The Social Costs of Property Rights in Broadcast (and Cable) Signals

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Efforts are currently underway internationally to create a new regime of broadcasters' rights - rights that would grant broadcast and cable companies copyright-like exclusionary protection over all uses of their transmission signals. Much of the current debate in the United States, surrounding these rights tends to be framed in either pro- or anti- property terms, and in the process neglects the reality that for over four decades now, the FCC and Congress have both actively employed the idea of property as a regulatory tool in the television industry. The current domestic regime regulating broadcasters, cable companies and content producers in the United States is premised on the existence of what this Article calls, 'attenuated exclusionary rights' - rights that unlike traditional intellectual property aren't limited temporally, but rather operationally, to ensure that they do little more than preserve the competitive balance between various distribution intermediaries. The new regime of broadcasters' rights however, remains fundamentally different in its being structured along the lines of traditional intellectual property rights -in rem rights, with little emphasis on the parties against whom they operate. In the process it fails to recognize (and capitalize on) the novel dynamics of information production, consumption and distribution brought about by the Internet and instead creates a regulatory regime that the FCC (and Congress) consciously avoided in the past. This Article argues that the only justification, if any, for introducing a new regime remains the need to subject commercial webcasting - an emerging channel of independent distribution - to regulation analogous to the one governing the current incumbents. Consequently, much can be learnt by examining the staggered process through which the current regulatory regime came to be and the intended (and perhaps, unintended) long-term efficiencies it produced in the broadcast and cable industries. This in turn would enable scholars and policymakers to (i) understand the possible implications of the new regime and (ii) better tailor property rights to enhance distributional competition and promote creativity in content production.