

[213] *Id.* at 1226 (statement of Ernest W. Jennes, Counsel, Association of Maximum Service Telecasters, Inc.) ("Besides the destruction of program exclusivity, [CATV] is unfair and inequitable. These multiple-channel CATV systems carry vast quantities of program material. If these systems went out into the marketplace to purchase rights to program material, the cost to the CATV's—and the corresponding return to the copyright owners—would be substantial."); *id.* at 1335 (statement of Arthur B. Krim, President, United Artists Group) ("If [CATV] is permitted to make use of copyrighted work without compensation, CATV will have a devastatingly destructive effect upon the business of producing and distributing television programs.").

[214] *Id.* at 196–97 (statement of Herman Finkelstein, General Counsel, American Society of Composers, Authors, and Publishers) ("No. (5) exempts performances on a so-called 'booster' . . . . We feel that it is appropriate to exempt such a further nonprofit transmissions . . . ."). The FCC stated as follows:

the plaintiffs presently suing Locast—including Disney, Universal Pictures, Twentieth Century Fox, and NBC—were comparatively ambivalent at the time.[215]

> We are concerned with the phrases 'without any purpose of direct or indirect commercial advantage' and 'without charge to the recipients of the further transmission.' We believe that the phrase 'without any purpose of direct or indirect commercial advantage' may prove to be troublesome. Where the translator is owned by or licensed to the commercial television station whose programs the translator is retransmitting, the purpose would clearly appear to include commercial advantage. However where the translator licensee is an individual or organization in the community served by the translator, there would appear to be countless fact situations which could raise difficult questions as to whether the purpose of establishing a particular translator was direct or indirect commercial advantage. Inquiry would have to be made into the *purpose* or *intent* which led to the construction and operation of a particular translator. In our view, the matter could better be handled by excluding from the exemption two particular classes of translators: those which are operated for profit, and those which are under common ownership with regular commercial TV stations (which have built them in hopes of improving their coverage). We would, therefore, favor eliminating the language 'without purpose of direct or indirect commercial advantage' and substituting language along the following lines: 'where the further transmission is by a facility neither operated for profit nor under common ownership (wholly or partly) with the commercial broadcast station whose signal it is rebroadcasting.'").

Id. at 478–79 (statement of FCC). The Air Force stated as follows:

> The Defense Department singles out clause (5) of section 109 for support because that portion of the bill insures that nonprofit retransmission of radio and television programs by community antenna systems, CATV, and by TV translators, which merely retransmit a signal on a different higher frequency, will be a noninfringing activity.

Id. at 1125 (statement of Maxwell C. Freudenberg, Patent Attorney, Department of the Air Force). Notably, the CATV operators wanted the nonprofit exception to be extended to for-profit CATV operation that didn't alter the retransmission signal. *Id.* at 1251 (statement of Frederick W. Ford, President, NCTA) ("For all of these reasons the 'without charge or commercial advantage' exemptions of the present bill are anomalies which fall short of a proper exemption for services which merely improve or assist reception but do not alter or add to the content of the original transmission.").

[215] Louis Nizer, on behalf of Disney, Universal Pictures, and Twentieth Century Fox, testified:

> The bill thus gives a special privilege to noncommercial CATV systems such as an antenna erected and shared by neighbors, as long as they do not alter or add to the content of the TV programs and as long as they do not charge for such service. As we interpret this provision, it would not permit large-scale operations by cooperatives which would make a regular or periodic charge to the recipients, but

Though, this ambivalence requires context. At the time, CATV was a capital-intensive business.[216] For-profit CATV operations required a decade before earning a profit.[217] Thus, it's difficult to imagine that many nonprofit CATV operations were being pursued. Louis Nizer, on behalf of Disney, Universal Pictures, and Twentieth Century-Fox, remarked that a nonprofit exception might not even be necessary given these financial realities.[218] As for NAB, CBS, and the Motion Picture Association: They were either silent or suggested that exempting nonprofit CATV-based retransmission *might* create further troubles.[219]

> would permit bona fide contributions by neighbors to the actual cost of building and maintaining antennas, amplifying and distribution equipment for their personal use. *While the necessity for such exemption appears doubtful, its economic impact on program suppliers and local television stations seems to be so limited that we do not oppose it*.

Id. at 1362 (statement of Louis Nizer, Counsel, Twentieth Century-Fox Televisions, Inc., Universal Pictures, Inc., Walt Disney Productions, Inc., Warner Bros. Pictures, Inc., and others). Thomas E. Ervin, Vice President and General Attorney for NBC, joined with Nizer on the issue. *See id.* at 1918 (statement of Thomas E. Ervin, General Attorney, National Broadcasting Company) ("[T]hose provisions of H.R. 4347 applicable to CATV systems are simply restatement of the present law. We support their enactment as clearly resolving any possible doubt as to the applicability of the copyright law to CATV systems.").

[216] Lisa Robin Stern, *The Evolution of Cable Television Regulation: A Proposal for the Future*, 21 URB. L. ANN. 179, 184 (1981).

[217] *Id.* at 184 n.27.

[218] "The bill thus gives a special privilege to noncommercial CATV systems such as an antenna erected and shared by neighbors, as long as they do not alter or add to the content of the TV programs and as long as they do not charge for such service. As we interpret this provision, it would not permit large-scale operations by cooperatives which would make a regular or periodic charge to the recipients, but would permit bona fide contributions by neighbors to the actual cost of building and maintaining antennas, amplifying and distribution of equipment for their personal use. *While the necessity for such exemption appears doubtful, its economic impact on program suppliers and local television stations seem to be so limited that we do not oppose it.*"

1965 House Hearings, *supra* note 24, at 1362 (statement of Louis Nizer, Counsel, Twentieth Century-Fox Televisions, Inc., Universal Pictures, Inc., Walt Disney Productions, Inc., Warner Bros. Pictures, Inc., and others) (emphasis added).

[219] *See id.* at 1719–1727 (statement of Douglas A. Anello, General Counsel, National Association of Broadcasters) (voicing support for extending public performance liability to CATV

Predictably, commercial CATV fiercely opposed the Office's stance. Representatives argued: (1) Commercial CATV furthered Congress' vision for national broadcast access;[220] (2) Because CATV does not retransmit the signal through the air, it was a passive technology that did not literally "perform" the copyrighted work;[221] and (3) Requiring copyright clearance would decimate broadcasting access for distant, rural communities.[222]

The Subcommittee concluded their hearings on September 2, 1965. Beginning in February of the following year, its members—together with the Copyright Office—held another forty executive sessions to apply what they learned for further revisions to the draft's language.[223] Over a month was dedicated to the issue of

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without mentioning the nonprofit exception or translators/boosters); *see also id.* at 1892–1893 (statement of Leon R. Brooks, Vice President and General Counsel, Columbia Broadcasting Systems, Inc.) (voicing support for extending public performance liability to CATV without mentioning the nonprofit exception or translators/boosters); *id.* at 1029 (statement of Adolph Schimel, Vice President and General Counsel, Universal Pictures Co., Inc.) ("As to the exemption under Section 109(5), if there be no charge to CATV recipients and no purpose of direct or indirect commercial advantage, we withhold any commitment at this stage, although we have some misgivings as to what the future may bring in this new and developing era.").

[220] *See, e.g.*, *id.* at 1277 (statement of Tom Creighton, Counsel, Texas Community Antenna Television Association) ("Thus, the CATV system enabled the broadcaster and copyright owners to achieve more satisfactory coverage of an audience within their intended coverage area."); *id.* at 1245 (statement of Frederick W. Ford, President, National Community Television Association) ("We believe that the public interest in free and unrestricted dissemination of television to the public, including the millions of viewers connected to community and other master antenna systems, and the national television policy compel a conclusion that these systems should be free from copyright clearance requirements.").

[221] *See id.* at 1245 (statement of Frederick W. Ford, President, National Community Television Association) (referring to Mr. Cary's comments: "As I indicated a moment ago, a CATV system does nothing more than provide its subscribers with a service for improving their television reception. . . . [it] is nothing more than a master antenna, the use of which is rented to the system's subscribers and a working connection from the antenna to the subscribers' sets.").

[222] *See id.* at 1243 (statement of Frederick W. Ford, President, National Community Television Association) ("[The Subcommittee's draft] would restrict home television reception by CATV subscribing members of the public by giving the holder of a copyright, for the first time, the exclusive right to control the reception of a telecast copyrighted work by a homeowner who uses a community antenna, which is basically contrary to the public's interest in full dissemination of the protected works. . . . This pure element of geographic chance, whether due to unfavorable terrain or high buildings which interfere with television reception, has been ignored by those who seek to create an element of invidious discrimination between Americans on an arbitrary and unjustified basis which to me is contrary to our basic concept of equality of treatment under the laws.").

[223] *1966 Senate Hearings*, *supra* note 40, at 7 (statement of Abraham Kaminstein, Register, United States Copyright Office) ("Beginning in February of this year, the House subcommittee

commercial CATV alone.[224] On September 27, 1966, the Subcommittee delivered amended language for consideration to the House Committee on the Judiciary.[225] This draft was the first labelled "section 111," and with it, much of the modern nonprofit retransmission exception's language was included (along with a series of limitations):

> §111. Limitations on exclusive rights: Secondary transmissions.
>
> (a) CERTAIN SECONDARY TRANSMISSION EXEMPTED. –
>
> (2) Notwithstanding the provisions of subsection (c), but subject to the provisions of subsection (b), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is not an infringement of copyright if the secondary transmission is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without any charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.
>
> (b) CERTAIN SECONDARY TRANSMISSION FULLY ACTIONABLE. – Notwithstanding the provisions of . . . clause[] (2) . . . of subsection (a), the secondary transmission to the public of a primary transmission embodying a performance or display of. a work is actionable . . . if:
>
> (2) the secondary transmitter, within one month before or after the particular secondary transmission, originates any transmission to those members of the public to whom it

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has been holding twice-weekly executive sessions aimed at revising and reporting the bill. So far there have been 40 of these sessions . . . .").

[224] *Id.* ("Consideration of the CATV problem alone took well over a month, during which every aspect of this immensely complex problem was explored and a proposed solution was drafted, reviewed, and agreed upon.").

[225] 112 CONG. REC. 24064–68 (1966) (summarizing principal provisions of H.R. 4347, as amended, and inserted into Record by Rep. Robert Kastenmeir (D-WI)).

> also makes the secondary transmission, except for no more than two transmission programs at any one time unaccompanied by any commercial or political advertising and consisting solely of: weather, time, and news reports free from editorial comments; agricultural reports; religious services; and local proceedings of governmental bodies; or
>
> (3) the secondary transmitter, within one month before or after the particular secondary transmission, makes any separate direct charge for any particular transmission it makes to those members of the public to whom it also makes the secondary transmission; or
>
> (4) the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public; or
>
> (5) the secondary transmission is made for reception wholly or partly outside the limits of the area normally encompassed by the primary transmission . . .
>
> (6) the secondary transmission is made for reception wholly or partly within the limits of an area normally encompassed by one or more transmitting facilities, other than the primary transmitter if –
>
> (A) a transmitting facility other than the primary transmitter has the exclusive right within that area, under an exclusive licenses or other transfer of copyright, to transmit the same performance or display of the work, and
>
> (B) the transmitter having the exclusive right or any other copyright owner has given written notice of such exclusive right to the secondary transmitter at least ten days before the primary transmission, in accordance with requirements that the Register of Copyright shall prescribe by regulation.[226]

[226] KAMINSTEIN, *supra* note 162 at 195–97.

Importantly, Subcommittee Chair Rep. Robert Kastenmeir (D-WI) rationalized the above edits using the same language the broadcasters used to describe commercial CATV during their 1965 hearings. Specifically, Kastenmeir emphasized that the exemption only extended to "passive" devices, including boosters, translators, and nonprofit CATV.[227] No device that impinged upon the market exclusivity of the local stations could earn immunity—*regardless* of whether they operated as a nonprofit.[228] In other words, the broadcasters won. Their lobbying resulted in a section which—in effect—maintained the market power of the networks and their stations. Their provisions successfully passed through the House Judiciary Committee and were introduced to a Committee of the Whole House on October 12, 1966.[229] The House would not debate the bill until April 6, 1967.[230] However, this lapse in time gave the commercial CATV interests the opportunity to form a resistance. By end of debate, section 111 was removed from the bill. And for the next 10 years, this issue single-handedly blocked any revision of a new Copyright Act from being adopted.

D. 1966-1967: Fortnightly*, the FCC, Debate of the Whole, and Removal of § 111*

At this point, it is essential to discuss what was happening outside of Congress. First, in the Southern District of New York, United Artists Television, Inc. —producer of *The Fugitive* and *Gilligan's Island*[231]—filed suit against Fortnightly, Inc., a West Virginia CATV operator.[232] United Artists argued that CATV retransmissions infringed their public performance right (an unresolved legal question at the time).[233] And on May 23, 1966, the Southern District agreed.[234] Judge William Herlands held that commercial CATV retransmissions constituted a "public performance for profit."[235] He acknowledged that exempting some categories of

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[227] 112 CONG. REC. 24066 (1966) (emphasis added).

[228] *See* 112 CONG. REC. 24066 (1966).

[229] H.R. REP. NO. 2237 (1966) (Submitted with H.R. 4347).

[230] 113 CONG. REC. 8580–8622 (1967).

[231] *United Artists Television*, TVIV, http://tviv.org/United_Artists_Television (last visited Feb. 27, 2021).

[232] United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, 180 (1966).

[233] *Id.* at 181; *see also* H.R. REP. NO. 90-83, at 51 (1967) ("[The *United Artists*] decision, the first to be handed down on the question in the United States . . . .").

[234] *See United Artists Television, Inc.*, 255 F. Supp. at 214 (deciding in favor of United Artists).

[235] *Id.*

retransmission technologies might be desirable "purely on policy grounds." Nonetheless, those distinctions were an issue to be resolved by Congress.[236] Second, the FCC buckled to years of pressure and asserted regulatory power over CATV.[237] The FCC's "First Order" required CATV using microwave relay to seek permission from local stations to retransmit their content, and were prohibited from carrying their programs into markets already served.[238] However, because most urban CATV didn't rely on microwave relay, they found themselves otherwise exempt from the FCC's scrutiny.[239] Therefore, when the Whole House reconvened on April 6, 1967,[240] CATV was desperate. Other than those operations based in urban markets, the FCC's Order shut the door to CATV's expansion to much of the country already accessible to local station signals. Further, regardless of whether or not the law was adopted, CATV was going to be forced to pay for copyright unless the Act contained an explicit exception. Enter: Rep. Arch A. Moore, House Republican for West Virginia.[241]

On April 5, 1967, Rep. Moore sought to destroy Section 111 and exempt *all* CATV from copyright liability. He actively circulated letters and comments to his colleagues urging them to accept an amendment doing the same.[242] The author has been unable to find evidence explaining Moore's motives. But one can speculate: In

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[236] *Id.* at 214–15.

[237] *See* Stern, *supra* note 216, 186–191 (detailing the FCC's eventual decision to assert regulatory jurisdiction over CATV).

[238] *Id.* at 191–92.

[239] *Id.* at 192.

[240] 113 CONG. REC. 8580–8622 (1967) (debating the bill).

[241] Rep. Moore had represented West Virginia in the House since 1956. *WVU Libraries Opens Congressman Arch Moore Archives, Releasees Digital Photographs*, WVU TODAY (Mar. 18, 2019), https://wvutoday.wvu.edu/stories/2019/03/18/wvu-libraries-opens-congressman-arch-moore-archives-releases-digital-photographs. He came from a long line of state electors and defied the odds as a powerful Republican in an overwhelmingly Democratic state. *See also* Adam Bernstein, *Arch Moore Jr., Charismatic W. Va. Governor Convicted of Corruption, Dies at 91*, WASH. POST (Jan. 8, 2015), https://www.washingtonpost.com/politics/arch-moore-jr-charismatic-wva-governor-convicted-of-corruption-dies-at-91/2015/01/08/e5857798-974d-11e4-927a-4fa2638cd1b0_story.html. A cunning politician, Moore was remembered for "his bravado on the stump, his backslapping demeanor and his ability to remember seemingly everyone's name." *Id.* He used these talents to win several years in the House and three terms of the West Virginia governorship. *Id.* So skilled was Moore that he defeated a (very) well-funded John D. Rockefeller IV for the latter position in 1972. *Id.* Thus, he was a lethal friend and enemy. And on the CATV issue, the CATV operators were lucky to call him a friend.

[242] *See* 113 CONG. REC. 8620 (1967) ("What Mr. Whitener does here is substantially submit for your consideration at an earlier time the proposals which I circulated to you by letter and by written comment late last evening.").

West Virginia, Moore served the cities of Clarksburg and Fairmont—the exact two cities where Fortnightly was headquartered and operated.[243]

Rather than attack its merits, Moore criticized section 111's development. Specifically, Moore grounded his opposition on a technical issue: He claimed that the House Judiciary, by assuming sole authority over the CATV issue and the new copyright law, interfered with the exclusive jurisdiction of the House's Committee on Interstate and Foreign Commerce:

> "[W]hat we seek to do in this legislation is control CATV by copyright. I say that is wrong. I feel if there is to be supervision of this fast-growing area of news media and communications media, it should legitimately come to this body from the legislative committee that has direct jurisdiction over the same, [the Interstate and Foreign Commerce Committee]. . . . I believe the ramifications of controlling CATV through the copyright mechanism is highly technical, is in error, and is a grievous mistake. Should not the recommendations in this matter, I say to this Committee, come from the legislative committee that has the direct responsibility and that which has the primary jurisdiction in this matter?"[244]

His stratagem was cunning and disingenuous. Cunning, because the Committee on Interstate and Foreign Commerce was chaired by Harley O. Staggers: an influential fellow West Virginian who likely sympathized with Moore's stance on the CATV issue.[245] Disingenuous, because Moore himself sat on the House

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[243] *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177, 179 (1966) (explaining that Fortnightly had CATV operations in both Clarksburg and Fairmont, West Virginia); *West Virginia's 1st Congressional District*, WIKIPEDIA, https://en.wikipedia.org/wiki/West_Virginia%27s_1st_congressional_district (last visited Feb. 27, 2021) (acknowledging Rep. Arch A. Moore representation of the First District of West Virginia, containing Clarksburg and Fairmont).

[244] 113 CONG. REC. 8599 (1967).

[245] *Harley O. Staggers Sr. Dies at 84*, WASH. POST (Aug. 21, 1999), https://www.washingtonpost.com/archive/local/1991/08/21/harley-o-staggers-sr-dies-at-84/f76b1223-a904-4f86-acf1-1ace3c739f8b/. This was a bet worth taking. Rep. Staggers was an unmatched political force. Until his retirement in 1981, he served 16 consecutive terms on behalf of West Virginia's Second District. Frank N. Wilner, *Staggers What? Time for a Name Change*, RY. AGE (Jan. 9, 2018), https://www.railwayage.com/news/staggers-what-time-for-a-name-change/. He demanded respect because of his reputation as "wholly and incorruptibly honest."

Judiciary Committee.[246] And according to at least one of his fellow members, Moore never voiced any jurisdictional opposition up to this date.[247]

This resulted in a "full-scale verbal war . . . between representatives favouring [*sic*] broadcasting and others supporting cable interests."[248] Nine representatives (across political party and country)[249] joined Moore to accuse the Judiciary Committee of jurisdictional interference.[250] Importantly, this included Rep. Staggers—an unmatched political force. When Rep. Staggers stood in opposition and called on his colleagues "to vote against the bill unless the regulatory provisions in section[] . . . 111 . . . [are] deleted," they listened.[251] Rep. Basil L. Whitener (D-

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Lenora G. Kenwolf, A Social Political History of the National Radio Astronomy Observatory at Green Bank, WV 37 (2010) (MA Thesis, West Virginia University) (on file with author). More importantly, Staggers chaired the House Committee on Foreign and Interstate Commerce for 16 years—the longest in the Committee's 200-year history. *Dinner Named in Memory of Harley O. Staggers Sr.*, CUMBERLAND TIMES-NEWS (Sept. 20, 2019), https://www.times-news.com/community/dinner-named-in-memory-of-harley-o-staggers-sr/article_1818d1d5-185f-5b4e-93e2-c0555405bc90.html.

[246] *About Arch Alfred Moore Jr.*, W. VA. UNIV.: W. VA. & REG'L HIST. CTR., https://moore.lib.wvu.edu/about (last visited Feb. 27, 2021).

[247] Herbert Tenzer, Democratic member of the House for New York, called out Rep. Moore on this point. 113 CONG. REC. 8615–16 (1967) (statement of Rep. Herbert Tenzer) ("Mr. Chairman, I participated in all of the sessions of this subcommittee. At no time did I ever hear any member of the subcommittee say a word—or read a communication from anyone—or did I hear a word spoken about interfering with the jurisdiction of the distinguished Committee on Interstate and Foreign Commerce. At no time did I hear any debate or any discussion or hear any testimony as to taking away the jurisdiction over communications from that distinguished committee. What we are dealing with here is protection of copyrighted material, and what the members of the Interstate and foreign Commerce Committee have sought to do is confound the House.").

[248] U.S. COPYRIGHT OFFICE, 94TH CONG., SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL, ch. 5, at 6 (Oct.–Dec. 1975) [hereinafter SECOND SUPPLEMENTARY REPORT] (unpublished manuscript) (on file with author).

[249] This included: Rep. Arch A. Moore (R-WV), Harley O. Staggers (D-WV), Torbret MacDonald (D-MA), Wayne Hays (D-OH), Paul Rogers (D-FL), J. Arthur Younger (R-CA), John Dingell (R-MI), John E. Moss, and Basil L. Whitener. 113 CONG. REC. 8599–8619.

[250] *See* 113 CONG. REC. 8600, 8602 (statement of Rep. Harley O. Staggers) ("[M]y objection is that the Committee on the Judiciary and particularly the subcommittee of which the gentleman from Wisconsin [Mr. Kastenmeir] is chairman, went into the communications field and has undertaken to state what CATV could broadcast, how they could broadcast it, and at what times they could broadcast it. We say that those questions lie within the jurisdiction of the Committee on Interstate and Foreign Commerce, while the gentleman states that it comes under the copyright law.").

[251] *Id.* at 8600.

NC) responded by offering an amendment doing the same while extending immunity to all CATV operations.[252] An amendment authored by Moore himself.[253]

Rep. William L. Springer (R-IL), the ranking member of the Interstate and Foreign Commerce Committee, stood to save the bill.[254] In harsh language, Rep. Springer proclaimed to the Whole of the House:

> [Rep. Moore] has offered an amendment which could not be more mischievous than anything I could think of. . . . This subject is complicated . . . [i]t has been up before our committee on several occasions. The bill now before the House attempts to modify that decision in order to give CATV some rights they do not already have, and it would partially overcome the decision of the New York court.
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> . . .
>
> I take it that down in the gentleman's territory there is a lot of CATV. At least one other gentleman on my side who is in the same area has indicated the same thing. [But] [s]omewhere along the line we have to be fair. We have to balance off the originating station with the CATV. I believe this bill does about as good a job in trying to balance those interests as we could find.
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> . . .
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> [I]f the substitute is defeated, an amendment will be offered by the gentleman from New York [Mr. Ottinger], which would strike all of section 111 and put the subject matter back in our committee. Reluctantly, I personally did not want to see all of this happen, but in view of the contentions that have arisen on this floor, rather than accept the amendment now and go ahead and do what the gentleman from North Carolina has in mind at this point, it would be much better to accept the Ottinger amendment . . . . At first I did not think this ought

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[252] *Id.* at 8619.

[253] *Id.* at 8620 (statement of Rep. Arch A. Moore) ("What Mr. Whitener does here is substantially submit for your consideration at an earlier time the proposals which I circulated to you by letter and by written comment late last evening, and which were also the subject matter of my comments in the study of this bill during general debate on this bill.").

[254] *Id.*

> to be done. I had a feeling that we ought to go along with section 111. But the way this thing is developing, the worst type of legislation you could have at this point would be the substitute. It would ruin the whole purpose of the copyright law with reference to the division, in fairness, between the originating station and CATV itself.[255]

Springer's statement was, in a sense, "Washingtonian." By demanding that the bill be refused a final vote and ordered to return to his committee, Springer rallied the broadcaster to retreat and fight another day. On cue, the vote was called for Moore's amendment and it lost 24-80.[256] And in its place, Rep. Richard Ottinger (D-NY) offered the Springer amendment: Striking section 111 without extending an exemption from public performance liability to CATV.[257] Shortly thereafter, the House halted discussion with plans to begin formal discussions on the new amendment in five days.[258]

On April 11, 1967, Rep. Ottinger reopened discussions on the Copyright Act by informing his colleagues of a compromise. According to Ottinger, the jurisdictional controversy on April 5 prompted the leadership of the Judiciary and Interstate Committees to discuss the future of the CATV issue.[259] And a compromise had been struck. Pursuant to this, the Interstate Committee was assigned responsibility over future CATV regulation and the Judiciary was left with handling the scope of copyright liability.[260] Section 111 would be removed from the bill, the CATV copyright issue would continue to be debated in the Senate Subcommittee on Patents, Trademarks, and Copyrights, and the rest of the Act would move to a full

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[255] *Id.* at 8620–21 (statement of Rep. William L. Springer) (emphasis added). The author also notes that Rep. Springer's motivations might also have been constituent-based. Rep. Springer was a long-time resident of Champaign, IL and a friend of the author's family. While living in Champaign, Springer was a notable friend of August C. Meyer Sr., founder of Midwest Television, Inc.—and one of the largest radio and television broadcasting companies in the country. Springer was an important ally of Meyer's business interests while he served in Congress.

[256] *Id.* at 8621.

[257] *Id.*

[258] *Id.* at 8622.

[259] *Id.* at 8990 (statement of Rep. Richard Ottinger) ("[L]ast Thursday . . . I offered my substitute striking section 111 primarily for two reasons: First, to head off an amendment by the gentleman from North Carolina [Mr. Whitener], which would have had the undesirable effect of exempting all CATV from any copyright protection whatsoever; second, because of jurisdictional problems between my own committee, the Committee on Interstate and Foreign Commerce, and the Committee on the Judiciary. After consultation with the two committees, the jurisdictional problem has now been worked out as I understand it.").

[260] *Id.*

vote in the Senate.[261] Secretly, they hoped that the issue would be clarified by the federal courts with *Fortnightly*.[262]

This thinking, however, was naïve. CATV was too important of an issue for the Senate to vote on a new Copyright Act without clarification on its future.[263] Moreover, it was doubtful that the federal courts were going to assume any role in this policy-driven debate—as demonstrated by SDNY's handling of *Fortnightly*. Thus, in effect, Congress' removal of Section 111 shelved all development of the Copyright Act until the issue could be resolved by the Senate subcommittee.[264] The

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[261] *Id.* at 8991.

[262] *Id.* at 8990–91 (statement of Rep. Richard Ottinger) ("In view of the dangers of wholesale copyright exemption posed by the amendment of the gentleman from North Carolina [Mr. Whitener], however, and in view of the agreement made between the commerce and the Judiciary Committees, I think my amendment, deleting CATV altogether from this bill and leaving its copyright coverage to the courts for the time being, is the best available disposition of the matter."); *see also* 113 CONG. REC. 10408 (1967) (statement of Rep. Richard Ottinger) ("The issue I presented to the House, however, was whether during the period that may elapse before the committee on Interstate and Foreign Commerce considers overall regulation of CATV and the Judiciary Committee considers any pertinent copyright provision in connection therewith, CATV should be left fully exempt from copyright coverage as proposed by the gentleman from North Carolina [Mr. Whitener], and the gentleman from West Virginia [Mr. Moore], or whether during this interim CATV should be fully covered as would be the effect of my amendment. Passage of H.R. 2512 with my amendment means that, should it become law in its present form, all CATV transmissions subject to its provisions will be included within its protections.").

[263] As Rep. Emanuel Cellar (D-NY) later recounted in a statement published in the *New York Journal*, "[t]he question quite seriously arises for me whether the bill that passed the House, even without any provisions bearing on cable television, could not appropriately have been allowed to become law, leaving the unresolved CATV and other issues for a later time. Proposals to disembarrass copyright law revision from the incubus of the CATV problem by enacting a so-called "bare bones" bill has not met with Senate approval." 116 CONG. REC. 37529 (1970).

[264] *See id.* at 37529–30 (statement of Rep. Emanuel Celler) ("We now know that no revision measure was enacted in 1967 or in 1968 or 1969 and that none will have been enacted in 1970. I guess we are here, or let us say I am here to speculate about the reasons why progress in copyright law revision has slowed down to the point where some assert that it is negative. . .. On the floor of the House these provisions ran into serious difficulties of the CATV issue is that it involves both the regulation of communications and compensation of copyright owners. . . . "[T]he situation in which the proponents of revision find themselves leaves them with little choice other than to close their ranks and continue in the coming year to hammer out the terms of an overall copyright law revision. This is so because the 'bare-bones' proposal has been rejected and because it is too soon to fall back to a situation in which individual issues are offered for piecemeal adoption.").

broadcasters and CATV operators responded by reentering negotiations.[265] These meetings became urgent, however, when the Supreme Court granted certiorari in *Fortnightly*.

E. 1967-1973: Fortnightly *and Clay J. Whitehead*

After the Second Circuit affirmed the Southern District's decision in *Fortnightly*,[266] the Supreme Court granted certiorari in 1968.[267] As previously discussed, the government saw this as an opportunity to end the CATV debate. The Solicitor General implored SCOTUS to administer a judicial compromise accommodating the relevant interests.[268] However, the Supreme Court refused.[269] Justice Stewart, writing for a 5-1 majority,[270] acknowledged that the 1909 Act needed revision given the modern nature of retransmission technologies.[271] But in a

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[265] SECOND SUPPLEMENTARY REPORT, *supra* note 248, ch. 5, at 11 ("Throughout this period there were countless private, semi-private, and public meetings aimed at negotiating a solution acceptable to the private interests involved."); 113 CONG. REC. 27588 (1967) (statement of Sen. John L. McClellan) ("The subcommittee has been confronted with a situation in which, before the Congress had an opportunity to complete action on the revision bill, a number of lawsuits for copyright infringement might be filed against CATV systems. This could disrupt the television viewing of millions of our citizens. Therefore, consideration has been given to the necessity of legislation providing for a temporary suspension of judicial remedies for copyright infringement by CATV systems . . . . *Before any such legislation was introduced, all interested parties participated in a series of meetings. As a result of these discussions there has been submitted to the subcommittee certain representations on behalf of the major owners and distributors of television film programs* . . . . [*W*]*hile the parties are negotiating contractual arrangements and discussing appropriate legislative formulas, the copyright owners will refrain from instigating legal action against CATV systems*." (emphasis added)); S. REP. NO. 91-519, at 6 (1971) ("During the first session of the 90th Congress, the subcommittee completed the public hearings on legislation for a general revision of the copyright law. The hearings were conducted on S. 597, which had been introduced at the request of the Librarian of Congress. During the subcommittee hearings on S. 597, the House of Representatives passed a copyright revision bill, H.R. 2512, and this has also been under consideration by the subcommittee. Although no action on copyright law revision was taken by the subcommittee during the second session, other than to approve legislation providing for a 1-year extension of expiring copyrights, there were a number of significant developments concerning several of the major provisions of this legislation.").

[266] *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872, 874 (2d Cir. 1967).

[267] *Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390, 393 (1968).

[268] *Id.* at 401.

[269] *Id.*

[270] Neither Justice Douglas, Marshall, nor Harlan participated in the decision. *Id.*

[271] *See id.* at 395 ("At the outset it is clear that the petitioner's systems did not "perform" the respondent's copyrighted works in any conventional sense of that term, or in any manner envisaged by the Congress that enacted the law in 1909. But our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development

shocking turn-of-face, Stewart reversed the lower courts and held that CATV was immune from copyright public performance liability under the existing Act.[272] He acknowledged the government's pleas for help,[273] but "decline[d] the invitation. That job is for Congress."[274] By the time this opinion was announced, approximately 2,000 cable systems were in operation around the country—serving 2.8 million homes.[275] All of which would be free to compete against the local stations without needing to pay copyright clearance fees thanks to the Stewart majority.

By this time, the FCC became convinced to enter the fray.[276] Two years before the Supreme Court's decision in *Fortnightly*, the agency issued a freeze on the importation of all cable signals into the top 100 markets.[277] A protectionist policy aimed at preserving the exclusivity of the major local stations.[278] Next, Senator John L. McClellan (D-AK)—Chairman of the Senate Subcommittee of the Patents, Trademarks, and Copyrights—reintroduced the Copyright Revision Bill for consideration by his subcommittee in 1969.[279] Although there is little recorded evidence of their negotiations, we do know the result: A compromise. Representatives of commercial CATV agreed to make reasonable payments for the use of copyrighted material under a compulsory licensing scheme.[280] In exchange, the FCC would remove their freeze order and allow CATV to grow. The bill went

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of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented.").

[272] *Id.* at 401.

[273] *Id.*

[274] *Id.*

[275] Lewis J. Paper, *Cable TV—The Time is Prime for Regulation*, N.Y. TIMES, Nov. 22, 1981, https://www.nytimes.com/1981/11/22/arts/cable-tv-the-time-is-prime-for-regulation.html.

[276] Stern, *supra* note 216, at 192 (1981) ("The FCC adopted further rules in 1966, extending the mandatory carriage and nonduplication rules to all cable systems."). It is important to note that whether the FCC had this authority was an open question that required multiple Supreme Court opinions. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

[277] Stern, *supra* note 216, at 193 (1981).

[278] *See id.* at 193–94.

[279] 115 CONG. REC. 1404 (1969) (statement of Sen. John. L. McClellan). Notably, in *Aereo*, Justice Breyer acknowledged that "one of Congress' primary purposes" in adopting the Copyright Act of 1976 was to "overturn" *Fortnightly*. *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 439 (2014).

[280] S. REP. NO. 91-519, at 7 (1969) ("Although there was general agreement that CATV systems should make a reasonable payment for the use of copyrighted materials, there was substantial disagreement as to the mechanics of determining and collecting such payment and with respect to the nature of protection to be accorded to copyrighted works.").

through significant edits to reflect these understandings.[281] As enumerated, the Subcommittee's draft provided that CATV would have to comply with a licensing fee schedule based on a percentage of the CATV's operator's gross receipts.[282] Existing CATV would be grandfathered in.[283]

Most importantly, McClellan's draft re-adopted the nonprofit retransmission exception in its entirety.[284] By December 10, 1969, the Senate Subcommittee on Patents, Trademarks, and Copyrights recommended the below text to the Judiciary Committee:[285]

> § 111. Limitations on exclusive rights: Secondary transmissions.
>
> (a) CERTAIN SECONDARY TRANSMISSION EXEMPTED. –
>
> (4) the secondary transmission is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without any charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.[286]
>
> (b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP. –
>
> Notwithstanding the provisions of subsection (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under sections 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception

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[281] *See* S. REP. NO. 91-1219, at 9 (1970) (discussing the creation of the compulsory license scheme); SECOND SUPPLEMENTARY REPORT, *supra* note 248, ch. 5, at 12–13 (discussing the creation and introduction of the compulsory license scheme into the bill).

[282] SECOND SUPPLEMENTARY REPORT, *supra* note 248, ch. 5, at 13.

[283] *Id.*

[284] KAMINSTEIN, *supra* note 162, at 209–10.

[285] S. REP. NO. 91-1219, at 4 (1970) (discussing the approval of the bill through the Senate Subcommittee).

[286] KAMINSTEIN, *supra* note 162, at 210.

> by the public at large but is controlled and limited to reception by particular members of the public.[287]
>
> (c) SECONDARY TRANSMISSION BY CABLE SYSTEMS. –
>
> (2) Subject to the provisions of subsections (a) and (b), but notwithstanding the provisions of clauses (2) and (4) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is subject to compulsory licensing under the conditions specified by subsection (d) in the following cases.[288]
>
> (B) Where the reference point of the cable system is within the local service area of the primary transmitter;

The subcommittee's decision to reintroduce the preexisting language suggests that the same thinking underlying the 1965 draft was intended to be maintained. Thus, the parties continued to believe that the nonprofit retransmission exception should extend only to boosters, translators, and nonprofit CATV. Development of the fee scheme, on the other hand, needed further development. This work was split between the Senate, special interests, and FCC over several years.[289] Of course, these efforts are not the subject of this note. The author is only concerned with the development of the nonprofit retransmission exception. But it is important to (briefly) discuss the parties involved and the consensus reached as this allows for better understanding of why nonprofit CATV was eventually amended out of the nonprofit retransmission exception in 1973.

The fee scheme reported out of McClellan's Subcommittee in 1969 bears little resemblance to what exists today.[290] This is so because the FCC, major copyright

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[287] *Id*. at 210–11.

[288] *Id*. at 213.

[289] *See* 119 CONG. REC. 9388–89 (discussing the consensus agreement between the FCC, special interests, and drafters of the Copyright Act of 1976).

[290] *Compare* KAMINSTEIN, *supra* note 162, at 210, *with* 17 U.S.C. § 111 (2012).

owners, and networks angrily opposed it.[291] The owners and networks felt the scheme overly favored CATV.[292] While the FCC believed that it would tie their hands with handling the broadcast spectrum.[293] In response, the FCC became more involved in the development of the copyright law's handling of CATV.[294] And in 1971, the agency provided their most important contribution: The endorsement of Clay J. Whitehead as mediator amongst the parties.[295]

Clay J. Whitehead was an MIT-educated electrical engineer and economist who had been obsessed with telecommunications since working on his ham radio as a child in Kansas.[296] After a brief stint at Bell Labs, he joined the White House as Special Assistant to President Richard Nixon.[297] In this role (and in the many roles he assumed over his illustrious career), Whitehead displayed a unique ability to combine his love for free markets with his expertise in arising technologies.[298] These skills were showcased early when he spearheaded the American "Open Skies" satellite policy, which allowed private companies to launch communication satellites.[299] Soon thereafter Nixon appointed Whitehead as the inaugural director of the newly created White House Office of Telecommunication Policy.[300] In this position, Whitehead aimed to make the federal government "more anticipatory" to technological change in the communications sphere.[301] More importantly, "he sought to demolish the monopoly model that had given tremendous power to large international [telecommunication] corporations."[302]

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[291] SECOND SUPPLEMENTARY REPORT, *supra* note 248, ch. 5, at 13–14.

[292] *See id.* at 13.

[293] *Id.* at 14 ("The amended copyright bill was also strongly criticized by the [FCC], primarily on the ground that it left the FCC with too little flexibility to deal with the problem of cable retransmissions.").

[294] *See id.*

[295] *See id.* at 15.

[296] Dennis Hevesi, *Clay T. Whitehead, Guide of Policy That Helped Cable TV, is Dead at 69*, N.Y. TIMES (July 31, 2008), https://www.nytimes.com/2008/07/31/washington/31whitehead.html.

[297] *Id.*

[298] *See id.*

[299] *Id.*

[300] Adam Bernstein, *Nixon Advisor Revolutionized Cable TV*, L.A. TIMES (Aug. 2, 2008, 12:00AM), https://www.latimes.com/archives/la-xpm-2008-aug-02-me-whitehead2-story.html.

[301] *Id.*

[302] *Id. See also* TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 177 (2010) ("In the 1960s, cable was a technology serving small towns and remote localities, barred by federal law from expansion. It seemed doomed to being but the handmaid of broadcasting. Indeed, another version of history, the cable networks would have emerged only as offshoots of NBC, CBS, and ABC, as has been the fate of cable in other major economies, among them Japan and Germany. But the Nixon administration had a different vision for cable. Nixon's

From the beginning, the Whitehead-mediated negotiations focused on the problem of unfair competition between the networks, their stations, and CATV.[303] The networks wanted assurance that the importation of distant signals into well-served local markets would be prohibited.[304] They also wanted Congress to overrule *Fortnightly* and obligate commercial CATV operations to pay for copyright clearance.[305] CATV, on the other hand, requested that the clearance fees be "fair" and contrarily requested for the removal of the FCC's freeze order.[306] After Whitehead's initial proposal failed to gather support, he sent a "take-it-or-leave-it" offer to all parties—today, famously known as the "Consensus Agreement."[307] Its terms included:

(1) The FCC's absolute freeze on distant signal carriage into well-served markets would be abolished.[308] Signal importation was allowed under certain limitations depending on the size of the imported market.[309] However, duplicative signal importation was prohibited.[310] Upon acceptance, these regulatory changes would be put into effect promptly.[311]

(2) All parties pledged to support separate copyright legislation.[312] This would provide for a compulsory license scheme for CATV retransmissions.[313] The

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young head of communication policy, Clay Whitehead, ran the Cabinet Committee on Cable, which foresaw a life for the medium as a highly deregulated common carrier.").

[303] James J. Popham, *The 1971 Consensus Agreement: The Perils of Unkept Promises*, 24 CATH. UNIV. L. REV. 813, 814 (1975).

[304] *See id.*

[305] *See id.*

[306] *See id.*

[307] *See id.*; *see also 1973 Senate Hearings*, *supra* note 41, at 295–296 (statement of Jack Valenti, President, Motion Picture Association of America, Inc.)

[308] *1973 Senate Hearings*, *supra* note 41, at 295–296 (statement of Jack Valenti, President, Motion Picture Association of America, Inc.).

[309] *Id.* ("CATV systems were to be permitted to import programs from distant stations subject to certain limitations depending on the size of the market into which the importation was to take place . . . .").

[310] *Id.* (". . . subject to the non-duplication by cable systems of programs available in the same market from local television stations.").

[311] *Id.* ("The rules will, of course, be put into effect promptly.").

[312] *Id.*

[313] *Id.*

fee obligation would cover all local signals and a certain number of distant signals.[314] The existing nonprofit exception would remain in the bill.[315]

All parties accepted these conditions, albeit "unenthusiastically."[316] Thus, Whitehead had managed to do what Congress had found impossible for nearly two decades: Get the copyright owners, networks, local stations, and CATV operators to agree on basic conditions. Later, the FCC "implement[ed] the communications segment of the compromise" and ended the freeze on distant signal importation.[317] In 1973, Senator McClellan (D-NY) formally notified Congress that the end was nigh. A revised Copyright Act was about to finish consideration in the Senate's Subcommittee on Patents, Trademarks, and Copyrights.[318] On August 1, the Subcommittee gave the broadcasters, copyright owners, and CATV operators one final chance to offer amendments. These hearings birthed the modern language of section 111(a)(5) when it stripped immunity from nonprofit CATV.[319]

F. 1973-1976: Scrutiny of Nonprofit Cable and Adoption of the Copyright Act

Despite pledging themselves to support speedy passage of the copyright legislation,[320] the major copyright owners voiced multiple gripes with section 111's existing language on August 1, 1973.[321] Most notably, Jack Valenti, President of the Motion Picture Association of America, Inc. (also speaking on behalf of the Association of Motion Picture and Television Producers Inc.), argued that the nonprofit retransmission exception was "overly-broad."[322] He emphasized that this grant of immunity should only cover *passive* retransmission devices—nonprofit translators, boosters, and "similar secondary transmitters."[323] Specifically, Valenti testified:

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[314] *Id.*

[315] Though not explicit.

[316] SECOND SUPPLEMENTARY REPORT, *supra* note 248, ch. 5, at 18.

[317] S. REP. NO. 92-935 (1972).

[318] 119 CONG. REC. 9389 (March 26, 1973) (statement of Sen. John L. McClellan) (introduction of S. 1361).

[319] *See generally 1973 Senate Hearings*, *supra* note 41, at 278–316 (statements from broadcasters, copyright owners, and cable operators during the August 1, 1973 hearing).

[320] *See id.* at 278 (statement of Jack Valenti, President, Motion Picture Association of America, Inc.) ("Now, all parties to this agreement pledged themselves to support the concept of a speedy passage of the legislation, and also the concept of an arbitration tribunal that would be put in the bill if the parties could not agree on a private schedule of fees.").

[321] *See, e.g.*, *id.* at 283.

[322] *Id.*

[323] *Id.* at 303–304.

> There are a large number of nonprofit organizations in the United States. Many of them operate big enterprises. Moreover, there are already in existence at least 15 municipally-owned CATV systems and there is an increasing drive across the country for municipal ownership of cable systems. . . . *The copyright owners are concerned that increasing governmental or non-profit ownership of cable systems may deprive them of license fees for the use of their product*.
>
> A free ride for these entities cannot be squared with the achievement of the public purpose which underlies the copyright system. . . . A legal requirement that copyrighted film programs be available to nonprofit and governmental users for free is no less repugnant to the purpose of the copyright system because the user does not intend to make a profit.
>
> *No matter how well governmentally sponsored and nonprofit enterprises function, no one would suggest that the law require that their suppliers of equipment, products, and services furnish them free of charge*.[324]

Valenti's thoughts were echoed by the Committee of Copyright Owners ("CCO"), an ad hoc committee formed by producers and distributors of filmed and taped programs.[325] The CCO additionally stressed to the subcommittee that any

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[324] *Id.* (emphasis added).

[325] The CCO offered their own version of the nonprofit retransmission exception found below. It is practically identical to what was eventually adopted by Congress in 1976.

> §111. Limitation, on exclusive rights: Secondary transmissions
>
> (a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED. – The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:
>
> (4) the secondary transmissions is not made by a cable system and is made by a governmental body, or other non-profit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

Id.

cable system which operates within a served community should be obligated to pay copyright fees.[326] The NAB agreed with these sentiments by stressing to the subcommittee that the broadcasters' primary qualms with cable television were twofold: (1) "CATV systems continue to take from broadcast stations without payment and sell to the public for a fee;" and (2) CATV was "in direct,

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[326] This is also found in their proposed statutory language:

> §111. Limitation, on exclusive rights: Secondary transmissions
>
> (c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS –
>
> (1) Subject to the provisions of clause (2) of this subsection (c), secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the [FCC] and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) in the following case:
>
> (B) Where the community of the cable system is in whole or in part within the local service area of the primary transmitter;
>
> (2) notwithstanding the provisions of clause (1) of this subsection (c), the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the [FCC] and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by section 502 trough 506, in the following cases:
>
> (B) Where the community of the cable system is in whole or in part within the local service area of one or more television broadcasting stations licensed by the [FCC] and –
>
> (i) the content of the particular transmission program consists primarily of an organized professional team sporting event occurring simultaneously with the initial fixation and primary transmission of the program; and
>
> (ii) the secondary transmission is made for reception wholly or partly outside the local service area of the primary transmitter; and
>
> (iii) the secondary transmission is made for reception wholly or partly within the local service area of one or more television broadcasting stations licensed by the [FCC], none of which has received authorization to transmit said program within such area.

Id.

competition . . . for viewers, listeners, and advertising revenue. . . . Indeed, leading CATV spokesmen state repeatedly that they hope and intend that cable television will largely, if not entirely, replace free broadcast television."[327] Finally (and most surprisingly), David Foster, President of the National Cable Television Association ("NCTA"), acknowledged that nonprofit cable operations should be obligated to pay compulsory fees—even when they operate in large, well-served urban markets, to help inhabitants reach obstructed broadcast signals.[328]

For our purposes, there is one exchange on August 1, 1973 that is worth deeply analyzing. Of all parties, the NCTA initially proposed to the subcommittee that the nonprofit retransmission exception should be eliminated altogether.[329] Specifically, David H. Foster testified:

> By the same token, Section 111(a)(4) exempts non-profit and government owned CATV systems from the requirement to pay fees. Here again, it would seem more prudent public policy, in light of our national policy encouraging private enterprise, to leave these two

[327] *Id.* at 377 (statement of Vincent T. Wasilewski, President, National Association of broadcasters).

[328] *Id.* at 398–399, 424. (statement of David H. Foster, President, National Cable Television Association) ("Mr. Chairman, we have supported the concept of cable television's paving [*sic*] copyright fees since 1968. . . . Continually since the consent agreement . . . [the parties] met in extensive negotiating sessions to determine whether or not there could be a meeting of the minds between the parties on what night [*sic*] be a reasonable copyright fee. . . . We found the parties positions were far apart . . . Primarily because cable television is still in its infancy. It is a very small industry. It is primarily operating in rural areas, in small towns, *and the major big-city markets* . . . The motion picture people have told us time and time again that they are not looking at the small systems for the revenues. They are looking for the large, big city systems that are yet to be built. . . . By the same token, Section 111(a)(4) exempts non-profit and government owned CATV systems from the requirement to pay fees. Here again, it would seem more prudent public policy, in light of our national policy encouraging private enterprise, to leave these two reception and distribution facilities on an even competitive basis by striking Section 111(a)(4).").

[329] *Id.* at 424. (statement of David H. Foster, President, National Cable Television Association) ("By the same token, Section 111(a)(4) exempts non-profit and government owned CATV systems from the requirement to pay fees. Here again, it would seem more prudent public policy, in light of our national policy encouraging private enterprise, to leave these two reception and distribution facilities on an even competitive basis by striking Section 111(a)(4).").

> reception and distribution facilities on an even competitive basis by striking Section 111(a)(4).[330]

In other words, the CATV operators suggested that *all* retransmission devices—including boosters and translators—should be subject to copyright liability. Regardless of whether they operated as a nonprofit. A shocking stance. As the legislative record demonstrates up to this point, all parties were practically unanimous for nearly a decade that boosters and translators deserved immunity if they operated without profit. Frustratingly, however, NCTA failed to rationalize their stance any further.

Even more surprising, Jack Valenti rebuffed the NCTA's offer in a filed statement to the subcommittee:

> NCTA also suggests that . . . Section 111(a)(4) should be eliminated . . . . We agree that the exemption for governmental and nonprofit systems is overly broad, but we do not agree that the provision should be deleted.
>
> In our initial statement filed with the Committee on August 1, 1973, we pointed out that this provision is concerned with the operation of nonprofit "translators" or "boosters" which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception. These translators and boosters have always been subject to FCC regulation and require retransmission consent of the originating station under Section 325(a) of the Communications Act.
>
> However, the language of the exemption contained in Section 111 (a)(4) would be equally applicable to cable systems which are operated by governmental bodies or nonprofit organizations. *Thus, in order to limit the exemption to nonprofit translators and boosters and similar secondary transmitters, we proposed to insert into the text of Section 111(a)(4) the words "... is not made by a cable system ...". Since we continue to believe that the exemption should be maintained for the benefit of the translator and booster systems described*, we submit that complete elimination of this exemption would be improper

[330] *Id.*

> and that the appropriate solution is adoption of the amendment we have submitted . . . .[331]

This exchange is susceptible to multiple readings. On the one hand, Valenti and the rest of the copyright owners were given a perfect opportunity to subject all nonprofit retransmission operations to liability. They instead rejected the offer and settled only for removing nonprofit CATV. On top of that, Valenti explicitly stated that "similar secondary transmitters" should additionally be granted immunity under the Act. Using this background as a lens to interpret the modern language of section 111(a)(5), one could certainly conclude from this exchange that these authors intended for *all* retransmission operations *except* for CATV to be protected. If this is so, then Locast is perfectly legal against this legislative history.

However, the author believes that the record more convincingly demonstrates that the aforementioend reading is incorrect. First, the only retransmission devices that Valenti mentions are then-existing boosters and translators. Although "similar secondary transmitters" is undoubtedly a catch-all phrase, there is no indication that Valenti was thinking of yet-to-be invented retransmission devices. Second, Valenti was not the only representative of the copyright owners and broadcasters present at these hearings. Notably, the CCO and NAB explicitly opposed CATV because of its ability to impinge upon the market exclusivity of the local stations. And it's difficult to imagine that these parties would have supported a yet-to-be invented nonprofit retransmission device that practically does the same thing as nonprofit CATV for the mere fact that it is not literally CATV. Regardless, as demonstrated below, Congress accepted the stance of Valenti, CCO, and NAB when authoring the modern nonprofit retransmission exception:

> § 111. Limitations on exclusive rights: Secondary transmissions.
>
> (a) CERTAIN SECONDARY TRANSMISSION EXEMPTED. –
>
> (4) the secondary transmission *is not made by a cable system but* is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without any charge to the recipients of the secondary transmission

[331] *Id.* at 611 (statement of Jack Valenti, President, Motion Picture Association of America, Inc.).

> other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.[332]

No further debate on the retransmission exception occurred. To the extent that the provision was mentioned in the legislative record, it is briefly mentioned in the House Report and Conference Committee Report on the bill.[333] Notably, their language fails to mention yet-to-be invented retransmission devices. Only "boosters" and "translators":

> Clause (4) would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of non-profit 'translators' or 'boosters,' which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no charge to the recipients 'other than assessment necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.' This exemption does not apply to a [CATV].[334]

IV
ANALYSIS

Goodfriend's claim that "[e]very American has the right to access broadcast for free"[335] is hyperbolic. Although access has long been a national priority,[336] Congress has consistently balanced this pursuit against the business needs of copyright owners, networks, and local stations.[337] No better example of this is found than in the legislative history of section 111(a)(5). At the time, CATV provided the best opportunity for achieving limitless television access. Nevertheless, Congress refused to grant it immunity—regardless of whether it operated as a nonprofit. Why? Because the section's authors felt it was unfair that CATV continued to split viewership by impeding upon the market exclusivity of local stations without paying

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[332] S. 1361, 93d Cong., §111 (a)(4), *reprinted in 1973 Senate Hearings*, *supra* note 41, at 15 (now enacted as 17 U.S.C. § 111(a)(5)).

[333] H.R. REP. NO. 94-1476, at 88 (1976); H.R. REP. NO. 94-1733 (1976).

[334] H.R. REP. NO. 94-1476, at 92.

[335] *See* Answer to Amended Complaint, *supra* note 14, at 2; *see also* 17 U.S.C. § 111(a)(5) (2012).

[336] As shown by the opening text of the Communications Act of 1934, 47 U.S.C. § 151.

[337] The FCC has consistently held that local station stability was key to achieving national access to television. *See* Stern, *supra* note 216, at 188 n.57 (1981).

for copyright fees.[338] In other words, CATV's lack of "passivity" made it unworthy of immunization under section 111(a)(5).[339] And this understanding is encapsulated in the House Report discussing its language:

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[338] *See, e.g.*, *1965 House Hearings*, *supra* note 24, at 1226 (statement of Ernest W. Jennes, General Counsel, Maximum Service Telecaster, Inc.) ("Because the same television programs are broadcast in many different markets, the importation by CATV into such well-served cities of the signals from stations in other markets means that the exclusivity of the local stations to many—if not most—of its programs, will be destroyed. To the extent that a program is viewed on imported channel, the benefit of exclusivity, for which the local station has bargained, is destroyed—to the damage of the local station, the copyright owner and, ultimately, the public."); *Id.* at 1335 (statement of Arthur B. Krim, President, United Artists Group) ("The usual [network] license contract in syndication does not grant the right to authorize the telecast of our programs over additional stations and prevent the licensee station or sponsor from authorizing a community antenna to perform the program. *These restrictions are in keeping with the underlying principle of geographical limitation that is central to all television release*. . . . [I]t can readily be seen [then] that when a CATV system brings programs from a distant city, it plays havoc with every existing licensing system and either seriously downgrades or utterly destroys the property of the copyright owner." (emphasis added)); *1973 Senate Hearings*, *supra* note 41, at 303 (statement of Jack Valenti, President, Motion Picture Association of America, Inc.) ("Section 111 would exempt completely from any copyright law provisions secondary transmissions when made at cost by either governmental bodies or nonprofit organizations. . . . [T]his provision was concerned with the operations of "nonprofit 'translators' or 'boosters' *which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception*. . . ." These translators and boosters have always been subject to FCC regulation and require retransmission consent of the originating station under § 325(a) of the Federal Communications Act. However, the language of the exemption as formulated in § 111 would be equally applicable to cable systems which are operated by governmental bodies or nonprofit organizations. . . . There are a large number of nonprofit organizations in the United States. Many of them operate big enterprises. Moreover, there are already in existence at least 15 municipally-owned CATV systems and there is an increasing drive across the country for municipal ownership of cable systems. . . . The copyright owners are concerned that increasing governmental or non-profit ownership of cable systems may deprive them of license fees for the use of their product. *A free ride for these entities cannot be squared with the achievement of the public purpose which underlies the copyright system*. That purpose is to promote the useful arts by granting compensation adequate to foster creativity. A legal requirement that copyrighted film programs be available to nonprofit and governmental users for free is no less repugnant to the purpose of the copyright system because the user does not intend to make a profit.").

[339] *See* 112 CONG. REC. 24066 (1966) ("Except for . . . *passive* common carrier activities covered by subsection (a), a secondary transmitter is fully liable if he does any of the following: (1) alters program content; (2) originates programs (with some limited exceptions); (3) charges for particular transmissions; (4) picks up primary transmissions not intended for reception by the

> [The clause] would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit "translators" or "boosters," *which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception*, would be exempt if there is no "purpose of direct or indirect commercial advantage," and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service." *This exemption does not apply to a cable television system*.[340]

The plaintiffs accuse Locast of importing foreign signals into well-served markets and stripping the Nielsen watermark of the seized transmission.[341] At this time, it is undetermined whether either are true. Undoubtedly, if the former is valid, then Locast is impinging upon the market exclusivity of the local stations in an identical fashion that CATV did and thus, would be inconsistent with the purposes behind section 111(a)(5). As for the latter, Goodfriend seemingly concedes that Locast strips the watermark in his amended answer.[342] If so, then viewership would effectively be split between standard broadcast users and Locast users

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public at large; (5) operates outside the primary transmitter's normal area and has not recorded his identity in the Copyright office; (6) operates outside the primary transmitter's normal area and within an area adequately served by other primary transmitters; or (7) operates in any area normally encompassed by one or more transmitting facilities other than the primary transmitter, if he has received notice that one of them has already acquired the exclusive right to transmit the copyrighted work in that area." (emphasis added)); *1965 House Hearings*, *supra* note 24, at 36 (statement of George D. Cary, Deputy Register, United States Copyright Office) ("A community antenna system is *much more than a passive device or service*. It is an extremely complex transmission system which does essentially what a regular television broadcaster does; namely, it transmits programs to the public. . . . CATV systems effectively deprive the copyright owner of control over his work. In many cases, for example, motion pictures or syndicated series, where the broadcasting of a work is licensed for a particular limited territory and audience, a CATV transmission of a broadcast to subscribers in another area can mean the actual loss of the market for broadcasts in that other area. Multiplied many times throughout the country this loss can be very serious." (emphasis added)).

[340] H.R. REP. NO. 94-1476, at 92 (emphasis added).

[341] Amended Complaint, *supra* note 6, at ¶ 12.i-iii ("Locast departs from the activities of a mere booster of broadcast signals in a variety of ways. Among other things, Locast . . . strips from the over-the-air broadcast signals the Nielsen watermarks that measure viewing for local and national advertisers, thereby endangering broadcasters' advertising revenue.").

[342] In response to this accusation, Goodfriend claims that he "den[ies] that [Locast] *purposefully* strips . . . the Nielsen watermarks." Answer to Amended Complaint, *supra* note 14, at ¶ 12.iii (S.D.N.Y. Nov. 13, 2020) (emphasis added).

An anonymous white paper—posted on Locast's website—disagrees with this conclusion.[343] This paper instead argues that the authors of section 111(a)(5) intended to distinguish their grant of immunity solely based on whether the retransmission device was nonprofit or for-profit:

> Congress balanced competing concerns. It recognized the public interest in expanding access to free broadcast television. At the same time, it believed that *for-profit* retransmission services should, in fairness, share their profits with the programs' creators. *Non-profit* retransmission services, by contrast, generate no such profits to share, so Congress exempted them from copyright liability altogether. The distinction the statute draws thus is not between Internet-based systems and over-the-air boosters and translators. It is between for-profit and non-profit systems. Locast falls squarely on the non-profit side of that line.[344]

This cannot be correct. Because if this were true, then nonprofit CATV would have remained immune under section 111(a)(5). The legislative record instead demonstrates that the authors of the section intended to distinguish between "passive" and disruptive nonprofit retransmission devices. Devices that acted as mere signal boosters for local stations were granted immunity. Devices used to impinge upon their market exclusivity and split viewership were contrarily denied. Thus, if plaintiffs' accusations are found true, then calling Locast a "digital translator" is a misnomer at best and disingenuous at worst.[345] Locast would not be acting as a signal strengthener. Instead, it would be directly competing against local stations in well-served, urban markets.[346] In fact, Locast's urban-focused growth and alleged competitive tendencies are eerily similar to what was witnessed with

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[343] *See* LOCAST: NON-PROFIT RETRANSMISSION OF BROADCAST TELEVISION (2018), https://www.locast.org/news/press-releases/locast-white-paper/.

[344] *See id.* at ii.

[345] Authors of the Locast white paper repeatedly refer to the service as a "digital translator." *Id. passim*.

[346] As of this writing, Goodfriend has strategically placed antennas in 31 well-populated cities, seven of which are amongst the most populated ten cities in the United States. *Select your city*, LOCAST, https://www.locast.org/cities/501 (last visited Mar. 20, 2021); *The 200 Largest Cities in the United States by Population 2021*, World Population Review, https://worldpopulationreview.com/us-cities (last visited Mar. 20, 2021).

"unlimited" CATV—which caused the copyright owners, networks, and local stations to lobby Congress for changes to the Act in the first place.[347]

Goodfriend argues that Locast's placement in well-served cities nonetheless results in protection under the section because it helps urban users—whose signals are obstructed by "tall buildings or other obstructions"—gain access to broadcasting.[348] But, as previously discussed, nonprofit CATV did this too. Cable uniquely helped urban television viewers because it got around the problem of over-the-air signal obstruction through the use of cable infrastructure. Locast does the same thing, except via digital stream.[349] The former was denied immunity. Why should the latter be treated differently?

Finally, if these allegations are true, then Locast would not only be impinging upon the local station's market exclusivity, but it would also be impinging upon the very purpose for why we have copyright:

> Under its dominant justification, copyright "contributes to the 'progress of Science' by maintaining adequate incentives to engage in the production of new artistic and literary works. Creating anew is often expensive and copying, cheap. Without copyright . . . copyists who don't face the same costs of creation that originators do will underprice originators and compete away the profits from new artistic and literary

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[347] *See, e.g.*, *1965 House Hearings*, *supra* note 24, at 1226 (statement of Arthur B. Krim, President, United Artists Corp.) ("In short, 'CATV unlimited' is a new type of CATV with capabilities and operations only faintly resembling historic CATV. As CATV's purpose and operations expand beyond providing an *auxiliary* service, CATV becomes a threat to the public interest in free, diverse, and competitive, local and area television broadcast services. In essence, this threat derives from CATV's ability to import multiple television signals from many distant stations into cities where local and area television stations are already reaching the viewing public. Because the same television programs are broadcast in many different markets, the importation by CATV into such well-served "cities of the signals from stations in other markets means that the exclusivity of the local station as to many—if not most—of its programs will be destroyed.").

[348] *See* Answer to Amended Complaint, *supra* note 14, at ¶¶ 4, 12.ii, 44, 46, 48 (S.D.N.Y. Nov. 13, 2020).

[349] *See id*. at ¶¶ 12.i ("Defendants admit that in any given local DMA that Locast serves, [it] functions by capturing the over-the-air signals, transcoding the signals into digital formats viewable on internet-connected devices, and then streaming the signals over the internet to registered users at the users' requests on internet-connected devices located within the local market.").

> creativity, thereby suppressing incentives to create new artistic and literary works in the first place.[350]

CONCLUSION

After analyzing whether the nature of Locast is consistent with the text and legislative history of section 111(a)(5), the author arrives at conflicting conclusions. Although Locast appears to fall within its text (absent further factual discovery), examination of section 111(a)(5)'s legislative history may lead to the opposite conclusion. The authors of section 111(a)(5)—the major copyright owners, networks, and their affiliated local stations—sought to strike a balance between national television access and the viability of standard broadcasting. In doing so, section 111(a)(5) was authored to distinguish between "passive" and disruptive nonprofit retransmission services. Passive nonprofit retransmission devices were seen as signal strengtheners—e.g., the boosters and translators that existed during the time of the Act's adoption. Disruptive nonprofit retransmission devices were contrarily used to impinge upon the market exclusivity of local stations by splitting viewership—e.g., CATV. If Locast imports foreign signals into well-served markets or strips Nielsen watermarks during signal retransmission, then Locast's nonprofit nature is meaningless under the Act because Locast would effectively be appropriating content paid for by the local stations, competing against them over the same audiences, and endangering their advertising revenue by splitting viewership in the same way that CATV did. Thus, if true, Locast would be a disruptive retransmission device inconsistent with the purposes behind section 111(a)(5).

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[350] JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 10 (2d ed. 2020).