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The Social Costs of Property Rights in Broadcast (and Cable) Signals

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THE SOCIAL COSTS OF PROPERTY RIGHTS IN BROADCAST (AND CABLE) SIGNALS

By Shyamkrishna Balganesh[†]

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I. INTRODUCTION

The use of property as a regulatory mechanism in the telecommunications sector is hardly novel. Since the early twentieth century, policy makers and regulators in the United States have experimented with different mechanisms for allocating private rights in the radio spectrum.¹ In 1959, Ronald Coase proposed that the FCC auction rights in the broadcast spec-

1. See Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & ECON. 529, 532-33 (1998) [hereinafter Hazlett, *Assigning Property Rights*] (noting how the idea began in 1912 and identifying four approaches that were adopted). See also Thomas W. Hazlett, *The Rationality of U.S. Regulation of Broadcast Spectrum*, 33 J.L. & ECON. 133 (1990); Lawrence J. White, "Propertyizing" the Electromagnetic Spectrum: *Why it's Important, and How to Begin*, in COMMUNICATIONS DEREGULATION AND FCC REFORM 111 (Jeffrey A. Eisenach & Randolph J. May eds., 2001).

trum and convert broadcast licenses into tradable commodities.² However, it was not until very recently that the FCC implemented Coase's idea. At least part of the reason for the long delay in implementing this seemingly efficient mechanism lay in the public nature of broadcasting and the perceived trade-offs between the "public interest" and private control.³

Since its creation, the FCC has regulated the grant of broadcast licenses using the rubric of "public interest."⁴ All the same, the FCC's ideal of "public interest" and its conception of what a property right is have varied over time.⁵ Historically, the well-documented taxonomical categories of ownership have included the privilege-based model, the "social compact" or "public trusteeship" model, and, more recently, the expansive market-oriented model.⁶

Spectrum allocation, however, is far from being the only area where property rights have been deployed to regulate broadcasting. Content producers have long enjoyed copyright protection over individual content that is broadcast over the spectrum.⁷ Additionally, many countries around the world recognize that broadcasters hold a property right in their content-carrying broadcast signals, independent of the copyright in the underlying content.⁸ Referred to as "broadcasters' rights", the purported justification for their existence derives from the need to equip broadcasters with mechanisms to prevent others from free-riding on their investment of time, skill, and effort in working the infrastructure of the television industry.⁹

2. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

3. See William H. Melody, *Radio Spectrum Allocation: Role of the Market*, 70 AM. ECON. REV. 393, 394 (1980) (characterizing the broadcast spectrum as a form of "social property"). Numerous other competing explanations exist for this anomaly and are considered in detail by Thomas Hazlett in his study. See Hazlett, *Assigning Property Rights*, *supra* note 1. Interestingly, Coase, the original proponent of the idea, would later characterize the public interest argument as "syrupy talk." Ronald H. Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 LAND ECON. 161, 167 (1965).

4. 47 U.S.C. § 309(a) (2000) (using the phrase "public interest, convenience, and necessity"). See discussion *infra* Section IV.C.

5. Hazlett, *Assigning Property Rights*, *supra* note 1, at 532-37.

6. *Id.*

7. 17 U.S.C. § 102(a)(6) (2000).

8. This is a consequence of the Rome Convention, otherwise known as the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, brought into force in 1961.

9. CLAUDE MASOUYÉ, WORLD INTELLECTUAL PROP. ORG. [WIPO], GUIDE TO THE ROME CONVENTION AND TO THE PHONOGRAMS CONVENTION (William Wallace trans., 1981).

Structured analogously to traditional copyright, these rights (together with certain others) are often characterized as “neighboring” or “related” rights.¹⁰

The idea of broadcasters’ rights, however, never found much favor in the United States. As early as 1930, decades before the idea of broadcasters’ rights assumed international importance, Louis Caldwell, General Counsel of the Federal Radio Commission (the predecessor to the FCC), argued that the idea of granting broadcasters property rights in their program-carrying signals was likely to pose innumerable conceptual, doctrinal, and practical problems.¹¹ Specifically, he argued that “the ‘juridical concept of broadcaster’s proprietorship’ might seem overly radical in the American context, where audiences had become accustomed to receiving broadcasts for ‘free.’”¹² For over seven decades since, the United States has stayed clear of adopting a system of open-ended broadcasters’ rights.¹³

Since 1998, however, the United States has been pushing for the adoption of a new treaty at the WIPO that would grant broadcasters and cablecasters independent property rights in their transmission signals.¹⁴ Titled the “WIPO Broadcasting Treaty”, this new instrument would update the existing international regime governing broadcasters’ rights and extend it to the digital world.

The creation of new property interests in intangible and informational goods (i.e., intellectual property rights) has been the subject matter of intense debate for quite some time now.¹⁵ In a similar vein, many have ques-

10. See, e.g., George H.C. Bodenhausen, *Protection of “Neighboring Rights”*, 19 LAW & CONTEMP. PROBS. 156 (1954).

11. Louis G. Caldwell, *Piracy of Broadcast Programs*, 30 COLUM. L. REV. 1087, 1101, 1110-12 (1930). For an overview of Caldwell’s attempted reform of the broadcasting industry as a whole, see Robert W. McChesney, *Free Speech and Democracy! Louis G. Caldwell, the American Bar Association and the Debate Over the Free Speech Implications of Broadcast Regulation, 1928-1938*, 35 AM. J. LEGAL HIST. 351 (1991).

12. Caldwell, *supra* note 11, at 1112-14.

13. The United States did not ratify the Rome Convention, despite participating actively during the actual negotiations. The reasons for this remain somewhat unclear.

14. Discussions on the treaty commenced in 1998 at the WIPO and the United States delegation submitted a detailed proposal in 2002. WIPO, *Protection of the Rights of Broadcasting Organizations*, WIPO Doc. No. SCCR/8/7 (Oct. 21, 2002), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_7.pdf.

15. For a sample of this literature, see PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2002); EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY (Rochelle Dreyfuss et al. eds., 2001); James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997); Richard A. Pos-

tioned the wisdom of the WIPO Broadcasting Treaty and its potential impact on television broadcasting.¹⁶ These debates tend to ignore the reality that while the United States never recognized open-ended broadcasters' rights as several other countries did, it nevertheless did grant the industry's main players (broadcasters, cable companies, and content producers) *attenuated exclusionary protection*, or limited property rights, believing that this grant would optimize competition to create a balanced, workable system. Television broadcast and cable revenues have continued to rise steadily under this system and there remains little reason to believe that broadcasting as a whole has suffered in any way.¹⁷

What, then, prompted the shift in the United States' position on broadcasters' rights, and what benefit, if any, is the new property regime likely to confer on national television broadcasting? More importantly, will the introduction of a new form of property remain compatible with the existing structural and functional attributes of the industry, which for decades has committed itself to the "public interest" and operated on a system of limited exclusionary protection?

This Article examines the implications of granting broadcasters and cablecasters open-ended property rights (as opposed to *limited* exclusionary privileges) in their transmission signals (as contemplated under the new WIPO Broadcast Treaty regime), specifically in the context of the United States television industry. It argues that while the gains associated with these rights are not readily identifiable, the regime is nevertheless likely to have significant costs.

Part II of the Article provides an overview of the idea of broadcasters' rights in their signals. It examines the genesis of the idea at the Rome Convention, then outlines the basic idea behind the WIPO Broadcast Treaty and concludes with a conceptual discussion of the possible justifications that might exist for these rights. Part III examines the existing structure of the U.S. broadcast industry and the myriad property rights re-

ner, *Intellectual Property: The Law and Economics Approach*, 19 J.L. & ECON. PERSP. 57 (2005).

16. See, e.g., James Boyle, *More Rights are Wrong for Webcasters*, FT.COM, Sep. 26, 2005, <http://www.ft.com/cms/s/441306be-2eb6-11da-9aed-00000e2511c8.html>; Adam R. Tarosky, *The Constitutionality of WIPO's Broadcasting Treaty: The Originality and Limited Times Requirements of the Copyright Clause*, 2006 DUKE L. & TECH. REV. 0016.

17. For an overview of revenues in the television broadcasting sector, see 12 FED. COMM'NS COMM'N ANN. ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING 4 (2006), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-06-11A1.pdf [hereinafter FCC ASSESSMENT] (noting that the market has continued to grow).

games that govern interactions between the different players therein. Part IV examines the possible effects that the new property regime is likely to have on the new user dynamic that has begun to emerge on the internet, on the ideal of greater authorial control over dissemination, and lastly on the public interest ideal that has remained central to communications regulation.

Part V argues that if broadcasters' arguments for property rights do have any merit, they derive from the principle of "unjust enrichment." It then goes on to suggest a staggered two-phase approach to implementing broadcasters' exclusionary privileges against commercial webcasters with the intention of recreating a level playing field and at the same time enabling the internet to develop as an independent distribution channel.

II. OPEN-ENDED PROPERTY PROTECTION FOR BROADCAST SIGNALS: THE CURRENT AND PROPOSED INTERNATIONAL REGIMES

The concept of broadcasters' rights has been in existence for at least four decades now.¹⁸ In spite of this, however, as an idea it remains relatively unknown in the United States. What does it mean to recognize *property rights* in broadcast signals, independent of the copyright in the underlying content?

Consider the following hypothetical: Walter, a film producer, produces a documentary on earthquakes entitled *Quakes*. Under the terms of both domestic and international copyright law, he obtains copyright in the documentary.¹⁹ Walter then licenses the use of the documentary to XBC Inc., a private broadcasting corporation that agrees to broadcast the documentary. Under the traditional model, XBC merely acquires the right of public performance²⁰ over *Quakes* that Walter originally had (either exclusively or non-exclusively). Under a broadcasters' rights model, however, XBC would also acquire, in addition to the right it licenses from Walter, an independent set of rights over its own broadcast signals carrying *Quakes*. The regime thus effectively converts XBC's contractually ac-

18. See International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43, art. 1 [hereinafter Rome Convention].

19. See 17 U.S.C. § 102(a)(6) (2000); Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 221, art. 2(1) [hereinafter Berne Convention].

20. 17 U.S.C. § 106(4) (2000); Berne Convention, *supra* note 19, at art. 11bis.

quired right into a full-blown set of rights that arise independent of XBC's license with Walter.

Now, if DBC Inc., another broadcaster, were to intercept XBC's transmission of *Quakes* and re-broadcast it as its own, what rights would Walter and XBC have against DBC? What if Boris, a viewer, made a recording of *Quakes* from the broadcast at home and later sold copies of his recording to the public? A broadcasters' rights regime purports to deal with precisely these types of situations.

A. Origins of the Idea: The Rome Convention

At the Brussels Revision Conference of the Berne Convention, member states settled on the idea of extending copyright to performers, phonogram producers, and broadcasters.²¹ Following the conference, actual work on a new instrument came to be delegated to three international organizations—the BIRPI (predecessor to the WIPO), the ILO, and UNESCO.²² After going through several drafts, the three organizations together finally convened a Diplomatic Conference at Rome in 1961, resulting in the Rome Convention.²³

Interestingly, each of the rights protected under the Convention is derivative of traditional literary and artistic works, the subject matter of copyright.²⁴ Performers *perform* musical or dramatic works; phonogram producers are responsible for the *fixation* of musical performances; and broadcasters facilitate the public *distribution* of audiovisual works. The activities covered by the Convention are thus “related to” creative works covered by copyright, but are rarely ever directly creative themselves. They do little more than facilitate the process by which creative works are

21. See DOCUMENTS DE LA CONFÉRENCE RÉUNIE À BRUXELLES DU 5 AU 26 JUIN 1948, 425-29 (1951); MASOUEYÉ, *supra* note 9, at 8; SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND (2d ed. 2006).

22. 2 RICKETSON & GINSBURG, *supra* note 21, at 1211-12. WIPO stands for the World Intellectual Property Organization, ILO for the International Labor Organization, and UNESCO for the United Nations Educational Scientific and Cultural Organization.

23. *Id.*

24. See *id.* at 1206-7. Hence the name “neighboring” or “related” rights. It is of course open to debate as to why these rights have not formed the subject matter of traditional copyright, especially given that copyright covers a wide spectrum of property-like rights over expressive activities. One answer is that historically, in most European countries with a civil law tradition, copyright or *droit d’auteur* is restricted to authorial rights and requires the identification of a creative author for the grant of property protection. Consequently, the need emerged to move away from the traditional conception of copyright. See Rudolf Monta, *The Concept of Copyright Versus the Droit d’Auteur*, 32 S. CAL. L. REV. 177 (1959).

produced and disseminated publicly, with the obvious consequence that the traditional justifications for copyright do not automatically carry over.

The Convention clarifies that the protection accorded under it does not detract from traditional copyright protection afforded to the underlying work independently.²⁵ In relation to broadcasters' rights, it defines broadcasting as the "transmission by wireless means for public reception" of the audiovisual work,²⁶ and thus excludes from its scope transmission over wires—i.e., cable transmissions.²⁷ This is explained by the fact that cable television emerged as a commercially significant player only after the actual adoption of the treaty.

The Convention grants broadcasters the "right to authorize or prohibit" a series of activities in relation to their broadcasts.²⁸ It does not use the phrase "exclusive right" commonly used in relation to copyright holders' rights over their works.²⁹ While the element of exclusivity may be inherent in the acts of authorizing or prohibiting, the absence of any express reference to it does enable the creation of overlapping rights over the same subject matter vested in multiple parties. This is probably a recognition of the fact that broadcasts are derivative resources and that copyright holders can already exercise some of these rights under traditional copyright law.

The Convention rights include: (i) rebroadcasting the broadcasts in question; (ii) fixation of the broadcasts; (iii) reproducing the fixations so made; and (iv) communicating the broadcasts to the public, when made in a publicly accessible place.³⁰ Much like copyright, the duration of these rights is limited, but to twenty years from the year of the first broadcast.³¹

25. Rome Convention, *supra* note 18, at art. 1.

26. *Id.* at art. 3(f).

27. See 2 RICKETSON & GINSBURG, *supra* note 21, at 1216. Ricketson & Ginsburg also argue that it is likely that the protection does not extend to encrypted wireless broadcasts, given that such broadcasts are not meant for *public* reception in the traditional sense, but rather for reception by a defined *subscriber* base.

28. Rome Convention, *supra* note 18, at art. 13.

29. See, e.g., Berne Convention, *supra* note 19, at arts. 8, 9, 11, 11*bis*, 12.

30. Rome Convention, *supra* note 18, at art. 13(a)-(d). Rebroadcasting is defined in art. 3(g) to include only the simultaneous retransmission of one broadcasting organization's broadcasts by another and is therefore distinct from the right to communicate to the public. The right to communicate the broadcast to the public is also known as the "television exhibition right" and was the subject of some debate during the Diplomatic Conference. See Abraham L. Kaminstein, *Report of the Rapporteur-General*, in RECORDS OF THE DIPLOMATIC CONFERENCE ON THE INTERNATIONAL PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS, ROME, 10 TO 26 OCTOBER 1961, at 33, 49-51 (1968).

31. Rome Convention, *supra* note 18, at art. 14(c).

These rights extend not just to the ephemeral transmission, but to subsequent fixations as well.³² The broadcaster thus gets to control uses of the broadcast beyond the actual broadcast itself. Thus, in relation to our earlier hypothetical, XBC is now equipped with claims against both DBC for *communicating* its broadcasts to the public and against Boris for *fixing* the broadcast and *reproducing* the fixation. The rights thus operate to give broadcasters a cause of action against competitors (i.e., XBC against DBC) as well as a mechanism to control revenue generation from uses of their broadcasts after its transmission (i.e., XBC against Boris). This distinction is critical when examining the justification for these rights.

Perhaps most interestingly, though, the Convention avoids defining with any degree of precision what exactly a “broadcast” is. During the Diplomatic Conference, it appears that countries interpreted the term to cover transmissions by “hertzian waves or other wireless means.”³³ Nowhere during the conference did countries consider problematic the fact that broadcasts (or transmissions) derive their physical existence and commercial significance exclusively from the underlying content that remains the subject matter of copyright. Conceivably, they may have believed that the independence safeguard in Article 1 was sufficient to take care of this.³⁴

At the Rome Conference, the U.S. delegation was by far one of the largest.³⁵ The head of the delegation, Abraham Kaminstein, then head of the Copyright Office, also served as Rapporteur-General to the Conference.³⁶ The United States participated rather actively through the drafting process and at the actual conference. Specifically, in relation to the broadcasters’ rights provisions, it proposed alternative definitions of “broadcast” and “broadcasting organizations” and even proposed extending the

32. *Id.* at art. 13(b).

33. Kaminstein, *supra* note 30, at 40. This emerged consequent to an Austrian proposal that broadcasting be defined to cover transmissions over wire as well, which the Conference ultimately rejected. See *CDR/49 Austria*, in RECORDS OF THE DIPLOMATIC CONFERENCE ON THE INTERNATIONAL PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS, ROME, 10 TO 26 OCTOBER 1961, at 209 (1968).

34. See Rome Convention, *supra* note 18, at art. 1 (“Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.”).

35. Consisting of twenty members.

36. See RECORDS OF THE DIPLOMATIC CONFERENCE ON THE INTERNATIONAL PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS, ROME, 10 TO 26 OCTOBER 1961, at 28, 32 (1968).

period of protection to fifty years.³⁷ Yet when it came to actually *signing* the convention, the head of the U.S. delegation placed on record the fact that he had yet to receive authority to sign the Convention from his government and had come merely with instructions to “return with the Final act.”³⁸ To this day, the exact reasons for the United States not signing the Rome Convention (either in 1961 or since), despite its active role in the drafting process, remain a mystery.

Following the adoption of the Rome Convention, many common law countries (other than the United States) amended their copyright laws to include broadcasts within the category of protected subject matter and thereby granted broadcasters rights analogous to those given to content producers.³⁹

The Rome Convention thus laid the foundation for the idea of copyright-like protection for broadcast signals. By failing to (i) specify the nature of the resource over which the right is to be exercised; or (ii) delineate the exact manner in which the new rights would interact with traditional copyright, the Convention avoided having to get into the broader regulatory implications of the new regime.⁴⁰ More importantly, though, the regime also avoided specifying the parties against whom these rights would operate. As technology developed and new means of distribution emerged, the Convention came to be viewed as largely outdated, although its general idea of property rights in broadcasts formed the basis for a newer, more expansive proposal.

B. Open-ended Property Protection: The WIPO Broadcast Treaty

Beginning in the 1990s, the WIPO embarked on the project of updating the existing international copyright and related rights regimes to adapt them to the digital age. The WIPO Copyright Treaty (WCT) updated traditional (authorial) copyright mechanisms, while the WIPO Performances & Phonograms Treaty (WPPT) involved an analogous updating of perform-

37. *See id.* at 67, 209, 225-26 (1968).

38. *Id.* at 134. Interestingly, though, the records seem to indicate that the United States did indeed sign the Final Act, but not the actual Convention. *See id.* at 20.

39. *See, e.g.*, Copyright, Designs and Patents Act, 1988, c. 48, §§ 6, 9, 14, 16, 19, 20, 35 (U.K.); Copyright Act, 1968, c. 133, §§ 87, 91, 95, 99 (Austl.). For an overview of the Australian regime and an interpretation of the provisions involved, see *Network Ten Pty. Ltd. v. TCN Channel Nine Pty. Ltd.* (2004) 218 C.L.R. 273 (Austl.).

40. *See generally* Gillian Davies, *The Rome Convention 1961—A Brief Summary of its Development and Prospects*, 2 EUR. INTELL. PROP. REV. 154 (1979); Andre Kerever, *Should the Rome Convention Be Revised and, If So, Is This the Right Moment?*, 25 COPYRIGHT BULL. 4 (1991).

ers' and phonogram producers' rights.⁴¹ Given that the Rome Convention dealt with performers, phonogram producers, and broadcasters, when discussions on the WPPT began, many countries felt that the instrument needed to include provisions protecting the rights of broadcasters as well.⁴² However, most countries ultimately concluded that further analysis was necessary before treaty language could be proposed, and as a result, discussions on broadcasters' rights were put off until the WPPT was adopted.⁴³ With the adoption of the WPPT in 1995, the WIPO began discussions on a new instrument on broadcasters' rights in 1998 in its expert body on copyright, called the Standing Committee on Copyright and Related Rights (SCCR).⁴⁴ Initially several countries proposed including these rights as an additional protocol to the WPPT, but eventually this idea was dropped and work began on drafting an altogether independent instrument.⁴⁵

After about fifteen SCCR sessions over seven years, the WIPO General Assembly called for two further special SCCR sessions, to be followed by a Diplomatic Conference in 2007.⁴⁶ At the first special session, most countries agreed that "signal protection" remained the objective. Yet

41. For a general overview of the WCT, the WPPT, and the radical changes they introduced, see MIHÁLY FICSOR, *THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION* (2002); JÖRG REINBOHE & SILKE VON LEWINSKI, *THE WIPO TREATIES 1996: THE WIPO COPYRIGHT TREATY AND THE WIPO PERFORMANCES & PHONOGRAMS TREATY: COMMENTARY AND LEGAL ANALYSIS* (2002). For analyses of their impact on U.S. domestic law see Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUR. INTELL. PROP. REV. 236 (1999); Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 269 (1997).

42. WIPO, *Existing International, Regional and National Legislation Concerning the Protection of the Rights of Broadcasting Organizations*, art. 1, WIPO Doc. No. SCCR/1/3 (Sept. 7, 1998), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_1/sccr_1_3.pdf.

43. *Id.*

44. WIPO, *Report of the Third Session of the Standing Committee on Copyright and Related Rights*, at 17-18, WIPO Doc. SCCR/3/11 (Dec. 1, 1999).

45. *See id.*

46. *See* WIPO, *Protection of Broadcasting Organizations*, WIPO Doc. No. WIPO/GA/33/4 (Sept. 22, 2006), available at http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_33/wo_ga_33_4.doc (setting the dates for the Diplomatic Conference); Standing Committee on Copyright and Related Rights, *Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations*, SCCR/15/2 (July 31, 2006), available at http://www.wipo.int/edocs/mdocs/sccr/en/sccr_15/sccr_15_2.pdf [hereinafter *Revised Draft Basic Proposal*]. *See also* William New, *WIPO Broadcasting Treaty Advances Past Disagreements*, INTELL. PROP. WATCH, Sep. 14, 2006, <http://ip-watch.org/weblog/wp-trackback.php?p=395>.

considerable ambiguity seemed to persist over *exactly* how a signal-protection-based instrument ought to be structured.⁴⁷ By the second special session, it became clear that countries could not quite agree on the *real* objectives and scope of the treaty. Consequently, parties concluded that more time was needed before a Diplomatic Conference could be convened.⁴⁸ Yet the treaty is to remain on the WIPO's agenda and is unlikely to disappear altogether in the near future.⁴⁹

The product of these discussions, called the draft WIPO Broadcast Treaty (WBT),⁵⁰ builds on the basic framework of the Rome Convention but expands on the nature of protection afforded to broadcasters.⁵¹ One of the major changes in the Rome Convention framework that the WBT introduces is in extending protection to cablecasters as well. It retains the classic definition of broadcasting as encompassing a wireless transmission,⁵² but at the same time introduces the concept of "cablecasting," which refers specifically to wire transmissions.⁵³ This is an obvious recognition of the emergence of cable TV as a major player in the television industry and the perceived need for analogous protection in this segment.

47. See Int'l Ctr. for Trade & Sustainable Dev., *Governments Remain Divided on WIPO Broadcast Treaty*, BRIDGES: WEEKLY, Jan. 24, 2007, at 4, available at <http://www.ictsd.org/weekly/07-01-24/BRIDGESWeekly11-02.pdf>; William New, *Questions Loom for WIPO Broadcasting Negotiation*, INTELL. PROP. WATCH, Jan. 23, 2007, http://www.ip-watch.org/weblog/index.php?p=511&res=1024_ff&print=0.

48. See WIPO, CONCLUSIONS OF THE SECOND SPECIAL SESSION OF THE SCCR ON THE PROTECTION OF BROADCASTING ORGANIZATIONS (2007).

49. *Id.* at 2.

50. It is worth mentioning that during discussions, more than one draft proposal was considered. The final official version that incorporated them all was the one of Feb. 8, 2006. See *Revised Draft Basic Proposal*, *supra* note 46. During the special sessions of the SCCR, however, the Chairman was entrusted with the responsibility of modifying this version informally, in an attempt to generate consensus among countries. The version that resulted from this came to be described as the "non-paper" version of the treaty. Given its unofficial status, the Revised Draft Basic Proposal continued to form the baseline for the negotiations. See WIPO, *supra* note 48. Where the non-paper version introduced significant changes to the treaty's ideas that were noteworthy, special mention is made in this Article of it.

51. For an overview of the scheme in very general detail, see MEGUMI OGAWA, PROTECTION OF BROADCASTERS' RIGHTS 73-113 (2006).

52. Standing Committee on Copyright and Related Rights, *Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations*, art. 5(a), SCCR/15/2 (July 31, 2006) [hereinafter *WIPO Broadcast Treaty*], available at http://www.wipo.int/edocs/mdocs/sccr/en/sccr_15/sccr_15_2.pdf.

53. *WIPO Broadcast Treaty*, *supra* note 52, at art. 5(b). It is interesting to note that the definitions of both broadcasting and cablecasting exclude the concept of webcasting—the transmission of signals over computer networks such as the internet—from their coverage.

Protection under the treaty is restricted to broadcasting and cablecasting *organizations*—defined as entities that take the initiative and have the responsibility for the transmission, assembly, and scheduling of content.⁵⁴ Thus, *individuals* engaged in the same activities are not entitled to the benefits of the treaty.

Unlike the Rome Convention, the WBT explicitly defines its protectable subject matter. It provides in no uncertain terms that protection “extends only to signals” used for transmission and not to the underlying content that they carry.⁵⁵ The WBT goes beyond the Rome Convention in that it grants broadcasters and cablecasters a set of seven expansive “exclusive rights” in relation to their transmission signals.⁵⁶ These are the rights to authorize:

- 1) retransmission, by any means, of their broadcasts;⁵⁷
- 2) communication to the public of their broadcasts;⁵⁸
- 3) fixations of their signals;⁵⁹
- 4) reproduction (direct or indirect) of the fixations;⁶⁰
- 5) distribution of the original and copies of the fixations;⁶¹
- 6) transmission to the public of the broadcasts following fixation;⁶² and
- 7) making available to the public of the fixations through broadcasts.⁶³

54. *Id.* at arts. 5(c) & 5(d). See also *Revised Draft Basic Proposal*, *supra* note 46, at 26-27.

55. *WIPO Broadcast Treaty*, *supra* note 52, at art. 6(1).

56. The non-paper of April 20, 2007 sought to move away from enumerating these rights individually, providing instead that broadcasters were to have the exclusive right to authorize the “retransmission of their broadcasts” and “deferred transmission” of fixed broadcasts. It omitted the fixation rights of the original proposal. However, given that fixation was protected under the Rome Convention, *see supra* note 30, this omission proved to be unacceptable, with many countries viewing it as doctrinally retrograde. See WIPO, *Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations*, art. 7, WIPO Doc. No. SCCR/S1/WWW[75352] (Apr. 20, 2007), available at http://www.wipo.int/edocs/mdocs/sccr/en/sccr_s1/sccr_s1_www_75352.doc.

57. *WIPO Broadcast Treaty*, *supra* note 52, at art. 9.

58. *Id.* at art. 10.

59. *Id.* at art. 11.

60. *Id.* at art. 12.

61. *Id.* at art. 13.

62. *Id.* at art. 14.

Together, these seven rights would give broadcasters and cablecasters near-complete control over the use and fixation of their transmission signals. In addition, the WBT mandates that countries recognize technological protection measures and grant rights-holders adequate legal remedies to enforce them.⁶⁴ It requires countries to create a cause of action against any person who circumvents a technological protection measure that prevents the access to and copying of broadcasters' signals.⁶⁵ From the structure of the treaty and the inclusion of the technological protection measures mandate, it is abundantly clear that the rights are meant to operate both against competitors *and consumers*.

While the treaty does not explicitly say so, the default assumption appears to be that these rights are to operate in rem, along the lines of traditional property rights.⁶⁶ Also, the theme of "anti-piracy" is a recurrent one throughout the treaty.⁶⁷ Furthermore, the rights would persist for a period of fifty years after the broadcast.⁶⁸

Going back then to our earlier hypothetical, XBC Inc., under this new regime, would have a larger bundle of rights to exercise against DBC and Boris. In addition to being able to preclude Boris from fixing its signals, XBC now obtains absolute control over the uses of the recording of *Quakes* from its broadcast. If XBC were to encrypt its transmission using digital technology, and Boris were to decrypt the transmission to view *Quakes* without XBC's authorization, XBC could then initiate a circumvention action against Boris. Further, if Boris were to distribute his recording of *Quakes* over the internet, this too would give XBC a cause of

63. *Id.* at art. 15.

64. *Id.* at art. 19.

65. For an overview of the WCT and WPPT's technical protection measures, see Dean S. Marks & Bruce H. Turnbull, *Technical Protection Measures: The Intersection of Technology, Law and Commercial Licenses*, WIPO Doc. No. WCT-WPPT/IMP/3 (Dec. 3, 1999). For a general overview of their implementation under U.S. and E.U. law, see Terese Foged, *U.S. v. E.U. Anti-Circumvention Legislation: Preserving the Public's Privileges in the Digital Age?*, 24 EUR. INTELL. PROP. REV. 525 (2002).

66. The Revised Draft Proposal provision on limitations and exceptions to the rights granted contains four alternatives, each with varying degrees of specificity. Three out of the four proposals contain an express exception for "private use"—thereby making it clear that individual users making unauthorized use of the broadcast signals would ordinarily be liable under the treaty. See *Revised Draft Basic Proposal*, *supra* note 46, at 65-70. For more discussion of in rem rights, see also *infra* Part III.

67. See *WIPO Broadcast Treaty*, *supra* note 52, Preamble (noting the "anti-piracy" function of the treaty). See also DARRELL PANETHIERE, *THE PERSISTENCE OF PIRACY: CONSEQUENCES FOR CREATIVITY, FOR CULTURE, AND FOR SUSTAINABLE DEVELOPMENT* 17-18 (2005), <http://unesdoc.unesco.org/images/0013/001396/139651e.pdf>.

68. *WIPO Broadcast Treaty*, *supra* note 52, at art. 18.

action against him. Thus XBC is given near-absolute control over its transmission of *Quakes*.

Now assume CC, a cablecaster, enters the picture and provides its own content to its subscribers. In addition, CC records XBC's broadcast and retransmits it to its own subscribers at a later date. Under the new regime, CC is given property rights over its transmissions analogous to XBC's rights over its transmission of *Quakes*. XBC now also has a claim against CC's recording and retransmission of its broadcast. This latter claim assumes special relevance in the U.S. broadcasting context, as will be seen later.

The WBT thus seeks to create a full-blown property rights regime in broadcast and cable transmission signals. Coupled with its anti-circumvention mandate, it enables broadcasters and cable operators to exercise a significant amount of control over the use of their signals.

C. Broadcasters' Rights: From Contract to Property?

Property rights can and often do minimize transaction costs.⁶⁹ The allocation of an in rem exclusionary entitlement ex ante reduces the need to contractually acquire it. Contractual acquisitions entail significant search, information, and negotiation costs and involve uncertainties associated with holdouts and cognitive biases.⁷⁰ By ensuring an optimal allocation up front and thus obviating the need for individual contractual transfers, property rights can enhance overall efficiency. It might therefore be argued that broadcasters' rights—as property rights—achieve precisely this result.

In this understanding, broadcasters' rights do little more than convert rights that a broadcaster might have contractually obtained from the original copyright holder into a property right. By vesting them in the broad-

69. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY* LAW 12-13 (2003) ("Reducing transaction costs is the very *raison d'être* of property rights."). For some of the seminal literature seeking to establish this correlation see YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* (2d ed. 1997); Armen A. Alchian, *Some Economics of Property Rights*, 30 *IL POLITICO* 816 (1965); Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AMER. ECON. REV.* 347 (1967); Harold Demsetz, *The Exchange and Enforcement of Property Rights*, 7 *J.L. & ECON.* 11 (1964); Eirik G. Furubotn & Svetoza Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 *J. ECON. LIT.* 1137 (1972); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1 (2000).

70. See generally Lloyd Cohen, *Holdouts and Free Riders*, 20 *J. LEGAL STUD.* 351 (1991); Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 *J.L. & ECON.* 553 (1993).

caster *ex ante*, this regime obviates the need for the broadcaster to convince the content producer to either (i) sue for an infringement when the broadcaster lacks standing; or (ii) transfer to it the entire copyright in the work.⁷¹ It thus gives XBC, a non-exclusive licensee of the “right to broadcast” *Quakes* from Walter, independent standing to sue both DBC and Boris. This seemingly represents an obvious efficiency gain. On deeper analysis, however, this view overlooks several significant elements.

While copyright law recognizes the divisibility of rights during a transfer, it continues to draw a clear distinction between exclusive and non-exclusive licenses.⁷² Exclusive licenses are treated as transfers of the copyright, while non-exclusive licenses are not.⁷³ Therefore, only an exclusive license would give a licensee an independent right to sue for infringement. Yet, even in relation to exclusive licenses, the licensee’s standing is limited by the scope of the license.⁷⁴ Thus, in our hypothetical, if XBC were to obtain a non-exclusive license from Walter to “broadcast *Quakes* nationally over the air,” it would lack independent standing to sue for copyright infringement.⁷⁵ Now if the license were *exclusive*, XBC *would* have standing to sue. Even with an exclusive license, though, it would have an action only against DBC, a broadcaster, and not against Boris, a copier and distributor, unless Walter transferred to XBC the exclusive rights to copy and distribute *Quakes*. This distinction remains crucial.

71. This analysis assumes, of course, that a broadcaster attempts to sue on either a contract or property theory. A third alternative that may be invoked involves tort law and in particular the claim of “tortious interference with a contract.” The tort has both contract and property overtones, but entails a strong intention/recklessness requirement that might be hard to establish in simple instances of infringement. See Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1 (1987); Benjamin L. Fine, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116 (1983); Mark P. Gergen, *Tortious Interference: How it is Engulfing Commercial Law, Why This is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175 (1996).

72. For an overview of the doctrine of indivisibility, contained in the Copyright Act of 1909, see 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 10.01 (2006); Robert A. Gorman, *An Overview of the Copyright Act of 1976*, 126 U. PA. L. REV. 856, 860 (1978); Leon Kaplan, *Artistic and Literary Property (Including Copyright) as Security: Problems Facing the Lender*, 19 LAW & CONTEMP. PROBS. 254, 265 n.51 (1954).

73. See 17 U.S.C. § 201(d)(2) (2000); 3 NIMMER, *supra* note 72, at § 10.02[A].

74. 3 NIMMER, *supra* note 72, at § 10.02[B][1] (noting how this amounts to a limited retention of the indivisibility rule).

75. *Id.* & n.16.

Additionally, the law forbids a transfer of the mere right to sue, independent of a transfer of the underlying right.⁷⁶ The Copyright Act allows for a transfer only of the exclusive rights it confers on the owner, and the right to commence an action for infringement is treated as an “entitlement” rather than an exclusive right.⁷⁷ Since a non-exclusive license is not treated as a transfer, anything short of an exclusive license to copy and distribute the work would render unenforceable an independent transfer of the right to sue for these actions.⁷⁸ In other words, barring a complete transfer of the rights to broadcast, copy, and distribute, XBC would have no action against DBC *or* Boris under copyright law.

A regime of broadcasters’ full-blown property rights would now grant the broadcaster independent causes of action against other broadcasters and individuals fixing its broadcasts and using them post-fixation. In spite of the broadcaster’s need for a license from the copyright holder (to avoid copyright infringement⁷⁹), the nature or existence of this license and its scope would now have *no bearing whatsoever* on the broadcaster’s ability to commence an action for use of the broadcast and its underlying content.⁸⁰

To be sure, each of the doctrinal subtleties outlined has a rational basis. To grant non-exclusive licensees the right to sue independently would create multiple infringement actions. Further, the very idea of a non-

76. See *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881 (9th Cir. 2005) (examining the statutory language, legislative history, and analogies to patent law and concluding that the mere right to sue for copyright infringement cannot be assigned); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27 (2d Cir. 1982). Indeed, this principle seems to be fairly well established in the law of patents, having been affirmed by the Supreme Court on more than one occasion. See *Indep. Wireless Tel. Co. v. Radio Corp. of Am.*, 269 U.S. 459 (1926); *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 35-36 (1923).

77. See 17 U.S.C. § 501(b) (2000). For a comprehensive overview of the rules of standing in intellectual property, see Roger D. Blair & Thomas F. Cotter, *The Elusive Logic of Standing Doctrine in Intellectual Property Law*, 74 TUL. L. REV. 1323 (2000).

78. See 3 NIMMER, *supra* note 72, at § 12.02 (“An exclusive licensee may not sue for infringement of rights as to which he is not licensed, even if the subject matter of the infringement is the work as to which he is a licensee.”).

79. See 17 U.S.C. § 106(4) (2000 & Supp. IV 2004).

80. It might of course be argued that Article 1(2) of the WBT, which specifically provides that the treaty is in no way meant to prejudice copyright in the underlying content, would require such a correspondence between the exercise of rights and the underlying license. While such a correspondence might be necessary for the actual *exercise* of the exclusive right (i.e., to actually distribute reproductions of the fixation) to avoid *infringing* the underlying copyright, it certainly would not be necessary for the exercise of the right to initiate an action, since that would in no way interfere with the content holder’s rights. See *WIPO Broadcast Treaty*, *supra* note 52, at art. 1(2).

exclusive license incorporates the basic understanding that the value of the license lies in its enabling the use of the work in and of itself, not the *exclusive* or even *limited* use of the work (the copyright holder being free to create infinite non-exclusive licenses), but by the *use* alone.

The efficiency argument ignores altogether the reality that broadcasters' rights go well beyond just granting broadcasters the right to sue for infringement of any right they might have contractually obtained. As noted earlier, broadcasters' rights extend beyond the right to broadcast to post-fixation actions.⁸¹ In other words, they replicate several of the copyright holder's exclusive privileges, but through the broadcast. Given the inseparability of the signal from its underlying content, these in turn translate into rights over the content. Thus, the broadcaster's exclusive right to authorize the "reproduction of fixations"⁸² means little more than the right to authorize the reproduction of the content of the broadcast, a right that is also vested in the content producer.⁸³ A user reproducing content obtained via a broadcast is now subject to two potential lawsuits—one from the copyright holder, and another from the broadcaster. Whereas avoiding multiple lawsuits remains central to the rules surrounding copyright licensing, the broadcasters' rights regime *is directed* at creating an additional right to sue.

Broadcasters' rights thus do much more than just *move* the entitlement from the content producer to the broadcaster, they *replicate* it. A mere duplication of the gate-keeping function might in some situations work to create what economists call a "polyarchival" or decentralized project structure.⁸⁴ Central to realizing the efficiency gains from such a structure is the need for the decision-making process to be substantively decentralized *as a whole*.⁸⁵ In other words, if an authorization from the broadcaster were to alleviate the need for a similar or equivalent authorization from

81. See *supra* notes 55-65 and accompanying text.

82. *WIPO Broadcast Treaty*, *supra* note 52, at art. 13.

83. See 17 U.S.C. § 106(1) (2000).

84. See Patrick Bolton & Joseph Farrell, *Decentralization, Duplication, and Delay*, 98 J. POL. ECON. 803 (1990); Raaj Kumar Sah & Joseph E. Stiglitz, *The Architecture of Economic Systems: Hierarchies and Polyarchies*, 76 AM. ECON. REV. 716 (1986). For further literature focusing on this distinction, see Ruth Ben-Yashar & Shmuel Nitzan, *The Robustness of Optimal Organizational Architectures: A Note on Hierarchies and Polyarchies*, 18 SOC. CHOICE & WELFARE 155 (2004); Thomas Gehrig, Pierre Regibeau & Kate Rockett, *Project Evaluation and Organizational Form*, 5 REV. ECON. DESIGN 177 (2004); and Raaj Kumar Sah & Joseph E. Stiglitz, *Committees, Hierarchies, and Polyarchies*, 98 ECON. J. 451 (1988).

85. See Tim Wu, *Intellectual Property, Innovation and Decentralized Decisions*, 92 VA. L. REV. 123, 129 (2006) ("[A]ny single actor's approval of a project is sufficient").

the content producer and vice versa, such that consent from either would immunize a user from liability (under both regimes), the decision-making structure then becomes truly polyarchival (i.e., with multiple gate-keepers, *any* of whom are sufficient for entry/authorization). Broadcasters' rights consciously reject such a model (of decentralized authorization), however, in the legitimate belief that so doing would undermine the content producers' contribution, which is central to the entire creative process.⁸⁶ Thus broadcasters' rights contemplate a structure that is distinctly hierarchical, detracting from the possibility of any structural efficiency gains.

The efficiency argument thus fails on three fronts. First, broadcasters' rights go far beyond the ideal of minimizing broadcasters' costs of contracting for similar rights, simply because broadcasters could not have contracted for such rights to begin with (except by acquiring the copyright in its entirety). Second, they do not effect a mere reallocation of the entitlement to sue for infringement. Instead, they replicate the entitlement and consciously contemplate a multiplicity of lawsuits for a single act of infringement. Third, the efficiency argument ignores the fact that transaction costs exist on both sides of the producer-consumer equation.⁸⁷ Even if the regime minimized broadcasters' transaction costs, it multiplies users' costs by now requiring them to navigate through an additional layer of liability.

D. Investment Protection & Piracy Prevention as a Rationale

Attempts to develop coherent theoretical justifications for copyright abound in the literature.⁸⁸ They range from the utilitarian or law-and-economics-based explanations to the more deontological ones based on

86. See Rome Convention, *supra* note 18, at art. 1; *WIPO Broadcast Treaty*, *supra* note 52, at art 1. See also *supra* text accompanying note 34.

87. In many respects this tracks the problem of an anticommons, identified by Michael Heller. Here, the creation of additional layers of property rights increases the transaction costs of using the underlying resources, thereby deterring actual use and resulting in an altogether different inefficiency. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1 (2000). The argument has been further extended to the world of intangibles. See Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998).

88. See, e.g., Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFF. 31 (1989); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996); Samuel E. Trosow, *The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital*, 16 CANADIAN J.L. & JURISPRUDENCE 217 (2003).

personality.⁸⁹ While none has proven to be unproblematic altogether, the utilitarian framework appears to be dominant in the traditional conception of copyright.⁹⁰ In this understanding, property rights are granted to authors of literary and artistic works as an ex ante incentive for their creativity.⁹¹

Broadcasters' rights and other related or "neighboring" rights represent an altogether different story because broadcasters and cablecasters never directly engage in any creative activity, in the traditional sense of the term.⁹² They nevertheless do contribute to the dissemination of creative works through their distribution networks. Hence, their rights remain conceptually related to traditional copyright. Broadcasters' rights, however, seemingly derive from a different type of utilitarian rationale—one related to their investment of time, energy, and resources.⁹³ As the WIPO Secretariat notes:

Broadcasting organizations have been granted protection for the result of their investment, their entrepreneurial efforts and their contribution to the diffusion of culture and their public information service. Broadcasting organizations are entities that take the

89. For the utilitarian approaches to the topic, see Deborah Chalsty, *The Economic Logic of Copyright*, in *THE POLITICAL ECONOMY OF LEGAL INFORMATION: THE NEW LANDSCAPE* 145 (Samuel E. Trosow ed., 1999); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 *AMER. ECON. REV.* 421 (1966); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 *J. LEGAL STUD.* 325 (1989). For the more deontological philosophical justifications, see Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 *TULANE L. REV.* 991 (1990); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287 (1988); Jeremy A. Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 *CHI.-KENT L. REV.* 841 (1968).

90. Part of this justification, at least in the context of the United States, derives from the fact that copyright derives from the Constitution, which in Article I, Section 8, provides: "To 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." This clearly is a utilitarian approach to the subject.

91. See Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 *U. CHI. L. REV.* 129 (2004).

92. 2 RICKETSON & GINSBURG, *supra* note 21, at 1212.

93. See Werner Rumphorst, *Neighbouring Rights Protection of Broadcasting Organizations*, 14 *EUR. INTELL. PROP. REV.* 339, 340 (1992); Werner Rumphorst, *The Broadcasters' Neighbouring Right: Impossible to Understand?*, *COPYRIGHT BULL.*, July-Sept. 2006, at 1, 3, <http://unesdoc.unesco.org/images/0014/001477/147736e.pdf> ("The broadcasters' neighbouring right is there to protect the broadcasters' entrepreneurial efforts and investments in the form in which they materialize as an end product from their activity, viz. the broadcasts.").

financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content.⁹⁴

The rationale thus appears to be that since broadcasters invest a significant amount of time and resources that indirectly contribute to the creative process, they ought to be granted property rights that enable them to control their investment. In a sense, this rationale is Lockean, yet significantly more consequentialist.⁹⁵

But why might such control be *necessary* at all? Surely not all investments require control as a quid pro quo. This takes us to the other side of the investment protection rationale: the piracy argument—that the unauthorized use of broadcasters' signals results in a diminution of their revenue. The UNESCO, in its discussion of the treaty, seems to allude to the legitimacy of this justification and its connection to the investment rationale, in observing that protection is intended to "prevent third parties from using these [signals] without . . . authorization" which could result in "economic losses" and that the rights involved are a recognition of the "investments [broadcasters] make . . . that benefit the eventual consumers."⁹⁶

The piracy argument is one that has been made ever since discussions on a new instrument began at the WIPO.⁹⁷ Broadcasters argue that with

94. WIPO, *Protection of Broadcasting Organizations: Terms and Concepts*, WIPO Doc. No. SCCR/8/INF/1 (Aug. 16, 2002), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_8/sccr_8_inf_1.pdf.

95. The Lockean argument is, of course, one from labor-desert, that an individual's expenditure of labor and effort entitles him or her to an exclusionary right over the product of those labors. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS* BY PETER LASLETT, §§ 25-51, at 302-51 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690). The Lockean theory has been applied rather extensively in the context of intellectual property, especially copyright. See, e.g., PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 41-72 (1996); Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 21 (2005); Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75 (2004); Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65 (1997). For an interesting revisionist account of the Lockean theory, applied in the context of copyright law, see Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891 (2006).

96. *Protection of the Rights of Broadcasting Organizations*, para. 6, UNESCO Doc. No. 171 EX/59 (Apr. 8, 2005), available at <http://unesdoc.unesco.org/images/0013/001390/139057e.pdf>.

97. See WIPO, *Agenda Item 4: Protection of the Rights of Broadcasting Organizations, Submissions Received from Non-Governmental Organizations by March 31, 1999*, at 8, WIPO Doc. No. SCCR/2/6 (Apr. 7, 1999), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_2/sccr_2_6.pdf ("Comprehensively updated international pro-

the advent of new technologies of digital copying, unauthorized interception, fixation, and retransmission of broadcasts has become rampant.⁹⁸ Studies undertaken by broadcasters' collectives to support this argument show that there was a 150% increase in television piracy in 2004; that 7% of all broadcast piracy occurred in the United States; and that revenue losses from signal theft globally amounted to approximately \$2 billion⁹⁹. The emergence of the internet as a distribution medium and its transnational nature, broadcasters claim, further diminishes their revenues.¹⁰⁰ Broadcasters often use the *iCrave TV* controversy that erupted in 2000 to illustrate the threat posed by the internet to their revenues.

The *iCrave TV* episode involved a Canadian entrepreneur capturing over-the-air broadcast signals from the United States and Canada and streaming them digitally over the internet, enabling others to view television broadcasts on their computers, for a subscription fee.¹⁰¹ After much convincing, U.S. broadcasters managed to get copyright owners to initiate an action against him for copyright infringement, on the premise that since users in the United States could access the service, he was infringing their rights in the United States. They eventually succeeded in getting an in-

tection of the broadcasters' neighboring right is the only way to ensure the possibility of swift and effective action against piracy of broadcasts."); WIPO, *Protection of Broadcasting Organizations*, at 15, WIPO Doc. No. SCCR/7/8 (Apr. 4, 2002), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_7/sccr_7_8.pdf. See also Viviana Munoz Tellez & Andrew Chege Waitara, *A Development Analysis of the Proposed WIPO Treaty on the Protection of Broadcasting and Cablecasting Organisation* 26-31 (South Ctr. Research Paper No. 9, Jan. 2007), available at <http://www.southcentre.org/publications/researchpapers/ResearchPapers9.pdf> (providing an overview of the piracy rationale).

98. See sources cited *supra* note 97.

99. These figures are from a briefing note by internet monitoring company *Envisional* in 2005, entitled *TV Piracy*. Broadcast unions such as the European Broadcasting Union (EBU) relied upon the figures extensively to establish an increase in piracy rates worldwide. See Will Sturgeon, *24 Reasons Why TV Piracy is Soaring*, WEBWATCH, Feb. 17, 2005, <http://networks.silicon.com/webwatch/0,39024667,39127919,00.htm>; Daisy Whitney, *Spiraling Piracy Threatens TV*, TVWEEK, Feb. 21, 2005, <http://www.tvweek.com/article.cms?articleId=27301>.

100. EUROPEAN BROADCAST UNION, SOME RECENT EXAMPLES OF BROADCAST PIRACY (2005), available at www.ebu.ch/CMSImages/en/leg_p_pressreports_piracy_120905_tcm6-42762.pdf (last visited Nov. 13, 2006).

101. See John Borland, *Broadcasters Win Battle Against iCraveTV.com*, CNET NEWS.COM, Jan. 28, 2000, <http://news.com.com/2100-1033-236255.html>; John Townley, *Movie, Broadcasting Companies Sue iCraveTV*, INTERNETNEWS.COM, Jan. 21, 2000, <http://www.internetnews.com/bus-news/article.php/291131>.

junction against him.¹⁰² However, the case is often used to illustrate the ease with which broadcast signals can be converted into digital format and retransmitted over global networks, and broadcasters' dependence on content owners to commence an action to stop the retransmitter—the alleged pirate.

The anti-piracy argument, however, raises an important conceptual issue that has significant practical implications. This relates to the distinction that is rarely ever made between revenue losses (strictly speaking) and lost revenue streams. A revenue loss from piracy may be said to occur when individuals or organizations deny broadcasters a source of revenue that they *would have had*, in the normal scheme of things. A failed revenue stream, on the other hand, represents the broadcaster being denied a source of revenue that it would not have ordinarily had, except in a hypothetical or theoretical sense. Take the *iCrave TV* episode described above. Broadcasters at the time were not yet making their content available online. Although a broadcaster might indeed argue that online broadcasting was the next natural step, this argument is at best hypothetical. The distinction is thus one of appropriate baselines to ascertain the status quo (and thereby losses). Broadcasters argue that a world with the entitlement is the status quo and anything short of it is a *loss*, which ignores the nuance that the very existence of the entitlement is at issue.¹⁰³

Computations of piracy-related losses do not seem to make this distinction.¹⁰⁴ They operate on the assumption that a diminution of any form of actual and potential revenue resulting from the use of broadcasters' signals represents a piracy-related loss. This distinction is relevant when it comes to the piracy-related justification for property rights in broadcast signals, for it is not clear that the losses identified merit classification as piracy-related when broadcasters' entitlement to them is unclear a priori.

Broadcasters' open-ended definition of piracy as including all revenue diminutions assumes that broadcasters are entitled to internalize *all* the positive externalities associated with their investment, at least insofar as these externalities are reducible to sources of revenue.¹⁰⁵ Their conception

102. *Nat'l Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. 2000).

103. For more on the use of baselines to determine harm and losses in intellectual property contexts, see Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449 (1992).

104. See *supra* note 99 and accompanying text.

105. For a theoretical exposition of this argument and its application in the property-intellectual property debate, see Mark A. Lemley, *Property, Intellectual Property, and Free Riding* 83 TEX. L. REV. 1031 (2005). See also Mark A. Lemley, *The Economics of*

of the property right is tied intrinsically to their understanding of piracy.¹⁰⁶ Thus, if piracy were understood as being limited to revenue losses, claims should be limited to unfair competition, restricting competitors from free-riding on the first-mover's efforts when such free-riding leads to a direct loss (for example, XBC against DBC). On the other hand, if piracy encompasses failed revenue streams as well, an open-ended property right becomes necessary. All of this of course depends on who broadcasters characterize as "pirates," and given the general tendency to include in this category any person making an unauthorized use of the broadcast signal, the usage tends to be in the direction of the widest possible interpretation.

Piracy losses ought to be understood as revenue losses resulting from free-riding on the efforts of an earlier entrant into the market and as excluding losses resulting from another party's identification of a new revenue stream, even if the new stream remains in some way indirectly connected to the established one. Discussions of signal piracy do not, at present, reflect this distinction. Indeed, a few years before discussions commenced at the WIPO, a prominent member of the European Broadcasting Union (EBU) observed that private copying of broadcasts by individuals "constitute[d] unjust enrichment on the part of the private individuals carrying out such recording [since] there is a corresponding actual loss or loss of opportunity to . . . license its protected material"¹⁰⁷ The tendency to equate revenue losses with lost revenue streams thus dominates the debate.

This analysis logically leads to a case that has become infamous in the information property context: *International News Service v. Associated Press*.¹⁰⁸ For quite some time now, commentators have faulted the Court's analysis of property in news there.¹⁰⁹ Where the *International News Ser-*

Improvement in Intellectual Property Law, 75 TEX. L. REV. 989 (1997); Mark A. Lemley & Brett M. Frischmann, *Spillovers*, 107 COLUM. L. REV. 257 (2007).

106. See generally Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT'L & COMP. L. REV. 127 (2003).

107. Moira Burnett, *Thirty-Four Years On: High Time for Filling the Gaps in Broadcasters' Protection*, 6 ENT. L. REV. 39, 40 (1995).

108. 248 U.S. 215 (1918).

109. See, e.g., Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411 (1983); Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992); Dennis S. Karjala, *Misappropriation as a Third Intellectual Property Paradigm*, 94 COLUM. L. REV. 2594 (1994); Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401 (1998); Richard A. Posner, *Misappropriation: A Dirge*, 40

vice holding might yet be useful to the present analysis is in the Court's attempt to understand excludability as being limited in scope to losses arising out of direct free-riding. In his majority opinion, Justice Pitney granted the plaintiffs a limited property interest in their news stories—one that would operate only against competitors, was time-specific, and would come into existence only when there was actual *ex post* free-riding.¹¹⁰ At the root of the Court's reasoning appears to have been a concern that one party was profiting off of the investments of another, a form of unfair competition. The Court thus recognized that an ordinary revenue loss was unfair, whereas losing a new revenue stream was not. If an individual had come along and found a way to distribute news stories freely using a novel mechanism—on kites, for example—the Court would probably have disallowed the plaintiff's claim, even though in an ideal world the plaintiff might have seen a new revenue stream in the distribution and preferred to control it.¹¹¹

Perhaps all of this piracy talk, which derives from the rhetorical force of identifying a "pirate," is one-sided. In other words, a pirate is but an individual who makes unauthorized use of another's property rights, and consequently we ought to first identify the owner of the property right before we embark on a discussion about piracy and related losses. While this would certainly be the case for real and personal property, it is not so for intangibles.¹¹² Real and personal property are at all material times endowed with the characteristic of ownability, by virtue of their being tangible (or a *res*). Conversely, an intangible is converted into an ownable *res* only through a legal fiction, and its independent legal existence as a *res* is consequent upon the identification of rights individuals have in relation to it.¹¹³ Thus, information becomes property only when the legal system accords individuals exclusionary entitlements over it.¹¹⁴ The same is true for

HOUS. L. REV. 621 (2003); Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property*, 75 U. MINN. L. REV. 875 (1991).

110. *Int'l News Serv.*, 248 U.S. at 241-42.

111. *See id.* at 239 ("The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted.").

112. *See* LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND CULTURE OF CREATIVITY* 53-84 (2005) (providing an exhaustive overview of the genesis of the term in the context of intellectual property discourses).

113. *See* Stephen L. Carter, *Owning What Doesn't Exist*, 13 HARV. J.L. & PUB. POL'Y 99 (1990).

114. *But see* Frank Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990); Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803 (2003). Another way of *owning* information, so to speak, is through mechanisms of secrecy—and here secrecy converts the element of *de*

broadcast signals that are equally intangible. Consequently, it becomes critical to identify the reasons upon which the justification for a property regime depends before bestowing proprietary status upon broadcast signals. Since the primary justification for the property regime is the existence of revenue losses from piracy, we need to begin from the piracy argument.

Undoubtedly, the main factor driving the broadcasters' push for extended property rights in their signals is the emergence of digital copying and with it the internet as a global medium of communication.¹¹⁵ In the internet, they see a huge market from which to eventually generate significant revenue. At the same time, they see it as a major source of potential competition for their analog revenues—especially when it involves their own signals.¹¹⁶ Creating a property regime over their signal *and its fixation* enables them to control *all uses* of the signal—in both the analog and digital worlds. This in turn ensures that until they decide to enter the world of internet broadcasts (or webcasts) themselves, they get to extend their dominance in the analog world to the digital one.¹¹⁷

Equipping broadcasters with broad exclusionary control over their broadcast signals, which in turn derive their existence from other sources, is bound to upset the equilibrium that currently exists between different players in the television broadcasting industry. It remains to be seen what the nature and consequences of this are likely to be.

In sum, the WBT would, if implemented, give broadcasters a set of independent exclusionary rights over their broadcast signals, many of which replicate copyright owners' control over the underlying content. Rather than move the entitlement from the content producer (i.e., copyright owner) to the broadcaster, the WBT *replicates* it, creating a system of dual liability. The WBT's sole justification seemingly derives from an open-ended view of piracy—one that treats any inability to internalize benefits

jure exclusivity into a de facto one. Secrecy arguments are made most commonly in the context of indigenous cultural property. See Michael F. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 199 (1998).

115. This is most apparent in the preamble to the WBT, which explicitly recognizes the threat posed by new technologies that have given rise to new opportunities for unauthorized use of broadcasts. See *WIPO Broadcast Treaty*, *supra* note 52, Preamble.

116. See *supra* text accompanying notes 96-101.

117. For a review of similar rationales in the context of Australia and Japan, see OGAWA, *supra* note 51, at 167-76. It is interesting to note that Australia introduced broadcasters' rights into its copyright legislation pursuant to a Free Trade Agreement (FTA) entered into with the United States in 2000, in order to provide protection for U.S. broadcasters. *Id.* at 122 n.15.

associated with the broadcast as a loss that detracts from broadcasters' legitimate entitlement.

III. ATTENUATED EXCLUSIONARY RIGHTS IN THE TELEVISION INDUSTRY

Part II examined the basic structure of the property rights regime for which broadcasters have been lobbying and which countries including the United States seem ready to adopt at the WIPO. This Part examines the current regime in place in the United States television broadcast industry and the nature of interactions that exist between its different players. The basis of the regulatory regime here is a balanced system of what I call *attenuated exclusionary rights*, vested in each of the primary actors. These rights together form a regime that creates a level playing field between different interests in the industry, and at the same time aims to preserve the ideal of the public interest.

A word first about the idea of "attenuated rights." Traditionally, one of the characteristic differences between property and contractual rights is that property encompasses rights that operate in rem against the world at large, whereas contractual rights only ever operate inter se between contracting parties.¹¹⁸ The in rem/in personam distinction is often taken as the basis for characterizing certain rights as property rights or otherwise.¹¹⁹ The regimes that exist in the current television industry are not in rem in the absolute or traditional sense, but are restricted to the existing industry players and are thus significantly more nuanced than the traditional ideal of exclusionary property, which tends to ignore the identity of a potential transgressor of the right.¹²⁰ In this sense, the existing property bundle remains *limited*. However, the concept of "limited rights" is today associated almost entirely with the intellectual property discourse and its emphasis on *temporally limited* rights.¹²¹ The word "attenuated" is therefore employed to highlight the fact that the limits here are *operational* rather than temporal. Yet the rights remain in rem—in that they come into existence independent of a contract or other ex ante interaction between the parties and

118. See generally Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001). See also Steven N.S. Cheung, *The Structure of a Contract and the Theory of a Non-exclusive Resource*, 13 J.L. & ECON. 49 (1970); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

119. See Merrill & Smith, *supra* note 118.

120. See J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 128 (1997).

121. In the context of the U.S., at least, this derives from the phrase "limited times" as used in the Copyright Clause of the Constitution. U.S. CONST. art. I, § 8, cl. 8.

are to that extent independent of the parties' identities. Hence the phrase "attenuated exclusionary rights."

A. A Structural Overview of the U.S. Television Industry

1. *The Basic Structure*

Apart from audiences (who in some sense remain passive) and advertisers, the U.S. television industry is today characterized by the existence of four primary players—program producers, networks, television stations, and cable companies.¹²² Cable television emerged as a commercial phenomenon only in the early 1960s, and to a large extent required the introduction of new rules that found a place for it within the overall system.¹²³

All legal rights of concern here originate with the producers of an audiovisual work such as a movie or a "television show." These program producers are either independent producers or produce programs based on the requirements of networks.¹²⁴ Independent producers sell their programs to television networks and are in turn paid a royalty rate that is often computed on the basis of factors such as the number of affiliate stations likely to broadcast the program and the amount of advertising revenue the network is likely to be able to keep for itself.¹²⁵

Television networks are brokers whose sole purpose is the assembly of television programs by purchasing content from producers and selling the assembled programming to television stations.¹²⁶ At the same time, however, they act as intermediaries between advertisers and television stations. In assembling the programming, networks offer advertisers internal spots, short time slots *within* each program, and receive compensation for each

122. See BRUCE M. OWEN ET AL., TELEVISION ECONOMICS 6 (1974) (profiling the different players in the television broadcasting industry at the time). Note that this book was published before the cable television boom and consequently does not devote significant attention to this segment.

123. See 3 ERIK BARNOUW, A HISTORY OF BROADCASTING IN THE UNITED STATES: THE IMAGE EMPIRE 247 (1970); VINCENT MOSCO, BROADCASTING IN THE UNITED STATES: INNOVATIVE CHALLENGE AND ORGANIZATIONAL CONTROL 85 (1979).

124. See Susan C. Greene, *The Cable Television Provisions of the Revised Copyright Act*, 27 CATHOLIC U.L. REV. 263, 265-66 (1978).

125. Stanley M. Besen et al., *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. & ECON. 67, 77 (1978). In a comprehensive review of the television program production segment of the industry, Owen et al. demonstrate that the industry is characterized by very high levels of competition, yet at the same time monopolistic competition—in the sense that numerous producers produce differentiated products that are easily substitutable and no producer earns profits in excess of a normal rate of return. See OWEN ET AL., *supra* note 122, at 17.

126. OWEN ET AL., *supra* note 122, at 7.

of these slots, priced commensurate with the size and demographic of the program's audience.¹²⁷ The networks are arguably the most important players in the television broadcasting industry.

Television stations, in turn, are of two kinds—affiliates and independents. Affiliates are television stations that are *affiliated* with an individual network.¹²⁸ Affiliates receive almost all their programming from the networks, and affiliates in the same time zone typically receive identical programming packages.¹²⁹ However, an affiliate is usually granted a certain degree of exclusivity in carrying the program within each geographic market. Interestingly, though, the network compensates affiliates for carrying programming, which implies the transfer of a certain portion of a network's advertising revenue to its affiliates.¹³⁰ It is important to remember, though, that the only advertising slots that networks can sell and derive revenue from are *in-program* slots. In addition to these internal slots, however, are time slots *between* individual programs, referred to either as "announcement time" or "adjacencies."¹³¹ These are controlled exclusively by the television stations. Television stations similarly sell these adjacencies to advertisers for revenue, determined again by variables such as viewership, nature and duration of the time slot, etc. The sharing of this advertising revenue is unidirectional. Unlike networks, who must share their revenue with stations, stations *do not* have to share their revenues from advertising sales with the networks.¹³²

Independents are local television stations that are not affiliated with any network.¹³³ This being the case, their primary source of programming comes from producers in the syndication market.¹³⁴ This market is gener-

127. Stanley M. Besen & Ronald Soligo, *The Economics of the Network-Affiliate Relationship in the Television Broadcasting Industry*, 63 AMER. ECON. REV. 259, 259 (1973); Franklin M. Fisher et al., *The Audience-Revenue Relationship for Local Television Stations*, 11 BELL J. ECON. 694, 695 (1980).

128. Regulations define a "full network station" as: "A commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the three major national television networks with which it has a primary affiliation (i.e., right of first refusal or first call)." 47 C.F.R. § 76.5(j) (2004).

129. Besen et al., *supra* note 125, at 77.

130. OWEN ET AL., *supra* note 122, at 97-100.

131. Fisher et al., *supra* note 127, at 695; Besen & Soligo, *supra* note 127, at 259.

132. Besen & Soligo, *supra* note 127, at 259.

133. Regulations characterize an "independent station" as one which generally carries no more than ten hours of programming per week offered by the three major national television networks during prime time. 47 C.F.R. § 76.5(l) (2004).

134. Greene, *supra* note 124, at 77. Regulations define a syndicated program as "any program sold, licensed, distributed or offered to television station licensees in more than

ally regarded as the secondary market for television programs. It is very rare for new programming to enter the syndicated market directly; consequently, the market here consists of programs that have completed their run on the primary networks. Obviously, the revenue that these programs generate is significantly lower than on the primary market. Occasionally, network affiliates (affiliate stations) also purchase programming on the syndicated market in order to fill non-network time.¹³⁵

Television stations—both affiliates and independents—then broadcast the content to viewer audiences *for free*. Of course, viewers do not represent a direct source of revenue for content producers, broadcast networks, or television stations.¹³⁶

The picture presented above is a rather simplistic model of the television broadcasting market. Two important exceptions, however, exist to the general model. The first is that the network-affiliate relationship merely gives affiliate stations a first claim over a network's programming, as opposed to an actual obligation to carry whatever the network gives them.¹³⁷ This exception is important, and it ensures that television stations also retain some amount of control over the content of what they broadcast. The second is that networks retain all the advertising revenue associated with a pre-determined amount of broadcast program time carried by the station.¹³⁸

2. *The Emergence of Cable Television*

Arguably, the most important development in the television industry prior to the digital revolution was the emergence of cable television as a commercial phenomenon. Cable television presented regulators and pol-

one market within the United States other than as network programming." 47 C.F.R. § 76.5(ii) (2004).

135. Owen et al. analyze the syndication market and conclude that, unsurprisingly, this market remains less competitive and at the same time less monopolistic. They attribute at least part of this effect to the fact that here content producers can interact with television stations directly, thereby taking advantage of the public good nature of their products, which producers cannot in the primary market. While the market is concentrated, the speed with which the demand needs to be met ensures its continuing viability. See OWEN ET AL., *supra* note 122, at 31-35.

136. Recent years have of course seen the emergence of new subscription-based broadcast technologies such as Direct Broadcast Service (DBS) and the Home Satellite Dish (HSD). While these continue to grow in popularity, their penetration rates continue to remain rather low compared to both cable and broadcast television. See FCC ASSESSMENT, *supra* note 17, at 36-46.

137. See 47 C.F.R. § 76.5(j) (2004) ("right of first refusal").

138. Besen & Soligo, *supra* note 127, at 259.

icity-makers with a host of different issues, all of which had major implications for the overall structure of the broadcasting industry.

In its most basic form, cable television is a hybrid between television and telephone technologies.¹³⁹ Cable systems use antennas to receive television signals (broadcast by broadcast stations) and wires to then carry them to individual subscribers.¹⁴⁰ While the emergence of broadcast technology marked the move from wired communication to over-the-air communication, cable television reversed this trend and thus to many seemed technologically regressive at the time.

Cable television in the United States began in the late 1940s as community antenna television (CATV)—a way of bringing broadcast signals to remote areas where they would not reach directly.¹⁴¹ In the typical setup, special antennas were installed at certain locations, such as hilltops. These antennas received television signals, amplified them, and then delivered them via coaxial cables strung from utility poles to individual homes. “Cable television” has since evolved into a generic phrase for three different things:¹⁴² (i) the community antenna system just described, where four to six channels were captured and delivered via coaxial cables; (ii) the CATV service which involves capturing broadcast signals from other cities or locations and transmitting it to local audiences (thereby augmenting local transmissions); and (iii) an independent service where content generated specifically for this service is delivered to a subscriber base.

In its initial stages, cable television worked as a supplement to broadcast television and actually enhanced broadcaster revenues by increasing overall viewership. Cable television first started to run into problems when operators began carrying signals from distant locations to local communities, and later when they began to provide audiences with programming of their own. When this happened, broadcasters, both local and out-of-state, began to worry that cable television was eating into their revenues. Ini-

139. STEVEN R. RIVKIN, *A NEW GUIDE TO FEDERAL CABLE TELEVISION REGULATIONS* (1978).

140. *See generally* MARY ALICE MAYER PHILLIPS, *CATV: A HISTORY OF COMMUNITY ANTENNA TELEVISION* (1972); CHARLES C. WOODARD, JR., *CABLE TELEVISION: ACQUISITION AND OPERATION OF CATV SYSTEMS* (1974).

141. David F. Simon, *Local Television Versus Cable: A Copyright Theory of Protection*, 31 FED. COMM. L.J. 51 (1979). For an elaborate overview of CATV's early years and the regulatory issues it presented see Note, *Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366 (1965); John C. Palmer Jr. et al., *CATV: Survey of a Regulatory Problem*, 52 GEO. L.J. 136-137 (1963).

142. DON R. LE DUC, *CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL* 6 (1973).

tially, the FCC refused to exercise jurisdiction over cable operators.¹⁴³ It was not until cable began to gain significant popularity and broadcasters' complaints increased that the FCC eventually promulgated guidelines for cable transmission.¹⁴⁴ Current estimates of the National Cable & Telecommunications Association (NCTA) indicate that the countrywide cable penetration levels as of September 2006 are around 58.9% of all households with a television set.¹⁴⁵

The most important characteristic of cable television, for the purposes of this Article, is that it acquires its content from two sources. First, cable operators retransmit basic broadcast signals. Second, in a more recent phenomenon, they also acquire rights to content meant *for* cable systems. Cable television networks have emerged much along the lines of broadcast networks.¹⁴⁶ These networks act as similar intermediaries between individual cable operators, broadcast networks, content producers, and advertisers. They acquire content from producers and broadcast networks, sell advertising space to advertisers, and then put together cable programming that is relayed to individual cable operators via satellite.

Cable networks, however, diverge from broadcast networks in one critical respect. They *sell* their programming to individual (affiliated and independent) cable operators with the royalties they receive dependent on the operator's subscription base, and at the same time they sell advertising slots to advertisers. Thus, unlike broadcast networks, cable networks have two independent sources of revenue.¹⁴⁷

143. See Joseph R. Fogarty & Marcia Spielholz, *FCC Cable Jurisdiction: From Zero to Plenary in Twenty-Five Years*, 37 FED. COMM. L.J. 113, 114 (1985) (noting the FCC's initial "unwillingness to impose any regulatory constraints on the cable industry").

144. For an overview of the FCC's attempts to regulate cable television, see generally ROBERT W. CRANDALL & HAROLD FURCHTGOFF-ROTH, *CABLE TV: REGULATION OR COMPETITION?* (1996); LELAND L. JOHNSON, *TOWARD COMPETITION IN CABLE TELEVISION* (1994); William S. Comanor & Bridger M. Mitchell, *The Costs of Planning: The FCC and Cable Television*, 15 J.L. & ECON. 177 (1972); Richard A. Posner, *The Appropriate Scope of Regulation in the Cable Television Industry*, 3 BELL J. ECON. & MGMT. SCI. 98 (1972); Daniel J. Smith, Note, *Stay the Course: A History of FCC's Response to Change in the Cable Industry*, 13 J.L. & POL. 715, 717-718 (1997).

145. Nat'l Cable & Telecomms. Assoc., Statistics, <http://www.ncta.com/ContentView.aspx?contentid=54> (last visited Nov. 14, 2006).

146. 47 C.F.R. § 78.5(i) (2004) ("A cable network-entity is an organization which produces programs available for simultaneous transmission by cable systems serving a combined total of at least 5,000,000 subscribers and having distribution facilities or circuits available to such affiliated stations or cable systems.").

147. Museum of Broadcast Communications, Cable Networks, <http://www.museum.tv/archives/etv/C/htmlC/cablenetwork/cablenetwork.htm> (last visited Nov. 16, 2006).

In cable television's early days, most networks tended to transmit programs previously aired over broadcast networks, continuations of programs that were not picked up by broadcast networks, or a few made-for-television movies. By the 1990s, however, cable networks began producing original programming.¹⁴⁸ Today several basic cable networks provide their own programming (e.g., ESPN or C-SPAN) or contract with independent producers to make movies or shows for them. In addition, many of them contract with movie producers to air movies after theatrical release. Another alternative is for cable networks to include shows that broadcast networks decide are not worth giving air time.¹⁴⁹

Cable television has become a major force in the U.S. television industry, and today generates more revenue than traditional broadcasting.¹⁵⁰

B. Exclusionary Rights Regimes in the Television Industry

Having examined the structure of the television industry in terms of both organization and revenue flows, this Section proceeds to examine the various property and quasi-property regimes that currently exist between the different industry players. The current claims of broadcasters and cablecasters for property rights (i.e., "broadcasters' rights") are hardly novel in light of the history of broadcast television regulation in the United States. In varying degrees, the FCC and Congress already rejected or accepted these claims to create the current system. To better understand the implications of the proposed regime, it thus becomes critical to analyze the current exclusionary regimes that exist and the process by which they came into existence.

The idea of property rights is generally associated with two related but somewhat independent concepts—tradability and excludability.¹⁵¹ Tradability is the notion that a property right creates a market for something and allows the forces of demand and supply to operate in ensuring its effi-

148. *Id.*

149. *Id.*

150. See *TV Industry Revenues*, in GLOBAL ENTERTAINMENT AND MEDIA OUTLOOK: 2006-2010, available at http://www.tvnewsday.com/fast_facts/tv_revenues.

151. Indeed, this is a debate that has existed among property theorists for a while now. For an excellent overview of the ideas involved, see Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357 (2001). For conceptions of property emphasizing the excludability element, see J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997); and Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998). But see Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 631 (1998) (arguing that the exclusivity metaphor is "at most a cartoon or trope" and ought to be used with caution).

cient allocation.¹⁵² In a sense, tradability represents a macro-conception of property rights. Excludability, however, relates to the actual functioning of the property right and to the idea that a property right fundamentally gives its holder (usually the owner) a right (in rem) to exclude the rest of the world from the object over which the right operates.¹⁵³ It thus represents a micro-conception of property. To a large extent, the macro- and micro-conceptions represent two sides of the same coin, in that excludability (or exclusivity) is critical to any idea of tradability. Thus, it makes little sense for *A* to sell *B* his car unless the car is *A*'s to begin with, which would only be true if *A* can exclude everyone else (including *B*) from it. But when we move to the world of intangibles, the presumptive inseparability of the two concepts becomes somewhat complicated.¹⁵⁴ Part of this complexity relates to the very definition of *property rights* over an intangible entity, but another part derives from the fact that property rights over intangibles are ultimately instrumental, in that their existence does not necessarily derive from the rivalrous nature of the resource in question.¹⁵⁵

In the context of most property regimes, tradability and excludability go hand in hand. However, one of them remains dominant. In the context of the television industry, and broadcast signals in particular, if tradability were the primary motive of the regime, it would hardly require the introduction of new rights. Copyright holders would transfer their rights (exclusively or non-exclusively) to networks, which would in turn transfer their rights to stations, and, through a chain of contracts, traditional copyright would continue to be a tradable asset. No new rights would be needed. Excludability thus remains the primary motive, a conclusion bolstered by broadcasters' reliance on piracy-related arguments to justify the

152. See David Berry, *The Market for Tradable Renewable Energy Credits*, 42 ECOLOGICAL ECON. 369 (2002) (applying the concept to renewable energy credits); Robert W. Hahn, *Market Power and Transferable Property Rights*, 99 Q. J. ECON. 753 (1984) (providing a conceptual overview of this idea). Cf. Martin Feldstein, *Tradeable Gasoline Rights*, WALL ST. J., June 5, 2006, <http://online.wsj.com/article/SB114946588448771080.html> (extending the idea to tradable gasoline rights for households).

153. For more on this, see Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y (forthcoming 2008) (describing the actual functioning of excludability in property law).

154. See *supra* note 113 and accompanying text. Cf. Christopher Kalanje, *Leveraging Intellectual Property: Beyond the Right to Exclude*, http://www.wipo.int/sme/en/documents/leveraging_ip.html (last visited Nov. 15, 2006) (arguing that the two go hand in hand and that the power of one ought to be leveraged into the other to render intellectual property meaningful).

155. See, e.g., Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005) (arguing that virtual property, unlike informational property, is rivalrous).

new regime.¹⁵⁶ The idea of a property regime for broadcast signals is thus predicated on excluding others' use of signals. These rights may indeed be traded or transferred, but excludability remains central.

Exclusionary rights have existed in the U.S. television broadcast industry for quite some time now. Given that excludability has been their primary focus, it becomes critical to delineate the parties *against whom* the rights operate at each stage. The television industry reveals an interesting dynamic of attenuated exclusionary rights between content producers, broadcasters, and cable operators that operate inter se and occasionally in rem. What follows is an outline of each of the regimes, organized structurally rather than chronologically, to illustrate the dynamic.¹⁵⁷

1. *Content Producers' Rights: Extending Copyright Law*

Of the different players in the television broadcast industry, the legitimacy of content producers' rights has remained unquestioned because of the belief that, as authors, content producers directly contribute to the creative process and therefore are entitled to authorial property rights in the work they directly create.¹⁵⁸ Since the emergence of television broadcasting, federal law has recognized the existence of copyright in audiovisual programs.¹⁵⁹ The real challenge for content producers has remained, however, in adapting these rights to new and emerging technologies.

Among the several rights granted to content producers as copyright holders under the Copyright Act of 1909 was the "exclusive right" to perform the work publicly.¹⁶⁰ Until the 1976 revision of the Copyright Act, the precise definition of "public performance" remained unclear, although it was undisputed that an unauthorized broadcast of a work (over the air) amounted to a public performance that was actionable.¹⁶¹ Content produc-

156. See *supra* Section II.D. It is also interesting to note that the WBT uses the phrase "exclusive right" throughout the treaty, but nowhere deals in any great detail with mechanisms through which these rights may indeed be transferred or sold.

157. For a chronological overview of the current structure, see LE DUC, *supra* note 142, at 81-106. See also Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77 (1981); Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media and the Political Components of Culture*, 74 N.C. L. REV. 141, 150 (1995); Tim Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 311-24 (2004).

158. This is the traditional authorial conception of copyright as an incentive or reward system. See, e.g., MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 58 (3d ed. 1999).

159. Today, this finds recognition in 17 U.S.C. § 102(a)(6), discussed *supra*.

160. See Copyright Act § 1, 17 U.S.C. § 1 (1974).

161. *Id.* § 1(d) ("to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhib-

ers were thus entitled to exclusionary protection against broadcasters, which they often invoked. As a consequence, broadcast networks began licensing copyrighted works from producers prior to broadcasts, which remained a relatively uncontroversial system.

With the emergence of cable television, things began to change. Cable television soon began to eat into the revenues of television broadcasting, and initially, as discussed, cable programming mainly involved the retransmission of content carried by broadcasters.¹⁶² Broadcasters and content producers felt that cable operators were free-riding off of their rights—rights that the broadcasters had paid for. In two separate cases, copyright holders attempted to assert their exclusionary rights under the copyright regime against cable operators. While it remains contestable whether they were motivated to do so on their own¹⁶³ or whether they were acting as proxies for broadcasters, the claims were doctrinally structured as assertions of copyright holders' rights.

The first case was *Fortnightly Corp. v. United Artists Television, Inc.*¹⁶⁴ The plaintiff was a production company that held the copyright in various motion pictures it had licensed to television broadcasters. The defendant operated a CATV service that captured the signals of five broadcasters (to whom the plaintiff had licensed its copyright) and retransmitted the unedited content to its own subscribers through wire.¹⁶⁵ The plaintiff argued that the defendant's retransmission amounted to a "performance" under copyright law that infringed its exclusive rights in the work.¹⁶⁶ Drawing a distinction between the role of a broadcaster and that of a viewer (who uses "equipment to convert electronic signals into audible sound and visible images"¹⁶⁷), the Court concluded that CATV fell on the "viewer's side of the line" and went on to conclude that cable operators (CATV operators) did not perform the work in question when they retransmitted it.¹⁶⁸ In his forcefully worded dissent,¹⁶⁹ Justice Fortas admon-

ited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever"). The Act goes on to draw a distinction between intentional and unintentional infringement by "broadcasters," thus making it clear that broadcasting was indeed covered by its express terms.

162. See *supra* Section III.A.2.

163. Wu, *supra* note 157, at 317 (noting that this was indeed a broadcasters' attack).

164. 392 U.S. 390 (1968).

165. *Id.* at 392.

166. *Id.*

167. *Id.* at 398.

168. *Id.* at 399-401.

ished the majority for “attempt[ing] to foster the development” of cable and abandoning precedent on the meaning of “performance.”¹⁷⁰ Arguing that the majority characterization was overly simplistic¹⁷¹, he concluded that cable retransmission was indeed a performance under the Act and therefore constituted an infringement.¹⁷²

While Justice Fortas’ suggestion that the majority was *driven* by the need to develop cable may seem extreme, it is plausible that it was at least influenced by the advertising model that broadcast television operated on and was therefore skeptical of any harm actually ensuing.¹⁷³ The *Fortnightly* majority opinion adopted a bipartite classification that does indeed seem overly simplistic and ignores the technical details of how cable television actually functions.¹⁷⁴

The second case on the same subject matter, decided six years later, was *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*¹⁷⁵ Here the plaintiffs owned copyright in several television programs and commenced an action against the defendant, a cable operator that was retransmitting its programs from distant areas to its own subscribers. While the District Court had found for the defendant (relying on *Fortnightly*),¹⁷⁶ the Second Circuit divided the defendant’s activities into two categories—one involving the wire retransmission of broadcast signals to subscribers within the range of the actual broadcast signals and the other involving the retransmission of signals to areas where the signals were not directed—and found the defendant’s activities to amount to a “performance” in the latter, though not in the former.¹⁷⁷ The Supreme Court rejected this reasoning, concluding that merely “by importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it per-

169. *Id.* at 402 (“This case calls not for the judgment of Solomon but for the dexterity of Houdini.”).

170. *Id.* at 404-05.

171. *Id.* at 405.

172. *Id.* at 408.

173. *Id.* at 400 (using the phrase “*additional viewers*”) (emphasis added).

174. The Court relied on the *Fortnightly* reasoning in another case involving the retransmission of a radio broadcast over a speaker system. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975). See Greene, *supra* note 124, at 271 (characterizing its use as precedent as a “disruptive consequence”).

175. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

176. *Columbia Broad. Sys., Inc. v. Teleprompter Corp.*, 355 F. Supp. 618 (S.D.N.Y. 1972), *rev’d in part*, 476 F.2d 338 (2d Cir. 1973).

177. See *Columbia Broad. Sys., Inc. v. Teleprompter Corp.*, 476 F.2d 338, 350 (2d Cir. 1973), *rev’d in part*, *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

forms for its subscribers."¹⁷⁸ The Court accordingly found for the defendant, as in *Fortnightly*.¹⁷⁹

Most interestingly, though, the Court seems to have been directly influenced by the revenue model that broadcast television operated on, in particular the fact that copyright holders and broadcasters were compensated by advertising revenue and never directly by subscribers. It went on to note:

Unlike propagators of other copyrighted material . . . holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material—that is, the television viewers—but by advertisers who use the drawing power of the copyrighted material to promote their goods and services.

....

By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor.¹⁸⁰

The Court thus appears to have been implying that broadcasters should find mechanisms to internalize the benefits of this enhancement in viewership rather than stifle technological development.¹⁸¹

As a direct consequence of these decisions, Congress amended the copyright law to extend content producers' exclusionary rights to cable television.¹⁸² The Copyright Act of 1976, which replaced the 1909 Act, defined a "public performance" as including any transmission or communication and, to clarify, defined "transmit" as including transmission by "any device or process."¹⁸³ Cable transmissions by wire are thus expressly covered.¹⁸⁴ A direct consequence of this amendment was that cable opera-

178. *Teleprompter Corp.*, 415 U.S. at 408.

179. *Id.*

180. *Id.* at 411-12.

181. For analyses of the decision see Gillis L. Heller, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, 69 CALIF. L. REV. 527 (1981); Note, *CATV and Copyright Liability: Teleprompter Corp. v. Columbia Broadcasting System, Inc. and the Consensus Agreement*, 25 HASTINGS L.J. 1507 (1974). See also Note, *Cable Television and Copyright Royalties*, 83 YALE L.J. 553 (1974) (analyzing the Second Circuit's decision).

182. Copyright Law Revision Act, Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976).

183. 17 U.S.C. § 101 (2000).

184. See H.R. REP. NO. 94-1476, at 63 (1976) ("[A] cable television system is performing when it retransmits the broadcast to its subscribers.").

tors who chose to carry copyrighted content *directly*, as opposed to retransmitting broadcast signals, were now subject to content producers' exclusionary rights.

In relation to retransmissions, however, the Act introduced a somewhat complex mechanism. For cable retransmissions, referred to as "secondary transmissions," the Act introduced a statutory licensing regime. Under this new licensing regime, cable systems are permitted to retransmit copyright content carried by broadcasters, upon the payment of a statutorily determined license fee.¹⁸⁵ The royalty received under this statutory license is then distributed to copyright holders through a mechanism involving the Copyright Royalty Tribunal.¹⁸⁶ The Act thus introduced an exclusionary entitlement vested in content producers but subjected it to a liability (as opposed to property) rule.¹⁸⁷ Scholars have called into question the efficiency of this mechanism, arguing that it stifles the free negotiation of royalties.¹⁸⁸ With the emergence of new services such as Direct Broadcasting (DBS) and satellite broadcasting, the same statutory license mechanism came to be extended there as well.¹⁸⁹

Even in relation to cable retransmissions, however, cable operators that are mere "passive carriers" of broadcast signals (i.e., those who exercise no editorial control over the selection and carriage of content) are exempted from any liability, including the payment of a licensing fee.¹⁹⁰ Thus, cable operators that merely pick up a broadcaster's signals and carry them to subscribers are not subject to the regime.¹⁹¹ However, the law makes a cable operator liable for infringement if it alters either programming content or commercial advertising in the broadcast signal.¹⁹² In such

185. 17 U.S.C. § 111(c) (2000).

186. 17 U.S.C. § 111(d)(4) (2000). For an elaborate overview of this mechanism and its functioning, see 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS*, § 8.18 (2006).

187. In the Calabresi-Melamed formulation. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

188. See, e.g., Besen et al., *supra* note 125, at 68, 94-95 (concluding that the long run impact of the mechanism will be detrimental to the overall supply of programs and that a full copyright liability regime would present a much better solution to the free-rider problem); Greene, *supra* note 124, at 264-65 (noting that the Act is likely to generate extensive litigation owing to its complex procedures).

189. See 17 U.S.C. §§ 119, 122 (2000). See also H.R. REP. NO. 108-660, at 1 (2004).

190. See 17 U.S.C. § 111(a)(3) (2000).

191. See *Hubbard Broad., Inc. v. S. Satellite Sys., Inc.*, 593 F. Supp. 808, 817-18 (D. Minn. 1984).

192. 17 U.S.C. § 111(c)(3) (2000).

a scenario, the operator is clearly no longer a “passive” conduit. This rule is thus designed primarily to safeguard broadcasters’ main source of revenue—advertising. Much like the Supreme Court, Congress structured the liability regime around the centrality of the advertising model to the system.¹⁹³

Content producers are today protected by a limited set of property rights against broadcasters, cable companies, and third parties, such as other producers who might reproduce their content. Through a mix of property and liability rules, their rights operate against all the other major incumbents in the television industry.

2. *Broadcasters’ Exclusionary Rights: Beneficial Ownership and Retransmission Consent*

Unlike content producers, broadcasters in the United States were originally without rights.¹⁹⁴ Under the rules applicable to radio broadcasts under the Communications Act of 1934, prohibitions existed on the re-broadcasting of one station’s programming by another without the original broadcast station’s authorization.¹⁹⁵ This regime thus operated between broadcasters inter se and prohibited one broadcaster from free-riding on another’s programs. With the introduction of television broadcasting, courts applied the open-ended language of the rule to television broadcasts as well.¹⁹⁶

193. See H.R. REP. NO. 94-1476, at 93-94 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5708-09. It notes:

In the Committee’s view, any willful deletion, substitution, or insertion of commercial advertisements of any nature by a cable system or changes in the program content of the primary transmission, significantly alters the basic nature of the cable retransmission service, and makes its function similar to that of a broadcaster. Further, the placement of substitute advertising in a program by a cable system on a “local” signal harms the advertiser and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser’s message is calculated to reach.

194. The phrase broadcasters’ rights as used here is not to be confused with the concept of “broadcasters’ rights” as used in connection with the rights proposed under the new regime. Here, they refer merely to the limited exclusionary rights granted to them as part of the overall regulatory structure.

195. 47 U.S.C. § 325(a) (2000) (“[N]or shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.”). See *Frontier Broad. Co. v. FCC*, 412 F.2d 162 (D.C. Cir. 1969).

196. See *United Video, Inc. v. FCC*, 890 F.2d 1173, 1176 (D.C. Cir. 1989) (noting that the section forbids a broadcast station from rebroadcasting another broadcast station’s signal without permission in the context of video transmissions as well).

With the emergence of cable television, however, broadcasters began to see their signals being retransmitted into both local and distant markets. More importantly, though, they noticed that cable operators were making significant profits from their subscribers, *using* broadcasters' program-carrying signals. They began to make the argument that this constituted a form of unfair competition, since they were required to pay the content producers for content, while cable operators were not.¹⁹⁷ But since § 325(a) was restricted in its operation to a "broadcasting station," they were seemingly without a statutory cause of action. As a consequence, they initially raised different common law claims as substitutes.

In *Intermountain Broadcasting & Television Corp. v. Idaho Microwave Inc.*,¹⁹⁸ a group of television stations (network affiliates) initiated an action against Idaho-based cable operators who carried their signals to subscribers located in the same geographic area over which they held exclusive contracts from their networks to carry the programming.¹⁹⁹ The plaintiffs here claimed that the defendants had engaged in a form of "unfair competition" and "unjust enrichment" and ought to be restrained through injunctive relief along the lines of the Supreme Court's decision in *International News Service*.²⁰⁰

In refusing to extend the doctrine of "unfair competition" to cable re-transmissions, the court proceeded to deny the plaintiffs any relief.²⁰¹ In addition, it seemingly restricted the operative scope of § 325(a) by holding that the provision did not grant broadcasters a *property* right of any kind against a re-broadcaster:

[T]he statutory requirement (Sec. 325(a)), of consent before re-broadcast is not based upon, or intended to recognize any property right of the originating station in its broadcast signal as such. It was designed only as a means for safeguarding the interests of such persons as might have property rights in program content which would be protectible under established law, as, for example, statutory or common law copyright or exclusive license arrangements protectible under the doctrine of unfair competition.

....

197. At one point, the National Association of Broadcasters (NAB) asserted that the broadcasting industry as a whole paid about 25% of its gross revenues for copyrighted material. See Greene, *supra* note 124, at 267 n.16.

198. 196 F. Supp. 315 (S.D. Idaho 1961).

199. *Id.* at 317-20.

200. *Id.* at 321.

201. *Id.* at 326.

The Commission points out that, since Sec. 325(a) does not purport to alter or define the property rights in program material, in some cases the consent given under the section may be of little value as authority for the rebroadcast of a program because of the station's lack of authority to give consent to a third party for the use of someone else's property.²⁰²

It is, of course, open to dispute whether the court's interpretation of § 325(a) is correct, given the express statutory language in question and other cases applying that language to television broadcasts. What is important to note, however, is the court's flat refusal to restrain defendants' transmission of content-carrying signals, even if transmission amounted to free-riding and even if the defendants were making a significant profit from such activity.²⁰³

In *Cable Vision, Inc. v. KUTV, Inc.*,²⁰⁴ brought the very next year, a group of cable operators brought an antitrust action against a local television station. In its counterclaim, the station alleged both tortious interference with its exclusive contractual rights and unfair competition.²⁰⁵ The district court initially found for the defendant and enjoined the plaintiffs.²⁰⁶ The Ninth Circuit reversed, concluding that since the television station had failed to establish the existence of a "protectible interest" by virtue of copyright law or other Congressional enactment, the court was forbidden from laying down a rule that would restrict access to the public domain without legislative authorization.²⁰⁷

A direct consequence of these decisions was that broadcasters could not exclude cable operators from retransmitting their signals. Immediately after *Cablevision*, the Supreme Court decided *Fortnightly* and *Teleprompter*, which together eliminated even the possibility of broadcasters initiating copyright infringement claims through content producers. Interestingly, studies show that broadcasters failed to maintain a cohesive position

202. *Id.* at 327.

203. *Id.* at 328 ("The Court does not believe that the mere profit-purpose of defendants' rendition of an identical service to the owners would transform the operation into unfair competition with plaintiffs.").

204. 211 F. Supp. 47 (S.D. Idaho 1962).

205. *Id.* at 50.

206. *Id.* at 60-61.

207. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, 354 (9th Cir. 1964) ("In conclusion, we hold that unless appellees are able to demonstrate a protectible interest by virtue of the copyright laws or bring themselves within the contemplation of some other recognized exception to the policy promoting free access to all matter in the public domain, they cannot prevail.").

in the wake of these decisions.²⁰⁸ Some were more interested in obtaining cable franchises, while others genuinely wanted to eliminate competition from cable television.²⁰⁹ This again brings to the forefront the *reasons* for which the property idea is deployed.

When Congress amended the copyright laws subsequent to *Teleprompter*, it did more than just give copyright holders rights against cable operators. In giving a "legal or beneficial owner of an exclusive right" the right to initiate an action for infringement, Congress went on to provide that broadcast stations (as licensees or assignees) were entitled to initiate actions for infringement against cable systems that retransmitted their signals, but only when such retransmission occurred within their local service area.²¹⁰ Thus, local broadcasters could restrict cable operators from retransmitting their signals into the same area they service. Broadcasters were given absolutely no control over cable operators that pick up their signals and retransmit them to other areas. This seems logical. If the real reason broadcasters seek to curb cable retransmissions is because cable operators compete with their source of revenue, then they should not object to operators who make profits by transmitting their programming to other areas because new areas represent new, rather than existing, revenue streams, given that broadcasters' revenues derive entirely from local advertising.²¹¹

Broadcasters were also given the right to commence an action against cable operators that alter the content of their signals to modify the programming or substitute the advertisements between such programming.²¹² Once again, this right was in recognition of the centrality of the advertising model to broadcasters.

Even after the 1976 Act, broadcasters were not given a property right in their signals. In 1984, Congress deregulated cable rates across the country in an effort to stimulate competition.²¹³ In the years following the 1984 deregulation, cable subscription prices in the United States rose by an av-

208. See LE DUC, *supra* note 142, at 134 (noting that 13% of all cable systems in 1965 were owned by broadcasters and that the members of NAB often exhibited more bitterness to each other than to cable television rivals).

209. *Id.*

210. 17 U.S.C. § 501(c) (2000).

211. See David F. Simon, *Local Television Versus Cable: A Copyright Theory of Protection*, 31 FED. COMM. L.J. 51, 57 (1978) (noting that the protection of local broadcasting was central to the provisions introduced in 1976).

212. 17 U.S.C. § 501(d)(i) (2000).

213. Cable Communications Policy Act, Pub. L. No. 98-549, § 601, 98 Stat. 2779, 2780 (codified at 47 U.S.C. § 521 (1984)).

erage of 56%, alarming policy makers and regulators.²¹⁴ In response, Congress passed the Cable Act of 1992.²¹⁵ Among its provisions were regulations granting broadcasters further property-like protection over their signals.

Referred to as the "retransmission consent" provisions, these new rules now required cable operators that sought to retransmit broadcasters' programming to obtain the express consent of the broadcast station originating the signals.²¹⁶ In effect, these rules gave broadcasters control over the distant transmission of their signals via wire by cable operators, even when the recipients were not in their local service area. The rationale was no longer that the retransmission affected their advertising revenue, but rather that as originators of the signals they were entitled to control the revenue that cable operators were making off of *their signals*. Once again we see the explicit resurgence of property talk.

At the hearings before the Senate sub-committee prior to the passage of the Act, broadcasters were vocal about their reasons for the protection.²¹⁷ Edward Fritts, then president of the NAB, noted that broadcasters were merely seeking the right to control "uses" of their signal and specifically requested the committee to include retransmission consent in the original bill.²¹⁸ On another occasion before the House of Representatives, Fritts specifically noted that there existed an "interest in the *signal* which belongs to the broadcaster" making the ownership claim explicit.²¹⁹ During the FCC's rulemaking proceedings following the Act's passage, the

214. See Gregory S. Crawford, *The Impact of the 1992 Cable Act on Household Demand and Welfare*, 31 RAND J. ECON. 422, 422 (2000). See also GEN. ACCOUNTING OFFICE, 1991 SURVEY OF CABLE TELEVISION RATES AND SERVICES (1991); THOMAS W. HAZLETT & M.L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION: THE ECONOMICS OF RATE CONTROLS (1997).

215. Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992). For an exhaustive study of the legislative history surrounding the Act, see Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 HASTINGS COMM. & ENT. L.J. 305 (1993).

216. 47 U.S.C. § 325(b) (2000 & Supp. IV 2004).

217. For an elaborate overview of the legislative history surrounding the retransmission consent provisions of the Act, see Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. § 325(b)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99 (1996).

218. *Cable TV Consumer Protection Act of 1991: Hearings on S. 12 Before the Subcomm. on Communications of the S. Comm. on Commerce, Science and Transportation*, 102d Cong. 199, 254 (1991).

219. *Cable Television Regulation: Hearings on H.R. 1303 and 2546 Before the Subcomm. on Telecommunications and Finance of the H. Comm. on Energy and Commerce*, 102d Cong. 774 (1991).

FCC specifically noted that "Congress created a new communications right in the broadcaster's signal, completely separate from the programming."²²⁰ This rhetoric suggests that retransmission consent was intended as an independent property right that broadcasters had in their transmission signals.

The retransmission consent provisions were structured in such a way that broadcasters were given the option of negotiating a royalty with cable operators *or* choosing to have them carry *all* their programming in return for the permission to carry some, called the must-carry alternative.²²¹ Negotiations were meant to happen every three years.²²² In the first round of negotiations since the provisions' introduction in 1992, most stations chose retransmission consent with a royalty instead of the must-carry option.²²³

The retransmission consent provisions also make it clear that they do not affect the compulsory copyright licensing mechanism introduced in 1976.²²⁴ Nevertheless, some remain skeptical about the ability of broadcasters to use the mechanism to extract revenues from cable operators without also affecting the copyright licensing mechanisms.²²⁵ Furthermore, although the Telecommunications Act of 1996 sought to further deregulate telecommunications, it left intact the retransmission consent provisions.²²⁶

As things stand today, then, broadcasters are equipped with limited property rights against other broadcasters, local cable operators, and distant cable operators.

220. *In re Implementation of the Cable Television Consumer Prot. & Competition Act of 1992*, 8 F.C.C.R. 2965 ¶ 173 (1993).

221. *See* 47 U.S.C. § 325(b)(3) (2000).

222. *Id.* § 325(b)(3)(B) (2000).

223. *Most Stations Seek Pay for Must-Carry*, S.F. CHRON., July 16, 1993, at C4. *See also* Lubinsky, *supra* note 217, at 146.

224. 47 U.S.C. § 325(b)(6) (2000).

225. *See, e.g.*, Patrick Murphy, Note, *Retransmission Consent: A Mixed Signal for Cable Copyright*, 17 COLUM.-VLA J.L. & ARTS 237 (1993). *See also* Lorna Veraldi, *Newscasts as Property: Will Retransmission Consent Stimulate Production of More Local Television News?*, 46 FED. COMM. L.J. 469, 489-90 (1994); Project, *Regulatory Reform in the Cable Industry: The Effect of the 1992 Cable Act's Must Carry and Retransmission Consent Rules on the Industry and the Consumer*, 47 ADMIN. L. REV. 587, 604 (1995) (noting that the regime produced no "new bountiful revenue streams").

226. *See* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).

3. *Cable Operators' Rights: Service Theft*

Of the three main players in the television industry, the law provides cable operators with the fewest rights and the widest protection. The Cable Communications Policy Act of 1984 introduced a provision aimed specifically at the theft of cable service.²²⁷ Specifically, it prohibits the “unauthorized interception or rece[ption] . . . [of] any communication service” offered over a cable system.²²⁸ The provision also allows a cable operator to bring a civil claim for an injunction or compensation.²²⁹

The cable operator is not granted an explicit property right in the ordinary sense of the term, but for all practical purposes, the regime operates analogously. The cable operators’ “authorization” is the equivalent of a tradable right in the property sense, which is protected by a property rule. The provision is purportedly directed at individual users who might gain access to cable television without authorization, but would obviously operate against others as well (e.g., one operator seeking to access another’s service to retransmit).²³⁰

Thus, although cable operators are not explicitly granted property protection over the content of their transmissions or over their signals, their service remains protected through property-rule-type remedies.

The present system thus represents a complex balance between the interests of content producers, broadcasters, and cable companies—interests manifested in the grant of limited exclusionary rights, or their analogs. Figure 1 summarizes the current regime and its equilibrium, identifying the party in whom the exclusionary right is vested and against whom it can be exercised. It is clear that content producers have by far the most expansive set of rights, under traditional copyright, while broadcasters have a more attenuated set of rights. Cable companies, on the other hand, are provided with mere property-analogs. The boxes in gray represent areas where full-blown exclusionary protection is absent, and for good reason.

227. Cable Communications Policy Act, Pub. L. No. 98-549, § 633, 98 Stat. 2779, 2796-97 (1984).

228. 47 U.S.C. § 553(a)(1) (2000). Assisting is also prohibited. 47 U.S.C. § 553(a)(2) (2000).

229. 47 U.S.C. § 553(c) (2000).

230. See generally MARTIN GREEN, *THEFT OF CABLE SERVICE* (1990); Kevin W. Grillo, *Electronic Piracy: Can the Cable Television Industry Prevent Unauthorized Interceptions*, 13 ST. MARY’S L.J. 587 (1982); Paul J. Mass & Carl S. von Mehren, *Cable Theft: The Problem, the Need for Useful State Legislation, and a Proposed Solution for Georgia*, 35 EMORY L.J. 643 (1986). See also 74 AM. JUR. 2D *Telecommunications* § 190 (2006).

Figure 1: Exclusionary Rights Regimes in the Television Industry

Against Vested in ↓	Content Producers	Broadcasters	Cable Companies	Third Parties (Audiences)
Content Producers	Copyright (17 U.S.C. § 106(1))	Copyright (17 U.S.C. § 106(4)&(5))	Copyright (17 U.S.C. § 106(4) & (5)) Compulsory Statutory License (17 U.S.C. § 111)	Copyright (17 U.S.C. § 106)
Broadcasters	No Fixation or Reproduction Rights	Retransmission Prohibition (47 U.S.C. § 325(a))	Beneficial Copy- right (17 U.S.C. § 501(c)) Integrity Rights (17 U.S.C. § 501(d)) Retransmission Consent (47 U.S.C. § 325(b))	No Fixation or Reproduc- tion Rights
Cable Operators	Cable Theft (47 U.S.C. § 553)—No independent property protection			

4. *The Ideal of Balance: A Meta-Narrative of Property*

The system of limited property rights described is thus characterized by one unifying characteristic—*balance*. The efficient functioning of the television broadcasting industry required limiting individual players' exclusionary rights and simultaneously ensuring that all the players in question were granted some kind of protection, even if only quasi-property in nature.

From one perspective, these limitations may appear artificial and without any rational basis. For example, consider the compulsory licensing mechanisms that Congress introduced for cable operators in 1976.²³¹ Scholars have criticized these provisions as resulting in the creation of an unfair and inefficient system.²³² However, the rationale for the mecha-

231. 17 U.S.C. § 111(c) (2000).

232. See Besen et al., *supra* note 125 (identifying the problems associated with the licensing system); Heller, *supra* note 181 (arguing for the imposition of full copyright liability).

nisms was never *purely* efficiency-driven, but rather involved the balancing of competing interests.

Thomas Streeter, in his interesting sociological analysis of the broadcast industry, characterized the property regimes that exist in the telecommunications sector as a form of postmodern property, where the concepts of "property" and "markets" are simulated through bureaucratic mechanisms.²³³ He additionally observes, in a related context, that "[w]hen faced with the absence or breakdown of traditional market relations, our bureaucratically structured business world sometimes sets out to establish an administrative counterpart to property, a *simulation* of property using the language and procedures of bureaucracy."²³⁴ In this understanding, much of what goes by the title of property in the broadcast world is merely a metaphor for some kind of regulation aimed at a set of some broader aggregate goals. What is apparent from the previous discussion of individual incumbents' rights is that one such goal is the notion of *balance*.

Balance of course has a specific meaning within this context. It is the idea that:

- 1) The effective functioning of the industry requires providing adequate financial and regulatory incentives to different participants. These incentives must relate to individual players' abilities to internalize revenue streams associated with their activities.
- 2) The incentives provided to one segment could prove to operate as a disincentive to another.
- 3) These systems of incentives and disincentives tend to exhibit variations in efficiency as technology develops.

The current exclusionary rights framework that exists between the different players represents this basic ideal: content producers need incentives, but ones that do not stifle broadcast and cable distribution; broadcasters need similar mechanisms, but ones that do not stifle cable or eat into content producers' incentives, and so on.

233. THOMAS STREETER, SELLING THE AIR: A CRITIQUE OF THE POLICY OF COMMERCIAL BROADCASTING IN THE UNITED STATES 208 (1996). Part of Streeter's thesis involved the rejection of the functionalist approach to property rights in certain areas, a view that believes that property rights are justified because they are needed to achieve the purpose they serve.

234. Thomas Streeter, *Broadcast Copyright and Bureaucratization of Property*, 10 CARDOZO ARTS & ENT. L.J. 567, 589 (1992).

In addition to the basic rights framework laid out before, the FCC had for several years prescribed regulations governing the activities of cable and broadcast companies. All of these mechanisms supplemented the regimes discussed above and were structured as exclusionary regimes, thereby tracking the general property structure in place. Taken together, they provide an ideal illustration of Streeter's point on simulated property. What they also represent, however, is a set of regulations that operate in the interstices of the property regimes, directed at introducing a sense of balance into the system. Their periodic modification (and eventual abolition) merely represents a series of attempts to remedy perceived imbalances in the system.

The FCC's first set of regulatory rules for cable television was promulgated in 1965.²³⁵ Since then, it has developed four primary sets of rules to govern the balance between content producers, broadcasters, and cable operators.²³⁶ The first were the "mandatory carriage rules," which required cable systems to carry *all* of the local broadcast stations' content over wire in their service areas.²³⁷ These rules highlighted the FCC's emphasis on localism in broadcast services and the belief that local stations formed the backbone of the public television system.²³⁸ Second were the "network non-duplication rules."²³⁹ These rules forbade cable operators from importing broadcast signals from distant markets if the programs were shown simultaneously (or near-simultaneously) on a local broadcast station, and were intended to protect network exclusivity.²⁴⁰ Third were the infamous "distant-signal-carriage rules."²⁴¹ These rules placed limitations on the number of distant broadcast signals cable systems could import. Lastly, the "syndicated-exclusivity" rules afforded syndicated programs (carried by independent stations) the same protection that the non-duplication rules afforded network ones.²⁴²

All of these regulations represented a balance between the interests of content producers, broadcasters, and cable operators. In the 1980s, the

235. See First Report and Order in Dockets 14895 and 15233, 38 F.C.C. 683, 716 (1965).

236. See Jules F. Simon, *The Collapse of Consensus: Effects of the Deregulation of Cable Television*, 81 COLUM. L. REV. 612, 616-17 (1981) (identifying five major rules, but noting that one of them applies only to sports broadcasts).

237. See 47 C.F.R. §§ 76.51-.55 (1980).

238. For an overview of the FCC's localism arguments, see Stanley M. Besen, *The Economics of the Cable Television "Consensus"*, 17 J.L. & ECON. 39, 49-50 (1974).

239. See 47 C.F.R. §§ 76.92-.94 (2004).

240. *Id.*

241. See 47 C.F.R. §§ 76.57-.65 (1979) (repealed 1980).

242. See 47 C.F.R. §§ 76.151-.161 (1979) (repealed 1980).

FCC eliminated altogether the distant-signal-carriage and syndicated-exclusivity rules.²⁴³ Over the years, the FCC has made modifications to the other rules as well to reflect Congressional changes in policy and advancements in technology.²⁴⁴ The system thus consisted of a complex interplay between the FCC's regulatory rules and Congressional grants of rights, both of which remained integral to the exclusionary regimes. Ever since the Supreme Court affirmed the FCC's authority to partake in this balancing process when it refused to invalidate the FCC's first round of cable regulations, the FCC has attempted to step in at various stages to supplement Congressional grants of rights and privileges.²⁴⁵

Since the 1990s, however, the FCC's regulatory incursions into the broadcast station-cable television conflict have been minimal relative to its initial foray into the area.²⁴⁶ The present system (and its equilibrium) is now largely a matter of statutory grants and denials of rights. The question this poses for both the present regime and the proposed system of broadcasters' and cablecasters' rights is whether the FCC will intervene to implement or dilute these rights and the stage at which such intervention would likely occur (i.e., before, concurrent with, or after Congressional implementation). If the FCC's recent attempts are any indication,²⁴⁷ it will probably play more than just a passive role in this ongoing debate.

IV. RECOGNIZING BROADCASTERS' (AND CABLECASTERS') OPEN-ENDED PROPERTY RIGHTS: IMPLICATIONS & CONSEQUENCES

Having seen how limited exclusionary rights function in the television industry, this Part focuses on the likely consequences of introducing open-ended property rights (i.e., broadcasters' rights) as an alternative. The analysis here derives from some of the key attributes of the modern television industry in an internet age, characterized by greater user autonomy and participants' ready access to new methods of distribution.

Broadcasters, cable companies, and content producers are each interested in controlling the revenue streams associated with their contribution

243. *In re Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663 (1980). This deregulation was challenged in *Malrite T.V. of N.Y. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), where the Court upheld the FCC's jurisdiction to deregulate.

244. For analyses of the FCC's more recent deregulatory initiatives, see Donald J. Boudreaux & Robert B. Ekelund, Jr., *Cable Reregulation*, 14 CATO J. 87 (1994).

245. *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968).

246. Boudreaux & Ekelund, *supra* note 244, at 87-88.

247. Specifically in the context of the Broadcast Flag controversy, discussed later. See *infra* Section IV.A.

to the process. While content producers' contribution is by far the most significant (and therefore seemingly worthy of the most extensive protection), broadcasters and cable companies also partake in the process as distributors. The broadcast chain thus involves different participants at each stage. This necessitates tailoring the protection provided to the exact contribution that each makes to the complex process.

To qualify for protection under the WBT, entities need to satisfy two conditions. The entity must take the initiative and responsibility for (i) the transmission of content to the public and (ii) the assembly and scheduling of content.²⁴⁸

In the case of broadcasting, it is reasonably clear that affiliates qualify for protection. Most broadcast programming is put together by the major networks and relayed to their affiliates. However, affiliates retain the right to refuse the network's lineup, and therefore retain control over the content and its scheduling; they are also responsible for transmitting it to the public.²⁴⁹ In the cable industry, however, the matter is different. While cable operators remain responsible for providing individual households with wired connections, they have little to no control over the content of the programming. They may, of course, limit the channels carried, but not the content of the programming in each channel, which is the exclusive prerogative of cable networks. While cable networks retain control of the assembly and scheduling of content, they are not responsible for transmitting it to the public, since they remain dependent on cable operators for subscribers. The two elements of the definition of a cablecaster are therefore split between two categories of incumbents in the industry, and it is not clear which one of them will come to acquire the "cablecasters' right." Ultimately it remains more than likely that the ultimate beneficiaries will remain cable networks. But if this is the case, the need for such protection becomes even more tenuous, given that networks seldom have any direct interaction with the public. To the limited extent that they might be concerned about unauthorized interception of their communications over the

248. See *WIPO Broadcast Treaty*, *supra* note 52, at art. 5(c). It provides: "[B]roadcasting organization' and 'cablecasting organization' mean the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of the transmission."

249. 47 C.F.R. § 76.5(j) (2004). Indeed, an affiliate (or "full network station") is defined by its broadcasting no less than 85% of its content from one of the major television networks. This clearly indicates that a station, even if an affiliate, retains control over the content selection and assembly process.

air to cable operators for distribution, this activity is covered by an existent regime.²⁵⁰

Additionally, under the new regime, the extent of individual incumbents' contributions is likely to be minimal, given that broadcasters' and cablecasters' rights are in a sense derivative.²⁵¹ This resonates with the "tomato juice" hypothetical that Nozick famously used to identify a problem with the classic Lockean property rights argument.²⁵² The question becomes: why should broadcasters' and cablecasters' contribution to the distribution process entitle them to a property right that covers content, given that they contribute very little to its production?

In the current regime, the FCC and Congress have tailored individual claimants' rights to reflect both the extent of their contributions and the parties against which the rights are to be asserted, in order to enable each party to internalize particular positive gains. This narrow tailoring reflects the ideal of balance and suggests that extensive and unjustified property protection could interfere with a host of other interests and values.

One such value is that of freedom of expression, which is enshrined in the First Amendment.²⁵³ The First Amendment implications of television are some of the most well-documented issues in the literature.²⁵⁴ The prin-

250. This would be covered by the cable theft regime, which would take care of an unauthorized interception and reception of a cable service. 47 U.S.C. § 553 (2000). Indeed, if cable networks are worried about their over-the-air transmissions to individual operators, protection for over-the-wire cablecasting seems completely redundant.

251. See *supra* Part II.A.

252. Locke's labor theory of property postulates that when an individual exerts his or her labor over something and as a consequence the labor gets irreversibly mixed with the thing, the thing ought to become the property of the individual. Nozick highlights the fallacy of this argument—by asking whether the equivalent of Locke's argument meant that if a person emptied his bottle of tomato juice into the ocean and the juice got irreversibly mixed with the waters there, the person could now claim ownership over the entire ocean. Nozick of course assumed that mixing one's property (i.e., tomato juice) with something was equivalent to Locke's idea of mixing one's labor with something. See ROBERT M. NOZICK, *ANARCHY, STATE, AND UTOPIA* 174-76 (1974).

253. For an overview of the free speech implications of the new regime, specifically in the context of the European Convention Human Rights, see Patricia Akester, *The Draft WIPO Broadcasting Treaty and Its Impact on Freedom of Expression*, COPYRIGHT BULL., Apr.-June 2006, at 1, <http://unesdoc.unesco.org/images/0014/001464/146498E.pdf> (last visited Nov. 16, 2006).

254. See, e.g., H.C. DONAHUE, *THE BATTLE TO CONTROL BROADCAST NEWS: WHO OWNS THE FIRST AMENDMENT* (1989); RICHARD E. LABUNSKI, *THE FIRST AMENDMENT UNDER SIEGE: THE POLITICS OF BROADCAST REGULATION* (1981); CHARLES H. TILLINGHAST, *AMERICAN BROADCAST REGULATION AND THE FIRST AMENDMENT: ANOTHER LOOK* (2000); Jack M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131 (1996); Jerome A. Barron, *Access to the Press—A*

cipal issues relate to the basic understanding that the First Amendment exists to promote a free “marketplace of ideas,”²⁵⁵ and consequently that both government regulation aimed at controlling media companies and private control vested in media companies are capable of impeding the realization of that ideal. The First Amendment issues associated with new broadcasters’ rights are likely to be cognates of similar debates that have occurred elsewhere. While several of the issues discussed here do implicate First Amendment values, they also derive their basis quite independent of the same.

A. Failing to Recognize the Emergence of a New User Dynamic

The emergence of digital technologies and the internet in the later part of the last century resulted in significant changes for communications media. The internet made the process of information dissemination relatively effortless, cheap, and instantaneous, not only for producers, but also for consumers. Additionally, the emergence of digital copying drastically reduced the marginal costs of copying, and at the same time made the process of copying itself very simple—requiring little technological expertise or financial investment.²⁵⁶

For incumbents in the television industry, though, digital technology had both positive and negative implications. On the one hand, the ease of dissemination meant that the costs of transmitting information to audiences across the world reduced dramatically. At close to zero marginal cost, content providers could transmit information and entertainment almost immediately to millions of individuals on the internet. However, the same technology that gave rise to this capability also enabled audiences to exercise greater control over what they were receiving—copying, moving, editing, altering, *and sharing* the content of the transmissions they received.

New First Amendment Right, 80 HARV. L. REV. 1641 (1967); Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905 (1997); Robert B. Horwitz, *The First Amendment Meets Some New Technologies: Broadcasting, Common Carriers, and Free Speech in the 1990s*, 20 THEORY & SOC’Y. 21 (1991); L.A. Powe, Jr., *Mass Communications and the First Amendment: An Overview*, 55 LAW & CONTEMP. PROBS. 53 (1992).

255. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (applying the idea). See also T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966). But cf. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (criticizing the idea).

256. See generally LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001); Boyle, *supra* note 15.

In the early part of the century, radio and television broadcasting revolutionized mass communication. By using the spectrum, broadcasters could communicate with millions of individuals who owned a television set. The traditional one-to-many model on which broadcasting operated, however, rested on the core principle of *audience passivity*.²⁵⁷ Audiences had little control over the content of what they received on their televisions except for the ability to switch their television sets off. To be sure, audience control has steadily increased over the years. Audiences now have multiple channels from which to choose, and cable and pay television allow more control over the time and quantity of programming. Nonetheless, the element of passivity has remained dominant.

This passivity-driven model of broadcasting is often characterized as the “market for eyeballs.”²⁵⁸ The main deficiency in this model is that it remains premised on the ideal of mass appeal and tends to ignore altogether the diversity of actual interests and the individual needs of audience members.²⁵⁹ Since broadcasters’ compensation derives from viewership, their concern is limited to putting together programming that attracts the most viewership. The advent of the internet changed all of this. It gave rise to a whole new category of players, *users*, who controlled the quantity, nature, and timing of information and, more importantly, often reworked the information to send to others.²⁶⁰ They thus situated themselves between producers and consumers by receiving, modifying, and transmitting information. As the *iCrave TV* episode illustrated, an individual could easily convert analog broadcast programming into digital format and transmit it over the internet to millions of users, who could in turn copy the stream and retransmit it to others. When this happened, incumbents began to clamor for greater control once they realized the threat that this posed to their model.

257. Indeed, even the Supreme Court operated on the assumption of audience passivity—using the phrase “captive audience” in relation to broadcast media quite often. For an overview of the doctrine and its use by the Supreme Court, see Charles L. Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953); Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991).

258. E.g., Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 564 (2000).

259. See C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997).

260. For a comprehensive comparison between the traditional broadcast model and the internet model, see Yochai Benkler, *Communications Infrastructure Regulation and the Distribution of Control Over Content*, 22 TELECOMM. POL’Y 183 (1998).

Audience passivity thus came to be replaced by greater *interactivity*. In the past, the established incumbents rallied together in an attempt to eliminate competition from new players bearing new technologies. Each time they sought to use copyright or analogous property arguments to keep new players out, as they did with the advent of cable television.²⁶¹ The response to the perceived threat from users is no different, and we thus see cablecasters and broadcasters claiming exclusionary rights over their activities.²⁶²

In the past, threats to distributors' revenue streams normally came from commercial entities like broadcast retransmitters or cable companies, and the argument for exclusionary rights ordinarily derived its justification either from (i) perceived free-riding *for commercial gain*, or (ii) the need to restrict players' activities to promote *overall competition*. The FCC in turn derived its rule-making jurisdiction from one or the other of these rationales.²⁶³

Users present an altogether different situation since they are not necessarily commercially driven and do not compete with broadcasters and cablecasters in the traditional horizontal sense. To the current incumbents, they represent both a *source* of additional revenue, as audiences, and a *threat* to it, as redistributors (albeit for non-commercial purposes).

The idea of the user continues to present problems for the intangible property rights discourse. For quite some time now, intellectual property theorists in general and copyright scholars in particular have grappled with the role of the user in relation to these rights.²⁶⁴ At one end of the spectrum remain the user-focused idealists who argue that copyright is in reality about the "the use of the work," with owners being granted a special right for a limited period and users a more general one that is not tempo-

261. Randy Picker describes this phenomenon as the use of copyright as "entry policy", observing that copyright law and presumably its variants have important competition consequences, especially in relation to new entrants. See Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 462 (2002) ("Copyright law, both judge-made and statutory, sets key features of the legal regime for digital distribution entrants.").

262. See generally *WIPO Broadcast Treaty*, *supra* note 52.

263. See *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968) (upholding the FCC's jurisdiction in connection with its property-like regulations as deriving from its ancillary jurisdiction); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (upholding the FCC's jurisdiction in connection with certain must-carry regulations imposed on local cable companies). But see *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (finding that the FCC lacked jurisdiction in relation to similar regulations).

264. See generally Benkler, *supra* note 258.

rally bounded.²⁶⁵ They thus argue for the recognition of a set of “user’s rights” within copyright (and indeed all of intellectual property)—rights that limit the normative claims of authors for greater control and simultaneously entitle the public to greater informational access. At the other end of the spectrum are the user-skeptics, who argue that users’ rights tend to focus on user consumption and ignore the role that copyright plays as an incentive mechanism in the creative process. Although the skeptics do agree that users are entitled to *some privileges*, they tend to disagree with the idealists in believing that focusing on users dilutes the proprietary significance of copyright.²⁶⁶

In any event, the key point is that the users’ rights discourse has existed within the realm of copyright and intellectual property for quite some time now. The intellectual property system that exists today represents a dynamic equilibrium between users’ access rights and owners’ exclusionary privileges.

In contrast, the regulatory property discourse that recognizes exclusionary rights in *distribution* channels has thus far never had to grapple with the idea of non-commercial users. Given that property rights, in the sense of *attenuated exclusionary rights*, existed exclusively between distributors in an effort to preserve a competitive balance, the regulatory regime recognized neither the legitimacy nor the need for such user regulation. This state of affairs is well illustrated by the recent disputes concerning the “broadcast flag mandate.”²⁶⁷

In late 2003, the FCC adopted the “Broadcast Flag Regulations,” a series of rules aimed at safeguarding broadcasters’ and cablecasters’ inter-

265. See L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 191 (1991); Benkler, *supra* note 258; Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347 (2005). See also Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 *B.C. L. REV.* 397 (2003).

266. See Kenneth W. Dam, *Self-Help in the Digital Jungle*, 28 *J. LEGAL STUD.* 393, 394 (1999) (observing that users’ rights advocates “effectively emasculate” traditional copyright principles); Jane C. Ginsburg, *Copyright and Intermediate Users’ Rights*, 23 *COLUM.-VLA J.L. & ARTS.* 67 (1999); Jane C. Ginsburg, *Authors and Users in Copyright*, 45 *J. COPYRIGHT SOC’Y* 1 (1997).

267. For an overview of some of the issues involved here, see Susan P. Crawford, *The Biology of the Broadcast Flag*, 25 *HASTINGS COMM. & ENT. L.J.* 1 (2002); Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 *U. CHI. L. REV.* 281, 291 (2003); Debra Kaplan, Note, *Broadcast Flags and the War Against Digital Television Piracy: A Solution of Dilemma for the Digital Era?*, 57 *FED. COMM. L.J.* 325 (2004).

ests during the transition to digital television.²⁶⁸ The rules mandated that television digital receivers incorporate the “broadcast flag,” a digital code that would prevent the receivers from redistributing broadcast content once received.²⁶⁹ The FCC relied exclusively on its ancillary jurisdiction for these regulations.²⁷⁰ However, the D.C. Circuit concluded that the FCC did not have authority to issue these rules since the broadcast flag only came into play *after* the transmission was complete.²⁷¹ It concluded that the Communications Act only granted the FCC jurisdiction to regulate devices associated with broadcasts, and therefore Congress did not delegate to the FCC jurisdiction over devices (and uses) not engaged in actual transmission.²⁷² Thus, actual post-reception *use* involving the broadcast flag was something the FCC’s exclusionary regime could not legitimately regulate. Of course, much of the concern with the broadcast flag arose because the FCC’s proposal was seemingly biased against consumers and sought to replicate copyright’s restrictions with few exceptions.²⁷³

What the broadcast flag case thus demonstrates is that the idea of users’ rights is largely alien to broadcast regulation, not because users’ privileges are in any sense neglected, but rather more fundamentally because the regime does not legitimately extend to regulating their activities to begin with.²⁷⁴ Users are not regulated because doing so is extraneous to the regime’s basic purpose—creating a competitive balance and no more.

268. See *In re Digital Broad. Content Prot.*, 18 F.C.C.R. 23,550 (2003). These rules were codified at 47 C.F.R. §§ 73, 76 (2003). See also *In re Hoover & Hoover Capital Mgmt., Inc.*, 17 F.C.C.R. 16,027 (2002) (inviting public comments on the idea).

269. *In re Digital Broad. Content Prot.*, 18 F.C.C.R. 23,550 (2003).

270. *Id.* at 23,563. The ancillary jurisdiction of the FCC derives from 47 U.S.C. § 153 (2000 & Supp. IV 2004), which in different places authorizes the FCC to regulate services incidental to broadcasting. The Supreme Court has in the past interpreted the scope of the FCC’s powers under ancillary jurisdiction. See, e.g., *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968) (finding jurisdiction); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (overturning regulation because of lack of jurisdiction).

271. *Amer. Lib. Assoc’n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005).

272. *Id.* at 704-05.

273. See BRIAN T. YEH, CONG. RESEARCH SERV., COPYRIGHT PROTECTION OF DIGITAL TELEVISION: THE BROADCAST VIDEO FLAG (2007), available at http://openncrs.cdt.org/rpts/RL33797_20070111.pdf.

274. Interestingly, some argue that the regime ought to step in not at the exclusionary rights end, but rather at the users’ access-privileges end of the debate. Thus, in situations where the market results in access being diluted, quite independent of exclusionary rights (e.g., self-help, technical protection measures)—regulators such as the FCC are thought to have a role in restoring some balance. See Molly S. Van Houweling, *Communications’ Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L. 97 (2005).

Property in the regulatory context and traditional intellectual property differ fundamentally. In the former, property is not temporally limited, but is nevertheless constrained by the actors *against whom* the exclusionary mechanism operates. In the latter, by contrast, it is temporally limited, but in rem in terms of its applicability. Limitations on users are deemed acceptable in the intellectual property context because they (i) remain temporally limited, and (ii) result in long-term efficiencies that accrue back to users through works entering the public domain.²⁷⁵ In the context of distribution-related exclusionary rights, however, the matter is different. Here, temporal limitations are absent *because* equivalent long-term efficiencies are unlikely. Thus, limiting cablecasters' ability to retransmit broadcast content only twenty (or fifty) years after the original broadcast is inefficient principally because any value associated with the content is largely *immediate*. Consequently, a temporal limitation is likely to be of little to no value. It is precisely for this reason that older programming (i.e., rerun programming from past seasons) is almost exclusively a part of the syndicated programming market carried by independent stations and not affiliates.²⁷⁶ Temporally limited, as opposed to operationally attenuated, exclusionary rights over the distribution process are of little utility, which explains why the regulatory discourse stayed by and large clear of time-bound in rem rights.

It is obvious that the user remains the target of the new regime—given that all other incumbents are already regulated. Interestingly, though, the new regime is structured in the nature of a temporally limited intellectual property right. The temporal tradeoff, however, is unlikely to be of significant value to the public, given the value of immediacy that remains central to television broadcasting and viewership.

Users are thus relegated to the peripheries of the new system in the belief that their interests will be served by the limitations and exceptions of the regime's exclusionary rights, which are analogous to those contained

275. For an elaboration on the efficiency trade-offs involved in limiting intellectual property terms, see WILLIAM D. NORDHAUS, *INVENTION, GROWTH, AND WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE* 79 (1969); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 284 (1977); Landes & Posner, *supra* note 89.

276. See Museum for Broadcast Communications, Syndication, <http://www.museum.tv/archives/etv/S/htmlS/syndication/syndication.htm> (last visited Dec. 5, 2006) (noting that the syndicated market does not cover prime time network programming, live news, and live sports events); James E. Fletcher, *The Syndication Marketplace*, in *MEDIA ECONOMICS: THEORY AND PRACTICE* 84 (Alison Alexander et al. eds., 1993).

in traditional copyright.²⁷⁷ This approach adopts an overly simplistic and outmoded conception of the user in the digital age—as a passive consumer of information supplied by content producers and distributors, who consequently cares very little about the use-value inherent in the timeliness of the broadcast.²⁷⁸ It ignores the fact that users in an interconnected environment function as *producers, consumers, and distributors*, and typically do so for non-commercial purposes. By forcing users into a regime premised on temporality, the new structure neglects at once (i) the reasons for which they were kept out of the regulatory property regime *and* (ii) the historical rationale for why the temporally limited intellectual property regime stayed clear of distribution rights in the United States. At least part of the reason for this neglect stems from the lack of a cohesive organizational framework for the category of users. In addition, users' interests are diversified and at times seemingly incompatible.

This user dynamic is thus one that the current version of the proposed broadcasters' rights regime completely glosses over. The regime remains premised on the belief that through exclusionary rights, broadcasters can extract rents from users and at the same time control their behavior. Situated midway between authors and passive consumers, users get none of the protective rights that authors and owners do, nor the protection ordinarily associated with consumers.

B. Detracting from the Benefits of a New Distribution Structure

One of the consequences of the internet and the emergence of digital technologies is that it decentralizes and democratizes the process of distribution.²⁷⁹ Broadcasters and cable companies are no longer viewed as *indispensable* agents in the distribution process.

The most obvious example of this is the emergence of companies such as YouTube, an online broadcasting (or webcasting) facility that allows members to share their video programming with others for free.²⁸⁰ Its

277. See *WIPO Broadcast Treaty*, *supra* note 52, at art. 14. The exact nature of these limitations and exceptions is, however, left to individual nations to determine while enacting treaty-implementing legislation.

278. See generally ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* 1 (2005) (documenting the different forms of user innovation that occur and noting that “[u]ser-centered innovation processes offer great advantages over the manufacturer-centric innovation development systems that have been the mainstay of commerce for hundreds of years”).

279. For a detailed elaboration of this argument and an analysis of the potential benefits associated with this decentralization, see YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

280. It describes itself as follows:

company slogan—"Broadcast Yourself"—is aptly indicative of its goals. Producers and directors of original videos merely upload their videos onto the service, and users of the service view the videos there for free. Services such as these are not targeted only at independent producers, who produce videos not necessarily meant for mass audiences; YouTube is today viewed as a major distribution base for commercial production as well. With more than 100 million viewers *each day* and 65,000 new videos added daily, YouTube presents advertisers and programmers dependent on advertising with an additional source of viewership.²⁸¹ Not surprisingly, commercial sports leagues have begun forming strategic alliances with the service—previously relegated exclusively to broadcast stations.²⁸²

Most importantly, though, broadcast networks have come to view online broadcasting as providing them with additional indirect benefits. In October 2006, CBS began supplying YouTube with programming. Within a month, CBS' content on the website became the most viewed, and CBS soon acknowledged that online distribution actually increased the ratings for its traditional programming content.²⁸³

Google's recent acquisition of YouTube reemphasized the growing importance of online broadcasting services.²⁸⁴ Some have argued that the growing importance of online broadcasting is likely to eat into television

YouTube is a consumer media company for people to watch and share original videos worldwide through a Web experience. Everyone can watch videos on YouTube—both at YouTube.com and across the Internet. People can see first-hand accounts of current events, find videos about their hobbies and interests, and discover the quirky and unusual. As more people capture special moments on video, YouTube is empowering them to become the broadcasters of tomorrow.

YouTube, YouTube Fact Sheet, http://www.youtube.com/t/fact_sheet (last visited Nov. 24, 2006).

281. *YouTube Serves Up 100 Million Videos a Day Online*, USATODAY.COM, July 16, 2006, http://www.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm.

282. *See YouTube in Web Video Deal with National Hockey League*, REUTERS.COM, Nov. 15, 2006, <http://www.reuters.com/article/sportsNews/idUSN1548693420061116>.

283. *See Vito Pilieci, YouTube Clips Boost CBS Ratings*, THE OTTAWA CITIZEN, Nov. 23, 2006, available at <http://www.canada.com/ottawacitizen/news/business/story.html?id=2e7b9c59-aebe-4206-b315-31cd5bec9c81>; Chris Tew, *CBS Happy with YouTube*, PVR WIRE, Nov. 22, 2006, available at <http://www.pvrwire.com/2006/11/22/cbs-happy-with-youtube>.

284. *See Michael Liedtke, Google Holds Back Stock in YouTube Deal*, USA TODAY.COM, Nov. 15, 2006, http://www.usatoday.com/tech/techinvestor/corporatenews/2006-11-15-google-youtube-cushion_x.htm?POE=TECISVA.

broadcast advertising revenues, which is already affected by competition from cable advertising.²⁸⁵

Content producers can enter into distribution contracts directly with these services, thereby bypassing broadcast and cable intermediaries altogether, which is precisely what the sports leagues and CBS have attempted. Additionally, advertisers can now contract with these services for similar chunks of the viewership pie. While it may be premature to predict the likelihood of this occurring, the mere possibility drives home the point that online distribution services present a threat to broadcasters' and cable companies' revenues in more ways than one.

Online broadcasting allows authors to play a more active role in controlling the dissemination of their work. Historically, copyright law has long recognized the exclusive right of public distribution to be one of the fundamental elements in the constituent bundle.²⁸⁶ Online broadcasting offers authors the chance to resurrect direct distribution and thereby directly internalize the benefits of their creations.²⁸⁷

Scholarly debate on the value of direct distribution has been both overly optimistic and overly pessimistic. Jane Ginsburg's position reflects the former.²⁸⁸ She argues that the emergence of the digital world equips authors with the opportunity to disseminate their works to the public and thereby internalize the incentive framework more directly, without having to submit to control by intermediary media companies.²⁸⁹ According to Ginsburg, this is likely to have two implications. First, it enhances the legitimacy of copyright as an exclusionary framework by remaining premised on generating creativity, and second, it offers the public access to an

285. See Bob Garfield, *YouTube vs. Boob Tube*, WIRED, Dec. 2006, at 226, available at <http://www.wired.com/wired/archive/14.12/youtube.html?pg=2>.

286. See generally LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968).

287. What exactly constitutes "direct distribution" might of course be a matter of some contention. It certainly would encompass the case of the author/producer/musician disseminating the work to the public directly, under some kind of a revenue model. See MARK W. CURRAN, *SELL YOUR MUSIC!: HOW TO PROFITABLY SELL YOUR OWN RECORDINGS ONLINE* (2001). Increasingly, however, authors/producers are also making use of free distribution channels, such as free webcasters (e.g., Google Video or YouTube). Here, authors retain complete control over the production process and the content of their work, but nevertheless reach the general public via free distribution channels that operate on business (i.e., revenue) models independent of subscription fees. This would qualify as direct distribution in the traditional sense simply because the process involves the same element of authorial control over the process that *true* direct distribution would entail.

288. Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1619 (2001).

289. *Id.* at 1617-18.

increased diversity of works.²⁹⁰ However, others argue that although the authorial control argument is laudable, it remains only an ideal given that the majority of creative works today are either *owned* by media companies through the work-for-hire doctrine or procured by them through assignments of copyright, and these intermediaries have a significant comparative advantage by specializing in the distribution process.²⁹¹

The answer probably lies somewhere between the two extremes. Webcasting has begun to assume a major role in the overall market for creative works only in the past year.²⁹² Online distribution is thus unlikely to eliminate the role of the intermediary distributor anytime soon, but authors are beginning to see a resurgence in their ability to communicate with the public directly. It is precisely this outlet with which the expansive set of new broadcasters' rights is likely to interfere.

The first thing to remember about the proposed bundle of broadcasters' and cablecasters' rights is that it extends beyond just the *act of broadcasting*. In other words, the rights are not restricted to *concurrent* retransmissions or *interferences* with an ongoing broadcast, but extend to fixations of the broadcast and uses of the fixation after the actual broadcast ends.²⁹³ In this latter respect, it obviously extends beyond just protecting the ephemeral signal to controlling its manifestations in a fixed after-life. In this respect, the proposed rights are more analogous to exclusive copyright in granting broadcasters absolute control over all *current* and *potential* uses of their signals. Furthermore, given that the signal is physically indistinguishable from (and indeed, dependent on) the underlying content, control over the signal after its ephemeral existence amounts to control over the underlying content.

290. *Id.*

291. See Wu, *supra* note 157, at 339-41 (noting the existence of "reasons to suspect that developments like the Internet . . . are unlikely to eliminate the central role of disseminators").

292. The first phase of online distribution involved the webcasting of music by online companies, which raised a plethora of issues related to the compulsory licensing scheme under 17 U.S.C. § 114 (2000 & Supp. IV 2004). It eventually resulted in the Small Webcaster Settlement Act, Pub. L. 107-321, 116 Stat. 2780 (2002). For an overview of the debates in this area, which are largely related to our present debate, see Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003). See also Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 827-29 (2007) (providing for a theoretical analysis of the regime introduced).

293. See *WIPO Broadcast Treaty*, *supra* note 52, at arts. 12-15.

Recall the hypothetical involving Walter and *Quakes*.²⁹⁴ Granting XBC the exclusive right to control the *post-transmission* fixation of its broadcast of *Quakes* and distribute copies of the fixation effectively gives XBC control over the work itself. Even if Walter were to make his work available free of charge on the internet, a user is unlikely to be able to determine whether a given version originated from Walter (legally) or from XBC's broadcast (illegally), which will most likely deter actual viewing of *Quakes* altogether.

If the skeptics are right, and Walter continues to remain dependent on XBC to distribute his work, the addition of this new set of rights to XBC's existing arsenal is clearly a step in the wrong direction—away from greater authorial control. In describing the emergence of a new paradigm of copyright law, which he calls “copyright's communications policy,” Tim Wu notes that giving an existent incumbent exclusionary control places the development of technologies of dissemination in the incumbent's hands.

Assuming that the pioneer controls the creation of content (either by controlling copyright, vertical integration, or through simple economic dependence), it can dictate what happens and what does not. . . . Everything then depends on whether policymakers believe that an incumbent can be trusted to promote, rather than destroy, its technological rivals.²⁹⁵

He proceeds to argue that this often militates against the recognition of broad initial entitlements in the incumbent.²⁹⁶

Broadcasters and cablecasters cannot be expected to act except with their own private interests in mind. Throughout the history of U.S. television broadcasting, they have sought to curtail the development of new technologies of dissemination, for fear that the technologies would cut into their sources of revenue. The most obvious instance of this was, of course, the emergence of cable television. Consequently, authors' distributive interests can hardly be left exclusively to their noble intentions. The new set of rights thus aptly illustrates Wu's point regarding the nature of the entitlement and individuals against whom it is to operate.

294. See *supra* text accompanying notes 18-21.

295. Wu, *supra* note 157, at 338. He also notes that in “the example of broadcast, if copyright in programming had clearly included future technologies like cable and satellite transmission, the decision to allow these dissemination technologies to develop would have rested with the broadcast industry.” Ironically, it is precisely copyright in broadcasts that the new regime seeks to introduce. See also Trotter Hardy, *Copyright and “New-Use” Technologies*, 23 NOVA L. REV. 657 (1999).

296. Wu, *supra* note 157, at 338.

Thus, quite apart from the effects the new regime is likely to have on the user, it also detracts more fundamentally from the basis of traditional copyright—and the central role of the author therein. In the past, when broadcasters sought exclusionary control against a new entrant (e.g., cable), authors were never directly implicated because of their almost complete dependence on intermediary distribution. At present, the internet will probably decentralize distribution and minimize this dependency. Thus, moving to a regime that negates the benefits of this decentralization will only stifle further creativity.

C. The Paradox of the “Public Interest”

This Section examines what the phrase “public interest” means in the broadcasting industry and how that understanding might impact or be impacted by the new regime of broadcasters’ rights. Few terms have garnered as much ignominy as the phrase “public interest” in the context of television broadcasting.²⁹⁷ It is therefore not surprising to see a significant amount of cynicism characterize discussions of public interest over the years. While it may indeed be difficult to construct a single coherent definition of public interest applicable across time and technology, one finds the semblance of a pattern in regulatory decisions premised on the ideal.

The FCC is mandated by law to use some standard of public interest in connection with innumerable regulatory and policy-making functions assigned to it under the Communications Act of 1934.²⁹⁸ Attempts to attribute meaning to the phrase by scholars over the past several years exhibit a significant amount of ideological variety and seemingly conflicting notions.

One of the earliest conceptions of public interest adopted by regulators reflected what came to be known as the “trusteeship model.”²⁹⁹ This

297. For general studies on the topic, see PATRICIA AUFDERHEIDE, COMMUNICATIONS POLICY AND THE PUBLIC INTEREST: THE TELECOMMUNICATIONS ACT OF 1996 (1999); MIKE FEINTUCK, “THE PUBLIC INTEREST” IN REGULATION (2004); LAURA R. LINDER, PUBLIC ACCESS TELEVISION: AMERICA’S ELECTRONIC SOAPBOX (1999); DENNIS MCQUAIL, MEDIA PERFORMANCE: MASS COMMUNICATION AND THE PUBLIC INTEREST (1992).

298. See, e.g., 47 U.S.C. §§ 154, 157-61, 201, 214, 229, 251, 257, 259, 271-72, 303, 307, 309, 310-11, 315, 319, 325, 332, 335-36, 362, 396, 533-34, 543, 548, 572-73, 605-06, 610 (2000). Of course, the standard applies to almost all of the FCC’s functions. For an excellent overview of the standard’s origins and its evolution, see Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605 (1998).

299. For apt examples of this model, see, for example, the FCC’s infamous 1946 Bluebook, FED. COMM’NS COMM’N, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946), and for the policies that followed its adoption, see Mark S. Fowler &

model was premised on the need for governmental guidance over all aspects of broadcast decision-making, including content-related decisions. This was indeed the approach adopted by the FCC early on.³⁰⁰

Over time, an expansive reading of broadcasters' First Amendment rights and various statutory amendments diluted the rigidity of the trusteeship model. In the 1970s, the FCC began to move away from this model, preferring instead to adopt a distinctively market-driven approach to defining the public interest.³⁰¹ FCC Chairman Mark Fowler made this position explicit in his well-known law review article expounding on the virtues of the new approach, where he noted that "the public's interest . . . defines the public interest."³⁰² This model adopted a decentralized marketplace approach to broadcast regulation, in the belief that broadcasters, driven by advertising revenues, would structure their activities and programming depending on public demand.³⁰³ At least part of the rationale for this approach derived from the belief that any monopoly over content distribution was likely to be diluted by new technologies of content delivery.³⁰⁴ The 1980s witnessed a spate of FCC action deregulating industry players (most notably cable television) under this model.³⁰⁵

In the 1990s, with the enactment of the Cable Act of 1992, the FCC began to realize that the pure marketplace approach was suboptimal. The FCC Chairman at the time, Reed Hundt, reiterated that the television industry was subject to obligations distinct from other media and advocated the introduction of specific content-related regulation, all purportedly in the public interest.³⁰⁶ The general consensus that emerged by this time was that equating public interest with private control (in the *laissez-faire* sense) resulted in significant welfare losses, which in turn necessitated remedial

Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 213-17 (1982).

300. See Robert K. Avery & Alan G. Stavitsky, *The FCC and the Public Interest: A Selective Critique of U.S. Telecommunications Policy-Making*, in PUBLIC BROADCASTING AND THE PUBLIC INTEREST 52 (Michael P. McCauley et al. eds., 2003).

301. The FCC's subsequent deregulation of cable television exemplifies this approach.

302. Fowler & Brenner, *supra* note 299, at 210.

303. *Id.* at 230.

304. *Id.* at 225-26.

305. See *supra* notes 243-244 and accompanying text.

306. Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 DUKE L.J. 1089, 1090 (1996) ("Clearly, broadcasters are subject to distinct public interest obligations not imposed on other media.").

measures, and that these market failures could be avoided by a form of "progressive paternalism" towards the industry.³⁰⁷

Regulators have thus gone back and forth in their conceptualization of the public interest as an ideal. Many have started to question whether the concept is worthy of any application at all, given both the readiness with which regulatory decisions have in the past been justified by appeal to the concept and the remarkable rapidity with which the philosophical basis of the idea has varied over the years.

Thomas Streeter, in his vitriolic critique of domestic telecommunications policy, argues that the FCC's regulatory approach is driven by an ideology of what he terms "corporate liberalism," which is premised on the ideas of property, markets, rights, and bureaucracies.³⁰⁸ Using the largely left-leaning philosophy of the Critical Legal Studies movement, he argues that over the years the phrase has come to mean little except when used in a functional sense as an *ex post* justification for regulators to reach decisions modeled on the premises of classical liberal thought.³⁰⁹

Streeter's cynical position reflects the general understanding that the public interest ideal remains an elusive palliative—one often used by regulators to justify whatever decision they reach. Indeed, attempts to generate a policymakers' definition through interviews with individual FCC officials aptly reflect the same.³¹⁰

However, the idea of public interest extends beyond content regulation into areas such as cable television regulation. Starting in the 1970s, the FCC introduced several rules and regulations for cable television, many of which were aimed at balancing competition between cable companies and local television broadcast stations. Interestingly, the FCC rationalized almost all of these regulations as instantiations of the Commission's public interest ideal.³¹¹ In relation to cable television, the FCC often invoked the public interest to argue that its regulatory measures were directed at exploring the benefits of emergent and developing technologies for the pub-

307. See James T. Hamilton, *Private Interests in "Public Interest" Programming: An Economic Assessment of Broadcaster Incentives*, 45 DUKE L.J. 1177, 1178 (1996) (reviewing Chairman Hundt's proposal).

308. See STREETER, *supra* note 233, at 22.

309. See Thomas Streeter, *Beyond Freedom of Speech and the Public Interest: The Relevance of Critical Legal Studies to Communications Policy*, 40 J. COMM. 43 (1990). See also ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, *THE POLITICS OF BROADCAST REGULATION* 192 (1978).

310. See Dean M. Krugman & Leonard N. Reid, *The "Public Interest" as Defined by FCC Policy Makers*, 24 J. BROAD. 311 (1980).

311. *Id.* at 312.

lic.³¹² Such policies represent a move away from a content-based approach to a process-driven one. Studies of the FCC's public interest goal in relation to cable regulation seem to indicate that it merely referenced a loose set of procedural ideals: (i) balance between different interests; (ii) diversity of content and ownership; (iii) dynamism of approach across different issues; and (iv) localism of content.³¹³ At the center of the FCC's conception of public interest in relation to cable television thus seemed to be the idea of balance—that its decisions needed to reflect the interests of the different players in the field, even if to different degrees.³¹⁴

One of the major flaws with the discussions of public interest and balancing in the context of cable television was that one party directly affected by policy changes was often without effective access to the policy-making process. This was the consumer.³¹⁵ While every incumbent in the process argued that it was acting in the best interests of consumers, consumers' direct inputs were rarely ever considered. Representational issues and collective action problems were largely responsible for this absence. Nevertheless, consumers' interests remained at least notionally at the forefront of policymakers' agenda, and their interests were safeguarded in a majority of instances through indirect representation.³¹⁶ What rendered this possible was of course the fact that (i) consumer protection was viewed as an aspirational ideal, for it aptly captured the idea of public interest, and more importantly that (ii) consumers were never likely competitors or the possible targets of a regulatory regime.

Enter the debate on broadcasters' rights. As noted earlier in Part II and Section IV.A, these rights are structured as in rem rights and remain targeted at the *user*. Much like consumers, users are unlikely to be effectively represented in the balancing process, but it is difficult for them to organize.³¹⁷ In addition, given that users remain the targets for the new rights, it is unlikely that any of the other parties will give their interests due consideration. Their only hope, then, is for regulators to take their concerns into

312. See, e.g., FED. COMM'NS COMM'N, CABLE TELEVISION REPORT AND ORDER AND RECONSIDERATION 4-5 (1972).

313. Krugman & Reid, *supra* note 310, at 319-20.

314. See generally Patricia Aufderheide, *Cable Television and the Public Interest*, 42 J. COMM. 52 (1992).

315. Krugman & Reid, *supra* note 310, at 323 (noting that the "most likely place for general public input is to the complaint service of the Cable Bureau").

316. For example, note that the Cable Act of 1992 was actually termed the "Cable Television Consumer Protection and Competition Act". See *supra* note 215.

317. For an overview of the collective action problem, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (2d prtg. 1971).

consideration. However, the recent Broadcast Flag regulations issued by the FCC, which failed to adequately address users' interests, reflect the sad reality that this is yet to happen.³¹⁸

The broadcasters' rights debate is thus likely to create an entirely new dynamic for the public interest.³¹⁹ Far from creating measures premised on a trusteeship ideal of broadcast regulation, incumbents advocate for measures *which directly restrict user's rights* to use broadcast signals, by arguing that those restrictions are in the public's best interest. The rhetoric seems to have thus come full circle—starting from a position where the public interest supposedly restricted private actions (trusteeship), to one where the public interest was considered to be in alignment with private interests (marketplace approach), to finally one where the public interest purportedly dictates rules directly limiting the public's use privileges. Semantic and philosophical skepticism apart, this shift is at once easy to identify, yet hard to ignore, given the extent to which the notion of public interest remains entrenched in the industry's regulatory framework.³²⁰

One might argue that any property-based exclusion is actually in the public interest, *in the long term*. Arguments along these lines—that short-term restrictions involve long-term efficiency gains—certainly are not new to intellectual property, which is premised on the idea that temporally limited use-restrictions can produce long-term use-gains. The notion of public interest, however, has never sought to place short-term detrimental limits or restrictions on the public in order to ensure long-term gains. Thus, for instance, the FCC has never in the past entertained regulatory measures that would allow cable television prices to rise exponentially in the short-term to ensure an eventual long-term price equilibrium. A distinction between short- and long-term public interest goals is both meaningless and

318. One of the major problems with the broadcast flag regulations that public interest groups highlighted was its failure to provide for use-exceptions along the lines of copyright's fair use doctrine. *See, e.g.,* Comments of the Electronic Frontier Foundation to the FCC, *In the Matter of Digital Broadcast Copy Protection*, M.B. Docket No. 02-230, Dec. 6, 2002, at 13. *See supra* note 273 and accompanying text. The idea has since taken the form of a Bill (H.R. 5252) currently before Congress. *See* Communications Opportunity, Promotion, and Enhancement Act of 1996, H.R. 5252, 109th Cong. (2006).

319. *See generally* Krasnow & Goodman, *supra* note 298, at 630 (noting that the emergence of the digital world does not require a radical change in the meaning of the standard, given that its "genius . . . is its breadth and flexibility").

320. Indeed, some argue that the "public interest" ideal is unconstitutional to begin with, given that it is indeterminate and amounts to an abdication of Congressional responsibility. Randolph J. May, *The Public Interest Standard—Is it Too Broad to be Constitutional?*, in *COMMUNICATIONS DEREGULATION AND FCC REFORM: FINISHING THE JOB* 185 (Jeffrey A. Eisenach & Randolph J. May eds., 2001).

self-defeating within the context of the television industry, particularly given (i) the rapidity of technological innovation in the telecommunications industry and (ii) the changing socio-cultural preferences of audiences.

For example, consider the case of devices such as TiVo, which enable users to time-shift and space-shift broadcast programming, and to fast-forward through advertisements.³²¹ Under a broadcasters' rights regime, its manufacture, sale, and use would presumably all be illegal, unless one was to wait *fifty years* before watching recorded programming. This kind of time-shifting and space-shifting is meaningful *only* because the shifting is within relatively short intervals.³²² Thus, Ronald, a busy banker, prefers to record Monday's episode of *Heroes* to be viewed later in the same week (or at most a week later), since he's always tied up in meetings on Monday nights. Sometimes, he views the episode on his computer at work, instead of his television set, the following day over lunch. The broadcasters' rights regime would now allow him to do all of this *only for programming* that aired at least fifty years ago—all in the name of an attempted trade-off. The converse is that, in relation to the *Heroes* episode, the recording and transmission would be permitted *fifty years* from the Monday on which it aired—meaning that if someone missed it live, they would have to wait a lifetime to see it again on their television sets in the comfort of their homes.

It is precisely the in rem and user-targeted nature of broadcasters' open-ended rights that results in this outcome. And it is probably for this reason that debates are typically couched in intellectual property or copyright terms, given that the copyright law framework readily accepts the temporal limitation trade-off. The public interest at stake in the copyright debates at the international level (i.e., at the WIPO) has little relevance to the current regulatory framework (i.e., retransmission consent, compulsory licensing, etc.). Policymakers might require more forceful judicial intervention in order to realize that the regime is actually about *broadcasting*

321. For an overview of the TiVo and its technological capabilities, see TiVo.com, Service Features, <http://www.tivo.com/1.6.4.asp> (last visited Dec. 10, 2006). For a detailed overview of the copyright-related issues that the TiVo technology (DVR) raises, see Ned Snow, *The TiVo Question: Does Skipping Commercials Violate Copyright Law?*, 56 SYRACUSE L. REV. 27, 35-38 (2005) (noting that unlike with the VCR, over 90% of DVR users actually do skip commercials); Matthew W. Bower, Note, *Replaying the Betamax Case for the New Digital VCRs: Introducing TiVo to Fair Use*, 20 CARDOZO ARTS & ENT. L.J. 417 (2002).

322. Time-shifting and space-shifting as legitimate forms of content "fair use" are normally traced back to the Supreme Court's holding in the *Betamax* case. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

and cablecasting, arenas where the public interest ideal (in whatever form) remains inescapable. The central question then is to what degree the public interest will be split into its short- and long-term variants.

V. A BALANCED IMPLEMENTATION PROPOSAL: STAGGERED EXCLUSION

The new regime of broadcasters' rights is without a coherent justification, ignores much of what exists as regulatory mechanisms in the television industry, and is likely to have serious detrimental consequences for both emergent technologies and the dynamic to which they seem to be giving rise. Broadcasters' and cablecasters' primary motivation for the new regime derives from the emergence of the internet as a decentralized distribution mechanism, and with it digital technologies of copying and transmission.³²³ Claims of signal piracy are in reality claims that broadcasters' de facto exclusivity over distribution is now being eroded.

But might there be a rationale for introducing a regulatory framework that at once both alleviates *some* of the concerns of broadcasters and at the same time is fully cognizant of the pitfalls of straying too far in the direction of property protection? This Part argues that there might indeed be, drawing from the discussion of attenuated rights in the current regime, and outlines the structure such a solution might take.

A. Unfair Competition as a Regulatory Basis

A regime premised on the ideal of unfair competition—aimed at recreating a level playing field *between competitors*—might represent a suitable alternative. Historically, the principle of unfair competition has been associated with the doctrine of misappropriation and notions of “free-riding.”³²⁴ However, the basis of the unfair competition regime proposed here derives not from these notions, which are proprietary, or at best quasi-proprietary, but rather from the ideal of unjust enrichment—that an individual benefiting from a system in which others bear costs for analogous benefits ought to also bear some of the costs.

323. See *supra* Section II.D.

324. See Rudolf Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595, 612 (1942) (“[O]ne who has used his intellectual, physical, or financial powers to create a commercial product should be afforded judicial relief from a competitor who seeks to ‘reap what he has not sown.’”); Miguel Deutch, *Unfair Competition and the “Misappropriation Doctrine”—A Renewed Analysis*, 48 ST. LOUIS U. L.J. 503, 545 (2004) (arguing that misappropriation doctrine must balance the “free-rider” problem with economic efficiency).

The unfair competition in the context of broadcasters does not derive from any value broadcasters add to the broadcast. Even if broadcasters add some value, determining the amount added by distribution, which would be necessary in order to limit the extent to which they can internalize the benefits that others pay for, is near impossible. A claim based on value added would track the unfair competition ideal in its misappropriation sense. The ideal of unfair competition that works best here is instead one that is uncoupled from misappropriation and tied to a notion of unjust enrichment. Specifically, one party must compensate another *only* because others are required by law to do so, and permitting the first party to avoid this result would enable it to compete on unfair terms with those others.³²⁵

Under the current system, broadcasters remunerate content producers for use of their creative works in broadcast programs.³²⁶ Analogously, cable companies also compensate content producers when they use broadcasters' programming. Indeed, the very basis of the current retransmission consent regime, which requires cable companies to compensate broadcasters for use of their signals, is premised on a *restitutionary* ideal.³²⁷ The basic idea is that since the regulatory framework requires current distributors to compensate the creator, a new distributor who seeks to use the same creative work ought to be subject to the same regulatory framework. Broadcasters, cable companies, and retransmitters all *compensate* authors for their work because to do otherwise would be unjust not in a property rights sense (i.e., because incumbents *own* their broadcasts), but in an equitable sense (i.e., in the interests of fairness and to create a level playing field between competitors).³²⁸

325. Unjust enrichment, as a general principle, is based on the idea that where one person derives a benefit from the actions of another, he is mandated by the principles of equity and natural justice to part with his benefit or at least a part thereof. See Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1769 (2001). Scholars often talk about the idea of "restitution for unjust enrichment," which is of direct application here. In the case of restitution for a wrong, restitution derives from a primary wrong, independently actionable under tort, contract, or property law. Restitution for unjust enrichment, however, is a principle of equity, for an action that is otherwise perfectly legitimate (or *damnum sine iniuria*) at law. In other words, the restitution concept used here derives from the unfairness or inequity inherent in the party's gain.

326. As an element of traditional copyright law, given that broadcasting has always been considered a "public performance."

327. See generally Allard, *supra* note 215.

328. Indeed, the unjust enrichment argument formed the basis of some of the broadcasters' early claims for property rights during the emergence of cable television. However, it is surprising that during discussions for the new regime at WIPO's SCCR, unjust enrichment arguments were never raised. For an out of context application of the unjust enrichment argument to private copying, see Burnett, *supra* note 107, at 40.

Webcasts of over-the-air or over-the-wire programming seek to make use of the same creative works for which broadcasters and cable companies must pay. If, like broadcasters, webcasters do so for a commercial motive, the principles of equity seem to require that they be subjected to similar regulatory restrictions. However, this argument is valid only if the online webcaster, or other party making use of current incumbents' programming, does so for *commercial purposes*.³²⁹ This concept alone remains absolutely central to the notion of unfair competition. The entitlement is not in rem in an absolute sense of the term, but in rem only against a specified class (i.e., competitors in the distribution market, however defined).

Regulatory proposals restricted to competitors certainly are not novel, nor restricted to the judicial context. In 1999, Congress considered introducing legislation aimed at protecting electronic databases from copying *by competitors*.³³⁰ The legislation was aimed at disallowing compilers of databases from avoiding the burdensome process of compiling their databases independently, by relying on the efforts of others.³³¹ It thus sought to subject new compilers to a similar detriment or a monetary equivalent. However, it differed from the proposal here, because it remained premised on copying or misappropriation by vesting the entitlement in the original compiler. An unjust enrichment rationale, on the other hand, would have vested the entitlement in some other party, such as the owner of the underlying content. Nevertheless, the legislation is aptly illustrative of a system limited to competitors.

Limiting the regime in similar manner, to new *commercial distribution* intermediaries—entities seeking to derive their profits through the distribution of content online—serves several purposes. It leaves intact the user dynamic of the internet and in a majority of instances would not interfere with the activities of individuals engaged in non-commercial activities, even if they involved the copying of current broadcast programming.

329. Copyright law already employs the commercial/non-commercial distinction as part of its standard fair use analysis. See 17 U.S.C. § 107 (2000 & Supp. IV 2004) (requiring courts to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"). The distinction has been applied fairly straightforwardly here and there seems little reason to believe this might present problems elsewhere.

330. Consumer and Investor Access to Information Act of 1999, H.R. 1858, 106th Cong. § 102 (1999); see also H.R. REP. No. 106-350, pt. 1 (1999) ("Congress must ensure that database publishers have sufficient protection against unfair competition.").

331. For a comprehensive analysis of the Bill, see Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000).

Thus, individuals accessing and copying programming for their own non-commercial purposes, public or private, would not be subject to this regulatory framework. Furthermore, mere uses, commercial or not, that are not accompanied by acts of commercial distribution would remain outside the reach of this regime, since the framework extends only to competing commercial distributors. (Copyright law might, of course, provide content producers with an independent remedy against such uses.) Lastly, if the regime employed a statutory licensing mechanism, it would also exclude from its scope developers of new technologies directed at non-commercial end users, like TiVo, since such developers, even if commercial, would not be competing in the distribution segment of the market.

Unfair competition thus offers regulators a rich body of work from which to structure a regime that merely seeks to ensure the creation of a level playing field between entities using the same content for their profits.³³² Such a regime will of course entail significant administrative and other related transaction costs.³³³ However, minimizing these costs by adopting an open-ended, decentralized enforcement regime of property rights would give rise to a plethora of other costs, as noted previously.³³⁴ This framework enables regulators to avoid most of those pitfalls.

B. Optimizing the Regulatory Structure: Taking the Past Seriously

How might a regulatory regime for the reuse of broadcasts (and cablecasts) be structured? In specific, who should compensation, if any, go to and how might this work? The regulatory battle between broadcast and cable television that eventually ended about a decade ago and resulted in the current regime is instructive.³³⁵ The very same arguments for property rights were made by broadcasters in that context. Yet both the FCC and Congress rejected these arguments, and instead adopted a staggered regulatory regime of exclusion. The result was the emergence of a burgeoning

332. Unfair competition and unjust enrichment have been tied together in the past, but in different contexts and, more importantly, as common law (i.e., judicial) solutions. See ANSELM KAMPERMAN SANDERS, *UNFAIR COMPETITION LAW: THE PROTECTION OF INTELLECTUAL AND INDUSTRIAL CREATIVITY* 134 (1997) (arguing for the creation of a new doctrine of “malign competition”). But see Caldwell, *supra* note 11, at 1111 (noting that he has “no faith in the unjust enrichment theory”).

333. Many of which might, of course, be minimized through a system of collective licensing as is currently in play. See Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383 (1992).

334. See *supra* Part IV.

335. See generally LE DUC, *supra* note 142.

cable industry that has all but replaced broadcast television as viewers' primary source of programming.

The history outlined in Part III reveals a gradual pattern in the development of broadcasters' current exclusionary rights. When cable television first emerged, broadcasters paid little heed to it. It was viewed as a mechanism to enhance broadcast viewership, and the retransmission of broadcast signals was allowed without any restrictions. It was only a few years later, when broadcasters began to realize that cable companies were competing with them and actually affecting their revenue model, that they began lobbying regulators for controls on cable. Their principal argument remained that while they were forced to contract with content producers for work, cable companies were able to short-circuit this requirement altogether. Both the courts and the FCC stayed away at first until Congress intervened with its copyright law revisions in 1976.³³⁶ Congress made cable transmissions a form of public performance and introduced compulsory statutory licensing for secondary transmissions of broadcast signals carrying copyrighted content.³³⁷ Additionally, it granted broadcasters standing to sue competing cable companies within their local jurisdiction. The new statute and the FCC's interstitial regulations allowed cable to flourish and compete with broadcasting on a level playing field. It was not until 1992, by which time cable revenues were substantial enough to compete with broadcasters' advertising revenues, that Congress introduced the system of retransmission consent, which granted broadcasters exclusionary rights over their content-carrying signals, but *only against cable companies* seeking to retransmit them.³³⁸

Of course, it was not owing to any lack of analytical foresight that policymakers consciously chose not to introduce property protection early on. The idea of "retransmission consent" was proposed in 1968 for the first time and rejected because of the nature of the industry.³³⁹ Regulators

336. See *supra* Section III.B.2.

337. *Id.*

338. For a historical overview of this, see LE DUC, *supra* note 142, at 86. See also ROBERT W. CRANDALL & HAROLD W. FURCHTGOTT ROTH, CABLE TV: REGULATION OF COMPETITION (1996); LELAND L. JOHNSON, TOWARD COMPETITION IN CABLE TELEVISION (1994). In addition, Congress also introduced a set of short-term liability rules to supplement these rights in 1992. The rules were to be reviewed periodically and extended if necessary, and were meant to operate in lieu of full-blown property regimes. See Lemley & Weiser, *supra* note 292, at 823 (analyzing these "program access rules" as modifications of traditional liability rules).

339. *In re* Amendment of Part 74, Subpart K, of the Comm'n's Rules & Regulations Relative to Cmty. Antenna Television Sys.; Notice of Proposed Rulemaking & Notice of Inquiry, 15 F.C.C.2d 417 ¶ 38 (1968). See Veraldi, *supra* note 225, at 480 ("Such consent

recognized that property rights could result in holdouts, which would in turn impede access to programming and the media.

Figure 2: Exclusionary Protection in the Broadcast-Cable Tussle

Phase 1	No regulation of cable television; FCC and courts decline jurisdiction
Phase 2	Congressional intervention: Cable transmissions rendered performances Broadcasters granted limited beneficial ownership Compulsory licensing introduced for retransmissions FCC issues exclusivity regulations to supplement these
Phase 3	FCC regulations relaxed considerably to promote cable
Phase 4	Retransmission consent introduced

One lesson to be learned from this phased approach to exclusionary protection is that although full-blown, exclusionary protection early on would have minimized administrative costs associated with the regime and decentralized enforcement to individual broadcasters, doing so would have killed the development of cable television as a viable alternative. It is likely that even the limited retransmission consent variant of exclusionary protection would have unduly stifled cable had it been introduced too early, which is one reason why its introduction was put off.³⁴⁰ It was not until cable grew to a level where it was recognized as capable of competing with broadcast independently that full blown retransmission consent (i.e., exclusionary protection) was introduced.

A similar staggered approach has much to offer in the context of broadcasters' current concern that online transmissions of their signals is in some sense unfair. The past several decades of its functioning do provide a workable basis on which to structure a new regime aimed at regulating an altogether new medium of distribution.

C. A Staggered Approach to Regulating Online Retransmissions

This section outlines a staggered approach to regulating webcasting based on three central principles. First, that the basis of the regime be neither proprietary nor wrong-based, but rather based purely on unfair competition and the belief that equity requires a level playing field. Second, given the centrality of unfair competition, that it be restricted exclusively to commercial webcasting, and thus that individual users would remain

requirements probably would have prevented any competition at all from cable systems.”).

340. See Veraldi, *supra* note 225, at 480.

exempt from the regime altogether. Third, that it forecloses courts from inventing causes of action to supplement the regime since such intervention would likely upset the balance of interests.

The webcasting industry is today at a nascent stage in its development and only recently has begun to emerge as a viable alternative to traditional over-the-air and over-the-wire transmissions.³⁴¹ However, its success as a business model is likely to depend on several factors. The most important factor is, of course, determining the exact revenue model that these structures are likely to adopt: advertising-based, subscription-based, or a hybrid of the two.³⁴² All the same, the internet as a distribution and communication medium has been around for close to two decades now, and digital copyright liability for copying and distribution are fairly well settled. Thus, the webcasting regulatory regime must take as a given that it is an act of infringement for a company or individual to distribute or perform works online.³⁴³

1. Phase I: Statutory Content Licensing for Retransmissions

Because broadcasters, cable companies, re-broadcasters, and cable re-transmitters all have to pay to use authors' creative content, commercial webcasters ought to do so as well. This requirement can be achieved in one of two ways. The first mechanism is through voluntary licensing, which would require webcasters to negotiate with copyright owners for licenses to use their works in online transmissions. The problem with this solution is that content producers today depend on incumbent intermediary distributors for royalties, and most of the works they create are produced either under a work-for-hire clause or have had their copyright transferred to the intermediary as a precondition to distribution.³⁴⁴ Under these condi-

341. See generally JESSICA KEYES, *WEBCASTING: HOW TO BROADCAST TO YOUR CUSTOMERS OVER THE NET* (1997); PEGGY MILES, *INTERNET WORLD GUIDE TO WEBCASTING* (Robert M. Elliott ed., 1998). See also Matthew J. Astle, *Will Congress Kill the Podcasting Star?*, 19 HARV. J.L. & TECH. 161 (2005); Susan A. Russel, *The Struggle Over Webcasting—Where is the Stream Carrying Us?*, 1 OKLA. J.L. & TECH. 13 (2004).

342. For an analysis of a few potential business models, see Sylvia M. Chan-Olmsted & Louisa S. Ha, *Internet Business Models for Broadcasters: How Television Stations Perceive and Integrate the Internet*, 47 J. BROAD. & ELEC. MEDIA 597 (2003); and Ashok Ranchhod & Călin Gurău, *Internet-Enabled Distribution Strategies*, 14 J. INFO. TECH. 333 (1999) (studying different models in existence). See also INTERNET TELEVISION (Eli Noam et al. eds., 2004) (analyzing the different regulatory and business models that are likely to evolve in the context of internet television).

343. For an overview of some of the issues in relation to this area, see JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001). See also Pamela Samuelson, *Toward a "New Deal" for Copyright in the Information Age*, 100 MICH. L. REV. 1488 (2002).

344. Wu, *supra* note 157, at 339-40.

tions, a voluntary licensing rule would require webcasters to negotiate either with powerless content producers or with powerful content distributors with whom they seek to compete directly. In the latter situation, hold-outs are very likely.

A compulsory licensing mechanism, on the other hand, would largely avoid the holdout problem and have the added advantage of allowing the benefits to accrue back to content producers—the sole contributors of creativity to the entire process—who today lack independent negotiating power. In addition, it would also allow the system to take advantage of collective licensing schemes that currently exist for content, thereby minimizing the transaction costs associated with individualized licensing.³⁴⁵ Of course, licensing here is *not* for works directly from the content producer, but rather for works *originating* from the producers but *obtained* from the capture of broadcasters' or cablecasters' signals. In other words, it is restricted to retransmissions and does not include primary transmissions, for which a regime already exists under traditional copyright law.

The compulsory licensing scheme would thus require commercial webcasters to pay a statutorily determined royalty fee for content contained in the broadcast signals they seek to use in their webcasts. If webcasters fail to make royalty payments, they would open themselves up to full copyright liability from content producers and their transferees. Sections 111 and 114 of Title 17 might provide policymakers with additional lessons, since they already contain similarly structured provisions—one for cable retransmissions and the other for webcasts of musical works.³⁴⁶

In this structure, commercial webcasters would be able to get access to creative content via the primary intermediaries—broadcasters and cable companies—but would have to remunerate the producers rather than the distributors of the content. This structure is analogous to the regime in Section 111 because its emphasis is on creating a level playing field. The effect of the statutory license here is thus that it enables webcasters to access content contained in traditional broadcasting without having to negotiate with either the producer or the distributor. A license under this regime would exempt a webcaster from all liability to both the broadcaster (should any exist) and the content producer (under traditional copyright). However, since only *commercial* webcasters can use this regime, non-commercial uses might still be subject to liability under traditional copy-

345. Such as those organized by the ASCAP and BMI. For an overview of copyright collectives and their functioning, see ABRAHAM HOLLANDER, *MARKET STRUCTURE AND PERFORMANCE IN INTELLECTUAL PROPERTY: THE CASE OF COPYRIGHT COLLECTIVES* (1983).

346. See 17 U.S.C. § 111(d)(2) (2000 & Supp. IV 2004).

right. This Article leaves unanswered the broader question of whether the rules of online infringement need to be re-appraised.³⁴⁷

In 1997, the Copyright Office considered compulsory licensing for online retransmissions and concluded that compulsory licensing was best introduced *after* market experimentation.³⁴⁸ Although the cable industry's compulsory licensing scheme did come into play *after* the industry had developed for over a decade, the industry in that case was not subject to copyright liability to producers or broadcasters. In the present scenario, this immunity does not exist, and consequently the market is not free to begin with.³⁴⁹ Furthermore, were the compulsory license mechanism introduced with a legislatively determined time limitation in mind, the realization of a truly free and equitable market might be significantly more viable.³⁵⁰ The objective should be to bring commercial webcasting on par with broadcast and cable television for it to compete, not to dilute the rights of content producers.

Enabling webcasters to retransmit creative works carried by broadcasters and cable companies should allow webcasting to develop as an inde-

347. A recent development in this regard that pits the cable industry against webcasting is the case brought by Viacom against YouTube for direct and indirect copyright infringement. Much of the balance between commercial webcasting and the current incumbents (i.e., broadcasters and cable networks) is likely to be determined by the outcome of this case. *See Viacom Int'l Inc. v. YouTube, Inc.*, No. 1:07CV02103 (S.D.N.Y. filed Mar. 13, 2007). For commentary on the case and its potential impact, see Lawrence Lessig, *Make Way for Copyright Chaos*, N.Y. TIMES, Mar. 18, 2007, sec. 4, at 12.

348. U.S. COPYRIGHT OFFICE, A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 97-99 (1997) (concluding that a license along these lines was likely to interfere with content owners' access to the internet's capabilities). For past suggestions in this vein, see Baoding Hsieh Fan, *When Channel Surfers Flip to the Web: Copyright Liability for Internet Broadcasting*, 52 FED. COMM. L.J. 619 (2000) (recommending a compulsory licensing regime for online webcasting); Michael Wirth & Larry Collette, *Should Congress Establish a Compulsory License for Internet Video Providers to Retransmit Over-the-Air TV Station Programming via the Internet?*, in COMMUNICATIONS POLICY IN TRANSITION: THE INTERNET AND BEYOND 397 (Benjamin M. Compaine & Shane Greenstein eds., 2001); Barbara S. Cohen, Note, *A Proposed Regime for Copyright Protection on the Internet*, 22 BROOKLYN J. INT'L L. 401 (1996). *But see* Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 FED. COMM. L.J. 191 (1990).

349. Many of these arguments were made during a congressional committee hearing on the subject in 2000. *See Copyrighted Webcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. (2000) [hereinafter *Webcast Hearings*].

350. *See Picker, supra* note 261, at 462-63 ("The modern structure of facilitating distributional entry by validating or conferring rights in copyright holders yet coupling those rights with statutory licenses has the virtue of mitigating the exercise of monopoly power and minimizing the transaction costs of negotiations.").

pendent distribution service. At the same time, it poses no threat to content producers who either seek to enter the webcasting world (e.g., YouTube) themselves or create content specifically for digital transmission. By creating a market for webcasting, the proposed Phase I regulations would induce producers to develop content specifically for internet audiences.³⁵¹

Phase I is meant to track the boom that cable television experienced in its first two to three decades of existence. With the issue of copyright liability resolved by the 1976 Act, content producers began to develop content exclusively for cable television. Both cable networks and an entirely new segment of the television market soon emerged, all because of the realization that cable television was a viable alternative to broadcast television, and one for which independent content could be produced with an expectation of returns.³⁵²

2. *Phase II: Statutory Retransmission Consent*

Once commercial webcasting reaches a stage where it is capable of competing with traditional broadcast and cable media, Phase II should be put into place. Phase II involves a licensing mechanism analogous to retransmission consent, but with liability rule protection instead of property rule protection. Phase II is structurally similar to Phase I, as a statutory mechanism that enforces broadcasters' and cablecasters' consent for retransmission through a "compulsory authorization" rule that would operate as a statutory licensing scheme to fix the payments webcasters need to make to obtain retransmission authorization from broadcasters.

A mechanism such as this serves more than one purpose. First, by requiring webcasters to pay broadcasters and cable companies for retransmissions and copyright owners for their works, it forces webcasting as an industry (which ought to have developed substantially by the time the Phase II regime is introduced) to move toward creating an independent market for webcasting content. By *penalizing* webcasters who seek to re-

351. Some argue that this is already occurring. See Jeff Howe, *Must-Stream TV*, WIRED, Feb. 2007, at 54 (noting how internet television shows are attempting to break into the world of television).

352. Once this happens for the internet, and content producers begin to contract independently with commercial webcasters, the regime in Phase I might be phased out. However, the dismantling ought to reflect the extent to which webcasting has developed vis-à-vis broadcasting and cablecasting in the market for independent original programming. Thus, if all or a substantial part of webcasters' content is original programming, it would be an indication that the time is ripe for the dismantling. Another alternative is to phase out the content license over a period of time. Ironically, in spite of cable television having become a dominant force in the television industry, the statutory licensing regime remains in place for no apparent reason.

main dependent on traditional broadcasters and cablecasters, it creates incentives for them to contribute in the development of an independent content market. All the same, since new entrants into webcasting are unlikely to have content made specifically for them, it allows them to develop through a statutory licensing regime in the absence of potential holdouts, which a property model would ordinarily entail.

It is likely that the period between Phase I and Phase II will be quite significant, given that in the context of cable television it took nearly sixteen years.³⁵³ However, cable regulations moved directly from statutory content licensing (the same as in Phase I) to a full property rights regime of retransmission consent. The proposal here is not quite the same. A retransmission consent regime would allow broadcasters to determine the prices they charge for retransmission and additionally enable them to restrict access to their content-carrying signals in the event that negotiations with cable operators fail.³⁵⁴ In the decade and a half since its adoption, conflicting reports exist on the effects of the retransmission consent provisions, with broadcasters continuing to assert that all is well, while cable operators argue that they are being forced to pay extortionate retransmission fees.³⁵⁵ The rule proposed here operates midway between full retransmission consent and no liability and alleviates both holdout and pricing problems on the one hand, and inequality concerns on the other.

The retransmission authorization regime of Phase II comes closest to full-blown property protection, but would still operate against a limited set of actors and never in rem. One might argue that recognizing broadcasters' entitlements in terms of a property right, even in this limited sense, moves

353. Statutory content licensing was introduced in the cable industry in 1976, while full retransmission consent was introduced only in 1992.

354. In 2005, the FCC reviewed the functioning of the retransmission consent regime and concluded that it had worked without any problems, therefore requiring little to no alteration to the basic mechanism. *See* FED. COMM'NS COMM'N, RETRANSMISSION CONSENT AND EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT OF 2004, at 41 (2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf.

355. Compare National Association of Broadcasters, *Retransmission Consent*, <http://www.nab.org/AM/Template.cfm?Section=Resources&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=7147> (last visited Nov. 27, 2006) ("Retransmission negotiations are fair and market driven when exercised.") with Am. Cable Ass'n, *Report Identifies Economic Harm Caused by Media Consolidation and Retransmission Consent Abuse Reinforces ACA's Call for Regulatory Reform* (2006) (on file with author); see also Richard A. Gershon & Bradley M. Egen, *Retransmission Consent, Cable Franchising, and Market Failure: A Case Study Analysis of Wood-TV 8 Versus Cablevision of Michigan*, 12 J. MEDIA ECON. 201 (1999).

the justification away from unfair competition/unjust enrichment towards a property-based one. The use of a liability rule (statutorily mandated authorization) instead of a property rule (voluntary authorization) ensures that this is not the case.³⁵⁶ The justification for compensating broadcasters and cablecasters under this rule is not because their *property* has in any sense been used or their facilities have been transgressed upon, but rather for instrumental purposes closely related to the development of commercial webcasting as an independent channel of distribution.

Additionally, the unfair competition argument derives from the current regulatory framework, which already requires an incumbent with an independent source of content (i.e., cable companies) to negotiate with a broadcaster for the use of the latter's content. To fail to require the same of commercial webcasting would in a sense be unfair to cable companies that today require broadcasters' consent for retransmission as a matter of law.³⁵⁷ The *unjust* element of the rationale therefore operates both vis-à-vis broadcasters and cablecasters, both of whom are regulated and constrained by the current regime. The use of a liability rule instead of a property rule, however, ensures an optimal and equitable solution that does not impede the overall flow of information and content.

D. Summation

The proposal described above is a conceptual overview of the direction a new regime aimed at developing webcasting as a viable distribution medium might take if it seeks to preserve the other beneficial characteristics of the internet. Phase II will certainly require fine-tuning and possibly regulatory intervention by the FCC, as it did for cable television,³⁵⁸ assuming of course that the FCC decides to assume jurisdiction over web-based retransmission.³⁵⁹ In addition, the statutory licensing and consent models

356. For debates on whether protecting a right through a property rule in the Calabresi-Melamed formulation renders the framework "property" or not, see Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091 (1997).

357. The corollary is that if Congress were to relax the retransmission consent rules the "level playing field" rationale for webcasters would as a consequence disappear.

358. See *Webcast Hearings*, *supra* note 349, at 85-89. In particular, the Chairman of the International Webcasting Association (IWA) offered to work with regulators to introduce similar exclusivity-based restrictions (along the lines of the syndicated exclusivity rules), should the compulsory licensing scheme come to be adopted.

359. The FCC's jurisdiction over internet-related activity is an issue that itself has generated a lively debate. The Telecommunications Act of 1996 seemingly forbids the FCC from entering the domain of internet regulation. See 47 U.S.C. § 230(b)(2) (2000 & Supp. IV 2004) (stating that it is the policy of the United States to "to preserve the vibrant

that currently exist will of course have to be altered to accommodate the specifics of the internet world.³⁶⁰ The exact time frame for the implementation of each phase will largely depend on the future direction of technology and the way in which the market develops.

More importantly, though, if the United States signs the WIPO Broadcast Treaty in its current format, it is unlikely that the above proposal will satisfy the mandate of the new treaty, which requires full-blown exclusionary protection intended to operate in rem, much like traditional copyright.³⁶¹

and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); Jason Oxman, *The FCC and the Unregulation of the Internet* (FCC Office of Plans & Pol'y Working Paper Series No. 31, 1999), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf; Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* (FCC Office of Plans & Pol'y Working Paper Series No. 29, 1997), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp29.pdf. More recent commentators argue for the FCC to step in on a case-by-case or limited basis. See James B. Speta, *FCC Authority to Regulate the Internet: Creating it and Limiting it*, 35 LOY. U. CHI. L.J. 15 (2003) (arguing for the introduction of Congressionally delegated authority to the FCC to regulate the internet); Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41 (2003) (arguing that the FCC can regulate the internet using its ancillary jurisdiction). Some also argue that even if the FCC was found to be without jurisdiction in relation to the broadcast flag debate, it nevertheless remains the *most competent* body to regulate the area, given its expertise in the television industry. See Van Houweling, *supra* note 274, at 114.

360. One sees the creation of a similar regime in the context of satellite television. With the emergence of satellite television in the mid-1980s, Congress stepped in to regulate its use of broadcasters' signals, when the satellite television industry moved from being one that merely provided service to areas not covered by broadcast and cable to one that began to compete with them. Congress' first move was the introduction of a compulsory licensing mechanism. The Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, tit. 2, 102 Stat. 3935, 3949 (codified at 17 U.S.C. § 119 (2000 & Supp. IV 2004)). In 1999 Congress amended its regulation of satellite television again, with the realization that the segment had grown commercially, to now subject it to the retransmission consent rule, but with numerous exceptions. The Satellite Home Viewer Improvement Act of 1999, Pub. L. No 106-113, app. I, tit. 1, 113 Stat. 1501, 1501A-523 (codified at 47 U.S.C. § 325(b)(2) (2000 & Supp. IV 2004)). An interesting question is of course whether web-casting qualifies as a "multichannel video programming distributor," as defined under the section. If this were indeed the case, much of the present debate would be rendered moot. For a recent interpretation of some of these provisions and their purpose, see *CBS Broad., Inc. v. Echostar Commc'ns Corp.*, 265 F.3d 1193 (11th Cir. 2001) (concluding that the SHVA does not violate a carrier's First Amendment rights).

361. In an elaborate study examining the compatibility of the § 111 statutory licensing standard with the United States' obligations under international copyright law, David Brennan concludes that the compulsory licensing regime would indeed be in violation of both the Berne Convention and the TRIPs Agreement, both of which recognize content

The current U.S. regime with its exclusionary rights for broadcasters emerged in spite of the U.S. not being a party to the Rome Convention. That the United States participated in the Convention's drafting and yet chose not to sign it hints that the U.S. might strategically favor implementing exclusionary privileges without being mandated to do so by an international treaty, especially given that the current regulatory regime arose from the unique characteristics of television broadcasting in the United States.³⁶²

VI. CONCLUSION

In his now classic study of the reasons why individuals seek to create or modify property rights regimes over resources, Gary Libecap argued that the primary motivations were often (i) shifts in relative prices; (ii) changes in technology; or (iii) shifts in parties' political influence.³⁶³ In some form, all three reasons seem to have motivated incumbents' most recent claims for open-ended property rights over their transmission signals. The emergence of the internet as a low-cost medium of distribution, the ease with which broadcasters and cablecasters can now reach audiences across the globe with few regulatory problems, and the rising economic power of the cable and broadcast industries are all responsible for the recent push towards a new regime.

This Article has attempted to show that much can be learned by examining the history of exclusionary rights regimes in the television industry, the political process through which they evolved, the compromises that

producers' exclusive right to broadcast the work in question. The United States is a party to both treaties—but continues to retain the compulsory licensing framework and its extensions to additional distribution channels (i.e., satellite broadcasting). Interestingly, the study does not analyze the issue of broadcasters' rights in any detail. DAVID J. BRENNAN, *RETRANSMISSION AND US COMPLIANCE WITH TRIPS* 305 (2003).

362. In this context, note that the United States is one of the main countries at the WIPO that is pushing for the extension of the current WIPO Broadcast Treaty's provisions to webcasting—ironically enough, in order to grant webcasters property rights over their internet-based transmissions. This would allow commercial webcasters to exercise full exclusionary protection against individuals making use of their webcasts online and interfere more directly with the user dynamic discussed before. As the treaty heads to the General Assembly, the United States remains the only country still adamant about the webcasting proposal and there remains a strong likelihood that the non-inclusion of this aspect alone could result in its not signing on to the final version. See WIPO, *Submission of the United States of America to the WIPO Standing Committee on Copyright and Related Rights*, WIPO Doc. No. SCCR/15/INF/2 (Aug. 22, 2006), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_inf_2.pdf.

363. GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* 16-19 (1989).

they represent, and the doctrinal structures through which they came to be implemented. Even though the United States never implemented a system of broadcasters' rights, its domestic television industry did not develop without the idea of property rights altogether, despite the fact that the United States was never a signatory to the Rome Convention. For nearly four decades, however, policymakers and regulators have continued to deploy property institutions to regulate competition between different players in the industry—broadcasters, cable operators, and content producers. Not surprisingly, the beneficiaries at each stage sought more expansive rights than they were eventually given. *Attenuated exclusionary protection* thus formed the backbone of the system, which over the years came to develop an equilibrium—one characterized by sporadic regulatory intervention—all in the name of the ideal of “public interest” that at least notionally guided lawmakers.

The new regime that current incumbents are seeking is a continuation of this process, except that, perhaps for the first time, the right being sought is in rem in nature and aimed at the activities of the principal beneficiary of the internet revolution, the *individual user*. Unlike in the past, the primary target of the exclusionary regime is the public, and the public is without direct representation in the negotiation process.

This Article has argued that there is very little justification for the broad and open-ended exclusionary regime that broadcasters and cable companies now seek. To the extent that a justification exists, it is limited to the inequity of the current regulatory framework, which subjects the current incumbents to liability inter se but exempts new commercial ventures like webcasters. This result is especially inequitable since these ventures employ similar revenue models and additionally capitalize on the virtues of the internet. A staggered implementation proposal that employs the same concept of attenuated exclusionary privileges to at once enable new incumbents to develop and subject them to the same staggered approach that each of the current incumbents went through in the past will remedy this seeming inequity and re-create a level playing field. This regime derives from the ideals of unfair competition and unjust enrichment rather than from a property right, thereby foreclosing the possibility of any in rem claims while ensuring that competing distribution channels are not treated disparately.

In the end, all of this may come to mean very little, if the United States should choose to refrain from signing the final instrument of the WBT, in spite of its active participation in the drafting and treaty-making processes. Indeed, its past record in this area, with the Rome Convention, as well as

other more recent instances, such as with the Kyoto Protocol³⁶⁴ and the Rome Charter of the International Criminal Court,³⁶⁵ make this a distinct possibility. Nevertheless, should the idea of property rights in broadcast signals ever raise its head in domestic policy discussions, regulators and policymakers will hopefully study the long and relatively complex history of the idea, for “a page of history is [often] worth a volume of logic.”³⁶⁶

364. See generally Jon Hovi et al., *The Persistence of the Kyoto Protocol: Why Other Annex. I Countries Move On Without the United States*, 3 GLOBAL ENV. POL. 1 (2003) (trying to understand reasons for the United States’ reluctance to sign the Kyoto Protocol).

365. See generally SARAH B. SEWALL & CARL KAYSEN, *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* (2000) (attempting to understand why the United States has not signed the ICC Charter in spite of the fact that the ICC represents the “triumph of American values in the international arena”).

366. *Eldred v. Ashcroft*, 537 U.S. 186, 188 (2003) (quoting Justice Holmes’ dictum in *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)); *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1842 (2006) (same). Interestingly, both the *Eldred* and *eBay* cases involved intellectual property issues, the former copyright term and the latter patent injunctions.

