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by

Wendy J. Gordon and Anne E. Gowen[1]

Here is the problem, as Congress saw it: a distributor of television programming (a cable TV operator, or a distributor of tv programming via other media) cannot thrive unless it can supply viewers with top-rated programming. Few customers want to subscribe to a service that lacks NBC's *Seinfeld,* the latest episodes of *General Hospital,* or, in rarer instances, PBS educational documentaries. However, because the national market for programming is dominated by a few large cable operators, obtaining permission to show popular programming may be difficult.

Congress's fear was that big cable operators typically demand that programming vendors enter into exclusive contracts with them. A vendor of a popular program would thereby agree not to sell his program to anyone else. This would leave small distributors with

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access to less valuable stock-in-trade, and potentially leave cable-tv customers in some areas without the shows they want to watch. (Also, for those customers who refused to hook up to cable services with paltry offerings, it could leave them with a few, static-filled broadcasts if anything at all.) Furthermore, of course, because large cable operators will tend to buy up all the most popular programs, Congress feared that freedom from competition could allow them to demand outrageous prices from television-hungry consumers.

Another concern played a role as well. Small or independent programming vendors--including the distributors or even creators of innovative, out-of-the-mainstream programs--may also find it difficult to enter the programming market, as it is currently structured. Many cable operators have a financial interest in larger vendors, and, quite naturally, show preference in their carriage choices for their affiliates. Congress worried that, with the domination of television by a few powerful vendors, viewers would be denied access to a more diverse spread of televised viewpoints.[1]

Congress responded to these fears with the 1992 Cable Television Act's controversial "must-carry" provisions.[2] Less well-known, but equally interesting, are the Act's "must-

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[1] Certainly, parts of this scenario are justifiably considered worthy of remedial legislation -- access to a greater diversity of programming certainly might indeed serve the lofty ideal of better educating the public and providing additional forums for the expression of less popular viewpoints. Other features, however -- a rural consumer's difficulty tuning in to a sensationalist talk show, for example -- seem less worthy of Congressional attention as an aesthetic matter, but one can understand the economic import.

[2] More precisely, the Cable Television Consumer Protection and Competition Act of 1992 (Public Law 102-385). The "must carry" provisions are contained in Section 4 of the

license" or "mandated access" provisions.[3] These provisions attempt to promote competition and diversity in the distribution of programming by making it easier for small or unaffiliated distributors to obtain licenses at nondiscriminatory rates for programming that otherwise might be reserved solely to the use of dominant or vertically-integrated distributors. Certain exclusive licenses between cable operators and vendors are prohibited, along with certain behavior that would effectively restrict carriage of programs to particular distributors.

According to some commentators, the constraints imposed by the must-license provisions illegitimately endanger vendors' property rights in their programming. Specifically, the threatened jurisprudential conflict is the following: prior to the Act, programming vendors had the right to dispose of their programs as they would -- they could sell them to whomever they desired, on terms that they chose (or at least, on the best terms they were able to negotiate). The Act, however, constrains vendors in several important ways: they no longer have the right, in many instances, to enter into exclusive contracts for programming; moreover, they must offer their programs for sale on "nondiscriminatory" terms to smaller, independent programming distributors. The Act narrows vendors' established

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Act, and are discussed in this symposium at xx.

[3] The "must-license" provisions are contained in Sections 12 and 19. Section 12 modifies Part II of title VI of the Communications Act of 1934 by adding a new § 616; it is encoded at 47 U.S.C. 536 and implemented by the FCC at 47 C.F.R. Part 76, Subpt. Q (added pursuant to the Cable Act), secs. 76.1300-1302. Section 19 modifies Part II of title VI of the Communications Act by adding a new § 628; it is encoded at 47 U.S.C. 548 and implemented by the FCC at 47 C.F.R. Part 76, Subpt. O, secs. 76.1000-1003 (added) and secs. 76.1004-1010 (amended).

property right in their programs, a right that included among its aspects the exclusive right to control the initial public performance of their works on the airways[4]. Is this modification consistent with what we take to be acceptable governmental interference with property rights?

This essay suggests that the must-license provisions impose limitations on property rights that are unsurprising given current practice in both the law of statutory intellectual property law and in the judge-made law of torts and property. That does not mean these provisions of the Cable Act must be deemed acceptable: it does suggest, however, that if the must-license or "mandeated access" rules are open to question, similar queries might be addressed to many other recent developments. In fact, one of the most important questions for our law to resolve over the next twenty years will be the issue of what importance should be given to a property owners "right to say no." This piece provides an introduction not only to the mandated access or "must license" provisions, but also to the sorts of issues that are raised by all such provisions.

I. Introduction to the "Must-License" Provisions

Loosely summarized, Section 12 ("Regulation of Carriage Agreements") aims to prevent economically powerful cable operators (C.O.s) and other multichannel video programming distributors (M.V.P.D.s) from unfairly refusing to carry programming produced

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[4]See 17 USC section 106(rights of a copyright owner) and 101 (definitions.) Note that the compulsory license provisions of section 111 apply to *re*transmission, not initial transmission.

by programming vendors in which the C.O. has no financial affiliation. Stated positively, Section 12 would require C.O.s and M.V.P.D.s to deal fairly with financially independent programming vendors. In relevant part, the Section calls for the FCC to issue regulations that:

> (1) . . . prevent a [C.O.] or other [M.V.P.D.] from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;
>
> (2) . . . prohibit a [C.O.] or other [M.V.P.D.] from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other [M.V.P.D.s] as a condition of carriage on a system;
>
> (3) . . . prevent [an M.V.P.D.] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated . . . vendor . . . to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors . . . .

Thus, the Section imposes three very general limitations on the behavior of an M.V.P.D. with respect to a programming vendor. An M.V.P.D. cannot require as a condition of program carriage that a vendor give the M.V.P.D. a financial interest in its operation[5]; an M.V.P.D. cannot coerce a vendor into signing away exclusive rights to the programming offered for carriage; and an M.V.P.D. cannot act in any way that would unreasonably hinder an

[5] In other words, an M.V.P.D. may not require "vertical integration" as a condition of carrying a vendor's programming. For brevity, we will use the phrase "vertically integrated vendor" to indicate a vendor in which an M.V.P.D. has a financial interest, and the phrase "vertically integrated M.V.P.D." to indicate an M.V.P.D. that has a financial interest in a vendor. Vertically integrated vendors and C.O.s are distinguished, of course, from vendors and C.O.s that are financially independent, and, presumably, less powerful economically.

independent vendor from competing fairly.

Section 12's language, in many aspects, mimics that of long-established and relatively uncontroversial legislation in the antitrust and consumer protection fields. In that regard, it has been suggested that a primary purpose of Section 12 is to give plaintiffs a speedier, less expensive remedy (through administrative proceedings of the FCC) than is available via in-court antitrust litigation.[6] Nevertheless, because the FCC has specifically declined to delineate exactly which activities Section 12 prohibits,[7] it is possible that Section 12 could have an impact on potential conflicts with property-rights jurisprudence. But our more pressing concern is a particular sub-part of Section 19.

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[6] Nicolas W. Allard, "The 1992 Cable Act: Just the Beginning," 15 HASTINGS COMM/ENT L.J. 305 (1993):

> Indeed, the types of practices prohibited in sections 628(b) and (c), including anticompetitive refusals to deal, price discrimination, and monopolization, have been illegal since the Sherman Antiutrust Act and the Robinson-Patman Act, if not before under common law. It follows that the 1992 Cable Act, if it is to make any sense as a matter of policy, is intentionally designed to reduce the transaction costs and shift the burden of proof to enhance the ability of cable competitors to obtain relief from monopolistic conduct. (Citations omitted.)

[7] Rather, the FCC reports:

> With respect to the prohibitions set forth in section 616(a) (1)-(3) [Cable Act, Section 12], we will define terms such as 'coercion' and 'discrimination' progressively through the case law developed by resolving section 616 complaints, because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation.

"Rules and Regulations, Federal Communications Commission; 47 CFR Part 76; 'Cable Act of 1992--Program Distribution and Carriage Agreements,' Final rule," 58 F.R. 60390, 60391 (November 16, 1993) (includes report adopting final rule pursuant to Section 12).

Section 19 of the Cable Act is "Development of Competition and Diversity in Video Programming Distribution." This section is targeted more specifically at particular practices in which both M.V.P.D.s and vendors now engage. Subsection (c) outlines the "Minimum Contents of Regulations" that the FCC must issue. In paraphrase, these prohibitions are the following:

(A) A C.O. with a financial interest in a vendor[8] may not unduly or improperly influence that vendor's decision to sell programming to an M.V.P.D. that is not vertically integrated.

(B) A vendor in which a C.O. has a financial interest cannot discriminate in the sale of programming to other M.V.P.D.s (with certain exceptions: e.g., in setting prices, a vendor is allowed to take into account reasonable differences in the cost of providing programming to different M.V.P.D.s).

Perhaps most controversially:

(C) **A programming vendor and a C.O. may no longer enter into exclusive contracts for programming**; nor may they engage in any behavior that would prevent (another) M.V.P.D. from obtaining programming from any vertically-integrated vendor; **when distribution to areas not served by a C.O. is at issue.**[9]

(D) **A C.O. and a vendor in which that C.O. has a financial interest may no longer enter into exclusive contracts for programming,** unless the FCC decides that such a contract would be in the "public interest."[10] This prohibition applies when

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[8] For simplicity, we use the general term "vendor" here. In contrast to Section 12, however, Section 19 generally refers more specifically to a "satellite cable programming vendor or a satellite broadcast programming vendor."

[9] Specifically, this subsection applies to distribution to areas not served by a cable operator as of the date of Section 19's enactment.

Under Section 19(c)(5), this prohibition (applicable to areas already served by cable) will be effective for only 10 years, unless the FCC decides that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."

distribution to areas now served by a C.O. is at issue.

Thus, while Section 12, among its other provisions, prohibits C.O.s from *coercing* vendors to enter into exclusive programming contracts as a condition of carriage, Section 19 goes farther: it prohibits C.O.s and vendors in certain circumstances from *voluntarily* entering into exclusive programming contracts. It is this latter provision which is most intriguing from a jurisprudential perspective.

Note that the prohibitions on exclusive contracts for programming applies to a limited class of industry actors: where distribution to areas unserved by cable is involved, the prohibition applies to all C.O.s and vendors; where distribution to served areas is affected, however, the prohibition applies only to C.O.s and vendors that are financial affiliates.

II. The compensation question

Many takings-clause questions could be examined here. For example, whether a transfer from one private party to another is for a "public purpose"[11] or whether it is even a "taking."[12] But given the Fifth Amendment's insistence on "just" compensation,[13] a

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[11]In *Ruckelshaus v. Monsanto Co.*, *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 104 S.Ct. 2862 (1984), the Supreme Court held that the federal government could "take" intellectual property in a way that redounded to the immediate benefit of a private party (the owner's competitor), so long as the long-range goal of the statute was for public benefit. This approach would also seem to characterize the Cable Act's mandated-access provisions as being in the "public interest" so far as the Fifth Amendment is concerned.

[12]It might always be argued that the erosion of the copyright owner's exclusive rights is not itself a taking. For such a possibility, see, e.g., the 1980 case of *Pruneyard Shopping Center v. Robins*, 447 U.S. 74; 100 S.Ct. 2035. There an abrogation of the right of exclusion

particularly intriguing issue is identifying the *the nature of the loss* for which compensation might have to be paid.

The Cable Act provisions largely leave unanswered a crucial question: how much money will change hands when programming is subjected to a non-exclusivity mandate? It is possible that the new provisions may have a very countable cost to program vendors: the price

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occurred when the state of California mandated that shopping centers must keep their grounds open to people bearing petitions, no matter how obnoxious the petitions views might be to the malls' owners. The Court suggested three factors to be considered in determining whether a given modification of a property right constitutes a taking:

> . . . the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.

Pruneyard at U.S. 83, S.Ct. 2042, citing *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S.Ct. 383, 390, omitted.

In *Pruneyard,* the Court ultimately found that the property owners had not met their burden of showing that the state regulation had an economic impact significant enough to constitute a taking, or that it interfered with any investment-backed expectations. Since under the Cable Act, vendors would still be paid for their licenses, it may be that the economic impact will be as minor as it was in Pruneyard, and thus considered no taking.

At another extreme of recent Fifth Amendment jurisprudence, however, is the 1982 case of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, in which the Court held that it was a compensable "taking" to require the owner of an apartment building to allow a cable television company to install its equipment on the building. The Court found irrelevant the cable company's argument that the economic impact on the property owner was *de minimis.*

Loretto is distinguishable from the instant controversy, for the Court there placed great emphasis on physical intrusion, id. at 435. Requiring that programming vendors license their products to willing purchasers on reasonable terms implicates no literal physical occupation.

[13]In *Midkiff,* the United States Supreme Court approved in principle laws which used eminent domain to transfer real property from one private party to another, so that this aspect of the Cable Act (private/private transfers) is probably acceptable. Nevertheless, the Court reserved the question of whether the state's compensation was just. Hawaii Housing Authority v. Midkiff, 467 US 229 (1984)(opinion by O'Connor, J.)

paid for several *non*exclusive licenses may not equal the price that would have been paid for one *exclusive* license. Should this matter? What "market" should be used to gauge appropriate compensation has long been a traditional mainstay of fifth amendment debate.

But even putting aside the impact of such possible shortfall, there may be a more intangible cost that goes unrecompensed. There may be something about exclusivity that should not be tradable in money at all;[14] something that suggests that 'the right to say no' is not equivalent to 'the right to get a price which is equal to what we thought you'd agree to.'

So far the Supreme Court has not addressed whether there are any interests that should be immune even from uncompensated takings. In any event, it is fairly clear that intellectual property (like the vendor's copyrighted programs) are not interests the Court sees as entitled to such deference.[15]

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[14]There is a wide literature on issues of incommensurability. See, e.g., Michael Walzer's SPHERES OF JUSTICE (suggesting that while money may be a good way to distribute some goods and services, other criteria will be more appropriate in other spheres); Susan Rose-Ackerman, *Inalienability*,COL L REV. In law, the subject is usually pursued under the topic "inalienability", which is the label employed in Calabresi and Melamed's classic article.

[15]In the 1984 case of *Ruckelshaus v. Monsanto Co.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862 (1984), the Supreme Court held that it would be a "taking" if the federal government obtained trade secrets under a promise of confidentiality, and then allowed competitors to utilize the information contained in the trade secrets. But the Court also held that these takings would *not be actionable* to the extent that the competitors paid adequate compensation for the information. Moreover, the *Monsanto* Court stated that where, as in that case, the taking was accomplished for a "public purpose" (467 U.S. at 1014, 104 S.Ct. at 2879), no injunction would be available in advance to prohibit the taking (467 U.S. at 1016, 104 S.Ct. at 2880) -- in other words, a taking of the sort at issue in that case was permissible, and money damages would be enough to compensate the former property owner.

III. Economic rationale

Congress clearly believed that market failure in the cable industry required the prohibitions of sections 12 and 19. In Section 2 of the Act ("Findings; Policy; Definitions"), the authors survey the history of the industry since its deregulation in 1984 Act, finding that:

> For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. *The result is undue market power for the cable operator as compared to that of consumers and video programmers.*[16]

Sections 12 and 19 respond to this perceived market failure by making it easier for smaller operators to purchase the well-known programs that consumers desire; the Congressional hope was that by 2002 (at which time the provisions of Section 19 are vacated by its sunset provision[17]), smaller operators would have become well enough established in the market for the Act's regulations to be unnecessary.

Of course, not all commentators would affirm Congress' market analysis. With regard to the specific prohibition on exclusive contracting, the White House made it clear that it felt lack of competitions was not a problem. The Administration submitted this statement in opposition the exclusivity prohibition:

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[16]Public Law 102-385, Section 2(a)(2).

[17]Section 19, adding subsection 628(c)(5) to the Communications Act of 1934.

> The Administration opposes the amendment to be offered by Rep. Tauzin concerning access to cable programs [i.e., the prohibition on exclusive contracting]. It would restrict the discretion of cable programmers in distributing their product. Exclusive distribution arrangements are common in the entertainment industry and encourage the risk-taking needed to develop new programming. Requiring programming networks that are commonly owned with cable systems to make their product available to competing distributors could undermine the incentives of cable operators to invest in developing new programming. This would be to the long-term detriment of the American public. If competitive problems emerge in this area, they can and should be addressed under the existing antitrust laws.[18]

Others who spoke during Congressional debates felt that the prohibition on exclusivity went too far, and that it would result in requiring program sales ". . . to all comers at government-mandated wholesale prices, terms, and conditions. . . ."[19] Ultimately, the accuracy of Congress' judgment that market failure causes industry actors to misvalue cable programming awaits the test of time. Moreover, because FCC regulations implementing the provisions of the Act neglect to lay out, for example, exactly what prices will be considered "nondiscriminatory," the practical effect of the Act on vendors is uncertain.[20]

IV. Section 19 and "property"

By prohibiting the formation of exclusive contracts for programming in certain circumstances, Section 19 will in those circumstances ultimately require the following of a

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[18]"Statement of Administration Policy," 138 Cong. Rec. H6487-01, 6489 (July 23, 1992).

[19]Statement by Reps. Tom Manton and Bill Richardson, 138 Cong. Rec. H6487-01, H6504.

[20]For example, we don't know if cable operators will refuse to buy programming from vendors who are prohibited from offering exclusivity provisions. Alternatively, if operators do keep buying, will prices be lowered drastically? Will the FCC in fact be forced to set prices to keep vendors afloat?

vendor: if a vendor sells its programming to a large cable operator, on whose business that vendor might depend for financial survival, it must in turn offer this programming for sale to other M.V.P.D.s, presumably at reasonably competitive rates.[21] In effect, then, for many programming vendors to remain in business, they will be legally required to license their intellectual products to all comers[22]. It is for this reason that the prohibitions in Section 19 are frequently referred to as "mandated access" or "must-license" provisions.

The must-license provisions have generated far less academic and legal attention than their must-carry cousins. Nevertheless, they raise interesting questions about the extent to which the government may legitimately interfere with private property rights -- in this case, vendors' right to sell programming to whomever they please.

In effect, Congress was concerned with two sorts of barriers to entry. On the one hand, there was the possibility that small distributors could not enter the field of distributing top-run programs for reasons unrelated to their being equipped to do the job of distribution. On the other hand, there was the possibility that program vendors and creators could not sell their material to the established players in cable television, for reasons unrelated to the programs' merit. It was as if Congress wanted to force a dis-aggregation of the various

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[21] For more on the rates at which vendors may sell to other M.V.P.D.s, see *infra*, note xx and accompanying text.

[22] Or, perhaps, all reasonable comers -- again, see *infra* note xx and accompanying text for a more detailed discussion of possible limits on the types of licenses vendors may be forced to enter.

interests at play, so that each could find its highest-valued use. Ironically, Congress chose a method which is inconsistent with the *usual* method of encouraging resources to flow to their highest-valued uses, namely, the maintenance of strong property rights.

Using the language of an influential article by Guido Calabresi and Douglas Melamed,[23] we can characterize the transformation in rights envisioned by the Act as follows. Prior to the Act, a copyright owner's interest in her product was governed by a "property" rule -- i.e., a programmer had an exclusive right to use her product as she wished and to refuse to sell it to any operator she chose. In other terms, she had a veto power over its sale. In contrast, the provisions of the Cable Act eliminate that "property rule" protection and (insofar as the Act's provisions apply) leave programmers protected by a mere "liability" rule: they lose their veto power, though they retain their right to be paid for the use of their product by purchasers.

Calabresi and Melamed consider the Invisible Hand assumption that an initial assignment of entitlements, or property rights, will inevitably yield an efficient distribution of those entitlements; in the cable television arena, this (extremely rough, unqualified) Smithian[24] analysis would suggest that leaving exclusive control of programming rights to

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[23]Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV L. REV. 1089 (1972).

[24]The "invisible hand" is usually credited to Adam Smith, but Smith himself noted the need for some regulation.In assessing the propriety of certain banking regulation, Smith noted:

> "[T]hose exertions of the natural liberty of a few individuals, which might endanger the security of the whole society, are, and ought to be,

vendors would yield optimal social outcomes. Calabresi and Melamed argue that by contrast, certain types of market failure make it cheaper for the government to take over the task of valuing the resource in question, by establishing a liability rule. This might happen, for example, when transactions involving the resource impose significant externalities on society, of which the original owner has no incentive to take account. Other property-rights scholars have argued in a similar vein.[25] But the use of liability rules long pre-dates the law and economics movement; even the U.S. Constitution allows property to be "taken" against the owner's will for a public purpose, so long as compensation is paid whose amount is deemed "just" by a governmental decision maker.

> restrained by the laws of all governments; of the most free, as well as of the most despotical."

ADAM SMITH, THE WEALTH OF NATIONS, Book II, Chapter II at 308 (Edwin Canaan, Ed. 1937)

[25]See, e.g., my discussion of this topic from an economic perspective in *Fair Use as Market Failure,* 82 COLUM L REV 1600 (1982) (exploring both free copying and compulsory licenses as responses to market failure); from a corrective justice perspective, Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149 (1992) [hereinafter Gordon, On Owning Information] (corrective justice approach justifies giving authors a less than full "property" right as reward for their efforts); and a Lockean natural law perspective, Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property,*102 YALE LJ 1533 at 1574-76 (1993); also see Wendy Gordon, "Property and Tort Responses to Failures in Markets for Intangibles," forthcoming as "Systemische und fallbezogene Losungsansatze fur Marktversagen bei Immaterialgutern" [literally, "Systemic and Case-by-Case Responses to Market Failures in Intagible Goods"], in OKONOMISCHE ANALYSE DES GEWERBLICHEN RECHTSCHUTZES, Verlag Mohr & Siebeck, Tubingen (Claus Ott & Hans-Bernd Schafer, Editors, 1994). For further exploration, see, e.g. Timothy J. Brennan, *Copyright and the Right to Deny,* 68 CHI-KENT LAW REV (1993)

The transformation of property-rules into liability-rules has gained increasing currency both in intellectual property law[26] and in the common law, as courts have become more willing to grant "compulsory licenses to use" what was formerly the property of another. This is a familiar practice in intellectual property law-- a relevant fact, since what is at issue in mandated access is the abrogation of the exclusive rights that the copyright laws give to authors in their works.

It is true that in our Constitution, Article I, clause 8 speaks of giving Congress the power to grant rights that are "exclusive." But neither the Congress contemporaneous with the Constitution, nor any Congress or court since, has imagined that the only rights that federal copyright law could grant would be rights of complete and utter exclusivity.[27]

The first English copyright statute, for example, provided for explicit limits on a copyright owner's exclusive rights over sale. Under the Statute of Anne, anyone who wanted a book but disliked the price charged for it could ask the law to lower the price: certain governmentally-authorized officials were empowered to "settle the price" of books in a

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[26]See, e.g., James L. Oakes, Copyrights and Copyremedies: Unfair Use and Injunctions, 18 HOFSTRA L. REV. 983, 992-97 (1990) (suggesting that even in cases where violation of right is proved and gives rise to monetary relief, free speech principles might warrant denying injunctive relief). This approach was implicitly adopted by the Supreme Court, albeit in *dicta,* in the recent Campbell v. Acuff-Rose case (at footnote 10).

[27]For example, one court noted that copyright does not give proprietors "a right to all benefits" that might flow from a copyrighted work. [Mad Magazine case.] See generally, Wendy J. Gordon, *An Inquiry into the Merits of Copyright*, STAN. L. REV. at =.

manner "as to them shall seem Just and Reasonable."[28]

The first United States copyright statute (1790) was also limited, in that it merely gave copyright proprietors exclusive rights to "print, reprint and vend" their works -- they had *no* exclusive rights over public performance.[29] Ironically, these rights to public performance -- shared by all nonexclusively in 1790 -- are precisely those rights that most concern the players in today's cable industry.

Admittedly, the first American statute did not contain a postively formulated "must-sell" provision like that in the Statute of Anne. However, by 1909 the United States copyright law had adopted a mandated access provision of its own, a compulsory license device still applicable today to certain classes of copyrighted works.[30] For example, once a musical work is made into a record and distributed, any musical group can produce a "cover" of that song -- that is, the group can make its own rendition of the song on its own record -- at a set license price and without needing the consent of the song's copyright proprietor.[31]

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[28] Statute of Anne (8 Anne c. 19, 1710).

[29]So, for example, the owner of copyright in a book could not prohibit someone from reading that book aloud to a mammoth audience.

[30] Admittedly, in these situations in the past, compulsory licenses have come on board at the same time as the new right -- as part of the legislative compromise getting the new right included in the copyright act. They are therefore better authority for the Cable Act's prospective effects than as to its effects on already-existing licenses. Nevertheless, even as for its retrospective operation (i.e., on licenses that already exist), Ruckleshaus and similar cases suggest there would still be no taking. See =, infra.

[31] See 17 U.S.C. section 115.

An even more direct predecessor to the 1992 must-license provisions is the compulsory license grant made by 17 U.S.C. 111, allowing cable operators certain rights to retransmit the signal of a broadcasting station.[32]

Thus, Anglo-American copyright law has developed in the direction of allowing limitations on the "exclusive right" of copyright proprietors. Moreover, the policy reasons underlying the 1992 Cable Act are consistent with the rationale historically expressed by lawmakers for decisions to reign in exclusive rights. The 1909 Congress grounded its compulsory license provisions for phonograph records in a fear of monopoly and a desire to foster competition;[33] courts have since often adopted compulsory licenses as a response to antitrust problems in both patent[34] and copyright.[35] Congress articulated analogous pro-

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[32] 17 U.S.C. 111 states in relevant part:

Ironically, Section 6 of the 1992 Cable Act, entitled "Retransmission Consent for Cable Systems," places a limitation on the compulsory license granted by 17 U.S.C. 111, by requiring in most cases that broadcasting stations consent to retransmission of their signals by M.V.P.D.s. In this instance, therefore, the 1992 Act strengthens (makes more exclusive) the rights of copyright proprietors.

[33]See article by Stephen Lee in Western N. Eng. L. Rev.

[34]See, e.g., ROBERT PATRICK MERGES, PATENT LAW AND POLICY: CASES AND MATERIALS (Michie Company 1992) at 764, 906-08.

[35]Consider e.g., the ASCAP consent decree. (As I recall, many years ago I had some minor involvement with the decree, for a client on the licensee side.)

competitive motives in passing the 1992 Cable Act.[36]

As mentioned, there are also common-law examples of "property rules" being transformed into "liability rules". The most famous case is probably *Boomer,* where the New York courts[37] refused to issue an injunction against a pollution-spewing cement plant, but did grant plaintiffs money damages. In effect, this award of damages (but refusal of injunctive relief) against a nuisance amounted to a compulsory license: people living around the cement plant were forced to give up their right of exclusion against air pollution, in exchange for compensation -- they were, in effect, forced to "license" part of their right to enjoy the air to the cement plant.

These and similar developments have sometimes lead to the *ad absurdum* query,

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[36] Section 2 of the Act, for example, outlines findings and policies; the authors explicitly conclude:

> For a variety of reasons . . . most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of comsumers and video programmers. Sec. 2(a)(2).

[37] Boomer v. Atlantic Cement Co., 26 N.Y.2d 219 (1970).

Critics of *Boomer* include Daniel A. Farber, in *Reassessing Boomer: Justice, Efficiency, and Nuisance Law*, in A PROPERTY ANTHOLOGY (Anderson Publishing Co. 1993) 274. He writes,

> "Damage awards may compensate for the victim's economic loss, but a liability rule [i.e., a remedy that refuses to grant an injunction] slights the more fundamental injury to the victim's dignity as a member of the community. ... " *Id.* at 277.

"what's next, a license to murder?"[38] It is undoubtedly the slippery slope of losing rights thought essential to personal security that raises emotions when dealing with provisions such as the Cable Act's new mandated access. But more than habits of thought is at stake. The essence of a "right" is often argued to be its capability of allowing the individual to stand *against* the majority; rights inevitably imply a sphere where individual will, rather than group welfare, is entitled to prevail. If that is so, a "right" cannot be a "right" in the strictest sense if it is sold against the will of the holder-- and a system which allows all rights to be so sold may have only a questionable claim to be termed a "rights-based" system at all. As the proportion of compulsory licenses and mandated-access provisions grows, we may need a fundamental reconceptualization of our notion of property.

No one fears that "licenses to murder" will be soon sold by governmental clerks (no matter what the budget crunch in Washington). But though our jurisprudence still gives fairly secure recognition to personal rights of bodily integrity, it gives somewhat less to rights against physical invasion (like those at issue in *Boomer)*, and even less to rights against the copying of intangibles like programming.

This may well be a desirable hierarchy. One can imagine a plausible rationale: we each have only one body, and do not usually desire to subject it to commercial valuation; we have many pieces of physical property, and we are used to trading them; and as for intangible

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[38]See, e.g., Arthur Hoppe, *A License to Steal,* in BRUCE A. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW (1975) at 49.

products like television programs, they are produced for trade, and can be infinitely reproduced without the originator losing his own access. But the hierarchy -- which places intellectual property at the most vulnerable position -- deserves rigorous scrutiny.