

## All signals, local or far, up for grabs by CATV's

**Court rules out copyright liability for cable retransmissions off the air; heat's on now for copyright legislation**

Modern cable-TV systems are as free to pick up and retransmit broadcast programming without copyright liability as the Supreme Court said less advanced systems were four years ago. Indeed, there may be "little limit to what can be done with broadcast signals by CATV's."

So said a federal district judge last week in a decision that dashed, at least temporarily, broadcasters' and copyright owners' hopes of establishing copyright equities in the programs cable systems take off the air. They had wanted cable liability established both to give them leverage in negotiations looking toward new copyright legislation and to serve them as a backstop if they failed to get legislation.

The decision gave them neither leverage nor backstop. Some broadcasting representatives professed to see some hope that if CATV operators in the future carried some practices to greater extremes—if they sold a great deal of time, for instance, or engaged in extensive interconnection—the outcome next time might be different. But the outcome this time was down the line for CATV.

Immediately attention turned to the Senate Copyright Subcommittee which, under the chairmanship of Senator John McClellan (D-Ark.), has been working on a new copyright bill. The chairman, busy campaigning for re-election, was reported to be firm in his intention to turn out a bill. There was doubt, however, that he would get to it this year, in view of his political distractions (see story, page 20).

The fateful court decision was handed down Tuesday (May 2) by Judge Constance Baker Motley of the U.S. Southern District Court in New York in the copyright infringement suit brought by CBS and three program packagers against Teleprompter Corp. involving five of Teleprompter's cable systems.

Despite claims by CBS and the other plaintiffs that much had happened to cast CATV operators more in the role of broadcasters than the Supreme Court found them to be in its 1968 "Fortnightly

case" decision—which held them to be more like "viewers" than like broadcasters and therefore not subject to copyright liability on retransmission (BROADCASTING, June 24, 1968)—Judge Motley held that Fortnightly still applied.

She did note, however, that courts' construction of the copyright law in the course of developing technology over the years has been built on one basic analogy—that the producers of a stage play "perform" the play, the audience does not—and suggested that "perhaps the time has come to cease piling analogy on analogy and to await word from Congress."

Nevertheless, she added, "taking the law in its present state, we find that the CATV's before us do not function as broadcasters within the meaning of the Fortnightly test, that they therefore do not 'perform' plaintiffs' works and hence do not infringe their copyrights."

CBS and the other plaintiffs, Judge Motley noted, contended that the Teleprompter systems engage in activities different from those in the Fortnightly case and that these different activities put the systems on the "broadcaster" rather than the "viewer" side of the line. The activities: program origination, importation of distant signals, selection of programs, microwave transmission, interconnection with other CATV systems, advertising and sale of commercials.

Of these seven activities, Judge Motley accorded greatest importance to "transmittal of broadcast signals from stations hundreds of miles away and program origination."

As to signal importation, she held that

even in the Fortnightly case the systems "brought in stations from which usable reception could not be had at all." Thus, she said, the chief difference in the Teleprompter case was that "in a number of the systems the antenna tower receiving the signals is located not on a hill over the city [where the system is located] but many miles away in the vicinity of the broadcasting station" whose signals are being picked up.

She said the Supreme Court in the Fortnightly decision gave "no indication that it intended to imply a geographical limit." Quoting the Fortnightly decision's assertion that "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 set," Judge Motley added: "What Teleprompter has done is to make its antenna even more 'well-located' and even more 'efficiently' connected to a viewer's set than in Fortnightly."

She also rejected arguments that importation of distant signals makes CATV operators more like broadcasters than like viewers because it gives them greater latitude in program selection: "Though Teleprompter has greater freedom of choice than Fortnightly, its latitude is not comparable to that of a broadcaster, which controls program content and scheduling."

Judge Motley agreed with the plaintiffs, however, that program origination is a broadcaster-like function:

"We do not doubt that Teleprompter's program origination is similar to that done by broadcasters. These CATV's select the programs, propagate them and have control over program content and arrangement. Teleprompter's New York system sells commercials for a portion, albeit small, of its original schedule. Certainly New York originates at least as many hours of programming as many local broadcast stations. With respect to its program origination Teleprompter is functioning as a broadcaster."

But this, she continued, does not affect CATV's copyright position in picking up and retransmitting broadcast programs. "It is true," she said, "that the originated programs and the received programs are sold to subscribers as a package; nobody buys one without the other. But the nature of the functions of a CATV with respect to received shows is not changed by the presence of original material on other channels or at other times.

"What Teleprompter is doing to plaintiffs' copyrighted material, and other over-the-air broadcasts, is the same whether the CATV's originate programs or not. The 'function' of the reception

Judge Motley

