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Mandated access: commensurability and the right to say no

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Mandated Access: Commensurability and the Right to Say “No”†

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Introduction

A. The Statute

Here is the problem, as Congress saw it: A distributor of television programming (a cable television operator or a distributor of television programming via other media) cannot thrive unless it can supply viewers with top-rated programming. Few customers want to subscribe to a service that lacks NBC's *Seinfeld*, the latest episodes of *General Hospital*, or even PBS educational documentaries. Special provisions in the 1976 Copyright Act gave cable operators some liberty to retransmit broadcast programming. However, that Act created no such liberties for programming originating from within cable companies. Because the national market for programming is dominated by a few large cable operators, smaller distributors—such as direct broadcast satellites (DBS) and multichannel, multipoint distribution services (MMDS) (wireless cable)—may find it difficult to obtain permission to show popular programming that originates from their large competitors.

Congress' fear was that big cable operators typically demand that programming vendors enter into exclusive contracts with them. A vendor of a popular program would thereby agree not to sell its program to anyone else. This would leave small distributors with access to less valuable stock-in-trade, and potentially leave cable television customers in some areas without the shows they want to watch. (Also, for those customers who refused to hook up to cable services with paltry offerings, it could leave them with a few, static-filled broadcasts

1. With certain qualifications 17 U.S.C. § 111(c)(1) requires that:
   [S]econdary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

if anything at all.) Furthermore, of course, because large cable operators might buy up all the most popular programs, Congress feared that freedom from competition could allow them to demand outrageous prices from television-hungry consumers.

Another concern played a role as well. Small or independent programming vendors—including the distributors or creators of innovative, out-of-the-mainstream programs—may have difficulty entering the cable programming market as it is currently structured. Many cable operators have a financial interest in larger vendors, and, quite naturally, show preference in their carriage choices for their affiliates. With the television market dominated by a few powerful vendors, independent creators of programming might be unable to reach the public; and Congress worried that viewers would be denied access to a sufficiently diverse spread of televised viewpoints.²

Congress responded to these and other fears with the passage of the 1992 Cable Act.³ Most attention has been directed to the 1992 Cable Act's "must-carry" provisions.⁴ Less well known, but equally interesting are the 1992 Cable Act's "must-license" or "mandated access" provisions.⁵ These provisions attempt to promote competition and diversity in the distribution of programming by making it easier for small or unaffiliated distributors to obtain licenses at nondiscriminatory rates for programming that otherwise might be reserved solely to the use of dominant or vertically-integrated distributors. These

². One of Congress' primary concerns was with the public's access to informational and entertainment programming (including "marquee programming" such as recent-release movies) which might not otherwise have been available. The concern was great enough that the provision with which this Article primarily deals—§ 19, discussed below—was added to the 1992 Cable Act on the floor of the House (rather than being a standard product of the committee process) and was subject to real discussion and scrutiny during the floor debate. Conversation with Andrew Schwartzman (Nov. 17, 1994) (discussing legislative history of the 1992 Cable Act).


⁵. The "must-license" provisions are contained in §§ 12 and 19. Section 12 modifies Part II of Title VI of the Communications Act of 1934 by adding a new § 616; it is codified at 47 U.S.C. § 536 (Supp. IV 1992) and implemented by the FCC at 47 C.F.R. pt. 76, subpt. Q (added pursuant to the 1992 Cable Act), §§ 76.1300-76.1302. Section 19 modifies Part II of Title VI of the Communications Act of 1934 by adding a new § 628; it is codified at 47 U.S.C. § 548 (Supp. IV 1992) and implemented by the FCC at 47 C.F.R. pt. 76, subpt. O, §§ 76.1000-76.1003 (added) and §§ 76.1004-76.1010 (amended).
provisions prohibit certain exclusive licenses between cable operators and vendors, along with certain behavior that would effectively restrict carriage of programs to particular distributors.

B. The Jurisprudential Issues

Accordingly, one hears arguments that the constraints imposed by the must-license provisions illegitimately endanger vendors’ property rights in their programming. Specifically, the threatened jurisprudential conflict is the following: Prior to the 1992 Cable Act, programming vendors largely had the right to dispose of their programs as they would—they could sell them to whomever they desired, on terms that they chose (or at least, on the best terms they were able to negotiate). The 1992 Cable Act, however, constrains the vendors of cable programming in several important ways. They no longer have the right, in many instances, to enter into exclusive contracts for programming. They must offer their programs for sale on “nondiscriminatory” terms to smaller, independent programming distributors. Thus, the 1992 Cable Act narrows vendors’ established property right in their programs. 7

One of the most important questions for the law to resolve over the next twenty years will be the issue of what importance should be given to a property owner’s “right to say no.” This Article provides an introduction not only to the must-license or mandated access provisions but also to the sorts of issues that are raised by all such provisions. We focus on how the law should approach the question of who should decide whether a person’s possessions are commensurable with money.

6. Note, however that a copyright holder’s rights are never fully exclusive. All rights granted by copyright are subject to various limitations. 17 U.S.C. § 106 (1988).

7. The property created by the Copyright Act includes among its aspects the exclusive right to control the initial public performance of the copyrighted work on the airways. See 17 U.S.C. § 101 (Supp. V 1993) (definitions); id. § 106 (rights of a copyright owner).

Although the 1976 Copyright Act made broadcasters subject to compulsory license provisions under 17 U.S.C. § 111, those compulsory licenses only applied to retransmission, not initial transmission. Hence, the broadcaster could choose when to first expose a given work to the public. This right to control timing can be important, particularly when nationwide advertising campaigns are being planned for a given premier. The compulsory licenses imposed by the 1992 Cable Act’s mandated access provisions (which are applicable to programming being distributed by cable companies, as distinguished from § 111’s focus on programming being broadcast over the air) are not so clearly limited to retransmission. It is conceivable that the 1992 Cable Act, too, will be interpreted to mandate licenses only for transmissions that occur after an initial exclusive transmission. However, the regulations are silent on this point.
I

Overview of the Mandated Access Provisions

Section 12 ("Regulation of Carriage Agreements") aims to prevent economically powerful cable operators (COs) and other multichannel video programming distributors (MVPDs) from unfairly refusing to carry programming produced by programming vendors in which the CO has no financial affiliation. Section 12 requires COs and MVPDs to deal fairly with financially independent programming vendors. In relevant part, Section 12 calls for the FCC to issue regulations that:

1. ... prevent a [CO] or other [MVPD] from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;
2. ... prohibit a [CO] or other [MVPD] from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other [MVPDs] as a condition of carriage on a system;
3. ... prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated ... vendor ... to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors ... . 8

Thus, Section 12 imposes three very general limitations on the behavior of an MVPD with respect to a programming vendor. First, an MVPD cannot require as a condition of program carriage that a vendor give the MVPD a financial interest in its operation. 9 Second, an MVPD cannot coerce a vendor into signing away exclusive rights to the programming offered for carriage. Third, an MVPD cannot act in any way that would unreasonably hinder an independent vendor from competing fairly.

Section 12's language, in many aspects, mimics that of long-established and relatively uncontroversial legislation in the antitrust and consumer protection fields. Though Section 12 does not abrogate any existing antitrust remedy, it has been suggested that a primary purpose of Section 12 is to give plaintiffs a speedier, less expensive remedy—through Federal Communications Commission (FCC)

9. In other words, an MVPD may not require "vertical integration" as a condition of carrying a vendor's programming. For brevity, we will use the phrase "vertically integrated vendor" to indicate a vendor in which an MVPD has a financial interest and the phrase "vertically integrated MVPD" to indicate an MVPD that has a financial interest in a vendor. Vertically integrated vendors and MVPDs are distinguished, of course, from vendors and MVPDs that are financially independent, and, presumably, less powerful economically.
administrative proceedings—than is available via in-court antitrust litigation. Nevertheless, because the FCC has specifically declined to delineate exactly which activities Section 12 prohibits, it is possible that the implementation of Section 12 could have implications for property-rights jurisprudence. But the more pressing concern is a particular subpart of Section 19.

Section 19 of the 1992 Cable Act, "Development of Competition and Diversity in Video Programming Distribution," is targeted more specifically at particular practices in which both MVPDs and vendors might engage. Subsection (c) outlines the "Minimum Contents of Regulations" that the FCC must issue. In paraphrase, these prohibitions are the following:

(A) A CO with a financial interest in a vendor may not unduly or improperly influence that vendor's decision to sell programming to an MVPD that is not vertically integrated.

(B) A vendor in which a CO has a financial interest cannot discriminate in the sale of programming to other MVPDs (with certain exceptions, e.g., in setting prices, a vendor is allowed to take into account reasonable differences in the cost of providing programming to different MVPDs).

Perhaps most controversially:

(C) A programming vendor and a CO may no longer enter into exclusive contracts for programming; nor may they engage in any be-


11. Rather, the FCC reports:

12. For simplicity, the authors use the general term "vendor" here. In contrast to § 12, however, § 19 generally refers more specifically to a "satellite cable programming vendor" or a "satellite broadcast programming vendor." 1992 Cable Act, supra note 3, § 19 (codified at 47 U.S.C. § 548(j)(2), 548(j)(4) (Supp. IV 1992)).
behavior that would prevent (another) MVPD from obtaining programming from any vertically-integrated vendor; when distribution to areas not served by a CO is at issue.13

(D) A CO and a vendor in which that CO has a financial interest may no longer enter into exclusive contracts for programming, unless the FCC decides that such a contract would be in the “public interest.”14 This prohibition applies even when distribution to areas now served by a CO is at issue.

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

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

II

Economic Rationale

Congress clearly believed that market distortions—including insufficient competition—in the cable industry required the prohibitions of Sections 12 and 19. In Section 2 of the 1992 Cable Act (“Findings; Policy; Definitions”), the authors survey the history of the industry since its deregulation in the 1984 Act, finding that:

For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.15

Congress feared that unless it acted to correct this perceived lack of competition, the industry would generate an insufficient diversity of

13. Specifically, this subsection applies to distribution to areas not served by a CO as of the date of § 19’s enactment. Id. (codified at 47 U.S.C. § 548(c)(2)(C)).

14. Under § 19(c)(5), this prohibition (applicable to areas already served by cable) will be effective for only 10 years, unless the FCC decides that it “continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.” Id. (codified at 47 U.S.C. § 548(c)(2)(D)).

15. Id., § 2(a)(2) (included in history at 47 U.S.C. § 521 (emphasis added)).
programming and consumers would have insufficient access to whatever programming was produced.\textsuperscript{16} Sections 12 and 19 respond to this perceived market distortion by making it easier for smaller operators to purchase the well-known programs that consumers desire; the congressional hope was that by the year 2002 (at which time the provisions of Section 19 will be vacated by its sunset provision\textsuperscript{17}), smaller operators would have become sufficiently established in the market for the 1992 Cable Act's regulations to be unnecessary.

Of course, not all commentators would affirm Congress' market analysis. With regard to the specific prohibition on exclusive contracting, the Bush Administration made it clear that it felt lack of competition was not a problem.\textsuperscript{18} The administration submitted this statement in opposition to the exclusivity prohibition:

The Administration opposes the amendment to be offered by Rep. Tauzin concerning access to cable programs [i.e., the prohibition on exclusive contracting]. It would restrict the discretion of cable programmers in distributing their product. Exclusive distribution arrangements are common in the entertainment industry and encourage the risk-taking needed to develop new programming. Requiring programming networks that are commonly owned with cable systems to make their product available to competing distributors could undermine the incentives of cable operators to invest in developing new programming. This would be to the long-term detriment of the American public. If competitive problems emerge in this area, they can and should be addressed under the existing antitrust laws.\textsuperscript{19}

Others who spoke during congressional debates felt that the prohibition on exclusivity went too far and that it would result in requiring program sales "to all comers at government-mandated wholesale prices, terms, and conditions."\textsuperscript{20} Ultimately, the accuracy of Congress' judgment that market distortion causes industry actors to misvalue cable programming remains to be seen. Moreover, because FCC regulations implementing the provisions of the 1992 Cable Act neglect to lay out, for example, exactly what prices will be considered "nondiscriminatory," the practical effect of the 1992 Cable Act on vendors is uncertain.\textsuperscript{21}

\textsuperscript{17} 47 U.S.C. § 548 (adding subsection 628(c)(5) to the Communications Act of 1934).
\textsuperscript{19} Id.
\textsuperscript{21} For example, it is unknown whether cable operators will refuse to buy programming from vendors who are prohibited from offering exclusivity provisions. Alternatively,
III
The Compensation Question

By prohibiting the formation of exclusive contracts for programming in certain circumstances, Section 19 will in those circumstances ultimately require the following of a vendor: If a vendor sells its programming to a large cable operator, on whose business that vendor might depend for financial survival, it must in turn offer this programming for sale to other MVPDs, presumably at reasonably competitive rates. In effect, then, for many programming vendors to remain in business, they will be legally required to license their intellectual products to all multichannel distributors. It is for this reason that the prohibitions in Section 19 are frequently referred to as must-license or mandated access. The mandated access provisions raise interesting questions about the extent to which the government may legitimately interfere with private property rights—in this case, vendors' right to sell programming to whomever they please.

In effect, Congress was concerned with two types of barriers to entry. On one hand, there was the possibility that small distributors could not enter the field of distributing top-rung programs for reasons unrelated to their being equipped to do the job of distribution. On the other hand, there was the possibility that program vendors and creators could not sell their material to the established players in cable television, for reasons unrelated to the programs' merit. It was as if Congress wanted to force a dis-aggregation of the various financial and property interests at play, so that each could find its highest-valued use. Ironically, Congress chose a method which is inconsistent with the usual method of encouraging resources to flow to their highest-valued uses—namely, the maintenance of strong property rights.

Using the language of Guido Calabresi and Douglas Melamed, we characterize the transformation in rights envisioned by the 1992 Cable Act as follows: Prior to the 1992 Cable Act, copyright owners' interests in their products were governed by a "property" rule—i.e., programmers had an exclusive right to refuse to sell their product to any operator they chose. In other words, programmers had a veto if operators do keep buying, will prices be lowered drastically? Will the FCC in fact be forced to set prices to keep vendors afloat? See infra note 29 and accompanying text.

22. For more on the rates at which vendors may sell to other MVPDs, see supra notes 20-21 and accompanying text.

23. Or, perhaps, all reasonable comers—again, see supra notes 20-21 and accompanying text for a more detailed discussion of possible limits on the types of licenses vendors may be forced to enter.

power over the sale of their products. In contrast, the provisions of the 1992 Cable Act eliminate that "property rule" protection and (insofar as the 1992 Cable Act's provisions apply) leave programmers protected by a mere "liability" rule: They lose their veto power, although they retain the right to be paid for the use of their product by purchasers.

The transformation of "property rules" into "liability rules" is usually explored in economic terms. In their classic article, Calabresi and Melamed consider the "invisible hand" assumption an initial assignment of entitlements, or property rights, that will inevitably yield an efficient distribution of those entitlements. (In the cable television arena, this Smithian analysis would suggest that leaving exclusive control of programming rights to vendors would yield optimal social outcomes.) In contrast, Calabresi and Melamed argue that certain types of market failure make it cheaper for the government to take over the task of valuing the resource in question by establishing a liability rule. Other property-rights scholars have argued in a similar vein.

However, the use of liability rules long pre-dates the law and economics movement. Even the Constitution allows property to be "taken" against the owner's will for a public purpose, so long as compensation is paid in an amount deemed "just" by a governmental decisionmaker. It is to this provision we now turn.

If we assume that this compulsory sharing of intellectual property could constitute a "taking" for which the Fifth Amendment requires

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25. The "invisible hand" is usually credited to Adam Smith, but Smith himself noted the need for some regulation. In assessing the propriety of certain banking regulation, Smith noted that "those exertions of the natural liberty of a few individuals, which might endanger the security of the whole society, are, and ought to be, restrained by the laws of all governments; of the most free, as well as of the most despotical." 2 ADAM SMITH, THE WEALTH OF NATIONS 308 (Edwin Canaan ed., 1937).


27. See Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (trade secrets constitute property protected by the Fifth Amendment's " takings" clause). Whether or not the mandated access provisions abrogation of exclusivity constitutes a "taking" could be debated. Compare Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (not a compensable "taking" for the state constitution to eliminate a landowner's right to exclude unwanted peti-
“just” compensation be paid, compensation is a key issue. Yet, the 1992 Cable Act provisions largely leave unanswered a crucial question: How much money will change hands when programming is subjected to a non-exclusivity mandate? Even the implementing regulations are completely silent on the issue of how much compensation should be paid to the copyright holders.

In assessing the compensation issue, a particularly intriguing concern will be identifying the nature of the loss for which compensation might have to be paid. It is possible that the new provisions may have a very countable cost to program vendors. The price paid for several nonexclusive licenses may not equal the price that would have been paid for one exclusive license.

Even putting aside the impact of such a shortfall, there may be a more intangible cost that goes unrecompensed. There may be elements of exclusivity that should not be tradeable in money at all.

Note that similar issues were not raised as pressing by the 1976 Copyright Act’s § 111, which gave cable companies certain compulsory licenses to access broadcast signals. That section came into existence against a background where the Supreme Court had recently held that “the cable television industry did not have to pay royalties for its retransmission of over-the-air broadcast signals.” Marshall Leaffer, Understanding Copyright Law 236 (1989). Therefore, there was no pre-existing exclusive right. The mandated access provisions, however, affect pre-existing exclusive rights.

28. In Midkiff, the United States Supreme Court approved in principle laws which used eminent domain to transfer real property from one private party to another, so that this aspect of the 1992 Cable Act (private/private transfers) is probably acceptable. Nevertheless, the Court reserved the question of whether the state’s compensation was just. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

The Supreme Court has also addressed similar issues in an explicit intellectual property context. In Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), the Court held that the federal government could “take” intellectual property in a way that redounded to the immediate benefit of a private party (the owner’s competitor) “so long as the taking has a conceivable public character” including “allowing greater competition.” Id. at 1014-15.

This approach would seem to characterize the 1992 Cable Act’s mandated access provisions as being in the “public interest” so far as the Fifth Amendment is concerned, leaving as a primary open question the amount of compensation that might be owed.


30. There is a growing array of legal literature on issues of incommensurability. See, e.g., Margaret Jane Radin, Compensation and Commensurability, 43 Duke L.J. 56 (1993); Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779 (1994). For exploration of related issues, see Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (1983) (suggesting that while money may be a good way to distribute some goods and services, other criteria will be more appropriate in other spheres); Frederick Schauer, Commensurability and its Constitutional Consequences, 45 Hastings L.J. 785 (1994) (arguing that whether or not all goods are truly incommensura-
Perhaps in some circumstances, "the right to say no" is not equivalent to a "right to get the market price we think you would receive." Even the "highest price we can imagine" may not be equivalent to the lost "right to say no."

IV

Mandated Access and "Property"

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

So far the Supreme Court has not addressed whether there are any interests that should be immune even from compensated takings. In any event, it is fairly clear that intellectual property rights (such as a vendor's copyrighted programs) are not interests that the Court sees as entitled to such deference. It is true that Article I of our Constitution speaks of giving Congress the power to grant rights that are "exclusive." In contrast, Congress and the courts have never imagined that the only rights that federal copyright law could grant would be rights of complete and utter exclusivity.

Even the first English copyright statute provided explicit limits on a copyright owner's exclusive rights over sale. Under the Statute of

31. See, e.g., James L. Oakes, Copyrights and Copyremedies: Unfair Use and Injunctions, 18 Hofstra L. Rev. 983, 992-97 (1990) (suggesting that even in cases where violation of right is proved and gives rise to monetary relief, free speech principles might warrant denying injunctive relief). This approach was implicitly endorsed by the Supreme Court in Campbell v. Acuff-Rose, 114 S. Ct. 1164, 1170 n.10 (1994).


33. In Monsanto, the Supreme Court held that it would be a "taking" if the federal government obtained trade secrets under a promise of confidentiality and then allowed competitors to utilize the information contained in the trade secrets. 467 U.S. at 1013. The Court also held that these takings would not be actionable to the extent that the competitors paid adequate compensation for the information. Id. Moreover, the Monsanto Court stated that no injunction would be available in advance to prohibit the taking—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. Id. at 1014-16.

34. U.S. Const. art. I, § 8, cl. 8.

35. Of course, to call any right of ownership fully "exclusive" inevitably involves some overstatement. For example, the Second Circuit noted that copyright proprietors receive a right to benefits that might flow from a copyrighted work, but "not without limit." Berlin v. E.C. Publications, Inc., 329 F.2d 541, 543 (2d Cir. 1964).
Anne, anyone who wanted a book but disliked the price charged for it could ask the law to lower the price; certain governmentally-authorized officials were empowered to "settle the price" of books in a manner "as to them shall seem Just and Reasonable." 36

The first United States copyright statute was also limited in that it only gave copyright proprietors the exclusive rights to "print, reprint and vend" their works—they had no rights over public performance. 37 Ironically, the rights to public performance—shared by all nonexclusively in 1790—are precisely those rights that most concern the players in today's cable industry.

Admittedly, the first American statute did not contain a positively formulated "must-sell" provision like that in the Statute of Anne. However, by 1909 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. 38 For example, once a musical work is made into a record and distributed, any musical group can produce a "cover" of that song—that is, the group can make its own rendition of the song on its own record—at a set license price and without needing the consent of the song's copyright proprietor. 39 An even closer parallel to the 1992 mandated access provisions is the compulsory license grant made by 17 U.S.C. section 111(c)(1), allowing cable operators certain rights to retransmit the signal of a broadcasting station. 40 Thus, Anglo-American copyright law has developed in the direction of allowing limitations on the "exclusive right" of copyright proprietors.

Moreover, the policy reasons underlying the 1992 Cable Act are consistent with the rationale historically expressed by lawmakers for decisions to reign in exclusive rights. The 1909 Congress grounded its compulsory license provisions for phonograph records in a fear of mo-

36. 8 Anne, ch. 19, para. 4 (1709) (Eng.).
37. Act of May 31, 1790, ch. 15, 1 Stat. 124. So, for example, the owner of copyright in a book could not prohibit someone from reading that book aloud to a mammoth audience.
Admittedly, those rights that an early copyright owner did have could be a said to have been exclusive, but that is a contestable linguistic matter. For example, when in the nineteenth century a copyright owner was held incapable of asserting any rights over an abridgement prepared without his consent, that frustrated owner would be unlikely to have described his rights as "exclusive."
38. As intimated supra note 27, 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 authorities for the 1992 Cable Act's prospective effects than as to its effects on already-existing licenses.
40. See supra note 1.
nopoly and a desire to foster competition. Similarly, courts have since adopted compulsory licenses as a response to antitrust problems in patent law. Congress articulated analogous pro-competitive motives in passing the 1992 Cable Act.

As mentioned, there are also common-law examples of "property rules" being transformed into "liability rules." The most famous case is probably Boomer v. Atlantic Cement Co., in which the New York court refused to issue an injunction against a pollution-spewing cement plant, but the court did grant money damages to the plaintiffs. In effect, this award of damages (but refusal of injunctive relief) against a nuisance amounted to a compulsory license. Landowners around the cement plant were, in effect, forced to "license" part of their right to enjoy the air to the cement plant.

These and similar developments have sometimes lead to the ad absurdum query: "What's next, a license to murder?" It is undoubtedly the perceived slippery slope of losing rights thought essential to personal security that raises emotions when dealing with provisions such as the 1992 Cable Act's new mandated access. However, more than habits of thought are at stake. Indeed, the essence of a "right" is arguably its capability of allowing the individual to stand against the majority; rights inevitably imply a sphere where individual will, rather than group welfare, is entitled to prevail. If that is so, a "right" cannot be a "right" in the strictest sense if it is sold against the will of the holder.

As the proportion of compulsory licenses and mandated ac-

43. For example, § 2 of the 1992 Cable Act outlines findings and policies, and the authors explicitly conclude:
    For a variety of reasons ... most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.
44. 26 N.Y.2d 219 (1970). Critics of Boomer include Daniel A. Farber. 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." Daniel A. Farber, Reassessing Boomer: Justice, Efficiency, and Nuisance Law, in A PROPERTY ANTHOLOGY 274, 277 (Richard H. Chused ed., 1993).
45. See, e.g., Arthur Hoppe, A License to Steal, in ECONOMIC FOUNDATIONS OF PROPERTY LAW 49 (Bruce A. Ackerman ed., 1975).
46. Though compensation can provide some recognition to rights, compensation for a lost right is not the same thing as honoring that right in full. See Radin, supra note 30.
cess provisions grows, society may need a fundamental reconceptualization of the notion of property.

No one fears that "licenses to murder" will soon be sold by governmental clerks. However, while American jurisprudence still gives fairly secure recognition to personal rights of bodily integrity, it gives somewhat less recognition to rights to be secure in one's enjoyment of property (like the nuisance right at issue in Boomer), and even less recognition to rights against the copying of intangibles like programming.

This may well be a desirable hierarchy. One can imagine a plausible rationale: each person has only one body and does not usually desire to subject it to commercial valuation; people have many pieces of physical property, and they are used to trading them; and, as for television programs, they are produced for trade, and can be infinitely reproduced without forcing the originator to forego the right of access. Nevertheless, such a hierarchy—which places some forms of intellectual property at the most vulnerable position—deserves further scrutiny. The next section of this Article offers some preliminary guidelines for beginning that inquiry.

V
Commensurability Guidelines

In determining whether an entitlement protected by a property rule should be protected instead by a liability rule, law and economics scholars generally inquire into whether factors are present that might impede voluntary market trades from occurring. These factors include elements such as high transaction costs and strategic behaviors.47 Scholars concerned with the limitations of the economic perspective go beyond this, typically focusing on the type, category, or quality of the thing at stake (e.g., babies or bodily integrity) to ask "if this thing is appropriately traded on the market."48 As part of this inquiry, scholars frequently suggest reasons why trades in certain resources are or should be forbidden.49

47. See, e.g., Calabresi & Melamed, supra note 24.
48. This has been my approach on occasion, too. See Wendy J. Gordon, On Owning Information, 78 VA. L. REV. 149, 223, 257-58 (1992) (recommending that the tort of misappropriation be limited to intangibles suitable for trading and discussing criteria of market suitability).
49. There is a growing literature on "inalienability." See, e.g., Calabresi & Melamed, supra note 24. Note that there can be degrees to which transfers are or should be blocked. For example, some things should not be transferred at all (such as one's vote), while some may be appropriately given away so long as no money changes hands (such as bodily organs).
These are indeed important aspects of the property rule puzzle. But they do not exhaust the issues at stake. Our concern here is with another part of the puzzle: protecting an entitlement holder's right to decide whether market deals are desired at all—including her right to decide whether market deals are only desired when coupled with some right of control.

We might call this concern with who decides the incommensurability question a "process" issue, as distinguished from the substantive issue of categorizing a given resource as commensurable or not. Some things which our society may be happy to see traded, it might not be happy to see traded against the will of the owner.

Here we will propose a set of tentative guidelines for approaching this issue of process. We will then use those guidelines to evaluate the 1992 Cable Act's mandated access provisions. Essentially, our question is whether, in this instance, any significant weight should be given to protecting a copyright proprietor's right to decide for herself whether her power to grant an exclusive contract is monetizable. We argue that those observers who complain about the mandated access provision on the ground that it undermines crucial rights of property and human dignity are drastically overstating their case. So long as valid distinctions can be drawn among uses of liability rules, most dangers of the slippery slope can be averted. The next section sets forth criteria from which distinctions with "staying power" might be drawn.

50. Recall the subtitle of the Calabresi & Melamed article, supra note 24: "One View of the Cathedral." It reminds us that just as Claude Monet could present only one view of Rouen Cathedral in any one canvas, theorists can do little more than present one perspective at a time.

51. Note that our focus is not on the overall issue of commensurability, but rather on the narrower question of commensurability with money. We use the broader term ("commensurability" rather than "monetizability") out of deference to the interesting literature that is crystallizing around "commensurability." See supra note 30.

52. The same person who might be willing to sell a painting for $500 might be highly insulted if someone came and took it off her wall without permission, regardless of whether the thief left $500 scotch-taped to the wall in its place.

53. Note that, even if protecting this interest were found to have significant importance, that would not lead immediately to condemning the mandated access provision. As mentioned, the process issue is only part of the puzzle. Rather, if the process issue is resolved in the right-holder's favor, then an assessment would need to be done to determine what weight that factor has here, and the factor would need to be weighed against whatever reasons might favor this particular transformation from property rule to liability rule.

But we do not attempt this final task; we will content ourselves with articulating a set of tentative guidelines for approaching the question of when an entitlement-holder's right to decide commensurability for herself is likely to have significance.
A. Preliminary Guidelines for Assessing "Process" Incommensurability Issues

We suggest two starting points for the "process" inquiry, one positive (or descriptive) and one normative. The positive starting point is an inquiry into the rule's current functions: Why has the law awarded the entitlement in question to this holder? Why up to this time has the entitlement been protected by a "veto right" property rule? Also, whatever the original purpose of the entitlement, what functions are now served by the entitlement and by the use of a property rule to protect it? The descriptive inquiry is largely a question of consistency with current law and practice.

The normative starting point goes beyond the status quo to ask whether these historic purposes and current functions are in fact desirable. However, since the choice of norms is inevitably a matter of deep controversy, the constraints of space caution us against attempting to specify (even preliminarily) a choice of normative criteria. Whatever the applicable norms, however, they deserve to be applied to the process issue of incommensurability as well as to the more standard policy questions.

Assuming the functions served by the entitlement and its property rule are considered legitimate under applicable norms, the next task would be to address the extent to which these functions would be undermined if the entitlement-holder lost her right to decide if the entitlement is or is not commensurable with money. As one example of applying these steps in the analysis, consider the familiar argument of law and economics practitioners that most common law property entitlements were granted for reasons of economics, and that property entitlements today continue to serve economic functions. According to this view, property rights are granted to provide incentives, and the "invisible hand" ensures that property owners function as good stewards to maximize social economic value. Assume for the moment that this was in fact the origin and function of a property right at issue, and that this economic stewardship approach satisfied the relevant normative inquiry. If so, then it would seem that (in the particular case) the "process" issue of incommensurability would largely drop out of the calculation of whether the entitlement should be protected by property rule or liability rule. That is, the more economic the reasons for granting and honoring a particular right, the more likely it will be ac-
ceptable to take away from the holder the choice of whether to monetize it. 54

At least four interrelated subissues remain to be canvassed. First, who is the holder of the right, a human individual or a corporate “person”? Though corporations occasionally hold rights that are not easily monetizable (consider, for example, a university’s right to decide whom to tenure), for most corporations their primary function is a monetary one. The more monetary the holder’s purposes, other things being equal, the less weighty becomes their claim under the “process” inquiry.

This is related to the second subissue: the nature of the resource. For example, does it appear to be personal or nonpersonal, wedding rings as inventory or wedding rings as heirlooms? 55 The more personal, the less likely it is to be monetizable.

A third subissue is relative importance, that is, how important is the resource at issue to the holder (whether that holder happens to be corporate or human) in relation to the holder’s other interests. The more relative importance the resource has, the more likely it is that abrogation of the holder’s rights over it will change the holder’s valuation of a host of other items. (Consider for example the importance of health: it may be more difficult to enjoy diamonds, and easier to enjoy leisure, when one’s health is in jeopardy.) Thus, the more important the resource to the person holding the entitlement, the more likely it is that only that person can accurately decide whether or not the entitlement is commensurable with other values.

The fourth subissue concerns the implications that the property rule holds for other social practices. 56 For instance, if the medical profession sought the right to monetize valuable organs at will, how would that affect our overall habits, such as people’s willingness to visit their doctors when ill? For a more general possibility, if rights that people have become accustomed to controlling through “prop-

54. For another example, consider instances when the reason for the proposed abrogation of an entitlement is that the lawmakers no longer think the entitlement is a good right to have. Consider, for example, the husband’s right to control the property of his wife under the old rules of “femme couvert.” If a contemporary lawmaker’s judgment about the fundamental undesirability of this spousal entitlement satisfied whatever criteria were set by the relevant normative standard, it would be absurd to care whether or not the holder felt that the right he was losing was incommensurable. Note that in both examples, the inquiry involves a normative judgment by whoever is making the inquiry, and not just consistency with practice or with the prior or present preferences of lawmakers.

55. See, e.g., Margaret Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982). Note that although the substantive “tradeability” of particular items is relevant to the process inquiry, the two issues are not identical.

56. See, e.g., Schauer, supra note 30; Sunstein, supra note 30.
ertty rules” became increasingly vulnerable to sale without their consent, how would that trend affect the community’s dignity, sense of security, or its overall incentives?\(^57\)

Now we shall apply these guidelines to the mandated access provisions of the 1992 Cable Act.

B. Application

When applying these guidelines, a preliminary task is to identify the affected entitlement. In the case of the mandated access provisions, the affected entitlement is the copyright holder’s exclusive right over a program, in particular, the right of public performance. The functions of this entitlement must be assessed from a positive and normative perspective.

From a positive (descriptive) perspective, the purposes of American copyright law are almost entirely instrumental. For example, the Constitution itself uses the language of incentives when it empowers Congress to grant intellectual property rights.\(^58\) To the extent that such an economic approach to copyright is normatively acceptable, this factor suggests that the copyright holder’s “process” interest is likely to be minimal. Monetizability is not an issue; the only issue is *how much* money.\(^59\)

Even if one questioned the normative appropriateness of the economic approach to copyright, the holder’s process interest does not seem much more weighty even if one instead employs alternative norms. For example, in looking at intellectual property from either a corrective justice or Lockean “desert” perspective, it appears that rights to reward are far more justifiable than are rights of control.\(^60\) And, from the perspective of privacy, what is at issue under the mandated access provisions is not the publication of a diary, preliminary

\(^{57}\) In his classic study of the “takings” clause, Professor Michelman suggested that too many uncompensated takings would produce “demoralization costs.” Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165 (1967). Too many compensated takings may have a similar effect.

\(^{58}\) “To promote the progress of Science and the Useful Arts . . . .” U.S. Const. art. I, § 8, cl. 8.

\(^{59}\) I do not mean to under-emphasize the question of “how much” money should be paid. As Calabresi & Melamed stress, *supra* note 24, the difficulty of valuation by third parties provides one of the best arguments for a market governed by property rules. But our concern is to explicate a different sort of argument.

draft, or otherwise private writing; television programs are intended for public performance.

Nevertheless, to the extent that rights of control might deserve independent respect, a copyright holder may be in a better position to claim a "process" interest than otherwise appears. This is particularly true if the statute is interpreted to forbid the copyright holder from even controlling the initial transmission of her program.61 Perhaps the statute will be interpreted to avoid such problems.

As for the subissues identified above, they would not seem to change the calculus much. The holder of a copyright may be either a person or a corporation, but given the nature of the work (a program intended for television) the holder's "personal" connection with it is likely to be implicated only by issues of distortion—and the statute does not permit distributors to distort or otherwise alter the programs. As for the importance of the resource to the holder, this is likely to be economic, so that as long as the compensation paid is sufficient, what is important to the holder will be largely preserved. Similarly, allowing mandated access would not seem to have deleterious consequences for our overall social practices, except insofar as any abrogation of property rules may have some demoralization effect.

Taken together, the process factor at stake in the mandated access context seems weak at best. Hopefully, the above analysis (though preliminary) can suggest that some of the concerns about the slippery slope of "licenses to steal" are overstated, and that Congress in this portion of the 1992 Cable Act did not flout the process issues we have identified. In other words, if Congress in the mandated access provisions acted to further the public interest, it did not do so at the expense of a significant "process" private interest.

61. For one example, consider extortion. If any multichannel distributor is at liberty to deliver the program to its audience without the consent of the copyright proprietor, there may be a danger that a distributor will use a form of legal blackmail. "So you have plans for a coordinated nationwide advertising blitz centered around a particular premiere date for your program? I'll ruin it with a cheapie preview unless you pay me." Such extortion attempts would be, to say the least, wasteful, and—more to the point for this Article—would be insulting to the dignity of the copyright holder. See Wendy J. Gordon, Truth and Consequences: The Force of Blackmail's Central Case, 141 U. PA. L. REV. 1741 (1993) (giving an overview of the blackmail literature and analyzing the results from both a consequentialist and deontological perspective).

62. See Michelman, supra note 57.
VI
Conclusion

Perhaps, because the Founders adopted a "takings" clause for property, or perhaps because of the growing influence of the law and economics movement, lawmakers seem to have become fairly accustomed to the notion that it may be proper to mandate the transformation of property into money. But the takings clause as interpreted has a limited reach, and the limitations of law and economics have become more obvious as the movement has grown more popular. Lawyers have increasingly turned to discussing whether all property is exchangeable for money, and to discussing the larger philosophic question of whether all our values are commensurable along a common metric.

The legal literature on incommensurability has usefully suggested that many substantive values are not exchangeable in money. Yet, a dearth of attention has been paid to the possibility that there might be some value in an individual having the right to decide what is or is not commensurable in money, regardless of how the substantive issue of commensurability might be resolved.

Usually monetizability seems to be discussed as if it were proper to subsume this "process" issue into a discussion of the substantive question. The assumption seems to be that it is solely up to the observer (the scholar, policymaker, or lawmaker) to decide whether or not a given resource is commensurable with money. Once the scholar, judge, or legislator has determined that the item at stake is monetizable, attention turns to how its monetary value can best be determined: Whether the highest-valued use can best be discovered by enforcing "property rules" and by relying on the market, or whether a better determination can be effectuated through some type of governmental regulation.

That is, only after the commensurability issue is resolved in favor of monetizability does the law and economics literature recommend that decisionmakers undertake a "process" inquiry. In our view, however, the locus of decisionmaking power should be a focus of attention at an earlier stage as well.

One of the many functions served by "property rules" is to ensure that property owners have the power to make their own decisions as to what is, and is not, commensurable with money. We argue that this "process" function can be sufficiently important that, in order to preserve it, the law should avoid transforming property rules into liability

63. See Radin, supra note 30.
rules in certain contexts. Accordingly, legislatures and courts need guidance in determining when this property-rule function can be safely dispensed with, and when it needs to be preserved.

In this Article, we have suggested a preliminary and tentative set of guidelines for approaching this process issue, and we have applied those guidelines to the 1992 Cable Act's mandated access provisions. We conclude that the process aspect of the commensurability issue should be resolved in the statute's favor.