INTERSECTING POINTS IN PARALLEL LINES: TOWARD BETTER HARMONIZATION OF COPYRIGHT LAW AND COMMUNICATIONS LAW THROUGH STATUTORY AND INSTITUTIONAL REFORM

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I. INTRODUCTION

[1] This Article highlights the historic separate federal legislative path for copyright law and communications law. As the technologies for mass distribution of copyrighted content expanded in the 1970s with the nationwide development of cable television,[1] Congress brought this medium within the scope of copyright law through the creation of a compulsory license for cable retransmission of broadcast signals.[2] Several years later, in the realm of communications law, Congress created a new compensation scheme for retransmitted broadcast signals that was based on a negotiated, rather than statutorily-mandated, compensation scheme known as retransmission consent.[3]

[2] This Article discusses the development of these differing approaches by copyright law and communications law, and presents options that would enable better harmonization between them based on the realities of the current and future media marketplace.

II. COPYRIGHT LAW AND COMMUNICATIONS LAW ALONG SEPARATE STATUTORY PATHS

[3] Until 1976, the worlds of American copyright and communications law operated largely in parallel universes.[4] Under the U.S. Constitution,

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[1] *See The Cable History Timeline*, CABLE CENTER 10–11 (2014), http://www.cablecenter.org/images/files/pdf/CableHistory/CableTimelineFall2015.pdf [https://perma.cc/7P6W-VF9M].

[2] *See id.* at 14 (explaining the compulsory licensing structure); Copyright Act of 1976, 17 U.S.C. § 111(c)(1) (2018).

[3] *See The Cable History Timeline*, *supra* note 1, at 30 (explaining the concept of retransmission consent); 47 U.S.C. § 535(c) (2018).

[4] *See* Library of Cong., Copyright Office, *General Guide to the Copyright Act of 1976*, 1

Congress is vested with the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[5]

[4] This authority was first used in the enactment of the Copyright Act of 1790,[6] with modern copyright law first reflected in the Copyright Act of 1909.[7] That Act covered all published works exclusively under federal law, provided a copyright notice was affixed.[8] Congress indicated therein that copyright law was "[n]ot primarily for benefit of the author, but primarily for benefit of the public."[9]

[5] In contrast, communications law has no specific constitutional mandate, with federal legislation first enacted in the early part of the 20th century.[10] This was necessitated by the need to assert governmental control over otherwise unregulated electromagnetic spectrum—commonly called the airwaves—to enable broadcasting.[11] Principles of technical non-

(Sept. 1977), https://www.copyright.gov/reports/guide-to-copyright.pdf [https://perma.cc/4HUC-989G].

5 U.S. CONST. art. I, § 8, cl. 8.

6 *See* Copyright Act of 1790, 1 Stat. 124 (1790).

7 *See* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075–76 (1909).

8 *See id.* at 1075, 1077.

9 H.R. REP. NO. 60-2222, at 7 (1909).

10 *See* 47 U.S.C. § 151 (1996).

11 *See* Irving R. Kaufman, *Reassessing the Fairness Doctrine*, N.Y. TIMES (June 19, 1983), https://www.nytimes.com/1983/06/19/magazine/reassessing-the-fairness-doctorine.html [https://perma.cc/TK8E-YG26].

interference of broadcast signals mandated an important government role in allocating commercial spectrum and in providing exclusive operating licenses that would be consistent with a "public interest, convenience, or necessity" standard.[12] This was accomplished through the enactment of the Radio Act of 1927,[13] followed by its successor, the Communications Act of 1934,[14] which also included television broadcasting in its scope.[15]

[6] In the ensuing years, these distinct statutory schemes—one for content protection, the other for conduit regulation—continued to operate under two expert government agencies. Copyright law is overseen by the Library of Congress Copyright Office,[16] while broadcast communications law is administered by the Federal Communications Commission (FCC).[17] Nether agency has any legal requirement to deal with each other;[18] moreover, until 1976, there was little if any working relationship between them.[19] They also reported to separate Congressional committees in both the U.S. House of Representatives and the U.S. Senate (Judiciary for

[12] 47 U.S.C. § 307(c)(1) (2004).

[13] *See id.* §§ 81–119 (repealed 1934).

[14] *See Communications Act of 1934*, ENCYCLOPEDIA BRITANNICA (Sept. 26, 2019), https://www.britannica.com/event/Communications-Act-of-1934 [https://perma.cc/N75B-MCSR].

[15] *See id*.

[16] *See Overview of the Copyright Office*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/ [https://perma.cc/58KE-QATM].

[17] *See What We Do*, FED. COMM. COMMISSION, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/95W4-6A2K].

[18] *See id.*

[19] *See* 1 Telecommunications & Cable Regulation ¶ 7.20[1] (2019).

Copyright;[20] Commerce, Science, and Transportation for Communications[21]), which meant that there also was little, if any, legislative coordination as needs arose for statutory reform.

III. Cable Television's Points of Intersection

[7] However, new electronic media began to challenge important aspects of both copyright law and communications law at roughly the same time. As over-the-air broadcast television emerged to become a national technology platform for copyrighted program distribution in the late 1940s, the technical limitations of spectrum-based transmission meant that millions of Americans could not receive their signals through rooftop antennas.[22] Recognizing this gap, entrepreneurs in areas with relatively sparse broadcast television coverage invested in master antenna systems that then could retransmit the broadcast signals through a coaxial cable rather than through the airwaves.[23] Individual households would pay for this service, called Community Antenna Television (CATV), with a subscription fee on a monthly basis.[24]

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[20] *See* Artistic Recognition for Talented Students Act, S. 2824, 116th Cong. (2019).

[21] *See* Broadband Interagency Coordination Act of 2019, S. 1294, 116th Cong. (2019).

[22] *See* Stuart N. Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 COMM/ENT L.S. 477, 478 (1979).

[23] *See* 111 CONG. REC. A1268 (1965) (statement of Rep. Oren Harris).

[24] *See* Thomas R. Eisenmann, *Cable TV: From Community Antennas to Wired Cities*, HARVARD BUSINESS SCHOOL: WORKING KNOWLEDGE (Jul. 10, 2000), https://hbswk.hbs.edu/item/cable-tv-from-community-antennas-to-wired-cities [https://perma.cc/2KQC-7SPD].

[8] CATV grew slowly throughout the 1950s and the early 1960s, since the business model was based largely on rural markets.[25] But it achieved quick profitability once capital investment had been recouped; the subscription fees generated predictable cash flow.[26] Broadcasters, who maintained valuable FCC licenses, began to recognize a competitive threat as more CATV systems were started in various regions of the United States.[27] Since broadcast television revenues could only be generated from advertisers based on ratings measurements of broadcast households, any CATV viewers would not be included in this advertiser-supported business model.[28] Additionally, any revenues generated by CATV subscribers would not be shared with the originating television stations.[29] In effect, CATV was a free-rider on broadcast television's investments, including those allocated to copyrighted program acquisition.[30] There was no regulatory oversight under either copyright or communications law then either.[31]

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[25] *See, e.g.*, Thomas A. Hart, Jr., *The Evolution of Telco-Constructed Broadband Servs. for CATV Operators*, 34 CATH. U. L. REV. 697, 698 n.3 (1985).

[26] *See* Michael Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U. L. REV. 816, 834 (1970).

[27] *See The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366, 381 (1965).

[28] *See id.* at 376.

[29] *See id.* at 381.

[30] *See History of Cable*, CAL. CABLE & TELECOMM. ASS'N, https://www.calcable.org/learn/history-of-cable/ [https://perma.cc/49ZG-V3H6].

[31] *See Communications Law and Regulation*, FINDLAW.COM, https://corporate.findlaw.com/law-library/communications-law-and-regulation.html [https://perma.cc/JFG4-FM2Y].

[9] Over time, broadcasters organized an intensive lobbying campaign at the FCC, arguing that CATV's potential to siphon viewers from over-the-air service would undermine broadcasting's revenue base.[32] In turn, under that theory, this could affect a broadcaster's ability to provide local programming, including news and information deemed to be in the "public interest."[33]

[10] The FCC ultimately accepted this rationale to assert ancillary jurisdiction over CATV based on its explicit statutory authority to allocate and license broadcast spectrum.[34] The U.S. Supreme Court subsequently affirmed the FCC's assertion of regulatory authority over CATV in 1968, ushering in a new era for communications law.[35]

[11] This decision, however, did not address the legal protection for the programming content that CATV was retransmitting from broadcast television stations.[36] There still remained the open question regarding what

[32] *See* United States v. Sw. Cable Co., 392 U.S. 157, 165 (1968) (noting "[t]he Commission acknowledged that it could not 'measure precisely the degree of . . . impact,' but found that 'CATV competition can have a substantial negative effect upon station audience and revenues . . .'").

[33] *See id.* at 160.

[34] *See Who Regulates the Spectrum*, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, https://www.ntia.doc.gov/book-page/who-regulates-spectrum [https://perma.cc/7MCG-TT6F] (stating that the FCC manages all uses of the spectrum that the National Telecommunications and Information Administration does not).

[35] *See* Sw. Cable Co., 392 U.S. at 161, 165, 167.

[36] *See id.* at n.10 (recommending readers look to Fortnightly Corp. v. Artists United Television, Inc., 392 U.S. 390 (1968) for a decision on CATC systems and copyright infringement).

legal liability this new medium might face under the Copyright Act of 1909, which required a "public performance" to trigger a copyright infringement claim.[37] CATV asserted that it was merely a passive technology retransmitting intact over-the-air broadcast signals, so that no statutorily-required public performance was taking place.[38] The analogy was to a rooftop antenna; viewers with an antenna installed would not face copyright liability since they were merely receiving the broadcast signal and retransmitting it through a wire into the home.[39] CATV argued that since the only difference was that its receiving antenna was placed so that it could serve an entire community, the nature of the retransmission—private rather than public performance—was the same.[40] Consequently, there could be no copyright liability.[41]

[12] In 1968, the U.S. Supreme Court found this argument to be persuasive, which resulted in CATV remaining under communications law jurisdiction.[42] The separate and parallel structure of the Copyright Act of 1909 and the Communications Act of 1934 thus remained fully intact.[43]

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[37] Copyright Act of 1909, Pub. L. No. 60-349, § 1, 35 Stat. 1075.

[38] *See* Gerald Meyer, *The Complete Guide to the New Copyright Law*, 22 N.Y.U. L. REV. 256 (1977).

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400–02 (1968).

[43] *See id.*

[13] Broadcasters were not satisfied with this outcome, of course, so they refined their argument once CATV began to expand its own channel capacity to offer subscribers a combination of both retransmitted broadcast signals and original programming that was exclusive to CATV.[44] Broadcasters argued that this new configuration had transformed CATV into a medium that was more than the strictly passive system the Supreme Court had considered in its initial decision.[45] Yet even when a second case was heard by the Court in 1974, the holding remained the same—namely, that CATV (now called cable television in recognition of its broadened capability) was not engaged in public performance, and thus remained outside the coverage of the Copyright Act of 1909.[46]

[14] When viewed in tandem, the state of the law by the mid-1970s revealed that the divergent Court opinions created a legal hole for cable television: liable to the FCC'S regulatory authority but not to the Copyright Office.[47] This asymmetry could not be remedied solely by having the FCC impose more regulatory restrictions on cable, which broadcasters aggressively lobbied for.[48] These restrictions included mandating minimum channel capacity; requiring channel set-asides for public, educational, and government programming; limiting the importation of distant broadcast signals by cable operators; banning

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[44] *See* Eleanor Noreika, *Communications Law*, 1977 ANN. SURV. AM. L. 577, 579 (1977).

[45] *See id.*

[46] *See* Teleprompter Corp. v. Columbia Broadcasting, 415 U.S. 394, 403 (1974).

[47] *See id.* at 405, 414; *see also* Fed. Comm. Comm'n Off. of Strategic Plan. & Pol'y, *Cable Television*, https://transition.fcc.gov/osp/inc-report/INoC-27-Cable.pdf. (https://perma.cc/CFC7-ZMX5).

[48] *See* Marshall W. Rosenthal, *Copyright Owners v. Cable Television: The Evolution of a Copyright Liability Conflict*, 33 SYRACUSE L. REV. 693, 717 (1982).

entirely the replacement of local network-affiliated stations with ones from distant markets; and prohibiting the carriage of syndicated programming from a distant market if a local television station already had negotiated for its syndicated rights.[49] None of these restrictions would provide more compensation to programming content owners, however, since cable television had no financial liability under the Copyright Act.[50]

IV. THE COPYRIGHT ACT OF 1976

[15] A solution that would help create a better sense of symmetry between copyright law and communications law was needed. With a comprehensive revision of the Copyright Act of 1909 already under way, both the White House and Congress urged the three parties with economic stakes at issue—broadcasters, cable television systems, and content owners—to craft a workable plan that could then be added to the new copyright legislation.[51] The result was Section 111 of the Copyright Act of 1976, which adapted the Copyright Act of 1909's compulsory license provision that provided fixed compensation to music publishers by music roll and phonorecord manufacturers.[52]

[16] Section 111 afforded cable with unlimited access to local broadcast television content provided it paid a statutory rate to be determined periodically by a new federal agency, the Copyright Royalty Tribunal

[49] *See* 47 C.F.R. § 76.251(c) (1974).

[50] *See* Rosenthal, *supra* note 48, at 693.

[51] *See* Jessica D. Litman, *Copyright Compromise and Legislative History*, 72 CORNELL L. REV. 857, 874 (1987).

[52] *See* Copyright Act of 1976, Pub. L. No. 94-553, Title I, § 101, 90 Stat. 2550 (codified as amended at 17 U.S.C. § 111(d) (1976)).

(CRT).[53] Broadcasters and other content owners would be eligible to a share of this CRT-controlled royalty pool by making a showing to the agency how widely its programming had been carried by cable.[54]

[17] This meant that for the first time ever, some level of harmonization between copyright law and communications law was achieved.[55] This was accomplished since Section 111 relied on the FCC's authority to define what constituted a cable television system.[56] The Copyright Office had no expertise in deciding what constituted a cable system, while the FCC made determinations in the regular course of exercising its jurisdiction over cable television.[57] This practical deference to communications law[58] also meant that the FCC would have unilateral capability to reduce by regulation the amount of copyrighted content to be available through retransmission of local broadcast signals.[59] In turn, these regulations could decrease the size of the copyright royalty pool overseen by the CRT.

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[53] *See generally* 17 U.S.C. § 111(d)(5) (2018); BESEN ET AL., COPYRIGHT LIABILITY FOR CABLE TELEVISION: IS COMPULSORY LICENSING THE SOLUTION? 4 (1977).

[54] *See* 17 U.S.C. § 111(d) (providing the statutory standard regarding statements of account and royalty fees).

[55] *See* Rosenthal, *supra* note 48, at 705.

[56] *See* Fox TV Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1014 (9th Cir. 2017).

[57] *See id.* at 1015.

[58] *See* Paul Glist, *Cable Copyright: The Role of the Copyright Office*, 35 EMORY L.J. 621, 621 (1986).

[59] *See* Comment, *Federal and State Regulation of Cable Television: An Analysis of the New FCC Rules*, 1971 DUKE L.J. 1151, 1153 (1971).

[18] Broadcasters thus had every incentive to continue their advocacy efforts to promote greater FCC regulation over cable. This even included limiting direct negotiations with content owners that were outside the compulsory license provision of Section 111.[60] When cable television offered individual, advertiser-free networks on a premium basis (requiring a separate fee once the monthly subscription fee for basic cable service was satisfied), it was not covered by the compulsory license, but rather needed to be negotiated in copyright licensing agreements directly with the content owners.[61] Broadcasters lobbied to make this process more difficult, too, by successfully lobbying for FCC restrictions on premium movie and sports content in order to undercut cable's ability to generate a new source of revenue to fuel capital investment for further expansion into urban markets.[62] Cable challenged these restrictions, and the U.S. Court of Appeals for the D.C. Circuit struck them down in 1977.[63]

[19] In the long term, broadcasters recognized that Section 111, and the reality that cable television would always be paying below-market rates for retransmitted programming, was not a fully satisfactory approach.[64] Although the Copyright Act of 1976 filled one hole in the law by at least establishing some copyright liability for retransmitted broadcast signals, it had no real impact on cable's ability to adjust its business model in favor

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[60] *See* Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 FED. COMM. L.J. 191, 234 (1990).

[61] *See id.*

[62] *See* Stuart N. Brotman, *Ex Parte Contracts in Informal Rulemaking: Home Box Office, Inc. v. FCC and Action for Children's Television v. FCC*, 65 CALIF. L. REV. 1315, 1317 n.12 (1977).

[63] *See* Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 14 (D.C. Cir. 1977).

[64] *See* Cate, *supra* note 60, at 204–205.

of original programming that had a higher revenue potential.[65] This led broadcasters to turn their attention from how extensively the FCC could regulate cable to whether a more comprehensive statutory solution was a better route. That led to major reform of the Communications Act of 1934.[66]

V. MAJOR CABLE AMENDMENTS TO THE COMMUNICATIONS ACT OF 1934

[20] By 1984, broadcasters successfully lobbied Congress for a new series of Communications Act amendments embodied in the Cable Communications Policy Act of 1984,[67] which enshrined the FCC's jurisdiction over cable in the statute and mandated rate regulation for basic cable (i.e., non-premium networks) to provide yet another way to limit cable's overall revenue potential.[68] The FCC also adopted must-carry regulations that required cable television systems to carry all broadcast television signals in their local markets.[69] This ensured that broadcasters

[65] *See* Cable Copyright and Signal Carriage Act of 1982, H.R. 5949, Hearing Before the Subcomm. on Commerce, and Transportation, 97th Cong. §2 (1982) (Statement of Robert A. McConnell**);** Susan C. Greene, *The Cable Television Provisions of the Revised Copyright Act*, 27 CATH. U. L. REV., 263, 279–280 (1978).

[66] *See* Joseph R. Fogarty & Marcia Spielholz, *FCC Cable Jurisdiction: From Zero to Plenary in Twenty-Five Years*, 37 FED. COMM. L.J. 113, 114 (1985).

[67] *See id.* at 124.

[68] *See* Cable Communications Policy Act, 47 U.S.C. § 521 (1984).

[69] *See* Audrey Perry, *Must-Carry Rules*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1000/must-carry-rules [https://perma.cc/99FL-9SYJ].

would be able to reach the largest possible audience to justify increased advertising rates.[70]

[21] In 1992, a new series of amendments to the Communications Act of 1934 were enacted to achieve a better sense of competitive balance between the broadcasting and cable television industries.[71] Cable sought legislative relief from basic cable regulation, which Congress agreed to provide whenever "effective competition" (e.g., through direct-to-home satellite transmission) was present in a particular geographic market.[72] In exchange, broadcasters championed the adoption of a modified must-carry regime that could be elected by a broadcaster as a mandatory right, or alternatively declined in favor of marketplace negotiations for retransmission consent.[73] For the first time, a quasi-intellectual property right was created in the Communications Act rather than in the Copyright Act,[74] which did not include a broadcast signal as a creation with independent copyright status apart from the program content embodied in that signal.[75]

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[70] *See id.*

[71] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460, 1460 (1992).

[72] *See id.* at §3, 106 Stat. at 1464.

[73] *See* Mark A. Conrad, *The Saga of Cable TV's "Must-Carry" Rules: Will a New Phoenix Rise from the Constitutional Ashes?*, 10 PACE L. REV. 9, 39–40 (1990).

[74] *See* Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102–385, 106 Stat. 1460.

[75] *See* Copyright Act of 1976, Pub. L. No. 94-553 § 111, 90 Stat. 2541, 2550–51 (1976).

[22] In the short term, this legislative bargain appealed to both industries since they received tangible benefits. In practice once enacted, most major market network-affiliated broadcast television stations declined to assert their must-carry rights in favor of negotiating directly with cable operators, ideally for cash compensation.[76] During the early years of the three-year negotiating cycle provided for in the Cable Television Consumer Protection Act of 1992,[77] broadcasters found cable to be more likely to offer in-kind rather than cash compensation for retransmission rights.[78] With expanded channel capacity, cable bargained for guaranteed channel placement for new original programming networks to be developed by broadcasters—an alternative win-win outcome that provided attractive new programming for cable and increased revenue for broadcasters.[79] Among the new cable networks created under this negotiation paradigm were FX (FOX), CNBC (NBC), and ESPN2 (ABC).[80]

[23] However, in the long term, there were only a limited number of new cable networks that could be created, branded, and become capable of achieving audience success through sustainable advertising support.[81]

[76] *See* Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism*, 20 COMMLAW CONSPECTUS 345, 345 (2012).

[77] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385 §§ 6, 13, 106 St. at 1460, 1482, 1489 (1996).

[78] *See* Meg Burton, *Reforming Retransmission Consent*, 64 FED. COMM. L. J. 617, 623 (2012).

[79] *See* Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. S 325(B)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 145–46 (1996).

[80] *See id.* at 146–47.

[81] *See id.* at 147–49.

Consequently, it was only a matter of time until broadcasters could assert the financial leverage that they envisioned originally—to demand cash compensation for retransmission rights rather than bartering channel capacity in exchange.[82]

[24] Retransmission consent fees paid by cable operators to broadcasters are expected to reach $11.72 billion at the end of 2019, which represents 35% of total broadcast revenues.[83] These figures continue on an annual upward trend and are now firmly part of broadcasting's overall business model.[84] When negotiations break down, it is not uncommon for broadcasters to withdraw their carriage rights until an acceptable amount of compensation is offered in a new retransmission consent agreement.[85] Although the FCC has authority to oversee the negotiation process, it typically declines to do so if both parties are negotiating in "good faith."[86]

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[82] *See* CHARLES B. GOLDFARB, CONG. RESEARCH SERV., RL34078, RETRANSMISSION CONSENT AND OTHER FEDERAL RULES AFFECTING PROGRAMMER-DISTRIBUTOR NEGOTIATIONS: ISSUES FOR CONGRESS 28–31 (2007).

[83] *See* Justin Nielson, *Broadcast Investor Retrans Projections Update: Sub Rates Continue to Rise*, S&P GLOBAL MARKET INTELLIGENCE (July 25, 2019), https://www.spglobal.com/marketintelligence/en/news-insights/research/retrans-projections-update-sub-rates-continue-to-rise [https://perma.cc/82ME-YKV7].

[84] *See id.*

[85] *See* Gregory J. Vogt, *Does Retransmission Consent Need Fixing (or Do Consumers Need Help so They Can Watch the Super Bowl, World Series, and Academy Awards?)*, 22 COMMLAW CONSPECTUS 108, 119 (2013).

[86] *See* John Eggerton, *FCC Finds for AT&T in Retrans Negotiation Complaint*, MULTICHANNEL NEWS (Nov. 8, 2019), https://www.multichannel.com/news/fcc-finds-for-at-t-in-retrans-negotiation-complaint [https://perma.cc/XGQ2-265U].

VI. APPROACHES TO BETTER HARMONIZATION BETWEEN COPYRIGHT LAW AND COMMUNICATIONS LAW

[25] This Article highlights above the current reality, where copyright law and communications law remain in separate legislative and regulatory domains, yet with overlapping interests as media has increasingly combined content in a phenomenon known as convergence.[87] Looking ahead, there are several approaches to consider that may be beneficial in creating better harmonization between copyright and communications law.

[26] Statutory reform would be the most durable potential route, but also the most difficult to achieve at a political level. Neither the broadcasting nor cable industries have sought to upset the status quo by seeking new legislation,[88] and without their joint support, it is highly unlikely that Congress would be motivated to act on its own. In theory, if Section 111 was deleted from the Copyright Act of 1976, broadcasters and cable operators would need to negotiate directly with each other for retransmitted broadcast programming content. Rates would be set in the marketplace rather than by the current government agency now in charge of statutory royalty rates for cable, the Copyright Royalty Board (CRB), which was created under the Copyright Royalty and Distribution Act of 2004.[89] In turn, the CRB could be abolished outright.

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[87] *See* John Nakahata & Michael Nilsson, *Convergence in US Telecommunications and Media Industry: Legal Considerations*, GETTING THE DEAL THROUGH (Apr. 8, 2014), https://gettingthedealthrough.com/area/39/article/28713/convergence-us-telecommunications-media-industry-legal-considerations/ [https://perma.cc/7PZ4-L2MT].

[88] *See* Daniel M. Downes, *New Media Economy: Intellectual Property and Cultural Insurrection*, 9 J. ELECTRONIC PUB., no. 1, 2006, https://quod.lib.umich.edu/j/jep/3336451.0009.103?view=text;rgn=main [https://perma.cc/N2AR-ZEQU].

[89] *See About Us*, U.S. COPYRIGHT ROYALTY BOARD, https://www.crb.gov/index.html [https://perma.cc/XFG2-WHG4].

[27] In communications law, a modification to the Communications Act also would need to be made in order to create legislative symmetry. This would involve eliminating the must-carry option in the 1992 Cable Act, except for commercial independent and public television stations that could be guaranteed must-carry status under a grandfather clause. This would mean that the vast majority of the most-viewed stations nationwide would need to negotiate retransmission consent rights in the marketplace, as they already do.[90] In order to phase this in, Congress may wish to enact a sunset provision in the existing Copyright Act that would bring this about on a certain date, while also giving industry players an opportunity to plan accordingly for a post-compulsory license environment.

[28] Although some might argue that leaving both sets of negotiations to the marketplace might result in prohibitively high transaction costs for broadcasters and cable operators,[91] there may be countervailing economies created since both parties could conduct one set of negotiations that covered both retransmission content and signal carriage rights. There also would be no regulatory compliance costs since the CRB would be abolished.

[29] This possible solution is more elegant than realistic, since legislation typically occurs when the affected industries push for Congress to act.[92] Here, the problem is apparent, but the likelihood of logical

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[90] *See* GOLDFARB, *supra* note 82, at 2–3.

[91] *See* Thomas W. Hazlett, *Duopolistic Competition in Cable Television: Implications for Public Policy*, 7 YALE J. ON REG. 65, 82 (1990).

[92] *See* Nathan Witkin, Note, *Interest Group Mediation: A Mechanism for Controlling and Improving Congressional Lobbying Practices*, 23 OHIO ST. J. DISP. RESOL. 373, 373–74 (2008).

legislative reform is very low because comfort with the status quo has become the norm.[93]

[30] Consequently, it is useful to consider several incremental approaches that do not require any legislative changes. First, the Copyright Office of the Library of Congress and the FCC can and should begin to work more closely together given the converged and overlapping interests highlighted above. Such coordination is especially important as rapid technology shifts, such as the emergence of major Over-the-Top (OTT) services (e.g., Netflix, Hulu, Amazon Prime), challenge the established business models based on broadcasting and cable television.

[31] Timely data and analysis regarding real-world activities in the brave new world of digital convergence would serve both agencies well. The recently-formed FCC Office of Economics and Analytics[94] can serve as a resource for the Copyright Office as well as the FCC, especially since the Copyright Office does not have a comparable internal unit that it can draw upon for policy initiatives. Enhanced funding might be necessary to accomplish this expanded role.

[32] Both agencies already have the capability to develop Notices of Inquiry (NOIs)[95] to seek information and perspectives from affected industries and the public at large. With greater coordination, they could

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[93] *Cf. id.* at 375–76.

[94] *See How OEA was Formed*, FCC, https://www.fcc.gov/how-oea-was-formed [https://perma.cc/XKS5-D4JW].

[95] *See, e.g.*, *Online Publication*, COPYRIGHT OFF., https://www.copyright.gov/rulemaking/online-publication/ [https://perma.cc/Y3RZ-HPMU] (Copyright Office notice of inquiry); *FCC Opens Annual Inquiry on Broadband Deployment*, FED. COMM. COMM'N, https://www.fcc.gov/document/fcc-opens-annual-inquiry-broadband-deployment-0 [https://perma.cc/2FH9-PXDQ] (FCC notice of inquiry).

share the compiled records of separate NOIs, or even develop joint NOIs for topics of mutual interest where a broader base of responses and perspectives could be solicited in a single proceeding.

[33] There can also be a formal designation of the FCC Chairman as the principal liaison to the Copyright Office. This would provide for an institutional structure that could promote cooperative activities at the highest levels of both agencies.

[34] Congress can take advantage of such cooperation through minor legislative amendments to both the Copyright Act and the Communications Act that are not likely to raise any political objections. Congress could require the Copyright Office and the FCC to issue a joint report to the respective committees in the House and Senate on a periodic basis (e.g., every two or four years) that discusses the state of copyright protection on digital media platforms, including broadcasting, cable, satellites and broadband. These reports should reflect affected industry input, and can be useful materials for Congress to consider in formulating any legislative initiatives that would require support by these industry players.

VII. Conclusion

[35] As illustrated above, there are ample ways in which to create a more harmonized copyright law and communications law system that respects the separate paths of both statutory sources while aiming to achieve better results in decision making processes and outcomes. More points of intersection in their parallel lines would be a welcome development indeed.