THE 1992 CABLE ACT AND THE FIRST AMENDMENT: WHAT MUST, MUST NOT, AND MAY BE CARRIED

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I. INTRODUCTION

Despite the Constitution's admonition that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[1] and the belief of some that "no law" means no law,[2] government regulation of speech and press is commonplace. Such regulation is evident in diverse areas including broadcasting, copyright, obscenity, defamation, national security, and commercial speech. As the law responded to dynamic technologies, apparently conflicting first amendment standards developed in tandem with various media and their associated regulations.[3]

With respect to cable television, the fundamental question presented is whether cable operators are more like newspapers, and thus the beneficiaries of the strongest first amendment protections, or more like wireless broadcasters, and therefore subject to more limited protection. Although the courts have yet to resolve this question, the issue is now presented to the Supreme Court of the United States as a result of the Cable Television Consumer Protection and Competition Act of 1992[4] ("1992 Cable Act") and the extensive regulation and litigation that it is generating.[5]

This Article will examine this question in the context of the Federal Communication Commission's ("FCC's") syndicated exclu-

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1 U.S. CONST. amend. I.

2 Justice Hugo Black is probably the best-known proponent of this approach. *See, e.g.*, Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'no law . . . abridging' to mean *no law abridging*.").

3 *Compare, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (holding newspaper right-of-reply statute unconstitutional) *with* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding broadcaster right-of-reply regulations).

4 Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

5 *See* Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993); Turner Broadcasting Sys., Inc. v. FCC, 113 S. Ct. 1806 (1993) (denying petitioner's application to enjoin the must-carry provisions of the 1992 Cable Act and noting the Court's jurisdiction to decide the merits of applicant's challenge to the Act on appeal). After a divided three-judge district court panel denied plaintiff's challenge to the must-carry provisions (Sections 4 and 5 of the 1992 Cable Act), 819 F. Supp. at 32, the Supreme Court noted probable jurisdiction and required all briefs to be served and filed by December 21, 1993. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 38 (1993). The Court heard oral argument on January 12, 1994.

sivity ("syndex") rules[6] and in various provisions of the 1992 Cable Act, including the mandatory carriage ("must-carry") and retransmission consent provisions.[7] Although both the syndex and must-carry rules were spawned concurrently during the 1960s out of FCC regulations designed to protect local broadcasting, logic dictates that their discussion here be somewhat bifurcated.

II. Syndicated Exclusivity and Network Non-Duplication

A. *Background*

A television program that is marketed to local broadcasters by means other than those of a television network is a "syndicated" television program. The FCC's syndex rules permit television broadcasters to negotiate exclusive rights to such syndicated programming and to enforce those rights against cable operators in the same television market as the broadcaster.

The root of the conflict between cable and broadcast television is grounded in the cable operator's ability to receive a broadcast station over the air and to retransmit the signal by wire to its subscribers. This retransmission is not considered a broadcast because it is not intended for reception by the public.[8] Additionally, prior to enactment of the Copyright Act of 1976,[9] two Supreme Court decisions, *Fortnightly Corp. v. United Artist Television, Inc.*,[10] and *Teleprompter Corp. v. CBS, Inc.*,[11] held that cable retransmissions did not violate the copyright held in the retransmitted programs because they were not "performances" within the meaning of the Copyright Act of 1909.[12] Cable systems were therefore free under copyright law to retransmit broadcast signals throughout the United States without further payment to either the broadcaster or the copyright proprietor.

Naturally, both the broadcasters originating the signal and the local broadcasters receiving it were distressed by this state of affairs.

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[6] 47 C.F.R. §§ 76.151-76.163 (1992). The closely related non-duplication rules will also be considered. *Id.* §§ 76.92-76.95.

[7] 1992 Cable Act §§ 4-6 (codified at 47 U.S.C. §§ 534, 535, 325).

[8] *See* 47 U.S.C. § 153(o) (1988) (defining broadcasting as the "dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations").

[9] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (1988)).

[10] 392 U.S. 390 (1968).

[11] 415 U.S. 394 (1974).

[12] *See Fortnightly*, 392 U.S. at 402 ("With due regard to changing technology, we hold that the petitioner did not under that law 'perform' the respondent's copyrighted works."); *Teleprompter*, 415 U.S. at 414 (following *Fortnightly*, but noting that "[d]etailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress").

The originating broadcasters and program copyright owners were denied license fees to which they felt entitled. The local broadcasters, meanwhile, were reduced to watching competitor cable systems import the same programs they were broadcasting (and to which they had purchased exclusive broadcast rights).[13] However, even before the Supreme Court upheld this practice with regard to copyright, the FCC had determined it to be unfair competition with regard to broadcasting. In 1965, the Commission promulgated exclusivity rules for both network and syndicated programs. These rules protected a local broadcaster from the importation by microwave-served cable operators of distant signals that duplicated programming to which the broadcaster had purchased exclusive rights.[14] The FCC expanded this protection to cover all cable systems in 1966, and required notification before a cable system could carry any distant signal.[15] In 1972, the FCC began comprehensive regulation of cable retransmissions, which included syndex rules.[16]

Finally, Congress enacted the Copyright Revision Act of 1976.[17] Among other things, it effectively overruled the *Fortnightly* and *Teleprompter* decisions and established a cable compulsory licensing scheme to address the copyright liability of cable systems that retransmitted distant signals.[18] Three years later, the FCC completed an extensive economic analysis of broadcast and cable television.[19] In contrast to its overall view of cable as a threat to free, community-oriented television, the FCC concluded that, with regard specifcially to the syndex and distant-signal rules, "competition from cable television does not pose a significant threat to conventional television or to our overall broadcasting policies."[20] The Commission consequently eliminated syndex protection in 1980, although network exclusivity was retained.[21] The FCC subse-

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13 *See Rules Re Microwave-Served CATV*, 38 F.C.C. 683, 703-05 (1965).

14 *Id.* at 741-46. The original rules covered only microwave cable systems. They were enacted concurrently with must-carry rules, which also were designed to protect local broadcasting from the perceived threat of cable television. See *infra* part III for a discussion of the must-carry rules.

15 *CATV*, 2 F.C.C.2d 725, 803-04 (1966).

16 *Cable Television Report and Order*, 36 F.C.C.2d 143, 284-86 (1972). The distant-signals regulations restricted cable systems to a certain number of imported distant stations, while the syndex rules limited the carriage of particular programming carried on those imported stations. *See generally id.* at 170-85.

17 17 U.S.C. §§ 101-810 (1988).

18 As discussed below, this licensing scheme has generated its own problems. *See infra* notes 64-74 and accompanying text.

19 *See Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 F.C.C.2d 632 (1979).

20 *Id.* at 661.

21 *CATV Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 663 (1980). The FCC found that in light of the new copyright landscape, syndex protection was no longer in the public

quently declined the broadcasters' 1984 petition to reconsider deletion of the rules.[22]

In 1987, however, after another review of the syndex rules, the FCC found that the absence of syndex protection was harming broadcast stations and possibly restricting the supply of syndicated programming. According to the Commission, this was due to the unexpectedly rapid growth of cable television in both audience size and associated advertising revenue. Therefore, ostensibly to protect local broadcasting and to promote diversity in syndicated programming, on May 18, 1988, the Commission adopted new syndex rules and expanded the existing network non-duplication rules.[23] Cable system operators unsuccessfully challenged the new rules in court, and they took effect on January 1, 1990.[24]

B. *The Current Syndex and Non-Duplication Rules*

The present incarnations of the syndex and non-duplication rules allow a broadcast station to purchase exclusive rights to exhibit a program within its market. With respect to the network non-duplication rules, a cable system located in the same geographic zone[25] as a network program, whose non-duplication rights are held by a commercial station pursuant to a network-affiliate agreement,[26] is required upon request to "delete the duplicating network programming of any television broadcast station whose reference point is more than 55 miles from the community" of that cable system.[27] The rule does not apply, however, to cable systems serving fewer than 1,000 subscribers[28] or to broadcast signals that are significantly viewed over the air in the community.[29] Further,

interest, and that its elimination would cause no serious harm to broadcasting stations. *Id.* at 814.

22 *Syndicated Program Exclusivity and Sports Telecasts,* 56 Rad. Reg. 2d (P & F) 625 (July 13, 1984).

23 *In re* Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C.R. 5299 (1988), *on reh'g,* 4 F.C.C.R. 2711 (1989) (rules codified at 47 C.F.R. §§ 73.658, 76.92-76.97, 76.151-76.163 (1992)).

24 *See* 47 C.F.R. § 76.97 (1992); United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989). See *infra* part II.C for a discussion of the case. Under the 1992 Cable Act, the syndex and non-duplication rules are unaffected.

25 47 C.F.R. § 76.92(a) (1992).

26 *Id.* § 76.93.

27 *Id.* § 76.92(d).

28 *Id.* § 76.95.

29 *Id.* § 76.92(g). "Significantly viewed" signals are listed in Appendix A of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order,* 36 F.C.C.2d 326 (1972). 47 C.F.R. § 76.54(a). Nonetheless, "significant viewing . . . may be demonstrated by an independent professional audience survey of non-cable television homes." *Id.* § 76.54(b).

to exercise its non-duplication rights, a broadcast station must notify each cable operator in the area and provide them with information identifying the program to be protected, the length of time such protection is to last, and the terms of the non-duplication agreement between the network and the broadcaster.[30]

The syndex rules contain analogous provisions.[31] The major differences with regard to non-network programming are that: 1) the geographic zone of protection is more open to modification by contract between the station and the syndicated program supplier;[32] and 2) the rules do not apply to signals that cast a grade B contour, in whole or in part, over the cable system, regardless of whether the signal is "significantly viewed" in the community.[33]

Upon receipt of notification from a broadcaster that it has purchased and is asserting exclusivity over particular programs, the cable operator must determine whether it is carrying the same programming on any of its imported distant signals. If it is, the cable operator may either attempt to negotiate a waiver from the local broadcaster or, depending on the value of such duplicative programming to its subscribers, delete the duplicated signals. If the duplicated program is deleted, the operator may replace it with its own original programming or any other programming for which it has exhibition rights. The rules apply to individual programs; therefore, deletion of a duplicated program does not necessarily imply deletion of the station on which the program is broadcast.

C. *Syndex Challenged:* United Video, Inc. v. FCC

While broadcasters predictably welcomed the re-imposition of syndex, cable system operators responded by attacking the rules in court. In *United Video, Inc. v. FCC*[34] the cable operators "challenge[d] the rules as arbitrary and capricious, and as violative of the Copyright Act of 1976, the Cable Act of 1984, and the first amendment."[35] The D.C. Circuit Court disagreed, however, and found the Commission to be acting properly within its authority.[36]

The FCC determined that the absence of syndex protection would lead to duplication between local broadcasts and imported distant signals.[37] Such duplication, the Commission inferred, low-

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[30] *Id.* § 76.94.
[31] *Id.* §§ 76.151-76.163.
[32] *Id.* §§ 76.151, 76.153.
[33] *Id.* § 76.156.
[34] 890 F.2d 1173 (D.C. Cir. 1989).
[35] *Id.* at 1176.
[36] *Id.* at 1178.
[37] *Id.* at 1192.

The court, however, disagreed:

> Syndex is clearly different from a requirement or prohibition of the carriage of a particular program or channel. Although it will certainly affect the content of cable programming, it is content-neutral. The basis on which syndex forbids carriage of certain programs is not their content, but ownership of the right to present them. Syndex itself does not require carriage of any particular program or type of program, nor does it prevent a cable company from acquiring the right to present, and presenting, any program.[56]

In a footnote, the court asserted that the syndex rules satisfied the first amendment test concerning the content-neutrality of government regulations because the rules were justified without reference to the content of the regulated speech.[57] The justification for syndex, it declared, was the encouragement of diverse programming by protecting the copyright value of the programming; because syndex protection turned only on ownership rights, it applied regardless of the program's content.[58]

Finally, petitioners argued that the syndex rules could not survive first amendment scrutiny under the test of *United States v. O'Brien.*"[59] They reasoned further that syndex "restrains the expression of fully protected speech which has been paid for and authorized under the compulsory licensing scheme of § 111 of the Copyright Act."[60] The court, after reminding petitioners that no compulsory license was available under the Copyright Act for transmissions in violation of the FCC's rules, responded that the First Amendment does not encompass a right to make commercial use of copyrighted material that belongs to others.[61] Further, the court rejected application of the *O'Brien* analysis to syndex rules. The D.C. Circuit found that "[c]ases in which a first amendment defense is raised to a copyright claim do not utilize an *O'Brien* analysis," and that the constitutionally granted congressional power to

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[56] 890 F.2d at 1189.

[57] *Id.* at 1189 n.13 (citing Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989)).

[58] 890 F.2d at 1189 n.13.

[59] *Id.* at 1190 (citing United States v. O'Brien, 391 U.S. 367 (1968)). Under *O'Brien,*

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

[60] 890 F.2d at 1190.

[61] *Id.* at 1191.

protect copyright "generally supersedes the first amendment rights of those who wish to use another's copyrighted work."[62] The court consequently held that because the scope of copyright protection under 17 U.S.C. § 111 was partially contingent on the FCC's decisions under the Communications Act, such decisions were not subject to the *O'Brien* standards.[63]

D. *The 1976 Copyright Act*

Federal regulations require cable operators to pay copyright fees based upon their system's gross receipts for all distant signals carried on the system. This has created an anomaly in merger situations, known as the "phantom signals" problem, because cable operators must pay copyright fees based upon gross receipts for all the distant signals formerly carried on the separate systems as though carried on the entire new merged system, even if they are not so carried. The anomaly requires cable operators to include in their gross receipts payments from subscribers who do not even receive the distant signals for which the system operator pays.

Section 111(c) of the Copyright Act provides that "secondary transmissions . . . by a cable system of a primary transmission made by a broadcast station . . . shall be subject to compulsory licensing."[64] To invoke the benefit of a compulsory license, the system operator must comply with the reporting and royalty payment provisions of § 111(d). In addition, the operator's carriage of the secondary transmissions must be permissible under FCC rules (*e.g.*, the non-duplication and syndex rules).[65] Where these conditions are not met, the system operator's willful or repeated secondary transmission of a broadcast signal constitutes an act of infringement that is subject to the remedies of the Copyright Act.[66]

Under § 111(d), the system operator must semiannually deposit a statement of account and pay royalty fees pursuant to Copyright Office and Copyright Royalty Tribunal ("CRT") regulations.[67] The royalty fees are paid to the Copyright Office, deposited to the Treasury, invested in interest-bearing United States securities, and distributed to claimant copyright owners annually by the CRT. Un-

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62 *Id.* at 1190.

63 *Id.* at 1191.

64 17 U.S.C. § 111(c)(1) (1988).

65 *See* 47 C.F.R. §§ 76.92-76.97 (1992) (non-duplication); *id.* §§ 76.151-76.163 (syndicated exclusivity); *see also id.* § 76.67 (sports broadcasts).

66 17 U.S.C. § 111(c)(2) (1988); *see id.* §§ 502-06, 509 (remedies include statutory or actual damages and attorney's fees).

67 17 U.S.C. § 111(d)(1)(A)-(B) (1988); *see* 37 C.F.R. § 201.17 (1992) (statements of account); *id.* § 308.2 (royalty fees).

like the satellite carrier compulsory license of § 119,[68] whose royalty formula is on a per signal, per subscriber basis that has proven easy to administer and to follow, the § 111 cable compulsory license is based on a complicated formula involving the system operator's gross receipts and outdated FCC rules.[69] Its application is poorly understood, even by most staffers at FCC, CRT, and the Copyright Office.[70] Unfortunately, neither the 1976 Copyright Act nor its associated regulations anticipated the results of a gross receipts-based royalty formula in a merger and acquisition scenario where cable systems that serve different contiguous communities with different broadcast signal complements become commonly owned.

The "contiguous communities" provision of § 111(f) provides as follows: "For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one head-end shall be considered as one system."[71] The associated regulations under 37 C.F.R. §§ 201.17 and 308.2 do not specify procedures for merger and acquisition situations because pursuant to section 111 of the Copyright Act "distant signal equivalents" ("DSEs") are created for the system as a whole; there is nothing in title 17 to allow for pro-rated compulsory license fees. Moreover, the Copyright Office is powerless to write provisions into the Act that Congress has omitted.[72] The problem of "phantom signals" is the result.[73] The Copyright Office clearly is aware of the "phantom

[68] 17 U.S.C. § 119 (1988).

[69] 17 U.S.C. § 111(d)(1)(B) (1988); *see* 37 C.F.R. §§ 201.17(b)(8)-(9), 201.17(h), 308.2 (1992) (explaining various royalty rates and their applications for cable compulsory licenses); *see also Hearing on H.R. 1103 Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (Mar. 17, 1993) (statement of Ralph Oman, Register of Copyrights and Assoc. Librarian for Copyright Services, at 2) [hereinafter Oman Statement]. For detailed information concerning these compulsory licenses, see Report of the Register of Copyrights, *The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis* (Mar. 1992).

[70] Telephone Interview with Linda Bocchi, Esq., General Counsel, Copyright Royalty Tribunal (Apr. 12, 1993); Telephone Interview with Tim Howe, Esq., Examining Attorney, Copyright Office (Apr. 12, 1993); Telephone Interviews with Mr. Jonathan Levy, Office of Plans and Policy, Federal Communications Commission (Apr. 7-12, 1993).

[71] 17 U.S.C. § 111(f) (1988).

[72] Telephone Interview with Tim Howe, Esq., *supra* note 70.

[73] "Phantom signals" occur principally in the acquisition and merger scenario when two or more cable systems serving different contiguous communities with different broadcast signal complements come under common ownership. Because the systems now must pay copyright royalties as if they were a single cable system, the operator must pay for all of the distant broadcast signals previously carried on the separate systems as if they are carried throughout the entire new single system. The result is that the operator must include in its gross receipts subscribers who, in many cases, do not even receive the distant signal for which the

signal" problem and has forcefully suggested that Congress remedy the situation.

> The current mechanism, which is based on obsolete, outdated, and overruled FCC rules that applied to the cable industry as it existed in 1976 (i.e. traditional wired cable), has long become an archaic beast that produces results at odds with logic and sound copyright policy. Cable systems often incur high per signal royalty rates based on FCC market surveys of twenty years ago which have no reality in today's video marketplace. Broadcasters are denied access to many cable markets because of high copyright fees, despite the fact that such broadcasters must compete for advertising with other broadcasters in the same markets that are carried by cable systems for free. For example, in the state of New Jersey, the FCC's obsolete rules allow cable systems in some counties to carry all New York City and Philadelphia broadcast stations without copyright charge, while New Jersey cable operators in neighboring counties must pay royalties for all of the Philadelphia signals. . . . The result is a system with marked inequalities, inefficiencies, and illogic, which worsens every year as the old FCC rules and the reality of the marketplace diverge to an increasing degree.[74]

III. MUST-CARRY RULES

A. *Background and Overview*

The FCC first promulgated "must-carry" rules for cable television in 1965 concurrently with the syndex provisions. The original must-carry rules required system operators to carry local broadcast stations in order to receive the microwave license needed for the importation of distant broadcast signals.[75] One year later, the FCC extended the must-carry rules to all cable systems,[76] and in 1972 expanded the rules further.[77] The purpose of the rules was to protect free local broadcasting from the perceived threat of elimination by cable.

> operator pays. The matter is further complicated when the new cable system spans a large geographic area which, in accordance with old FCC rules, has several different complements of permitted distant signals. The expense of the "phantom signal" problem has forced a number of cable operators to drop long-carried distant signals valued by subscribers in certain communities merely to avoid incurring a substantial copyright fee.

Oman Statement, *supra* note 69, at 10-11.

[74] *Id.* at 7-8.

[75] *See Rules Re Microwave-Served CATV*, 38 F.C.C. 683 (1965).

[76] *CATV*, 2 F.C.C.2d 725 (1966).

[77] *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972).

The must-carry concept originated in 1962 when the FCC denied a television microwave-system license to a common carrier, but granted the applicant leave to refile upon a showing that its cable system customers would carry the local broadcast television station without duplicating their programming.[78] In *Carter Mountain Transmission Corp. v. FCC*,[79] the Commission argued, and the D.C. Circuit Court agreed, that granting a license would not serve the public interest despite the improved service that appellant's proposed new facilities would bring to rural cable television subscribers.[80] The FCC concluded that allowing the importation of distant signals into the community would force the local television station out of business.[81] This would mean that a substantial number of persons who were not served by cable television, or who were either unwilling or unable to pay for it, would lose television service altogether. The Commission therefore reasoned that the need for a local television outlet outweighed the improved service that new facilities would bring to cable subscribers.[82] It did, however, expressly allow the application's refiling when appellant could show that the local station would be carried without duplication on the cable system.[83] This was the seed from which the must-carry and syndex rules grew.

At the time of *Carter Mountain*, cable television (known then as Community Antenna Television, or CATV) was in its infancy. CATV's purpose was to deliver good quality television signals in areas, almost exclusively rural, where reception proved difficult or impossible. The dispute in *Carter Mountain* arose out of the proposed delivery of distant television signals to three towns in rural Wyoming that were served by various CATV systems and one financially struggling local broadcaster.[84] The cable operators were the applicant's proposed customers; the applicant itself, as mentioned above, was a common carrier by radio. These facts are important to keep in mind. For example, the Commission's concern for the potential ruin of a local broadcaster appears reasonable in a scenario where a single, relatively impoverished broadcaster is serving a remote area.

Appellant presented four central arguments, all of which were

[78] *See* Carter Mountain Transmission Corp. v. FCC, 32 F.C.C. 459, 465 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).
[79] 321 F.2d 359 (1963).
[80] *Id.* at 361.
[81] *Id.* at 365.
[82] *Id.* at 361.
[83] *Id.*
[84] *Id.* at 365.

rejected by the court. Appellant argued that: 1) the FCC should have applied basic common-carrier criteria, and therefore should not have denied appellant a permit because of any economic impact such a permit might have upon the competitors (*i.e.*, the broadcaster) of its proposed customers; 2) the FCC had no jurisdiction over CATV; 3) the FCC's conclusions were based upon an inadequate record, which did not show the appellant's services to be the decisive factor in the predicted demise of the local broadcaster; and 4) the Commission's denial constituted unlawful censorship with regard to the CATV operator.[85]

The court's response was that: 1) common carrier standards, which arose from regulation of the transportation industry, were irrelevant in the communications field; 2) the FCC's regulations were directed toward appellant's activities and, although indirectly affecting CATV, were intended to protect local broadcasting, which placed them within FCC jurisdiction; 3) the record amply supported the Commission's conclusions; and 4) the Commission did not violate any constitutional or statutory mandates concerning censorship; and, in any event, appellant could not rely on the putative rights of CATV operators not before the court.[86]

Two characteristics of the D.C. Circuit's opinion are worthy of note. The first is the court's deferential treatment toward the FCC; the other is the court's conclusion that any improvement in CATV would seriously jeopardize the local broadcaster's survival. By 1966, the must-carry requirements that the FCC successfully sought to impose as a condition of licensure in *Carter Mountain* were codified and applied to all cable systems.[87]

B. *The Fall of Must-Carry*

In 1985, the D.C. Circuit opinion in *Quincy Cable Television, Inc. v. FCC*[88] reversed a twenty-year practice by striking down the FCC's longstanding must-carry rules as unconstitutional. *Quincy* held that the FCC had failed adequately to articulate and tailor the government's substantial interest in the must-carry rules so as to overcome the cable operator's first amendment right to editorial autonomy.[89] The following year, the FCC adopted a new set of

85 *Id.* at 362-65.

86 *Id.* Why the court did not join the cable operators pursuant to FED. R. CIV. P. 19, and why they did not seek to intervene under FED. R. CIV. P. 24 is unclear.

87 *See Rules Re Microwave-Served CATV*, 38 F.C.C. 683 (1965); *CATV*, 2 F.C.C.2d 725 (1966).

88 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

89 768 F.2d at 1463.

must-carry rules in an effort to satisfy the *Quincy* standard, but in *Century Communications Corp. v. FCC*[90] the court invalidated the revised must-carry rules as "incompatible with the first amendment."[91] The court, however, did "not suggest that must-carry rules are *per se* unconstitutional," but rather held simply that the FCC had failed to meet its burden of demonstrating that the rules clearly furthered a substantial government interest and were "narrowly tailored so as to satisfy the *O'Brien* test for incidental restrictions on speech."[92]

C. Quincy v. FCC

By the time *Quincy* reached the D.C. Circuit Court of Appeals, the factual scenario regarding cable television had changed dramatically. Cable television was no longer a fledgling industry operating primarily in remote and inaccessible areas. It had become a burgeoning nationwide phenomenon, drawing increasing profits and competing well with broadcast television for viewers and advertising revenue. In addition, the court's attitude toward the FCC had changed. Extreme deference to FCC studies and the conclusions to be drawn from them were a thing of the past; the court now demanded that the government affirmatively prove not only the substantiality of the interests its regulations served, but also the effectiveness of those regulations. The nature of the debate had changed also, and was now focused on the consonance of must-carry rules with the First Amendment.

By 1984, the FCC's must-carry rules required all cable system operators to carry every television broadcast station that was either significantly viewed in their community or otherwise considered local under FCC regulations.[93] The system operators incurred this obligation upon the request of a local broadcaster, and under FCC rules such carriage had to be provided without compensation.

Turner Broadcasting System ("TBS"), a prominent cable program supplier who claimed the rules impinged upon the first amendment rights of cable programmers, system operators, and viewers, petitioned the Commission in 1980 to delete them. After a dilatory response from the FCC, culminating finally in a formal denial nearly three and one-half years later, TBS petitioned the D.C.

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[90] 835 F.2d 292 (D.C. Cir 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988).

[91] *Id.* at 293.

[92] *Id.* at 304; *see supra* note 59 (quoting the test of United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[93] *See* 47 C.F.R. §§ 76.5, 76.51, 76.53, 76.55, 76.56, 76.58, 76.60 (1984).

Circuit Court of Appeals for review.[94]

Quincy Cable Television, Inc., a cable operator with a twelve-channel system who claimed the rules violated both the First and Fifth Amendments, sought a waiver of the rules from the FCC in 1979. After denial of the waiver, eventual imposition of a $5,000 forfeiture by the FCC, and the exhaustion of administrative appeals, Quincy also petitioned the D.C. Circuit for review.[95]

The court consolidated the cases *sua sponte* to resolve what it considered to be "virtually identical First Amendment challenges,"[96] and undertook an extensive examination of cable television regulation.[97] After acknowledging that different first amendment standards may be applied to different media, the D.C. Circuit took note of the different technical and economic situations faced by the broadcast and cable television industries, and of the FCC's must-carry objective; *i.e.*, the protection of free local broadcasting from the perceived threat of cable. That perception was grounded in the belief that absent must-carry protection, cable would draw viewers, and therefore advertising revenue, away from broadcasters to an extent that could undermine the broadcasters' financial viability.[98] Before proceeding with its first amendment analysis, the court also noted that the Commission was unable to prove the factual underpinnings of its analysis.[99] Moreover, in contrast to its rationale for must-carry, the Commission had since concluded that in the context of syndex, competition from cable television did not threaten broadcasters.[100]

With respect to the relationship between cable television, must-carry, and the First Amendment, two fundamental questions are presented. The first concerns the quantum of first amendment protection to which cable is due. Should cable television be subject to the expansive first amendment treatment generally reserved for newspapers and other print media?[101] Or should it receive the

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94 *Quincy*, 768 F.2d at 1445-46.

95 *Id.* at 1446-47.

96 *Id.* at 1438 n.5.

97 *Id.* at 1438-45.

98 *Id.* at 1440-41 (citing *Rules Re Microwave-Served CATV*, 38 F.C.C. 683, 689, 703 (1965)).

99 768 F.2d at 1442 (citing 38 F.C.C. at 701, 711).

100 768 F.2d at 1442. The Commission responded that in rescinding the syndex and distant-signal rules it had "'expressly assumed the continuation of the must carry rule[s].'" *Id.* at 1456 (quoting Respondents' Brief at 11). Although the FCC had repealed the syndex rules, they were subsequently reinstated and have withstood court challenge. *See* United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989) and discussion of syndex rules *supra* part II.C.

101 *See, e.g.*, Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Grosjean v. American Press Co., 297 U.S. 233 (1936).

more limited protection applied to broadcast media?[102] Although the Supreme Court has held that cable operators are engaged in activities that "plainly implicate First Amendment interests,"[103] no court has determined precisely where cable television falls along the continuum between print and broadcast media. The hybrid nature of cable television—part common carrier, part "newspaper," part broadcaster—has yet to receive conclusive judicial treatment.

The *Quincy* court, while avoiding a precise answer to this question, found the scarcity rationale, which justified extensive government regulation of broadcast, to be inappropriate in the cable context. "In light of cable's virtually unlimited channel capacity, the standard of First Amendment review reserved for occupants of the physically scarce airwaves is plainly inapplicable."[104]

The second question concerns whether the must-carry rules are content-based or content-neutral regulations. If considered content-based, regulations restricting speech may be upheld only if they are precisely drawn to serve a compelling government interest and go no further than the vindication of that interest.[105] On the other hand, where such regulations serve a governmental interest that is unrelated to the content of the regulated speech, and restrict speech only incidentally, they will satisfy the First Amendment if the regulations "further[ ] an important or substantial governmental interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[106]

The *Quincy* court similarly declined to reach this question, concluding instead that "the rules so clearly fail under [the *O'Brien*] standard that we need not resolve whether they warrant a more exacting level of First Amendment scrutiny."[107] Even before apply-

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[102] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[103] City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986); *see also* Leathers v. Medlock, 499 U.S. 439, 444 (1991) ("[Cable television] is engaged in 'speech' under the First Amendment, and is, in much of it operation, part of the 'press.'").

[104] 768 F.2d at 1450. In a discussion of broadcast and cable television, scarcity can be viewed from at least three perspectives: scarcity of available broadcast frequencies; scarcity of public rights-of-way (*i.e.*, available space to lay cable); and scarcity of cable channel capacity. Contrary to the *Quincy* court's hypothetical assumption, scarcity may be applicable in the cable context because of the actual channel capacity of existing cable systems and possible saturation of available channels on those systems.

[105] *See* Texas v. Johnson, 491 U.S. 397, 407 (1989); Frisby v. Schultz, 487 U.S. 474 (1988); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[106] United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also* Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-48 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977).

[107] *Quincy*, 768 F.2d at 1448 (citing *O'Brien*, 391 U.S. at 382).

ing the *O'Brien* standard, however, the court expressed grave doubts as to whether the rules were in fact merely an incidental burden on speech. The rules, it asserted, were explicitly designed to favor one class of speakers (local broadcasters) over another (cable program suppliers). They coerced speech by requiring the system operator to carry signals against its will, and therefore severely infringed upon editorial discretion. In addition, where a cable system is saturated by must-carry stations, "the rules prevent cable programmers from reaching their intended audience even if that result directly contravenes the preference of cable subscribers."[108] The court believed all these factors militated toward a finding that the regulations were content-based. Nonetheless, the D.C. Circuit invalidated the must-carry rules under the less demanding "incidental" *O'Brien* standard.[109]

In applying *O'Brien*, the court found that, even if it accepted the Commission's asserted interest in preserving free, locally-oriented television as substantial or important, the FCC had failed to justify the regulations by establishing a record that demonstrated a real problem. In other words, the FCC had failed to show that local broadcasting would actually be threatened in the absence of must-carry.[110] The court assailed the agency for relying on unsupported assumptions, intuitive models, and collective instinct, and asserted that

> the FCC has failed to "put itself in a position to know" whether the problem the rule seeks to cure—the destruction of free, local television—"is a real or merely a fanciful threat." That approach, we have concluded, falls far short of the burden the government must affirmatively bear to prove the substantiality of the interest served by the rules.[111]

Then, in a statement that has generated some confusion, the court went on to say that "[w]e hold only that . . . the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat . . . [and] that the must-carry rules in fact serve to alleviate that threat."[112] This statement, however, must be viewed in the context of the court's hypothetical discussion under the *O'Brien* test; the court had previously stated that "we have concluded and now hold that the must-carry rules are *fundamentally* at odds with the First Amendment and, as currently drafted, can no

108 768 F.2d at 1453.
109 *Id.* at 1451.
110 *Id.* at 1454-55.
111 *Id.* at 1457 (quoting *Home Box Office*, 567 F.2d at 50).
112 768 F.2d at 1459.

longer be permitted to stand."[113] Presumably, if the rules are fundamentally violative of the Constitution, that defect could not be cured by a mere showing that they would alleviate the threat to an important governmental interest, especially if such rules were considered to be content-based restrictions (as the court seemed to believe).

The *Quincy* court went further, however. It found that even if the FCC had adequately shown the substantiality of the governmental interest served by the rules, they would fail under the second prong of the *O'Brien* test; *i.e.,* the fit between ends and means. If the goal was to preserve free local broadcasting, as opposed to local broadcasters, the rules represented a poorly tailored response because they required carriage of all broadcasters without reference to the quantity of local service available, the number of local stations already carried by the cable operator, or whether the broadcasters carried any local programming at all. Therefore, the rules clearly were not narrowly tailored to the government's asserted interest.[114]

Finally, the court suggested that the FCC explicitly define the interest served by must-carry, and establish objective criteria regarding the status of free, locally-oriented television. Only then could the court determine whether the Commission's rules were constitutional with regard to the fit between the government's ends and its chosen means.

D. Century v. FCC

After its defeat in *Quincy*, the Commission initiated proceedings to refashion must-carry according to the court's guidelines.[115] The following year, it released new must-carry rules.[116] Very soon thereafter, the rules were again before the D.C. Circuit in *Century Communications Corp. v. FCC*.[117]

The new rules were limited in many respects. No longer were cable operators necessarily required to carry every local broadcast station. Systems with less than a twenty-channel capacity were exempt from must-carry. Systems with between twenty-one and twenty-six channels were required to reserve seven channels for

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[113] *Id.* at 1438 (emphasis added).

[114] *Id.* at 1459-61.

[115] *See* Carriage of Television Broadcast Signals by Cable Television Systems, *Notice of Inquiry and Notice of Proposed Rulemaking*, 50 Fed. Reg. 48,232 (1985).

[116] *In re* Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C.R. 864 (1986), *recon. denied*, 2 F.C.C.R. 3593 (1987).

[117] 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

must-carry stations.[118] Finally, systems with twenty-seven or more channels were required to reserve 25% of their channels for must-carry.[119] With regard to non-commercial educational ("NCE") stations, systems with less than fifty-four channels were obligated to carry one, while all other systems were obligated to carry two such stations. No system was required to carry more than one network affiliate. In addition, to be eligible for must-carry status, broadcast stations were required to demonstrate a minimum viewership standard.[120]

Moreover, the Commission's justification for the rules had changed as well. The FCC now asserted that must-carry was needed for a five year period during which viewers would become acclimated to the use of a television input-selector ("A/B") switch. The FCC believed that public acceptance of this device would obviate the need for must-carry because the switch would serve to maintain viewer access to local broadcast television.[121]

Although, in *Century*, petitioners raised first amendment, fifth amendment, and Administrative Procedure Act ("APA") challenges to the must-carry provisions, the court avoided all but the first amendment claims.[122] Petitioners argued that the FCC rules were more than an incidental restriction on speech; they were an encroachment on the system operators' editorial discretion that should be evaluated under the print media standards of *Miami Herald Publishing Co. v. Tornillo*.[123] The Commission responded that must-carry was a commercial regulation which burdened speech only incidentally, and therefore should be analyzed under the more relaxed *O'Brien* test.[124] Once again, however, the court avoided the fundamental constitutional issue: *i.e.*, the precise level of first amendment protection to which cable television is due. Instead, the D.C. Circuit again struck down the must-carry rules under *O'Brien* without deciding the larger question.

The Commission's rules did not satisfy the first prong of the test because, according to the court, "the FCC's judgment that transitional rules are needed is predicated not upon substantial evi-

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118 *Id.* at 296.

119 *Id.* at 297.

120 *Id.* at 296-97. As discussed below, the rules invalidated in *Century* are similar to the challenged must-carry provisions of the 1992 Cable Act. *See infra* text accompanying notes 121-22.

121 *Id.* at 296.

122 *Id.* at 297.

123 418 U.S. 241 (1974) (holding that a state statute granting a political candidate the right-of-reply was an interference with a newspaper's constitutionally protected "editorial discretion"); *Century*, 835 F.2d at 298.

124 391 U.S. 367, 377 (1968); 835 F.2d at 298.

dence but rather, upon several highly dubious assertions."[125] The only evidence in the FCC record to support its contention that must-carry was needed for a five-year period was a partisan study by the National Association of Broadcasters ("NAB") purporting to show that the public was unprepared for introduction of the A/B switch, and that approximately one-half of cable subscribers would probably not use the device even if it was available. The court discounted this study.[126] In addition, the *Century* court found the FCC's assumption that cable operators would drop local broadcasts in the absence of must-carry requirements to be contradicted by the operators' behavior during the period between the *Quincy* decision and adoption of the new, modified must-carry rules.[127] The court consequently found that a substantial government interest had not been shown.[128]

The new rules similarly failed the second prong of the test, the court said, because absent convincing evidence to the contrary (which the FCC had failed to provide) it could not find the five-year transition period to be narrowly tailored. Thus, must-carry was once again invalidated, although the court did assert that the must-carry rules were not *per se* unconstitutional.[129]

IV. The 1992 Cable Act

A. *Legislative History*

On October 5, 1992, after three years of extensive hearings, Congress passed the 1992 Cable Act[130] over a presidential veto.[131] The Act, which, among other things, re-established must-carry requirements for cable systems, undertakes extensive regulation of the cable television industry. For example, the Act also mandates

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125 *Century*, 835 F.2d at 300.

126 *Id.* at 302.

127 *Id.* at 303.

128 *Id.*

129 *Id.* at 304.

130 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

131 The legislative history of the 1992 Act includes: H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231; H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992); S. Rep. No. 92, 102d Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133. The floor debates accompanying the veto override votes are also instructive. *See* 138 Cong. Rec. S16,676 (daily ed. Oct. 5, 1992); 138 Cong. Rec. H8671-87 (daily ed. Sept. 17, 1992); *see also* 138 Cong. Rec. S16,652-77 and H11,477-88 (daily ed. Oct. 5, 1992); the presidential veto message, Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, 28 Weekly Comp. Pres. Doc. 1860 (Oct. 3, 1992). For an in-depth review of the Act's legislative history, see Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 Hastings Comm. & Ent. L.J. 305, 307-311 (1993).

rate regulation of the basic and cable programming tiers by either the FCC or local franchising authorities for all cable systems that are not subject to effective competition, as defined in the Act.[132] In addition, the Act imposes restrictions on cable programming suppliers who are affiliated with system operators, and charges the FCC with promulgating a dazzling array of regulations, which include everything from technical standards to provisions concerning "indecency."[133]

The hearings revealed that horizontal and vertical integration in the cable industry were unfairly preventing non-cable programmers (*i.e.*, primarily broadcasters and non-affiliated programming suppliers) from competing effectively in the television marketplace. Congress specifically found that, although cable had become the dominant video medium, competition within the industry was lacking. Cable operators rarely compete because most areas are served by only one cable system. Further, Congress found that the industry has become horizontally concentrated (where many operators are commonly owned) and vertically integrated (where the same entity operates both the cable system and the programming enterprise). Congress concluded that these economic forces have seriously jeopardized free local broadcast television and that mandatory carriage was needed to remedy unfair trade practices, preserve local broadcasting, and ensure a wide variety of video programming for the public.[134]

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[132] Under section 3 of the 1992 Act, a cable system is deemed subject to effective competition in three instances: (1) where the system has a penetration rate of less than 30 percent in its franchise area; (2) where the franchise area is served by at least two other unaffiliated multichannel video distributors, who each offer service to at least 50 percent of the households in the franchise area, and their combined penetration rate exceeds 15 percent; and (3) where the municipality or state operates a competing service that offers programming to at least 50 percent of the households in the franchise area. 1992 Cable Act, § 623(l)(1); 47 U.S.C. § 543(l)(1). The FCC's interpretation of this provision is found in the first Report and Order regarding rate regulation. *See In re* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking*, 8 F.C.C.R. 5631, at ¶¶ 18-49 (1993) (hereinafter *First Rate Order*). *See also* Nicholas W. Allard, *Reinventing Rate Regulation*, 46 FED. COMM. L.J. 63, 89-94 (1993).

[133] The section 10 indecency provisions of the 1992 Cable Act, Communications Act § 612(h), 47 U.S.C. § 532(h), and FCC regulations promulgated pursuant to it already have either been held unconstitutional or have been remanded to the FCC. *See* Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993); Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993).

[134] *See generally* 1992 Cable Act § 2(a); S. REP. No. 92, 102d Cong., 1st Sess. 42-46 (1992); H.R. REP. No. 628, 102d Cong., 1st Sess. 50-57 (1992); H.R. REP. No. 862, 102d Cong., 1st Sess. (1992) (conference report).

B. *Carriage Obligations Under the 1992 Cable Act*

Section 4 of the 1992 Act[135] establishes limited obligations on cable system operators for the carriage of local commercial television stations. These obligations bear a striking resemblance to the FCC rules invalidated in *Century* as unconstitutional.[136] Under the 1992 Act, cable systems with more than twelve usable activated channels must allocate up to one-third of such channels for the carriage of local commercial stations, while systems with twelve or fewer usable activated channels are required to carry the signals of at least three local commercial stations. Cable systems with fewer than 300 subscribers are exempt from the must-carry rules, although they are prohibited from deleting carriage of a broadcast television station.[137] If the number of local commercial stations exceeds the number of channels that the system is required to allocate, the Act allows the system operator, with some exceptions, discretion in selecting which of these stations shall be carried on its system.[138]

A "local commercial television station" under the Act is a licensed full-power television broadcast station that is in the same television market as the cable system on which it is or could be carried.[139] The television market is determined by the station's Area of Dominant Influence ("ADI") as defined by Arbitron.[140] Arbitron assigns every commercial station an ADI. It also assigns an ADI to nearly all U.S. counties. These counties are assigned to a particular ADI if the stations in that ADI receive the preponderance of total viewing hours in the county according to sampling surveys. Although Arbitron's ADI assignments are not static—samplings are reviewed annually and reassignments made if necessary—every commercial station has only one ADI, and every county

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[135] Inserting a new section 614 to the Communications Act of 1934 (codified at 47 U.S.C. § 534).

[136] *Century*, 835 F.2d at 293. In fact, as the cable operators and program suppliers have argued, they are more restrictive and less narrowly tailored. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction at 36, Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993) (No. 92-2247).

[137] 1992 Cable Act, § 614(b)(1).

[138] *Id.* § 614(b)(2).

[139] *Id.* § 614(h)(1)(A). Specifically excluded from the term "local commercial television station" are low-power television stations, stations that fail to deliver a signal of specified strength (unless they agree to pay the cost of upgrading their signal), and a "television broadcast station that would be considered a distant signal under section 111 of title 17, United States Code, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system." *Id.* § 614(h)(1)(B).

[140] *Id.* § 614(h)(1)(C); *see* 47 C.F.R. § 73.3555(e)(3)(i) (1992).

can be in only one ADI. There can be no overlap.[141]

Nevertheless, the 1992 Act allows the FCC, following a written request, to make market adjustments to better effectuate the must-carry rules. Pursuant to section 614(h)(1)(C), the FCC may include additional communities or exclude communities from a broadcast station's television market, or determine that certain communities are part of more than one television market. In making such market adjustments, the Act directs the FCC to consider the following factors:

> (I) whether the station . . . [has] been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to the community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community [under the must-carry rules] provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[142]

In addition, the FCC is obligated to "provide for expedited consideration" to requests for market adjustments, and cable operators are prohibited from deleting the signal of a commercial station while a request for market change is pending before the FCC.[143]

The provisions of the 1992 Cable Act that define whether a signal is local for must-carry purposes do not apply in determining whether a signal is "distant" for copyright purposes. The copyright standards are based on the old FCC must-carry rules,[144] which, despite being invalidated in *Quincy*,[145] persist for purposes of cable copyright. This creates the potential for great confusion. ADIs and market determinations under the must-carry provisions of the 1992 Act are different than the thirty-five mile zones, "significantly viewed" classifications, and Grade B contours used to determine whether a commercial station is "local" for copyright purposes.

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141 *See* Paul Glist and Wesley R. Heppler, *The 1992 Cable Act: Rate Regulation, Must Carry and Retransmission Consent*, 35-38 *in* A PRACTICAL GUIDE TO THE 1992 CABLE ACT (1992).

142 1992 Cable Act, § 614(h)(1)(C)(ii). Here, the Act clearly draws distinctions based on programming content (as it does in various sections). Programming whose content includes sporting events, local coverage, service, news, or other events of interest to the community is favored. This belies the claim that the Act is not a content-based measure.

143 *Id.* § 614(h)(1)(C)(iii), (iv).

144 *See* 37 C.F.R. §§ 201.17, 308.2 (1992).

145 768 F.2d at 1438; for a discussion of *Quincy*, see *supra* part II.B-C.

Therefore, with regard to a particular cable system, a broadcast station may be wholly or partially "distant" for copyright, but "local" (*i.e.*, located in the same ADI or television market) for must-carry purposes. Under the 1992 Act, these stations must agree to indemnify the cable operator for "any increased copyright liability" due to carriage on the cable system. Absent such an agreement, the station will not be included in the mandatory carriage pool.[146]

Under section 614(b)(5), cable operators are not required to carry "any local commercial television station that substantially duplicates the signal of another" must-carry station on their cable system. They are also not required to carry more than one affiliate of the same network. In choosing among network affiliates for must-carry purposes, the cable operator must select the station that is closest to the system's principal headend.[147]

Section 5 describes the cable operators' non-commercial educational ("NCE") must-carry obligations.[148] Systems with a capacity of greater than thirty-six channels are required to carry every NCE that requests carriage, unless its programming is substantially duplicated by another station on the system. Systems with twelve or fewer channels must carry one qualified NCE, while those with between thirteen and thirty-six channels must carry either one, two, or three NCEs.[149] As with the commercial must-carry provisions, system operators are required to carry the station's entire broadcast schedule, and are prohibited from accepting compensation for such carriage. In addition, every NCE must-carry station may elect either its current broadcast channel position or the channel position it occupied prior to July 19, 1985.[150]

C. *Retransmission Consent*

Section 6 of the 1992 Act[151] prohibits cable systems "or other multichannel video programming distributor[s]" from retransmitting broadcast signals without the express authority of the originating station, unless the retransmission is pursuant to the must-carry

146 1992 Cable Act § 614(h)(1)(B).

147 *Id.* § 614(b)(2)(B).

148 *Id.* § 615 (inserting a new section into the Communications Act) (codified at 47 U.S.C. § 535). The Act defines NCE as 1) a station licensed by the FCC as an NCE that is owned by either a public agency or non-profit entity and that is eligible for grants from the Corporation for Public Broadcasting; or 2) a municipally owned and operated station that transmits primarily non-commercial programs for educational purposes. *Id.* § 615(l)(1) (codified at 47 U.S.C. § 535(l)(1)).

149 *Id.* § 615 (b).

150 *Id.* § 615(g)(5).

151 Amending section 325 of the Communications Act of 1934 (47 U.S.C. § 325).

rules.[152] Retransmission consent does not apply to: 1) noncommercial broadcasts; 2) satellite superstations in operation on May 1, 1991, "if such signal was obtained from a satellite carrier and the originating station was a superstation;" or 3) home satellite antenna reception of (a) independent broadcasters that were being retransmitted by satellite on May 1, 1991 and (b) network broadcasters where reception is to households unserved by the broadcaster.[153]

The retransmission consent provisions took effect on October 6, 1993.[154] By June 17, 1993, local television stations were required to elect either the right to carriage under § 614 or the right to grant retransmission consent under § 325.[155] The selection of one precludes the other;[156] if the broadcaster chooses retransmission consent, the cable operator will be compelled only by market forces to pay the broadcaster's price for its consent.[157] The broadcaster must then live with its choice for three years, at which point it can choose again.[158] The broadcaster, however, can make its selection system-by-system, and is not constrained to select either must-carry or retransmission consent for all cable systems in a market. The only limitation is where two cable systems serve the same geographic area (*i.e.*, an overbuild). In that case, the broadcaster must make the same selection for both cable operators.[159]

Finally, the Act provides that carriage through the negotiated grant of retransmission consent "shall not interfere with or supersede" the rights of stations that have elected must-carry status.[160] This apparently means that a station negotiating for carriage through retransmission consent cannot prejudice another station's must-carry or channel positioning rights. Consequently, a retransmission consent agreement that had the effect of displacing a competing must-carry station from the cable system would probably be invalidated under the Act.

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[152] 1992 Cable Act § 325(b)(1)(A), (B).

[153] *Id.* § 325(b)(2)(A)-(D).

[154] *Id.* § 325(b)(1).

[155] *Id.* § 325(b)(3)(B); *see In re* Implementation of the Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, *Report and Order*, 8 F.C.C.R. __ (1993); FCC Final Rule, Cable Act of 1992—Must-Carry and Retransmission Consent Provisions, 58 Fed. Reg. 17,350 (1993) (codified in scattered sections of 76 C.F.R.).

[156] 1992 Cable Act § 325(b)(4).

[157] Moreover, there is nothing other than the market to prevent the system operator from requiring compensation by the broadcaster for carrying it on the system.

[158] *Id.* § 325(b)(3)(B).

[159] *Id.* § 325(b)(3)(B), (4).

[160] *Id.* § 325(b)(5).

D. *Legal Challenges to the 1992 Cable Act*

Legal action challenging the constitutionality of the 1992 Act began on the same day it became law.[161] Various cable system operators and programming suppliers brought first amendment challenges attacking the consitutionality of the Act's must-carry and retransmission consent provisions, and sought preliminary injunctions barring their enforcement. The D.C. District Court consolidated the five cases on November 23, 1992 and assigned the actions to a three-judge court pursuant to section 23 of the 1992 Cable Act.[162] Subsequently, the court severed the challenge to section 6 (retransmission consent), leaving only the must-carry claims.[163] The court also denied preliminary relief.[164]

The plaintiffs argued that the must-carry provisions violate their first amendment rights to freedom of speech for the following reasons:

> [T]hey force cable system operators to devote a portion of their finite signal-carrying capacity to deliver the signals of a privileged class of competing "speakers," *i.e.*, over-the-air broadcasters, thus diminishing the number of channels remaining available to them for other programming they might prefer to carry. Must-carry also violates the First Amendment rights of the operators, they say, because it inhibits the operators' "editorial discretion" to determine what programming messages to provide to their subscribers, compelling them perforce to deliver some programming they might otherwise choose not to carry. And the programmers argue that must-carry exalts broadcasters to preferred status as "speakers" by awarding them favored cable channel positions the programmers covet.[165]

The court, however, held the must-carry provisions constitutional, and dismissed the plaintiffs' actions. This was surprising for several reasons. The D.C. Circuit's previous decisions in *Quincy* and *Cen-*

161 The must-carry and retransmission consent lawsuits included: Turner Broadcasting System, Inc. v. FCC, Civ. No. 92-2247; Daniels Cablevision, Inc. v. United States, Civ. No. 92-2292; Time Warner Entertainment Co. v. FCC, Civ. No. 92-2494; National Cable Televisio[n] Assoc., Inc. v. United States, Civ. No. 92-2495; Discovery Communications, Inc. v. Unite[d] States, Civ. No. 92-2558 (D.C. Oct. 5, 1992). In addition, several other sections of the Ac[t] either have legal challenges currently pending or have been held unconstitutional. *Se[e], e.g.*, Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993) (indecency provi[-]sions and associated FCC rules); Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993) (indecency provisions, remanded to FCC).

162 Codified at 47 U.S.C. § 555.

163 Turner Broadcasting Sys., Inc. v. FCC, 810 F. Supp. 1308 (D.D.C. 1992).

164 Time Warner Entertainment Co. v. FCC, 810 F. Supp. 1302 (D.D.C. 1992).

165 Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 38 (D.D.C. 1993) (footno[te] omitted).

tury certainly suggest the opposite result.[166] The Act's must-carry provisions are in fact a greater burden on speech than the FCC rules that the D.C. Circuit rejected as "incompatible with the first amendment."[167] In contrast, the district court panel viewed the must-carry rules as economic regulations unrelated to "speech" within the meaning of the First Amendment.[168]

What had changed other than the fact that the new must-carry provisions resulted from congressional legislation rather than FCC regulation? The court applied the same *O'Brien* standard to very similar rules, yet arrived at the opposite conclusion. Perhaps one difference was that the cable operators' monopolistic practices, referred to in the hearings preceding the Bill's passage, generated wide-spread antipathy for the operators among their subscribers. Some have suggested that because *Turner* was decided after cable television came to Washington, D.C., the system operators might have suffered from the ire of judges who were now themselves cable subscribers.

Unlike the circuit court, which avoided resolving the standard-of-review issue, Judge Jackson's majority opinion in *Turner* rejected strict scrutiny analysis, and held that the interest-balancing formulation of *O'Brien* and *Ward* should be applied to the must-carry provisions.[169] The majority distinguished *Quincy* and *Century*, finding neither of them controlling. Both dealt with the FCC's failure to establish an adequate record, the court said, while here Congress

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166 This is the probable reason behind section 23 of the 1992 Act (codified at 47 U.S.C. § 555), which provides that any other provision of law notwithstanding, all challenges to the must-carry provisions will be heard by a three-judge panel of the D.C. District Court. It provides further that appeals from the court's holding any part of the must-carry section *unconstitutional* shall be heard, as of right, by direct appeal to the Supreme Court. *Id.* § 635(c)(1)-(2).

167 *Century*, 835 F.2d at 293.

168 The Cable Act of 1992 is simply industry-specific antitrust and fair trade practice regulatory legislation: to the extent First Amendment speech is affected at all, it is simply a byproduct of the fact that video signals have no other function than to convey information.

> In other words, the Court holds that the must-carry provisions are essentially economic regulation designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices. The regulation is justified by the existing structure of the cable business itself, and by the market peculiarities resulting from the technological differences in the manner in which different video signal distributors deliver their products to their viewers' receivers. So perceived, the Court concludes that the must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver.

Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 40 (D.D.C. 1993).

169 *Id.* at 45.

compiled an extensive one.[170]

The court rejected plaintiffs' strict scrutiny argument, finding that "[s]trict scrutiny applies only if the governmental regulation is overtly content-based or presents an opportunity for official censorship."[171] What is not enntirely clear is why the court did not view the provisions as content-based, inasmuch as they explicitly favored one speaker over another based upon whether the content of their programming was "local."

In applying the *O'Brien-Ward*[172] formulation, the majority found that the extensive congressional record amply demonstrated that the must-carry provisions furthered a significant governmental interest. Thus, the court reasoned, the first prong of the test was satisfied.[173] The second prong of the test was also satisfied, the court concluded, because "the must-carry provisions are sufficiently, if not surgically, tailored to Congress' larger economic market-adjusting objective."[174] In that regard, the majority cited *Ward* for the proposition that the government need not settle for the least restrictive means to satisfy the narrowly-tailored requirement, and found that must carry left open plentiful alternative avenues in which the operators could speak.[175]

However, the majority's reasoning here is more difficult to accept in light of Judge Williams's dissent. He argued that the fit between ends and means was a poor one because available within the Act are solutions to the problem that do not intrude upon first amendment interests.[176] The better alternative, according to Judge Williams, would be expansion of the Act's leased-access provisions and adoption of common carrier-type regulation to cable television.[177] For example, cable operators may be ordered to

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170 *Id.* at 46.

171 *Id.* at 42.

172 *See* United States v. O'Brien, 391 U.S. 367, 377 (1968); Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989).

173 819 F. Supp. at 45-46.

> The court does not find improbable Congress' conclusion that [the] market power [that cable operators have attained] provides cable operators with both incentive and present ability to block non-cable programmers' access to the bulk of any prospective viewing audience; unconstrained, cable holds the future of local broadcasting at its mercy. . . . [T]he court must conclude that the danger perceived by congress is real and substantial.

Id. at 46.

174 *Id.* at 47.

175 *Id.*; *see also* United States v. Albertini, 472 U.S. 675, 689 (1985) ("Regulations that burden speech incidentally or control the time, place, and manner of expression. . . . [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech." (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1984)).

176 819 F. Supp. at 57 (Williams, J., dissenting).

177 *Id.* at 57-58.

erve on leased-access channels all parties that meet neutral criteria or service, in much the same way as long-distance telephone companies gain access to local telephone networks.[178]

Judge Williams also disagreed in connection with the proper standard of review applicable to must-carry. Concluding that the provisions are inherently content-based, he argued for the application of strict scrutiny to them.[179] In addition, he rejected the conclusion that must-carry was necessary to ensure public access to local broadcast television.[180] Judge Williams noted that in the nearly eight years in which no must-carry rules were in effect the number of both commercial and NCE stations, as well as the extent of their coverage, increased significantly.[181] This observation seriously undermines the claim that broadcasters are in danger without the protection of must-carry.[182] Further, he noted that even plaintiffs' evidence revealed that, as of 1988, "98% of all broadcast stations that would have qualified for mandatory carriage were still being carried despite the absence of such a requirement."[183] Judge Williams concluded, therefore, that the congressional findings could not sustain re-imposition of the must-carry rules.[184]

Judge Williams's suggestion that common-carrier regulation be applied to cable television would solve the anti-competitive situation that exists currently in the industry. It would allow competing programming suppliers open access to the system, and would finally provide consumers with a choice among programming suppliers. One of the most common complaints from cable television subscribers concerns their total lack of choice if they are dissatisfied with the system operator. If cable system operators were treated as common carriers, in a manner similar to that local Bell Operating Companies ("BOC"), they would be required to open their systems to competing programming "packagers." This could ameliorate the vertical integration problem and foster competition in the market for cable television programming. Dissatisfied consumers would then have a choice among other programming suppliers, much as a dissatisfied ATT customer can now choose MCI or Sprint, for example.

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178 *Id.*

179 *Id.* at 59-60. Strict scrutiny requires that a content-based regulation serve a compelling governmental purpose and that the means be narrowly-tailored to the government's end. Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

180 819 F. Supp. at 63 (Williams, J., dissenting).

181 *Id.*

182 *Id.*

183 *Id.* at 64.

184 *Id.* at 65.

A common-carrier solution, however, will require congressional action. Congress thus far has explicitly rejected common-carrier style regulation for cable television.[185] Further, the FCC views the common-carrier model as a complex and burdensome regulatory structure for both regulator and regulatee.[186] Nonetheless, recently proposed legislation requires the FCC to study and report to Congress whether it is in the public interest to make cable operators common carriers.[187]

V. Conclusion

On January 12, 1993, the Supreme Court heard oral arguments in the *Turner* case.[188] As expected, cable operators renewed their arguments that the must-carry provisions impermissibly interfere with editorial discretion protected by the First Amendment, and that strict scrutiny should be applied to such laws, as in *Tornillo*.[189] Whatever the Court decides with respect to the constitutionality of these portions of the 1992 Cable Act, the appellants' position concerning editorial discretion appears strained. Cable operators do not have the same kind of editorial discretion as newspapers. Their "editing" is restricted to deciding whether to carry a particular station or programming service. Unlike newspaper editors, who may rewrite, delete portions, or strike a particular article entirely, cable operators have little or no control over the content of the programming transmitted over their systems. Their editorial discretion is analogous to that of a newsstand operator who decides which newspapers and magazines to carry but has no control over what messages are conveyed in them.

On the other hand, the government may not compel a newsstand operator to carry a selected group of publications based on their coverage of local events. In essence, this is the compulsion that the must-carry provisions of the 1992 Cable Act place upon cable operators. Must-carry regulations create a favored class of speakers based upon the local content of their speech. As such, they are inherently content based, and, in this writer's opinion, the cable operator's strict-scrutiny argument stands a good chance of

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[185] *See* 47 U.S.C. § 541(c) (1993); Communications Act of 1934 § 621(c). Cable systems "shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." *Id.*

[186] *See First Rate Order*, *supra* note 132, at ¶8.

[187] *See* National Communications Competition and Information Infrastructure Act, H.R. 3636, 103d Cong., 1st Sess., tit. II, § 653 (1993).

[188] Turner Broadcasting Sys., Inc. v. FCC, No. 93-44.

[189] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

prevailing in the Supreme Court.[190]

"Either-or" arguments regarding whether cable operators should be treated as newspapers or broadcasters miss the point, however. Cable television is a hybrid created by technology. The continuing convergence of television, telephone, and computer technologies will continue to challenge the legislature, the judiciary, and the FCC to fashion new regulatory standards that are consistent with both the First Amendment and with the "public interest, convenience, and necessity."

[190] Based on reports of the oral arguments, many Justices have doubts regarding the government's rationale and justification for the must-carry rules. In addition, several Justices expressed interest in a common-carrier solution to the antitrust issues extant in the cable television industry. *See* Linda Greenhouse, *New Law Regulating Cable TV Gets Skeptical Response From High Court*, N.Y. TIMES, Jan. 13, 1994, at A12; Vincente Pasdeloup, *Must Carry at the Supreme Court*, CABLE WORLD, Jan. 17, 1994, at 4.