

CLOSING COMMENTS OF  
FCC COMMISSIONER JAMES H. QUELLO  
BEFORE THE  
AMERICAN BAR ASSOCIATION'S  
SECTION OF  
PATENT, TRADEMARK AND COPYRIGHT LAW  
WASHINGTON MARRIOTT HOTEL  
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I BELIEVE TODAY'S DISCUSSIONS ON INTELLECTUAL PROPERTY RIGHTS AND THE ELECTRONIC MEDIA ARE MOST TIMELY AND DEMONSTRATE THE COMPLEXITY OF ISSUES FACED BY THOSE IN THE ELECTRONIC MEDIA. I AM A STRONG SUPPORTER OF PROPERTY RIGHTS; HOWEVER, THE MECHANISMS DEvised TO ASSURE JUST COMPENSATION FOR THE USE OF PROPERTIES MAY CREATE INEQUITIES TO BOTH THE PROPERTY RIGHT HOLDER AND THOSE IN THE ELECTRONIC MEDIA WHO ARE DISTRIBUTING THE PROPERTY.

I WOULD LIKE TO HIT A FEW OF THE HIGHLIGHTS. IN MY SOMEWHAT CRITICAL SEPARATE STATEMENT ON THE FINALLY RELEASED MUST-CARRY PROCEEDING, I INDICATED THAT I WILL FOLLOW CLOSELY THE COMMENTS FILED IN RESPONSE TO THE INQUIRIES WE WILL INITIATE CONCERNING THE COMPULSORY LICENSE SCHEME AND SYNDICATED EXCLUSIVITY. I BELIEVE THAT IT WAS CONGRESS'S INTENT TO LINK THE COMPULSORY LICENSE SCHEME WITH THE COMMISSION'S PAST MUST-CARRY RULES. EFFORTS TO SUNSET THE NEWLY FORMULATED MUST-CARRY RULES WHILE MAINTAINING THE CURRENT

COMPULSORY LICENSE SCHEME WOULD BE DEVASTATING TO PROPERTY RIGHT HOLDERS AND UNDERMINE THE BROADCAST INDUSTRY'S ABILITY TO SERVE THE PUBLIC INTEREST. FURTHERMORE, LOOKING BEYOND THE ELECTRONIC MEDIA TO THE CREATIVE COMMUNITY, WHAT INCENTIVES EXIST IN A WORLD OF COMPULSORY LICENSES ABSENT MUST-CARRY RULES?

REGARDING THE INQUIRY ON PROGRAM EXCLUSIVITY, MY POSITION IS CLEAR. IN 1980, WHEN THE COMMISSION ADOPTED THE REPORT AND ORDER ELIMINATING THE SYNDICATED EXCLUSIVITY RULES, I DISSENTED -- "I STRONGLY BELIEVE THAT THE ELIMINATION OF SYNDICATED EXCLUSIVITY IS INEQUITABLE, NOT NEEDED, NOT WANTED BY A SIGNIFICANT NUMBER OF CABLE TV OWNERS AND OPERATORS, AND IS COUNTER TO THE LONG-TERM PUBLIC INTEREST." THESE WORDS FROM MY DISSENTING STATEMENT ARE OVER SIX YEARS OLD. I BELIEVE THAT TIME AND CHANGES IN THE COMPETITIVE NATURE OF THE MARKETPLACE ADD EVEN GREATER WEIGHT TO MY DISSENTING STATEMENT. I WAS THEN AND AM NOW UNCOMFORTABLE WITH THE CONCEPT OF EXPROPRIATING A VALUABLE PROPERTY -- A TELEVISION PROGRAM -- WITH NEITHER CONSENT FROM NOR COMPENSATION TO THE OWNER OF THAT PROPERTY.

LATER, IN 1984, WHEN THE COMMISSION'S MAJORITY VOTED DOWN A PETITION FILED BY HENRY GELLER SEEKING REINSTATEMENT OF THE COMMISSION'S PAST SYNDICATED EXCLUSIVITY RULES, I ALSO ISSUED A DISSENTING STATEMENT. I ARGUED THEN THAT THE COMMISSION SHOULD INSTITUTE A NOTICE OF INQUIRY TO EXAMINE THE CHANGES THAT HAVE OCCURRED IN THE BROADCAST PROGRAMMING MARKETPLACE

SINCE OUR EARLIER DECISION TO ABANDON OUR SYNDICATED EXCLUSIVITY RULES. THE COMMISSION COULD THEN DETERMINE WHAT, IF ANY, STEPS ARE NECESSARY TO REMEDY ANY MARKETPLACE FAILURES. AS I HAVE SAID BEFORE, "THE BROADCAST INDUSTRY DOES NOT OPERATE IN A VACUUM. COPYRIGHT ISSUES ARE A CRUCIAL ELEMENT OF THE BROADCAST MARKETPLACE, AND THE COMMISSION CANNOT FULFILL ITS RESPONSIBILITIES IF IT IGNORES THE EFFECTS OF ITS ACTIONS ON THE VERY MARKETPLACE FORCES ON WHICH IT HAS PLACED SUCH HEAVY RELIANCE." NEEDLESS TO SAY, I WOULD SUPPORT A COMMISSION INQUIRY INTO THE EFFECTS OF THE ELIMINATION OF THE SYNDICATED EXCLUSIVITY RULES.

I WOULD LIKE TO SAY A FEW WORDS ABOUT SATELLITE DELIVERED PROGRAMMING AND THE PUBLIC'S RIGHT TO THAT PROGRAMMING. AGAIN, I FAVOR THE RIGHTS OF THE PROPERTY HOLDER. I ALSO BELIEVE IN THE AMERICAN PUBLIC'S RIGHT TO ACCESS THIS PROGRAMMING. THE PROBLEM EMERGES WHEN BOTH THE RIGHTS OF THE PROPERTY HOLDER AND THE RIGHTS OF THE AMERICAN PUBLIC ARE HELD HOSTAGE TO SCHEMES OF THOSE WHO WOULD RESTRICT ACCESS TO PROGRAMMING CHOICES BY SATELLITE DISH OWNERS IN ORDER TO MAINTAIN THEIR COMPETITIVE ADVANTAGE. THE COMMISSION IS CURRENTLY EXAMINING MANY ISSUES ASSOCIATED WITH SCRAMBLING AND I WILL HOLD OFF MY FINAL JUDGMENT UNTIL I CAN REVIEW THE FINDINGS OF OUR INQUIRY.

FINALLY, I WOULD LIKE TO SAY A FEW WORDS ABOUT THE LICENSING OF MUSICAL PERFORMANCE RIGHTS IN THE CABLE AND BROADCAST INDUSTRIES. CONGRESS, NOT THE COMMISSION HAS BEEN THE FORUM

FOR THE DISCUSSION OF LICENSING OF MUSICAL RIGHTS. I THINK THAT MANY OF YOU WOULD AGREE THAT THE REAL ISSUE IN THIS DISCUSSION, ALTERNATIVE LICENSING SCHEMES, WERE OFTEN CLOUDED BY THE EMOTIONAL TESTIMONY OF THOSE RESPONDING TO THE PROPOSED LEGISLATION. I AM CONFIDENT THAT LEGISLATION WILL BE REINTRODUCED IN THE NEW CONGRESS ADDRESSING SOURCE LICENSING. TO THE EXTENT THAT THE PROPOSED LEGISLATION ASSURES THE OWNERS OF THE PROPERTY RIGHTS JUST COMPENSATION FOR THE USE OF THEIR PRODUCT, WHILE ALSO PROVIDING MORE FLEXIBLE, ALTERNATIVE LICENSING SCHEMES FOR CABLE OPERATORS AND BROADCASTERS, I WOULD SUPPORT SUCH LEGISLATION. AT THIS STAGE OF THE GAME, HOWEVER, ITS TOO EARLY TO PREDICT THE SUCCESS OR FAILURE OF PROPOSED LEGISLATION ON MUSIC LICENSING.

BEFORE CLOSING AND COMMENTING ON THE ISSUES THAT ARE CRITICAL TODAY, I'D LIKE TO GIVE YOU MY NO FRILLS, BOTTOM LINE POSITION ON MUST-CARRY. I BELIEVE THE MOST SIMPLE, DIRECT AND VIABLE MUST-CARRY SOLUTION WOULD HAVE BEEN TO ADOPT THE BROADCAST-CABLE INDUSTRY COMPROMISE PLUS REQUIRED CARRIAGE FOR ONE PUBLIC STATION ON ALL SYSTEMS WITHOUT THE MANDATORY A/B SWITCH. I WENT ALONG WITH THE COMMISSION ITEM INCLUDING THE A/B SWITCH TO GAIN A CONSENSUS, BUT I EXPRESSED CONCERN AS TO ITS PRACTICALITY. NOW, AS BROADCASTERS AND CABLE OPERATORS FACE THE NEW MUST-CARRY RULES WITH THE POSSIBILITY OF SUNSETTING THESE RULES IN FIVE YEARS, LAWS AND COMMISSION RULES REGARDING COMPULSORY LICENSE AND SYNDICATED EXCLUSIVITY RESPECTIVELY MAY HAVE TO BE CHANGED.

IN CLOSING, I HOPE THAT WE HAVE DEVELOPED A GREATER SENSE OF THE COMPLEXITY OF THE ISSUES ASSOCIATED WITH INTELLECTUAL PROPERTY RIGHTS AND THE ELECTRONIC MEDIA. THE STRENGTH OF OUR SOCIETY IS LARGELY DEPENDENT ON THE RIGHTS OF INTELLECTUALS, INVENTORS, ARTISTS, WRITERS AND OTHERS TO BENEFIT FROM THEIR CONTRIBUTIONS. WE MUST ASSURE THESE INDIVIDUALS OF THEIR PROPERTY RIGHTS AND PROVIDE THE PROPER INCENTIVES AND REWARDS, BOTH FORTUNE AND FAME. SUCH ASSURANCES REQUIRE FAIR AND EQUITABLE REGULATION AND LAWS SUBJECT TO PRACTICAL CHANGE AS NEWLY DEVELOPED TECHNOLOGY MAY WARRANT.

THANK YOU