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Chipping Away at the Copyright Owner's Rights: Congress' Continued Reliance on the Compulsory License

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NOTES

CHIPPING AWAY AT THE COPYRIGHT OWNER'S RIGHTS: CONGRESS' CONTINUED RELIANCE ON THE COMPULSORY LICENSE

I. INTRODUCTION

Sports bars profit from the draw of Major League Baseball, the NFL, and the NBA every year. This success, however, comes at no small cost. A maze of copyright regulations and substantial royalty fees paid to the copyright owners of the broadcasts make public performances more than a simple flick of the power button. In order to present these copyrighted broadcasts to the public the sports bar owners must receive permission from the teams and leagues—the copyright owners—and pay the market price for this use.

The entrepreneurs managing these establishments are willing to pay for the use of the copyrighted broadcasts, however, these small

1 See, e.g., NFL v. McBee & Bruno's, 792 F.2d 726, 729 n.5 (8th Cir. 1986) ("The owner of one of the defendant restaurants testified that when a blacked-out [football] game was shown, he served 190 patrons, as opposed to 30 customers on a regular Sunday.").


3 Publicly perform is defined as follows:
   (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
   (2) to transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device ... whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

businesses cannot afford the high prices the leagues charge. In response, Congress proposed yet another compulsory license to pacify the competing interests in broadcasting: copyright owners versus viewers. In this instance, viewers are represented by the sports bar owners. The compulsory license allows payment of copyright owners for use of their works, guaranteeing their protection while also guaranteeing use of the work to serve the needs of the viewing public, in this case, sports fans. The profit needs of these establishments, however, appear to be the only needs served by this compulsory license. In addition, this compulsory license does not meet the rationale and purpose behind the

4 A market place consisting of multi-million dollar television networks and superstations with resources far exceeding even the most upscale sports bar or restaurant chains sets the outrageous prices for these broadcasts. See, e.g., Chicago Professional Sports, Ltd. v. NBA, 961 F.2d 667, 669 (7th Cir. 1992) (stating NBA's expenditures for television coverage), cert. denied, 113 S. Ct. 409 (1992); Jerome Holtzman, Vincent Tries A Little Tenderness: Seeks Middle Ground To Defuse Superstation Dilemma, Chi. Trib., June 21, 1992, at 5 (discussing Major League Baseball's $6-100 million contracts with superstations such as ESPN, WTBS and WGN); Mark Maske, Numbers Translate To Losses: Each Day of Strike Costs Both Sides, Wash. Post, Aug. 21, 1994, at D1 (discussing Major League Baseball's loss of $140 million in national broadcasting fees due to baseball strike); Leonard Shapiro, Sports Waves - Owners Cash In, Carry NFL to New Home, Wash. Post, Dec. 19, 1993, at D9 (discussing $1.6 billion NFL-Fox network deal paying league owners $400 million per year through 1997); Steve Zipay, Media: A Whole New Ballgame, Newsday, Dec. 19, 1993, at 8 (discussing NFL-Fox network $1.6 billion four year deal).


8 Hyman, supra note 6, at 126 (discussing balance between user and copyright owner).
compulsory license.\(^9\)

Congress uses the compulsory license to keep pace with new technology and broadcast interests.\(^{10}\) With the advent of cable and satellite technology and the copyright questions that these new uses created, courts generally refused to find copyright infringement.\(^{11}\) Courts, however, urged Congress to step in and resolve the issues.\(^{12}\) Congress' solution in both cases was to grant compulsory licenses\(^{13}\) allowing copyright owners to receive a statutorily set payment for the use of their broadcasts while freeing users from negotiating individually with each copyright owner for royalty payments.\(^{14}\) This compromise cut down on the transaction costs of negotiation;\(^{15}\) however, it removed a great deal of the copyright owners' control over the use of their materials.\(^{16}\)

To solve the current controversy surrounding sports bars' use of copyrighted materials, Congress again put forward a proposal effectively granting a compulsory license for the use of sports

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\(^9\) See infra notes 80-83 & 122-124 and accompanying text (discussing rationale and purpose of cable and satellite compulsory licenses).

\(^{10}\) An example of this pattern includes the cable compulsory license, 17 U.S.C. § 111 (1988), which was introduced as a compromise when the United States Supreme Court allowed the newly established cable industry to retransmit programs without paying the copyright owner. See H.R. REP. No. 1476, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S.C.C.A.N. 5659. Similarly, the satellite compulsory license was a response to the growing number of private homes using the new satellite technology. See H.R. REP. No. 887(I), 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 5611.


\(^{12}\) Teleprompter, 415 U.S. at 414. See also David Prebut, Note, Best Interests or Self Interest: Major League Baseball's Attempt to Replace the Compulsory Licensing Scheme with Retransmission, 3 SETON HALL J. SPORTS L. 111, 117 (1993) ("Congressional action rather than judicial legislation would be required if further copyright protection was to exist.").


\(^{15}\) Hyman, supra note 6, at 112 (discussing primary purpose for compulsory license: elimination of transaction costs).

\(^{16}\) Id. at 111 (arguing that compulsory licenses remove owners' control over who has access, how much of work may be used, and at what price).
programming by "places of public accommodation." The Right to View Professional Sports Act would amend the Copyright Act of 1976 (1976 Act) and the Cable Communications Policy Act of 1984. All "places of public accommodation" providing television broadcasts of professional sports games would be exempt from copyright infringement if a "reasonable fee" is paid to the copyright owners for such programming. The question then arises whether compulsory licensing is an adequate solution. Is Congress going too far in proposing a compulsory license for these copyrighted broadcasts? Are all of these exceptions chipping away at the rights granted under copyright law?

This Note will focus on the expansion of the compulsory license, and specifically its use in sports broadcasting. The first section addresses the establishment of a property right in a sports broadcast. Second, this Note traces the development of the compulsory license from the Copyright Act of 1909 (1909 Act) through the cable and satellite licenses. Finally, this Note analyzes the proposed Right to View Professional Sports Act and its problems.

17 Legislation, supra note 5, at 32. "Places of public accommodation" are defined as "an inn, hotel, motel or other place of lodging, or a restaurant, bar or other commercial establishment serving food or drink." 139 CONG. REC. E1173 (daily ed. May 6, 1993).
22 Legislation, supra note 5, at 32. The proposed bill will amend Section 705 of the Communications Act which was revised in 1984 to include protection of satellite and cable communications. Id.
II. THE PROPERTY RIGHT

Copyright protection stems from Article I, Section 8 of the Constitution of the United States. This protection is reinforced through the bundle of exclusive rights granted to copyright owners enumerated by Congress in the 1976 Act. The 1976 Act specifically sets forth the categories of works that may be registered and protected. The flexibility of the Constitution is evident as these rights and categories have been adapted over time to accommodate changes in technology. The recognition of a sports broadcast property right and its protection with the advent of television presents a clear example of this flexibility.

The issues surrounding sports television broadcasting can be traced to a collegiate baseball game between the Columbia Lions and the Princeton Tigers in 1939, which has the distinction of being the first televised sporting event in the United States. The establishment of the property right for sports broadcasts, however, began even earlier with cases involving radio broadcasts of Major League Baseball.

The earliest case discussing sports broadcasting involved the challenge of a radio license renewal before the FCC in 1934. The defendant, Newton, provided his audience with "running accounts" of the 1934 World Series while he listened to authorized broadcasts from stations which negotiated the right to broadcast.

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24 U.S. CONST. art. I, § 8, cl. 8 (providing in part, "The Congress shall have Power . . . 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.").
28 See Prebut, supra note 12, at 112 (discussing origin of sports broadcast property right).
29 See generally Prebut, supra note 12 (discussing alleged exploitation of compulsory license by superstations such as WTBS, WOR and WGN); Lynne S. Sutphen, Comment, Sports Bars' Interception of the National Football League's Satellite Signals: Controversy or Compromise?, 2 SETON HALL J. SPORTS L. 203 (1992) (discussing interception of satellite signals).
31 In re A.E. Newton, 2 F.C.C. 281 (1936).
with Major League Baseball. The FCC renewed Newton's license. The federal courts, however, were not as forgiving to similar offenders, which lead to greater protection of teams' rights to control their live broadcasts.

For example, the exclusive property right in sports broadcasting was upheld under a set of circumstances similar to Newton. The court was not persuaded by the argument that the games were news which anyone should be allowed to disseminate. The court found that the team possessed a property right in the news of the baseball games and, therefore, had the sole right to control use of the news for a reasonable time following the games. A preliminary injunction was granted for violation of the team owner's property right. The court, examining the exclusivity of the property right, reasoned that the baseball team "by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use ..." Courts continued to follow this rule, protecting sports teams' exclusive property rights in the broadcast of games and preventing the unauthorized use of those rights. The Supreme Court also recognized and strengthened the sports broadcast property right in striking down a First Amendment defense that the broadcast was protected free

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Id. The FCC renewed Newton's license even though they regarded his conduct dishonest, unfair and deceptive because his sports broadcasting was limited to the 1934 World Series. Id. at 284.

Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa. 1938). KQV, without consent, broadcast play-by-play descriptions of a Pittsburgh Pirates baseball game with information it received from station employees positioned along the field walls. Id. at 492.

Id.

Id.

Id.

Id.

See, e.g., Johnson Kennedy Radio Corp. v. Chicago Bears Football Club, Inc., 97 F.2d 223 (7th Cir. 1938) (enjoining radio station from broadcasting professional football game, where rights had previously been granted to another station); Liberty Broadcasting Sys. v. National League Club of Boston, Inc., 1952 Trade Cas. (CCH) ¶ 67,278 (N.D. Ill. 1952) (concluding that each baseball club has property right in games and "news, reports, descriptions and accounts thereof," and "sole right" to disseminate these accounts); National Exhibition Co. v. Fass, 133 N.Y.S.2d 379 (Sup. Ct. 1954) (enjoining use of teletyped reports to radio station for immediate rebroadcast without authorization), aff'd without opinion, 136 N.Y.S.2d 358 (App. Div. 1954), 143 N.Y.S.2d 767 (Sup. Ct. 1955) (final judgment).
speech.  

Congress further protected the sports broadcast property right with the enactment of the 1976 Act by extending federal copyright protection to live sports broadcasts. The 1976 Act grants copyright owners the exclusive right to "perform publicly" their live sports broadcasts as long as the broadcasts are "fixed" simultaneously with the transmission. The property rights of teams and leagues in their broadcasts continue for the statutorily set duration of a copyright. As discussed below, although the rights are exclusive, they are not limitless.

III. COMPULSORY LICENSING

Although federal copyright law protects the sports broadcast property right, sections 107 through 119 of the 1976 Act place limitations on these exclusive rights. Compulsory licensing is one such limitation placed on the exclusive rights of copyright

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38 Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578-79, 205 U.S.P.Q. 741 (1977). An Ohio television station was sued for broadcasting the "Flying Zacchini's Human Cannonball" performance without consent. Id. at 564. The Court noted the importance of the publicity right to compensate for effort and give economic incentive to create. Id. at 573. See also Post Newsweek Stations - Conn., Inc. v. Travelers Ins. Co., 510 F. Supp. 81 (D. Conn. 1981) (noting that athletics is periphery of protected speech and right to deny access of press into a sporting event is crucial to upholding licensing agreements made to broadcast such events).


41 H.R. REP. NO. 1476, 94th Cong., 2d Sess. 52-53 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665-67. 17 U.S.C. § 101 states that "work consisting of sounds, images, or both, that are being transmitted, is 'fixed' . . . if a fixation [or recording] of the work is being made simultaneously with its transmission."


A compulsory license, resembles an unwritten contract which gives the user unlimited use of the work or product in return for the promise that he will pay a fee or royalty at some later date . . . [and] the holder of a copyright in a work must grant [it] to one who uses the work in any of the ways specified in the Copyright Law.46

Upon payment of a royalty,47 the user has access to the entire work and the owner has no right of refusal or right to restrict the extent of the work to be taken.48 The compulsory licensing system severely limits the control of the copyright owner. Consequently, the value of broadcasts to the copyright owners are limited because the compulsory license allows wider distribution of the broadcast, undermining exclusive network contracts.49

The earliest compulsory license was granted under the 1909 Act for mechanical reproductions.50 This license granted copyright

46 Another primary limitation on the exclusive rights of the copyright owner is the fair use doctrine. See 17 U.S.C. § 107 (1988). Through a four factor balancing test, this doctrine allows the use of copyrighted materials in a reasonable manner without the consent of the owner. See, e.g., Hyman, supra note 6, at 106-07. The factors include: (1) the purpose of the use; (2) the nature of the work; (3) the amount of the portion used in relation to the work as a whole; and (4) the effect of the use upon the potential market for or value of the work. 17 U.S.C. § 107.

Another limitation applicable to the sports bar context is the "single receiving apparatus" exception. See 17 U.S.C. § 110(5). The copyright holder's permission is not necessary when a small retail establishment plays copyrighted broadcasts over a radio or TV "of a kind commonly used in private homes." NFL v. McBee & Bruno's Inc., 792 F.2d 726, 731 (8th Cir. 1986).

47 See, e.g., 17 U.S.C. § 111(d)(1)(B) (discussing royalty fees for cable compulsory licenses); 17 U.S.C. § 119(c) (discussing royalty fees for satellite compulsory licenses).

48 Robert S. Lee, An Economic Analysis of Compulsory Licensing in Copyright Law, 5 W. NEW ENG. L. REV. 203, 204-05 (1982). The provisions of the Act "not only deny creators the exclusive right to use their work as they wish, but also require them to do business with persons not of their own choosing and to accept statutorily established rates at statutorily mandated intervals for the use of their works." Id.

49 See infra notes 151-160 and accompanying text (discussing link between control and value with respect to sports broadcasting).

50 Ch. 320, § (e), 35 Stat. 1075 (1909); superseded by 17 U.S.C. § 115 (1988). See White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908) (leading to first compulsory license under 1909 Act). The license was a response to new technology, the manufacture of
owners of music the right to a royalty fee if their work was recorded by others.\textsuperscript{51} With the enactment of the 1976 Copyright Act, Congress modified the mechanical compulsory license\textsuperscript{52} and expanded the use of compulsory licenses into other areas.\textsuperscript{53} These areas included: retransmission by cable systems of broadcast signals;\textsuperscript{54} public performance of music on jukeboxes;\textsuperscript{55} and public broadcasting.\textsuperscript{56} In 1988 Congress further expanded compulsory licensing, adding a license for retransmission by satellite carriers of broadcast signals to private home viewers.\textsuperscript{57} Copyright owners
of sports broadcasts are primarily concerned with compulsory licenses for retransmission of broadcast signals by cable and satellite carriers.68

A. CABLE

Prior to the 1976 Act, as a result of the expansion of cable technology in the 1950's and the growth of the cable television industry, traditional licensing methods became inefficient.69 Cable was first used to improve the reception of local broadcast signals in outlying areas.70 "After the broadcaster negotiated with the copyright owner and transmitted the program, the local cable companies would pick up the signal at no cost and retransmit them to the homes locally."71 With increased technology, the cable companies delivered distant72 as well as local broadcasting signals, thus undermining the exclusive contract agreements between the broadcaster and the copyright owner.73 Distributors of copyrighted programs encountered refusals by television stations to buy their programs74 because these programs were already broadcast on competing local market stations by cable systems, which imported the programs from distant stations without the

transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct or indirect charge for each retransmission service to each household receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private home viewing.

Id.

68 See generally Prebut, supra note 12 (discussing Major League Baseball and cable and satellite compulsory licenses); Sutphen, supra note 29 (discussing NFL satellite transmissions and compulsory licensing).

69 Lee, supra note 48, at 209 (discussing economic ramifications of compulsory license).


71 Prebut, supra note 12, at 116 (emphasis added).

72 See NIMMER, supra note 60 (making signals available from distant television stations which would not otherwise be available even with clear reception).

73 Brotman, supra note 60, at 478.

The detrimental economic impact of the distant signal importation forced broadcasters to ask the courts to find the cable operators liable for copyright infringement when they broadcast signals without permission.\textsuperscript{66} The Supreme Court, however, refused to find the cable companies liable in two separate cases.\textsuperscript{67}

First, in \textit{Fortnightly Corp. v. United Artists Television, Inc.},\textsuperscript{68} a cable company that retransmitted local broadcast signals was held not liable for copyright infringement under the 1909 Act because the Court found cable systems to be "passive beneficiaries."\textsuperscript{69} The cable companies did not "perform" within the meaning of the 1909 Act;\textsuperscript{70} they simply enhanced the broadcast.\textsuperscript{71} Although the Court recognized that technology changes must be considered when construing copyright statutes, "the [technology] change could not transform the cable television function of enhancing the viewer's capacity to receive the broadcaster's signals into a 'perform-ance'."\textsuperscript{72} This decision allowed cable companies throughout the country to retransmit broadcast signals without paying any fees to
the copyright owner. The Supreme Court expanded cable's use of broadcasts in Teleprompter Corp. v. CBS, including retransmission of distant broadcast signals. The Court once again took the position of the cable companies. The Court, however, encouraged Congress to investigate this issue further and come to a resolution.

Congress reached a compromise between the cable companies and copyright owners. Congress implemented the compromise in the 1976 Act. Unlike the Supreme Court, Congress acknowledged the copyright owners' rights in the cable companies' use of their broadcasts and also acknowledged that the cable companies should pay royalties for the use of the broadcasts. In addition, Congress recognized that transaction costs would be "impractical and unduly burdensome" on cable companies if forced to negotiate individually with each copyright owner. Therefore, Congress addressed both interests in section 111 of the 1976 Act through the compulsory license.

Under section 111, once a cable system satisfies five required conditions, it obtains the unrestricted right to retransmit FCC licensed broadcasts for a statutorily set royalty fee, thus remov-

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73 Prebut, supra note 12, at 117.
75 Early on cable companies consisted largely of small local franchise operators, however, with the growth of the cable industry large multiple system operators now dominate the market and often monopolize cable broadcasting in a number of locations. See, e.g., Nicholas W. Allard & Theresa Lauerhass, De balkanize the Telecommunications Marketplace, 28 CAL. W.L. REV. 231, 238 & n.39 (1992) (discussing growth of cable industry).
76 Id. at 414 ("Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.").
78 Id.

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ing copyright owners' control over the use of the program. Unlike the *Fortnightly* and *Teleprompter* decisions, Congress recognized copyright owners' right to a fee. The compulsory license, however, also removed the copyright owners' control and ability to negotiate for their fees, which were statutorily determined. Review of the factors used to determine royalty distribution under the compulsory licensing scheme reveals an attempt to consider what the owner would receive if contracts were negotiated individually.

In addition to fee considerations, other tradeoffs were made with the compulsory license. Congress established the compulsory license to encourage program diversity and to meet the public's viewing needs while upholding copyright protection. The reduction of transaction costs, including identification costs, information costs and enforcement costs, while striking a balance between the user and the copyright owner, provide a strong argument in favor of compulsory licensing. The compulsory license guarantees the author and copyright owner protection and payment for their work, and the cable companies are guaranteed use of the work to fulfill the needs of the public.

Many, however, are dissatisfied with the cable compulsory licensing system. Major League Baseball and other sports leagues have led opposition to various aspects of the cable compulsory licensing scheme. There are four main objections to the scheme.

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83 See, e.g., Prebut, supra note 12, at 122 ("[T]he primary factors to be applied are: the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems, the benefit derived by cable systems from the secondary transmissions of certain copyrighted works, and the market-place value of the works transmitted. . . . A full evidentiary hearing would [also] be held to allow claimants to substantiate any and all claims to the royalty funds.") (quoting Cable Royalty Distribution Proceeding, 45 Fed. Reg. 50,621, 50,622 (1980)).

It may be fairly assumed that the same types of factors will be considered by the Copyright Arbitration Royalty Panels which have replaced the Copyright Royalty Tribunal. See 17 U.S.C. §§ 801-03 (Supp. 1993).
84 See, e.g., Prebut, supra note 12, at 128-29 (discussing rise of compulsory license).
85 See, e.g., Hyman, supra note 6, at 126 (discussing advantages of compulsory license).
86 Id.
87 See generally Prebut supra note 12 (discussing Major League Baseball's opposition to compulsory licensing and concern over superstations' impact on television contracts); Sutphen, supra note 29 (discussing NFL's fight against sports bars' interception of satellite signals).
First, opponents claim fees do not accurately represent marketplace prices, diminishing the copyright owner’s "bargaining chip." Second, opponents claim the formula used to set fees does not adequately reflect economic developments. Third, opponents suggest that more private negotiation is needed to allow a greater representation of the product's value because of the difficulty of the distribution mechanism. Finally, opponents argue that compulsory licensing has a detrimental impact on the supply of programs. Since program earnings are lower than their market value, production may be discouraged, working counter to one of the most basic principles of copyright law: fostering creation.

In addition, one of the initial factors for the implementation of the compulsory license was to foster the growth of the infant cable industry. The industry, however, has reached a level of financial stability and public acceptance, and no longer needs this protective support. Therefore, arguments that the cable compulsory license should be replaced with full copyright protection for copyright owners are persuasive.

B. SATELLITE

Following in the footsteps of the cable companies, a compulsory license was granted to another growing technology: satellite carriers, which market satellite dishes for private home viewing. Unlike the cable compulsory license, however, the satellite compulsory license is limited to private home viewing of satellite

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83 See, e.g., Hyman, supra note 6, at 127 (arguing for replacement of cable compulsory license with full copyright liability).
84 Id.
85 Id. at 128.
86 Id.
87 Id.
88 Id.
89 Nimmer, supra note 60, at § 8.18[A], 8-197.
90 Id. ("They may ultimately become the primary form of television reception.").
91 See, e.g., Allard, supra note 75, at 238 (arguing cable industry no longer requires protection).
93 Nimmer, supra note 60, at § 8.18[F], 8-249 (discussing viewers' need for satellite hook up because they can not receive signals with roof top antenna).
retransmissions. 99

The growth of the home satellite dish began with technology changes in the cable television industry. 100 In the aftermath of the cable compulsory license, the FCC repealed a set of regulations concerning distant signal importation, which had required a cable station to import signals from the closest major markets. 101 This spawned the growth of superstations such as WTBS in Atlanta and WOR-TV in New York which, as a result of the FCC's change in regulations, now have nationwide markets. 102 Initially, the growth of superstations seemed unlikely because of the high cost of importing distant signals. 103 The introduction of nationwide satellite distribution, an economic alternative for high priced microwave transmission, however, allowed superstations to flourish. 104 Satellite technology flourished as well, lowering the cost of satellite dishes and making the technology available to the home viewer. 105

A new problem was created as the use of satellite technology expanded to the home viewer and as satellite dishes began to appear. The satellite dish allowed individuals to receive unauthorized retransmissions directly from satellite carriers, thus avoiding payment of any copyright fees, either directly to copyright owners or indirectly through cable subscriptions. 106 To prevent this


100 See, e.g., Prebut, supra note 12, at 130 (discussing cable companies use of satellite distribution as an alternative to high priced microwave transmission).

101 Id. at 130 & n.120-21. The FCC was not concerned with the growth of superstations because they mistakenly assumed that the cost of importing distant signals would be too high. Id. at 130 & n.122.


103 Prebut, supra note 12, at 130 & n.121.

104 Id. at 131.

105 Id. at 132-34 (discussing impact on growth of private satellite use).

106 H.R. REP. NO. 100-887(I), 100th Cong., 2d Sess. 5 (1988), reprinted in 7 U.S.C.C.A.N. 5611, 5614-15 (1988) [hereinafter SHVA History]. Initially, the cable system paid the satellite carrier a fee per subscriber to deliver the broadcast or signal, and the cable system in turn transmitted the signal to its subscribers. Id. at 5615. With new satellite technology and the ability of an individual to build a home earth station, a dish owner can intercept the retransmissions made by the satellite carrier at no cost, thereby avoiding the subscription rate ordinarily paid to the cable system. Id. See also NIMMER, supra note 60, at § 8.18[F], 8-250.
piracy, satellite carriers began to scramble their satellite signals. Consequently, the scrambling of signals and the marketing schemes developed to sell descrambling devices to home dish owners threatened the "passive carrier" exemption under section 111(a)(3) of the 1976 Act. The exemption is only available to unaltered secondary transmissions.

Copyright owners argued that scrambling of signals is an alteration of the transmission which removes the transmission from the "passive carrier" exemption. The courts, as with cable technology, protected the new satellite technology, not the copyright owners. The satellite carriers were held to be "passive carriers" under section 111(a)(3), as the Court in *Fortnightly* and *Teleprompter* held cable carriers to be "passive beneficiaries" under the 1909 Act.

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107 *SHVA History*, supra note 106.

108 *Id.* Title 17, Section 111(a)(3) states:

(a) Certain Secondary Transmissions Exempted—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if... (3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others.


109 *See Nimmer*, note 60, at § 8.18[F], 8-251 (raising question of whether satellite carrier lost "passive carrier" exemption because scrambling arguably alters transmission).


111 *See supra* notes 68-76 and accompanying text (discussing Court's protection of cable companies to detriment of copyright owners).

112 *See*, e.g., *Hubbard Broadcasting, Inc. v. Southern Satellite Sys., Inc.*, 777 F.2d 393, 228 U.S.P.Q. 102 (8th Cir. 1985) (finding for satellite carrier); *Eastern*, 691 F.2d 125 (finding for satellite carrier). *But see* *WGN Continental Broadcasting Co. v. United Video Inc.*, 693 F.2d 622, 217 U.S.P.Q. (7th Cir. 1982) (finding against satellite carrier, not passive carrier because altered transmission).

113 *See supra* notes 68-76 and accompanying text (discussing *Fortnightly* and *Teleprompter*).

114 *See supra* note 112 and accompanying text.
With the difficult issues that arose concerning the use of satellite technology, Congress again responded with a compulsory license. In 1988, Congress passed the Satellite Home Viewer Act (SHVA) to meet the specific problems of satellite distribution. The SHVA created a temporary compulsory license for the secondary transmissions by satellite carriers of primary transmissions of superstations and network transmissions for private viewing by owners of satellite dishes. This legislation follows the same rationale as the cable compulsory license: allowing a new technology to grow and supporting a new industry.

The SHVA balances the copyright owner's need for protection through scrambling of satellite transmissions and the public's interest in continued access to programming. This legislation, however, avoids some of the complaints directed at the cable compulsory license because the SHVA includes a "sunset date" requiring termination of the legislation on December 31, 1994.

See, e.g., supra note 107 and accompanying text (discussing problem created with advent of satellite technology).

SHVA History, supra note 106, at 5617.


17 U.S.C. § 119(a)(1)(B). See generally, Nimmer, supra note 60, at § 8.18[F][2], 8-256. Satellite transmission of network programming is limited to "unserved households" defined as households that can not receive signals "through the use of a conventional outdoor rooftop receiving antenna." 17 U.S.C. § 119(d)(10)(A). The statute also requires that the household not have subscribed to a cable system that provides that network programming within 90 days of its satellite subscription. 17 U.S.C. § 119(d)(10)(B). The purpose of section 119(d)(10)(B) is to ensure cable subscriptions are not canceled so the household may qualify as an unserved household. Nimmer, supra note 60, at § 8.18[F][2], 8-256 n.367 (citing SHVA History, supra note 106, at 27).


While the primary transmissions of superstations are more commonly retransmitted, the two years prior to the enactment of the SHVA realized the retransmission of a large number of network affiliated signals. SHVA History, supra note 106, at 5618. As a means of discounting the lesser used network affiliated signals, satellite carriers pay a lower statutory royalty rate. Id.

SHVA History, supra note 106, at 5618.


At that time Congress will reexamine the industry and decide whether it is necessary to continue the current scheme or if the industry has grown and succeeded enough to stand on its own.\textsuperscript{124} In addition to avoiding complaints, the SHVA generated unusual support. The cable industry did not oppose the SHVA\textsuperscript{125} even though the private satellite earth stations are considered strong competitors of the cable industry.\textsuperscript{126} The Motion Picture Association of America, a strong voice opposing the compulsory license, recognized that this legislation contains important protections for copyright owners, including: (1) a statutory flat fee\textsuperscript{127} for the compulsory license; (2) incentives for the parties to negotiate\textsuperscript{128} a license fee; and (3) a sunset date\textsuperscript{129} of December 31, 1994 for the compulsory license.\textsuperscript{130}

Opposition to this new license, however, was also voiced: "[e]very new technology that comes along . . . lines up for a compulsory license and avoids the rigors of competition . . . ."\textsuperscript{131} Even so, there are protections for the copyright owner in this legislation that

\textsuperscript{124} See Satellite Legislation, supra note 122, at 464. See also NIMMER, supra note 60, at § 8.18[F][4], 8-263 n.413 ("[T]he legislation is premised on encouraging the establishment of a market place licensing mechanism for satellite carriers. . . .") (quoting SHVA History, supra note 106, at 23).


\textsuperscript{125} See Satellite Legislation, supra note 122, at 464 (citing statement by president of National Cable Television Association, James P. Mooney, approving update of law with latest technology, but expressing concern with “sunset provision” and possibility that it would be used to gain repeal of cable compulsory licenses entirely).

\textsuperscript{126} Id.

\textsuperscript{127} See 17 U.S.C. § 119(b)(1)(B)(i)-(iii) (describing “phase 1” of the royalty structure, effective for 4 years, until December 31, 1992). A royalty fee is to be deposited with the Register of Copyrights for the preceding 6 months. 17 U.S.C. § 119(b)(1)(B). The fees in phase 1 are approximations of cable fees for receipt of similar copyrighted signals. NIMMER, supra note 60, at § 8.18[F][3], 8-259 n.393 (citing SHVA History, supra note 106, at 22).


\textsuperscript{129} See NIMMER, supra note 60, at § 8.18[F][4], 8-263 (discussing SHVA’s sunset date).

\textsuperscript{130} Satellite Legislation, supra note 122, at 464.

\textsuperscript{131} Id. at 455 (quoting Preston R. Padden, president of Association of Independent Television Stations, Inc.).
make the compromise of full copyright protection less of a burden on the copyright owner. This type of legislation allows a new technology to be established and become competitive without being priced out of the market. Then, after a period of time, the parties enter a system of negotiations. During this phase parties begin a structured relationship which will continue beyond the sunset date. One of the rationales behind the compulsory license is to cut down on transaction costs. Although such costs will occur, the ground laid between the parties under the statute will minimize these costs. Moreover, compulsory licenses may be a "necessary evil" in the copyright statute. Congress' movement to a short, defined time period and toward facilitation of negotiations allow the copyright owners to receive more of the benefit of their exclusive right, while still promoting technology and meeting the needs of the viewers.

IV. THE RIGHT TO VIEW PROFESSIONAL SPORTS ACT

Currently pending before Congress is a proposal for another compulsory license. The most compelling argument in support of the cable and satellite compulsory licenses has been the need to promote new technology and support infant industries. This argument does not apply to the proposed legislation and there does not appear to be a compelling argument to take its place. Rather, this proposal responds to: (1) the need of commercial establishments to attract customers through the use of a specific type of broadcasting; and (2) the inability of these establishments to compete in the free market.

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132 See supra notes 127-130 and accompanying text (listing legislation's protections for copyright owner).
133 The Right to View Professional Sports Act of 1993, H.R. 1988, 103rd Cong., 1st Sess. (1993). The bill was referred to the House Judiciary Committee and the House Energy and Commerce Committee on May 5, 1993. 139 CONG. REC. H2301 (1993). On July 26, 1993, Representative Mink (D-HI) was added as a cosponsor of the bill. 139 CONG. REC. H5105 (1993). Finally, on April 28, 1994, the most recent action on the bill, Representative Pastor (D-AZ) was added as a second cosponsor. 140 CONG. REC. H2913 (1994). It appears as though the bill will not proceed out of committee.
134 See supra notes 59-95 and accompanying text (discussing § 111 cable compulsory license); supra notes 96-131 and accompanying text (discussing § 119 satellite compulsory license); supra notes 50-52 and accompanying text (discussing § 115 mechanical compulsory license).
The Right to View Professional Sports Act of 1993 proposes an amendment to the 1976 Act, creating a new section 121. The proposal exempts all "places of public accommodation" that provide television broadcasts of professional sports games from copyright infringement liability if a "reasonable fee" is paid to the copyright owners for such programming. The proposal limits the licenses to one type of broadcast, a new step in compulsory licensing that should not be taken. Commentators argue that the SHVA is too narrow because it is technology-specific, and Congress should avoid this type of legislation and focus instead on underlying policy objectives. Following this argument, the proposal is even more dangerous because it is narrower than the SHVA.

The impetus for this proposal came from cases such as NFL v. McBee & Bruno's. In McBee, a sports bar intercepted live broadcasts of blacked-out football games with a satellite dish.

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136 H.R. 1988, 103rd Cong., 1st Sess. (1993), quoted in Legislation, supra note 5, at 32 (defining "places of public accommodation" to include places of lodging and establishments serving food or drink). See also supra notes 17, 21 (defining "places of public accommodation" and "reasonable fee").
137 Cf. Allard, supra note 75 (arguing for technology-neutral telecommunications legislation).
138 See, e.g., Allard, supra note 75, at 261 (discussing technology specific legislation). E.g., Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 186 U.S.P.Q. 65 (1975) (stating compulsory license goal of "broad public availability of literature, music and the other arts.").
139 See H.R. 1988 (limiting protection to specific type of broadcast).
141 McBee, 792 F.2d at 728-29. The NFL's television contracts include a provision: that games which are not sold out within 72 hours of game time are to be "blacked out," that is, not broadcast within a 75-mile radius of the home team's playing field. Officials of the league and club testified at trial that such a rule boosts team revenue directly by increasing ticket sales and indirectly because a full stadium contributes to a more exciting television program and therefore makes the right to broadcast games more valuable.
The bar did not qualify under any of the existing compulsory licensing schemes or exemptions to the performance right, such as "home use." The home use exemption allows a commercial establishment to turn on a standard radio or television for its customers because, as Congress stated, "the secondary use... is so remote and minimal that no further liability should be imposed." The use of any equipment beyond that which is normally found in the home, however, does not fall under this exemption, and the establishment will be liable for copyright infringement as in McBee. It may be argued that with the growth of private satellite dish use such actions may fall under the section 110(5) home use exemption at some point in the future. The home use exemption, however, has not yet been extended to cover satellite dish use.

Supporters of the proposal argue that these establishments are willing to pay for the use of these broadcasts, but cannot afford the "outrageous" fees the leagues currently charge. They also argue that this proposal benefits the leagues because it promotes viewership and popularity of the sport, and allows displaced fans to keep up with their teams. The leagues, however, argue that

Id. at 728.
144 McBee, 792 F.2d at 731. See also 17 U.S.C. § 110(5) (codifying home use exemption).
146 See supra note 29, at 222-23. The 1976 Act contains this exemption which bars a finding of infringement when the transmission is received by equipment similar to the type "commonly used in private homes." 17 U.S.C. § 110(5) (1988). Unlike the noncommercial "fair use" exemption, this kind of use may have a semi-commercial purpose, but as long as the type of equipment used is the kind "commonly found in private homes," it is exempt from copyright infringement. Id. See also H.R. REP. NO. 94-1476 at 87, 94th Cong., 2d Sess., reprinted in 1976 U.S.C.C.A.N. 5659, 5701 (explaining the purpose of this clause). See generally NIMMER, supra note 60, at § 8.18[C][2], 8-211 to 8-221 (discussing section 110(5) exemption).
147 Id. See NIMMER, supra note 60, at § 8.18[C][2], 8-215 n.86 (stating that "future" may be closer than thought possible when McBee was decided, because with the passage of the SHVA "price for dishes plummeted and households with satellite dishes mushroomed towards 2 million," twice the number referred to in McBee).
148 See supra note 4 (discussing fees paid to sports leagues for broadcast rights).
149 Legislation, supra note 5, at 33.
150 Id. at 32.
the proposal will undermine their television contracts and diminish
gate receipts because fans will simply watch the games at a local
bar for free rather than pay the admission to the game.151

Sports leagues oppose compulsory licensing in general.152 The
compulsory license limits the control of the copyright owner. The
value of the broadcast, especially with sports broadcasts, is directly
linked to the owner’s control over dissemination of the broad-
cast.153 Sports leagues have a contractual interest in controlling
the distribution of game telecasts.154 The telecasts have a higher
value in certain markets, determined by the amount of money
networks are willing to pay for the broadcast rights which depends
on the demand by advertisers for commercial airtime.155 The
networks, however, pay for exclusive use of the game telecasts, and
the ability of other users to broadcast the games diminishes the
value of the game to the network.156

Since the user under the compulsory license must pay a fee to
use the game, presumably the fee will make up the difference for
what is lost by the network. This is not the case. The rates
received under the compulsory license are well below the market
value reached if the parties were to negotiate a contract.157 The

151 Id.
153 Major League Baseball was a vocal supporter of the Copyright Broadcast Retransmis-
 sion Licensing Act of 1992, an attempt to repeal the compulsory license. H.R. 4511, 102d
 Cong., 2d Sess. (1992) (proposing a bill to amend Title 17 of the United States Code, by
 revising compulsory licensing system which applies to cable systems and satellite carriers).
The Commissioner of Baseball has argued before Congress for the repeal of the compulsory
license. See Hearing on H.R. 5949 Before the Subcomm. on Courts, Civil Liberties, and the
Admin. of Justice of the House Comm. on the Judiciary, 97th Cong., 1st & 2d Sess. 132, 164-
154 Id.
155 See Chicago Professional Sports, Ltd. v. NBA, 961 F.2d 667, 669 (7th Cir. 1992)
(stating owner collects larger royalties from one station than another because of station’s
larger audience), cert. denied, 113 S. Ct. 409 (1992); Pittsburgh Athletic Co. v. KQV
Broadcasting Co. 24 F. Supp. 490, 493 (W.D. Pa. 1938) (stating sports broadcasts are
designed to aid in obtaining advertising); Sutphen, supra note 29, at 209 (determining value
of broadcasts).
156 See, e.g., Prebut, supra note 12, at 141 & n.184 ("ESPN [negotiates directly with Major
League Baseball and] currently pays 12 times more than a superstation [protected through
a compulsory license] for a nationally televised game. The more games broadcasted over a
superstation, the less likely ESPN will agree to a similar deal in the future.")
157 Id. at 124.
Copyright Royalty Tribunal fully admitted that "the current statutory rates [can] not be considered those that would result from full marketplace conditions if the compulsory license did not exist. The rates were established as a legislative compromise, they are arbitrary, and they were intended to require only a minimum payment..." Therefore, it is easy to understand why sports leagues, like most copyright owners, do not support the compulsory licensing system. A compulsory license directed specifically at professional sports is not likely to receive positive reaction.

In addition, the legislation seems to draw arbitrary lines without rational justification. There are other establishments, such as gyms and health clubs, that may use professional sports broadcasts that are not included in the section 121(b)(2) definition. Also, under section 121(b)(1), the exception is made specifically for professional sports, leaving out amateur competitions such as

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158 The fees under the compulsory licensing scheme used to be deposited with the Register of Copyrights and distributed to the copyright owners by the Copyright Royalty Tribunal (CRT). 17 U.S.C. § 111(d)(3) (1988). The CRT was established by the 1976 Act to distribute royalties and set rates, and the court system continued to shape its power. Prebut, supra note 12, at 120. See, e.g., National Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal, 724 F.2d 176, 221 U.S.P.Q. 1044 (D.C. Cir. 1983) (addressing adjustment of royalty rates); National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 214 U.S.P.Q. 161 (D.C. Cir. 1982) (upholding CRT distribution against first challenge to CRT integrity).


160 See supra note 152 (discussing opposition to compulsory license).

161 H.R. 1988, 103rd Cong., 1st Sess. (1993). Proposed amendment to Title 17 will add section 121. Id. The proposal specifically limits the exemption to "places of public accommodation" defined in section 121(b)(2) as: "[A]n inn, hotel, motel, or other place of lodging, or a restaurant, bar, or other commercial establishment serving food or drink." 139 CONG. REC. E1173 (daily ed. May 6, 1993) (Rep. Lipinski submitting text of bills into Cong. Rec.).

162 H.R. 1988, 103rd Cong., 1st Sess. (1993). The proposed amendment only includes professional sports teams, as stated in section 121(b)(1): "Limitations on exclusive rights: exemption for certain displays of video programming... (b) Definitions.—As used in this section—(1) Professional sports team.—The term "professional sports team means a professional team engaged in the sport of football, baseball, basketball, ice hockey, boxing, or other sport." 139 CONG. REC. E1173 (daily ed. May 6, 1993) (Rep. Lipinski submitting text of bills into Cong. Rec.).
college athletics and the Olympics. Non-professional sporting events are used just as effectively by sports bars to draw patrons, but are not a consideration under the current legislation. May it therefore be concluded that the NCAA has greater right to full copyright protection than the NBA, NFL or Major League Baseball?

This legislation may have gone too far in circumventing copyright law. Although it considers the important balancing of copyright owners' interests and viewers' interests, the justification of a "displaced fan" should not outweigh the exclusive rights granted under copyright law, especially considering the seemingly arbitrary lines used to create this legislation. The bill may also begin a domino effect, slowly eroding the owner's rights by category of broadcast. Today professional sports, and tomorrow cooking shows.

The most important distinction between this proposal and its predecessors is that this proposal does not come as a response to new technology not already considered under the current statute. Both the cable and satellite compulsory licenses were a response to a new wave of technology. Although this proposal does involve a new use of satellite reception, section 119 addresses satellite reception and specifically limits the compulsory license to private viewers. These commercial establishments should be left in the marketplace to negotiate for themselves.

V. CONCLUSION

The federal courts first protected sports broadcasts in the early radio cases. Then Congress extended copyright protection to live television sports broadcasts in the 1976 Act. This protection affords the copyright owner exclusive use and control over the broadcast.

The compulsory license, however, limits this exclusive use. Upon payment of the statutorily set royalty fee, access to the entire work is granted to the holder of a compulsory license. Of the many rationales stated for the implementation of compulsory licenses, the most compelling is the need to promote the growth of new technolo-

This rationale allows the limitation of the exclusive rights granted under the 1976 Act.

However, Congress must proceed cautiously when extending the compulsory license into new areas. Both the growing cable and satellite industries appeared to be appropriate areas to extend the compulsory license. In the case of the satellite compulsory license, Congress included protections for the copyright owner such as the sunset date and incentives for negotiation which ease the burden of the compulsory license on the copyright owner.

Congress strayed from the important rationale of promoting growth of new technology when it proposed the Right to View Professional Sports Act. This proposal responds to the economic needs of a small segment of commercial establishments determined by arbitrary lines with little rational justification. In addition the proposal addresses satellite technology which is already addressed in the 1976 Act and limited to private viewers. Before encroaching further on the exclusive rights of the copyright owner Congress should take better care to justify its actions.

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