In the

Supreme Court of the United States

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TELEPROMPTER CORPORATION ET AL., Petitioners	)	
vs	)	No. 72-1628
COLUMBIA BROADCASTING SYSTEM, INC., ET AL.,	)	
AND	)	
COLUMBIA BROADCASTING SYSTEM, INC., ET AL., Petitioners,	)	No. 72-1633
vs	)	
TELEPROMPTER CORPORATION ET AL.	)	

Washington, D. C.
January 7, 1974

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Washington, D.C.

Monday, January 7, 1974

The above-entitled matter came on for argument at 1:49 o'clock p.m.

BEFORE:

WARREN E, BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL., JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT C. BARNARD, ESQ., 1250 Connecticut Avenue, N.W., Washington, D.C. 20036

ASA D. SOKOLOW, ESQ., 575 Madison Avenue, New York, New York 10022

SEYMOUR GRAUBARD, ESQ., 345 Park Avenue, New York, New York 10022

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1628, Teleprompter Corporation against Columbia Broadcasting, and Columbia Broadcasting against Teleprompter.

Mr. Barnard, I think you may proceed whenever you are ready and if you will help watch your time, I'll help you, too.

MR. BARNARD: Thank you, your Honor.

ORAL ARGUMENT OF

ROBERT C. BARNARD, ESQ.,

MR. BARNARD: Mr. Chief Justice and may it please the Court:

I represent Teleprompter Corporation, a Community Antenna Television operator, Petitioner number 1628.

Columbia Broadcasting Company, CBS, and the other copyright owners are petitioners in the conditional cross-petition, number 1633.

The two petitions have been consolidated for argument and counsel have agreed that Teleprompter will present its position first in both the petition and the cross-petition.

CBS will respond and I will reply.

To avoid confusion as to who is petitioner and respondent, I will refer to the parties as Teleprompter and

CBS.

MR. CHIEF JUSTICE BURGER: Do you wish to save five minutes for rebuttal, or more?

MR. BARNARD: I would like to, your Honor.

CBS owns copyrights on works which CBS licenses to broadcasters to be broadcast for reception by the public. The other cross-petitioners are copyright owners who have, by contract, granted to CBS the right to license their works for broadcast.

Teleprompter owns CATV Systems. The reception of the licensed broadcasts of the copyrighted works by five of Teleprompter's CATV Systems in 1964, 1969 and 1971 is alleged in the complaint to be a copyright infringement.

And fortnightly against United Artists, this Court held that a CATV System which receives a broadcast and makes the broadcast signal available to suscribing members of the public, does not perform the work which was broadcast.

Two issues are presented by these petitions:

First, the main petition, the so-called "distance signal" issue. Does the location of the CATV's receiving antenna on which the broadcasts were received, more than a few miles from the CATV community and the connection from the antenna to the community by a microwavelength licensed by the FCC, have copyright significance?

Trial court held it did not. Court of Appeals

concluded that the antenna location and the connection to the antenna have copyright significance.

Second, the conditional cross-petition raises the issue whether the reception of a broadcast by a CATV System is converted into a performance of the broadcast work, not by what the CATV System did with reference to the broadcast, copyrighted work, but by reason of what the CATV System did on separate channels, not used to receive broadcasts and not involving CBS' copyrights.

Both courts --

Q That is, the origination of other programs and the commercials and the interconnections?

MR. BARNARD: That is correct, your Honor.

Q And the microwaves?

MR. BARNARD: Well, the issue of microwave is not up in this petition.

Q No, but it is the interconnection and the origination of the other programs?

MR. BARNARD: And the sale of commercials.

Q And the sale of commercials.

MR. BARNARD: Both courts below held that those three activities did not have considerable effect on the reception service and held that it did not change it into a performance.

Q Right.

MR. BARNARD: I turn first to the leading issue of the distance signal issue. Fortnightly, as the Court will recall, involved two CATV systems in West Virginia, one in Clarksburg, one in Fairmont, which received Pittsburgh and other stations 60 to 80 miles away. And, Fortnightly, the issue was whether the reception by the two CATV systems was a performance and, hence, an infringement and holding that the reception service by those two CATV systems was not a performance, this Court did not discuss the receiving antenna nor its location in relationship to the CATV communities which had granted a franchise to the Fortnightly CATV.

There were actually five towns that had granted franchises to the Clarksburg CATV and two to the Fairmont CATV; nor did the Court discuss the devices which connected the antenna to the CATV DISTRIBUTION SYSTEM.

There was, in Fortnightly, an issue as to the technology of the equipment, cables, amplifiers and other equipment, to bring the signal from the antenna to the subscribers' sets.

United Artists, the copyright owner there, argued -- and CBS repeats the argument here -- that the CATV systems have complicated equipment, sophisticated equipment, and that they are active rather than passive and that the transmission and retransmission of the broadcast signals by

the CATV systems in the course of distributing the signals to the subscribers constitutes a performance.

There was also, in Fortnightly , an issue as to whether the CATV systems spoiled the market for the copyright owners by making the broadcast available in the CATV community outside the broadcast station's market.

The trial court found that broadcasts could not be received by the residents of Clarksburg and Fairmont on their own antennas and the CATV reception, the copyright owner argued, spoiled his market.

The Fortnightly court of appeals said that the copyright owner was entitled to prevent dilution of his market and to limit his license to areas and to audiences.

This Court rejected arguments based on the technology of equipment and the arguments by the copyright owner that his market had been spoiled. It focused on the meaning of the word "performance" and held that reception of a broadcast intended for public reception and the distribution of the broadcast signals to the -- what this Court called "additional viewers" was not a performance.

Despite this background, the Court of Appeals in this case concluded that the location of the antenna on which the broadcast was received and the technology of the equipment to connect the antenna to the cable distribution system had copyright significance.

The error, we submit, in the decision of the court below stems from the fact that the court based its reasoning here, as it did in Fortnightly, on what the copyright owner said was his preferred method of economics in exploiting his copyright, rather than on the meaning of the word "performance."

CBS and the copyright amici in the court below argued that the television station has a specific market area bounded by the points where the broadcasts are received off the air by rooftop antennas.

A copyrighted owner, it is said, does not intend his broadcast to be viewed outside that area and if it is viewed outside that area, by reason of a CATV reception, it is, CBS says, an "importation of a distant signal," which is, according to CBS, a "broadcast function."

Q No matter how far.

MR. BARNARD: That is correct. All of this is an echo of the copyright owner's economic argument.

Building on this copyright owner's preferred economics, the court below concluded that the CATV reception would be permitted only if the broadcast signal was, in the court's words, "in the community." If the signal was not already in the community, then it was a distant signal and importing it into the CATV community made the CATV functionally equivalent to a broadcaster and the court

deemed that to be an infringement.

The court recognized the difficult task of defining the term "distant signal." It could not use roof-top antennas as the CBS had suggested. Such a conclusion, the court said, would "fly in the fact of the mandate of Fortnightly." It could not require that the receiving antenna be located in the CATV community. The CATV receiving antennas in Fortnightly were located outside all seven of the CATV communities, although the exact distance did not figure in any way in the decision in Fortnightly.

In the end, the court below devised a definition based on antenna technology, using such vague litigation-prone words as "near" or "adjacent to."

"When the antenna is not near or adjacent to the CATV community --" and what the court called "transmittal" or "retransmittal devices," were needed to bring the signal from the antenna to the CATV community. Then it is a distant signal unless the CATV can bear what it called "the heavy burden"of showing that the signal could be received near or adjacent to the CATV community on an antenna of equivalent sophistication, another litigation-prone test.

The transmittal or retransmittal device that the court talked about in its formulation included either micro-wave or cable.

In the courts below, CBS argued that because

microwave is transmission through the air, its use makes CATV like a broadcaster, who also transmits through the air. But both courts below held that microwave is point to point transmission, equivalent to or substitute for cable or wire. And that issue of microwave is not in the petition here.

Nonetheless, the court below made the use of the transmittal device -- such as microwave or cable -- critical, overlooking the fact that a transmittal device was, in fact, used in Fortnightly cables and amplifier to bring the signal from the antenna to the community.

In support for this new judicial formulation, the court below, and CBS here, place central reliance on two sentences in this Court's opinion, United States v. Southwestern Cable.

That case involved the FCC's rule under the Communications Act requiring that CATV systems and the Grade B contour of a station receive the station and block out other signals, so-called "nonduplication" of the same program.

In upholding the FCC's regulatory authority, this Court described CATV systems as having one or both of two functions.

First, enhancing reception of local stations and, second, transmitting to subscribers the signals of stations beyond the reach of local antennae, which this

Court referred to as the"importation of distant signals."

This was said in a regulatory context, not copyright, and this Court specifically noted that the term, "distant signal" was given a specialized definition by the FCC in the context of the compulsory carriage rule.

"Distance" meant, "received beyond the Grade B contour of a station," a line calculated on an engineering assumption along which good reception is expected 90 percent of the time at 50 percent of the locations. It does not mark the limits of actual reception.

The court below recognized that this FCC definition of distant signals for regulatory purposes was, in its words, "unsuitable for copyright purposes."

Five of the 10 stations received by the Fortnightly CATV's were distant under the FCC rule, beyond the B contour. This is significant because Fortnightly and Southwestern were argued together and decided at virtually the same time.

If the FCC definition of distant signals had copyright significance, this Court would surely have said so. Instead, it held that the reception of signals, both distant and nondistant, under the FCC definition, was not a performance.

While the court below uses the word "distant" signal, the rule as constructed is not based on distance

nor on the FCC definition. In fact, it conflicts directly with the FCC definition.

The Durango station, received by the CATV in Farmington, which the court below held was distant, is only, in fact, 45 miles from Farmington. In Fortnightly, the Pittsburgh stations were 80 miles from the Clarksburg CATV systems.

A mountain blocks the reception of the Durango station in Farmington. The CATV receiving antenna is on the side, on the mesa, 40 miles away and the signal is brought to Farmington by a microwavelength licensed by the FCC. But Farmington is within the Grade B contour of the Durango station and, hence, it is local under the FCC compulsory carriage rule.

The station demanded and received compulsory carriage and nonduplication protection.

Under the new definition of the court below, the reception of the Durango station, by the Farmington CATV, which is required by the FCC, has become a performance, a consequence which CBS drily describes as "anomalous."

The court below said, without analysis, that in receiving distant signals, as it defined them, the CATV was functionally equivalent to a broadcaster. But it made no attempt to compare the functions of a CATV system and a broadcaster. Whether or not the signal is distant under the

rule of the court below, the CATV had nothing to do with procuring or originating the program, the broadcaster did.

The CATV system merely received what was broadcast and made the signals available instantaneously and without editing to its subscribers. This is exactly what the CATV did in Fortnightly.

CBS argues that the CATV selects stations to be received for their programming and, hence, selects programs. This is an echo of the attempt made in Fortnightly to confuse the selection of stations with the selection of programs.

In Fortnightly, the selection of stations was held not to be -- was held to be on the viewers' side and not a performance.

The same conclusion, we think, should be applicable here.

Moreover, the court overlooked the fact that in law and in the economics of the television industry, the CATV subscribers are in the audience coverage area of the television station.

The FCC has authority under its statute to fix the "areas or zones to be served by a station." It has done this by its general rules permitting CATV reception of stations, including the so-called "distant signals." But in this instance the FCC has acted more specifically. It has granted microwave licenses to receive these specific stations

by these specific CATV's to distribute the signals in this CATV community. This is a specific act by the Commission, exercising its authority to put these CATV subscribers in the zone or area to be served by the station.

In addition, in television industry economics, the CATV subscribers are included in the station's coverage area. Television is a mass medium and its economics turn on audience size, the selection of affiliates, the prices paid for -- charged to advertisers, the prices paid for programs, all turn on the size of the audience.

The audience is measured by the rating services, ARB and Neilsen are the two big ones, and these --

Q National advertisers may perhaps -- might be charged on the total exposure, but do you think some local advertiser on a San Francisco station really is going to pay for being advertised in Phoenix?

MR. BARNARD: Mr. Justice White, an advertiser will have to compete for television time against other advertisers who want that television time. The stations' rates are geared to the size of the stations' audience. If he wants to use the station, then he has to pay the station's rates which are tied directly into the station's audience.

He may not want to have his program or advertisement seen by somebody in Phoenix, or he may not want to have it seen by juveniles, or he may not want to have it seen by

women, but he pays for them because they are in the station's audience.

Q And if the station's audience is increased by CATV, they count that in their rates?

MR. BARNARD: The rates charged advertisers and the prices paid for programs, the Cost of Living Council, in the orders which it issued about this industry has said that both the rates charged advertisers and the prices paid for programs are not tied to costs but to the size of the audiences measured by the rating services. And the significant thing, your Honor, is that the distant station here that CBS talks most about, Los Angelese to FArmington, is -- has the Farmington CATV subscribers included in its coverage area in the -- and it is published in the volumes as they are published. It shows what the coverage area is and the record has got a number of proposals by the stations citing its CATV coverage including that of a Los Angeles station which talks about its CATV coverage in New Mexico.

When CBS decided to use television to exploit its works, it took the medium the way it is in fact and in law.

When CBS authorized the broadcast, it was broadcast under the words of the statute intinded to be received by the public. The statute says "the public," not just the part of the public CBS would like, for its own private

reasons, to be allowed to receive the broadcasts and in the industry economics, the subscribers were in the station's coverage area.

I now turn to the issue raised by the cross-petition: Whether the activity of the CATV station on separate channels, not used for broadcast reception so tainted the reception of the broadcasts as to convert that reception into a performance. Put in another way, is there a doctrine of infringement by analogy or, in the words of the court below, is there a spillover effect?

When a CATV originates the program and makes it available to suscribers, it performs the program. If copyrights are involved, Teleprompter secured a license and paid a royalty.

No CBS program was involved in any CATV origination. This is not pay tv. No extra or separate charge was made for the originated program. The origination by the CATV was on separate, nonbroadcast channels and in no way interfered with or interrupted the reception of the broadcasts.

There were two kinds of programming, so-called "automated programming" in which a camera scans clock and weather instruments, and sort of general interest programming.

The idea of originating programming occurred in the early 60's because there was an empty channel not used

for broadcast reception in the Farmington system and they conceived the notion of originating with the idea of attracting people to use the CATV service. It worked and in the relevant periods in this case, three of the five systems had general interest programming and automated programming, Farmington, Great Falls and New York.

The amount varied. Great Falls had two hours a day, five days a week and Upto in New York, 1971, 10 hours a day.

Now, the interconnection that Mr. Stewart mentioned is actually a form of origination. It was closed-circuit rights to the Ali-Liston fights which the systems got in 1964 and 1965. Three of the systems here carried those fights. No extra charge was made for that.

But with reference to -- I should say that all of this CATV origination was in conformity with the FCC rules and there was one sale of commercials. That occurred in 1971 in New York, New York CATV. That also was in conformity with the FCC rules.

CBS has proposed a new doctrine of totality by which a reception service can be converted from a non-performance into a performance. Because a broadcaster originates programs, sells commercials, is interconnected in networks, a CATV, it is said, which performs these functions is equivalent to a broadcaster and its entire reception

service thereby becomes a performance.

But the CATV systems perform none of the braodcaster functions that CBS talks about with reference to the broadcast works.

CBS also speaks about receiving distant signals by broadcasting stations. But here, also, the analogy is based on a confusion. A distant signal in this context means that a broadcasting station got its program from a distant source, i.e., a network. But the broadcaster remained responsible as the originator of the program and he performed it when he broadcast it. Moreover, there is no totality here. Two of the systems, Rawlins and Elmira, had only these automated programming devices, time and weather scan. New York did not receive distant signals. Its franchise required it to receive only New York stations.

Only one system sold commercials on originations, New York. Two events of interconnection that are talked about occurred in 1964 and 1965, months away or years away from the dates of the alleged infringement.

The courts below, we submit, were correct in holding that there is no spillover effect and that there is no doctrine of totality by analogy.

In conclusion, the FCC's regulatory plan for CATV is designed, among other things, to provide television service to households in small communities that is like the

service otherwise only residents in large metropolitan areas are able to get.

More than two million households now depend on CATV reception of distant signals for part of their television service. By emphasizing --

Q How do you define "distant signal?"

MR. BARNARD: I think there is no significance for distant signals in the copyright context.

Q Well, you just used the phrase. Now, what do you mean by it?

MR. BARNARD: I am using the phrase that they used distant signals in the context of the court below.

Q In other words, when Farmington -- when the Farmington CATV station went out and got KTTV, an independent station in Los Angeles, that was something that nobody in that area with his own television set, no matter what kind of an aerial he might have had, including one on a high hill, could have possibly received. Isn't that correct?

MR. BARNARD: That is correct, your Honor, but that may have had significance in the regulatory context but it seems to me it has no significance in the copyright context.

Q That is your argument, then.

MR. BARNARD: And, in addition, the FCC in that instance, KTTV, granted the license which put the CATV

subscribers in the coverage area.

Q I think it is KTTV. It is that independent station in Los Angeles.

MR. BARNARD: Yes, there are four of them, yes.

Q There are four of them, I think.

MR. BARNARD: That is correct, your Honor.

Q And how far away was KTTV from its broadcasting in Farmington?

MR. BARNARD: I think it is about 900 miles. I think the microwave network was a little longer because it wandered around, but I think airmiles it is about 900 miles.

Q Umn hmn.

MR. BARNARD: By emphasizing a prospective ruling only and by offering to waive damages, CBS is really asking this Court to turn its back on Fortnightly. Overruling or restricting CBS -- restricting Fortnightly as CBS asks will place in the hands of the large copyright owners like CBS the power to set the FCC CATV plan aside and to decide in their own private interest what television service the public and the United States should receive.

I reserve the remainder of my time, your Honor.

MR. CHIEF JUSTICE BURGER: It is four minutes.

MR. BARNARD: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Sokolow.

ORAL ARGUMENT OF

ASA D. SOKOLOW, ESQ.

MR. SOKOLOW: Mr. Chief Justice, Members of the Court:

The Court did agree, pursuant to our application, your Honor, that I could share five minutes of my half-hour time with my co-counsel, Mr. Graubard, who will address himself to the question of the syndication market and the effect of the importation of distant signals on copyright owners in that context, and the Court did grant that request, your Honor.

This lawsuit is not a lawsuit involving what Mr. Barnard calls "antenna technology." The ultimate issue here, as we see it, is whether the Copyright Act is going to be declared inoperative with respect to an entire industry because the cable television industry, as it exists today, is not the same industry that existed at the time of the Fortnightly decision.

With all due respect to the Court, one could say that the Fortnightly decision was outdated almost at the time that it was written. Fortnightly was decided in 1968. The complaints were filed, I believe, in 1960. The record was filled with facts prior to that time.

Fortnightly involved a system that did nothing more but go two and a half miles out of town, put up an

antenna on a long hill, big hill, and enhance the reception of television signals which were over the air in those communities, were intended to be received by the members of those communities, were, in fact, received by some members of the community with rooftop antenna and received by others with cooperative antennas.

That is all that the Fortnightly system did.

Now, at the time that the Fortnightly issue was before this Court, the Court was informed that there were then in existence other cable stations. They included Teleprompter. They were not back in the horse and buggy days of Fortnightly but which were importing distant signals hundreds of miles away who could not enter a particular market except for the activity of the cable system. These stations were originating programming.

As a matter of fact, the Teleprompter Cable Station in New York City originates more programming than WCBS-TV, our owned and operated affiliate in New York.

They were selling commercials and they were interconnecting internetworks.

Now, when the Fortnightly case was here, the question was, what was the performance? All that we have to guide ourselves your Honor, was existing thought. We thought that a performance consisted of a retransmission and a reproduction of a copyrighted work and in broadcasting

parlance, radio, I thought that the electronic transmission or retransmission of a program and its reception by the public constituted a performance. I thought the retransmitter and the receiver were both performers. But the receiver was not performing in public and therefore was not engaged in a public performance and he wasn't a copyright violator.

Q What if a television set were turned on in a bar and grill? It would, then, be a performance.

MR. SOKOLOW: It might very well, your Honor. And if I called someone into my home, in the Fortnightly case, your Honor, that differentiated between broadcasters and viewers.

Q Right.

MR. SOKOLOW: But I think that if I brought my new color television set into my home and charged everybody $10 --

Q No, even if you didn't charge them anything.

MR. SOKOLOW: If I -- If I invited a group in? It could be a public performance.

Q Right. And therefore, the person that sold you the television set could be a contributory infringer.

MR. SOKOLOW: I don't think so. I think the transmitter of that television programming was the performer. I think the receiver was the performer but that the

transmitter of the programming was performing in public, and for public and if you came in and invited people in, other than a social occasion --

Q Well, why would it be other than a social occasion?

MR. SOKOLOW: Well, if I charged people $10 to see the Washington Redskins --

Q What difference does that make, from the point of view of the Copyright Act?

MR. SOKOLOW: I think if you --

Q You would violate copyright if you have a -- put on a dramatic performance, whether or not you charge admission, don't you think?

MR. SOKOLOW: I don't know whether the courts would say that if I invited in two or three friends to watch the reception that would be public performance.

Q The question is, whether or not it would be in public.

MR. SOKOLOW: Yes.

Q But whether or not it is in public doesn't depend upon how much admission is charged, does it?

MR. SOKOLOW: At present it does not, your Honor.

Well, in any event, what the pre-Fortnightly rule was as far as a performance was concerned was, as we

understand Mr. Justice Fortis, who dissented in the Fortnightly case, was changed so that now we have got a functional test as to what a performance is, at least for this particular industry.

Now, Mr. Barnard says that we are making a frontal assault on the Fortnightly decision. I think that we are entitled to recover here and that there should be an infringement, whether the Fortnightly decision stands, whether it falls, whether it is limited to its own facts because if you read Fortnightly, Fortnightly says that you have to look at the functions; what place does cable television play in the total spectrum of the broadcasting industry? And it used such words as "viewers, passive beneficiaries on the viewers side of the line," as contrasted with "broadcasters."

Now, I can't imagine a television viewer or a passive beneficiary who imports distant signals or originates programming or who sells commercials or interconnects into a network. Now, I know who performs that kind of a function, broadcasting stations. WCBS-TV in New York City imports a local signal from a network broadcasting center and it originates programming and sells commercials and it is a broadcaster and so does the Teleprompter Cable Station in New York City. It receives those local signals. It originates programming and it is selling commercials.

Now, when the case was here, the Fortnightly case was here, Mr. Barnard did not talk to this Court about importation of distant signals. He said repeatedly in that oral argument that we are in the area where reception is possible off the air; we are in the area where reception would have been expected if it were not for the ruggedness of the area.

There was no talk about distant signals. He said that those areas were in the service area of the broadcast stations.

Now, what is involved in importation of distant signals? Taking that function, the fact of the matter is that the Court of Appeals didn't invent the term. The earth is round and television signals on the earth travel in straight lines. As a result, as an engineering matter, television signals normally don't travel more than 60 to 100 miles, although there are a few exceptions.

There was uncontradicted evidence in the record on that subject.

Now, furthermore, the FCC has always regarded it as a policy to have separate markets. They don't want superstations in New York City retransmitting to different areas and therefore, Los Angeles is a separate market and it is not Farmington.

Now, how did Farmington -- Teleprompter

Farmington -- get the Los Angeles stations?

Well, what it did was to procure and select the type of programming that it wanted, Mr. Justice Stewart. That is what you said in Fortnightly was a characteristic of a broadcaster.

There were some 113 other television stations as close to or closer to Farmington than Los Angeles but they wanted those Los Angeles stations because of the type of programming that they had. I am sure that they had sports. I am sure they had situation comedies. I am sure they had lots of things. To get those signals into Farmington there was no way of getting those signals into Farmington other than by this importation and Teleprompter got a 1,000-mile microwave transmission link in order to bring it in there and the Los Angeles stations did not intend that their programs go to Farmington and the copyright owners who testified at this trial said that they, when they licensed those independent stations at Los Angeles, they did not intend the programs to go to FArmington because they were looking to sell those programs again or to license them again for syndication in the Farmington area.

That is the subject on which Mr. Graubard will talk.

The Los Angeles supermarket or the used-car salesman who is sponsoring a program on the Los Angeles

station had no interest in Farmington. There has been an amicus brief submitted by MPAA which has some very interesting statistics on the subject that Mr. Justice White asked about.

The statics show that only 30 percent of the advertising on national television is national advertising; 70 percent of it is local advertising, spot advertising. Those kind of advertisers have no interest in this.

Mr. BArnard follows with the question of how the court below defined distance signals. Well, the court started out by defining local signals.

A local signal, it said, was something that could be received in a local community with a CATV antenna, for example, but you had to get a clear and good reception.

If you went 600 miles or 800 miles further, if you had to locate your antenna near the broadcasting station, miles and miles away, and you had to use microwave to bring it in there, then the court said the signal is presumptively distant.

It is costly to lay miles of cable and to go through this microwave apparatus. If Teleprompter didn't have to go 600 miles to Los Angeles, it would not have done it. So the court of appeals said that with respect, for example, to the Los Angeles stations which went 600 miles to Farmington, they were presumptively distant.

Noone would quarrel with that. The Salt Lake City stations were 400-odd miles away from Great Falls. No way that those signals could have gotten in there, no way that they could be called anything but distant. The Denver stations were something like 160 miles from Rawlins. No question about the fact that they were distant.

So that the dispute as to what the court really did here below, I think is rather meaningless. Mr. Barnard has referred to the fact that the FCC has recently refined its description. Instead of now talking just in terms of Grade A and Grade B contours, they now use the term "significant viewing." If you apply the significant viewing test, the current FCC test to the signals that were involved in our case, all with the exception of Durango, that the court of appeals found imported, then distant signals would be distant signals under current FCC definition.

Mr. Barnard disagrees with our arguing totality of services but I don't understand how we could talk about anything but totality if we are talking about function.

Teleprompter advertises that it imports distant signals. Then it attracts an audience and the audience listens to the Teleprompter originations and that new audience that is attracted to the originations turns on the commercials and listens to the commercials.

Now, what difference does it make that it is on a

different channel? The court of appeals said maybe there would be a different result if you were on a different channel.

Well, up in New York City where I am, that Teleprompter channel has four or five channels on which it is originating programming, or having public access programming or it is showing time and weather or it is running an A&P report. Every time you turn onto that other channel, you are not watching WCBS-TV. It is not enhancing the reception of the signal. It is blocking it out.

Now, that might be desirable because the FCC encourages this type of activity, but it blocks out our signal just as much as if they had run those originations on our channel to New York City.

Now, it is true that if Teleprompter were not there, channel two is competing with channel four and channel five and channel seven and the viewer has the same option. But every one of those competitors is paying copyright royalties. The only competitor that is not paying copyright royalties is Teleprompter.

And make no mistake about it. Teleprompter has said repeatedly in its public statements that it is a competitor. The Fortnightly system was no competitor of the broadcaster, at most it enhanced the reception. But the Teleprompter prospectusses which we have placed into

evidence here state that they are competitive with broadcasters for programming, for personnel, for sponsors and for contents.

Therefore, I think that each of these separate functions, one feeds on the other. I think that the Court --

Q Mr. Sololow, you said a moment ago that when people turn on the Teleprompter channels in New York, it blocks out channel two. I am not personally familiar to understand what you mean.

MR. SOKOLOW: Mr. Justice Rehnquist, let me explain it. We have, on the top of our television set, a converter which is provided by Teleprompter. It has all the usual channels plus the other particular channels, so --

Q Including two.

MR. SOKOLOW: Yes, of course, including two, which is WCBS-TV.

Q Which is required -- it is required to carry all the local stations.

MR. SOKOLOW: Definitely, sir. And it does carry all of the local stations and the UHF station is included and the educational channel and in addition, it has other origination channels.

All I was saying, Mr. Justice Rehnquist, is that if I turn that dial and I put on an origination channel and I'm watching the New York Knicks or the New York Rangers which are pretty popular sports, I am not watching channel

two. Now, I don't mind that if Teleprompter --

Q You are getting a better picture.

MR. SOKOLOW: Pardon?

Q You are getting a better picture of channel two.

MR. SOKOLOW: Well, I am a subscriber to a copyright. I hope that doesn't make me an infringer. But --

[Laughter.]

-- but so it only blocks it out in that sense.

Q What do you block out when you turn away from one broadcaster to another one?

MR. SOKOLOW: Yes, the only differentiation I was making, Mr. Justice Rehnquist, is that when -- if I don't have the color cable it is a question of free competition whether I turn on channel two or channel four. Let them pay their proper share of the origination of the programming and we'll all be happy.

Q Well, there is no question of paying whatever royalties are due with respect to any programming that they originate.

MR. SOKOLOW: I don't think that is correct. I did stipulate with Mr. Barnard that for the purpose of programming which they originate -- you know, this case was done mainly by stipulations, your Honor.

Q Yes, I know.

I do not believe that Teleprompter pays for the music that it uses and I think ASCAP has filed a brief amicus here, would really not concede that it is being paid by Teleprompter for the use of the music.

Q Well, is that at issue here? I thought that the only issue was as to its liabilities under the Copyright Act for what is originated by CBS?

MR. SOKOLOW: That is all I am concerned with, your Honor. I was just trying to answer your question as to whether or not they, in fact, paid copyright royalties to use the music.

Q No, I asked whether that was an issue in this case.

MR. SOKOLOW: No, it is not. As far as we are concerned, that ASCAP issue is a question between ASCAP and them. We have stipulated as far as this case is concerned that we will concede that they paid those.

Q That is what I thought.

MR. SOKOLOW: And now I'd like to have Mr. Graubard address himself to the question of syndication. I want to explain why I am doing that.

Syndication is a very important subject. CBS is not allowed by FCC law to engage in syndication any more so I thought that the argument would more appropriately come from --

Q Will you tell us what it is?

MR. SOKOLOW: Yes, what it involves, your Honor, is the production of television programming which may be shown initially on a network?

Q Umn hmn.

MR. SOKOLOW: Then, after it has been on the network for two or three times, it may be sold or licensed in another area and that is the process of syndication. There are various runs. In fact, sometimes, the program is not even created for network television. It is created to be sold in one market. But that is what Mr. Graubard's clients do and they are copyright owners.

MR. CHIEF JUSTICE BURGER: Mr. Graubard, you have somewhat more than the five minutes that your colleague promised you. You'll have until 2:46, if you will help me keep an eye on the clock.

MR. GRAUBARD: Thank you, sir.

ORAL ARGUMENT OF

SEYMOUR GRAUBARD, ESQ.

MR. GRAUBARD: Mr. Chief Justice. May it please the Court:

I am speaking for those copyright owners who are independent producers and who license their works to television broadcasters and to others. Thus, Dena Corporation, which I represent directly, is owned by Danny Kaye, an actor

and by his wife, Sylvia Fineke, a composer and lyricist. They do not broadcast themselves, any of their productions. They license their productions. So do the other named co-plaintiffs in this action and so do many others, including producers of motion pictures.

I am also speaking for the authors, actors, directors, composers and musicians who sell their creative output to the producers.

Under their Guild contracts, they receive, in addition to their compensation for the initial performance of their works, stipulated percentages of the amounts paid for reruns of the programs.

Most television programs, even if they are fortunate enough to be rewarded with a network broadcast, do not recover their costs through that initial broadcast. The profits that may be earned generally come from the additional showings or reruns that follow the initial network performance.

Both the producers and the artists who create these programs rely on these reruns for their ultimate compensation. Now, the term --

Q Mr. Graubard, this includes the actors who a members of a cast of --

MR. GRAUBARD: Yes, sir.

Q -- either a movie or one made exclusively for

tv and these are the so-called "residuals," isn't that right?

MR. GRAUBARD: Yes, sir, that is correct.

Q They have come in recently. The old-time movies, unfortunately, those old-time stars don't get a nickel, do they, when they run a rerun?

MR. GRAUBARD: That's right. As a matter of fact, in the old days, even the producers --

Q Right --

MR. GRAUBARD: -- failed to --

Q -- to have residuals.

MR. GRAUBARD: -- realize the values of the residuals.

Q The residuals, right.

MR. GRAUBARD: That is no longer the case today.

Q No.

MR. GRAUBARD: Mr. Sokolow has explained the meaning of the term "syndication." Generally speaking, once the intial performance is over, the program owner licenses individual television stations to perform the work or the program and these television stations obtain their own advertising revenues for the programs. As some members of this Court may have noticed, some of these reruns seem to go on forever and there is a different scale of compensation for the artists depending upon how many reruns there are.

Now,obviously, a program has a greater potential

audience and a greater sales value to licensing if it has not previously been shown in the local area.

Many network broadcasts that are initially licensed are limited to certain regions. No broadcasts, through broadcasting stations, reach the entire nation. By importing distant signals, the CATV systems injure the market for these programs that are to be shown initially in the areas not previously fortunate enough to have had the benefit of the initial performance.

Thus, the cable performance in this distant area is frequently an exclusive first run for which the copyright owners receive nothing.

Moreover, the copyright owner must then deal in these areas for license fees based on second showings rather than on initial performances.

To the extent that the copyright owners receive a smaller amount for a second run, the creative artists similarly suffer.

On the other hand, to the extent that the cable systems would pay a reasonable royalty for a license to perform programs received by distant signal, the copyright owners and the artists would benefit.

We believe that this is a clear case for the enforcement of the Copyright Law whose purpose and design were to reward the creators of programs for the performance of

their works.

It follows that the copyright owners and their associated creative artists also support the contention that cable systems that function as broadcasters are actually performing the copyrighted works and should pay royalties for the use they make of these works.

Now, we are not as concerned, frankly, at this time about classifying as broadcasters those cable stations that have innovative programs, that have interconnection, that draw advertising.

We independents and artists know that cable television today is still growing. By the end of the decade it is predicted that approximately one-half the families of the United States with television sets will be linked to cable. It is also predicted, and the Court may find this amply demonstrated in the briefs before it, that pay television on a broad scale will be a fact, that there may be two-way connections between cable stations and their subscribers and, in short, that the cable stations are progressively becoming a more and more important communication element in our society.

If this Court is going to make law in regard to the function of a cable television set today, not as in Fortnightly, a pair of giant rabbit ears which performed none of these functions, but if it is going to view cable

television as it is currently developing, as it has developed since Fortnightly, and as it is well on the road to become in the future, I believe the Court will find that cable television projectors or stations will be major competitors, if not the major competitor of the broadcasters.

To give these stations the unfair competitive advantage of being able to perform certain works without the payment of royalties is very bad, of course, for CBS.

Q Well, you are begging the question when you say they are performing.

MR. GRAUBARD: I recognize that, your Honor.

Q That is like saying --

MR. GRAUBARD: May I say, correct myself and say I hope the Court will call that a performance. I will correct myself by saying "to use these programs." To use these programs means potential great injury for the television broadcasters.

Q As I recall, a television set uses the programs and if it is not done in private, there you could make the argument that that is a violation, every time he turns on his set, of the copyright laws, if it is in public.

MR. GRAUBARD: Your Honor, I would not personally make that argument.

Q Well, it can be made, just the same way you are making this one.

MR. GRAUBARD: I was --

Q Would he be doing that for commercial purposes?

MR. GRAUBARD: Yes, your Honor.

Q The listener?

MR. GRAUBARD: Oh, you mean in the home?

Q Playing it in his home, turning on the television set. He isn't selling that to anybody, is he?

MR. GRAUBARD: He is not, in any case, before this Court.

Q The statute doesn't say anyting at all about doing it for commercial purposes or noncommercial.

MR. GRAUBARD: No, sir. I have every confidence --

Q It is talking about a performance in public, isn't it?

MR. GRAUBARD: That is right, sir. I have every confidence that if that particular question, that issue reached this Court, at some future time, this Court would deal with it accordingly, as it saw fit.

I am not making any advocacy of a position which I believe at the present time to be extreme. Rather, I am stating that I believe in the future and it is becoming increasingly obvious today, the owners of copyright will be losing revenues if the cable stations are not going to be

held liable to pay the copyright owners proper license fees, just as do the television stations.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Graubard.

Mr. Barnard?

Q Before you sit down, Mr. Graubard, as I remember, the Fortnightly case was argued and decided back in 1967, 1968. I think it had originated in 1960.

MR. GRAUBARD: That is right, sir.

Q We were told at that time that this was a matter in the Congress and it was about ready to be settled in the Congress, there was going to be legislation. I don't think -- apparently, all we still have is the statute enacted back in 1909, long before anybody dreamed of television itself, let alone CATV.

What is the status now with the situation in Congress? Because this, of course, is the basic problem in this case, is we all know is trying to apply a 1909 statute to a technological revolution.

MR. GRAUBARD: Well, it did appear before the Fortnightly decision came down, that there was likely to be legislation. In fact, it appeared that there was likely to be legislation when this particular case was on the way up. But after the district court opinion was rendered, the CATV

people, at any rate, lost interest in the compromise legislation that was pending.

Now, your Honor, I have -- there is nothing in the record in regard to this and I am just attempting to answer your question directly.

Q Well, Congress itself might have some interest. Will they only move if the CATV people are interested?

MR. GRAUBARD: I could not answer that. Perhaps Mr. Barnard can.

I don't know, sir.

Q Is there a bill now in the Congress?

MR. GRAUBARD: Yes, sir, and all I can say is --

Q Is it before a committee? What is the status of it?

MR. GRAUBARD: I am told that if the CATV people are motivated by what eventuates from this case, there is likely to be legislation.

Q Have there been committee hearings?

MR. GRAUBARD: There have been committee hearings, yes, sir.

Q In both houses?

MR. GRAUBARD: In the House of Representatives, certainly.

Q And in the Senate, too?

MR. GRAUBARD: I don't believe there have been any in the Senate.

Q Anything reported out of a committee in either house?

MR. GRAUBARD: I think they are awaiting final determination of these issues, as far as this point is concerned.

Q Awaiting what?

MR. GRAUBARD: They are awaiting a resolution of issues between --

Q Well, what difference would that make to legislators, I mean, who are drafting a new statute?

MR. GRAUBARD: Mr. Justice White, you are completely correct. I have no excuse or alibi to offer for what Congress has done or is contemplating doing and --

[Laughter.]

Q But you think they are waiting?

MR. GRAUBARD: Perhaps they have greater reliance on the wisdom of this Court than on their own means. I have no other reason to offer.

Q That's very nice.

MR. GRAUBARD: Thank you, sir.

Q All we have is a 1909 statute to guide us.

MR. GRAUBARD: I recognize that.

MR. BARNARD: I don't think I can make a full

report --

MR. CHIEF JUSTICE BURGER: Mr. Barnard, you have five minutes, now.

REBUTTAL ARGUMENT OF

ROBERT. C. BARNARD, ESQ.

MR. BARNARD: Thank you. I don't believe that -- I believe that a statute has been reported out by Senate subcommittee and is pending action on the Senate side.

There have been, I believe, hearings on both sides.

Q Has it been reported out by sub-committee or has it been reported out by the whole committee?

MR. BARNARD: As I understand it, sir, it has been reported out by subcommittee to the full committee.

Q Umn hmn, and what would that bill provide?

MR. BARNARD: It has got a fairly complicated set of rules that have, among other things, compulsory licenses. They have provisions for payments. They have a whole set of standards as to which CATV systems would apply to. I say to the Court these in very general terms because I am not involved in the legislative fight and I know it only incidentally but I would suggest to the Court that what Mr. Graubard has said and what CBS has also intimated as well as one of the other amici, that the Court should decide against CATV to motivate the situation so that there is

legislation, hardly places the proper emphasis on the issue in front of this Court. The issue in front of this Court is not to motivate legislation, it is to decide what is the meaning of the word "performance," and the statute which is in front of the Court.

May I comment on one or two of the points that Mr. Sokolow made in the course of his argument?

He talked about how much origination CATV does and compared the origination by the New York CATV with WCBS-New York. In fact, WCBS-New York, under the rules, originates everything it broadcasts, whether it gets it from the network or not. It is the responsible broadcaster and the responsible originator.

Mr. Sokolow said that we transmit -- we engage in transmission and retransmission. We are engaged in handling electromagnetic energy. We do not handle the sights and sounds of the programs in any way. We receive a signal. We deliver the signal to our subscribers' homes. If he chooses to view the program, he turns on his set. If he doesn't, he doesn't.

Otherwise, there is no sight or sound involved in this.

Mr. Sokolow talked about whether we were active or passive. This Court, in Fortnightly, said that the CATV systems were active, they were active on the side of the

viewer. He said that in Fortnightly, it was intended that these programs be viewed by -- broadcast by the Pittsburgh stations -- be viewed in Clarksburg and Fairmount.

The Court of Appeals here said they recognized that the programs would not have been viewed in Clarksburg and Fairmount, but for the CATV and in Fortnightly, the copyright owner made exactly the same argument as made here, that his market in Clarksburg, where there was a television station, was being disturbed by the reception of the CATV programs.

In Fortnightly, we urged that the CATV subscribers were in the coverage area of the stations. I think that our suscribers now are in the coverage area of the stations. They are in the coverage area of the stations by the industry's economics and by the actions --

Q Well, by reason of your activities, they are, wouldn't you say?

MR. BARNARD: And the industry's economics were taken into account as part of the station's audience, which it uses as a basis for its rates and the prices which are paid for its programs.

He said that the Los Angeles station does not intend that its signal be received in Farmington, but, in fact, it exploits that fact by putting out sales literature saying that you can get reception in New Mexico by subscribing

to this system. In the record, there is a sales brochure from one of the stations. The same is true of the Great Falls --

Q Who is selling it?

MR. BARNARD: A station in Los Angeles.

Q This is a CATV trying to sell it to --

MR. BARNARD: No, it is a station in Los Angeles trying to sell advertisers, put out a sales brochure in which it bragged about its CATV coverage.

Q I see.

MR. BARNARD: Including the coverage in New Mexico.

Q I see, and the CATV also advertises similarly, doesn't it? If you subscribe to our service, you'll get Los Angeles stations, naturally.

MR. BARNARD: Yes, we advertise what we provide to our subscribers, whatever it is we provide, we advertise.

Q But your point is, that the Los Angeles broadcaster sells to advertisers on the basis of, if you advertise with us, your message will be heard over in Farmington and New Mexico.

MR. BARNARD: That is correct. That is correct. That is correct.

Q I see.

MR. BARNARD: And there may be some advertisers

that don't want that, but he has to compete with advertisers that do want that, because that is the basis on which the --

Q How many Los Angeles advertisers are there that want their message heard in Farmington and New Mexico?

MR. BARNARD: There may be a great many. There may be a great many and there may be people who engage in mail service. There are a lot of --

Q Many people want Farmington people to come to Los Angeles.

[Laughter.]

MR. BARNARD: There are a lot of organizations that sell by mail.

There are a lot of people who would want it.

Q Who are advertising on television?

MR. BARNARD: Sure. People who sell records. People who have mailorder services. People who advertise institutionally. Sure.

MR. CHIEF JUSTICE BURGER: I think your time is up now, Mr. Barnard.

Thank you, gentlemen, the case is submitted.

[Whereupon, at 2:50 o'clock p.m., the case was submitted.]