An analogous legal problem, but one of far greater popular and economic significance, relates to cable television. Cable television originated in the late 1950s as a vehicle for retransmitting into rural communities a number of stations and programs that otherwise would never have been available in that area. As cable (then known as community antenna television, or CATV) expanded into larger cities whose residents wanted to improve their signal, the copyright owners of the shows being retransmitted sought compensation for what they contended were public performances by the cable systems of works that had only been licensed for the television station or network. As noted earlier, in its first major decision in this field, *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968), the Supreme Court rejected that copyright claim, adopting a narrow definition of "public performance" to exempt CATV transmissions from copyright liability. The court explained:

> The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.
>
> When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

392 U.S. at 397–401. Six years later, in *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974), the Court reiterated this verdict, even though cable systems had become much more sophisticated in transmitting signals from across the country, as well as adding and selling commercials.

During this same period, Congress had embarked on its wholesale 1976 revisions of the Copyright Act, which included several major changes in the legal treatment of cable. One was the expanded definition of "public performance" which, if it covered a local bar, would definitely include a regional cable system.

At the same time, though, Congress created (in § 111(a)(3)) a special "passive carrier exemption" for retransmission of broadcast signals 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, cable, or other communications channels for the use of others.

The price of that exemption (or compulsory license) was a statutorily prescribed royalty to be distributed by the Copyright Royalty Tribunal to the copyright owners of sports broadcasts and other television shows.

The details and controversies surrounding this royalty system will be described later. For the moment, it is important to note that cable systems must pay such royalties only for "distant non-network" programming. Retransmission via cable of local television signals enhances rather than harms the existing returns of the local advertiser-supported stations, that now are able to reach more viewers. So also for network programming where the financial returns of either the producers or networks have already been calculated on the assumption that a national market is reached. The focus, then, of this licensing-royalty system was on distant and independent (non-network) stations whose programming (and advertising) were aimed at their local market, but could now be retransmitted by cable to homes across the country.

The interplay of sports broadcasting and cable transmission made it possible for a selected number of such "distant non-network" signals to become superstations, with major consequences for both the sports and the broadcasting world.[1] This became a problem particularly in baseball, and then in basketball, because (unlike the NFL) most baseball and basketball games are telecast on local stations pursuant to contract licenses from the local clubs. Efforts by sports leagues to cope with individual team broadcasts on superstations will be considered later, but the fit between such sports broadcasts and the Copyright Act has produced two major circuit court interpretations of the 1976 amendments.

EASTERN MICROWAVE, INC. V. DOUBLEDAY SPORTS, INC.

United States Court of Appeals for the Second Circuit, 1982.
691 F.2d 125.

MARKEY, CHIEF JUDGE:

* * *

Plaintiff, Eastern Microwave, Inc. (EMI) is licensed by the Federal Communications Commission (FCC) to provide services as a communications common carrier. EMI's services include the retransmission of the television signals of broadcast stations to markets outside the service areas of the broadcast stations. Retransmission is accomplished by converting broadcast signals into microwave signals and relaying the microwave signals via satellite or a string of line-of-sight terrestrial microwave repeater stations. Retransmitted signals are delivered by EMI to the headends of the customers of its transmitting services, cable television (CATV) systems, which then reconvert the microwave signals to television signals for distribution to and viewing by the CATV system's subscribers.

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[1] See Thomas Joseph Cryon and James S. Crane, *Sports on the Superstations: The Legal and Economic Effects*, 3 U. Miami Enter. & Sports L. J. 35 (1986) and Ariel Y. Bublick, *Note, Are You Ready for Some Football?: How Antitrust Laws Can Be Used to Break Up DirecTV's Exclusive Right to Telecast NFL's Sunday Ticket Package*, 64 Fed. Comm. L.J. 223 (2011); Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating the Sherman Act*, 16 Sports Law. J. 1 (2009); Ethan Flatt, Note, *Solidifying the Defensive Line: The NFL Network's Current Position Under Antitrust Law and How It Can Be Improved*, 11 Vand. J. Ent. & Tech. L. 637 (2009).

For more on the vertical integration of regional sports networks into network stations, see Diana Moss, *Regional Sports Networks, Competition, and the Consumer*, 21 Loy. Consumer L. Rev. 56 (2008); see also Stephen Dixon, *A Channel Worth Changing? The Individual Regional Sports Network: Proliferation, Profits, Parity, and the Potential Administrative and Antitrust Issues That Could Follow*, 33 J. Nat'l Ass'n Admin. L. Judiciary 302 (2013) (exploring the potential for development of individual regional sports networks in baseball).

EMI has been retransmitting the original television signals of WOR-TV of New York City by repeater stations since 1965, and more recently by both repeater stations and satellite. WOR-TV has not objected to that retransmission.

Doubleday Sports, Inc. (Doubleday), owner of The New York Mets baseball team, contracts with WOR-TV to broadcast approximately 100 Mets games per season. It is undisputed that The Mets, i.e., Doubleday, owns the copyright in the audiovisual work represented by the Mets games. * * *

In March of 1981, EMI was notified by Doubleday of the latter's view that retransmission of WOR-TV Mets game broadcasts infringed Doubleday's copyright. Thereupon, EMI instituted this action, seeking a declaratory judgment that it was a passive carrier exempt from copyright liability under 17 U.S.C. § 111(a)(3)[3] of the Copyright Act of 1976 (Act). * * *

* * *

Exemption

EMI's activities, described as those of an intermediate or "resale" transmitter, are a new and mixed breed. Unlike those of broadcasters and CATV systems, they do not include the sending of signals intended for reception as such on television sets. Like those of some CATV systems, they do include the acquisition "off the air" of broadcast signals. Unlike the activities of older, established common carriers, e.g., the telephone company, they include carrying the communications desired by receivers rather than those desired by senders. Also unlike older common carriers, EMI is paid by receivers rather than by senders. Like those of older common carriers, EMI's activities are paid for as services and involve transmittal of the entire signal without change.

* * *

The present activity of EMI cannot be viewed in historical isolation. In 1968, the FCC suspended the hearing process required by its 1966 rules in favor of proposed rules requiring cable systems in the top 100 markets to obtain consent from distant stations before transmitting their signals. *Notice in Docket No. 18397, 15 F.C.C. 2d 417 (1968).* That resulted in denial of virtually all transmission rights, and designation of the action as a "freeze" on cable growth.

At about the same time as the 1968 FCC action, distribution of microwave-relayed television signals by CATV systems to subscribers was held not a "performance" under the Copyright Act of 1909, and CATV systems were therefore not liable for copyright infringement. *Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 88 S. Ct. 2084, 20 L. Ed. 2d 1176*, *reh. denied*, *393 U.S. 902, 89 S. Ct. 65, 21 L. Ed. 2d 190 (1968)*; *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394, 94 S. Ct. 1129, 39 L. Ed. 2d 415 (1974).*

Congress over the ensuing years worked out a legislative compromise, one part of which was the provision in the Act of a definition of "to perform or display a work publicly" having a breadth sufficient to encompass the distribution of relayed signals by CATV systems. Recognizing that a process requiring each CATV system to obtain the consent of or negotiate with numerous individual copyright owners would be unworkable, *see, Malrite T.V. of New York v. Federal*

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[3] 17 U.S.C. § 111(a)(3) provides:

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: *Provided*, that the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; . . .

Communications Commission, 652 F.2d 1140, 1148 (2d Cir. 1981), Congress established as the other part of the compromise the compulsory license program set forth in the Act.[7]

Under the congressionally mandated scheme, television broadcast stations like WOR-TV continue to pay license or royalty fees directly to copyright owners like Doubleday, while CATV systems pay license fees under their compulsory licenses to the United States Copyright Office in accord with formulae provided in 17 U.S.C. § 111(d)(2)(B). The fees paid by CATV systems are distributed to copyright owners like Doubleday by the Copyright Royalty Tribunal (Tribunal), as provided for in *17 U.S.C. § 111(d)(5)*. The Congressional scheme thus provided for compensation from CATV systems to copyright owners measured by the number of cable viewers or potential viewers, and placed the responsibility for payment of that compensation on the CATV systems.

We begin, as we must, with the statute, 17 U.S.C. § 111(a)(3), under which EMI is entitled to the "carrier" exemption if its activities are passive, merely retransmitting exactly what it receives, if it exercises no control over the content or selection of the primary transmission, or over the particular recipients of its transmission, and if its retransmission activities consist solely of providing wires, cables, or other communications channels for the use of others.[11]

The first question presented is thus whether EMI exercised "control over selection of the primary transmission" when it chose to retransmit the WOR-TV signal via satellite. [The court rejected the argument that selecting WOR for transmission constituted "control." The court also found that EMI met the second requirement for the exemption, an absence of direct or indirect control over the particular recipients of its retransmission. Finally, the court found that EMI was not selling Mets games, but rather was selling transmission services.]

The Compulsory License Scheme

Interpretation of the Act must occur in the real world of telecommunications, not in a vacuum. The centerpiece of the compromise reflected in the Act is the compulsory licensing scheme. That scheme is predicated on and presupposes a continuing ability of CATV systems to receive signals for distribution to their subscribers. Doubleday is but one of numerous copyright owners whose works may be broadcast by WOR-TV. EMI serves as a signals conduit between the performance by WOR-TV and the performance by its CATV system customers. Adoption of Doubleday's position would stand all copyright owners athwart that conduit between the original

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[7] 17 U.S.C. § 111(c)(1) provides:

Subject to the provisions of clauses (2), (3) and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

[11] As reflected in the text, we believe a proper application of the statute, and continuation of its overall scheme as designed by Congress, requires that EMI's activities challenged in this case be perceived as falling within the intent of *17 U.S.C. § 111(a)(3)*. Later pronouncements of the Congress cannot be looked to as indicative of its intent at the time of a statute's enactment. Of general interest, however, is a recent House Committee Report on H.R. 5949, 97th Cong., 2nd Sess. (May 17, 1982), and its comment on this very case:

> In the course of Committee deliberations on this legislation, a decision was issued in a case involving an interpretation of *Section 111(a)(3)*, *Eastern Microwave, Inc. v. Doubleday Sports, Inc., 534 F. Supp. 533* (N.D., N.Y., 1982), which leaves the cable industry in a state of turmoil. The holding of that case was that the carrier, Eastern Microwave, Inc., failed to qualify for the *Section 111(a)(3)* exemption. In the Committee's view, the decision incorrectly construed the carrier exemption. If the decision is applied to other parties, all satellite resale carriers could be held liable for copyright infringement when they deliver distant signals to cable systems. Further, terrestrial microwave carriers could also be in danger of losing their exemption. These carriers are the primary means whereby cable systems receive distant signals for retransmission to cable subscribers; rather than face copyright liability, they may suspend broadcast retransmission. As a result, the signal carriage standards of the FCC could be undone, and the entire compulsory licensing scheme undercut, which would be antiethical [sic] to the intent of this committee and the public interest.
>
> There has never been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities.

H.R. REP. No. 599, 97th Cong., 2d Sess. 4 (1982).

broadcast and the opportunity for subsequent performances by CATV systems. In so doing, it would defeat Congress' intent by imposing on EMI the unworkable separate negotiations with numerous copyright holders from which the Act sought to free CATV systems. Congress drew a careful balance between the rights of copyright owners and those of CATV systems, providing for payments to the former and a compulsory licensing program to insure that the latter could continue bringing a diversity of broadcasted signals to their subscribers. The public interest thus lies in a continuing supply of varied programming to viewers. Because CATV systems served by intermediate carriers cannot provide their full current programming to their subscribers without the services of those carriers, imposition of individual copyright owner negotiations on intermediate carriers would strangle CATV systems by choking off their life line to their supply of programs, would effectively restore the "freeze" on cable growth described above, and, most importantly, would frustrate the congressional intent reflected in the Act by denying CATV systems the opportunity to participate in the compulsory licensing program. After years of consideration and debate, Congress could not have intended that its work be so easily undone by the interposition of copyright owners to block exercise of the licensing program by cable systems.

The Royalty Scheme

EMI is, like all common carriers, compensated for its transmission services as such. In accord with its FCC-approved tariff, and as above indicated, EMI is paid by each CATV system in relation to the number of its subscribers up to a maximum of $3,000. The fee does not increase thereafter, regardless of the number of a CATV system's subscribers. In contrast, the royalty fee paid by each CATV system under the Act is limited to no maximum, but is entirely based on percentages of gross receipts from subscribers to the CATV service in accord with 17 U.S.C. § 111.

It is undisputed that if each CATV system had its own string of microwave repeaters or satellite transponder it would be liable through the Tribunal to a copyright owner for only the one established royalty fee when and if it publicly performed the copyrighted work by making it available to its subscribers; and that such an integrated CATV system would not be liable for a second royalty fee for having itself retransmitted the original broadcast signal to its headend. We are unpersuaded by counsel's urging that a different result should obtain when a separate entity, e.g. EMI, supplies the retransmission service. That EMI is a separate entity supplies no justification for subjecting EMI to copyright liability when those same activities would not result in copyright liability if carried out by the CATV systems served by EMI. In the Act, Congress established a specific scheme for recognition of the rights of copyright owners. Under that scheme those rights are not unlimited. Neither are they rendered superior to the rights of viewers. If this court were to impose here a requirement that intermediate carriers negotiate with and pay all copyright owners for the right to retransmit their works, assuming such requirement were not impossible to meet, such action would produce a result never intended by Congress, namely a substantially increased royalty payment to copyright owners with no increase in number of viewers.

While the Mets may have lost that initial legal battle, they ultimately won the economic war. As the contracts with stations like WOR (or WGN, WPIX and KTVT) expired, the teams involved were able to negotiate new rights fees that reflected the higher economic value derived from their station's new national market. Crucial to that effort was Ted Turner, then owner of the most "super" of all superstations, WTBS in Atlanta, as well as Atlanta's baseball Braves and basketball Hawks.

In tandem with its retransmission carrier, Southern Satellite System, WTBS developed a new method for transmitting its signal to the satellite system and to local cable systems. A key feature of that technology was that it made it possible for WTBS to insert different advertising in

the programming transmitted to distant cable systems from that incorporated in the original programming in Atlanta. WTBS was an extremely attractive superstation for cable systems around the country precisely because it offered Braves' games in the summer and Hawks' games in the winter. The new technology permitted Turner—especially given his common ownership of both the teams and the station—to sell separate commercial time to advertisers in the local Atlanta market and in the national market. This proved a bonanza for Turner's combined broadcasting and sports empire, which in 1996 was merged into the much vaster Time Warner entertainment conglomerate, but then in 2000 made the major financial mistake of becoming just 45 percent of the new Internet AOL Time Warner.

The flip side is that WTBS was considered a severe market threat by local stations in distant markets—not simply because the stations had to compete with WTBS sports broadcasts, but also because they had to face WTBS' broadcast of the syndicated shows for which WTBS had secured the license in Atlanta, but for which the local stations had bought the supposedly exclusive license in their areas. In *Hubbard Broadcasting v. Southern Satellite Systems*, 777 F.2d 393 (8th Cir.1985), the owner of television stations in Minneapolis, Albuquerque, and St. Petersburg challenged the compatibility of this new technology and broadcasting venture with the 1976 Copyright Act regime. After analyzing and rejecting the various technical arguments, the Eighth Circuit addressed the economic core of the case:

> Turner's Commercial Substitution and the Compulsory Licensing Program
>
> As a third theory of liability, Hubbard asserts that the commercial substitution process undertaken by Turner and facilitated by Southern impermissibly alters the careful balance achieved by Congress through the compulsory licensing system. Specifically, Hubbard focuses on section 111(c)(3) which provides that the compulsory license will not be applicable if the content of the particular program . . . or any commercial advertising . . . transmitted by the primary transmitter . . . is in any way willfully altered by the cable system. . . . 17 U.S.C. § 111(c)(3). Here, Hubbard argues that Turner, by substituting commercials at the primary transmission stage, accomplishes indirectly what Congress has concluded cable systems cannot do directly. As a result, Hubbard contends that cable systems carrying WTBS cannot qualify for the compulsory license of section 111(c)(1) with respect to the WTBS transmission. We disagree.
>
> In adopting section 111(c)(3), Congress concluded that to allow cable television systems to alter the primary transmission by substituting commercials would significantly alter the basic nature of the cable retransmission service, and make its function similar to that of a broadcaster. Further, the placement of substitute advertising in a program by a cable system on a "local" signal harms the advertiser and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach. On a "distant" signal, the placement of substitute advertising harms the local broadcaster in the distant market because the cable system is then competing for local broadcasting dollars without having comparable programming costs. Consequently, Congress "attempted broadly to proscribe the availability of the compulsory license if a cable system substitutes commercial messages."
>
> Congress, in forbidding commercial substitution by cable systems, sought to ensure the competitive compatibility of the cable system and the local broadcaster. Cable systems, when retransmitting local signals, would retransmit exactly what was received and in so doing would neither undercut the local broadcaster's ability to generate local advertising revenues nor jeopardize the ability of creators of programming to receive a fair return for their product based upon the size of the audience that the advertiser's

> message was calculated to reach. In other words, the status quo relationship between local broadcasters and copyright holders would be protected and facilitated. With respect to distant signal retransmission, Congress sought to ensure that cable systems were not allowed, while claiming protection of the compulsory license, to compete for local advertising dollars without having to bear comparable programming costs.
>
> As an initial matter, we emphasize that there has been no assertion on the part of Hubbard that either Southern or any cable system carrying the WTBS signal has ever substituted or in fact has ever attempted to substitute commercials originally placed on the WTBS signal by Turner. Rather, both Southern and the cable systems retransmit intact any commercials they receive from Turner on the WTBS signal. Thus, under the literal language of section 111(c)(3), no infringement based upon commercial substitution has occurred.
>
> Additionally, we conclude that none of the concerns raised by Congress in adopting section 111(c)(3) are implicated by Turner's practices. WTBS, in placing only national advertising on the microwave signal, seeks to and in fact can economically address only the national advertising market. Turner cannot effectively address the local advertising markets served by Hubbard. Thus, Turner does not compete with Hubbard for local advertising dollars.
>
> Further, to the extent Turner and Hubbard compete for national advertising dollars, that competition will exist regardless of Turner's current practices since even absent the microwave signal, Turner's UHF signal will continue to reach a national market and carry national advertising. And, unlike a cable system that substitutes commercials without bearing programming costs, Turner has the same types of programming costs as Hubbard.
>
> Finally, we also conclude that Turner's development of two separate WTBS signals has no adverse impact on the interests of the copyright holders. These individuals or companies, when contracting with Turner, know that WTBS signals will be available nationwide as well as locally and are entirely free to take those steps necessary to assure that they are compensated accordingly. At bottom, no copyright holder is deceived by the extent of Turner's market or the commercial content of the signals; no advertiser reaches a smaller market than anticipated; and no local broadcaster is forced to compete with Turner on any greater level than would exist absent Turner's transmission of two television signals.

777 F.2d at 403–04.

QUESTIONS FOR DISCUSSION

1. *Hubbard* concluded, then, that Satellite, WTBS, and Ted Turner's teams were entitled under federal copyright law to transmit their games on cable systems across the country. Does that ruling imply that teams in the games cannot assert their common law property rights (dating back to *Pittsburgh Athletic*) to decide whether there will be a broadcast on such a system? For example, could a small market team like the Pittsburgh Pirates sue to block WTBS from telecasting a Pirates-Braves game back into Pittsburgh? Should the answer differ depending on whether the game is being played in Pittsburgh or in Atlanta? Does the *NBA-Motorola* ruling mean that any such common law rights are now preempted by Turner's copyright in the broadcast "expression" of the game?

2. What about league rules that purport to block such transmission? In the early 1980s, for example, baseball teams in divisional playoffs in each league were permitted to broadcast their games on their local channels, but the league sold to a network (for a large fee) the exclusive right to national broadcasts. When the Braves made the 1982 National League playoffs, was either the league or ABC

entitled to block WTBS from telecasting Braves' playoff games if the WTBS telecasts were retransmitted across the country?

The superstation phenomenon has posed major institutional and financial challenges to sports. From the point of view of the "best interests" of the league, what do you think should be its policy about whether any games should be telecast on superstations, and if so, how the revenues should be allocated? As we will see in the next chapter, from the point of view of consumer interests, there are major questions about restraints that a league might want to impose on such team-station relationships, under the watchful eye of antitrust law.

The other side of the copyright license conferred by statute on cable transmission is that these systems must pay a statutory royalty for the shows they use. This model of a compulsory license-royalty was originally developed in the 1909 Copyright Act for music. Once a song is published, any music group has a right to perform and record it, with payment of a "mechanical" royalty set by statute and collected and distributed by the Copyright Royalty Tribunal (CRT). Congress's assumption about music, and then about cable, was that this legal regime is a more efficient technique for ensuring that consumers would have easy access to the songs they wanted to hear and the shows they wanted to watch, rather than having to rely on individual negotiations about who would get the performance license and how much should be paid for it.

The compulsory license has certainly resolved the issue of program accessibility to the nation's vast cable system. The statutory formula for royalty payments generated a total of $12 million in 1978, had produced more than $200 million by the early 1990s, and was producing close to a billion dollars a year by 2012. There remains, however, a running annual battle in front of the Copyright Royalty Board (before 2005 called the Copyright Royalty Tribunal) about precisely how this money should be divided up among the numerous copyright owners of the rebroadcast programs. (For a representative, and the most recent published case, see *National Broadcasting Co. v. Copyright Royalty Tribunal*, 848 F.2d 1289 (D.C.Cir.1988) (regarding the distribution of 1984 revenues).)

One obvious question is how to determine the share that should go to different program sources—sports versus syndicated series re-runs, for example. The Motion Picture Association of America has always argued for a formula based on the amount of time its producers' shows are on the air. The Joint Sports Council (representing baseball, basketball, hockey, and the NCAA) was successful, however, in persuading the CRT that a better test of the comparative market value of different programming is the shows' Nielsen ratings (on which sports have consistently scored higher). So far, though, the sports world has not won its argument that the ideal test would be the demographic makeup of the respective audiences, as measured by commercial advertiser preferences. One should not, however, overestimate the significance of this debate: for example, the share of Major League Baseball's total revenues that comes from these statutory royalties is only about 3 percent.

Especially when their spokesman was Fay Vincent (who came to the commissioner's office from the entertainment world), baseball has strongly objected to the principle of a statutory license and royalty for cable transmission of its games.[2] Baseball (and the other sports) would

[2] See David Prebut, *Best Interests or Self Interests: Major League Baseball's Attempt to Replace the Compulsory Licensing Scheme With Retransmission Consent*, 3 Seton Hall J. of Sports L. 111 (1993). Additionally, see Nathan M. Hennagin, Note, Blackout or Blackmail? How Garber v. MLB Will Shed Light on Major League Baseball's Broadcasting Cartel, 8 Brook. J. Corp. Fin. & Com. L. 158 (2013).

prefer to let the free market set the terms on which any of its games would be telecast. In reflecting on that fundamental issue of intellectual property law, keep the following issues in mind.

1. Are there any practical obstacles in the way of sports teams (or copyright owners of other programs) negotiating agreements for the showing of their events on cable? Any differences from the *New Boston-ESPN* case we saw earlier about game highlights on the news?

2. Are there differences between the showing of a pay-for-view boxing match, for example, in a sports bar and the showing on cable of a regular season game already licensed to be telecast on a local station? Precisely what kinds of economic losses does a team suffer by not being able to withhold its consent to the latter? Are these the kinds of losses that the law should compensate?

3. Even more basic, when Congress was revising the Copyright Act in 1976, it had three options. The first was to preserve the Supreme Court's status quo, which had deemed cable transmission not to be an infringement of copyright in sports (or other) telecasts. The second option was to make every cable transmission a copyright violation that required agreement (for a fee) from the program owner. The third option (which Congress adopted) was to come down somewhere in-between. More than twenty years later, which of those options seems to make sense? For whom is it supposed to make sense—sports teams, cable system operators, their respective fans, or the general public interest?
