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## COMMUNITY ANTENNA TELEVISION: REACTION OF THE INDUSTRY

Although today few homes in the cities are without television sets, television reception is still unavailable to many homes in the isolated rural areas of the United States. Rugged topography of the continent and limited broadcast range account for this situation. Neither problem, however, has proved insurmountable. One system devised to broaden coverage is the community antenna (CATV).<sup>1</sup>

A community antenna is a large antenna set on high ground within the broadcast range of one or more television stations. The antenna is designed to pick up the signals of network or of local stations and to relay them either directly or indirectly into the homes of the locale. Relay may be accomplished either by use of a master cable running from the antenna to the homes, or, where relay is over a greater distance, by use of microwave facilities to the master cable and then to the subscribing homes. In the course of distribution, signals in some instances are converted to different channels and frequencies than those on which they have been transmitted by the originating station.<sup>2</sup>

Usually the CATV pays nothing to the originating station for use of the signals. In most cases, the CATV charges its subscribers for services rendered in relaying the signal.<sup>3</sup> This practice gives rise to the legal questions discussed in the body of this note.<sup>4</sup> Stated broadly the question is this: Can a CATV appropriate and sell a television station's broadcast signal without obtaining that station's consent, and without paying compensation? Implicit in this problem are four more probing questions: (1) Can the television industry protect its programs by statutory copyright? (2) Can the industry protect its programs by resort to common law copyright? (3) Are there other common law remedies available in the state courts? (4) What effect has the Federal Communications Act upon all judicial remedies in this area?

## I. Protection by Statutory Copyright

In general, the protection of television programs by statutory copyright is less than complete. The federal constitution gives Congress power "... To promote the Progress of Sciences and useful Arts, by securing for Limited Times to Authors ... the exclusive Right to their respective Writings. . . ."<sup>5</sup> Construing the constitutional grant broadly, Congress exercised its power to fashion a copyright law to protect the works of authors in Title 17 of the United States Code. The statute protects both authors and proprietors of some thirteen distinct classes of "Writings."<sup>6</sup> Statutory copyrights can be obtained on some specified classes of works not reproduced for sale and on thirteen classes of published works.

Published works are copyrighted by publication of the work with the specified statutory notice affixed.<sup>7</sup> The statute gives the owner of the copyright the exclusive right to "print, reprint, publish, copy and vend" the copyrighted work.<sup>8</sup> Where the work is unpublished and not reproduced for sale, a copyright can be obtained which protects the work until publication. Lectures, dramatic, musical and dramatico-musical compositions, photographs, and photoplays can be copyrighted

1 FCC, INQUIRY INTO THE IMPACT OF COMMUNITY ANTENNA SYSTEMS, TV TRANSLATORS, TV "SATELLITE" STATIONS, AND TV "REPEATERS" ON THE ORDERLY DEVELOPMENT OF TELEVISION BROADCASTING, 26 F.C.C. 403 (1959).

2 See generally Doerfer, *Community Antenna Television Systems*, 14 FED. COM. B.J. 4 (1954).

3 Time, Nov., 13, 1964, p. 110.

4 See generally Wall Street Journal, Dec. 15, 1964, p. 1, col. 1.

5 U.S. CONST. art. I, § 8.

6 17 U.S.C. § 5 (1958).

7 17 U.S.C. § 10 (1958).

8 17 U.S.C. § 1 (1958).

as nonpublished works not reproduced for sale.<sup>9</sup> This copyright is obtained by deposit of copies with a claim of copyright. The act protects the author or proprietor of the work, or his assignee.<sup>10</sup> Therefore, where the industry itself through its employees has created the program, or where it has obtained an assignment from the independent creator, the industry could sue an infringing CATV on its own behalf.<sup>11</sup> On the other hand, a licensee cannot sue in his own name.<sup>12</sup> However, he may compel suit by his licensor against an infringer.<sup>13</sup> Thus, since a great many television programs would fall within one of the statutory classes, the statute would seem to give at least partial protection. Practically, however, statutory protection of "expression"<sup>14</sup> as it is found embodied within one of the thirteen classes, is inadequate for the purposes of the television industry. In the case of published works, the strict requirements of the statute as to "notice" and "deposit" prevent copyrighting of numerous programs.<sup>15</sup> Copies of "live" programs<sup>16</sup> cannot be deposited. Moreover, certain programs such as news and sports broadcasts do not fit within any one of the statutory classes. In the case of works unpublished and not reproduced for sale, the problems are similar. Here again protection is too narrow. Many programs, such as "live" broadcasts would fall outside the protected classes. Further, reproduction for sale would end all protection under section 12.<sup>17</sup> Where, for example, a network would make copies of a travelogue, upon sale the works would no longer be protected under section 12. Finally, since protection for nonpublished works ends upon publication, and since it seems reasonable that national broadcasts should amount to publications, protection is probably illusory, even though the majority of courts to date have held broadcasting to be mere "performance" or "limited publication."<sup>18</sup> Cognizant of these problems, the television industry has relied on the traditional remedies of common law copyright and unfair competition. In the event that these remedies should prove unavailable, the statutory forms will no doubt be used to the extent of their worth.

A performer who is not an author cannot protect his creations or renditions by use of statutory copyright. In spite of the "novelty of his rendition," the statute grants no protection to a mere performer, such as a singer, newscaster, or athlete.<sup>19</sup>

9 17 U.S.C. § 12 (1958).

10 17 U.S.C. § 9 (Supp. V, 1964). See generally Note, 39 NOTRE DAME LAW. 161 (1964).

11 17 U.S.C. § 9 Supp. V, 1964; 17 U.S.C. § 26 (1958), "[T]he word 'author' shall include an employer in the case of works made for hire."

12 *Goldwyn Pictures Corp. v. Howells Sales Co.*, 282 Fed. 9, 11 (2nd Cir., cert. denied, 262 U.S. 755 (1922)).

13 *SPRING, RISKS AND RIGHTS IN PUBLISHING TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER* 168 (2nd ed. 1956) elaborates:

"The licensee is only the equitable owner of the rights in the bundle licensed to him. A licensee therefore cannot sue an infringer in his own name for infringement of rights he holds as licensee. If the licensor refuses to sue to protect the licensee, the licensee can make his licensor a party defendant, together with the infringer, and thus force the licensor to sue."

14 See *Mazer v. Stein*, 347 U.S. 201, 217 (1953).

15 37 C.F.R. § 202.2 (1949). Where works are in fact published, and where notice has been affixed as required, if the work is within one of the protected classes, then the work is protected from infringement even though there has been no deposit. No action, however, can be brought for infringement prior to deposit. *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1938).

16 Throughout this note, the intended meaning of "live" broadcast is not only unfilmed, but spontaneous. Consequently, a "live" broadcast based on a *script* should not be included within the term. The author would describe an in-progress, simultaneously televised baseball game as a "live" broadcast.

17 17 U.S.C. § 12 (1958). See text accompanying note 9 *supra*.

18 See, e.g., *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937). See discussion in text accompanying notes 70-74 *infra*.

19 *Id.* at 437-38, 194 Atl. at 633. The Court said: "The creator of such a work must protect his property rights therein, but the statute does not recognize any right of a performing artist in his interpretative rendition of a musical composition, or in the acting of a play, composed by another." The applicant had tried to copyright his rendition but the Register

## II. Protection by Common Law Copyright

According to a number of state court decisions, it seems that common law copyright could be used by the television industry to protect its programs from appropriation. Two recent Federal Supreme Court decisions, however, raise questions as to the propriety of this use of the remedy.<sup>20</sup>

Common law copyright is a traditional judicial remedy. It was designed to protect the expression of a creator as his expression was embodied prior to publication.<sup>21</sup> The Supreme Court of Illinois has described common law copyright:

At common law the author of a literary composition had an absolute property right in his production which he could not be deprived of so long as it remained unpublished, nor could he be compelled to publish it. This right of property exists at common law in all productions of literature, the drama, music, art, etc., and the author may permit the use of his production by one or more persons to the exclusion of all others, and may give a copy of his manuscript to another person without parting with his property in it. . . . Upon the publication of the production the author's common-law right ceased, and it became public property unless protected by statute.<sup>22</sup>

In the United States the common law copyright remedy is preserved by statute:

Nothing in this title [copyright act] shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.<sup>23</sup>

The section creates no new federal right, but leaves an author a remedy for infringement.<sup>24</sup>

State courts have given surprisingly broad protection by means of this common law action.<sup>25</sup> They have not felt themselves bound by the thirteen statutory classes.<sup>26</sup> Consequently, many works clearly not writings have been protected.

In *Waring v. WDAS Broadcasting Co.*<sup>27</sup> an orchestra's musical rendition was held to be secured by common law copyright exclusively to the orchestra's leader as an artistic work.

[In contributing] by his interpretation something of novel intellectual artistic value, . . . [Waring] has undoubtedly participated in the creation of a product in which he is entitled to a right of property, which in no way overlaps or duplicates that of the author of the musical composition.<sup>28</sup>

*Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.*,<sup>29</sup> has gone even further in holding that a television broadcaster's "voice and style of talking" were forms of "art expression"<sup>30</sup> protected as his property by common law copyright.

of Copyrights said: "There is not and never has been any provision in the Act for the protection of an artist's personal interpretation or rendition of a musical work not expressible by musical notation in the form of 'legible' copies although the subject has been extensively discussed both here and abroad." *Waring v. WDAS Broadcasting Station*, *supra* at 438, 194 Atl. at 633-34, n.2.

20 *Sears Roebuck and Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

21 Warner, *Protection of the Content of Radio and Television Programs by Common Law Copyright*, 3 VAND. L. REV. 209 (1949); SPRING, RISKS AND RIGHTS IN PUBLISHING TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER § 42 (2d ed. 1956).

22 *Frohman v. Ferris*, 238 Ill. 430, 435-36, 87 N.E. 327, 328 (1909), *aff'd*, 223 U.S. 424 (1912).

23 17 U.S.C. § 2 (1958). (Emphasis added.)

24 See *Edgar H. Wood Associates, Inc. v. Skene*, 197 N.E.2d 886, 890 (Mass. 1964).

25 Warner, *Protection of the Content of Radio and Television Programs by Common Law Copyright*, 3 VAND. L. REV. 209, 211-13 (1949). See text accompanying notes 15-39 *supra*, for illustration of common law copyright coverage.

26 17 U.S.C. § 5 (1958).

27 327 Pa. 433, 194 Atl. 631 (1937).

28 *Id.* at 441, 194 Atl. at 635.

29 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964).

30 *Id.* at 725, 248 N.Y.S.2d at 811.

Assuming that these holdings are correct, common law copyright has extremely broad coverage.<sup>31</sup>

Besides protecting "works" or "writings" outside the statutory classes, the state courts have also given "authors" a more inclusive meaning. Thus in *Waring v. WDAS*<sup>32</sup> a band leader was held to be an "author," and in *Documentaries Unlimited* an announcer was held to be an author.<sup>33</sup>

Common law copyright can exist only in an "unpublished" work.<sup>34</sup> If there is to be protection after "publication," the requirements set out in the statute must be met.<sup>35</sup> Failure to comply results in a dedication of the work to the public; it puts the work in the public domain.

"Publication" is a complex fact. It includes both objective and subjective elements. Pennsylvania's Supreme Court makes this clear:

"In determining whether or not there has been such a publication, the courts look partly to the objective character of the dissemination and partly to the proprietor's intent in regard to the relinquishment of his property rights."<sup>36</sup>

The state courts have rendered numerous and conflicting decisions as to whether given facts will amount to publication. Both state and federal courts have defined publication without considering that the fact of "publication" might be a federal question.<sup>37</sup>

In *Uproar Co. v. National Broadcasting Co.*<sup>38</sup> the plaintiffs sued for damages for interference with a second licensing agreement for use of an already broadcast script. The defendants, the first licensee had combined to prevent the later use of a script on the grounds that the second licensee would cause diminution of the value of their license. The court prohibited the second licensing because such action would be in derogation of the rights of the prior licensee. The trial court took the position that broadcasting did not amount to "publication" and the appellate court impliedly agreed. Similarly, in *Metropolitan Opera Ass'n Inc. v. Wagner-Nichols Recorder Corp.*,<sup>39</sup> where the issue was the presence or absence of unfair competition, a New York appellate court held that broadcasting was not "publication," and consequently enjoined the defendant from recording the Metropolitan Opera's radio broadcasts for subsequent sale. Along the same lines, quite recently in *Documentaries Unlimited*<sup>40</sup> a New York appellate court held that television news broadcasts were not publications so as to render the announcer's "voice and style" subject to appropriation for use on defendant's phonograph records.

The question of whether broadcasting amounts to "publication," however, may

31 17 U.S.C. § 2 (1958) makes express provision for common law copyright as a state court remedy. This section is a carryover from the act of 1909. The intent of the provision seems to be to preserve the remedy as it had been known. Up until that time the remedy had been invoked only to protect an author's expression as it was found embodied either in a writing or other work of art. Whether state courts can now protect "expression" of an author not so embodied is open to question. See text accompanying notes 41-53 *infra*.

32 *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937).

33 *Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964). See *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939); a garbled opinion which protected the rights of a performing artist; the case was subsequently overruled by the state legislature.

34 *Shapiro, Bernstein & Co., Inc. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950); 17 U.S.C. § 2 (1958).

35 17 U.S.C. §§ 10, 13 (1958).

36 *Waring v. WDAS Broadcasting Station*, 327 Pa. 443, 444, 194 Atl. 631, 636 (1937).

37 *E.g.*, *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955) (followed law of New York).

38 8 F. Supp. 358 (D. Mass. 1934), *modified*, 81 F.2d 373 (1st Cir.), *cert. denied*, 298 U.S. 670 (1936).

39 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950); *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951).

40 *Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964).

not be finally settled.<sup>41</sup> It seems that "publication" might be a federal question rather than a matter for the determination of the courts of the several states. The fact of "publication" pervades the entire copyright law. It is crucial in cases of statutory as well as in cases of common law copyright. Aware of this problem, the Court in *G. Ricordi & Co. v. Haendler* said: "even though the state law held that publication was not a dedication we feel bound to disregard it, because the question would still be, not one of state law, but of federal law."<sup>42</sup> The federal copyright statute grants protection only where there is "publication." Therefore, the Court concluded that "publication" is a federal question. The decision further merits special notice because the Supreme Court has recently approved *Haendler* in *Sears Roebuck and Co. v. Stiffel Co.*<sup>43</sup> Beyond this, the decision is of importance because no federal court accepting the *Haendler* doctrine has determined whether broadcasting amounts to publication. It seems reasonable to call a nation-wide network broadcast a "publication" rather than a "limited publication" or mere "performance." It is possible that such a dissemination would "justify the belief that it took place with the intention of rendering such work common property."<sup>44</sup>

Nevertheless, in view of the state holdings on the meaning of "author" and "work," if not "publication," it seems that state courts will protect television broadcasts by way of common law copyright. Indeed, this is precisely what was done in *Columbia Broadcasting Co., Inc. v. Documentaries Unlimited, Inc.*<sup>45</sup> *A fortiori*, if protection can be given in such a case, all television programs must be protectable. If a newscaster has protectable rights in his voice and style, certainly sports announcers must have similar rights. By assignment, the stations themselves could have these rights.

The above stated principles of state law, however, should not be regarded as conclusive. In view of two recent decisions of the Supreme Court of the United States, it would seem that the states in granting such broad protection by way of common law copyright have overstepped the bounds of authority.<sup>46</sup> It appears that the states are not free to enlarge substantially the coverage of their remedy beyond its historical scope. *Sears Roebuck and Co. v. Stiffel Co.*,<sup>47</sup> while speaking in terms of unfair competition, clearly applies:

Just as a State cannot encroach upon the federal patent [and copyright] laws directly, it cannot, under some other law . . . give protection of a kind that clashes with the objectives of the federal patent [and copyright] laws. . . . To allow a State by the use of its laws of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public.<sup>48</sup>

*Compco Corp. v. Day-Brite Lighting, Inc.*,<sup>49</sup> a case decided the same day, is in accord. Neither *Sears* nor *Compco* by any means voids section 2. They must be read, however, as limiting state remedies to their traditional boundaries; copyright

41 See *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 664 (2d Cir. 1955) (dissenting opinion).

42 194 F.2d 914, 915 (2d Cir. 1952).

43 376 U.S. 225, 233 (1964).

44 *American Tobacco Co. v. Wreckmeister*, 207 U.S. 284, 300 (1907).

45 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964).

46 In *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 n.7 (1964) the Court indicates the pre-emptive effect of federal law:

The purpose of Congress to have national uniformity in patent and copyright laws can be inferred from such statutes as that which vests exclusive jurisdiction to hear patent and copyright cases in the federal courts . . . and that section of the Copyright Act which expressly saves state protection of unpublished writings but does not include published writings, 17 U.S.C. § 2.

47 376 U.S. 225 (1964).

48 *Id.* at 231-32.

49 376 U.S. 334 (1964).

must only be used to protect the expression of an author, artist, etc., as it is found embodied. Consequently, it would seem that, as in the case of the statutory copyright, "live" broadcasts would be without protection. A recent Massachusetts Supreme Court holding lends weight to this argument. In *Edgar H. Wood Associates, Inc. v. Skene*, the court said:

A careful reading of these two opinions does not convince us that they have struck down common law copyright, which protects unpublished *material*. . . . The Copyright Act . . . expressly saves state protection of unpublished *writings* but does not include published *writings*. . . .<sup>50</sup>

On the other hand, common law copyright would certainly cover those television programs based on scripts. Nor is there much doubt that the CATV's relay to subscribers would amount to infringement of the copyright. A performance for profits without the consent of the copyright proprietor constitutes an infringement.<sup>51</sup> Moreover, the actions of a CATV are quite similar to the activities proscribed in *Buck v. Jewell-LaSalle Realty Co.*<sup>52</sup> There the owner of a hotel relayed radio broadcasts which he had received by use of his own radio to the rooms of his guests throughout the hotel. Since he did this to make his hotel more desirable and thereby increase business and profits, the piping of sound to the rooms was a "performance for profit." The decision has been followed.<sup>53</sup>

### III. Protection from Unfair Competition

The third question concerns the extent to which state laws against unfair competition can be invoked by the television industry to protect its programs. Although state courts have granted wider protection against unfair competition than against copyright infringement, *Sears*<sup>54</sup> and *Compco*<sup>55</sup> seem to indicate that the states have gone too far.

The basis of all state court decisions in this area is the Supreme Court's holding in *International News Service v. Associated Press*.<sup>56</sup> There the court held, over dissent by Mr. Justice Brandies, that the Associated Press had a "quasi-property right" in "news" which it had gathered,<sup>57</sup> and that appropriation of the news by INS, a competitor, would constitute unfair competition, until such time as the news had lost its commercial value. The majority said that appropriation alone was sufficient ground for relief; "palming-off" (sale of an appropriated product as one's own) was no longer requisite to a showing of unfair competition.<sup>58</sup> Copyright considerations were irrelevant.<sup>59</sup> Throughout the opinion, the Court made it clear that the competitors — as opposed to the general public — were limited in their activities by considerations of fairness.<sup>60</sup> The state courts in a number of somewhat similar situations have relied upon this holding to reach what they have perceived to be "equitable" results.<sup>61</sup>

After the *INS* decision, a New York Court in *Twentieth Century Sporting Club, Inc. v. Trans-Radio Press Service*<sup>62</sup> enjoined defendants from rebroadcasting by way of paraphrase the plaintiff's blow-by-blow description of a prize fight, citing

50 197 N.E.2d 887, 890 (Mass. 1964).

51 See 17 U.S.C. § 1 (1958).

52 283 U.S. 191, 197 (1931).

53 See, e.g., *Society of European S.A.A.C. v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937).

54 *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

55 *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

56 248 U.S. 215 (1918). Hereinafter referred to in text as *INS*.

57 *Id.* at 236.

58 *Id.* at 241-42.

59 *Id.* at 234-35.

60 *Id.* at 239-40.

61 E.g., *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 796, 101 N.Y.S.2d 483, 492 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951).

62 165 Misc. 71, 300 N.Y. Supp. 159 (Sup. Ct. 1937).

*INS*. In the same year, in *Waring v. WDAS Broadcasting Station*<sup>63</sup> the Pennsylvania Supreme Court forbade a radio station from rebroadcasting music from records made by RCA Victor which bore a restrictive legend stating that the record was not sold for broadcast purposes. The Court found the radio station to be Waring's competitor, and held the use of the records to be enjoined as misappropriation under the state's law against unfair competition. The Court relied heavily on *INS*.

A similar result was reached in New York in *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*<sup>64</sup> The Metropolitan Opera had granted broadcast rights in its performances to the Columbia Broadcasting System. The defendants attempted to record these broadcasts on phonograph records and to sell them. The Court, citing *INS*,<sup>65</sup> issued a restraining order and found that the Metropolitan Opera had property rights in its productions which the defendant was seeking to pirate. In granting its relief without requiring actual competition, the Court extended *INS*.<sup>66</sup>

The result reached in these cases seems fair: protection for the creator and his work. The simple underlying premise in each of the progeny of *INS* is that the creator retains an interest in his work,<sup>67</sup> which the courts can secure to him by granting him a "limited property right," which will be safeguarded against competitor appropriation. Further, in every instance, it has been incumbent upon the complainant to show that there has been less than total dedication to the public: that is, that the creator, in spite of all that was done, still retains an interest in the product at least as against an entrepreneur seeking to enrich himself by use of the work.<sup>68</sup> Thus in *Waring*, the Court seized upon the contract granting RCA Victor exclusive recording rights to establish a protectable interest,<sup>69</sup> and in *Metropolitan Opera* the Court looked to the restrictive legend which forbade the use of the records for broadcast purposes to establish retention of the protectable interest.<sup>70</sup> A recent New York case, *Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.*,<sup>71</sup> has gone even further. In that case a newscaster's voice and style were protected against a recording company's misappropriation and use as a one-minute part of a forty-eight minute record. The retention of

63 327 Pa. 433, 194 Atl. 631 (1937).

64 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951).

65 Besides relying on *INS*, the court also relied on *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938). There, the courts sustained the exclusive right of the plaintiff to control the broadcasting of descriptions of the baseball games played in the plaintiff's park by the plaintiff's team. The court enjoined the defendants from broadcasting the play-by-play description. Defendants had tried to broadcast from a perch on a rooftop just outside the park.

66 *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951).

67 See *International News Service v. Associated Press*, 248 U.S. 215, 240-41 (1918); *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 453, 194 Atl. 631, 640 (1937); *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 798-99, 101 N.Y.S.2d 483, 494-95 (1950).

68 *Contra*, *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315 (D. Idaho 1961). A CATV planned to appropriate the signals of a local telecaster. The telecaster sought an injunction which was denied. The court found no protectable interest, absent reliance on the copyright law, or reliance upon an exclusive licensing agreement between the network station and the local stations. The court also found that 47 U.S.C. § 325(a), discussed *infra*, gave the local station no protection. See, *National Exhibition Co. v. Teleflash, Inc.*, 24 F. Supp. 488 (S.D.N.Y. 1936); comment, 61 *Colum. L. Rev.* 1524 (1964); comment, 23 *Md. L. Rev.* 365 (1961).

69 *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 453, 194 Atl. 631, 640 (1937). "In line with the theory of the Associated Press Case, the 'publication' of the orchestra's rendition was a dedication of them only to purchasers for use of the records on phonographs, and not to competitive interests to profit therefrom at plaintiff's expense."

70 *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 798-99, 101 N.Y.S.2d 483, 494 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951).

71 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964).



interest was found to result from his contract of employment with the station. Here his broadcast was held to be something less than a complete dedication, thus blocking the recording company. The Court reasoned that the defendant's use made the recording company his competitor, and found unfair competition. We may infer that the case extended the holding of *INS*.

In light of the Supreme Court's decisions in *Sears* and *Compco*, the decisions since *INS*, protecting expression or performance from unfair competition, seem questionable. Unfair competition cannot be used to protect every existing interest.

In the *Sears* case, the plaintiff had designed a pole-lamp and had secured design patents for his product. The defendant, without mislabeling, copied the poles exactly. Some customers were confused by the similarity. The plaintiff sued, relying upon his patents and upon the law of unfair competition. The District Court, although finding the patents invalid, found unfair competition and gave equitable relief. The Seventh Circuit affirmed. The Supreme Court, however, reversed, holding:

[The patent laws], like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. . . .

Thus the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a State could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required upon federal patents. . . . Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws.<sup>72</sup>

Considering an analogous fact situation on the same day, the Court in *Compco* elaborated on what it had said in *Sears*:

Today we have held in *Sears* . . . that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy . . . of allowing free access to copy whatever the federal patent laws leave in the public domain.<sup>73</sup>

The meaning of the cases is clear. Congress in enacting the patent law sought to protect invention; in enacting the copyright law, it attempted to protect expression. It gave all the protection that it thought desirable, and pre-empted the field.<sup>74</sup> Repeated refusals by Congress to extend copyright protection further show that Congress has intended no additional protection of expression.

*Sears* and *Compco*, although they seem incompatible with the progeny of *INS*, do not seem irreconcilable with *INS* itself. In *INS* the Court was not allowing a state to protect "expression" either directly or indirectly. Rather, it was allowing the protection of "news" — something in the nature of a current asset.

[N]ews matter, however susceptible of ownership or dominion in the absolute sense, is *stock in trade*, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise.<sup>75</sup>

This distinction, however, becomes blurred in the broadcast cases. In *Metropolitan Opera* and in *Waring* it is not so clear whether the rendition is an "asset" or an

72 *Sears Roebuck & Co. v. Stiffel Co.* 376 U.S. 225, 229-31 (1964).

73 *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964).

74 See *Flexitized, Inc. v. National Flexitized*, 335 F.2d 774, 780-81 (2d Cir. 1964); the Second Circuit seems to have done exactly what the Supreme Court forbade in *Sears*. The district court held the trademark, "Flexitized," invalid, because it was merely descriptive. Yet it found that the defendant's use of the word amounted to unfair competition, in spite of the fact that it could not find "palming-off" or "secondary meaning." The Second Circuit treated the case as a mere diversity case, saying: "[T]he source of the right sued upon, rather than the ground used to obtain federal jurisdiction, should determine the governing law. . . . [S]tate law ought to govern the result we reach."

75 *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918). (Emphasis added.)

"expression."<sup>76</sup> In fact, the two seem to merge. This is also true in the television area, in a case such as *Cable Vision, Inc. v. KUTV, Inc.*<sup>77</sup> There, operation of a community antenna was typical. The shows appropriated were both the creations or expressions of the producing station, and, at the same time, assets of the station. It is true that the revenues of the stations are not obtained by selling the programs to the public for cash; yet, the fact that they are salable is clearly illustrated by their activities.<sup>78</sup> In the case of the CATV the sale is direct; in the case of the television station, the sale is indirect in that the public supports the sponsor who in turn pays the stations for its product. At the same time, however, the productions are "expressions." Consequently, under *Sears* and *Compco*, it would appear that statutory and common law copyright must be the allowable extent of protection. Viewing the programs as "expressions" results in inadequate protection because of the application of federal pre-emption; "live" shows again would be without protection.<sup>79</sup> Therefore, the question presented is this: Is that protected essentially an "asset" or an "expression"? If substantially the latter *Sears* and *Compco* supply the relevant precedent. If the former, *INS* should govern.

In *Cable Vision* the Ninth Circuit faced this very problem. The CATV was appropriating the signals of the station and relaying it for profit to its subscribers. The Court, pointing out that *INS* had been limited by the Second Circuit<sup>80</sup> to its facts, distinguished the case on the grounds that the station and the CATV were not competitors, and also, by pointing to some "palming-off" in *INS*. The Court followed Brandies' dissent in *INS* and referred to his remarks: "The general rule of law is, that the noblest productions — knowledge, truths ascertained, conceptions, and ideas — become after voluntary communication to others, free as air to the common use."<sup>81</sup> The Court treated the programs only as "expressions." If this is correct, so was its reliance on *Sears* and *Compco*. But if the programs are more in the nature of "assets," then the decision should be reversed, for *Sears* and *Compco* would have no application, and *INS* should govern.

In treating *INS* as an anomalous decision rather than distinguishing legal principles involved, the Court forced itself to make two questionable factual distinctions. The fact that the station derives revenues from sponsors while the CATV derives its income from subscribers does not seem to preclude a finding of competition for reasons discussed above. The economic realities of the situation indicate competition. Both want the same viewers.<sup>82</sup> Further, the palming-off distinction is unpersuasive, for in *INS* that Court indicated that "palming-off" was neither present nor essential. More important, however, *INS* has never been limited to its facts by the Supreme Court, and it has been liberally applied by many other courts.<sup>83</sup>

76 It is difficult to categorize a "song" or a "musical rendition" as stock in trade. On the other hand, a television program seems to be in the nature of an asset.

77 *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964); comment, 31 GEO. WASH. L. REV. 868 (1963).

78 *Cable Vision, Inc. v. KUTV, Inc.*, *supra* note 77.

79 "Live" shows as the term is used here means those shows which are spontaneous; that is shows without scripts.

80 *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940). Here again an orchestra leader sought to limit the use of his renditions. As in *Waring* the records bore a restrictive legend which proscribed broadcasting. Hand, J., however, limited *INS* to its facts, and cited *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, (2d Cir. 1929).

81 *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (dissenting opinion).

82 The sponsors want their advertising to reach the homes in the locale. If the CATV cut into the audiences of the broadcasting stations, the advertising by way of the local station reaches fewer homes. The station has a more difficult time selling its programs to the sponsor, and consequently its revenues drop. The network stations can also be hurt. They sell their programs to the local stations. If the local stations fail, the networks lose customers.

83 See *Waring v. WDAS Broadcasting Station*, 327 Pa. 433, 194 Atl. 631 (1937);

It would seem, therefore, that television programs are more in the nature of stock in trade. If this is the case, then the state courts should be open to protect the industry against the CATV.

#### IV. Federal Communications Commission Complications

The Federal Communications Commission originally said that it had no power to regulate CATV operation. Where the CATV merely receives the broadcast signal and relays it directly by cable to its subscribers, the FCC has yet to regulate. Where, however, the CATV receives the signal and relays it by microwave carrier to the point of dissemination, the Commission has reversed its original stand and has regulated. This section of the note will discuss grounds for FCC regulation of the CATV industry, and, where grounds exist, the effect of such regulation upon the courts in cases of copyright infringement and unfair competition.

##### A. Grounds for Regulation

In general, Congress has vested the FCC with power to regulate broadcasting<sup>84</sup> and common carriers.<sup>85</sup> Subchapter III of the Federal Communications Act contains provisions relating to broadcasting. Subchapter II of the act deals with common carriers. Both provisions seem to give the FCC power to regulate the CATV industry. The FCC, however, has said that they did not.<sup>86</sup>

Under title III of the act, the Commission has power to license radio facilities<sup>87</sup> pursuant to standards of the "public interest, convenience and necessity."<sup>88</sup> These facilities may be either private broadcasting stations or common carrier broadcast facilities. "Broadcasting" is defined as "dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."<sup>89</sup> "Radio Communication" is defined as the "transmission by radio of . . . pictures, and sounds. . . ."<sup>90</sup> Included in the phrase "transmission by radio" are transmissions by instrumentalities "incidental" to radio operation which serve to receive, forward and deliver the communications.<sup>91</sup> The 7th Circuit Court has said that television is one form of broadcasting.<sup>92</sup> The CATV disseminates "communications . . . intended to be received by the public" and they transmit "pictures and sounds." Further, they "receive, forward and deliver . . . communications." A literal reading of the statute would thus seem to put them under the FCC's control.

The FCC, however, after a special study, determined that it could not control the CATV by use of its Subchapter III powers.<sup>93</sup> The Commission reached its conclusion by looking to the underlying purpose of the subchapter as it is found set out in section 301 of the act.<sup>94</sup> The Commission said that Congress gave it

*Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951); *Columbia Broadcasting System, Inc. v. Documentaries, Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964); many other cases also.

84 Federal Communications Act § 301-29, 48 Stat. 1081 (1934), as amended, 47 U.S.C. § 301-29 (1958), as amended, 47 U.S.C. §§ 303-30 (Supp. V 1964).

85 48 Stat. 1070 (1934), as amended, 47 U.S.C. §§ 201-22 (1958), as amended, 47 U.S.C. §§ 202, 219 (Supp. V 1964).

86 FCC, INQUIRY INTO THE IMPACT OF COMMUNITY ANTENNA SYSTEMS, TV TRANSLATORS, TV "SATELLITE" STATIONS, AND TV "REPEATERS" ON THE ORDERLY DEVELOPMENT OF TELEVISION BROADCASTING, 26 F.C.C. 403 (1959). Hereinafter cited as "INQUIRY."

87 48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307 (1958), as amended, 47 U.S.C. § 307(d) (Supp. V 1964).

88 48 Stat. 1075 (1934), as amended, 47 U.S.C. § 309(a) (Supp. V 1964).

89 48 Stat. 1065 (1934), 47 U.S.C. § 153(o) (1958).

90 48 Stat. 1065 (1934), 47 U.S.C. § 153(b) (1958).

91 48 Stat. 1065 (1934), 47 U.S.C. § 153(d) (1958).

92 *Allen B. Dumont v. Carroll*, 184 F.2d 153, 155 (7th Cir.), cert. denied, 340 U.S. 929 (1950).

93 "INQUIRY," 26 F.C.C. 403 (1959).

94 48 Stat. 1081 (1934), 47 U.S.C. § 301 (1958).

power only to order use of the broadcastways, and not to regulate communications in general. The CATV uses only cables, not airways, to transmit its signals. The legislative history of the act would appear to support the Commission's determination.<sup>95</sup>

Other arguments can be made in favor of a finding of no jurisdiction. The CATV does in fact "receive, forward, and deliver . . . communications." In doing so, however, they are not "facilities incidental to radio [or television] operation." They are systems separate unto themselves.

Finally, there is quite a distinct reason why the FCC should have no power under title III to regulate the CATV industry. The FCC has been created to deal with problems of national concern.<sup>96</sup> In many instances, however, the operation of the CATV is essentially local, and will interfere with no one. This commonly occurs where the CATV relays to subscribers beyond the broadcast range of all television stations; here the activities should be beyond the power of the FCC.

A second ground suggested for FCC control is that the CATV is a common carrier, which the act defines as "any person . . . engaged . . . in interstate . . . communication by wire or radio. . . ." <sup>97</sup> "Communication by wire" is defined as "transmission of . . . pictures, and sounds . . . by aid of wire or cable . . . between the points of origin and reception of such transmission. . . ." <sup>98</sup> Consequently, from an examination of these subsections it would appear that the CATVs might be carriers subject to the Commission's jurisdiction. On the other hand, section 152(b), which explains the coverage of the act, tends to negate a finding of jurisdiction. This section provides (subject to the provisions in subchapter III) that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . any carrier engaged in interstate communication . . . with the facilities of another carrier."<sup>99</sup>

In *Frontier Broadcasting Co. v. Collier*<sup>100</sup> and in a special study on the CATV question,<sup>101</sup> the Commission made its ruling by looking to the nature of carrier operations. In *Frontier* the subscriber rather than the carrier chose the matter to be transmitted. The Commission held that it had no jurisdiction to regulate the subscriber as a carrier, pointing out that a common carrier does not choose the intelligence to be transmitted. Moreover, the Commission could not regulate the subscriber by regulating the subject matter that the carrier might transmit because this would be censorship which is expressly prohibited by the act.<sup>102</sup> Since the CATV similarly chooses what is to be transmitted, it cannot be regulated as a carrier.

A third proposed ground for FCC regulation has been found in section 325(a) of the act. The section provides that no "broadcasting station [shall] rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."<sup>103</sup> The proponents of regulation contend that since CATV operation is similar to a rebroadcasting station, it should be governed by the section. The legislative history of the section, however, justifies the contrary conclusion of the Commission.<sup>104</sup>

95 *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940): "The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license."

96 See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). "By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry."

97 48 Stat. 1065 (1934), 47 U.S.C. § 153(h) (1958).

98 48 Stat. 1065 (1934), 47 U.S.C. § 153(a) (1958).

99 48 Stat. 1064 (1934), as amended, 47 U.S.C. § 152(b) (1958).

100 *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958).

101 "INQUIRY," 26 F.C.C. 403 (1959).

102 48 Stat. 1091 (1934), as amended, 47 U.S.C. § 326 (1958).

103 48 Stat. 1091 (1934), 47 U.S.C. § 325(a) (1958).

104 "Inquiry," 26 F.C.C. 403, 429-30 (1959).

It has also been contended that in enacting section 325(a) Congress meant to confer property rights upon the broadcasting stations in their broadcasts.<sup>105</sup> The Commission, however, has rejected this argument, interpreting the provision only to allow protection of rights where they have been already held by the courts to exist. In doing so, the Commission stated that it is not the proper forum for the adjudication of the existence or non-existence of private property rights.<sup>106</sup>

A fourth ground urged for the exercise of FCC power lies in the FCC's "plenary power" over communications. The Commission has a duty to encourage the use of radio, make regulations applicable to broadcasting, and generally make such rules and regulations, not inconsistent with law, as may be necessary to carry out the act and its purposes.<sup>107</sup>

The FCC, however, originally disclaimed "plenary power"; the Commission said it did not have power to regulate "any and all enterprises which happen to be connected with one of the many aspects of communications."<sup>108</sup> The Commission, however, expressly left the door open where the "connected enterprise" would have a "substantial adverse impact" on local stations and upon the public interest.<sup>109</sup> Since that time, such a case has risen, and the Commission has exercised "plenary power."

In *Carter Mountain Transmission Corp. v. FCC*<sup>110</sup> a common carrier applied for a permit to install microwave relay facilities. The Commission found that the facilities would be used by a CATV, that improvement of the CATV facilities would probably drive the local broadcasting station out of business, and that this would be contrary to the public interest. It therefore denied the permit by an exercise of its "plenary power." It refused to apply the statutory common carrier standards of "public convenience and necessity," but instead looked to the "public interest" (the standard used in licensing broadcasting stations):

Carter [the carrier] contends that because we have no jurisdiction over the customer, we cannot consider the activities of the customer in regulating the carrier. We do not agree. If making the grant enables this customer . . . to destroy a basic Commission policy . . . the ability to create such a situation in this particular instance is sufficient to warrant an examination into the entire problem. . . . We will not permit a subsequent grant to be issued if it be demonstrated that the same would vitiate a prior grant, without weighing the public-interest considerations involved.<sup>111</sup>

Examining the case in this manner, the Commission found that economic injury to the television stations would be against the public interest. Although the FCC has yet to go so far, under this rationale regulation of all CATVs which affect local television broadcasting seems possible.

Since the affirmance of *Carter Mountain* by the Court of Appeals, the FCC has embarked upon a program of regulation of CATVs by regulation of their microwave suppliers. In doing so, the Commission has said it is to promulgate regulations which will give adequate protection to the local television service without inhibiting the growth of the community antenna service.<sup>112</sup> To implement this purpose, the FCC in December of 1963 gave notice of the following proposed rules: (1) that the CATV systems should carry the programs of the local stations, and (2) that there should be no duplication of the local programs within the primary contours for 15 days.<sup>113</sup>

105 *Id.* at 434.

106 *Id.* at 430.

107 48 STAT. 1081 (1934), 47 U.S.C. 303 (1958), as amended, 47 U.S.C. § 303 (1), (5) (Supp. V 1964).

108 "INQUIRY," 26 F.C.C. 403, 429 (1959).

109 *Id.* at 431.

110 32 F.C.C. 459 (1962), *aff'd* 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

111 *Id.* at 461-62. (Emphasis added.) Comment, 13 AM. U. L. REV. 98 (1963).

112 F.C.C. Docket No. 14895 (Dec. 13, 1963); F.C.C. Docket No. 15233 (Dec. 13, 1963).

113 *Ibid.*

### B. Effect of Jurisdiction

Even assuming, however, that the Commission might have complete jurisdiction over the licensing of the CATVs, it does not follow that pre-emption should occur in every instance involving broadcasting. Although it has been said that the Federal Communications Act provides a comprehensive plan for the regulation of the broadcasting industry, it is clear that the FCA was not intended to do away with common law remedies where questions of private rights are at stake. The Commission has itself said that it is not the proper forum for the adjudication of property rights.<sup>114</sup> The FCA is concerned only with regulating the broadcasting industry so as to provide for the "public interest";<sup>115</sup> it is not concerned with adjudication of rights between individuals,<sup>116</sup> even though they may happen to be individuals whose primary activities are broadcasting. On this basis, the courts of Nebraska had jurisdiction to determine questions of property law and fraud, even though a judgment would necessarily involve the determination of ownership of a broadcast license.<sup>117</sup> The courts retained this jurisdiction even though the Commission admittedly had exclusive power to grant radio licenses.

### V. Conclusion

At least in some instances, the television broadcasting industry desires protection for its programs from unauthorized and uncompensated use by the CATVs. The industry has gone to the courts, the FCC and to Congress. In the courts, the industry has sought relief by claiming infringement of common law copyright and unfair competition, relying on precedent supplied by analogous radio cases. In *Cable Vision* the Ninth Circuit refused to invoke either remedy to protect the industry. But television programs are arguably like stock in trade. *Cable Vision*, therefore, seems incorrectly decided and the Supreme Court, having granted certiorari, should reverse relying on *INS* as precedent. Unauthorized and uncompensated use of another's stock and trade is unfair competition. Common law copyright may also be available to protect some programs — those analogous to works that would have been protected at common law. The remedy must be confined within its traditional boundaries by the pre-emption of federal law. The decisions which have gone further seem incompatible with *Sears* and *Compco*. Statutory copyright, like common law copyright, affords only partial protection.

The industry has also sought relief from the FCC. Originally the FCC said that it had no jurisdiction over the CATVs. More recently, however, the Commission has found that it can regulate the CATVs where their operations jeopardize the Commission's plans for providing local programming, and where the destructive effect upon local stations would be harmful to the public interest. The Commission's determination seems correct in light of the Commission's mandate — to order the broadcasting industry. Absent Congressional intervention, the Commission can be expected to extend its regulation to all cases in which it feels the television broadcasting industry and the public might be harmed by the competition of the CATVs.

Finally, although bills to control the CATVs have until now been defeated in Congress, legislative authorization for regulation seems imminent. Such authorization would seem appropriate in light of the foregoing analysis.

John Donald O'Shea

<sup>114</sup> "INQUIRY," 26 F.C.C. 403, 430 (1959).

<sup>115</sup> FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

<sup>116</sup> FCC v. Sanders Bros. Radio Station, *supra* note 115; Daly v. Columbia Broadcasting System, Inc., 309 F.2d 83, 85-86 (7th Cir. 1962).

<sup>117</sup> Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945).