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Simultaneous Rediffusion by Cable Television Operators in Canada and the Problem of Nonpayment of Copyright Royalties

Larry Seidenberg*

I. Introduction

This Article surveys a controversial issue involving both Canadian and United States copyright interest groups. Simultaneous rediffusion involves the unauthorized reception and retransmission or rediffusion of copyrighted United States broadcast programming by foreign cable television systems.¹ The issue has important ramifications for a future revision of the copyright by the Canadian Parliament as indicated in the Revision of Copyright Subcommittee Report of October 1985, "A Charter of Rights for Creators,"² and is useful to an examination of United States copyright principles and the international role of the United States in copyright.

This author's conclusion is that compulsory license³ for simulta-

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1. See generally *International Copyright/Communication Policies: Hearings Before the Subcommittee on Patents Trademarks of the Senate Committee on Patents Trademarks of the Senate Committee on the Judiciary, 98th Cong. 1st Sess.* 123-28 (1983) (statement of Walter Josiah, Executive Vice President and General Counsel of Motion Picture Association of America). Other names by which it has been called are retransmission liability, satellite signal theft, and unauthorized secondary transmission. For studies dealing with economic feasibility of a rediffusion right, see SECOR, INC., "POSSIBLE COSTS OF A RETRANSMISSION RIGHT IN CANADA: AN ADAPTION OF THE AMERICAN SYSTEM TO CANADA," (Sept. 1985).

2. Fox, *Culture and Communication: Key Elements of Canada's Economic Future* (Brief to the Royal Commission Authority) 13 (1983) [hereinafter *Culture and Communication*].

3. Article I, § 8 of the U.S. Constitution sets forth the basic policy for copyright protection in the United States. A statutory intellectual property right was created to protect the financial interests of copyright owners balanced against the interest of the public's access to works of authorship.

The fear of statutorily created monopolies in fields dependent upon these copyrights prompted Congress to enact limitations on the copyright owners' powers to keep his or her works from the public. Thus, a compulsory license scheme was enacted, allowing noncopyright owners access to the copyrighted work in return for payment.

neous rediffusion of broadcast signals is a proper course to take in the development of a long-term copyright policy in Canada. Economic studies indicate the feasibility of a rediffusion right for copyright owners at a minimal expense to cable television (CATV) systems⁴ that may be absorbed as subscription levels climb. Canadian Satellite Communications (CANCOM) and future superstation development should assure increased viewership for CATV systems to make up for any early revenue declines due to increased royalty payments through performing rights organizations like Composers, Authors and Publishers Association of Canada (CAPAC). Whether they be foreign nationals or Canadians, the rights of copyright owners must be balanced against the interest of established industry groups like CATV system owners and the national interest in Canadian cultural development. By maintaining a rediffusion right, Cana-

The first compulsory license was enacted in the 1909 Copyright Act in 17 U.S.C. § 1 (1908), which required a person mechanically reproducing a copyrighted work to pay the owner a royalty of two cents on each part manufactured. Since that time, the 1976 Act incorporated 13 compulsory license provisions or limitations on copyright. They can be found in 17 U.S.C. §§ 107-118 (1931), as well as 17 U.S.C. § 602 (1959).

A compulsory license for secondary cable retransmissions is suggested for a future Canadian Copyright Law Revision to be modeled on the corresponding U.S. provision. *U.S. Copyright Act*, 17 U.S.C. § 111(d) "Compulsory License for Secondary Transmission by Cable Systems" [P.L. 94-553, Oct. 19, 1976].

In that very detailed section a royalty fee is paid based upon computations of the gross receipts received from subscribers. This computation utilizes a formula that employs factors such as service beyond the local area and first, second, third, and fourth distant signal equivalents. The computation is defined in the United States Copyright Act of 1976 as the value assigned to the secondary transmission of any non-network television programming earned by a cable system in whole or in part beyond the local service area of the primary transmitter of the programming. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial educational station for the non-network programming so carried under the rules, regulations, and authorizations of the FCC. These values assigned for independent network and noncommercial educational stations are subject to certain exceptions and limitations. *Copyright Act of 1976 et al.*, SECOR, INC., "PROBABLE COST OF A RETRANSMISSION RIGHT IN CANADA: AN ADAPTATION OF THE AMERICAN SYSTEM TO CANADA," (Sept. 1985).

4. CATV systems are defined in Federal Communications Commission Rule 76.151a, which states that it is a nonbroadcast facility consisting of a set of transmission parts and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such terms would not include 1) any such facility that serves fewer than fifty subscribers or 2) such facility that serves or will only serve subscribers in one or more multiple dwelling units under common ownership, control, or management.

Simply, a CATV system is a system of coaxial cable and assorted equipment operations from a central receiving head-end or tower by which television signals are received off the air or by other indirect delivery means for a fee to subscribers. This system may serve a number of political subdivisions although within a distinct franchised area. "*A Cable TV System — Its Functions and Operation*," John P. Cole, Jr., April 7, 1978, reprinted in PRACTISING LAW INSTITUTE 1978, CURRENT DEVELOPMENTS IN CATV, TV AND PAY TELEVISION (Gary L. Christensen, Chairman, Patent, Trademarks, Copyrights and Literary Property, Coursebook series).

Consumers or subscribers are fed satellite programming through CATV, MDS or Multi-point Distribution Service, or STV or Subscription Television Service. MDS is an over the air service that permits a customer's microwave antenna to receive MDS signals and convert them to a viewable frequency. *Id.* STV uses over the air frequencies not allocated to TV broadcast service and the signals are scrambled so viewing is not possible without a decoder.

dian copyright remains true to copyright principles and law, and does not become solely a means of accomplishing immediate Canadian cultural objectives perhaps feasible through other means.

II. Scope of the Problem/Implications

Copyright law may be viewed as legal recognition of a creator's rights. This is based on the notion that a creator should benefit from the fruits of his labor. In providing such protection, creators are encouraged to create new works; and in doing so, the national culture and general store of information is enriched.⁵

The broadcast medium is an important means of disseminating not only information but mass culture in the modern age.⁶ This medium has had special importance to development of an indigenous Canadian culture due in part to the vast geographic expanse of Canada in relation to its small population, as well as Canadian demands for the best in entertainment, education, and culture. One reason for this is the threatening engulfment by its culturally dominant neighbor, the United States. Canada has assertively attempted to use its law and treaty obligations toward strengthening its regional and world cultural position. The Broadcast Act,⁷ Copyright Law,⁸ and international treaty membership⁹ to the Berne Union and the U.C.C. reflect this stance.

In Canada, the government vests the Canadian Radio and Television Commission (CRTC) with the regulatory functions and powers to implement goals of cultural independence. Specifically, Section 3 of the Broadcast Act, has as its purpose: "to guarantee a broadcast system which would be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the culture, society, . . . [and] economic fabric of Canada."¹⁰

CRTC policy calls for Canadian content mediums of thirty percent between six a.m. and twelve midnight and limits of up to twenty percent non-Canadian equity ownership.¹¹ Even though only two per-

5. KEYES AND BRUNET, COPYRIGHT IN CANADA: PROPOSALS FOR A REVISION OF THE LAW, April 1977. [hereinafter PROPOSALS FOR A REVISION].

6. See *Culture and Communication*, supra note 2, at 13.

7. Broadcasting Act 1967-69, c. 25, s.1 [hereinafter Broadcast].

8. Canadian Copyright Act, R.S. c. 55, s.1, R.S.C. 1970, c. c-30 [hereinafter Canadian Copyright]. As to the provision affecting cultural materials, see Section 27 Importation of Copies and Sections (1)(2)(3).

9. Canada's accession to the Berne Convention affords it the comfortable option of not granting copyright protection to foreign cable transmissions. As a part of a national treatment, treaty members need only afford foreigners the same protection granted its own nationals for retransmissions, which is none. Canada is not a member of the Brussels Satellite Convention, that does afford a retransmission right.

10. Broadcast Act § 3(6).

11. SPECIAL REPORT ON BROADCASTING IN CANADA, 1968-1978 VOL. 1, CRTC [CANADIAN RADIO & TELEVISION COMMISSION], Minister of Supply and Services Canada, 74 (1979).

cent of the federal budget is spent on all cultural activity, this percentage does not reflect the significant impact generated by cable television. First, cultural industries generate 1.7 billion dollars,¹² which is more than the paper, textiles, or metal industries. Second, market penetration rates show about fifty-nine percent of the households are served by cable. Furthermore, as of 1983, eighty percent of Canadian households could easily be wired for cable, as compared to thirty-nine percent of United States households being wired for cable.¹³

Another example of recent note is a 1983 CRTC decision to license a Canadian music video programming service subject to conditions evidencing CRTC's commitment to the Canadian, as opposed to the United States, video production industry.¹⁴ Some of the conditions in the license included the following: (1) that the Canadian music video clips distributed shall comprise not less than ten percent of the total number, (2) that starting in 1986 this figure increases to twenty percent, (3) in 1988 to twenty-five percent, (4) in 1989 to thirty percent and (5) that the greater of 2.4 percent of gross revenues or 100,000 dollars shall be devoted to the development of Canadian music video clips.¹⁵

The rationale of this policy is that, by creating Canadian culture, more Canadian artists get exposure and achieve success by increased payments of royalties through Performing Rights Societies.¹⁶ While much of this Article deals with the legal aspects of a relatively new technology and property rights of creators involved, in the foreground is the issue of cultural autonomy, which is equally as important as the achievement of a high technological plateau and corresponding stage of economic advance.

Canadian-born economist John Kenneth Galbraith recognized the importance of culture when he stated as follows:

[W]e must cease to suppose that science and resulting technological achievement are the only edge of industrial advance. Be-

12. Morgan, "Cable, Computers, Copyright and Canadian Culture," 63 INTELL. PROP. J. 69, 72 (1985).

13. *Id.* at 74.

14. See CRTC 83-176, 117-1 Can. Gaz. 2490 (Mar. 8, 1983).

15. CRTC decision 84-338, CHUM Ltd. 8324770, CMTV Canadian Music Television, Ltd. 832435200, Canadian Radio Television and Telecommunications. DECISIONS AND POLICY STATEMENTS, vol. 10, part 1(a), April 1, 1984 - September 1984, Supply and Services Canada 1984.

16. Performing Rights Societies such as PRO Canada Ltd [Performing Rights Organization] and ASCAP [American Society of Composers, Authors and Publishers Association] in the United States and CAPAC [Canadian affiliate of Composers, Authors and Publishers Association] all collect revenue on the basis of a general license to stations for use of their entire catalog of works. The fee is founded on the gross receipts of the station less adjustments such as agency commissions. Revenue is distributed to copyright owners such as composers, authors and publishers.

yond science and engineering is the artist; willing or unwilling, he or she is vital for industrial progress in the modern industrial world. . . . The basic point is a simple one and it applies to the widest range of industrial products: after things work well, people want them to look well. After utility comes design. And design depends not alone on the availability of artists; it invokes depth and quality of the whole artistic tradition. It is on this that industrial success comes to depend. . . . The Italian case is only the most vivid. The industries of Paris, New York and London — textile and furniture design, building construction, dress manufacturing, advertising, filmmaking and theatre — all survive in their otherwise economically inhospitable surroundings because of their juxta-position to the arts . . . It has been little noticed that in the older industrial countries, those industries that best survive are those that co-exist with a strong artistic tradition.¹⁷

III. The Problem of Simultaneous Rediffusion

Diffusion occurs when a CATV System¹⁸ originates its own programming and distributes the signal whereas rediffusion¹⁹ is when a CATV System simultaneously retransmits signals to its subscribers originated by others. The problem lies in the latter, simultaneous rediffusion,²⁰ because the Canadian Copyright Law does not protect the rediffused signal since it is not considered broadcast or radio communication. Later amendments of the Berne Convention²¹ allow the author the exclusive right to authorize any radiocommunication to the public whether over wires or not.²² However, accession to the Rome Protocol by Canada only protects the original radiocommunication and not the rediffusion of signals.²³ Thus, Canadian CATV

17. *Culture and Communication*, *supra* note 2, at 12-13.

18. *See supra* note 4.

19. *See supra* note 1.

20. *See supra* note 4.

21. Berne Convention for the Protection of Literary and Artistic works, signed on September 9, 1886, completed at Paris on May 1, 1896, *revised* at Berlin on November 13, 1908, completed at Berne on March 20, 1914, *revised* at Rome on June 2, 1928, at Brussels on June 26, 1948 at Stockholm 1971, 331 U.N.T.S. 218.

22. *See, e.g.*, The Rome Protocol of 1928. Article II *bis* of the Rome revision of 1928. *See* Schedule A; R.S.C. 1970 C.C-30, Schedule III:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radio communication.

(2) The national legislators of the countries of the Unions may regulate the conditions under which the right mentioned in the preceding paragraph shall be exercised, but the effect of those conditions will be strictly limited to the countries which have put them in force. Such conditions shall not in any case prejudice the moral right of the author, nor the right which belongs to the author to obtain an equitable remuneration which shall be fixed, failing agreement, by the competent authority.

23. As to the Rome Protocol Amendment of 1928, see Copyright Amendment Act, S.C.

Systems pay no royalties for the simultaneous rediffusion.

Specifically, the problem is illustrated by a current controversial retransmission of signals from the three major United States networks²⁴ and PBS by the CANCOM monitoring station in Windsor, Ontario, which is located just across the river from Detroit. The Toronto-based Canadian satellite company scrambles the United States signals to stop secondary theft and sells them to Canadian CATV companies, which serve 885,000 households.²⁵ However, recording the signal on videotape for later rediffusion is considered an infringement according to Section 3 of the Canadian Copyright Act.²⁶

Revision of the law studies over the past thirty years have each addressed the problem of simultaneous rediffusion differently. In 1957, the Royal Commission on Patents, Copyrights, Trademarks and Industrial Design was the first of three comprehensive reports on copyright law and was published by the Illsley Commission.²⁷ The Illsley Commission opposed CATV System liability, reasoning that a copyright owner should not be entitled to prevent retransmission if he already authorized the original broadcast. This is, in sum, the no double payment argument.²⁸

In 1966, the Report on Intellectual and Industrial Property was the second of three comprehensive reports on copyright law. The Economic Council of Canada²⁹ examined the Canadian copyright law and suggested a compulsory license for CATV and royalties for simultaneous rediffusion of unaltered broadcast signals. Liability, it said, would attach only if ads were deleted or substituted.

In 1977, the Keyes/Brunet Report³⁰ was the third of three comprehensive reports on copyright law. As part of the Minister of Consumer and Corporate Affairs Department Working Group proposal, the Keyes/Brunet Report suggested CATV system liability for redif-

21822 Geo.5, c.8., s.12. (1931). It is important to note here that no diffusion right exists in Canada because Canada is a member of Berne only at the 1928 level. Actually, if Canada adheres to a later version of the Berne Convention, a rediffusion right could exist thereby overturning the *Canadian Admiral* case. See *infra* text accompanying notes 37-41.

24. The three major television networks include ABC, NBC, CBS.

25. Fix, *If you can't trust friends . . .*, FORBES, September 23, 1983.

26. See *Warner Brothers Seven Arts Inc. v. CESM-TV Ltd.*, 65 C.P.R. 215 (Ex. 1971). This case merely illustrates an example of § 3(1)(f) infringement according to the Canadian Copyright Act. It was held in this case that a cable system that copies off air for later diffusion has infringed the copyright in the work contained in the off air broadcast because it is reproduction of the work without authorization.

27. ROYAL COMMISSION ON PATENTS, COPYRIGHTS, TRADEMARKS AND INDUSTRIAL DESIGN: REPORT ON COPYRIGHT, Ottawa 1957.

28. Double payment contemplates a situation in which the copyright owner is paid once for authorization of the original broadcast and second for the rediffusion.

29. ECONOMIC COUNCIL OF CANADA, REPORT ON INTELLECTUAL AND INDUSTRIAL PROPERTY, CAT EC 22-1370, 175-77 (January 1971).

30. PROPOSALS FOR A REVISION, *supra* note 5. It should be recognized that this proposal is not a practical one since it cannot be implemented under the U.C.C. convention. See *infra* text accompanying notes 105-106.

fusion of only Canadian broadcasts. This meant that under the Keyes/Brunet Revision proposal American broadcasters had no claim. The Keyes/Brunet report explained that it was not correct to analogize a CATV compulsory license scheme to a Section 19 mechanical recording compulsory license³¹ because of the different origins of the industries. The Section 19 license was enacted to establish a balance between a then developing recording industry in which there was no recording right, and claims of composers who held monopoly rights. In this instance, which concerns broadcast signal rediffusion, the CATV industry is not developing, but is already well established.³² Thus, the Keyes/Brunet Report did not suggest a CATV Compulsory License scheme for transmitted signals.

The Keyes/Brunet report also suggested a solution by which additional payments are made for excess coverage of local and imported signals.³³ Payment would be made where the CATV signal does not duplicate the local broadcast. Local signals are defined in terms of the normal reception area. Distant signal importation³⁴ payments would be on a schedule set up by the Copyright Tribunal.³⁵

Two Canadian cases related to the problem of rediffusion liability illustrate the current legal argument against rediffusion protection under the exclusive rights provision, which lists the exclusive right "to communicate any literary, dramatic, musical or artistic work by radio communication."³⁶ First, in *Canadian Admiral Corp. v. Rediffusion, Inc.*,³⁷ the court found no infringement of a live telecast of football games of the Allouette Football Club to CATV subscribers and to the CATV System showroom. The court reasoned that the broadcast by coaxial cable rather than Hertzian wave did not constitute a public performance violative of Section 3(1) of the Canadian Copyright Act.³⁸ Rather, it constituted many private per-

31. PROPOSALS FOR A REVISION, *supra* note 5, at 140.

32. *Id.* at 141.

33. A local market is defined as the market value where it is possible to receive signals transmitted by a broadcaster.

34. A distant signal is a signal originating at a point too distant to be picked up by ordinary reception equipment.

35. Generally the rate of compensation would take into account a) whether commercial advertising has been deleted or substituted; b) whether there is additional revenue derived from substituted commercials; c) whether there is increased audience by the addition of subscribers to the cable system; and d) whether there is economic loss by reason of pre-release of the work in a distant market. See NORDICITY GROUP STUDY FOR THE CANADIAN CABLE TELEVISION ASSOCIATION (CCTA), ECONOMIC ANALYSIS OF CABLE COPYRIGHT LIABILITIES IN CANADA; PROPOSALS FOR A REVISION, *supra* note 5, at 141.

36. Canadian Copyright Act § 3(1) R.S.C. 1970 c-30 R.S.C. 55, 5.1.

37. Ex. C.R. 382, 20 C.P.R. 75 (1954).

38. For purposes of the Canadian Copyright Act, § 3(1) provides as follows:

"copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public if the work is unpublished, to publish the work or any substantial part thereof, and includes

formances. Further, the live telecast was distinguished from a film telecast in that the former might qualify as a dramatic or artistic work within Section 2 of the Canadian Copyright Law³⁹ since the coaxial cable transmission here was not a "work" as defined by Section 2, which states that "a work be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance."⁴⁰ The court also found that a live telecast was not analogous to film because film involves production of a negative and reprinting from the negative of a positive, whereas TV broadcast is a conversion of a picture into an electronic signal transmitted by Hertzian waves.⁴¹

In a second case, *Composers, Authors and Publishers Association of Canada v. Canadian Television*,⁴² the plaintiff licensed TV stations in defendant's network for broadcast of his material. The station recorded the material on videotape and sent it out to affiliates by microwave. The court held that there was no infringement of Section 3(1)(f) because what was protected was not the works but a performance of the works to the public, neither of which occurred in the case.⁴³

the sole right (a) to produce, reproduce, perform or publish any translation of the work; (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work; (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise; (d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered; (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present such work by cinematograph if the author has given such a work an original character but if such original character is absent the cinematographic production shall be protected as a photograph; (f) in the case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication and to authorize any such acts as aforesaid.

39. Canadian Copyright, *supra* note 8, at § 2.

40. *Id.*

41. Ex. C.R. 382, 20 C.P.R. 75 (1954).

42. 68 D.L.R. 98, 55 C.P.R. 132 (1968).

43. *Id.* at 100, 55 C.P.R. at 136. A related problem to diffusion by CATV. . . . *Buffalo TV Station v. Rogers CATV Ltd.* (discontinued before trial) (For a discussion of this case, see *Survey of Canadian Law: Intellectual Property Review*, 11 OTTAWA L.R. 489 (1979)). The *Rogers CATV* proceeding cited several arguments including violation of the Inter-American Radio Convention of 1937. Havana Treaty, § 11, 21 prohibits in S. 11: interference with services of TV company in the U.S. and in S. 21: requires consent of the United States TV company to rebroadcast the signals.

In a related action before the CRTC, in which Rogers had applied to the CRTC for authority to delete and substitute, the CRTC was held to be within its jurisdiction. As Judge Thurlow stated, "appellants [Buffalo TV stations] in opposing the Rogers application have no proprietary or other legal rights in their signals in Canadian airspace." *In re Capital Cities Communications, Inc.*, F.C. 18 at 20, *aff'd* 2 S.C.R. 141 (1978) (power of Commission to authorize deletion of commercials in cable broadcast upheld). The Supreme Court of Canada affirmed without comment except to say that standing to the Buffalo stations to challenge the CRTC authority would not be denied. *Id.*

IV. The Impact of Rediffusion Without Payment: A Deficit in the Canadian International Copyright Balance of Payments

As the global village of the work community shrinks with more technologically sophisticated communication means, nations with initial advantages in cultural product stock or legal enforcement apparatus for protection of that form of capital, will benefit to a greater extent. In this respect, Canada, as a net importer of cultural/copyright material, has ventured onto the international scene carefully. This net importer status of Canada in copyright materials is not likely to improve soon according to the Minister of Communication⁴⁴ for the following reasons. First, the number of producers of cultural products is increasing internationally, especially in the United States. Second, the number of distributors is expanding by a proliferation of new and different media. Third, the volume of distribution is increased with the advent of satellites, fibreoptics and coaxial cable⁴⁵ and video cassettes. Fourth, most cultural products can be digitalized in binary code language moveable electronically, for example, signals.

V. An Example of Technological Advance Affecting Net Importer Status: Canadian Communications Satellite, Inc. (CANCOM)

An example of the development of increased distribution capacity exacerbating the copyright balance of payments is the CRTC approval of CANCOM on March 8, 1983.⁴⁶ When CANCOM licenses for distribution of TV signals of major United States networks,⁴⁷ it permits transmission to remote areas of Canada without payment. Of greater concern to United States broadcasters now is CANCOM's intention to distribute the signals to more populated areas.

In a recent radio interview on National Public Radio,⁴⁸ "All Things Considered" program (11-10-85), Pierre Morrisette, Chief Executive Officer of CANCOM, said its purpose for increased distribution capacity was to provide for an extension of broadcast services equally to all parts of Canada. This statement is better understood if one realizes that most of Canada's population lives close to the northern U.S. border.⁴⁹ On that same program, William Johnson of

44. See *supra* note 2.

45. For purposes of this Article, coaxial cable is a means by which a cable television program is transmitted. The means consists of transmission by wire as opposed to frequency.

46. See *supra* note 14.

47. See *supra* note 24.

48. *All Things Considered*, (Radio Interview on National Public Radio, Nov. 10, 1985, Les Cook, Ed.).

49. As of March 1985, out of the 25.2 million Canadian citizens, 80% live within 160 kilometers (100 miles) of the United States border. Half of this amount lives in the southeast-

the United States Federal Communications Commission reiterated that the view endorsing no requirement of payment was inconsistent with the common principle of a fair exchange for goods or services used.

These arguments will surely increase in fervor as free trade negotiations between the two nations progress. American network affiliates in Detroit, Seattle and other border regions are especially concerned. The CANCOM decision reflects elements of communications policy, copyright law, and popular sentiment in Canada. In its meager effort to regulate CATV Systems, the CRTC approval of CANCOM can be viewed as an example of communications policies in blatant violation of equity and intellectual property concepts.

Copyright policy is reflected by the lack of protection for this type of transmission and lack of reasonably prompt efforts to implement revisions and amendments that would address the problem. Popular support of CANCOM signal poaching is speculative but perhaps best judged by both the brisk sale of home satellite equipment for homes and businesses alike and the high percentage of wired for cable viewers on a world scale.⁵⁰ One of the original goals of CANCOM, as Mr. Morrisette stated in his radio interview, was to provide signals to remote, underserved communities.⁵¹ Many Canadians already have satellite dishes to pull down programming from American signals, but CANCOM seeks to prevent this by establishing a market for existing CATV Systems.

The effect of Canada's decision to approve CANCOM becomes more obvious when noting the proliferation of domestic satellite signals⁵² carrying U.S. programming that may be poached or stolen. The following is an example of six U.S. satellite systems:

<i>SATELLITE</i>	<i>OWNED BY</i>
SATCOM III-R	RCA
SATCOM IV	RCA
WESTAR IV	Western Union
WESTAR V	Western Union
COMSTAR D-4	AT & T, GTE
GALAXY I	Hughes Communication

ern part near the Great Lakes. The land mass of Canada, 9.9 million square kilometers (3.97 million sq. mi) makes it the second largest country that translates into great distances between the far reaches of its borders and population centers. U.S. DEPT. OF STATE, BUREAU OF PUBLIC AFFAIRS, BACKGROUND NOTES, CANADA 3 (1985).

50. See Tarbet, *Use of American Broadcast Signals by Canadian Cable Networks*, 32 BUFF. L. R. 732, 736 (1983).

51. See *supra* note 48.

52. Each nation has a satellite program wherein they launch their own satellites from which to send and receive signals.

Most of the large CATV Systems and networks are carried by SATCOM III-R and include ARTS, CNN, CINEMAX, ESPN, MTV, Nickelodeon, Spotlight, Showtime, USA Network, Weather Channel, WGN-TV Chicago, and WTBS [Turner Broadcasting System].⁵³ SATCOM IV carries Bravo, ESPN, Financial News Network, and the Playboy Channel.⁵⁴ The WESTAR V carries ARTS, Madison Square Garden Television Satellite News Channel, and WOR-TV, Newark.⁵⁵

The producers and distributors of film in the United States are usually the copyright owners who negotiate licenses with pay TV programmers like HBO, who in turn transmit to various CATV Systems by satellite. Three types of license mechanisms are used in retransmission of signals:⁵⁶

1) *Statutory License*: Where a CATV system or broadcaster is given a compulsory license to retransmit subject to a fixed fee.

2) *Negotiated License*: Where a broadcaster bargains freely for the right to transmit.⁵⁷

3) *Clearinghouse System*: Where CATV Systems or broadcasters choose whether to retransmit based on a pre-set fee.

VI. Viewpoints on the Problem of Retransmission Liability

A. From the CATV System Owners View

Owners of CATV systems argue that retransmission of signals without payment still increases the profits of copyright owners and broadcasters because the increase in the audience size caused by the increased viewership is accounted for in the rate cards upon which the broadcaster and copyright owner fees are charged. Moreover, the owners argue that charging a CATV system for the retransmission would exact double payment and constitute unjust enrichment. Finally, under CRTC mandate, CATV Systems achieve profits by subscribership and already are subject to compulsory carriage requirements on rediffusion of local TV stations' signals within that CATV system community.⁵⁸

53. Yarvis, *Signal Piracy: The Theft of United States Satellite Signals*, 8 FORD. INT'L L. J. 62 (1984-85).

54. *Id.*

55. *Id.*

56. *Id.* at 67; see also MOTION PICTURE EXPORTING ASSOCIATION OF AMERICA, INC. MEMORANDUM ON THE USES OF SATELLITE TECHNOLOGY 23, January 30, 1984.

57. With regard to negotiated licenses, there are two major and significant variations, namely those in which only the price may be negotiated but no right to prohibit exists, and those in which the owner is able to prohibit the use as well as negotiate the price. In the former case, it is a voluntary license and in the latter case it is a nonvoluntary license.

58. See Cable Television Regulations, C.R.C., c. 374 s.6(1), Cable Systems are already required to broadcast specific local signals within the local market. If the cable system owner

The CATV system further supports retransmission of signals without payment because system owners only function as a receiver to aid in the reception of broadcast signals and do not select programs nor charge for particular programs sent out. CATV Systems take the position promulgated by the United States Supreme Court in two pre-1976 Act cases, *Fortnightly Corp. v. United Artists*⁵⁹ and *Teleprompter v. CBS*,⁶⁰ after which compulsory licensing for CATV broadcasts was adopted. *Fortnightly* held that reception and transmission of copyrighted materials from a local signal did not infringe on the owners' copyright,⁶¹ and *Teleprompter* held that importation of distant signals did not alter the CATV systems' function as to constitute public performance and thus infringe on exclusive rights of copyright owners.⁶²

B. From the Broadcaster Viewpoint

Broadcast owners maintain that they are hurt by CATV Systems retransmission because the programming is no longer exclusively aired. They argue that CATV Systems achieve a larger subscriber base and pay nothing while a local non-network station pays a high cost for those exclusive rights. Further, the CATV System has induced audience fragmentation in the eyes of potential advertisers who will now refuse to be sponsors because of the lack of exclusivity.⁶³

1. *Dissent: Herfindahl Index Use Negates Fragmentation Theory.* — Dissenters on the market fragmentation argument point to a study by S.J. Leibowitz of the University of Western Ontario⁶⁴ which found that first, since CATV increases choices in programming, it generally makes TV a more attractive medium without change in the amount of TV consumed in a cable market.⁶⁵ Second, the study found that when there is diversity in programming based on increased cable channels,⁶⁶ people would watch TV more intensely with greater receptivity to TV commercials. By utilizing a

cannot afford the copyright owner's terms, or is prohibited from broadcasting the work, the cable system owner has the choice of infringing the exclusive rights of the copyright owner by broadcasting the work or violating CRTC regulations in refusing to broadcast the local signal. *Canadian Broadcasting, A Single System*, CRTC Policy Statement, July 16, 1971.

59. 392 U.S. 390 (1968).

60. 415 U.S. 394 (1974).

61. 392 U.S. at 395.

62. 415 U.S. at 401.

63. Noel, *Should Cable Systems Pay Copyright Royalties?*, 12 OTTAWA L.R. 195, 203 (1980).

64. S.J. Liebowitz, *Copyright Obligations for Cable Television: Pros and Cons*, CONSUMER AND CORPORATE AFFAIRS, CANADA 48 (1980).

65. *Id.* at 50.

66. *Id.* at 53.

proxy similar to that used to determine advertising rates (the Herfindahl Index),⁶⁷ Mr. Leibowitz determined the percentage of cable viewers and found nearly a twenty percent increase in advertising rates and cable penetration rather than a decrease.⁶⁸ This study would suggest rediffusion or retransmission liability⁶⁹ by means of a compulsory license is unjust enrichment for cultural producers.

2. *Applebaum-Herbert Report*.⁷⁰ — This study suggests contrary results of market fragmentation and potential network disintegration because of the inopposite principal guiding network advertising favoring audience cohesion.⁷¹

Additionally, broadcasters dispute the legalistic fiction that there is a difference in liability between Hertzian wave or coaxial cable transmission. Moreover, broadcasters contend that importation of signals in the fill-in market⁷² and both the distant signal markets⁷³ are actually rebroadcast and rebroadcasters should be held liable for such. Broadcasters argue CATV systems go beyond their duty to serve the local community when they import distant signals.⁷⁴ Broadcasters are concerned that the combination of these events will force local stations out of business and ultimately lead to decreased Canadian programming.

C. *From the Copyright Owners' Viewpoint*

The copyright owners state that generally speaking there is more broadcast material available than can be used. Thus, even if rate cards (and broadcaster revenues) increase, it does not filter down to copyright owners. Copyright owners further argue that

67. The Herfindahl Index is normally used to measure market concentration, but the proxy for percentage of cable viewers is not itself available, but is an agglomeration of factors. See Morgan, *supra* note 12, at 80.

68. EROLA AND FOX, DEPT. OF COMMUNICATIONS, FROM GUTENBERG TO TELIDON: A WHITE PAPER ON COPYRIGHT, PROPOSALS FOR THE REVISION OF THE CANADIAN COPYRIGHT ACT, MINISTER OF SUPPLY AND SERVICES, OTTAWA 96 (1984). This paper estimated the impact of cable systems on broadcast revenues, noting that cable systems influence broadcasting revenues in such ways as through market fragmentation. Viewers who have access only to station will have many more stations to watch when cable is introduced and stations share of local audience will drop. This fragmentation is thought to reduce advertising revenues because advertisers in a given locality might not value distant viewers as much as local viewers.

69. See *supra* text accompanying note 1.

70. The Applebaum-Herbert Committee promulgated by the Federal Cultural Policy Review Committee issued the APPLEBAUM-HERBERT REPORT, OTTAWA: MINISTER OF SUPPLY AND SERVICES, CANADA (1982).

71. Proliferation of diverse cable programming will work against similar content of programs at given times and thus promote program and in turn audience specialization. Until broadcasters stop selling programs to broad audiences rather than specialized groups, network advertising revenues will be misdirected and minority cultural interests will be neglected. See Morgan, *supra* note 12, at 82 (*citing* the APPLEBAUM-HERBERT REPORT).

72. This market refers to a market operating in areas not within the broadcast range of any TV station and allows for better reception.

73. This market refers to the importing of signals for rediffusion in the local markets.

74. See *supra* note 68, at 104.

rediffusion diminishes the value of their work by undercutting program exclusivity and, in effect, weakening the licensing system.⁷⁵

Additionally, three types of programming that are subject to exclusive license are hurt by market fragmentation from CATV System rediffusion. First, recorded non-network programming is created and owned by others for which the station buys exclusive territorial rights. Second, when a station has geographic exclusivity by contract with the network, live or recorded national and regional network programs are also hurt by rediffusion. Third, local programs created and owned by others to which stations broadcast and enter into exclusive territorial license gain an unfair advantage over a broadcaster who must bargain for the rights among producers and distributors.⁷⁶

Copyright owners fear that first, broadcasters will not pay for programs already shown outside their market, and second, that local advertisers will not pay for ads, and last, that national advertisers will not pay for duplicate coverage in both the distant and local TV markets.⁷⁷ Copyright owners, rather, support the theory of a property right in the work distinguished from the exclusive broadcast right or even rediffusion right.

VII. Other Canadian Domestic Law Theories Against CATV Rediffusion Liability Immunity

Other theories have been argued in attempts to hold CATV operators liable with two results commonly occurring. First, the event of satellite rediffusion is found not to be a public performance under Canadian law.⁷⁸ Second, it has been found not to constitute broadcasting within Canadian law.⁷⁹

One theory that has been used to hold CATV operators accountable is the property rights theory. The property rights theory disputes the CATV operator argument that radio frequencies in space are public property according to Section 3(a) of the Broadcast Act. It is argued that legal notions of property apply that engender the frequencies with property-like qualities similar to other informa-

75. With reference to the licensing system, two methods of program distribution exist. First, Network Programming is when the network grants a license for a single and simultaneous broadcast on network stations and second, Syndications that consist of the licensing of programs locally to stations market-by-market. The high cost of network program production means syndication is commonly the only way to see a profit. Noel, *Should Cable Systems Pay Copyright Royalties?*, 12 OTTAWA L.R. 195, 199 (1980).

76. *Id.*

77. See *supra* note 68, at 101.

78. *Canadian Admiral Corp. v. Rediffusion, Inc.*, Ex. C.R. 382, 20 C.P.R. 75 (1954) [hereinafter *Canadian Admiral*].

79. The Broadcasting Act 1967-68, c. 25, s.1. § 2. Broadcasting means any radio communication in which the transmissions are intended for direct reception by the public (not rediffusions).

tional subject matter.⁸⁰

Another theory is that the CRTC is delegated with the authority to regulate broadcasts, of which satellites are a part, and to interpret "radio communication" according to the Radio Act,⁸¹ Interpretation Act,⁸² and Broadcast Act.⁸³ What follows from this conclusion is that the rediffused signal is protected within Section 3(1)(f) of the Canadian Copyright Act exclusive rights provision since the Copyright Act utilizes the term radio communication in Section 3(1)(f). These issues were discussed in *Canadian Admiral Corp. v. Rediffusion, Inc.*⁸⁴ A question posed in that case was whether a satellite communicated by radiocommunication is covered by Section 3(1)(f) of the Canadian Copyright Act. First, a definition of radio might be found in the Radio Act. This interpretation was made in *CAPAC v. CTV*,⁸⁵ in which the judge stated as follows:

The word radio is probably a word from the world of engineers but Parliament has defined it in the Radio Act and I think it can be assumed Parliament is using the word radio in the Copyright Act with the meaning which is given to the word by the

80. See *Insurance v. A.P.*, 248 U.S. 215 (1918). As to the property rights theory itself, in Copyright in Canada: reference to various theories that underlie copyright law are made. PROPOSALS FOR A REVISION, *supra* note 5, at 4. In England, Keyes notes that copyright developed as a brand of property rights separate from personality rights or droit moral as it is called on the continent. The English Copyright Act of 1710 first recognized literary property after copyright law was used as a means of press regulation and censorship. See COPINGER AND SKONE JAMES ON COPYRIGHT: LONDON 1971, 11TH EDIT., Chapter 2. Copyright law that was based in part on personality rights or moral rights separate from an economic right to exploit the work developed in Europe under Droit Moral was the right to prevent mutilation, distortion, or alteration of the work. Mr. Keyes in PROPOSALS FOR A REVISION, *supra* note 5, at 4-5 asserted that Canadian copyright, in part, reflects the author's property interests and that whichever basis of copyright one uses is of little consequence without different conclusions being drawn.

This view drew criticism from other commentators who dispute copyright as anything akin to a natural property right. Professor Roberts of the University of Western Ontario said this characterization of copyright puts a great burden on uses of copyrighted works. The issue is whether copyright is akin to a right in real property or is only a statutorily limited monopoly grant of rights. Keyes and Brunet, *Canadian Copyright: Natural Property or Mere Monopoly*, 40 C.P.R.2d 33, 35 (1979).

Clearly, copyright is a statutory right primarily in the United States and Canada. The disputed origins of current statutory copyright, however, is significant to a recognition of future copyright interests such as droit moral. Cable operators, for example, would take the view that copyright is purely statutory and therefore no droit moral violation exists and no other rights exist within the rediffused signal such as individual contributors to the work.

In a printed reply to the Roberts article above, Mr. Keyes, then Advisor to the Department of Secretary of State in Canada, said that his study did not characterize Canadian copyright as solely based on natural property rights but recognized it as a source of copyright law based upon public policy. *Id.* at 55; see generally F. KASE, COPYRIGHT THOUGHT IN CONTINENTAL EUROPE: ITS DEVELOPMENT, LEGAL THEORIES AND PHILOSOPHIES — A SELECTED BIBLIOGRAPHY (1967).

81. R.S.C., 1952, c. 233, s.2(1).

82. R.S.C., 1970, c.1-23.

83. See *supra* note 7.

84. Canadian Admiral, *supra* note 78, at 410, 20 C.P.R. at 103.

85. Ex. C.R. 872, 57 D.L.R.2d 5, 48 C.P.R. 246 (1966), *aff'd*, S.C.R. 676, 68 D.L.R.2d 98, 55 C.P.R. 132.

statute specially enacted to regulate radio.⁸⁶

The Radio Act defined radio to be "radio telegraph, and any other forms of radio electric communication including the wireless transmission of writing, signs, signals, pictures and sounds of all kinds by means of Hertzian waves."⁸⁷

Even if it is found through application of the latter interpretational theories of Canadian law that a satellite indeed communicates by radiocommunication, proof of infringement via Section 3(1)(f) of the Canadian Copyright Act must be shown, perhaps by a violation of the exclusive right of performance. It is significant, however, to recognize that in searching the legislative background for definitions of radio, reliance should be placed upon the definition of radio in Section 3(1)(f) that was added to the Canadian Copyright Act in order to implement the Rome Protocol of 1928.⁸⁸ Reliance should not be placed upon either the Radio Act or the Interpretation Act. Article II bis of the Rome Protocol of 1928 provides as follows: "(1) Authors of literary and artistic works shall enjoy the communication of their works to the public by radiocommunication."

The original draft was translated from French and uses the term radio diffusion defined as broadcasting in the Broadcast Act, Radio Act, and CRTC Act. However, in French, the radiocommunication word intended for Section 3(1)(f) of the Canadian Copyright Act translates into "radio phonie" and as a result of inaccurate translation was left undefined in Canadian law.⁸⁹ The judge in *CAPAC v. CTV*⁹⁰ noted these defects and concluded as follows: "Bearing in mind that the Rome Convention is in French, no other conclusion is possible but that the intent is to provide that copyright includes the exclusive right of public performance or representation by radio broadcasting (communication au public par la radiodiffusion)."⁹¹

Commentators⁹² have suggested, as in the latter case, that the proper interpretation of communication by radiocommunication is a correct translation of Article II bis of the Rome Protocol. Thus, satellite communications constitute a communication to the public.

86. *Id.* at 876, 48 C.P.R. at 251.

87. R.S.C. 1970, c. R-1, s.2(1).

88. *See supra* note 22.

89. Negros, *Canadian Copyright Law and Satellite Transmission*, 20 OSGOODE HALL L. J. 232, 243 (1982).

90. *See supra* note 85.

91. *Id.* at 682, 68 D.L.R.2d at 102, 55 C.P.R. at 138.

92. *See Negros, supra* note 89, at 245.

VIII. Evaluation of a Solution Through International Copyright Treaties

A. *International Telecommunications Convention*

In 1973, the International Telecommunications Convention (I.T.C.) was held at Malaga Terremolinos.⁹³ Since the I.T.C. is administered in part by the Radio Regulations,⁹⁴ I.T.C. members follow Radio Regulations Article 17, which deals with interception of radio communications. Article 17 of the Radio Regulations for I.T.C. deals with radio signal interception and says members are to prevent "the unauthorized interception of radio communications not intended to the general use of the public"⁹⁵

The problems lie in the ambiguity of the word "use of the *public*" in Article 17 and broadcast for direct "reception" by the public in Article 1 of the Radio Regulations. Article 1 defines Broadcast Satellite Service as a "radio communication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public . . . direct reception encompasses both individual and community reception."⁹⁶ The confusion arises when the administering Radio Regulations refer to broadcast for the use of the public and also direct reception by the public. It is arguable whether the term "reception by the general public" places the signals outside Article 17 protections or whether it also includes transmissions of radio signals. In either case, the ineffectiveness of that legislation has been noted by commentators in the lack of enforcement sanctions.⁹⁷

B. *The Berne Union*⁹⁸

The Berne Convention (Berne) allows authors the exclusive

93. *Id.*

94. Radio Regulations, Dec. 21, 1959, 12 U.S.T. 2377, T.I.A.S. No. 4893, *latest revision* July 17, 1971, 23 U.S.T. 1527, T.I.A.S. No. 6435.

95. Article 17 of the Radio Regulations, *see id.*, states in relevant part that members are bound to prevent a) the unauthorized interception of radiocommunications not intended for the general use of the public, and b) publication or any use whatsoever, without authorization obtained by the interception of the radiocommunications mentioned in a) above.

96. *See* Article 1 of the Radio Regulations, *supra* note 94.

97. Barbara Ringer, former United States Register of Copyrights (then delegate to the United States to the Brussels Conference in 1974), speaking at the Caribbean Basin Initiative Hearing on S. 544 Before the Committee on Finance, 98th Cong., 1st Sess. 395 (1983), stated that "one of the alternatives discussed for solving the problem . . . was whether the ITC Convention and the Regulations, to the extent that they actually cover the problem as a technical matter, have no enforcement machinery and it was doubtful whether they could be made an effective means to combat satellite piracy."

98. Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* on September 9, 1886, 1886 Gr. Brit. T.S. No. (cmd. 5167), completed at Paris May 4, 1876, 1896 Gr. Brit. T.S. No. (cmd. 8681), *revised* at Berlin Nov. 13, 1908, 1 U.N.T.S. 217, completed at Berne Mar. 20, 1914, 1 U.N.T.S. 243, *revised* in Rome June 2, 1928, 123 U.N.T.S. 233, *revised* at Brussels June 26, 1948, 331 U.N.T.S. 217, *revised* at Stockholm July

right to authorize broadcast or any other communication of their work to the public. It is the only international treaty expressly granting protection directly to authors against unauthorized use of their works. It allows implementation of member countries' compulsory license schemes in connection with telecommunications. The United States and many Latin American countries are not members. Several Latin American countries are not members because strict adherence would mean costly revision to their copyright laws. The threshold question in applying Berne to satellite communications⁹⁹ is one of relevance; Article II of the convention speaks of broadcast and communication by "wireless diffusion of signs, sound, or images" without mention of satellites.¹⁰⁰

Additionally, Article II of the Berne Convention brings into question for potential signatories the recognition of an author's right to exclusively authorize retransmission. Article II, Section 2 provides as follows:

It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. *They shall not in any circumstances be prejudicial to the moral rights of the author nor his right to obtain remuneration* which in the absence of agreement shall be fixed by competent authority.¹⁰¹

C. *Universal Copyright Convention (U.C.C.)*

This treaty was drafted in 1952 in reaction to the nonratification of Berne by the United States and Latin American countries.¹⁰² The applicable section is Article IV, Section 1, which requires states to protect owners' rights to authorize reproduction of the works by any means.¹⁰³ Moreover, the broadcasting right under the U.C.C. is deemed to include satellite transmission as well as cable transmissions and retransmissions.¹⁰⁴ The major problem with the U.C.C. is

14, 1967, 21 U.S.T. 1749, T.I.A.S. No. 6932; revised at Paris July 24, 1971, 25 U.S.T. 341, T.I.A.S. No. 7868, 828 U.N.T.S. 221. For an excellent overview of the Berne Convention, see *Hearings Before the Subcommittee on Patents, Copyrights and Trademarks*, 98th Cong., 1st Sess., 26-33 (1984).

99. See *supra* text accompanying notes 82-93. It is important to note that some commentators do recognize the Berne Convention as applying to satellite signals.

100. Article II, see *supra* note 98.

101. *Id.* at Article II *bis* (emphasis added).

102. U.C.C. Convention *opened for signature*, September 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132, revised at Paris July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 943 U.N.T.S. (entered into force July 10, 1974).

103. See *supra* note 98.

104. Article 3 *bis* of the U.C.C., see *supra* note 102, included under its protection, "works published . . . whatever may be the means of manufacturing . . . [including] the com-

its lack of enforcement mechanisms. For example, the treaty is governed by the International Court of Justice at the Hague, whose jurisdiction must be specifically consented to by the parties.¹⁰⁵

D. *Rome Convention*¹⁰⁶

A major emphasis of this treaty is its concern with the neighboring rights it gives to broadcasters for the exclusive right to control the use of their broadcasts without a separate grant to them for protection of the material within. Usually, broadcasters are not authors unless they produce either the programs themselves or purchase the rights. However, as in both Berne and the U.C.C.,¹⁰⁷ the problem here is with enforcement. No uniformity of national treatment exists among members, but instead each state is left to implement its obligations to the treaty according to its reservations and domestic legislation.¹⁰⁸

E. *The Brussels Satellite Convention*¹⁰⁹

This convention was ratified in 1974 for the initial purpose of responding to issues concerning satellites and neighboring rights. The major drawback was its limited membership of eight nations, which does not include Canada. (As of March 1984, the United States became a member.)¹¹⁰ One result of this is that states are left with their own national implementation policy for preventing unauthorized distribution. The original draft of Brussels had more ambitious designs of establishing substantive property rights in the signals.¹¹¹

munications by wire or the broadcasting of literary or artistic works."

105. International Court of Justice, Stat. art. 36 (2) and for the Universal Copyright Convention, 6 U.S.T. 2731, T.I.A.S. No. 3324, revised in Paris on July 24, 1971, 25 U.S.T. 1341, T.I.A.S. 7868 [hereinafter ICJ]. Works published by a foreign national will be entitled to the same protection a nation accords to its own citizens under its laws; however, the U.C.C. as a national treatment document provides four minimum standards whereas Berne fundamentally is minimum standards on all points. Neither provide enforcement mechanisms. See *Hearings Before the Subcommittee on Patents, Copyrights and Trademarks*, 98th Cong., 1st Sess., 37-60 (1984).

106. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, opened for signature October 26, 1961, 49 U.N.T.S. 44 [hereinafter The Rome Convention].

107. U.C.C. Convention, see *supra* note 102; ICJ, *supra* note 105.

108. See *supra* note 106.

109. Convention Relating to the Distribution of Program — Carrying Signals Transmitted by Satellite, opened for signature, May 21, 1974, Article 1, 13 I.L.M. 1444, 1447 [hereinafter Brussels Convention].

110. The United States ratified this in October 1984, Senate Foreign Relations Document 98-31.

111. For example, § 2(1) of the Brussels Convention, *supra* note 109, states as follows: each contracting state adequately measures to prevent the distribution on or from its territory of any programme carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended. This obligation shall apply where the organization is a national of another contracting state and

An important issue for this convention was whether there should be an exclusive right of authorization in the broadcaster to the detriment of the copyright owner. The Brussels convention requires states to take adequate measures to prohibit unauthorized distribution or take from its "territory any program carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended," Article 2(1).¹¹² The Brussels convention puts the obligation of preventing unauthorized use on receiving nations and not on sending ones. The reasoning is that the emission or uplink of a signal to a satellite cannot be considered an infringement since this is not a public communication.¹¹³

The major problem here is also in the enforcement provisions, which leave enforcement to national legislation.¹¹⁴ This has been criticized as an inadequate solution because the copyright property problem may be ignored even if nations develop legislation in the form of administrative, criminal, or broadcast regulation sanctions.¹¹⁵ It also avoids the problem of neighboring rights.

There have been suggestions that the United States' ratification of the Brussels Convention will solve many of the problems of foreign interception of signals. The argument does that by demonstrating that the United States attaches importance to this issue, other nations will become members. The only eight members are Austria, Germany, Italy, Mexico, Nicaragua, Kenya, Morocco and Yugoslavia.¹¹⁶ Pitfalls do exist with the Brussels Convention, however, in that satellite signals intended for direct reception by the general public are excluded.

Direct broadcast is but one type of reception among three. The others are point-to-point systems and distribution satellite systems. Point-to-point satellite systems link two particular earth stations where signals are relayed from one ground station to nine receiving stations with a large diameter parabolic receiving antennae. Direct broadcast satellites are similar in that only they have less amplica-

where the signal distributed is a derived *signal* (emphasis added).

See generally Nairobi Conference, Report on the Third Committee of Governmental Experts on Problems in the Field of Copyright and of the Protection of Performers and Producers of Phonograms and Broadcast Organizations Raised by Transmission via space satellites, U.N. Doc., UNESCO/WIPO/CONFESAT 3 (1973).

Before the Nairobi Conference a signal remained the same signal no matter the number of times it was modulated or amplified. At the Conference, a signal's life was divided into three stages, when it is emitted, derived and distributed.

112. See Brussels Convention, *supra* note 109, at 1456.

113. See *supra* note 11.

114. Negros, *supra* note 89, at 239.

115. See *supra* note 11.

116. Not all signatory nations may adopt similar, uniform implementing legislation. Accession to a uniform treaty agreement ensures reciprocal protection and broad acceptability. Negros, *supra* note 89, at 238.

tion capability.¹¹⁷ They are dissimilar in that only direct broadcast satellites are intended for direct reception by the general public.

IX. CATV Compulsory Licensing in the United States and Legislative Solutions to Satellite Signal Theft

A. Pre-1976 Copyright Act

Under the 1909 United States Copyright Act, the only compulsory license provision was for musical works.¹¹⁸ The motivation for enactment of this provision was protection of a developing recording industry.

B. 1976 Act Compulsory License for CATV Secondary Transmission of Copyrighted Broadcasts

The 1976 act¹¹⁹ addressed the problem of retransmission liability in 17 U.S.C. section 111.¹²⁰ In regard to this problem, the House report¹²¹ shows the drafters recognized the administrative burden of requiring individual negotiation and of the existing law, which found no liability. The current United States compulsory license scheme for cable television contains the following elements:¹²²

- (a) Required compliance with reporting requirements.
- (b) Payment of royalties set by schedule.
- (c) Ban on deletion and substitution of commercial advertising.
- (d) Geographic limits on the compulsory license for copyrighted programs broadcast by Canadian and Mexican stations.

This last point is set out in 17 U.S.C. section 111, which states as follows:

[N]otwithstanding the provisions of clause (1) . . . the secondary transmission to the public by a cable system for a primary transmission made by a broadcast station licensed by an appropriate

117. Liebowitz, *Bringing Protection for Satellite Delivered Programming Down to Earth*, 2 COMMUN. LAW. 58 (1984). The more powerful the transmitting capability of the satellite the less need for a powerful earth station receiver. See generally Matte, *Aerospace Law, from SCIENTIFIC EXPLORATION COMMERCIAL UTILIZATION* 135 (1977).

118. United States Copyright Act of 1909, Section 17 U.S.C. 1(3) states as follows: as a condition of extending the control to [reproduce mechanically the musical work] that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyright work upon the parts of the instruments serving to reproduce the musical work, any other person may make similar use of the copyrighted work upon payment to the copyright proprietor of a royalty

119. United States Copyright Act, 17 U.S.C. § 101.

120. United States Copyright Act of 1976 compulsory license provisions for secondary broadcast transmissions.

121. H.R. REP. NO. 94-1476, 94th Cong., 2nd Sess., 89-90, 97 (1976). Stat. 2551, PL 94-553, Oct. 19, 1976.

122. 17 U.S.C. § 111.

governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under Sec. 501, . . . subject to remedies 502 through 506 if: a. with respect to Canadian signals, the community of the cable systems is located more than 150 miles from the U.S./Canadian border and is located south of the 42nd parallel of latitude.¹²³

The royalty fee schedule reflects a scale relative to the gross receipts of a cable system without distinguishing between local and distant signals.¹²⁴ This is substantiated because copyright owners are not effected by those retransmissions. It is the retransmission of distant non-network programming which go beyond both the license area and cable viewership that cause authors to be harmed.

Under the guise of F.C.C. cable television regulations, it is appropriate to note the federal administrative backdrop that existed previous to the adoption of 17 U.S.C. section 111. These regulations were promulgated by the F.C.C., but have since been effected by deregulation. For example:

1. Limitations on Distant Signal Importation

No more than two independent (non-network) signals can be imported and these are subject to variations based on broadcast stations whose signals may otherwise be available in CATV markets.¹²⁵

2. Syndicated Exclusivity Rules

Of programming available by the broadcast station no duplication by imported signals is allowed in the market in which the signal would be imported.¹²⁶

3. Must Carry Rules

This requires CATV systems to include over the air broadcast signals available in markets broadcast to by cable systems.¹²⁷

Returning to the CATV compulsory license scheme, three basic accomplishments were achieved. First, a compulsory license scheme was established exempting passive common carriers from copyright liability for the secondary transmission.¹²⁸ Second, statutory license fees were set based upon both revenue from subscriber receipts and number of signals.¹²⁹ Third, the Copyright Royalty Tribunal (CRT) was established to divide fees among applicants allowing the CRT to

123. *See supra* note 120.

124. *Id.*

125. *Compulsory Licensing for Cable Television: A Report*, 12 J. ARTS, MGMT. & L. 29, 32 (1983).

126. *Id.*

127. *Id.*

128. *Id.* at 33.

129. *Id.*

increase fees in accordance with changes in F.C.C. rules or inflation.¹³⁰

As a major argument for its repeal, advocates of abolishing the Section III compulsory license scheme cite the changes in the industry since its adoption. The concentration of ownership in CATV Systems is one example. For instance, the fifty largest Multiple System Operators (MSO's)¹³¹ own forty percent of the 4,800 CATV Systems and account for seventy-five percent of all subscribers. Moreover, since the adoption of 17 U.S.C. section 111, twelve additional commercial satellites have been launched, multiplying the value of transmitted programs by increased audiences.¹³² Advocates of abolishment of the compulsory license scheme also argue that Section III is not propelled by valid public interest sufficient to curtail the rights of copyright holders. They suggest substituting it with a privately negotiated licensing system¹³³ because statutory fees do not reflect the value of retransmitted programs.

Furthermore, copyright royalty claimants are limited to: (a) copyright owners whose work is included in a secondary transmission of distant non-network programming,¹³⁴ (b) any copyright owner whose work is included in a secondary transmission identified in a special statement of account deposited under Section III (d)(2)(A),¹³⁵ and (c) any copyright owner whose work was included in distant non-network programming consisting exclusively of coaxial signals.¹³⁶

C. U.S. Legislative Solutions to Satellite Signal Poaching: The International Copyright Fairness Bill

Two solutions to the foregoing problem are being considered by the United States Congress, but have not yet been acted upon. The first effort is a bilateral solution in the form of a treaty called the Carribean Basin Initiative (CBI)¹³⁷ that would try under foreign trade sanctions to comply with compulsory license laws covering United States signal retransmission. A related solution renews the

130. *Id.*

131. *Id.* at 35.

132. *Id.*

133. Each broadcaster must negotiate with each individual program producer or copyright owner for an agreed price.

134. 17 U.S.C. § 111(d)(1); *see also* CHISUM, INTELLECTUAL PROPERTY: COPYRIGHT, PATENT AND TRADEMARK LAW § 72 (1980) [hereinafter CHISUM].

135. CHISUM, *supra* note 134, at 72-73.

136. CHISUM, *supra* note 134, at 72.

137. Carribean Basic Conference Recovery Act, P.L. No. 98-67, § 212, 97 Stat. 384, 385-86 (1983). This is an economical recovery package designed to help Carribean and Central American countries rejuvenate their economies. *See Carribean Basin Initiative Hearing on S. 544 Before the Committee on Finance, 98th Cong., 1st Sess., 395 (1983).*

General System of Preferences (GSP's)¹³⁸ in application to importation of goods from countries that comply with United States copyright laws. While the latter does not concern the satellite signal dilemma in relation to Canada, a second option, an amendment to the U.S. Copyright Law, does. The International Copyright Fairness Bill,¹³⁹ is aimed at signal theft from Canada.

Under this proposal, the Copyright Royalty Tribunal¹⁴⁰ must find before royalties are paid to nonresident foreign nationals for cable retransmission that a claimant's country allows equivalent remuneration to United States copyright holders for use of their material abroad. Critics maintain the bill is violative of the national treatment principle of the U.C.C. because it disfavors foreign copyright owners. For example, Canada, by extending no such recognition remains within the equal treatment principle to national and foreign copyright owners.¹⁴¹ Critics also maintain that smaller nations cannot be prodded into expensive revampings of their laws to the benefit of primarily United States copyright owners while worsening their own international copyright balance of payments. The smaller nations will further spurn membership in Berne or the U.C.C., thereby aggravating a problem worsening with the increase in satellite program distribution and retransmission.

A related bill that has not yet been acted on is the International Security and Development Cooperation Act of 1983 (ISDCA).¹⁴² This bill proposes a direct link between foreign aid and the United States copyright law compliance. The bill would directly affect F.C.C. authorization for resale carriers to extend service to foreign regions within a reception area. F.C.C. authorization is subject to the conditions of (1) consent from the state of delivery and (2) a waiver from INTELSAT.¹⁴³ Before granting authorization to the satellite system for retransmission, the F.C.C. would get a clearance

138. S. REP. NO. 485, 98th Cong., 2nd Sess. 1 (1984).

139. It's called "A Bill to Provide that Non-Resident Foreign Nationals Not be Compensated Unless such Claimant's Country Compensates United States Citizens for Restransmissions of Materials they Own" S. 736, 98th Cong., 1st Sess. (1983).

140. For background information on the structure and function of the Copyright Royalty Tribunal, see *Oversight of the Copyright Office and the Copyright Royalty Tribunal: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess., 49-50 (1983) (statement of Commissioner Edward Ray Copyright Royalty Tribunal).

141. See *supra* note 99.

142. H.R. REP. NO. 2992, 98th Cong., 2d Sess. 1 (1983).

143. The International Telecommunications Satellite Organization (INTELSAT) was initially established as a result of a two-part agreement. First, Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, *opened for signature* Aug. 20, 1964, 2 U.S.T. 1705, T.I.A.S. No. 5646, 514 U.N.T.S. 26, and, second, Special Agreement *opened for signature* Aug. 20, 1964, 2 U.S.T. 1745, T.I.A.S. No. 5646, 514 U.N.T.S. 48. The INTELSAT system consists of a series of communication satellites and earth receiving stations.

from the State Department.¹⁴⁴

The latter devices, the ISDCA, Fairness Bill, CBI, and GSP system, will not affect the liability of Canadian Satellite rediffusion as much as the pending revision of the Canadian Copyright Law.¹⁴⁵ The position Canada takes will reflect its direction in copyright law development in relation to its international treaty obligations and its desire to be dependent on United States copyrighted materials. Some nations wish to exclude Western and United States programming from its citizens' reach to preserve cultural identity or to prevent satellite communications from acting as agents of propaganda and political information, indoctrination, or social moré disruption.¹⁴⁶ Other nations welcome the availability of United States programming and maintain the opinion that the United States should share with developing nations its vast store of wealth by not imposing requirements for remuneration.¹⁴⁷

D. Canadian Parliament Report Recommends Retransmission Liability and a Compulsory License: "Charter of Rights for Creators," October, 1985

The solution proposed in the October, 1985 subcommittee report ¹⁴⁸ is to establish liability for broadcast retransmission and to set up a compulsory licensing system administered by a Copyright Appeal Board similar to the American Copyright Royalty Tribunal.¹⁴⁹ The report addresses a wide range of concerns such as extension of moral rights, increased emphasis on cultural enterprises by broader application of the copyright law, and general recognition of copyright law as a tool of cultural policy to reflect legal commitment to the value of creators in society. The introduction of the Charter shows this concern as follows:

The task of the subcommittee is not one of mere updating. 60 years ago what might have seemed, to a country barely emerging from colonial status, as wishful thinking is now a widely acknowledged reality. . . . [C]reation of a Canadian culture need no longer be a focus for policy; the issues are now to give it adequate recognition, to maintain its vitality and to expand its appreciation both in this country and abroad.¹⁵⁰

144. See *In re* Satellite Business Systems, 91 F.C.C. 2d 940 (1982); *Transborder Satellite Video Services*, 88 F.C.C.2d 258 (1982).

145. See *supra* text accompanying notes 119-35.

146. See *Direct Broadcasting from Satellites*, 3 N.Y.U.J. INT'L L. 72, 78 (1970).

147. One example of such a nation is Belize, formerly known as British Honduras.

148. FONTAINE, M.P. CHAIRMAN, A CHARTER OF RIGHTS FOR CREATORS, CANADA HOUSE OF COMMONS: REPORT OF THE SUB-COMMITTEE ON THE REVISION OF THE COPYRIGHT LAW: STANDING COMMITTEE ON COMMUNICATIONS AND CULTURE 3, (Oct. 1985).

149. *Id.* at 81.

150. *Id.* at 82.

The subcommittee rejected the CATV industry argument that market penetration would suffer because of a perceived price sensitivity and subsequent forced removal of programming. The subcommittee noted adoption of such a right may be offset by substitution of a local signal for a distant signal per CRTC Regulations.¹⁵¹ This is accomplished when a local station has purchased the right to broadcast a given program by cable that is simultaneously broadcast on a distant station also carried by cable. In this case, retransmission of a local signal would mean lower copyright royalties. Further, a 1985 study entitled "Probable Cost of a Retransmission Right in Canada"¹⁵² shows the economic consequences of recognizing a retransmission right that is capable of being adequately absorbed. This study finds, at most, 11.2 million dollars in royalties would have to be paid out by CATV systems for that year, constituting 1.7 percent of total CATV systems' revenue.¹⁵³ Dissenters to this report estimated that between 34-82 million dollars per year are to be paid out to copyright owners; however, these figures have been criticized as being exaggerated.¹⁵⁴

One proposal of the subcommittee is to treat retransmission rights as extended broadcast rights regardless of label, whether the means be by Hertzian waves, coaxial cable, etc., thus eliminating the need for a separate right. Another advantage of a broad redefinition is non-recognition of such a right dependent on a single, current technology. Of further significance is the subcommittee report's suggestions for guidelines to determine the value of retransmission activities. The Copyright Appeal Board would assign a lower value to local signals, not dependent on technical or topographical consideration but assign such a value based on the target audience indicated by intent to reach that audience regardless of achievement of that goal.

X. Conclusion

Copyright commentators have written much against compulsory license systems in the United States and argue in effect for a free market in negotiation of license fees. The introduction of one in Canada applied to CATV broadcasters seems appropriate in light of long term Canadian copyright policy, yet it is not without its costs. Defining a rediffusion right in the author, however, should be made according to the recommendations of copyright collectives who file tariffs with a Copyright Appeal Board. Entrepreneurial efforts that

151. *Id.*

152. *See supra* note 1.

153. *Id.* at 2.

154. *Id.*

exploit the absence of rediffusion right recognition, such as CANCOM, should be subject to signal liability, no matter what the public benefit of its services. Exceptions should be made for small cable systems for retransmission to small communities that have been contemplated by the Revision Subcommittee. Additionally, in order to implement immediate cultural objectives of industries concerned with Canadian cultural producers, there exists other laws and policy tools apart from copyright.

To implement these changes in a future copyright revision of the Canadian Copyright Act would serve the purposes of both modernizing the current law and placing Canadian industries in the arts, publishing, etc, which are dependent on copyright, onto equal footing with other nations in the post industrial information age.

