Mandated Access to Prc

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Conference on the 1992 Cable TV Act

The CITI conference organizers have asked me to address the constitutionality of sections 12 and 19 of the new Cable Television Act. Speaking quite generally, these provisions purport to promote competition in the distribution of programming by prohibiting certain exclusive licenses and by prohibiting certain behaviors that could lead to exclusive licenses.

These provisions of the Cable Act might be called "mandated access" or "must-license" provisions, for they aim to make 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. The provisions thus necessarily interfere with ownership rights that the proprietors of copyright in the affected programs would otherwise have to control the circumstances through which their programs-- their "speech"-- will be disseminated. In legal terms, some observers see these "must license" sections of

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the Act as raising problems under the Constitution's Fifth Amendment "takings" clause and under the First Amendment's protection for free speech. That both the Fifth and First Amendments might be called upon simultaneously is no surprise, for each is crucial to the protection of the dignity of the individual against a potentially overreaching state.

My focus will be on whether these or other Constitutional provisions indeed invalidate those parts of the 1992 Cable Act that erode the exclusive rights Congress granted in the 1976 Copyright Act. I will interperse this with discussion of more theoretic issues.[1]

But first, a bit of background. The 1976 Copyright Act was enacted pursuant to Art.I, Cl.8, of the Constitution, which empowers Congress to grant authors and inventors "the exclusive right" in their writings and inventions. The Constitution mentions only one explicit limitation on these exclusive rights, namely, that the Congressional grant is to be for "limited times". Section 106 of today's Copyright Act[2] accordingly grants an author several exclusive rights, among them the exclusive right to reproduce and publicly perform her creation, and to authorize others to do so. On the surface of things, then, the Cable Act looks like it might be making an alteration in the copyright law that is inconsistent

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[1]The latter will be supplemented in my oral remarks.

[2]17 U.S.C. section 106.

with the Constitutional foundations of Congressional copyright authority.

Further, our cultural attitudes toward exclusivity in property ownership implicate our beliefs in autonomy and individualism. Being able to say "no" when someone wants to buy your family home -- regardless of how much the potential buyer is offering for it -- vindicates our culture's respect for peoples' different emotional and even sentimental valuations for the things they own. Sure, we acknowledge that our system sometimes allows forced sales under eminent domain because of the acknowledged difficulty of putting together freeways and other big governmental projects. But being forced to sell, even at a good price, is something we all dread.

So from both a legal and cultural perspective, I can understand why the must-sell provisions of the Cable Act might send shivers up a programming executive's spine. But I will conclude that the Act raises no significant problems either as a matter of Constitutional doctrine, or as a matter of property and free speech theory.

Of course, I shall not address whether or not Congress's judgment was *empirically* flawed; I do not have the data to address adequately the question of whether or not an erosion of exclusivity was in fact necessary to encourage programming diversity and competition. Rather, my task here will be to tell you why the Supreme Court is highly unlikely to upset the decisions Congress made on this question of mandated access, and why it makes sense

that this part of the Cable Act could stand as valid.

I. Article I of the Constitution

Turning first to the argument drawn from the Constitution's copyright and patent clause,[3] it is true that 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.[4]

For example, the first United States copyright statute (1790) merely gave copyright proprietors exclusive rights to "print, reprint and vend" their works-- they had *no* exclusive rights over public performance.[5] Note, ironically, that these are the kinds of rights that most concern the players in today's cable industry. In 1790, public performance rights were nonexclusively shared by all.

The first English copyright statute even 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

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[3]I am indebted to Ann Gowen for flagging this issue.

[4]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 ∞.

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

governmentally-authorized officials were empowered to "settle the price" of books in a manner "as to them shall seem Just and Reasonable."[6] Admittedly, the first American statute did not contain such a "mandated access" provision, but 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.[7] 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, they can make their own rendition of the song on their own record-- at a set license price and without needing the consent of the song's copyright proprietor.[8] At least one of the reasons the 1909 Congress expressed for adopting the compulsory license for phonograph records was a fear of monopoly and a desire to foster competition,[9] and courts have since often adopted compulsory licenses as a response to antitrust

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

[7] 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.

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

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

problems in both patent[10] and copyright.[11] Congress articulated analogous pro-competitive motives in passing the 1992 Cable Act.

All of the above indicates that the Supreme Court would be most unlikely to hold that Congress is disempowered from giving anything less than complete exclusivity to a copyright proprietor, particularly in a context implicating intra-industry competitiveness and antitrust policy. As for the literal words used by the Constitution in Article I, namely "exclusive right," note that even under the Cable Act an affected copyright proprietor *has* a number of exclusive rights-- one of which is *an exclusive right to the license fees* that distributors will pay, both under the mandated access provisions and in the regular market. For all these reasons the copyright and patent clause of the Constitution would not seem to provide a basis for attacking the mandated-access provisions of the Cable Act.

II. Fifth Amendment

Yet an exclusive right to receive money is undeniably a lesser right than the exclusive right to say "no" to any potential licensee for any reason. I therefore turn to considering whether the loss of the latter right violates the Fifth Amendment provision that the government shall take no private property without just

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

[11]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.)

compensation. The programming provisions, in prohibiting the execution of certain exclusive contracts between programmers and operators, raise two intriguing doctrinal issues. First, can the abrogation of an "exclusion" right by itself be considered a "taking" of property under the Fifth Amendment? Second, if it can be called a taking, will the compensation paid to programmers by purchasers be adequate to eliminate Constitutional infirmity?

Using the language of an influential article by Guido Calabresi and Douglas Melamed,[12] 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" and (insofar as the Act's provisions apply) leave programmers protected only by a "liability" rule: they lose their veto power, though they retain their right to be paid for the use of their product by purchasers. The question then becomes, should programmers be specially compensated for the loss of the more powerful property rule, or, as in many other areas of law, does a liability rule provide adequate

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

compensation for the use of their property by others?

Doctrinally, it's very hard to predict exactly what approach the Supreme Court would take if the provisions were challenged on Fifth Amendment grounds. Nevertheless, I have real doubts that the "must license" provisions of the Cable Act would be considered a taking; even if they were, this taking would certainly be permissible given the compensation envisaged by the Act.

The Court has a broad range of legal standards from which to choose in determining whether a "taking" has occurred. At one extreme is the 1982 case of *Loretto v. Teleprompter Manhattan CATV Corp.*, involving a cable box permanently affixed to an apartment building. In that case the Court held that because the abrogation of the right of exclusion was a "permanent physical occupation" (426), it was irrelevant that the economic impact on the property owner was de minimis: a taking had occurred nevertheless. A very different approach was used in the 1980 case of *Pruneyard Shopping Center v. Robins*, where an abrogation of the right of exclusion 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. Because the economic impact on mall owners was minimal -- there had been no interference with "reasonable investment backed expectations" -- the court held that no taking had occurred.

It seems more likely that in a must-sell case the Court would follow the reasoning of *Pruneyard*, holding that despite abrogation

of an owner's exclusion right, no "taking" will be found to occur unless the statute interfes with reasonable, investment-backed economic expectations. On this view, it is unlikely that the must-sell provisions could even be considered a taking because the fair compensation package could likely be structured to avoid the constitutional problem by rendering the erosion of economic interest *de minimis*.

But what if the abrogation of the owner's "property rule" right to say "no" was in fact considered a taking? In the 1984 case of *Ruckleshaus v. Monsanto Co.*, the Supreme Court decided its only Fifth Amendment takings case concerning intellectual property. There the 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. Since the Cable Act provides for competitors to pay compensation when they obtain licenses through its provisions, it is hard to see any Fifth Amendment action remaining.

What if the change from "property rule" to "liability rule" protection is itself something that should be compensated, and would not be included in the competitors' license payments? Even if that unlikely event, the Tucker Act presumably remains available for the affected copyright holders to use to bring suit for any

remaining compensation. I say this is an "unlikely" event because, in the section 1983 context, the Court has ruled that when Constitutional rights are violated, only compensatory damages can be obtained, and that the abstract violation of a Constitutional right, standing alone, warrants no compensation.[13] The abstract transformation of the nature of the right is thus unlikely to be separately compensable.

Further, it is unlikely that the "property rule" right would be held to be inalienable, or not subject to the takings power. The Court in the *Monsanto* case indicated that governmental abrogation of intellectual property exclusivity that served competitors' interests could be constitutionally considered to be serving "public purposes"[14] and as such could not be enjoined.[15]

The suggestion that what might be termed "compulsory licenses to use" should be granted has gained increasing currency, both in

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[13]See, e.g., Carey.

[14]This case indicated 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. Also see *Midkiff*.

[15]Moreover, the *Monsanto* Court stated that where, as in that case, the taking was accomplished for a "public purpose" (at 1014), no injunction would be available in advance to prohibit the taking (at 1016) -- 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.

intellectual property law[16] and in the common law. For example, in the realm of tort law, the New York courts in the *Boomer* case 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" their right to use the air to the cement plant.

A pressing jurisprudential issue is the question of how important a role property rule vetoes should play in our current system. Under an economic approach to law, the veto is analyzed in terms of its utilitarian function. That is, if an owner has the right to veto other's use of her property, she can negotiate a higher price with potential buyers than she could if both knew that the government could force her to sell at some set price. According to the Calabresi and Melamed view to which I alluded earlier, the price at which the parties arrive by bargaining, given the possibility of a veto, will involve less fakery and be more accurate than a price set by a distant government decision maker. Nevertheless, from an economic perspective, little more than such administrative and efficiency concerns counsel against abrogating

[16]See, e.g., Judge Oakes's article, *Copyrights and Copyremedies*.

"property rules".

By contrast, from the point of view of critics concerned with individual autonomy, the right to say "no" -- to veto the licensing of one's property -- is crucial to dignity.[17] So far, the Supreme Court precedent does not place a strong emphasis on this dignity interest -- particularly in contexts like the PruneYard shopping mall -- and this seems plausible, where the property involved is corporate. A very different analysis should perhaps be applied to takings involving, for example, an individual's home,[18] and a concern for dignity and autonomy may explain the special treatment one sees being given to physical takings in the *Teleprompter* case.[19] But these issues of personhood do not seem to be signicantly implicated by the Cable Act's provisions. An individual author-- one who has not assigned her copyright to a corporate entity-- seems to be guaranteed more rather than less autonomy by the Act, particularly in section 12.[20]

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[17]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.

[18]See for example Peggy Radin, "Property as Personhood," STAN.L.REV.

[19]Also see Frank Michelman, *Property, Utility and Fairness,* HARV.L.REV., for examination of the ways that physical invasion can stand as "proxy" for a variety of profound concerns.

[20]Cf., the provisions against "coercion."

Another question that the must-license provisions raise in relation to the Fifth Amendment is whether government can condition the grant of a property right on the owner's allowing certain uses by others. The 1992 case of *Lucas v. South Carolina Coastal Council* suggests that it may, provided that the limitation on exclusivity is part of citizens' "historic understandings" regarding the content of the right.

The legislative "understanding" of the right has been various over time; though the statutes have continually expanded the ownership interest, the statute itself does not to provide a stable "historic" or normative baseline. If it did, the rights given to the public in 1790 have been "taken" by the expansion of the owners' rights in years thereafter![21]

As for the common law, the common law of restitution is the area of common law most analogous to intellectual property. My analysis of that doctrine suggests that at most, authors of copyrighted material have a "natural" or "common law" right to compensation-- not to control via injunctive relif.[22]

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[21]That is, for every "owner's" baseline inherent in a statutory scheme, there is a corresponding "public" baseline as well. To the extent the allocations between public and private right change-- as they have in copyright law-- they therefore cannot be used to specify constitutional baselines.

I am indebted to Rob Merges here.

[22]Wendy J. Gordon, *On Owning Information,* VA. L. REV.; Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution and Intellectual Property,* J.LEG.STUD.

I turn now to another issue: whether the government can redefine property rights in order to evade the Fifth Amendment. Here we have two federal statutes, one (the Copyright Act) granting a property interest, and the other (the Cable Act) modifying them. This is unlike the usual compulsory license situation, in which the license is born at the same time as the original right. Nevertheless, the fact that the Cable Act involves a two-step process is not problematic -- even if the must-sell provisions are considered to accomplish an abrogation rather than a mere redefinition I see no problem for the reasons just discussed. Compensation is provided.

III. First Amendment

But even if the Fifth Amendment poses no problems for the mandated-access provisions of the new Cable Act, what about the First Amendment? If one were to challenge these provisions on free speech grounds, presumably the difficulty with the statute would be that it could be applied to require a sharing of programming material. Scholars tend to assume that the First Amendment embraces a right to keep silent as well as a right to speak. This right to keep silent may appear inconsistent with the mandated-access provisions of the Cable Act because, under these provisions, some owners of copyrighted material will likely be unable to prevent their material from "speaking" through media and to audiences and in contexts that the copyright owners cannot control.

But it is difficult to see such a First Amendment challenge

being given much credence. First of all, no actual "silence" is at issue.[23] Presumably the programming for which extra licenses will be sought under the statute will be programs already planned for distribution by the copyright owner's *preferred* licensee, so that--as in the compulsory license for phonograph records mentioned above-- the party seeking access through legal compulsion will be a later distributor rather than one seeking to usurp first distribution rights.[24]

Second, in these Cable Act provisions the government appears not to be engaging in content-oriented discrimination. Admittedly, it is the more popular programming which outsiders will seek to license, but that is a case of private parties taking advantage of generally-applicable limitations on property rights. Compulsory licenses have always worked this way without serious Constitutional infirmity.

Third, and most importantly, the circumstances here implicate the public's right to speak and hear even more than a copyright

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[23]Even if it were, it is unclear how much weight should be given to the issue; recall that we are focusing on commercially-motivated corporate "speakers" who aim at disclosure, not on individual diarists and the like. Even as to the latter group, who have perhaps the best claim to a strong "right to keep silent", there may not be an absolute right of first publication. Thus, Congress recently amended the Copyright Act to make clear that the unpublished nature of a given work does not conclusively bar strangers from making the first public use of the work. 17 U.S.C. section 107 (last sentence).

[24]Presumably an exclusive license would be upheld against an outside license-seeker who wanted to be the *first* to distribute.

owner's right to keep silent. The First Amendment generally works to *encourage* dissemination of speech rather than to discourage it. The remedy for bad speech, for example, is said to be "more speech." That one's ideas will be repeated in new contexts to new audiencies, and subjected to scrutiny or even ridicule, is part of the very point of the First Amendment.

It is a bit surprising that the First Amendment is called upon by persons opposed to the must-license provisions. The Amendment's free speech principles are called upon far less often by persons seeking to broaden copyright's exclusivity than by persons arguing to *limit* the reach of intellectual property rights. After all, a copyright owner's rights of exclusion must be cabined lest they deprive members of the public of their own rights to speak.[25]

Nevertheless, conceivably the First Amendment can function on the pro-enforcement as well as the anti-enforcement sides of copyright debates. The Supreme Court has noted that "[T]he Framers intended copyright itself to be the engine of free epxression."[26]

Yet we should bear in mind *how* copyright functions as the engine of free expression: it promotes speech by, in the Court's own words, creating, simply, a "marketable right" through which a

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[25]See generally Wendy Gordon, *A Property Right in Self-Expression: Equality, Individualism and the Natural Law of Intellectual Property*, YALE L.J. (1993), and the sources cited therein.

[26]Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 at = (1985).

copyright owner can obtain compensation.[27] The Cable Act does not eliminate compensation to copyright owners.

Would a greater or lesser degree of exclusivity result a greater sum total of speech? No one right now can say. Enforcing copyright may restrain speech for the short term, while for the long term enforcing exclusive copyrights can increase the stock of speech in the world. These tendencies, pulling in opposing directions, raise imposing empirical questions in any case where we want to know if more or less exclusivity will better increase the amount of speech in the world. There is nothing I know of in First Amendment jurisprudence that would forbid Congress from making its own empirical judgment about the degree of exclusivity that might best serve free speech interests in a given circumstance.

Also, the copyright law has had a long tradition of allowing "fair use" of others' intellectual property.[28] Where exclusivity of use is inconsistent with the public interest, the Court has held that the copyright "owner" must yield her right to use to another -- without compensation. This emphasizes that free speech interests can at least sometimes be served by abrogating the exclusive rights of the copyright holder. But most importantly, if the overall

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[27] "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." Id.

[28] "Fair use" is currently recognized in 17 U.S.C. section 107, and has been approvingly applied in numerous judicial opinions on both the Supreme Court and lower court levels.

impact on free speech interests of modifying exclusivity involves complex empirical analysis -- as is certainly the case with the must-sell provisions -- a Court would probably decide that a presumption of correctness should lie with the legislature, which is better equipped to handle such investigations.

Conclusion

In sum, I can see why the "must-license" or "mandated-access" rules would cause consternation. They raise two very important problems for the temper of our times: first, to what extent the dignity of the individual will matter, when opposed to governmental power; and second, the extent to which we're going to use an economic calculus rather than one which takes into account this individual dignity. Nevertheless, although the Cable Act provisions tickle our reactions, I do not see that they raise significant problems on either front.