

**RETRANSMISSION CONSENT,
CABLE FRANCHISING & MARKET FAILURE:**

**A Case Study Analysis
Of WOOD-TV 8 vs. Cablevision of Michigan**

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Abstract

In October 1993, cable television subscribers in the city of Kalamazoo, Michigan were notified by Grand Rapids based NBC affiliate WOOD-TV 8 that they would no longer be able to receive Channel 8 on Cablevision of Michigan. WOOD-TV's parent company, Lin Broadcasting, indicated that Cablevision Systems Corp. had failed to fulfill its obligations under the terms of Retransmission Consent as defined in the Cable Television Consumer Protection and Competition Act of 1992. The case of WOOD-TV 8 v. Cablevision of Michigan provides highly illustrative example of market failure since Kalamazoo's Cablevision subscribers have been without an NBC affiliate since January 1997 as well as other times in the intervening years. This paper will consider the causes and consequences of Retransmission Consent and its direct impact on the negotiations between Cablevision of Michigan and WOOD-TV 8 in the city of Kalamazoo, Michigan. This paper will also consider the franchise agreement process as defined in the Cable Communications Policy Act of 1984 and examine the intended consequences that result from franchise fee obligations. As this case study will show, Cablevision of Michigan, WOOD-TV 8 and the city of Kalamazoo have all directly contributed to market failure in the provision of broadcast and cable television service to the community.

We have an arrogant, greedy broadcast station that
Is demanding cash from the public. They're using the
Cable operator as a tax collector for themselves...

Cablevision of Michigan

Cablevision has called us greedy but yet they have
The audacity to go before they city commission and ask
For a rate increase for less service...

WOOD-TV 8, Lin Broadcasting

INTRODUCTION

In October 1993, cable television subscribers in the city of Kalamazoo, Michigan were notified by Grand Rapids based NBC affiliate WOOD-TV (channel 8) that they would no longer be able to receive Channel 8 on Cablevision of Michigan. WOOD-TV's parent company, Lin Broadcasting, indicated that Cablevision Systems Corp. had failed to fulfill its obligations under the terms of Retransmission Consent as defined in the Cable Television Consumer Protection and Competition Act of 1992 (hereafter, Cable Act of 1992). As such, it was requesting that Cablevision remove WOOD-TV 8 from its programming lineup until such time as an agreement could be made.

Cablevision, for its part, wanted to keep WOOD-TV 8 on its system, but was unprepared to meet any form of compensatory agreement. Shortly thereafter, Kalamazoo's 51,700 cable subscribers were unable to receive WOOD-TV 8. The first blackout lasted a total of four months and was settled just days prior to the 1994 Super Bowl which was being televised on NBC. At the time, Kalamazoo mayor, Edward Annen, was able to successfully pressure both sides into reaching an agreement. Under the terms of the 1994 agreement, WOOD-TV would allow its signal to be carried by Cablevision in exchange for replaying the local news from WOTV-TV (channel 41) on Cablevision's weather channel. WOOD-TV and WOTV-TV are both managed by Rhode Island based, Lin Television Corporation.

The agreement lasted until January 1995 when WOOD-TV 8, once again, discontinued service claiming that none of the agreed upon terms had been put into effect. This time, the blackout lasted a total of nine days before Cablevision restored service in opposition to WOOD-TV. According to Cablevision spokesman, Jim Evangelista, "We believe we have every legal right and obligation to carry WOOD-TV and will continue to do so. In its position, Cablevision claimed that WOOD-TV 8 had violated federal law thus entitling it to restore WOOD-TV 8's signal.

Cablevision was soundly criticized by WOOD-TV 8 for taking the signal without permission. In response, Cablevision spokesman, Benson Brundage stated unequivocally:

"Cablevision has never, nor will it ever pay cash for free TV. It is our hope that they will drop their cash for carriage terms again. Cablevision's hard line position was in keeping with the company's corporate policy that a cash payment to WOOD-TV 8 would open up the doors to similar type requests from other broadcast stations in different markets where Cablevision does business. Thus, Cablevision resumed WOOD-TV 8's signal after nine days of interrupted service.

Immediately thereafter, WOOD-TV 8 pursued legal action while the FCC was asked to consider WOOD-TV 8's request for compensation under the terms of Retransmission Consent. Cablevision was later notified that they were legally required to remove WOOD-TV 8 from their programming lineup. Negotiations continued once again between Cablevision and WOOD-TV 8 throughout the month of December 1996 but to no avail. After repeated requests for extensions, WOOD-TV 8 General Manager, Scott Blumenthal, Broke off discussions stating: "If I give you (Cablevision) and extension, all it does is continue to mislead your cable customers into thinking that your are negotiating in good faith.

Cablevision removed WOOD-TV 8 effective January 4, 1997 and substituted *Romance Classics* in its place. It should be noted that Cablevision Systems Corp. is the parent company of American Movie Classics which owns *Romance Classics*.

Simultaneous to these events, Cablevision's franchise with the city of Kalamazoo (and several surrounding communities) was due to expire in April 1996. Preliminary discussions concerning possible upgrades in service began as early as 1994. It should be noted that the city of Kalamazoo participates in a local government advisory committee consisting of representatives from seven surrounding communities. Their primary responsibility is to look at the cable related needs of their respective community and to make recommendations that will be used to establish a master franchise plan. The city of Kalamazoo also organized a task force group under the auspices of the Kalamazoo Community Access Center (KCAC). Their charge was to look at the present and future related cable needs of the community with a special commitment toward

promoting the cause of community access. It should be noted that the KCAC occupies four channels on Cablevision's 44 channel system. Primary funding for the KCAC is accomplished through the cable franchise fee process. Approximately 40% of that revenue goes to support the KCAC.

As franchise negotiations proceeded, Cablevision's first set of proposals (and early discussion) indicated that they were not planning any major upgrades in service. They justified their position on the basis that a major change in service upgrade would cost \$36 million. In February 1997, Cablevision of Michigan announced its intentions to sell its Kalamazoo franchise. According to Cablevision spokeswoman, Laura Buscani, the decision to sell the Kalamazoo franchise was part of a larger corporate strategy and was not specific to Kalamazoo Cablevision Systems Corp. plans to concentrate its efforts in three central hub locations, including: New York/Long Island, Boston and Cleveland. Cablevision Systems Corp. is the sixth largest cable multiple system operator (MSO) in the United States with 2.8 million subscribers. In February 1997, Cablevision also notified the city of Kalamazoo (and seven surrounding communities) that it would be proposing a 3.3 percent monthly increase in basic cable service starting in May 1997.

Market Failure: the Problem Defined

The case of WOOD-TV 8 v. Cablevision of Michigan provides a highly illustrative example of market failure. Market failure occurs when an existing markets fails to achieve an efficient allocation of resources. The externality (or economic effect) can be higher costs to the consumer and a lowering in the quality and availability of products and services in the marketplace.

One of the fundamental problems of economics is the legal assignment of property rights. In the case of WOOD-TV 8, what happens when the private use of a public good is no longer serving the public interest or where the public at large is being adversely affected by private management decision making? In the case of Cablevision of Michigan, what happens when a company, due to its natural monopoly status, is unprepared or unwilling to negotiate a solution

with WOOD-TV 8? More importantly, what happens when that same cable company is unprepared to negotiate a franchise agreement that is in keeping with the telecommunications requirements of a modern American city for the 21st century?

In the absence of well-defined property rights, there is no automatic corrective device built into the marketplace mechanism. Government regulation provides the classic rationale for correcting a perceived market failure. But what happens when the city of Kalamazoo and its subset organizations are also a contributing factor toward market failure?

This paper will consider the causes and consequences of Retransmission Consent and its direct impact on the negotiations between Cablevision of Michigan and WOOD-TV 8 in the city of Kalamazoo, Michigan. This paper will also consider the franchise agreement process as defined in the Cable Communications Policy Act of 1984 (hereafter, Cable Act of 1984)¹⁷ and examine the intended and unintended consequences that result from franchise fee obligations. As this case study will show, Cablevision of Michigan, WOOD-TV 8 and the city of Kalamazoo have all directly contributed to market failure in the provision of broadcast and cable television service to the community.

BROADCASTING AND CABLE TELEVISION: Economic and Regulatory Considerations

Broadcast Television

Broadcasting in the United States is first and foremost a business. According to media economist Robert Picard:

Media in the United States are for the most part capitalist ventures operated by private parties for the purpose of generating profit, and are thus subject to the operational principles of the market system. Even not for profit media - such as public broadcasting or organizational operated media - are influenced by the principles of the market system and are thus affected by its operations.¹⁸

There are two economic assumptions that characterize the business of broadcasting. The first is that television and film products are examples of a "public good." The cost of production is independent of the number of people who consume it. If a viewer watches

television, this action does not prevent others from watching.¹⁹ Once the cost of production has been realized, the cost per viewer declines as the size of the audience increases. The marginal cost of letting an additional person consume the good is zero once it is produced. It costs the producer and/or society nothing for additional people to consume the said good.²⁰

A second important assumption is that the broadcast spectrum can be considered a public resource; that is, a form of public property that is privately managed. During the early years of radio (and later television), the historic justification for regulating the broadcast airwaves was based on the principle of spectrum scarcity.²¹ The Radio Act of 1927²² and later the Communications Act of 1934, duly affirm the broadcaster's obligation to provide programming that serves in the "public interest, convenience and/or necessity."²³ Starting in the mid 1970's, there was a major shift in the thinking of industry officials and government regulators - from the perception that television was a scarce resource to the current belief that a multitude of service offerings exist, limited only by their ability to compete in the open marketplace. Broadcasters, today, treat the management of their respective operations as a matter of corporate (or private) property.

Cable Television

The business of cable television consists of two primary sets of players, including: the cable television operator and the cable program supplier. The cable operator is responsible for providing cable television service to the community. The cable operator "packages" a diverse set of program services and charges subscribers a fee accordingly. The cable programmer is responsible for delivering program services to the cable operator. A program supplier can include both broadcast television suppliers (ABC, CBS, PBS etc.) and cable network suppliers (ESPN, CNN, USA, etc). Program suppliers break down into two major categories, including advertiser supported services (NBC, ESPN, CNN etc.) and pay supported services (HBO, Disney, Showtime etc.). In principle, the cable operator will pay advertiser supported cable

networks such as ESPN, CNN and USA a license fee in order to receive the cable network service, whereas, the cable operator has not traditionally paid for broadcast television services.

Cable Television Franchise

The Cable Act of 1984, the first cable statute adopted by Congress, incorporates cable regulation into the 1934 Communications Act and allows communities to regulate cable through franchising, but with Federal oversight. A cable television franchise is a contractual agreement between the cable operator and the local community in which it serves. The franchise agreement defines the rights and responsibilities of both parties in the construction and operation of the cable system.²⁴ The cable operator is given the right to provide cable service for a period typically between 10-12 years. The franchise agreement is the principal document against which the performance of the cable company is judged at the time of renewal. Any proposed changes in the provision of service must be approved by the local community or its designated franchising authority. The subsequent modifications are then written into the franchise agreement. It is understood by both parties that certain changes are inevitable in the life of a franchise agreement.

A cable operator has certain rights and responsibilities. Two of the cable operator's important rights include: 1) the right to make a reasonable return on investment and 2) the right to make all programming decisions that affect the business operation of the cable system. The Cable Act of 1984 protects the cable operator from communities that seek to impose unreasonable programmatic or service obligations that would adversely affect the financial or technical performance of the cable operator.²⁵

The cable operator has certain responsibilities as well. One of the cable operator's important responsibilities, includes the requirement to pay a franchise fee to the local community in which it operates. The franchise fee cannot exceed 5% of the cable operator's gross annual revenues. It is understood by both parties that franchise fees can be used to support a variety of local community projects, including education and community access channels.

THE RELATIONSHIP BETWEEN BROADCASTING AND CABLE

Historically, the relationship between broadcasters and cable can be characterized as antagonistic. Before cable television became an accepted medium in the late 70's, it was often looked upon by broadcasters as a technology that was ancillary to the function of broadcasting. All this began to change with the successful debut of HBO in 1972 and later CNN in 1980. For the first time, cable television was able to offer consumers more than improved television reception. The successful emergence of cable television provides a classic example of a newer communication's medium and its effort to successfully compete with the established media of broadcasting and film. As Ithiel de Sola Pool writes:

The first defensive tactic by the owners of an old medium against competition by a new one, is to have the new one prohibited. If this does not work, the next defensive tactic is to buy into the attacker.²⁶

Between the years 1952 and 1977, broadcasters and television/film producers supported a number of regulatory measures designed to limit the growth of cable television. In principle, broadcasters were concerned about three central issues:

1. Program Siphoning

that cable television would siphon; that is, compete for programming intended for broadcast use and then distribute it on cable, thereby, inflating the cost for program acquisition.

2. Distant Signal Importation

that distant signal importation could fragment local audiences and the corresponding advertising dollar as well as destabilize the value of copyrighted material.

3. Program Gatekeeping

that cable would exercise too much control at the local level in the selection of which broadcast services would be made available to the cable subscriber.

Program Siphoning and Cable Programming

In 1973, the FCC introduced the highly controversial pay cable television rules.

The pay cable rules were designed to limit all would be cable programmers from distributing select forms of programming entertainment, including feature length films and sporting events.²⁷

In filing comments before FCC in 1973, the National Association of Broadcasters (NAB) wrote:

The potential effects of siphoning on the quality of free television programming are well known. First, since free television is limited in its ability to compete with pay television for high quality programming, much popular programming could only become available on pay television. Consequently, a large proportion of the public would never again have access to previously available programming.²⁸

The National Cable Television Association (NCTA) challenged the NAB's position by arguing that the broadcast industry was more concerned with protecting the status quo, rather than defending the so called rights of the American television viewer. As part of the FCC's Special Notice of Inquiry, NCTA President David Foster testified:

The real issue is whether an innovative and vital communications service is going to be strangled aborning [sic] to appease the apostles of the status quo, or whether the creative forces of the marketplace are going to be given their rein. . . . We ask only for the right to compete on a fair and equitable basis.²⁹

Home Box Office v. Federal Communications Commission

The FCC's Pay Cable Television rules were eventually challenged in *Home Box Office v. Federal Communications Commission*.. The U.S. District Court concluded that the FCC had not established regulatory jurisdiction over pay cable television and that the rules were in direct violation of the petitioner's First Amendment right. The Court noted:

The purpose of the Commission's pay cable rules is to prevent "siphoning" of feature films and sports materials from conventional broadcast television to pay cable. Although there is dispute over the effectiveness of the rules, it is clear that their thrust is to prevent competition by pay cable entrepreneurs for film or sports material that either has been shown on conventional television or is likely to be shown there. How such an effect furthers any legitimate goals of the Communications Act is not clear.³⁰

The outcome of *Home Box Office v. Federal Communications Commission* fundamentally challenged the FCC's approach to the regulation of cable. The court stated that the

FCC had failed to justify its position that cable television must be a supplement to rather than an equal of broadcast television. The court reminded the FCC that 'prior restraints' on speech are heavily disfavored and can be sustained only where the proponents of the restraint can convincingly demonstrate a need. In the end, the cable television industry prevailed despite such efforts to establish regulatory barriers to entry. More importantly, the outcome of this case provided the regulatory basis in allowing the newly emerging cable television industry to access all forms of television programming.³¹

Distant Signal Importation

By the late 1960's broadcasters recognized that cable television could provide more than improved television reception. The real danger was cable's ability to import distant signals and thereby fragment local audience share. The importing of long distance signals was especially problematic for program producers whose primary revenue depended on the exclusive licensing of programming to the local station market. The copyright holders ability to sell syndicated programming to local broadcasters would be substantially reduced if the same programs could be seen on another channel.

Fortnightly Corporation v. United Artists Television, Inc.

In 1960, United Artists (U.A.) sued the Fortnightly Corporation claiming that Fortnightly was in direct violation of copyright law by importing and retransmitting broadcast signals that involved the use of U.A.'s copyrighted material.³² Fortnightly, a West Virginia based CATV operator, provided its cable customers with broadcast signals from neighboring television stations located in West Virginia, Pennsylvania and Ohio. Fortnightly's customers were primarily located in small, mountain towns with poor television reception. Specifically, the courts were asked to consider whether the retransmission of broadcast programming violated the program owners' exclusive rights under the Copyright Act of 1909.³³

United Artists won at trial as well as the appellate court levels. Afterward, the Supreme Court agreed to hear the case and overturned the lower court rulings.³⁴ The Supreme Court found that Fortnightly was not in violation of copyright law when it retransmitted U.A.'s over-the-air broadcast signal. In giving the court's opinion, Justice Stewart noted that cable television fulfills a different purpose than over-the-air broadcasting. Broadcasting involves the production and selection of programs which qualifies as performance, whereas, CATV was likened to a television viewer; that is, the passive recipient of a licensed broadcast work.³⁵

CBS v. Teleprompter Corporation

The outcome of Fortnightly did not bring an end to the question of cable television distribution and copyright. The question remained, what about larger systems that provide more than improved television reception? What happens when such systems originate local programming and/or compete directly in the sale of advertising? Simultaneous to the Fortnightly case, CBS filed a law suit against Teleprompter Corporation, then considered the nation's largest cable MSO, and five of its systems.³⁶

In their complaint, CBS argued that several Teleprompter systems were originating programs and sold advertising in a manner similar to an over-the-air broadcaster. CBS cited the fact that Teleprompter maintained a system of interconnections between CATV systems that allowed for the transfer of programming between sites not unlike a traditional network affiliate relationship. Once again, the court was asked to consider whether an MSO the size of Teleprompter was a "performer" under the terms of the 1909 Copyright Act.

Teleprompter did indeed make varying use of microwave links to import programming from distant markets to many of their cable systems. At trial, the Court ruled that the importing of distant signals did not make Teleprompter a performer.³⁷ The Court of Appeals disagreed, finding that distant signal importation was a copyright violation.³⁸ However, the Supreme Court concurred with the trial court ruling and reaffirmed its earlier position in Fortnightly.³⁹

Despite his admonition that the regulation of television is a legislative task, Justice Stewart's majority opinion in *Teleprompter*, was premised on the belief that broadcasters and program suppliers do not deserve special protection. The retransmission of a broadcast signal was not considered a violation of copyright law.⁴⁰ The court made clear its position that the operation and size of a cable operator was not relevant. As Patrick Murphy points out, the *Teleprompter* decision resulted in the complete negation of the Copyright Act of 1909 for cable television and a significant weakening in traditional copyright principles. Yet at the same time, *Teleprompter* did not offer a clearly articulated policy for the future.⁴¹

The Copyright Act of 1976

Prior to the passage of the Copyright Act of 1976, the Supreme Court had now spoken twice ruling that cable television did not violate copyright law when transmitting an over-the-air broadcast signal. In 1976, Congress revised the U.S. Copyright Act and specifically addressed the obligations of cable television transmission. Under Section 111, the newly revised copyright act established a compulsory licensing scheme.⁴² This approach allowed cable operators to retransmit programming but required them to compensate copyright owners for programming using a prescribed formula. Passage of this legislation was highly controversial. As an example, the Copyright Act did not require payment for the retransmission of over-the-air broadcast signals whether it was network or locally originated. The legislative intent was to ensure that compensation was to be made only to copyright owners and not broadcasters (except to the extent that they own the copyright). Not surprisingly, reaction to the Copyright Act and the aforementioned cable provisions were mixed. Critics point out that the legislation should have contained full copyright liability and that the Act precluded the market from setting appropriate prices for copyrighted material.⁴³

Retransmission Consent

The passage of the Cable Television Consumer Protection and Competition Act of 1992,⁴⁴ was an attempt to reregulate what was perceived to be cable's unassailable monopoly status. One of the most important provisions contained in the 1992 Cable Act is the principle of Retransmission Consent which gives local broadcasters the right to elect must carry status (guaranteed placement on the system)⁴⁵ or financial compensation for being carried.

Under the terms of Retransmission Consent, "must carry" status requires the cable operator to reserve a channel allocation for all local broadcasters who request placement on the system. Must Carry is the obvious choice for smaller, independent stations that want to ensure guaranteed placement on the cable system. Otherwise, such stations run the risk of the cable operator choosing not to carry them at all. Alternatively, some broadcasters, (most notably the major network affiliates), can elect compensation whereby the cable operator is obliged to compensate the broadcaster for the right to carry the said programming.

The broadcast industry's principle argument is that today's television landscape has forever changed. They are in direct competition with multiple cable television networks, including USA, CNN, ESPN and MTV to name only a few. The aforementioned cable networks are paid by the cable operator for the right to be carried. Such cable network services as CNN and USA networks can command licensing fees upwards of 50 cents per subscriber on a monthly basis. In several position papers, the National Association of Broadcasters argue that cable subscribers spend more than 70% of their time watching broadcast programming and yet broadcasters are paid nothing for their service which by all accounts gives tremendous value to the cable operator. In a poll conducted by the Roper Organization in 1992, 78% of the cable subscribers interviewed indicated that they should pay less for cable if the operator does not carry the networks. Sixty four percent of the people interviewed said that they would cancel their cable service if the networks were dropped.⁴⁶

The cable industry's counter argument is that network television is a free over-the-air service that uses a publicly licensed medium (i.e. the electromagnetic spectrum). The NCTA takes the position that cable provides the broadcaster with improved television reception and greater access to the home. In several position papers, the NCTA argues that compensation for broadcast television programs would result in higher costs to the operator that, would in turn, be passed on to the consumer. The direct consequence of that action runs counter opposite to the very principle of free, advertiser supported TV. In the end, the cable operator can elect not to carry the networks (and their corresponding affiliates) if compensation is sought regardless of whether the programming is popular.

During the first round of Retransmission Consent, approximately 90% of America's television broadcasters chose retransmission consent over must carry. The vast majority of stations choosing retransmission consent were network affiliates (80%) as compared to independent stations (20%).⁴⁷ While Retransmission Consent did not achieve the goal of cash compensation, it did accomplish the goal of giving many broadcasters an important property right in the form of an extra channel assignment.⁴⁸ This, in turn, meant that broadcasters could use the extra channel assignment to develop new forms of cable programming, including local news and other information programming.⁴⁹ As Charles Lubinsky points out, the real winner was not the local broadcaster but the major U.S. television networks and (multiple station owners) who were able to leverage retransmission consent in order to obtain a second channel in order to promote new programming services.⁵⁰

DEREGULATION OF BROADCASTING AND CABLE

The decade of the 1980's witnessed an unprecedented number of international mergers and acquisitions that has brought about a major realignment of business players. In one industry after another, companies are announcing strategic alliances or outright mergers that would have been unthinkable in past years. The concerns for antitrust violations seem to be overshadowed

by a general acceptance that such changes are inevitable in a global economy. The result has been a consolidation (and crossownership) of players in all aspects of business, including media and telecommunications.⁵¹

Broadcast / Cable Crossownership

As Poole correctly forecasted, the four major television networks have slowly bought into the attacker. During the years 1985-1988, both ABC and NBC underwent a major shift in the sale, merger and acquisition of communication properties. General Electric purchased NBC and Capital Cities Publishers bought ABC Television. Both networks subsequently became major players in the field of cable television programming. Starting in 1979, ABC purchased an 80% interest in *ESPN* and is now the parent company to the nation's most successful cable sports network. In July 1995, the Walt Disney Company purchased Cap. Cities/ABC for \$19 billion. The merger combined entertainment giant, Walt Disney, with a highly profitable television network.⁵² The merger also consolidates both companies cable interests, including Disney's owned *Disney Channel* pay television service. Today, Disney/ABC derives more than \$1.2 billion a year from its national and international cable television services.

In 1985, the General Electric Corporation purchased NBC.⁵³ GE immediately went about reshaping NBC, including a major commitment to cable television programming. In 1989, NBC launched its first cable network, CNBC. Since then, GE/NBC has been very aggressive in the field of cable television programming partnering with the Microsoft Corporation to form MSNBC. In addition, NBC has major investments in the *Arts and Entertainment Network*, *History Channel*, and *Court TV* to name only a few.

Westinghouse/CBS is the most recent television network to enter the business of cable television programming. Starting in 1995, Westinghouse has taken CBS quickly beyond the fiscally conservative period of Lawrence Titch and has aggressively moved the company into new areas of communication including the purchase of both radio station properties and cable network

services. In March 1997, Westinghouse/CBS purchased the Nashville Network (TNN) and Country Music Television (CMT) from Gaylord Broadcasting.⁵⁴ Table 1. identifies the four major networks in terms of their current investments in cable television programming.

Table 1.
Four Major U.S. Television Networks
Investments in Cable Television Programming

Cable Network Service	Ownership and Start Date		
Disney/ABC			
ESPN	80%	Sept.	1979
ESPN 2	80%	Oct.	1993
ESPNNews	80%	Nov.	1996
Disney Channel	100%	Apr.	1983
Arts & Entertainment	37.5%	Feb.	1984
History Channel	37.5%	Jan.	1995
Lifetime	50.0%	Feb.	1984
E! with Comcast	68.8%	June	1990
GE/NBC			
MSNBC	100%	July	1996
CNBC	100%	Apr.	1989
Court TV	16.67%	July	1991
Arts & Entertainment	25%	Feb.	1984
AMC	25%	Oct.	1984
History Channel	25%	Jan.	1995
Ind. Film Channel	50%	Sept.	1994
E! with Comcast	68.8%	June	1990
Westinghouse/CBS			
The Nashville Network (TNN)	100%	Mar.	1983
Country Music Television (CMT)	100%	Mar.	1983
Telenovicias	100%	Feb.	1997
Eye on People	100%	Mar.	1997
News Corps./Fox			
FX	50%	June	1994
Fox News Channel	100%	Oct.	1996
FXM: Fox Movies	100%	Nov.	1994
Fox Sports Net	50%	Nov.	1996

Sources: Company Reports and Broadcasting & Cable

Deregulation and the Advancement of Cable Television

Beginning in the early 1980's, the U.S. under the Reagan administration actively promoted the cause of economic deregulation. The policy was designed to foster greater economic competition by allowing the marketplace to establish priorities and professional standards of business conduct rather than needless government intervention. The passage of the Cable Act of 1984⁵⁵ was especially important to the cable industry. Cable operators were now able to adjust service and rates more flexibly in response to market conditions. In a few short years, the cable industry experienced dramatic growth both in terms of subscribers and number of operating systems. In 1986, there were 42,237,000 cable TV households on 7,500 cable systems.⁵⁶ In 1997, there are 64,800,000 cable TV households on 11,600 cable systems.⁵⁷ In the U.S. today, cable television is the primary means of delivering multichannel television service to the home. Cable television is available in approximately 68.3% of all U.S. homes. Table 2. provides an overview of cable television in the U.S.

Table 2.
Cable Television Development
in the U.S. (1997)

Sources:	Broadcasting & Cable	Paul Kagan Associates
Cable TV: Total Systems	11,600	--
Basic Cable/ TV Households	64,800,000	64,080,000
Homes Passed:	93,790,000	93,790,000
Penetration: Basic Cable to Television Households:	68.3% ⁵⁸	66.06% ⁵⁹

Cable's dramatic growth has also meant a corresponding increase in cable rates as well. Since 1984, cable rates have increased by approximately 81.5%. In 1984, the cost of basic cable television service was \$8.98. In 1996, the average cost for basic cable service is \$26.95. Table 3. examines average monthly cable rates since 1984.

Table 3.
Average Monthly Cable Rates
(1984-1996)

Year	Basic Rate	Year	Basic Rate
1984	\$ 8.98	1990	\$16.78
1985	\$ 9.73	1991	\$18.10
1986	\$10.67	1992	\$19.08
1987	\$12.18	1993	\$19.39
1988	\$13.86	1994	\$21.62
1989	\$15.21	1995	\$23.07
		1996	\$26.95

Source: Paul Kagan Associates, Inc.⁶⁰

Cable Television as Electronic Gatekeeper

Cable television has fundamentally changed the American television landscape. Cable's most enduring contribution to the field of television programming is that it has given subscribers a greater selection of choice. In 1985, there were 56 cable network services as compared to 162+ cable network services today. Much of that programming is narrowcasted; that is, the programming is targeted to a more narrowly define audience.⁶¹

Cable television can also be considered the great equalizer in terms of providing equal access to a variety of broadcast and cable programmers. Cable television allows VHF, UHF, and cable program services equal access to prospective viewers. The principle of equal access becomes especially important for smaller VHF and UHF stations that have a long history of not being seen due to poor reception and/or its channel positioning on UHF rotary dials. At the same time, not being carried on a cable system can mean virtual obscurity for large and small stations alike. The problem becomes especially acute in those communities where a cable operator has a penetration rate of 70% to 80%.

Cable television has become a mature industry. In today's television market, the cable operator exercises a critical gatekeeping function in the selection and channel positioning of

television program services. The quality and diversity of program services is largely determined by the actual size of the cable system and its channel capacity. In the U.S. today, approximately 14% of the estimated 11,600 cable operating systems have 54+ channels of service. Yet the number of available cable program services has nearly tripled since 1985. As a result, there are many more program services than there are systems with the channel capacity to accommodate them. This means that the allocation of channel space becomes very important to the cable operator in terms of cost effectiveness, programming diversity and regulatory obligations.

One of the direct consequences of increased programming and limited capacity is that America's broadcast industry has experienced a steady decline in broadcast television market share. In 1983/1984, broadcast television accounted for 91% of all television viewing in the U.S. In 1995/1996, broadcast television is responsible for 70% all television viewing.⁶² In light of these changes, broadcasters want to exercise greater control and obtain better value for their program software.

WOOD-TV 8 v. CABLEVISION OF MICHIGAN

On January 9th, 1997, Cablevision's General Manager, Gary Wrightman, sent a letter to WOOD-TV's Scott Blumenthal, requesting that negotiations continue. Blumenthal refused on the basis that he would only consider a real and meaningful offer. Cablevision, indicated that it had submitted ten offers in the past and that all such offers were refused. Blumenthal vehemently denies this and says: "We have not received a single offer. Not one!"⁶³

Blumenthal noted that WOOD-TV had submitted three major proposals in the past and that each had been refused. One such proposal called for the creation of a weather channel that would require the allocation of a separate channel on the Cablevision system. Cablevision refused noting that the citizens of Kalamazoo did not want or need a second weather channel. Cablevision made clear its position that the present system was filled to capacity and that there were multiple cable programmers unable to get on the system. According to Cablevision spokesperson, Laura Buscani:

The problem with the WOOD-TV offer is that they want us to tie up one channel with a weather channel. On top of that, they want us to pay for it the same way we do for CNN.⁶⁴

After several months of failed negotiations, Blumenthal stated for the record that if the problem cannot be settled, it was now time to consider an independent third party arbitrator.⁶⁵ Cablevision has steadfastly refused stating:

If we can't agree, we're not going to submit our fate to an arbitrator. We need to know there's a middle ground that WOOD-TV is willing to sit down and talk to us. We don't think there's a middle ground right now.⁶⁶

The city of Kalamazoo, for its part, has remained neutral. Former Kalamazoo Mayor, Barbara Larson, has stated publicly:

... although news and entertainment access are matters of public interest, the city does not believe it has a place in the negotiations between two private companies.⁶⁷

WOOD-TV's Scott Blumenthal confirms Larson's position noting that there is very little that city officials can do except to "possibly give their support for binding arbitration."⁶⁸ Joan Burke, Cable Administrator for the City of Kalamazoo, concurs and suggests that "if the city tries to impose a solution, it is unlikely that it would stand up in the face of a First Amendment challenge."⁶⁹

In February 1997, Cablevision of Michigan announced plans to sell its Kalamazoo franchise. Later that same month, Cablevision also notified the city of Kalamazoo that it would be proposing a 3.3% monthly increase in basic cable television service effective May 1997.⁷⁰ Cablevision's announcement has only served to fuel speculation that the company does not have a long term interest in the community. The decision to raise rates only makes a bad situation worse. The timing of Cablevision's announcement also complicates the franchise renewal process since the company has no desire to bind itself or a future cable company to long term franchise renewal obligations. Cablevision's Gary Wrightman readily acknowledges the difficulty:

The decision to sell the Kalamazoo franchise has made negotiations between us and the city of Kalamazoo very difficult. The analogy I would use is that its like trying to sell a house. You would not invest a lot of money into a house just before you decide to sell it.⁷¹

Throughout this entire ordeal, Kalamazoo area residents have been powerless to do anything about the apparent stalemate between both parties. However, Kalamazoo residents have been quite vocal in their dissatisfaction. Kalamazoo's local newspaper, *The Kalamazoo Gazette*, has received a number of angry letters from area residents with such comments as:

Short of putting up an antenna or a satellite dish - while the scoundrels on both sides make us wait while they posture and dance around the issues. It seems our only recourse is to let both Cablevision and WOOD-TV know how unhappy we are in terms they both understand - Money!⁷²

Susan Hollar, Kalamazoo

It's no laughing matter. Cablevision of Michigan has decided for their 51,000 viewer-customers that NBC's 'Must-See TV' will not be seen in this viewing area. Cable service in Kalamazoo is barely adequate when compared to other cities in Michigan. . . I cannot understand why I, the customer, must be subject to another interruption in basic service.⁷³

Nathaniel Clark, Kalamazoo

First, thank you Cablevision for not caving into TV 8's greedy demands. Your customers appreciate your stand. . . I recommend a boycott of the local TV 8 programming and their syndicated shows. . . Hopefully, TV 8 will soon realize that annoying its viewers and cheating its advertisers is a bad business decision.⁷⁴

Reid B. Fader, Kalamazoo

Have the angry letters and negative publicity had an impact on either company's ability to do business in the Kalamazoo area? In terms of advertising, WOOD-TV's Scott Blumenthal, does not appear to be too worried about the possible loss of advertisers. Since Kalamazoo is not considered to be WOOD-TV's primary market, the apparent loss of Kalamazoo's 52,000 cable subscribers doesn't seem to be having an effect on local advertising.⁷⁵ According to Blumenthal: "This hasn't been a problem. The audience size is relatively small."⁷⁶ For Cablevision, the WOOD-TV standoff has been a problem from a public relations standpoint, but it has not translated into a significant loss in subscribers. The situation, however, does complicate the franchise negotiation process as well as the company's ability to sell the Kalamazoo franchise. In the end, the real losers in this dispute are the 51,700 citizens of Kalamazoo who subscribe to Cablevision

of Michigan. They are without an NBC affiliate. It should be noted that in 1996-1997, NBC was the most highly successful network of the four major networks in the U.S both in terms of programming and advertising revenue.

MARKET FAILURE

Market failure occurs when an existing market fails to achieve an efficient allocation of resources.⁷⁷ In examining the dispute between WOOD TV 8 v. Cablevision of Michigan, this paper argues that there are five interdependent reasons that account for market failure, including:

1. When public resources become private goods
2. The absence of perfect knowledge among consumers regarding the decisions being made by both private business and public organizations, including a minimal degree of public participation
3. The lack of available good substitutes
4. Business (and organizational decisionmaking) that is engaged in rational self-interest
5. Inefficient methods for regulatory intervention

When Public Resources become Private Goods

The broadcast spectrum can be considered a public resource; that is, a form of public property that is privately managed. While it can be argued that the public is considered the legal and rightful owners of the broadcast spectrum, in practice the public is basically dependent upon broadcasters for the delivery of program services. As Economist, A. Allen Schmid points out, there is a certain lack of precision when it comes to defining the nature of public property and the legal rights of users.

People have use rights, but no exchange rights. Individual shares cannot be capitalized. Rights are not lost by nonuse nor can they benefit the holder if he leaves the community.⁷⁸

In the case of broadcasting, the public has the right to access any and all forms of radio/TV programs broadcast on the public airwaves. The public, however, has limited rights

when it comes to the management, sale or transfer of a station license. One of the indirect consequences of 1992 Cable Act is that Retransmission Consent has widened the ownership gap between broadcast station managers/owners and the public's right to access what is supposed to be public property. The real question is whether a broadcaster's commitment to serve the public interest rests solely on whether that signal is conveyed to the public via the electromagnetic spectrum? Retransmission consent effectively gives the broadcaster the legal right to withhold a broadcast signal even if that means complicating or denying the public access to a clear signal. WOOD-TV, in this case, has made it harder for the public to avail itself of the very property they are said to "collectively own." The public is powerless to effect change while the two parties work out their private disputes that substantially involves public property.

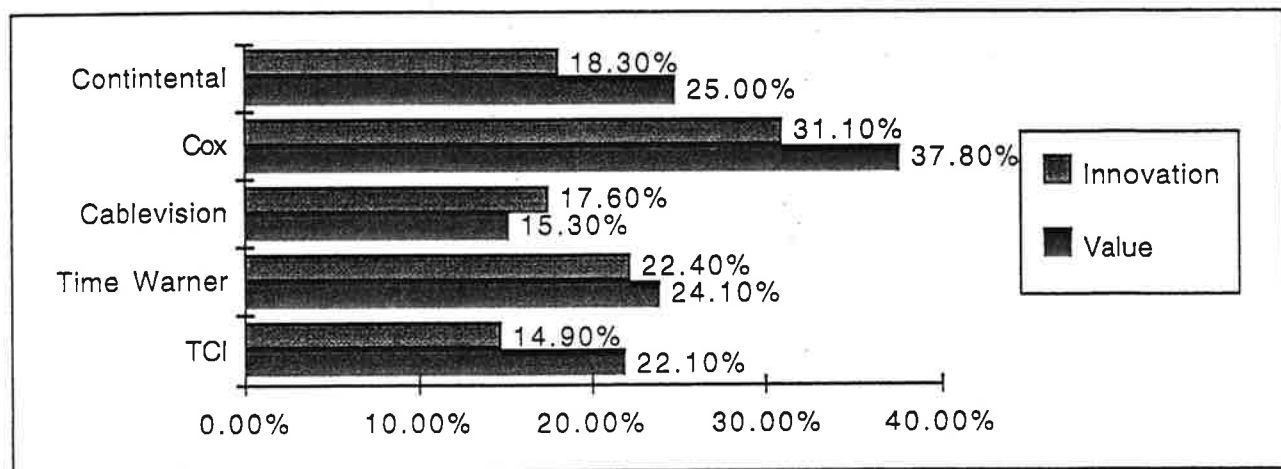
The Absence of Perfect Knowledge Among Consumers

Private negotiation between two parties is just that private. In the case of Cablevision v. WOOD-TV 8, the consumer is given little opportunity to know the real level of discussion that has transpired between both parties. The discussion, itself, is set against the backdrop of Retransmission Consent which is a very complicated piece of regulation. Cable television subscribers are not interested in the regulatory issues affecting broadcasting and cable television. Nor are they interested in the technology of delivery. They do, however, understand programming and program value. Cablevision subscribers understand that they are paying more for less service, including the fact that NBC's WOOD-TV 8 is not one of the available choices. They also see the inconsistency of Cablevision's decision to raise rates at a time when subscribers feel they are getting less value for their money.

We may rightfully ask, is Kalamazoo's 44 channel system consistent with other Cablevision systems across the United States in terms of programming and channel capacity? In terms of channel capacity, Kalamazoo's Cablevision system is consistent with other communities of comparable size. From a programming standpoint, Kalamazoo is somewhat unique in terms of carrying two ABC affiliates, no NBC affiliate and four channels dedicated

to community access. How does Cablevision Systems Corp. compare to other multiple system operators (MSOs) on a national basis. In a survey conducted by Chilton Research Services in May and June of 1996, consumers (and existing cable subscribers) were asked to rank order five major MSOs in several categories, including value, dependability, innovation and friendliness. In Table 5., we have presented a summary of those results in two important categories including price value to the customer and level of innovation in terms of programming and equipment.⁷⁹ As can be seen, Cablevision scored lowest in value to the customer (15.3%) and second lowest in innovation (17.6%).

Table 5.
Consumer Reaction to
Five Nationally Recognized
Cable MSO's (1996)



The Lack of Available Good Substitutes

Cable television operates as a defacto natural monopoly. The cost characteristics of cable television, including franchise fees, physical wiring and television program acquisition makes competition difficult to sustain in small to medium size communities. While the law permits cable competition, the practical reality is that overbuilds tend to occur in large urban communities where the population base can sustain competitive cable systems.

The lack of competition makes it possible for cable operators to take economic advantage of subscriber dependency on cable TV. Researchers, Sinel, Grant, Little and Cook argue that cable's natural monopoly status is a contributing factor toward market failure.⁸⁰ In their view, cable television has become a necessity. This is especially true for those subscribers who live in areas where geographical conditions precludes the clear reception of broadcast signals.

Starting in 1995, the cable television industry began to see the first signs of real competition in the form of Direct Broadcast Satellite (DBS) communication. DBS represents a new generation of high powered satellites capable of delivering television programs to users equipped with small earth stations (parabolic dishes) approximately a meter and half in diameter. The cost requirements for obtaining DBS service typically include the cost of an earth station, tuning equipment as well as a monthly user fee.⁸¹ While present and future DBS systems represent a major step toward improved competition, the present DBS systems do not carry local affiliate stations. Thus, in the case of Kalamazoo Cablevision subscribers, DBS offers significantly improved television selection, but it does not address the problem of obtaining local affiliate stations.

Business and Organizational Self-Interest

An important problem of the market concerns the question of externalities; that is, the effects of a voluntary transaction between two parties on third parties. A very large part of the problem of externalities is closely associated with what economists refer to as rational self-interest. In principle, business and government organizations are said to engage in rational self-interest when they pursue legitimate goals without considering the full effect on third parties. According to John McManus, the pursuit of rational self-interest can have both intended and unintended consequences on the marketplace. This, in turn, can lead to market failure.⁸²

This paper argues that Cablevision and WOOD-TV have both engaged in rational self-interest. The observance of rational self-interest can be seen in how both companies handle

program software. Let us consider Cablevision first. Cablevision's decision to substitute the *Romance Classics* cable network in place of NBC was prompted by two considerations. First, Cablevision Systems Corp. is the parent company of American Movie Classics which owns *Romance Classics*. Cablevision Systems Corp. realizes immediate cost savings by programming their own service rather than paying a license fee for a more well-established cable service. Second, Cablevision achieves an important marketing advantage by being able to showcase *Romance Classics* at a time when other cable startup services are finding it difficult to obtain nationwide cable access due to intense competition and limited channel capacity. What is important to the consumer, however, is that *Romance Classics* is not a comparable substitute for the NBC television network. In fact, *Romance Classics* (according to the company's product literature), is a cable service targeted for women.⁸³

WOOD-TV 8, for its part, is taking full advantage of its Retransmission Consent rights even if it means leaving Kalamazoo's Cablevision subscribers without cable access to an NBC affiliate. Their negotiations for compensation includes an offer to substitute a weather channel in place of cash compensation. According to Cablevision's Gary Wrightman, the WOOD-TV offer is just another form of cash compensation. "If we pay for their weather channel, we get NBC for free."⁸⁴ Cablevision subscribers are rightfully questioning the business or regulatory logic that would allow a 44 channel system to give priority to a second weather channel given the limited number of channels and the clear omission of better known cable services.

Inefficient Methods for Regulatory Intervention

According to Charles Wolf, the problems associated with market failure provide the classic rationale for government intervention. Yet the proposed solutions and desired outcomes can sometimes fail to achieve goals that are in the public's best interest.

In both cases, incentives influencing individual organizations may lead to outcomes that diverge substantially from what is socially preferable. The basis for the market/nonmarket distinction is that market organizations derive their revenues from prices charged for output

sold in markets where buyers can choose what to buy as well as whether to buy, while nonmarket organizations receive their revenues from taxes, donations, or other nonprice sources.⁸⁵

Public policies intended to remedy the problems associated with market failure usually takes the form of a legislative mandate or an administrative assignment of tasks. The government sponsored task force (or agency) is expected to produce certain outcomes which are intended to address the shortcomings of the market. They are often given exclusive control in a particular field. The appointment is seldom contested by the public at large. Defining the proper goals and objectives for such organizations are hard to establish in principle and whose outcomes for success are harder still to evaluate in practice.⁸⁶ When such government sponsored task forces fail, they do so in large measure because their performance is not subject to the forces of the marketplace mechanism.

In principle, the cable television franchising process (and the creation of a franchising authority) is subject to many of the difficulties thus described. Cable television, in particular, has some unique permutations given the widespread use of franchise fees. Cable operators are obligated to pay up to 5% of its gross annual revenues in the form of franchise fees to the community in which it operates. Such yearly revenue goes to support a variety of community projects, including education and community access television. Therefore, a price increase in basic cable rates translates into a corresponding increase in contributions to the city as well. While local community officials may publicly and legitimately criticize an increase in cable rates, the said community is indeed the beneficiary of any proposed increase. In short, the franchise fee payment can sometimes place local government in a dependency role; that is, it is captured by a special interest.

The cable television franchising process is flawed for other reasons as well. While the Cable Act of 1984 gives communities the right to deny a cable franchise, in practice this a rare occurrence. To start with, few government officials would be willing to justify the inconvenience and public relations fallout that would result should the community's franchising authority actually

deny a cable franchise and shut down the system altogether. Secondly, most small to medium sized communities are not prepared to face the probable law suit that would occur should a cable franchise be denied. In short, the threat of costly litigation is a powerful disincentive for those communities who may want to challenge the business practices of the local cable operator. Since 1990, only three cable franchises in the U.S. have been denied.⁸⁷ The nation's cable operators are well aware of this and use this knowledge to negotiate terms that are indeed advantageous to the system operator.

In the city of Kalamazoo, the problem is complicated by the fact that 40% of Cablevision's \$322,894 annual franchise fee goes to support the Kalamazoo Community Access Center's annual budget. The KCAC has achieved a unique distinction in the field of community access television. In 1990, the KCAC was voted the best cable community access center in the U.S. and has won several IRIS awards from the NCTA for local community productions. The KCAC enjoys strong community support and produces local television programming at 68% the national rate of most community access centers. In short, the KCAC is not just another community access center. What is significant is that the city of Kalamazoo has a lot invested in the present and future status of community access. It should be noted that the KCAC's Director, Ms. Joan Burke, also serves as the city's cable administrator and is the designated person to head up franchise negotiations with Cablevision of Michigan. The situation poses a potential conflict of interest when the city of Kalamazoo must consider cable rate increases as well as negotiating specific terms related to the cable television franchise. All of this has a direct bearing on the finances and operation of the KCAC.

Cablevision, for its part, recognizes how much the city of Kalamazoo has invested in community access and (like many cable operators) leverages that information when it comes to proposing rate increases and negotiating specific terms related to the franchise agreement. It is Cablevision's position that the KCAC underutilizes the four channels that have been designated for community access. The company has on several occasions expressed their

desire to utilize two of the four channels for new programming. According to Cablevision's Laura Buscani:

The number of channels [utilized in Kalamazoo] is not typical of community access centers across the nation. You have to understand that we have 50+ cable programmers that would love to get on our system but that are effectively locked out because of the problem of channel capacity.⁸⁸

CONCLUSION

The case of WOOD-TV 8 v. Cablevision of Michigan provides a unique look at the problem of market failure. Market failure occurs when an existing markets fails to achieve an efficient allocation of resources. A central premise of this paper is that all parties concerned, including WOOD-TV 8, Cablevision of Michigan and the city of Kalamazoo, have engaged in rational self-interest. The example of WOOD-TV 8 illustrates a situation where corporate based decision-making (originating in Providence, Rhode Island) has adversely affected the citizens of Kalamazoo by denying them cable access to Grand Rapids based NBC affiliate, WOOD-TV 8. Likewise, Cablevision of Michigan illustrates a situation where corporate based decision-making (originating in Woodbury, New York) has adversely affected the citizens of Kalamazoo by the company's inability or lack of willingness to effectively negotiate a solution with WOOD-TV 8. The resulting effect has been higher costs to the consumer and a lowering in the quality and availability of product in the marketplace. In the end, the losers in this case are Kalamazoo's 51,700 Cablevision subscribers who are denied cable access to an NBC affiliate and are getting less value for their money.

The Legal Assignment of Property Rights

One of the fundamental problems in the case study is the legal assignment of property rights. Both WOOD-TV 8 and Cablevision manage and exercise the use of property. WOOD-TV 8 utilizes a frequency assignment that is part of the electromagnetic spectrum. In principle, that frequency assignment is considered a public resource. The Radio Act of 1927⁸⁹ and later the

Communications Act of 1934, duly affirm the broadcaster's obligation to provide programming that serves the "public interest, convenience and/or necessity."⁹⁰ Broadcasters, today, treat the management of their respective operations as a matter of private property.⁹¹

Cablevision manages property in the form of physical cable to the home which requires city approval. One of the city's principle obligations is to provide physical clearance and rights of way access in order for the cable operator to build the system. This electronic gateway to the home enables the cable operator to exercise important property decisionmaking powers concerning the selection and use of programming on the system. The cable television franchise establishes the contractual relationship, including the stated and unstated partnership, that exists between a cable operator and the community in which it operates. According to Eileen Huggard, Executive Director of the National Association of Telecommunications Officers and Advisors (NATOA):

The cable operator uses city property and we in turn provide them with rights of way and clearance. We cannot tell the cable operator what to program. But cities do have a right to expect reasonably good service since cable operators are often a one of a kind service provider. We're in it together. It's a partnership of sorts...⁹²

The city of Kalamazoo also exercises important property rights that includes direct control and access to 4 channels (or 11%) of Cablevision's 44 channel system. This, in turn, calls into question the matter of public accountability in the application and use of government sponsored television. It is Cablevision's position, with some justification, that the KCAC underutilizes the four channels that have been designated for Community Access. The real test of the marketplace is whether Cablevision subscribers, if given a choice, would prefer two of those channels to be alternative program services. In the final analysis, Kalamazoo Cablevision subscribers pay for four channels of community access regardless of whether they want the program service or not.

Retransmission Consent

Cable television has fundamentally changed the American television landscape. Today's television universe is markedly different from the television universe of the early 1970s where the emphasis was on improved television reception. Cable's most enduring contribution to the field of television programming is that it has given subscribers a greater selection of choice. As mentioned, cable television exercises important gatekeeping functions. For broadcasters, cable's emergent strength has become a mixed blessing. In the best sense, cable television makes it possible for all VHF and low powered UHF broadcasters to access people's homes directly. Cable's success, however, has also meant a steady decline in audience share among the four major networks. In 1995/96, the four major networks accounted for 65.2% of prime time viewing. In 1996/97, the four major networks have seen a 6% audience decline to a current prime time viewing level of 62%.⁹³ As the trend toward fragmentation continues, broadcasters now find themselves having to compete in a multichannel universe for the same sources of programming as well as prospective viewers.

In light of these changes, the four major television networks have adopted a competitive business strategy that includes the acquisition or creation of new cable services. In addition, the major networks have become ever more concerned about controlling the value of their information and entertainment product. After all, while audience share may have declined, network television is still unquestionably the most popular programming among television viewers. It is not surprising, therefore, that America's broadcasters pushed very hard for Retransmission Consent believing that in a multichannel television universe, they were equally entitled to be paid for their program software. Thus, Cablevision's position to treat WOOD-TV 8 (or any other broadcast programmer) differently than a cable network service is contrary to current and future trends in television programming as well as the digital technology that will support it.

Rational Self-Interest

The pursuit of rational self-interest has been the major contributing factor for market failure in this case. WOOD TV, requested compensation under the terms of Retransmission Consent. The issue is not whether they have the right. The law affirms their right to seek compensation. It was the manner in which they went about structuring their proposal. WOOD-TV's proposal called for either cash compensation or a proposed second channel for which they would have to be paid. As Cablevision's Gary Wrightman points out, this is simply another form of cash compensation. In fact, this proposal is worse than straight cash compensation since Cablevision would have to tie up a second channel for a local weather service that has limited appeal. It would also mean having to vacate an existing cable service in order to accomplish it.⁹⁴

Cablevision, for its part, indicated that it had submitted ten proposals in the past for resolving their dispute with WOOD TV 8. None of the ten proposals have ever been made public. If Cablevision wants the city of Kalamazoo and its customers to believe that they are negotiating in good faith, this information should have been made publicly available and it was not. To make matters worse, Cablevision announced its intentions to sell the Kalamazoo franchise at the same time it was planning a rate increase of 3%. The present stalemate with WOOD-TV 8 combined with ongoing delays in franchise negotiations demonstrates a failure of vision to consider the future telecommunications needs of the city of Kalamazoo.

The city of Kalamazoo and its subset organization the KCAC have also contributed to market failure. The problem is in large measure due to the very nature of the franchising process and the franchise fee in particular. The cable franchise fee places the community in a dependency (or captured) role. In the city of Kalamazoo, the problem is compounded by the fact that 40% of Cablevision's annual franchise fee goes to support the KCAC and related cable needs of the city. The situation poses a potential conflict of interest when the city of Kalamazoo must consider cable rate increases as well as negotiating specific terms related to the cable television franchise. Such planning considerations (and the resulting franchise fee) has a direct bearing on the KCAC.

Public Responsibilities of Broadcasters and Cable Operators

It is clear that the city of Kalamazoo could have (and should have) been more proactive in the resolution of the WOOD-TV 8/Cablevision dispute. The city has a responsibility to forge an agreement by bringing the players to the table. While the city cannot mandate a solution, they can provide the citizenry with an accounting of the negotiations that have taken place. In terms of broadcasting, the city can file a grievance with the FCC when and if it feels that a local broadcast station is not fulfilling its proper role as a broadcast service. In terms of cable, the city has more than sufficient right under the terms of any franchise agreement to ask for an accounting when there is visible disruption of cable service.

In the end, it's not just about whether the citizens of Kalamazoo get to see an NBC affiliate via cable television. The real question is what are the public responsibilities of broadcasters and cable operators in providing the best possible set of services to its customers? There is a lot at stake in the answers to that question. For broadcasters, the answer to that question can be traced back to the original intent and spirit of the Communications Act of 1934; that broadcasters should operate in the "public interest, convenience and necessity."⁹⁵ The operative word here is convenience; not inconvenience, which from the public's standpoint is at the heart of the WOOD-TV 8/Cablevision dispute. There is no question that the management of the broadcast airwaves should be privately managed. But at the same time, broadcasters like WOOD-TV 8 need to remember that their's is a public stewardship - not a private right.

Cable operators need to understand that the television programming universe has irrevocably changed and that old assumptions and distinctions about broadcast vs. cable network originated programming are no longer valid. The continuing consolidation and crossownership of broadcast and cable programming by today's transnational media corporation certainly underscores this point. As to the viewer, it's just television. . .

In 1998, the city of Kalamazoo finds itself negotiating a cable television franchise whose outcome is very important to the city's future. The various delays that have occurred are done at the city's expense. Cablevision, (like all cable operators) have a professional obligation as well as a legal requirement under the terms of the 1992 Cable Act to be proactive in helping to plan for the city's future telecommunications needs.⁹⁶ Today's cable operator needs to recognize the changing role of cable television technology and what it means for communities in the years to come. They too, have a civic responsibility that is all too often forgotten. The future design and development of a cable television service has to be understood in the broader context that it is providing an electronic gateway for a whole host of entertainment, utility and value added services to the home, including: education, medical communication services, energy management, electronic shopping and Internet access to name only a few. In the 21st century, the provision of multichannel television services to the home will become a necessity for a society that is dependent upon timely news, entertainment and information. The future design and development of cable television networks represent a core component of what city planners now refer to as "smart cities." Programming will come to mean much more than entertainment services. Programming speaks directly to a community's ability to offer advanced information services to its citizens.

POSTSCRIPT

In January 1998, Cablevision of Michigan announced that it had reached a tentative agreement to sell the Kalamazoo Cablevision system to TCI. TCI is the largest cable MSO in the U.S. and owns several cable systems in southwest, Michigan. Shortly after the announcement, WOOD-TV 8 announced that it would return Channel 8 to the normal Cablevision lineup until such time as the Kalamazoo Cablevision system was sold and transferred to TCI. It should be noted that WOOD-TV 8 has several existing retransmission agreements in place with TCI. Thus, the decision to restore Channel 8 to the Kalamazoo Cablevision system was intended to be a gesture of good faith with the greater Kalamazoo public and a recognition of the ongoing relationship that WOOD-TV 8 has with TCI. Channel 8 was returned to the Kalamazoo Cablevision system in time for the 1998 Superbowl thus ending a five year dispute.

Endnotes

- 1 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in selected portions of 47 U.S.C.) [hereafter, Cable Act of 1992].
- 2 The city of Kalamazoo, Michigan is part of the southwest, tricity television market consisting of Kalamazoo, Grand Rapids and Battle Creek as well as surrounding communities. In terms of size, the southwest, Michigan market ranks between 36th-37th in the United States according to the A.C. Nielsen research corporation
- 3 *NBC Affiliate and Cablevision are Feuding Again Over Broadcast Fees*, Kalamazoo Gazette, C4 (November 13, 1995).
- 4 Id.
- 5 LIN Television Corporation is 45% owned by AT&T and its subsidiary McCaw Communications. LIN Television owns and operates eight television stations. LIN Television was created when its forerunner, Lin Broadcasting, spun off seven of its eight television stations from McCaw Communications in 1994. WOOD-TV was the only LIN property whose ownership remained with McCaw Communications. In August 1997, LIN Broadcasting and AT&T announced plans to sell WOOD-TV 8 as part of a \$1.7 billion deal to Dallas based broadcast group, Hick, Muse, Tate and Furst.
- 6 *Cable TV Dispute Still Bubbling on Back Burner*, Kalamazoo Gazette, D1 (February 11, 1995).
- 7 Cablevision cited the example that WOOD-TV 8 had granted more accommodating retransmission consent terms to Kalamazoo based Western Michigan University and their on-campus cable system which crosses over (or utilizes) Stadium Drive considered to be a major avenue and public right of way. In principle, if two cable systems serve the same area, the station [Wood TV-8] cannot assign must carry status for one cable operator and not the other.
- 8 *Supra* note 3 at C1.
- 9 Telephone Interview with Laura Buscani, Director of Public Relations, Cablevision Systems Corporation, Midwest: (May 27, 1997).
- 10 *Cable TV Ruling: WOOD-TV Could Leave Cable Lineup*, Kalamazoo Gazette, 1 (November 27, 1996).
- 11 *WOOD Pulls Plug on Cable Broadcast*, Kalamazoo Gazette, A2 (January 16, 1996).
- 12 The master franchise plan is intended to be a blueprint that participating communities can use in establishing cable related goals and priorities. Each community, however, must sign an individual franchise agreement with their respective cable operator.
- 13 In 1996, the city of Kalamazoo received \$322,894 in franchise fee payments. Approximately 40% of that revenue goes to support community access. An additional 10% covers administrative costs and cable related services, to the city including televised coverage of city commission meetings and educational television.
- 14 *Supra* note 9.
- 15 *Cablevision of Michigan for Sale*, Kalamazoo Gazette, C1 (February 26, 1997).
- 16 *Cable TV Bills are Going Up*, Kalamazoo Gazette, D1 (March 30, 1997).

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- 17 Cable Communications Policy Act of 1984, 47 U.S.C. (1984) [hereafter, Cable Act of 1984].
- 18 See Robert G. Picard, *Media Economics*, 14 (1989).
- 19 *Id.* at 66.
- 20 See S. Charles Maurice, Owen R. Phillips and C.E. Ferguson, *Economic Analysis: Theory and Application* 562 (1982).
- 21 See Erwin G. Krasnow, Lawrence D. Longley and Herbert A. Terry, *The Politics of Broadcast Regulation* 19-25 (3rd Ed., 1982). See also Bruce M. Owen and Steven S. Wildman, *Video Economics* 15-16 (1992).
- 22 Radio Act of 1927, 44 Stat. 1162-66, 1168 (1927).
- 23 Communications Act of 1934, 48 Stat. 1064 (1934).
- 24 47 U.S.C. sec. 521 (1984).
- 25 The Cable Act of 1984 prohibits local governments from arbitrarily refusing to renew a cable operator's franchise and limits the amount of money that can be charged for franchise fees.
- 26 See Ithiel de Sola Poole, *Technologies of Freedom* 50 (1983).
- 27 52 F.C.C., F.2d 1 (1975).
- 28 Comments of the National Association of Broadcasters before the FCC, Docket No. 19671, Washington, DC.: May 21, 1973.
- 29 David Foster, President of the National Cable Television Association, speech before the Federal Communications Commission Hearings on Pay Cable Television, Washington, DC.: November 5, 1973.
- 30 *Home Box Office v. F.C.C.*, F.2d 9 (1978).
- 31 See Richard A. Gershon, *Pay Cable Television: A Regulatory History*, (12)2 Communications and the Law, 18-20 (1990).
- 32 *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp, 181 (S.D.N.Y.) 1966.
- 33 17 U.S.C. Sec. 1 (1909).
- 34 *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390 (1968).
- 35 *Id.* at 399.
- 36 *Columbia Broadcasting System v. Teleprompter Corporation*, 355 F. Supp. 618 (S.D.N.Y. 1972), rev'd. 476 F.2d 338 (2d Cir. 1973), rev'd, 415 U.S. 394 (1974).
- 37 355 F. Supp. at 630.
- 38 476 F.2d at 349.

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- 60 Paul Kagan Associates, Inc., *The Cable TV Financial Databook*, 10 (1996).
- 61 Examples of narrowcasting, include *Black Entertainment Television (BET)*, *ESPN Sports*,
Music Television (MTV), and the *Disney Channel* to name only a few. For viewers, this means
having the ability to watch programming that is more specialized (or customized) to personal tastes.
For advertisers, it means having an audience base (or composition) that is more easily identifiable.
- 62 A.C. Nielsen Company, Nielsen Television Index (NTI) in National Cable Television Association,
Cable Television Developments, 5 (Washington, DC: 1997).
- 63 Interview with Scott Blumenthal, General Manager, WOOD-TV 8, Kalamazoo, MI: (February 11, 1997).
- 64 *Supra* note 9.
- 65 *WOOD-TV Head: Arbitrator Could Resolve Dispute*, Western Herald, 1-2 (February 12, 1997).
- 66 *Id.* at A1.
- 67 *Cablevision Refuses Mediation in Dispute*, Kalamazoo Gazette, A1 (January 18, 1997).
- 68 *Supra* note 66.
- 69 Interview with Joan Burke, Cable Administrator - City of Kalamazoo, Kalamazoo, MI: (June 13, 1997).
- 70 *Supra* note 16.
- 71 Telephone Interview with Gary Wrightman, General Manager of Cablevision of Michigan -
Kalamazoo, MI: (June 13, 1997).
- 72 *Angry Viewers Can Fight Cable Melee with Wallets*, Kalamazoo Gazette, Viewpoint (January 23, 1996).
- 73 *Letters to the Editor*, Kalamazoo Gazette, (January 24, 1996).
- 74 *Id.*
- 75 WOOD-TV 8 is based in Grand Rapids, MI and its principal advertising comes from that city and
surrounding townships.
- 76 *Supra* note 63.
- 77 See David M. Newberry, *Missing Markets: Consequences and Remedies* in *The Economics of*
Missing Markets, Information and Games, 211-242 (Frank Hahn Ed. 1989). See also Charles Wolf,
A Theory of Nonmarket Failure: A Framework for Implementation Analysis, 21 *Journal of Law and*
Economics, 112 (April 1979).
- 78 See Alfred Allan Schmid, *Property, Power and Public Choice* 52-53 (1978).
- 79 Chilton Research Services, *Battle of the Brands*, Cablevision Blue Book, Vol. V (1997).
- 80 Norman M. Sinel et al., *Current Issues in Cable Television: A Rebalancing to Protect the Consumer*,
8 *Cardozo Arts & Entertainment*, 395-402 (1990).
- 81 In today's market, the estimated cost of an earth station is between \$100 - \$300 plus a monthly user
fee between \$30-35 for basic service.

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- 39 415 U.S. at 414.
- 40 See Patrick Murphy, *Retransmission Consent: A Mixed Signal for Cable Copyright*, 17 Columbia-VLA Journal of Law & the Arts, 246-247 (1993).
- 41 Id.
- 42 The Copyright Act of 1976, 17 U.S.C. Sec. 111(f) (1994).
- 43 See Stanley M. Besen et al., *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 Journal of Law and Economics, 67 (1978). See also: Leslie A. Swackhammer, *Cable Copyright: Cable Copyright: The Corruption of Consensus*, 6 Hastings Communication & Entertainment Law Journal, 283, 317-318 (1984).
- 44 *Supra* note 1.
- 45 In March 1997, the U.S. Supreme Court upheld the must carry provision of the 1992 Cable Act.
- 46 The National Association of Broadcasters, *The Facts About Retransmission Consent*, a position paper, 4-7 (Washington D.C., 1993).
- 47 See *Most Stations Seek Pay for Must Carry*, San Francisco Chronicle, C4. (July 16, 1993). See also: *Retransmission Plans: Programming the New Channels*, 16, Broadcasting & Cable, (October 11, 1993).
- 48 The extra channel allocation has proven very popular for some broadcasters, marking the debut of such broadcast/cable services as Fox's fx, ABC's ESPN2, NBC's America's Talking as well as more than 20 local broadcast/cable services. In some cases, broadcasters were able to work out a local news tie-in with a cable news service such as CNN Headline News.
- 49 See Lorna Veraldi, *Newscasts as Property: Will Retransmission Consent Stimulate Production of More Local Television News*, (46)3 Federal Communications Law Journal, 470 (1994).
- 50 See Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision*, (49)1 Federal Communications Law Journal, 114-115 (1996).
- 51 See Richard A. Gershon, *The Transnational Media Corporation: Global Messages and Free Market Competition*, 9-13, 20-21 (1997).
- 52 Ibid., p. 182.
- 53 See Ken Auletta, *Three Blind Mice*, 72-106 (1991).
- 54 *Broadcasters Connecting to Cable*, Broadcasting & Cable, 4-6 (February 17, 1997).
- 55 *Supra* note 17.
- 56 National Cable Television Association, *Cable Television Developments*, 1-2 (Washington, DC: 1997).
- 57 *By the Numbers*, Broadcasting & Cable, 58 (July 7, 1997).
- 58 Id.
- 59 *Supra* note 57.

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- 82 See John McManus, *A Market-based Model of News Production*, 5 *Communication Theory*, 328 (1995).
- 83 It should be noted that Kalamazoo's subscriber count is factored into Romance Classics nationwide marketing effort.
- 84 *Supra* note 71.
- 85 Wolf, *Supra* note 77 at 112.
- 86 *Id.* at 112-115.
- 87 Cable franchises have been denied in Ralla, MS., Morgantown, PA. and Sturgis, KY.
- 88 *Supra* note 9.
- 89 Radio Act of 1927, 44 Stat. 1162-66, 1168 (1927).
- 90 Communications Act of 1934, 48 Stat. 1064 (1934).
- 91 While the assigned frequency is privately managed, broadcasters can and will be fined by the FCC for its misuse such as obscenity on the airwaves or failure to maintain proper equipment.
- 92 Telephone Interview with Eileen Huggard, Executive Director of NATOA, (May 27, 1997).
- 93 Sources: Nielsen Media Research and Cable Advertising Bureau
- 94 It should also be remembered that the southwest Michigan market is comprised of two Lin Television owned stations, including: WOOD TV, Grand Rapids and WOTV, Battle Creek. The possibility of a third programming service owned by Lin Broadcasting in the same market raises a legitimate concern about broadcast crossownership and market dominance.
- 95 *Supra* note 90.
- 96 In granting a franchise renewal, one of the important provisions contained in the Cable Act of 1992 was the stated recognition that local communities do have the right to consider whether a cable operator has developed a legitimate plan for addressing the future cable related needs of a community.

