Crossed Signals: Copyright Liability for Resale Carriers of Television Broadcasts

I. Introduction

Although the legal battles triggered by cable television systems' reception and retransmission of broadcast television programs have been fought on the grounds of copyright law for over a decade,[1] until very recently, the combatants have been limited to the copyright owners of television programs and the broadcasters on one side and the cable systems on the other side. However, two recent copyright cases, *WGN Continental Broadcasting Co. v. United Video, Inc.*[2] and *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*[3] (*EMI*), have drawn a new party, allied with the cable systems, into the fray.

This new party is the resale carrier of broadcast television signals, which receives the broadcaster's signal and retransmits it to the cable systems,[4] which in turn retransmit the signal to their subscribing customers who pay for the cable service. In the *WGN* and *EMI* cases, the resale carriers sought absolute exemption from copyright infringement liability for their use of the copyrighted programs that were contained in the broadcaster's signal, even though the Copyright Act of 1976[5] imposes statutory liability on the cable systems for use of the same programs.[6] In *WGN*, the Seventh Circuit reversed the district

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[1]*See* Teleprompter Corp. v. Columbia Broadcasting Sys., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968).

[2]523 F. Supp. 403 (N.D. Ill. 1981) [hereinafter cited as *WGN I*], *rev'd*, 685 F.2d 218 (7th Cir. 1982) [hereinafter cited as *WGN II*].

[3]534 F. Supp. 533 (N.D.N.Y.), [hereinafter cited as *EMI I*], *rev'd*, 691 F.2d 125 (2d Cir. 1982) [hereinafter cited as *EMI II*], *cert. denied*, 51 U.S.L.W. 3601 (1983) (No. 82-957).

[4]This retransmission is accomplished either by microwave relay or via satellite. For a more detailed description of these methods, see *EMI II*, 691 F.2d at 128. Retransmission by satellite is becoming the dominant method, because it allows the resale carriers to deliver their product farther and more economically. *See* Southern Satellite Sys., Inc., 62 F.C.C.2d 153, 159 (1976). As of September, 1981, there were nine domestic satellites in orbit, each satellite having approximately 24 transponders or channels through which the retransmission is made, and all of the transponders were occupied. In addition, even though the Federal Communications Commission (FCC) estimates that satellite capacity will triple by 1984, one industry source stated that "about 95% of all the capacity the FCC approved for launch through 1985 has already been spoken for." Bus. Wk., Sept. 14, 1981, at 89-90.

[5]17 U.S.C. §§ 101-810 (Supp. V 1981).

[6]*Id.* § 111(c). A related subsection of The Copyright Act sets forth the compulsory license fee schedule, which determines the amount of copyright royalties paid by the cable systems. *Id.* § 111(d). For a detailed description of the compulsory license system, see Note, *Cable Television's Compulsory License: An Idea Whose Time Has Passed?*, 25 N.Y.L. Sch. L. Rev. 925, 941-43 (1980). For a less detailed discussion of the compulsory license system, see *infra* notes 55-65 and accompanying text.

court[7] and denied the resale carrier the exemption;[8] but, the Second Circuit in its *EMI* decision, also reversing the lower court,[9] granted full exemption to the resale carrier.[10]

This Note will begin its examination of the issues that determine the resale carriers' copyright infringement liability by tracing the policies and regulations of both Congress and the Federal Communications Commission (FCC) that affect the resale carriers. The Note will then balance the underlying public interest considerations concerning the carriers' copyright infringement liability. Finally, the arguments, decisions, and implications of the *WGN* and *EMI* cases will be analyzed. Before these issues can be discussed profitably, however, the reader must have a basic understanding of the market forces that are at work in the television industry. It is the disturbance of these forces that causes the copyright owners and the broadcasters to contend that resale carriers should be liable for copyright infringement.

II. BACKGROUND

A. Distant Signal Importation

Cable television programming that is included in the basic subscription fee comes from two sources. First, cable systems are required by FCC regulations to carry the signals of local broadcast stations.[11] Local stations are those stations that are located in the same geographic region, or market, in which a cable system operates. Secondly, the cable systems are permitted to import signals sent by a resale carrier from distant, or nonlocal, markets.[12]

The resale carrier exports a distant broadcast signal to the importing cable system either by microwave relay or by satellite retransmission.[13] Any cable system that imports one or more distant signals must pay two fees: a copyright fee under the Copyright Act's compulsory license system[14] and a fee to the resale carrier that ex-

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[7]*WGN I*, 523 F. Supp. at 415.

[8]*WGN II*, 685 F.2d at 224.

[9]*EMI I*, 534 F. Supp. at 538-39.

[10]*EMI II*, 691 F.2d at 133-34.

[11]47 C.F.R. §§ 76.57(a), 76.59(a), 76.61(a) (1981). Collectively, these regulations are known as the must-carry rule.

[12]A cable system is presently permitted to import an unlimited number of distant signals. *Id.* §§ 76.57(b), 76.59(b), 76.61(b). Prior to October 14, 1980, the "distant signal rule" placed a limit on the number of signals that could be imported. *Id.* §§ 76.59(b)-(e), 76.61(b)-(f), 76.63 (1979). However, this limitation was eliminated in 1980. 45 Fed. Reg. 60,299 (1980). *See infra* notes 66-73 and accompanying text.

[13]*See EMI II*, 691 F.2d at 128.

[14]17 U.S.C. § 111(c)-(d) (Supp. V 1981). *See* Note, *supra* note 6. *See infra* notes 54-65 and accompanying text.

ports the distant signal.[15] The cable system's revenue is derived from subscription fees paid by those who receive the cable service.

The resale carriers' cost of doing business does not include copyright fees at present but does include expenses for building and maintaining microwave relays and the cost of acquiring the use of a satellite transponder, which is leased from the satellite owner.[16] The cable systems that receive the resale carriers' retransmission of the broadcast signal typically pay the carrier ten cents per subscriber per month for the retransmission service.[17]

B. The Marketing of Broadcast Television Programming

To understand the copyright owners' and the broadcasters' allegations of the damage that is caused by the resale carriers' retransmission of broadcast signals, the manner in which broadcast television programs are marketed must be understood. Because the typical resale carrier of television signals retransmits the signal of an independent broadcast station,[18] that is, a station not affiliated with a network, the present discussion will be limited to the marketing of television programs to independent stations.

Independent broadcasters usually buy programs directly from program producers who have chosen not to market their work through the networks or from a syndicator who is authorized by the copyright owner to negotiate the sale of the rights to broadcast a program. The broadcaster purchases the exclusive right to show the program in its market for a limited period of time.[19] The copyright owners generally

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[15]*See infra* note 17 and accompanying text.

[16]Transponders are usually leased on an accelerating rate schedule. For example, Southern Satellite Systems' agreement in 1976 with RCA Americom for the lease of one transponder provided for payments of $648,000 for the first year, $828,000 for the second year, and, if Southern exercised its option to renew, $1,000,008 per year thereafter. Southern Satellite Sys. Inc., 62 F.C.C.2d 153, 154 (1976).

[17]Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 COMM/ENT L.J. 477, 481 (1980). (For the convenience of the reader, the full title of this relatively new periodical is: COMM/ENT A JOURNAL OF COMMUNICATIONS AND ENTERTAINMENT LAW).

[18] The cable systems want to provide their viewers with programs that the viewers cannot receive over-the-air from local broadcasters. The programs that are provided by the networks to their nationwide affiliates are the same in every market. Therefore, assuming that all three networks operate in the cable system's market, the importation of a distant network affiliate's signal would, for the most part, merely duplicate the programming available to viewers over-the-air from the network affiliate in that market. The resale carriers, thus, find a greater demand among the cable systems for an independent station's non-network programming, which avoids such duplication and allows the cable systems to offer their existing and potential customers more diverse programming than is available from local broadcasters.

[19]Note, *supra* note 6, at 936.

operate on a marketing plan in which they sell their programs in different markets at different times, usually starting in the largest markets and working down to the smaller ones.[20] The fee charged by the copyright owner for the right to show a program varies with the size of the broadcaster's potential audience.[21] In the case of the broadcaster whose signal is not retransmitted by a resale carrier to distant cable systems, the size of the potential audience is determined solely by the size of the broadcaster's market.

Once the independent station has purchased the right to broadcast a program, the station seeks to profit by selling time to those willing to pay to advertise during a given program. The larger the audience for a program, the more valuable the air time is to the advertiser.[22] Thus, the value of a program to the broadcaster also depends upon the size of the audience that the program attracts, which in turn depends on several other factors. The first factor is the quality of the program: in essence, its popularity with the viewing public. Another factor is the promotional efforts that are put into attracting an audience by the broadcaster. A third factor is the time at which the program is broadcast. Finally, the exclusivity of the program in a given market is an important factor.[23] If the viewers can only watch a certain program on one channel at one time each day or each week, the audience for that program will be larger than if the show is available at another time or on another channel.

The exclusivity factor is the factor most important to the present discussion, because the copyright owners and the broadcasters allege that the activities of the resale carriers place this factor beyond their control. They claim that when a resale carrier exports a broadcast signal to a distant cable system without their consent, thereby increasing the size of the audience, the copyrighted programs that are contained in that signal become less exclùsive and, therefore, less valuable.[24]

C. Problems Created by Distant Signal Importation

The copyright owners who market their television programs in different markets at different times claim that their marketing plan is ruined when the signal that carries a television program, which is sold to a broadcaster in one market is then retransmitted by a resale carrier to a cable system in a distant market.[25] The copyright

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[20]*Id.* at 928.

[21]*See* Brotman, *supra* note 17, at 481-82.

[22]*See* Student Symposium, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, 69 CALIF. L. REV. 527, 528-29 (1981).

[23]Note, *supra* note 6, at 936.

[24]*See id.*

[25]*See* Note, *supra* note 6, at 928.

owners claim that when they attempt to sell their programs in the distant market, the shows have already penetrated the cable portion of the audience.[26] The broadcaster will not be willing to pay the copyright owner as much for distribution rights to the program because the program is less exclusive and, therefore, less valuable to the broadcaster in the second market.[27]

The broadcaster whose signal is imported by the distant cable system claims that exportation of his signal by the resale carrier results in higher charges demanded by the copyright owner for rights to show a program, because the copyright owner bases his fee to the broadcaster on the potential size of the broadcaster's audience.[28] If the broadcaster's signal is retransmitted nationwide by a resale carrier to cable systems, the copyright owner charges the broadcaster a fee based on a nationwide audience. The copyright owner assumes that the larger audience means larger advertising revenue for the broadcaster, and so charges more for rights to show the program.[29]

The broadcasters allege that this fee basis is unfair for two reasons. First, although the audience for the retransmitted broadcast signal may be larger, even nationwide, the advertisers in the broadcaster's local market may not value the nationwide audience as potential customers and, thus, may not be willing to pay the higher prices that are charged for advertising time.[30] Secondly, because of the FCC's open entry policy[31] and the Copyright Act's passive carrier exemption,[32] the broadcaster is helpless to prevent the retransmission of his signal and, therefore, is unable to control the cost of acquiring the rights to a program.[33]

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[26]*Id.*

[27]*Id.* at 928-29.

[28]*See* Brotman, *supra* note 17, at 481-82.

[29]*See id.* The higher charge may help compensate the copyright owner for the decreased revenues he might expect to receive when he attempts to sell his program to a broadcaster in the market where the importing cable system is located. *See supra* note 27 and accompanying text.

[30]*See* Student Symposium, *supra* note 22, at 530. At least one broadcaster has attempted to take advantage of the exportation of his signal to widely distributed cable systems. Ted Turner, the unabashedly ambitious founder of the original "superstation," WTBS (formerly WTCG) in Atlanta, has sought national advertisers for his station. His station's signal is delivered by resale carrier Southern Satellite Systems to 20.4 million of the 31 million American homes having cable television. In those 20.4 million homes, WTBS is estimated to command about a tenth of the audience throughout the day. TIME, Aug. 9, 1982, at 51. Turner hopes to attract national advertisers by charging them for advertising time at a rate that is lower than the networks charge (30% lower in 1980) yet higher than local rates, thereby increasing his revenues. Wall St. J., Jan. 9, 1979, at 1, col. 1.

[31]*See infra* notes 37-48 and accompanying text.

[32]*See infra* notes 49-53, 133-54 and accompanying text.

[33]KTTV (TV) in Los Angeles, dissatisfied with this situation, petitioned the FCC

The broadcasters that are in the same market as an importing cable system claim that they also are damaged by distant signal importation. The broadcaster has purchased from the copyright owner the exclusive rights to a given program, which may be violated if the importing cable system receives a signal that carries the same program.[34] The exclusivity that the broadcaster bargained for is destroyed, and the value of the program is reduced because the audience is fragmented into one segment watching the show on the local broadcast station[35] and another segment watching it on the signal imported by the cable system.

The copyright owners' and the broadcasters' dissatisfaction centers on their belief that the retransmission and the importation of broadcast television signals disturb the exclusivity of their programs, thereby damaging the programs' value. They point to the resale carriers as the culprits in upsetting the market forces on which their marketing schemes rely. The resale carriers have relatively unrestricted use of the broadcast signals, which contain copyrighted programs, yet, although the resale carriers profit from that use, they pay neither copyright royalties to the copyright owners nor retransmission consent fees to the broadcasters. However, the play of the market forces in this field has not occurred in a regulatory vacuum. An analysis of the federal regulations and policies that affect the resale carriers reveals that the lack of restrictions on the resale carriers' use of the broadcast signals is no accident.

III. Federal Regulations and Policies Affecting Resale Carriers

Although federal regulation of the cable industry as a whole has only recently begun to encourage the industry's growth,[36] the regula-

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to review its decision granting resale carrier ASN, Inc., authority to retransmit the KTTV signal. The broadcaster claimed that ASN was "appropriating and selling, without consent and for profit," programming purchased by KTTV for broadcast to the Los Angeles television market. Brotman, *supra* note 17, at 482. The question was mooted, however, when the resale carrier's business failed before it retransmitted the broadcaster's signal.

[34]The exclusivity purchased by the broadcaster was protected until 1980 under 47 C.F.R. § 76.151-.161 (1980), which required a cable system to delete programming at the request of a broadcaster in the same market who owned exclusive rights to the program. This "syndicated program exclusivity rule" was removed from FCC regulations, effective October 14, 1980. 45 Fed. Reg. 60,299 (1980). A revision of the copyright law introduced to Congress in 1982 would have established statutorily a limited form of this rule. H.R. 5949, 97th Cong., 2d Sess. § 101(d) (1982). However, the bill died in the Senate at the expiration of the 97th Congress. *See infra* note 175.

[35]*See supra* note 11 and accompanying text.

[36]Federal regulation of the cable industry as a whole has developed in five stages. *See* Malrite T.V. v. FCC, 652 F.2d 1140, 1143-47 (2d Cir. 1981).

tions and policies that affect the resale carriers of broadcast television signals have consistently encouraged the freedom of that segment of the cable industry.

A. Regulations Directly Affecting the Resale Carriers

1. The FCC's Open Entry Policy.—The FCC first announced its open entry policy for resale carriers of communications services in its decision in *Resale and Shared Use of Common Carrier Services and Facilities.*[37] Having determined that a policy of open entry into the resale carrier market would be in the public interest,[38] which is re-

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Stage 1: Prior to 1966 the FCC denied that it had jurisdiction to regulate the cable industry directly. *See* Frontier Broadcasting Co., 24 F.C.C. 251 (1958).

Stage 2: In 1966 the FCC began to regulate cable television directly as cable operations expanded from simple signal enhancement in areas where reception was poor to importation of distant signals. *See* Community Antenna Television Sys., 2 F.C.C.2d 725 (1966). The Supreme Court upheld the FCC's power to regulate the cable industry, so long as the particular regulations were "reasonably ancillary" to the performance of the FCC's statutory duties. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). From 1966 to 1972, FCC regulations protected existing broadcasters at the expense of the cable industry. For example, the cable systems were required to purchase the consent of broadcasters whose signals the cable systems wanted to retransmit to their subscribing customers. The result of this "retransmission consent" experiment was a freeze of the cable industry, as broadcasters denied virtually all cable systems' requests for retransmission rights. *Malrite*, 652 F.2d at 1148 n.9.

Stage 3: In 1972 a consensus agreement, negotiated by the White House among the affected television industry interests—program producers, broadcasters, and cable systems—eased the restrictions placed on the cable industry, permitting its limited expansion. *See* Cable Television Report and Order, 36 F.C.C.2d 143 (1972).

Stage 4: In Teleprompter Corp. v. Columbia Broadcasting Sys., 415 U.S. 394 (1974), the Supreme Court rejected the argument that cable systems should be held liable for copyright infringement when retransmitting broadcasters' signals that contained copyrighted programs, but the Court also called for congressional action on the matter. *Id.* at 414. Congress responded to the promptings of the Court by enacting the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1976). Subsections 111(c)-(d) of the Act established the compulsory license system, which imposed copyright infringement liability on the cable systems but allowed for their expansion by licensing their access to distant signals. *Id.* § 111(c)-(d) (Supp. V 1981). *See infra* notes 55-65 and accompanying text.

Stage 5: In 1980 the FCC began to deregulate the cable industry by repealing the distant signal and syndicated program exclusivity rules. Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom.* Malrite T.V. v. FCC, 652 F.2d 1140 (2d Cir.), *cert. denied*, 102 S. Ct. 1002 (1981). This signaled the end of the FCC's restrictive regulation of the cable industry.

[37]60 F.C.C.2d 261 (1976), *aff'd sub nom.* American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

[38]The FCC "warranted" its belief that open entry to the communications common carrier market would have beneficial effects, "based on our cumulative knowledge of the industry," in 1971. Specialized Common Carrier Services, 29 F.C.C.2d 870, 910 (1971). Five years later, the FCC extended its expectation of beneficial effects from open

quired by section 214 of the Communications Act as interpreted by the Supreme Court,[39] the FCC established minimum requirements for certification of applicants for status as common carriers offering resale services. Applicants are required only to demonstrate "that they are technically, legally and financially qualified to provide the service which they propose."[40]

The FCC anticipated that the competition fostered by open entry into the resale market would have many beneficial effects, such as a "more efficient utilization of existing communication capacity; better management of communications networks; improved marketing of communications services and facilities; a wider variety of communications offerings; and increased research, development and implementation of communications technology."[41]

The *Resale and Shared Use* decision defined the term "resale" as "the subscription to communications services and facilities by one entity and the reoffering of communications services and facilities to the public . . . for profit."[42] That decision expressly applies only to the traditional types of "sender" resale services, such as those offered by American Telephone & Telegraph, Bell Systems, and Western Union. But, the FCC's decision in *Southern Satellite Systems, Inc.*[43]

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entry to the resale carrier market in its *Resale and Shared Use* decision, 60 F.C.C.2d at 310.

[39]47 U.S.C. §§ 101-744 (1976). Subsection 214(a) of the Act provides that any applicant for communications common carrier status must obtain certification from the FCC that "[t]he present or future public convenience and necessity require or will require" the new carrier service. *Id.* § 214(a). The Supreme Court has held that the public interest requirement is not met by the FCC's mere presumption that competition in and of itself will benefit the public:

> In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit.
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> . . . [B]ut the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. . . . Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one [the common carrier industry], is not enough.

FCC v. RCA Communications, 346 U.S. 86, 96-97 (1953).

[40]60 F.C.C.2d at 312.

[41]*Id.* at 302.

[42]*Id.* at 263.

[43]62 F.C.C.2d 153 (1976). The Southern Satellite's application proposing to "lease domestic satellite facilities for the multipoint distribution of television broadcast signals primarily to widely dispersed cable television systems," *id.* at 159, was considered a first by the FCC: "[T]his application appears to be an innovative combination of new technology and established practices." *Id.* It was anticipated that the proposed service would supply "the more efficient utilization of existing communications capacity," *id.; see supra* note 41 and accompanying text, and that it would "make available a service that cannot be efficiently or economically provided by terrestrial means [such

brought the resale carriers of broadcast television signals, who serve the receivers of communications,[44] within the resale definition and applied the policies that were stated in *Resale and Shared Use* to these carriers.[45] The definitive statement of the open entry policy for the resale carriers of broadcast television signals was subsequently made by the FCC in *United Video, Inc.*:[46]

> This Commission has determined that the public interest would be served by permitting the entry of resale entities into communications common carrier markets without requiring a showing of a special need for service or assessing the economic impact of entry on other carriers. We accordingly declared that we . . . will grant all applications which demonstrate that the reseller has the necessary legal, technical, and financial qualifications to perform the resale service.
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> This Commission subsequently determined that persons who lease satellite facilities for the purpose of providing common carrier communications services to cable systems are resellers and that the policies established in the *Resale and Shared Use* decision govern the processing of . . . applications to provide such services.[47]

By permitting resale applicants to enter the common carrier market based only upon a showing of "legal, technical, and financial qualification," the FCC has encouraged more applicants to enter the business of reselling communications services, and, thus, has encouraged the activities of the resale carriers of broadcast television signals.[48]

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as microwave relay] and would result in an increase in the diversity of cable television programming available to the public." 62 F.C.C.2d at 159-60. Consequently, Southern's application was approved as consistent with FCC policy and the public interest. *Id.* at 160.

[44]The distinction between resale carriers that serve senders and those that serve receivers of communications was repeatedly pointed out by the Second Circuit in *EMI II*. *See EMI II*, 691 F.2d at 128, 130, 131. Indeed, the failure of the district court to discern this distinction appears to have been one of the major faults in its decision, which required its reversal. *See infra* notes 134-54, 157 and accompanying text.

[45]62 F.C.C.2d at 159-60.

[46]69 F.C.C.2d 1629 (1978).

[47]*Id.* at 1635-36 (citations omitted).

[48]This is not to say that, once a qualified applicant is authorized by the FCC to engage in resale activities involving television signals, the applicant may operate absolutely free of all restrictions. For example, the FCC imposed the following restrictions upon the operations of resale carrier United Video, Inc.: (1) the carrier's authorization was limited to five years; (2) FCC authorization was required before the carrier could transmit to additional cable systems or could terminate service to previously authorized systems; (3) the carrier was prohibited from serving customers affiliated with or related to the carrier for a greater number of hours per month than it served

2. The Section 111(a)(3) Exemption.—The Copyright Act of 1976[49] also directly encourages the resale carriers' operations. Congress provided for an exemption from copyright liability when

> the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others . . . .[50]

The legislative history of the Copyright Act leaves some doubt whether this exemption was intended to apply to the traditional types of common carriers,[51] such as the owner of a satellite who leases a transponder for the use of a resale carrier of television signals.[52] The most recent and authoritative judicial interpretation of the exemption statute held that the exemption does indeed apply to the resale carriers of broadcast television signals.[53] Assuming that the interpretation that Congress did intend the exemption to apply is correct, the presence of the exemption in the Copyright Act demonstrates Congress' intent to permit the free and unrestricted retransmission of television signals by the resale carriers. A more direct encouragement of the carriers' activities is difficult to imagine.

B. Regulations Having an Indirect Effect on Resale Carriers

Any regulation that facilitates distant signal importation by the

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unrelated customers; (4) the carrier was prohibited from substantial involvement in the production, writing, selection or influencing of the content of any signals it transmitted; (5) the carrier was required to file a tariff with the FCC fully describing the services provided and the charges therefore; (6) the carrier was prohibited from rendering service to any cable system that was not authorized by the FCC to use the transmitted signal. United Video, Inc., 69 F.C.C.2d 1629, 1641-42 (1978).

[49]17 U.S.C. §§ 101-810 (Supp. V 1981).

[50]*Id.* § 111(a)(3).

[51]*See EMI I*, 534 F. Supp. 533, 538 n.14. *But see* H.R. REP. NO. 559, 97th Cong., 2d Sess. (1982) (report of the House Committee on the Judiciary of a bill that, inter alia, would have amended the present section 111(a)(3) to ensure that the exemption would apply to resale carriers of television signals). *See also* H.R. 5949, 97th Cong., 2d Sess. § 101(a) (1982). *See infra* notes 169-75 and accompanying text. The report on this bill states: "There has *never* been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities." H.R. REP. NO. 559, 97th Cong., 2d Sess. 5 (1982) (emphasis added). Admittedly, this post hoc assertion of the legislative intent does not make certain that Congress intended the original section 111(a)(3) to apply to resale carriers of broadcast television signals. *EMI II*, 691 F.2d 125, 129 n.11.

[52]*See EMI II*, 691 F.2d at 132 n.17.

[53]*Id.* at 133-34.

cable systems has the indirect effect of encouraging the activity of the resale carriers of television signals, because the resale carriers are the "conduit" through which distant signals are delivered to the cable systems.[54] The regulations discussed below have the direct effect of facilitating distant signal importation.

1. The Compulsory License System.—The most innovative feature of the Copyright Act of 1976[55] was the creation of the compulsory license system.[56] Clause 111(c)(1) of the Act provides that the license applies to "secondary transmissions 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 [copyrighted] work . . . ."[57] The remaining clauses of subsection 111(c) describe acts of infringement,[58] which are subject to the remedies described in the Act.[59]

Subsection 111(d) of the Act requires the cable system seeking a license for its retransmissions of a broadcaster's signal to fulfill certain requirements.[60] The most important clauses of this subsection require that the cable system deposit a royalty fee, which is based on the number and kind of distant signals imported by the cable system and on its gross receipts, with the Register of Copyrights.[61]

In its recent *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*[62] (*EMI II*) decision, the Second Circuit recognized the vital role that the resale carriers of television signals play in the compulsory license system by stating that "the compulsory licensing scheme . . . is predicated on and presupposes a continuing ability of CATV systems

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[54]*See EMI II*, 691 F.2d at 132.

[55]17 U.S.C. §§ 101-810 (Supp. V 1981).

[56]*Id.* § 111(c)-(d).

[57]*Id.* § 111(c)(1).

[58]*See* 17 U.S.C. § 501 (Supp. V 1981). The broadest and most important limitation on the license granted to the cable systems incorporates the FCC's rules and regulations affecting cable systems. *Id.* § 111(c)(2)(A). Also, a cable system must meet the requirements of subsection 111(d) to qualify for the license. *Id.* § 111(c)(2)(B). *See infra* notes 60-61 and accompanying text. Further, a cable system may not change, delete, or add to the content of any program, commercial advertisement, or station announcement that is contained in the broadcaster's primary transmission. 17 U.S.C. § 111(c)(3) (Supp. V 1981). Finally, infringements of broadcast signals that are authorized by the governments of Canada or Mexico are prohibited. *Id.* § 111(c)(4).

[59]*See* 17 U.S.C. §§ 502-506, 509-510.

[60]The cable system must provide the Copyright Office with information regarding the ownership of the system and with notice of the broadcast stations whose primary transmissions are to be carried regularly by the cable system. *Id.* § 111(d)(1). Also, the Register of Copyrights must be informed of certain matters, including the gross receipts received by the cable system from its subscription-paying customers. *Id.* § 111(d)(2)(A).

[61]*Id.* § 111(d)(2)(B)-(D). *See* Note, *supra* note 6, at 941-43.

[62]691 F.2d 125 (2d Cir. 1982).

to receive signals for distribution to their subscribers."[63] The court further stated that

> imposition of individual copyright owner negotiations on intermediate carriers would strangle CATV systems by choking off their life line to their supply of programs, would effectively restore the "freeze" on cable growth [which existed during the retransmission consent experiment between copyright owners and cable systems from 1968-1972[64]] . . . and, most importantly, would frustrate the congressional intent reflected in the Act by denying CATV systems the opportunity to participate in the compulsory licensing program. After years of consideration and debate, Congress could not have intended that its work be so easily undone by the interposition of copyright owners to block exercise of the licensing program by cable systems.[65]

2. The Repeal of the Distant Signal Rule.—Prior to 1980, FCC regulations limited the number of distant signals that a cable system could import.[66] The limitations varied according to the size of the market in which the importing cable system was located. For example, a cable system in one of the top fifty markets could make available to its subscribers a total of three independent and three network stations,[67] while a CATV system that was not located in one of the top one hundred markets was limited to offering three network stations and one independent station.[68] Of course, these totals included the local stations, which the cable systems were required to provide to their customers under the must-carry rule.[69]

In 1980 the FCC repealed the distant signal rule.[70] According to the Second Circuit, which reviewed and affirmed the FCC's action, the FCC "found that the impact on broadcasting stations from the deregulation of cable television would be negligible, and that consumers would be decidedly better off due to increased viewing options from the greater availability of expanded cable services."[71]

The effect of the repeal of the distant signal rule was to allow

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[63]*Id.* at 132.

[64]*See* Malrite T.V. v. FCC, 652 F.2d 1140, 1148 n.9 (2d Cir. 1981).

[65]*EMI II*, 691 F.2d at 132-33.

[66]*See supra* note 12.

[67]47 C.F.R. § 76.61(b) (1979).

[68]*Id.* § 76.59(b). CATV is an acronym for Community Antenna Television.

[69]*See supra* note 11 and accompanying text.

[70]Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom.* Malrite T.V. v. FCC, 652 F.2d 1140 (2d Cir.), *cert. denied*, 102 S. Ct. 1002 (1981).

[71]Malrite T.V. v. FCC, 652 F.2d 1140, 1146 (2d Cir. 1981).

cable systems to import an unlimited number of distant signals. As long as a cable system pays the increased royalty fee for additional imported signals, which is required by the Copyright Act,[72] the cable system may import any number of distant signals and yet retain its compulsory license.[73] To the extent that the repeal of the distant signal rule facilitates distant signal importation by the cable systems, the resale carriers are encouraged to deliver the signals to the cable systems.

The open entry policy, the section 111(a)(3) exemption, the compulsory license system, and the repeal of the distant signal rule all reflect the federal government's direct or indirect encouragement of the activities of the resale carriers of broadcast television signals. However, public interest considerations also enter the picture and provide arguments both for and against the unfettered retransmission of television signals by resale carriers.

IV. Public Interest Considerations

Underlying the controversy between the resale carriers and the copyright owners and broadcasters is the private economic interest of each group. However, the parties also can claim that their individual private interests should be protected because it is in the public interest to do so.

The copyright owners, as well as the broadcasters who purchase rights to distribute copyrighted works, point out that the Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[74] Thus, copyright legislation is explicitly authorized by the Constitution as a way to encourage "Progress of . . . useful Arts" by creating an economic incentive for artists in the form of an exclusive right to profit from their work. If it is conceded that television programs come within the category of "useful Arts," then the copyright owners of those programs and the broadcasters who purchase rights to show them can argue that permitting resale carriers to profit from the use of the copyright owners' property without giving compensation will damage the public interest, because the economic incentive to create will be impaired. The result will be fewer and lower quality television programs available to the public as well as the retardation of the progress of the television producers' art.

On the other hand, the resale carriers of television signals point out that Congress and the FCC, through their regulations and pol-

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[72]17 U.S.C. § 111(d)(2)(B)(iv) (Supp. V 1981).

[73]*Id.* § 111(c)(2)(A). *See supra* note 57.

[74]U.S. Const. art. I, § 8, cl. 8.

icies,[75] have sought to encourage diversity in television programming as a benefit to the public, and that the resale carriers are necessary to provide that diversity.

The value of program diversity has been recognized by the United States Supreme Court. The court stated in *United States v. Midwest Video Corp.*[76] that FCC regulations must " 'further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and *augmenting the public's choice of programs* and types of service.' "[77]

In addition, the Court of Appeals for the Second Circuit, in affirming the FCC's repeal of the distant signal rule,[78] stated that such deregulation would have negligible impact on broadcast stations, but that consumers would be decidedly better off because they would receive a greater number of viewing options from the deregulated cable systems.[79] The appellate court also stated:

> Free television . . . limits program diversity by its concentration on mass audience shows, which make advertising worthwhile. In shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity, a valid FCC regulatory goal.[80]

Congress also has recognized the public's interest in program diversity as it is fostered by the cable systems' importation of distant signals: "With advances in the state of the art, cable systems are now able to transmit signals by cable, microwave and satellite . . . far beyond the local market area. In the bill [Copyright Act of 1976] we refer to these as 'distant signals'. Admittedly they serve the public interest."[81]

The resale carriers argue that the recognition of the public interest in program diversity is also recognition of the public interest in the continued unrestricted retransmission of broadcast signals by the resale carriers, because, without the services of those carriers, cable systems could not provide their customers with a wide variety of programs.[82]

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[75]*See supra* notes 37-73 and accompanying text.

[76]406 U.S. 649 (1972) (plurality opinion).

[77]*Id.* at 667-68 (quoting Community Antenna Television Sys. (CATV), 20 F.C.C.2d 201, 202 (1969) (emphasis added).

[78]*See supra* notes 12, 66-73 and accompanying text.

[79]Malrite T.V. v. FCC, 652 F.2d 1140, 1146 (2d Cir. 1981).

[80]*Id.* at 1151 (citations omitted).

[81]H.R. REP. No. 1476, 97th Cong., 2d Sess. 360-61 (concurring views of George E. Danielson), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5803.

[82]*See EMI II*, 691 F.2d 125, 132 (2d Cir. 1982).

The balance of the public interest considerations tips in favor of the resale carriers. The most important consideration supporting this conclusion is that the uninhibited operation of the resale carriers is essential to providing the public with the diversity of programming that has been determined to be in the public interest. The copyright owner/program producer's economic incentive to create television programming is provided by the broadcasters' payment to the copyright owner for the rights to broadcast programs and by the cable systems' payment of copyright royalties for the distant signals they import under the compulsory license system.[83] The resale carriers contend that additional compensation from them would result in a windfall to the copyright owners because the increased revenue would not reflect an increase in the number of ultimate users of the copyrighted work, the viewers.[84]

In *EMI II*, the Second Circuit also recognized that the public's interest in diversity of programming outweighs the interest in granting additional compensation to the copyright owners for the resale carriers' retransmission of copyrighted works:

> Congress drew a careful balance [in the Copyright Act of 1976] between the rights of copyright owners and those of CATV systems, providing for payments to the former and a compulsory licensing program to insure that the latter could continue bringing a diversity of broadcasted signals to their subscribers. *The public interest thus lies in a continuing supply of varied programming to viewers.* . . . CATV systems served by intermediate carriers cannot provide their full current programming to their subscribers without the services of those carriers . . . .[85]

V. Crossed Signals: Resale Carriers' Copyright Liability in Court

The regulations and policies of Congress and the FCC[86] and the public interest considerations[87] support the unrestricted resale carriage of broadcast television signals. However, in applying the Copyright Act of 1976[88] to the activities of the resale carriers,[89] the courts seem to have their signals crossed. In *WGN Continental Broad-*

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[83]*See* 17 U.S.C. § 111(c)-(d) (Supp. V 1981). *See supra* notes 55-65 and accompanying text.

[84]*See EMI II*, 691 F.2d at 133.

[85]*Id.* at 132 (emphasis added).

[86]*See supra* notes 37-73 and accompanying text.

[87]*See supra* notes 74-85 and accompanying text.

[88]17 U.S.C. §§ 101-810 (Supp. V 1981).

[89]*See id.* § 111(a)(3).

casting Co. v. United Video, Inc. (*WGN I*),[90] the district court held that the resale carrier's retransmission of the broadcaster's signal was not an infringement of a copyright;[91] however, the Seventh Circuit reversed the lower court's decision.[92] In *Eastern Microwave, Inc. v. Doubleday Sports, Inc.* (*EMI I*),[93] the district court held that the resale carrier's activity did constitute copyright infringement[94] but was reversed on appeal by the Second Circuit.[95]

The permutation of these decisions seems to indicate that the courts are quite confused on the question of copyright infringement liability for the resale carriers of broadcast television signals. Although a closer analysis of the cases reveals that each decision is consistent with the copyright law, a clarification of the present copyright act would be very helpful in guiding the courts and potential litigants in this area.[96] A juxtaposition of the decisions in the *WGN* and *EMI* cases brings into focus the issues that determine resale carriers' infringement liability under the present copyright law.

A. The Public Performance Issue

Subsection 106(4) of the Copyright Act of 1976 grants an owner

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[90]523 F. Supp. 403 (N.D. Ill. 1981), *rev'd*, 685 F.2d 218 (7th Cir. 1982). The broadcaster in this case brought action to enjoin the resale carrier from retransmitting its signal after the broadcaster learned that the carrier was stripping a part of the signal, known as the vertical blanking interval, before retransmitting it. The broadcaster transmitted experimental teletext material in the blanking interval, and the resale carrier stripped this material and replaced it with the carrier's own information. The broadcaster alleged that such activity by the carrier infringed the broadcaster's copyright of the nine o'clock news program, during which the teletext was inserted in the blanking interval, and of the teletext material itself. An important fact of this case is that the broadcaster registered the news program and the teletext under a single copyright.

[91]*Id.* at 415.

[92]*WGN II*, 685 F.2d 218, 224 (7th Cir. 1982).

[93]534 F. Supp. 533 (N.D.N.Y.), *rev'd*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3601 (1983) (No. 82-957). In this case, the resale carrier sought a declaratory judgment that its activities with respect to the copyright owner's work did not constitute copyright infringement. The carrier retransmitted the broadcast signal of WOR-TV, New York, which had contracted with the owner of the New York Mets for the rights to broadcast a number of their baseball games. The Mets' owner also owned the copyrights to these ballgames. Although the broadcaster did not object to the retransmission of its signal by the resale carrier, the copyright owner did object to the retransmission of its copyrighted work, that is, the Mets' games that were contained within the signal. In a series of letters to the resale carrier, the copyright owner insisted that the retransmission of the baseball games constituted infringement of the copyright and demanded that the carrier cease those retransmissions. The carrier refused and brought this suit for a declaratory judgment that it was not infringing the copyright.

[94]534 F. Supp. at 538.

[95]691 F.2d at 133-34.

[96]*See* H.R. 5949, 97th Cong., 2d Sess. § 101(a) (1982).

of a copyright on an audiovisual work the exclusive right to "perform the copyrighted work publicly."[97] Thus, before a resale carrier can be held liable for copyright infringement, its retransmission of the broadcaster's signal that contains a copyrighted work must constitute a public performance of that work. Otherwise, no violation of the copyright owner's exclusive right has occurred. The Act provides: "To perform or display a work 'publicly' means—(1) to perform or display it at a place open to the public or . . . (2) to transmit or otherwise communicate a performance . . . to the public . . . ."[98] Part (2) of this definition is relevant to resale carriers' retransmission of broadcast signals.[99]

1. The WGN I *Decision.*—The District Court for the Northern District of Illinois held that the resale carrier's retransmission of the broadcaster's signal was not a public performance of the copyrighted work, which was contained in the signal.[100] In effect, the court interpreted the term "public" to mean the viewing public, that is, the cable systems' subscribing customers. The court reasoned that the resale carrier's retransmission of the broadcast signal only reached the cable systems, and not the public. It was the cable systems' transmissions that reached the public.

2. The EMI I *Decision.*—The District Court for the Northern District of New York declined to take the narrow view of the term "public" taken in the *WGN* district court decision.[101] The district court in *EMI I* stated that Congress could have limited its definition of the term to members of the viewing public, but had not done so.[102] The court held that the cable systems to whom the resale carrier retransmitted the copyrighted work were themselves members of the public and that the carrier's retransmission of the broadcaster's signal was, therefore, a public performance.[103] The district court stated:

> The [district court decision in *WGN*] stated that an interpretation of the term "public" which would include the CATV systems, would, in effect, read the public requirement out of the Act. This Court does not agree. Rather, to limit the meaning of public to the viewing public without express direction

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[97]17 U.S.C. § 106(4) (Supp. V 1981).

[98]*Id.* § 101 (defining the term "publicly").

[99]*See WGN I*, 523 F. Supp. at 414; *WGN II*, 685 F.2d at 221; *EMI I*, 534 F. Supp. at 536.

[100]*WGN I*, 523 F. Supp. at 415.

[101]The Second Circuit did not consider the public performance issue; the appellate court rested its decision in *EMI II* solely upon the section 111(a)(3) exemption issue, *see infra* notes 134-54 and accompanying text. *EMI II*, 691 F.2d at 127 n.5.

[102]*EMI I*, 534 F. Supp. at 536.

[103]*Id.*

from Congress would be to read a narrow interpretation of public *into* the Act.[104]

3. The WGN II *Decision.*—The Court of Appeals for the Seventh Circuit also held that the resale carrier's retransmission of the broadcaster's signal was a performance of the copyrighted work to the public, but its reasoning was slightly different from that in the *EMI I* district court opinion. Rather than define the cable systems as members of the public, the Seventh Circuit found that the public performance requirement was satisfied indirectly and stated that "the Copyright Act defines 'perform or display . . . publicly' broadly enough to encompass *indirect* transmission to the *ultimate* public."[105] Thus, the court of appeals seemed to agree with the lower court's interpretation of the term "public" as meaning the viewing public. Nevertheless, the court reversed the district court, holding that the resale carrier's retransmission was indeed "to the public,"[106] albeit indirectly via the cable systems.

4. Analysis.—The holding in *EMI I* that the resale carrier's retransmission of the broadcast signal to the cable systems constituted a public performance, because the cable systems are themselves members of the public, is better supported than the *WGN* decisions, which limited the term "public" to the ultimate, viewing public. The FCC has indirectly recognized that cable systems are members of the public. The tariff[107] of Eastern Microwave, Inc. (EMI), which was filed with and approved by the FCC,[108] defined EMI's customers as *"any member of the public* who directly orders . . . services offered or provided by Carrier."[109] Because the resale carrier's customers are the cable systems that order resale services from the carrier, the FCC's approval of the tariff indicated that the FCC accepted the cable systems as members of the public. In addition, the FCC has defined "resale" as "the subscription to communications services and facilities by one entity and the reoffering of the communications services and facilities *to the public* . . . for profit."[110] The communications services of the resale carriers of television signals are reoffered only to cable

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[104]*Id.* at 537 (citation omitted) (emphasis added by court).

[105]*WGN II*, 685 F.2d at 221 (emphasis added).

[106]*See supra* note 98 and accompanying text.

[107]One court has defined a tariff as "a public document setting forth the services of the carrier being offered, the rates and charges with respect to the services and the governing rules, regulations and practices relating to those services." International Tel. & Tel. Corp. v. United Tel. Co., 433 F. Supp. 352, 357 n.4 (M.D. Fla. 1975).

[108]*See* Eastern Microwave, Inc., 70 F.C.C.2d 2195, 2203 (1979).

[109]*EMI I*, 534 F. Supp. at 536 n.9 (emphasis added by court).

[110] Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261, 263 (1976) (emphasis added).

systems, not to members of the viewing public.[111] Therefore, the FCC's definition of resale indicates that the FCC recognizes the cable systems as members of the public.

The position that the term "public" means the ultimate or viewing public, which was taken in both opinions in the *WGN* case, is unnecessarily narrow.[112] The *WGN* district court based its interpretation of the term "public" on the Copyright Act's definition of a cable system as "a facility . . . that . . . makes secondary transmissions of [broadcast television] signals or programs . . . to *subscribing members of the public* who pay for such service."[113] From this definition, the district court concluded that the cable systems could not be members of the public because they "are not viewing [the broadcaster's] programming, but distributing the programming to the public."[114] This statement is particularly telling because it shows how, in the court's mind, the concept of public is tied to the function of viewing. Nothing in the Act requires such a connection.

The Seventh Circuit's decision in *WGN II* concerning the public performance issue was not based upon the court's reliance on textual support in the Copyright Act.[115] Rather, the court focused on practical reasons for considering the resale carrier's activities to be a public performance of the copyrighted material. First, the court stated that if the carrier's retransmission were not a public performance, then the section 111(a)(3) exemption[116] would be rendered superfluous.[117] Without a public performance, there could be no copyright infringement and, thus, no need for the exemption. Further, the court stated that the compulsory license system would be "disrupted, or at least made cumbersome,"[118] if the carrier were immune from copyright liability simply because its transmission to the viewing public was accomplished through the intermediary of the cable systems. By this

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[111]*See EMI II*, 691 F.2d at 127 n.6.

[112]*See supra* note 104 and accompanying text.

[113]*WGN I*, 523 F. Supp. at 414 (quoting 17 U.S.C. § 111(f) (Supp. V 1981)) (emphasis added by court).

[114]523 F. Supp. at 414-15.

[115]The circuit court's statement that an "indirect transmission to the ultimate public" would come within The Copyright Act's public performance requirement, *WGN II*, 685 F.2d at 221, implies that the court believed that a transmission to the ultimate, viewing public was necessary to a public performance. In this interpretation of the term "public," the circuit court seems to be in general agreement with the lower court. However, the Seventh Circuit stated that it could not find "good textual support for the district court's position." *Id.* Therefore, to support its holding of public performance, the circuit court was forced to turn to the implications of non-public performance. *See infra* notes 116-20 and accompanying text.

[116]17 U.S.C. § 111(a)(3) (Supp. V 1981). *See infra* notes 123-59 and accompanying text.

[117]*WGN II*, 685 F.2d at 220-21. *But see EMI II*, 691 F.2d at 132 n.16.

[118]685 F.2d at 221.

reasoning, the resale carrier's immunity would allow it to "mutilate to its heart's content the broadcast signal it picked up,"[119] and would leave the copyright owner with the burden of proceeding against the cable systems who retransmitted the mutilated signal to the public rather than against the resale carrier. This, the court warned, would require "a thousand or more copyright infringement suits instead of one."[120]

Whether one relies on the FCC's apparent recognition of the cable systems as members of the public[121] or on the practical reasons for considering the resale carrier's indirect transmission to the viewing public a public performance,[122] the evidence favors the conclusion that the resale carrier's retransmission of a copyrighted work that is contained in the retransmitted signal constitutes a public performance. If this conclusion were adopted, future copyright infringement suits against resale carriers would turn solely on the exemption issue.

B. The Section 111(a)(3) Exemption Issue

Even if the resale carrier's secondary transmission[123] of the broadcaster's primary transmission[124] is held to be a public performance, the carrier nevertheless may be exempt from liability for copyright infringement if it meets the exemption requirements set forth in section 111(a)(3) of the Copyright Act.[125]

1. The WGN *Decisions.*—The factual setting of the *WGN* case[126] required the preliminary determination of the scope of the broadcaster's copyright protection. Both the nine o'clock news program and some experimental teletext material, which was transmitted in a blank portion of the broadcaster's signal during the news show, were registered under a single copyright.[127] The preliminary question was whether both were protected by the copyright, and if not, which of the two *was* protected.

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[119]*Id.*

[120]*Id.*

[121]*See supra* text accompanying notes 107-11.

[122]*See supra* notes 115-20 and accompanying text.

[123]"A 'secondary transmission' is the further transmitting of a primary transmission simultaneously with the primary transmission . . . ." 17 U.S.C. § 111(f) (Supp. V 1981). This includes both the resale carrier's transmission of the broadcast signal to the cable systems and the cable systems' retransmission of the signal to their customers.

[124]A primary transmission is defined in the statute as "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted." *Id.*

[125]*Id.* § 111(a)(3). *See supra* text accompanying note 49-50.

[126]*See supra* note 90.

[127]*WGN I*, 523 F. Supp. at 408.

The district court held that only the nine o'clock news program was properly registered and protected by the copyright.[128] The court also held that "the 'primary transmission' as used in Section 111(a)(3) means *the copyrighted work* which is initially broadcast and retransmitted."[129] Because the resale carrier's stripping of the teletext from the broadcast signal did not affect the retransmission of the protected news program, the district court held that the resale carrier's activities did not "constitute control over or selection of WGN's 9:00 News programs, the primary transmissions at issue in this case. Therefore, UVI [the resale carrier] is entitled to the benefit of the passive carrier exemption of Section 111(a)(3)."[130]

The Seventh Circuit found that the teletext was related sufficiently to the nine o'clock news program for the two to be registered under a single copyright and reversed the district court.[131] The circuit court held that the resale carrier's deletion of the teletext constituted "an alteration of a copyrighted work and hence an infringement under familiar principles."[132]

The circuit court disposed of the section 111(a)(3) exemption issue in a single sentence: "United Video cannot avail itself of the passive carrier exemption, because it was not passive—it did not retransmit WGN's signal intact."[133] Unfortunately, the court did not address the implied corollary of its statement—that a resale carrier who does

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[128]This holding was based on the Copyright Act's definition of "audiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors." 17 U.S.C. § 101 (Supp. V 1981). The district court deduced from this definition that "the Act contemplates one copyright for each 'series of related images.' " 523 F. Supp. at 412. But the court found that the teletext and the news program were not related sufficiently to constitute a single audiovisual work and, therefore, were not properly registered under a single copyright. *Id.* at 412-13. However, the court never fully explained why the news program, rather than the teletext material, remained within the protection of the copyright. The reason may be related to the court's statement earlier in the opinion, that "the copyright laws are designed to protect intellectual property, not methods of communication." *Id.* at 411. The court apparently viewed the teletext as a method of communication.

[129]*WGN I*, 523 F. Supp. at 411 (emphasis added).

[130]*Id.* at 413. The term "passive carrier exemption" is sometimes used to refer to section 111(a)(3) and comes from a statement in the legislative history of the Copyright Act: "The general exemption under section 111 extends to secondary transmitters that act solely as passive carriers." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 92, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5706.

The court also pointed out that the carrier's failure to transmit the teletext material might be of interest to the FCC because the carrier's authorization was conditional upon refraining from involvement in the selection of the content of the information that was transmitted over its facilities, but that this was not an issue before the court. 523 F. Supp. at 414.

[131]*WGN II*, 685 F.2d at 222-23.

[132]*Id.* at 221.

[133]*Id.*

retransmit the broadcaster's signal intact is entitled to the section 111(a)(3) exemption.

2. The EMI *Decisions.*—The district court and the circuit court in the *EMI* case were more thorough in the examination of the section 111(a)(3) exemption. Three issues, each raised by the language of the statute, were addressed by each court: (1) Whether the resale carrier had exercised "direct or indirect control over the content or selection of the primary transmission,"[134] (2) Whether the carrier had exercised "direct or indirect control . . . over the particular recipients of the secondary transmission,"[135] and (3) Whether the carrier's "activities with respect to the secondary transmission consist[ed] solely of providing wire, cables, or other communications channels for the use of others."[136] A finding against the resale carrier on any one of the three issues would be sufficient to deny it the benefit of the exemption.

On the first issue, the district court held that the resale carrier had exercised control over the selection of the primary transmission.[137] The resale carrier had originally planned to retransmit the signal of both WOR-TV, New York, and WSBK, Boston. However, only one satellite transponder was available for lease to the carrier, and, based on the results of a market survey, the carrier chose to retransmit the WOR signal. The district court held that this choice constituted control over the selection of the primary transmission.[138] The resale carrier's argument that it should not be held to have selected the primary transmission because the technical impossibility of retransmitting all available television signals had forced the selection was rejected as being "without merit."[139]

On appeal, however, the Second Circuit found a great deal of merit in this argument. The court distinguished the function of the resale carrier of television signals from the function of the ordinary common carrier in that the activities of the former "include carrying the communications desired by receivers rather than those desired by senders."[140] Thus, the court concluded:

> When the communication service is technologically limited to one sender . . . a type of "selection" is impelled. That type of forced selection cannot be the type precluded by the statute in the context here presented, for to so hold would be to require that exemption be denied to any carrier that did not

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[134]17 U.S.C. § 111(a)(3) (Supp. V 1981).
[135]*Id.*
[136]*Id.*
[137]*EMI I*, 534 F. Supp. at 537.
[138]*Id.*
[139]*Id.* at 537-38.
[140]*EMI II*, 691 F.2d at 128.

> retransmit every television broadcast of every television station in the country.[141]

The circuit court went on to state that control over the content of the primary transmission was the sort of control that the resale carrier must avoid to remain exempt from copyright liability.[142]

On the second issue, the *EMI* district court held that, in contravention of section 111(a)(3), the resale carrier had exercised control over the particular recipients of the secondary transmission.[143] The requisite control was found in the resale carrier's choice of the cable systems with whom it contracted for its resale services.[144] The court rejected the resale carrier's argument that the cable systems' subscribers were the particular recipients of the secondary transmission and that it had no control over those recipients: "EMI only carries the secondary transmission to the CATV headends . . . . The signal received by the subscribing members is transmitted by the CATV systems themselves. Therefore, the recipients of the secondary transmission carried by EMI are the CATV systems, not their subscribing members."[145]

The Second Circuit agreed with the district court that the cable systems were the recipients of the resale carrier's secondary transmission,[146] but, noting that resale carriers differ from traditional common carriers by serving receivers rather than senders,[147] did not equate this circumstance with control over the recipients of its retransmission.[148] The court pointed out that the resale carrier was licensed as a common carrier by the FCC and that

> [a]s such, it is bound to furnish its communications services upon reasonable requests. 47 U.S.C. § 201 (a). . . . The record indicates that no reasonable request for its services was ever refused by EMI. EMI has thus not exercised "control over the particular recipients" of its transmissions within the meaning and intent of 17 U.S.C. § 111(a)(3).[149]

Finally, the *EMI* district court held that even if the resale car-

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[141] *Id.* at 130.

[142] *Id.* This is perhaps the weakest part of this decision, because, although the court said that selection could not mean station selection, *id.*, the court never explained what selection did mean. Certainly, selection cannot mean content, because control over that facet of the primary transmission is already expressly forbidden by section 111(a)(3).

[143] *EMI I*, 534 F. Supp. at 538.

[144] *Id.*

[145] *Id.*

[146] *EMI II*, 691 F.2d at 131. *But see id.* at n.13.

[147] 691 F.2d at 131.

[148] *Id.*

[149] *Id.*

rier had not exercised control over the selection of the primary transmission and over the particular recipients of the secondary transmission, the resale carrier still would not be entitled to the exemption because its activities went beyond providing channels of communication for the use of others, in contravention of section 111(a)(3).[150] The court found that the resale carrier did not provide channels of communications solely for the use of others but had used those channels itself to actively market a product—the broadcaster's signal.[151] Concerning the resale carrier's marketing practices, the court stated: "It is not the fact that EMI advertises that causes EMI to lose the exemption . . . . It is the fact that the advertisements demonstrate that EMI is, itself, using the wires, etc., it makes available in contravention of the requirement set forth in 17 U.S.C. § 111(a)(3)."[152]

In reversing the district court's decision, the Second Circuit again pointed out that the resale carriers of television signals serve the receivers rather than the senders of secondary transmissions: "[T]he 'others' [for whom the carrier provided wires, cables, and channels] here are the receiving CATV systems which cannot afford their own wires, cables, and channels, rather than the originating senders who use (and cannot afford their own) wires, cables, and channels of more traditional common carriers like a telephone company."[153]

The court rejected the copyright owner's assertion that the resale carrier provided the wires, cables, and channels for its own use because the carrier marketed the copyrighted works, which were contained in the broadcast signal, to the cable sytems: "EMI is selling . . . only its transmission services . . . . That it transmits particular signals in response to contracts with its customers specifying those signals, and that it announces to potential customers its ability to transmit those signals, are actions not in conflict with an exempt carrier status."[154]

3. Analysis.—Although the Second Circuit's decision in *EMI II* is not binding upon other federal appellate courts that might consider the exemption issue in the future, it is the most authoritative judicial analysis of the section 111(a)(3) exemption.[155] Both of the *WGN* opinions ignored the question of the resale carrier's control over recipients of

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[150]*EMI I*, 534 F. Supp. at 538.

[151]*Id.*

[152]*Id.*

[153]*EMI II*, 691 F.2d at 131.

[154]*Id.*

[155]The authoritativeness of this decision is enhanced by the participation of Judge Markey, chief judge of the United States Court of Customs and Patent Appeals, who wrote the court's opinion. *Id.* at 126. As a patent judge, Judge Markey presumably is more familiar with the principles and policies of patent and copyright law than the average district or circuit court judge.

the secondary transmission and the question of providing wires, cables, and channels of communication for the use of others. However, the language of section 111(a)(3) requires the consideration of these questions. The *WGN* circuit court opinion, therefore, offers very little guidance in interpreting section 111(a)(3) beyond the facts of that particular case.[156]

Although the district court decision in *EMI* fully considered the issues set forth in the exemption, the court seemed blind to the notion that the resale carrier of television signals is no less a common carrier simply because it serves the receivers, rather than the senders, of communications. The Second Circuit made a point of this at every step of its reversal of the district court decision.[157] Indeed, the failure to recognize this concept seems to have been the undoing of the district court's decision.

The soundness of the Second Circuit's decision lies not only in its recognition of the resale carriers of television broadcasts as mere common carriers serving receivers rather than senders, but also in its consistency with federal policy as expressed in the regulations affecting the carriers[158] and with the balance of the public interest.[159] However, the apparent soundness of a decision never guarantees that the next court will accept it as precedent. Thus, the implications of a decision contrary to the Second Circuit's *EMI* decision must be considered.

VI. Implications of Copyright Liability Imposed on Resale Carriers

The most direct result of holding resale carriers of broadcast television signals liable for copyright infringement would be their liability to copyright owners for either actual damages and lost profits,[160] or for statutory damages, which are between $250 and $10,000[161] for each and every infringement occurring within the three-year statute of limitations period.[162] Given the number of copyrighted programs retransmitted by resale carriers each day, each week, and each year, the result of such liability could be the total devastation of resale carrier operations.

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[156]The facts of the *WGN* case are distinguishable from the typical resale carrier situation. The typical resale carrier, unlike the carrier in *WGN*, retransmits the broadcaster's signal intact, as is required by FCC regulations.

[157]*See supra* notes 140, 147, 153 and accompanying text.

[158]*See supra* notes 37-73 and accompanying text.

[159]*See supra* notes 74-85 and accompanying text.

[160]17 U.S.C. § 504(b) (Supp. V 1981).

[161]*Id.* § 504(c)(1). In cases of willful infringement, damages up to $50,000 may be awarded. *Id.* § 504(c)(2).

[162]*Id.* § 507(b).

Further, to avoid future infringement, the resale carrier would be required to obtain consent from the copyright owner before retransmitting any broadcast signal that contained copyrighted programs. The retransmission consent system, however, is fraught with complications. First, a consent requirement imposed upon the resale carriers would be an indirect method for the broadcasters and the copyright owners to freeze the cable industry.[163] If consent were denied to the resale carriers or offered only at a price beyond their means, the cable systems would be unable to import distant television signals.[164] The cable systems' offerings to subscribers would be restricted to local programming, which is already available over the airwaves to home viewers. As a result, the attractiveness of the cable service would be vastly reduced. The competitive attitudes that are held between broadcasters and cable systems[165] and the experiences with the retransmission consent experiment that was conducted between cable systems and copyright owners a decade ago[166] indicate that blanket denials of retransmission rights to resale carriers could be expected, thus, causing the cable industry to wither.

In addition, a retransmission consent system might not result in just compensation to copyright owners, because the increased royalties received from resale carriers in exchange for consent to retransmit could easily be consumed by the costs of negotiating that consent.[167] Alternatively, if the resale carrier is forced to pay the copyright owner for consent to retransmit a copyrighted program, a windfall to the owner could result. The consent payment would be in addition to the fee paid by the broadcaster for rights to show the program and to the compulsory license fee paid by the cable system, even though the number of ultimate viewers would remain unchanged.[168]

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[163]*EMI II*, 691 F.2d at 132. *See* Malrite T.V. v. FCC, 652 F.2d 1140, 1148 n.9 (2d Cir. 1981).

[164]*See EMI II*, 691 F.2d at 132 ("CATV systems served by intermediate carriers cannot provide their full current programming to their subscribers without the services of those carriers").

[165]*See* TIME, Aug. 9, 1982, at 54. ("Playing on the traditional suspicion between broadcasters and cable people, [superstation owner Ted] Turner has launched a direct-mail campaign aimed at arousing cable operators; he enclosed copies of ABC memos counseling local affiliate stations to use every resource . . . to campaign for 'free TV.' ").

[166]*See* Malrite T.V. v. FCC, 652 F.2d 1140, 1148 n.9 (2d Cir. 1981). *See also EMI II*, 691 F.2d at 128.

[167]*Cf.* Note, *supra* note 6, at 950 (discussing retransmission consent between copyright owners and broadcasters). However, there is no reason to believe that negotiation costs would be lower if the resale carrier were involved rather than the cable system.

[168]The copyright owners counter the multiple payment argument by asserting that the compulsory license fee does not approach the market value of their programs. BROADCASTING, Mar. 22, 1982, at 30. *See EMI II*, 691 F.2d at 133 n.18. The compulsory license fees, however, were set at rates that must be presumed to have been deemed

VII. Conclusion: Getting the Signals Straight

The policies of Congress and the FCC that are expressed in their regulations affecting resale carriers, the balance of public interest considerations, the authoritative judicial interpretation of the present copyright law, and the ominous implications of deviation from that interpretation all favor permitting the resale carriers of broadcast television signals to retransmit those signals to their cable system customers unburdened by copyright liability. However, not one of these factors is binding on any court that might consider this issue in the future, and the permutation from district court to circuit court in the *WGN* and *EMI* decisions indicates that the judiciary has had its signals crossed on how the present copyright law applies to the activities of the resale carriers.

In 1982 Congress had the opportunity to straighten those signals for the courts and for potential litigants. A bill introduced in Congress[169] would have amended section 111(a)(3) of the Copyright Act to ensure that resale carriers of television signals would be covered by the copyright infringement exemption. The amended section would have provided exemption from copyright liability when

> (3) the secondary transmission is made by any carrier who has no direct or indirect control over *the content* of the primary transmission, and whose activities with respect to the secondary transmission or over the *ultimate* recipients of the secondary mission [sic] consist *primarily* of providing wires, cables, or other communications channels for the use of others.[170]

The House Committee Report of this bill indicates that it was intended to accomplish by statute what the Second Circuit accomplished judicially; that is, reverse the district court decision in *EMI I*. The Report stated:

> [A] decision . . . in a case involving an interpretation of [17 U.S.C.] section 111(a)(3), *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, . . . leaves the cable industry in a state of turmoil. . . . In the Committee's view, the decision incorrectly construed the carrier exemption. . . . As a result . . . the entire

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fair by Congress. *See id.* at 132, 133 n.18. Also, the Copyright Royalty Tribunal has authority to adjust the compulsory license rates. 17 U.S.C. § 801(b)(2)(A)-(D) (Supp. V 1981).

[169]H.R. Rep. No. 5949, 97th Cong., 2d Sess. (1982).

[170]*Id.* § 101(a) (emphasis added). To the benefit of copyright owners, the bill also would have established statutorily a limited form of the syndicated program exclusivity rule, *id.* § 101(d). *See supra* note 34. The bill would have benefited the broadcasters by enacting a statutory must-carry rule. H.R. 5949, 97th Cong., 2d Sess. § 201 (1982). *See supra* note 11 and accompanying text.

> compulsory licensing scheme [could be] undercut, which would be antiethical [sic] to the intent of this committee and the public interest.
>
> There has never been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities.[171]

The bill would have amended the present section 111(a)(3) to prohibit carrier control over the content of a primary transmission, rather than over content *and* selection, and over the ultimate, rather than particular, recipients of the secondary transmission. In addition, the bill would have required that the resale carrier's activities with respect to the secondary transmission consist primarily, rather than solely, of providing wires, cables, and channels for the use of others.

Had the *WGN* and *EMI* cases been decided under the amended statute, the decision of each court would have been the same. The resale carrier in *WGN* still would have failed to qualify for the exemption because its practice of stripping a portion of the broadcast signal and inserting its own information would have constituted control over the content of the primary transmission. The carrier in *EMI* still would have qualified for the exemption because, as the Second Circuit held, the carrier did not control the content of the primary transmission[172] or the ultimate recipients of the secondary transmission.[173] Although the carriers' activities with respect to the secondary transmission could possibly have been construed as "marketing" the broadcaster's signal, as the copyright owner alleged, those activities consisted *primarily* of providing channels of communication for the use of receivers of the communications, the cable systems.[174] Thus, the apparently contrary holdings of the *WGN* and *EMI* circuit court opinions can be harmonized on the basis of the facts of each case viewed under the proposed section 111(a)(3) amendment.

The benefits to the cable industry in protecting the compulsory license system and to the public interest in guaranteeing continued diversity in cable television programming that would have accrued under the amendment are great. Unfortunately, the bill died when the Senate failed to act on it before the end of the 97th Congress.[175]

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[171]H.R. REP. NO. 559, 97th Cong., 2d Sess. 4-5 (1982). The report was issued prior to the circuit court's *EMI II* decision.

[172]*EMI II*, 691 F.2d at 130. By eliminating the question of control over the selection of the primary transmission, H.R. 5949 would have made unnecessary the weakest part of the circuit court's opinion. *See supra* note 142.

[173]*EMI II*, 691 F.2d at 131. *See id.* at n.13.

[174]*Id.* at 131.

[175]The bill was in Senate hearings as of December 3, 1982. No further action was

In order that those benefits be protected by providing the courts with clear statutory guidance on the question of copyright infringement liability for resale carriers of television broadcasts, a bill guaranteeing the carriers exemption from liability should be reintroduced and passed by the 98th session of Congress. Only then will the signals finally be set straight and kept straight.

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taken before the end of the year. [1981-1982 Transfer Binder] 2 CONG. INDEX (CCH) 34,518 (Dec. 30, 1982). According to a spokeswoman in the copyright section of the House Committee for the Judiciary, there were no plans for a similar copyright amendment to be reintroduced to the Congress in the first six months of 1983.