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Footprints Over the Caribbean: Bringing Program Protection in Step with Satellite Technology

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FOOTPRINTS OVER THE CARIBBEAN: BRINGING PROGRAM PROTECTION IN STEP WITH SATELLITE TECHNOLOGY*

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I. INTRODUCTION

Until recently, television programming was distributed simply: common carrier telephone and microwave links delivered network programming to local affiliates while independent television stations broadcast programming created by themselves or received through "bicycling"[1] films or tapes. The ultimate recipients, the viewing audience, were intended to view the programs without making a direct payment. Broadcast revenues were garnered through advertising subsidies.

Today, the emergence of new program services, including cable and subscription television systems, have radically changed the way programs are delivered to viewers. Many of these new services are being supported by viewer-subscriber payments rather than by advertising. The security of the systems which deliver the programming to the distribution entities and the ultimate viewing audience, has become an increasingly critical factor for the financial

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1. Physical circulation of copies from station to station.

viability of these program services and the programs suppliers of these services.

Satellite distribution of programming has, to a large extent, supplanted the traditional common carriage and bicycling systems; the large coverage area of a satellite signal (commonly known as the signal's "footprint") makes satellites a cost-effective program delivery system. However, this capability, coupled with the trend to direct viewer payments, poses a serious dilemna. The same signals which deliver programming to authorized program services are intercepted and retransmitted by others (sometimes by private entrepreneurs, sometimes by Government facilities) without the authority of the owners of copyright in the programs. This problem is exacerbated by the fact that the typical footprint of U.S. satellites transcends the continental United States and extends into large parts of Canada, Mexico, Latin America and the Caribbean.

The present and potential impact of this problem is not only to deprive copyright owners of payment for use of their programs, but to upset established marketing patterns (especially for cinematic works) in foreign markets. The problem is already acute in Latin America and Caribbean markets. The ability to control this problem is complicated by the nature of copyright laws. Copyright laws are all national in character, and many countries have laws which have not been revised to afford an effective regime for regulating transmissions of copyrighted works.

The international treaties, including the Universal Copyright Convention[2] to which the United States is signatory, promise only limited help. The Congress is stirring, however, to address the problem. In doing so, it must consider the legal and administrative apparatus for authorizing satellite services, the condition of national copyright laws, the relevance of the international copyright treaties (including the Brussels Satellite Convention[3] to which the United States has not yet adhered) and attitudes in other countries toward elaborating and extending copyright protection, especially as that effort affects international remittances.

Efforts now are under way in the United States to encourage effective protection abroad for copyrighted works used internationally in telecommunications technologies. These issues recently emerged in Congressional hearings on a bill introduced by Senator

2. Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868.

3. Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, *opened for signature* May 21, 1974, 13 I.L.M. 1444.

Patrick J. Leahy of Vermont,[4] in response to the problem of the unauthorized cable rediffusion of American broadcast signals in Canada, where such activity is legal under Canadian law. This paper describes the extent of the problem with respect to our Caribbean and Latin American neighbors, points out how existing copyright treaties relate to the problem and identifies new tools which have been implemented or are under consideration to deal with the problem.

II. THE PROBLEM

Satellite technology has expanded the use of United States-transmitted programming abroad. Satellites in geostationary orbit above the equator emit signals receivable over a large area, making a satellite an almost ideal method of distributing programming, either as an intermediary to local broadcast stations or cable systems, or as a direct transmitter in direct broadcast satellite (DBS) transmission service. As noted above, however, the disadvantage is that a satellite signal may be received by unintended recipients without authorization.

Encryption technology ("scrambling" signals) may help reduce the unauthorized reception of these signals. At present, however, scrambling may not be affordable or totally effective technically. As a result, a new and far-reaching copyright problem has emerged, both domestically and internationally, in connection with the unauthorized distribution of copyrighted motion pictures, sports events and other television programming received through the interception of satellite signals.

The earnings abroad of industries affected by these practices significantly contribute to the United States balance of trade. In the telecommunications field, particularly program production, the United States is already the largest copyright exporting state. The size and importance of these contributions will likely increase. It is urgent that the problems resulting from the foreign unauthorized and uncompensated use of our programming be solved. If foreign broadcasters, cable systems and other program distribution services can take valuable copyrighted programs without payment, or without being subject to the protective limitations of a reasonable license, it could mean significant injury for theatrical and conventional television markets in the United States and other affected countries. This is particularly true because of long-established

4. S. 736, 98th Cong., 1st Sess., 129 CONG. REC. S2436 (daily ed. Mar. 9, 1983).

marketing practices in the United States and in foreign markets which govern the sequential commercial release of films for exhibition in theaters, on pay and cable television services and on over-the-air broadcasts. Furthermore, the failure of the United States Government to act in the face of unacceptable foreign practices may encourage foreign countries to continue and, indeed, "legalize" the systematic appropriation of American copyright properties.

For almost one hundred years, the United States Department of State has been in the forefront of efforts to secure justice for American copyright owners abroad. Through bilateral agreements, Presidential proclamations and multilateral copyright treaties, some reasonable success has been achieved. However, satellite distribution and other relatively new technologies pose challenges to the existing system of international copyright protection at a time when the international political environment for its rapid modernization, which would afford effective protection, is unfavorable.

Many countries in the Western Hemisphere protect copyright under laws which have not been revised in many years. Some of these laws predate the advent of commercial broadcasting, as well as satellite technology; many do not specifically address the liability of various distribution services for the unauthorized secondary transmission of copyrighted broadcast programming. Even where national copyright statutes appear to accord broad public performance rights in broadcast materials, the law is often neither so developed nor so clear in application as to settle the question of the applicability of these rights in the area of satellite transmission.

Motion pictures, sports and other television programming owned by United States nationals are being intercepted and distributed without authorization or compensation throughout the Caribbean and Latin America. The following examples describe the various methods of distribution, the states where they are taking place and the program-carrying signals involved.

1) *Over-the-air broadcast television*: Government controlled over-the-air broadcast stations in Antigua, Haiti, Jamaica and Saint Kitts have been distributing television programming in unscrambled form, and without charge emanating from several sources, including Home Box Office (HBO) and the resale carrier feed of WTBS.[5]

5. Domestic satellite resale carriers provide a variety of services including the delivery of U.S. television broadcast signals to U.S. cable television systems, which simultaneously retransmit these signals to their subscribers. Presently, retransmitted broadcast signals are

2) *Subscription television*: Private subscription television stations located in Belize and Honduras are broadcasting programming similar to that described in "a" above. Unlike traditional over-the-air broadcast stations, however, these stations broadcast the intercepted programming in scrambled form and subscribers must pay the subscription television stations a fee to descramble the signals.

3) *Cable television*: Private cable television companies are known to be operating in the Dominican Republic, Guatemala and Panama. These systems have far greater channel capacity than either over-the-air broadcasting or subscription television. For this reason, they are able to distribute programming from a wider variety of sources including Cable News Network (CNN), Showtime, Spanish International Network (SIN), USA Network and the resale carrier feeds of WGN and WTBS.

4) *Hotels*: Hotels catering to English-speaking tourists and located in the Bahamas and the Cayman Islands have constructed television receive-only earth stations (TVRO's) to intercept various U.S. satellite program services for distribution to their guests.

III. Basic Sources of International Copyright Protection

Through a complex network of bilateral and multilateral copyright treaties, the works of United States' authors and copyright owners receive protection in approximately 75 countries. This protection is not, however, uniform from country to country. The copyright treaties to which the U.S. adheres are neither self-executing nor legislative in character, and do not regulate national copyright regimes in great detail. Multilateral copyright treaties uniformly adopt "national treatment" as the basic legal obligation: foreign countries generally give authors and their works the same

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delivered to U.S. cable systems by several satellite resale carriers: Eastern Microwave, Inc. (which delivers the signal of WOR, Secaucus, New Jersey), Southern Satellite Systems, Inc. (which delivers the signal of WTBS, Atlanta, Georgia), and United Video, Inc. (which delivers the signal of WGN, Chicago, Illinois).

Under U.S. copyright law, transmissions made by satellite resale carriers and cable television systems constitute "public performances" of the copyrighted programming contained in the signals so carried. As such, they are activities ordinarily put within the exclusive control of the owners of the copyright in the programming [17 U.S.C. §106(4)].

Under section 111(a)(3) of the act, however, the secondary transmission of signals is exempt from copyright liability when undertaken by a passive carrier (which may be a satellite resale carrier) which does not, among other things, exercise control over the content or selection of the signals being delivered; copyright liability attaches, however, to the ultimate distributor of the retransmitted signals — the cable system. The cable system's liability is discharged through a compulsory license.

level and quality of copyright protection that those countries give their own nationals. A brief description of the two principal international copyright treaties, U.S. bilateral agreements and Inter-American Conventions, is useful here:

A. *The Convention for the Protection of Literary and Artistic Property (The Berne Convention), as revised at Paris, 1971*

The Berne Convention establishes the levels to which member states can regulate copyright, including: 1) detailed "Convention rules" which all states must reflect in their legislation; and 2) rules which either set broad principles to govern national discretion or leave the treatment of a subject wholly to such discretion.[6] Since the original Berne Convention of 1886,[7] there have been five generally revised texts: Berlin (1908),[8] Rome (1928),[9] Brussels (1948),[10] Stockholm (1967),[11] and Paris (1971).[12]

Since 1948, the Berne Convention has contained specific provisions which assure authors broad rights to authorize the public performance of their works by broadcasting, including "communication to the public by wire or by rebroadcasting."[13] The interpretation of this provision and its relationship to art. 11 bis (2),[14] which sanctions the limited use of compulsory copyright licenses in telecommunications, is currently the subject of intense disagreement among Convention states. The cause for the dispute is the copyright liability of cable television systems for their retransmission activities.

Although the United States is not a member of the Berne

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6. Berne Convention for the Protection of Literary and Artistic Property (Paris Act), July 24, 1971, Copyright Laws and Treaties of the World, vol. 3, item H-1, (Supp. 1972).

7. Berne Convention for the Protection of Literacy and Artistic Property, Sept. 9, 1886, 168 Parry's T.S. 185, British and Foreign State Papers, vol. LXXVII, p. 22.

8. Berne Convention for the Protection of Literacy and Artistic Property, (Berlin Convention) Nov. 13, 1908, 1 L.N.T.S. 218, Copyright Laws and Treaties of the World, vol. 3, item C-1, (Supp. 1974).

9. Berne Convention for the Protection of Literacy and Artistic Property, (Rome Act), June 2, 1928, 123 L.N.T.S. 233, Copyright Laws and Treaties of the World, vol. 3, item E-1, (Supp. 1974).

10. Berne Convention for the Protection of Literacy and Artistic Property, (Brussels Act), June 26, 1948, 331 U.N.T.S. 217, Copyright Laws and Treaties of the World, vol. 3, item F-1, (Supp. 1974).

11. Berne Convention for the Protection of Literacy and Artistic Property, (Stockholm Act), July 14, 1967, Copyright Laws and Treaties of the World, vol. 3, item G-1, (Supp. 1974).

12. Berne Convention, *supra* note 6.

13. Berne Convention, *supra* note 11, art. 11 bis (1).

14. Berne Convention, *supra* note 11, art. 11 bis (2).

Convention, and never has been, the importance of the Convention in shaping protection abroad for works of U.S. nationals is considerable: the Berne Convention is the basic treaty source of copyright law for virtually all of Europe, much of the British Commonwealth and the Francophone Third World. Where its rules are clear and directive, Berne obligations determine the "national treatment" American works receive in states which are also members of the Universal Copyright Convention. Even where it is ambiguous or where it accords national discretion, the search for a consensus solution for national implementation is framed by the letter and spirit of the Convention.

B. *The Universal Copyright Convention, Geneva 1952 and Paris 1971*

The unwillingness of the United States and major Latin American States to join the Berne Convention prompted the preparation in 1952 of the Universal Copyright Convention (UCC), under the aegis of the United Nations Scientific and Cultural Organization (UNESCO).[15] The Convention was revised at Paris in 1971, principally to incorporate provisions in favor of developing countries, and now exists in two texts. Presently, the United States and 70 other states are members of the UCC; many of these other states are also party to the Berne Convention.

The UCC was drafted with the aim of bringing as many states as possible into a simple, multilateral copyright relationship, without requiring major amendments to domestic law. The Convention is, therefore, quite general in its regulation of the local copyright laws of its members and lacks the detailed provisions of the Berne Convention. The UCC provides: 1) that works by authors of contracting states be protected in all other contracting states the same as national works ("national treatment"); 2) a simple mechanism whereby any formalities required by a contracting state for securing copyright might be complied with; and 3) a brief enumeration of minimum authors' rights which must be provided for, including, in the Paris version, rights in public performance by broadcasting. Because the UCC lacks detailed provisions relating to cable television, rediffusion and satellites, it has not emerged as a conceptual

15. Universal Copyright Convention, *supra* note 1. This convention remained open for signing after being deposited with the Director General of the United Nations Educational, Scientific and Cultural Organization (UNESCO). UNESCO is an international organization designed to represent international participants in the substantive areas of education, science and technology, cultural activity, communications, and the social sciences.

framework for analysis of copyright laws' relationship to new telecommunications techniques. The copyright laws of UCC states which deal with these issues are nonetheless applicable to American-owned works under the principle of "national treatment."

Since the mid-1960's, the UCC has assumed a special role with respect to developing countries; and the focus of the UNESCO Secretariat has been on subjects of present concern to the Third World. As a result, cable television is not high on the agenda. Although satellite communications policies are high on that agenda, the interest is still on political an infrastructural aspects, rather than on the intellectual property components of these policies.

C. *Bilateral Copyright Agreements*

From 1891 to 1965, the United States concluded over 65 bilateral copyright arrangements with most of the major nations of Europe, Latin America and Asia. The legal authority for such bilateral agreements inheres in the Executive's foreign affairs powers, and is also provided for in statutes.

A small number of bilateral arrangements were concluded under Friendship, Cooperation and Navigation (FCN) agreements. Except for non-UCC States, bilateral agreements have been largely superseded by the UCC. There is, however, a renewed interest in considering whether an aggressive policy seeking bilateral copyright relationships with nations outside of multilateral arrangements is desirable in the face of widespread copyright piracy.

D. *Inter-American Conventions*

Between 1889 and 1946, six copyright conventions open to all the states of the Americas were concluded: Montevideo (1899),[16] Mexico City (1902),[17] Rio de Janeiro (1906),[18] Buenos Aires (1910),[19] Caracas (1911),[20] Havana (1928)[21] and Washington

16. Montevideo Copyright Convention, Jan. 11, 1889, Copyright Laws and Treaties of the World, vol. 3, (Supp. 1957).

17. Mexico City Copyright Convention, Jan. 27, 1902, Copyright Laws and Treaties of the World, vol. 3, (Supp. 1957).

18. Rio de Janeiro Copyright Convention, Aug. 23, 1906, Copyright Laws and Treaties of the World, vol. 3, (Supp. 1957).

19. Buenos Aires Copyright Convention, Aug. 11, 1910, Copyright Laws and Treaties of the World, vol. 3, (Supp. 1957).

20. Caracas Copyright Agreement, July 17, 1911, Copyright Laws and Treaties of the World, vol. 3, (Supp. 1957).

21. Havana Copyright Convention, Feb. 18, 1928, Copyright Laws and Treaties of the World, vol. 3, (Supp. 1957).

(1946).[22] The United States is a member of the Mexico City and Buenos Aires Conventions. Neither Convention deals specifically with broadcasting or satellite communications.

IV. Alternatives Encouraging Effective Protection Abroad of U.S. Copyrighted Programming

The danger that foreign states will either resist modernization of their copyright laws to prevent the growth markets for American works in their territory, or adopt discriminatory regimes disfavoring American works will not disappear just because the United States hews closely to contrary policies. Over the last several years, copyright-intensive industries in the United States have discovered that along with growing international markets have come problems with the recognition of property rights in their works and the effective enforcement of such rights. Recouping the costs of creating, organizing and distributing products and services, such as motion pictures, increasingly depends upon worldwide markets, rather than one's own home market. In many parts of the world inadequate protection of intellectual property is a major problem for United States exporters.

Bilateral governmental efforts, through trade agencies, to persuade foreign governments that it is in their interest to protect U.S. intellectual property, fairly and effectively, are attractive tools with which to approach much of the global piracy problem. They demonstrate to other governments the seriousness with which the United States views violations of its nationals' intellectual property. More importantly, by casting the issue into the context of the overall trade "fit" with a particular state, greater negotiating leverage can be obtained than with traditional multinational or bilateral copyright tools. A purely copyright basis for negotiations may be tactically weak.

The United States Government can make clear through bilateral trade based negotiations that copyrighted works are an important element of U.S. export interests which must be recognized in *overall* trade relationships. The failure by U.S. trading partners to protect adequately these properties will imperil the ready access to the U.S. market for exports of comparable value originating in the particular state concerned.

Several measures may be calculated to further interests of

22. Washington Copyright Convention, June 22, 1946, Copyright Laws and Treaties of the World, vol. 3, (Supp. 1957).

copyright producing industries without compromising the basic structure of international copyright and the principle of national treatment.

A. *System of Generalized Preferences*

A number of proposals have been made that the eligibility of certain foreign states for preferential access to the United States market be conditioned upon their adequate and effective protection of intellectual property, including copyrights. A bill was introduced in the U.S. Senate to renew the System of Generalized Preferences (GSP) by which the products of manufacturers of developing states are admitted duty-free into the United States.[23] The bill contains a provision which would condition GSP treatment upon the reciprocal protection of United States intellectual properties.

B. *Caribbean Basin Initiative*

The Caribbean Basin Initiative (CBI)[24] is a cornerstone of the Administration's Latin American policy. It seeks to promote the strength and resiliency of 27 countries in the Caribbean by according economic assistance and tariff benefits to the eligible states for imports into the United States. Eligibility for CBI designation depends upon certain evaluations weighed against statutory criteria, some of which are mandatory eligibility requirements while others are variables which must be taken into account in making a CBI designation.

One purpose of these criteria is to tie important commercial and developmental benefits to socially and economically free societies. Many of the criteria are ultimately concerned with political freedom as much as with commercial relations. One of the mandatory criteria is that a CBI designee not engage in the rebroadcast of United States copyrighted material through a government-owned entity without the express consent of the copyright holder.[25]

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23. S. 1718, 98th Cong., 1st Sess. (1983).

24. Interest and Dividend Tax Compliance Act of 1983 — Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 369 (1983). The following nine Caribbean Basin countries have been designated as beneficiaries of the CBI as of January 1, 1984: Antigua and Barbuda, Belize, the British Virgin Islands, El Salvador, Grenada, Guatemala, Haiti, Honduras and Montserrat. President's Designation of Caribbean Basin Economic Recovery Act Beneficiaries, 19 WEEKLY COMP. PRES. DOC. 1749 (Dec. 29, 1983).

25. Interest and Dividend Tax Compliance Act of 1983 — Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 369, 386 (1983).

Among the criteria whose weight is essentially discretionary with the Executive are these:

> 1) The extent to which such countries prohibit its nationals from engaging in the broadcast of copyrighted material, including film or television material, belonging to United States owners without their express consent.
>
> 2) The extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights.[26]

Taken as a whole, these designation criteria use the offer of valuable trade concessions by the United States as an incentive to two very different sorts of steps by otherwise eligible CBI states: first, to stop and prevent the unauthorized interception and use of U.S. programming distributed by satellite; second, to encourage CBI states to make their internal laws governing intellectual property responsive to goods and services important to the economic well-being of the United States.

The "carrot and stick" approach taken by CBI in the case of unauthorized foreign uses of satellite distributed works may be justified by the relative newness of the problem (and the practices abroad) and the gravity of the dangers of the practices if not checked. But the last criterion — the one that looks toward a broader harmony in Inter-American intellectual property relations — may require a more collaborative, multilateral forum to reach its goals. This is so because the last criterion calls for nothing less than a real modernization of internal copyright law. This is a difficult and time-consuming task which, internationally, requires close cooperation, cross-education and great sensitivity to the political and cultural interests which are inherent in copyright laws everywhere.

C. *Foreign Assistance Legislation*

Whereas GSP and CBI legislation link copyright protection of U.S. materials to trade benefits,[27] the International Security and Development Cooperation Act of 1983,[28] links copyright protection to public bilateral assistance outside of the economic sphere. The House Committee on Foreign Affairs, upon the initiative of Con-

26. *Id.* at 387.
27. H.R. 2992, 98th Cong., 1st Sess. (1983).
28. International Security and Development Cooperation Act, 22 U.S.C. §151 (1983).

gressman Michael D. Barnes of Maryland, recently stated that:

> [T]he President, in determining the level of assistance to a country under the Foreign Assistance Act, the Agricultural Trade Development Act of 1954, or the Arms Export Control Act, shall consider the extent to which the government of that country permits a government-owned entity or nationals of that country to engage in the broadcast of copyrighted materials (including films and television material) belonging to U.S. copyright owners, without their expressed consent. It further provides that, if the President determines that a government-owned entity of a country engages in such activity, the level of assistance provided to that country for the fiscal year 1984 not exceed one-half of the amount proposed for that country in the congressional presentation materials. However, this restriction on the funding level may be waived by the President if he determines and reports to Congress that it is in the national interest to do so.
>
> This provision reflects the committee's concern with the unauthorized foreign broadcast of copyrighted materials received through the interception of satellite signals. In particular, the Jamaican Broadcasting Corporation, a Government agency, and private parties in other Caribbean countries are intercepting pay-TV signals carried by American domestic satellites and are rebroadcasting motion pictures and other TV programs without the consent of the American copyright owners. This practice is not consistent with international convention and deprives the American owners of the copyright program material of their property without compensation.[29]

Whether aid in the forms contemplated above ought to be subject to respect for specific property rights of private U.S. citizens is a judgment for the Congress to make. Congress having done so, it is for the Executive to articulate them with broader national security considerations.

D. *The Convention Relating to Distribution of Programme-Carrying Signals Transmitted by Satellite (The Brussels Satellite Convention 1974)*

The apparent success of the CBI and the interest shown in developing other trade and assistance based means to protect copyrights abroad should not obscure the important role which multilateral copyright treaties may play in raising the level of cop-

29. Report on the International Security and Development Cooperation Act of 1983, H.R. REP. No. 98, 98th Cong., 1st Sess. 81 (1983).

yright protection available throughout the world. One particular avenue to pursue in this regard would be the ratification by the United States of the Convention Relating to Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Satellite Convention),[30] which was created in 1974.

The Brussels Satellite Convention obligates a contracting State to "take adequate 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."[31] The means of implementing this obligation is left to the choice of the contracting States; they are free to choose private rights, penal provisions or regulatory controls as the basis for enforcement. Satellite signals intended for direct reception by the general public are excluded from the scope of the Convention.

The vagueness of the Convention is at once a weakness and a strength. It is a weakness because membership is still limited and no clear and successful mode of implementation can yet be discerned or tested; a strength because it permits States to move decisively against unauthorized signal distribution without requiring acceptance of any particular notions of law, property or commercial freedom which copyright tends to require.

To date, eight countries have ratified or acceded to the Convention: Austria,[32] the Federal Republic of Germany,[33] Italy,[34] Kenya,[35] Mexico,[36] Morocco,[37] Nicaragua[38] and Yugoslavia.[39] United States adherence to the Brussels Satellite Convention has been periodically under consideration since the conclusion of the Diplo-

30. Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, *supra* note 3.

31. *Id.* at 1447.

32. Austria entered into the Convention on August 6, 1982. 20 COPYRIGHT (WIPO) 10 (1984).

33. Federal Republic of Germany entered into the Convention on May 25, 1979. 20 COPYRIGHT (WIPO) 10 (1984).

34. Italy entered into the Convention on Jul. 7, 1981. 20 COPYRIGHT (WIPO) 10 (1984).

35. Kenya entered into the Convention on Jan. 6, 1976. 20 COPYRIGHT (WIPO) 10 (1984).

36. Mexico entered into the Convention on Mar. 18, 1976. 20 COPYRIGHT (WIPO) 10 (1984).

37. Morocco entered into the Convention on June 30, 1983. 20 COPYRIGHT (WIPO) 10 (1984).

38. Nicaragua entered into the Convention on Dec. 1, 1975. 20 COPYRIGHT (WIPO) 10 (1984).

39. Yugoslavia entered into the Convention on Dec. 29, 1976. 20 COPYRIGHT (WIPO) 10 (1984).

matic Conference in 1974. Until recently, however, domestic private sector support for U.S ratification has been meager for several reasons. First, national program producers and distributors believe that the obligations of the member states under the Convention are weak and can be circumvented in several instances through the optional limitations on protection provided for in article 4 and article 8(3). The limitations in these articles concern uses by developing countries of educational or informational parts of programs carried and possible reservations with respect to cable distribution. These producers and distributors hoped that time would allow for the creation of a new convention with stronger provisions. Second, during the early years following the establishment of the Convention, there was little significant use of satellites for the delivery of programming and limited availability of satellite reception earth stations. Finally, educational groups within the United States believe that the optional limitations on protection were not broad enough.

During the last two years, representatives of the program supply and broadcast industries, and educational groups, have expressed near unanimous support for U.S. ratification of the Brussels Satellite Convention for several reasons:

> 1) Increased use of satellites for the delivery of programming;
> 2) Low cost of satellite reception earth stations;
> 3) Widespread unauthorized international interception of U.S. program-carry satellite signals; and
> 4) Realization that a new, stronger Convention would not be created.

Support within the Government for U.S. ratification has come from the Department of State, the National Telecommunications and Information Administration (NTIA), and the Copyright Office. Both NTIA and the Copyright Office view section 605 of the Communications Act of 1934 (entitled "Unauthorized Publication or use of Communications")[40] taken together with the provisions of the U.S. copyright law, as adequate implementing legislation.[41] The Department of Justice reportedly is presently formulating its

40. Wire Tapping Act, 47 U.S.C. §605 (1982).

41. Legislation has in the past been proposed to strengthen section 605 by specifically providing a private right of action and civil remedies. While the Copyright Office believes that section 605 as presently in force is adequate for purposes of implementing the Brussels Satellite Convention, it has encouraged Congress to consider proposals to make explicit an enforceable private right which may already be implicit in the statute.

views concerning the reliance on section 605 for purposes of implementation.

V. Conclusions and Recommendations

The fact cannot be ignored that without some vigorous Governmental efforts, the problems created by unauthorized redistribution in foreign countries of U.S. programming transmitted via satellite will continue and worsen. These are global problems. The situation is particularly urgent in this Hemisphere, because this is where the present U.S. satellite signal footprints fall. The problems exist everywhere, however, and they will grow as technology provides larger and perhaps multiple footprints. Thus, while the reception and redistribution of U.S. satellite signals are now a practical issue only with regard to countries adjacent to U.S. borders, American film and television producers (who license their works for broadcast in the four corners of the world) are deeply affected by the telecommunications and copyright policies of countries which cannot at the moment receive U.S. satellite signals. The same technology which provides easy access to U.S. satellite signals creates an essentially similar situation between, for example, the Federal Republic of Germany and Austria, or between France and Belgium.

Because the satellite redistribution problem is moving inexorably toward a global level, what happens in this Hemisphere is extremely important. Trade sanctions, in particular, may be necessary steps to move the problem off dead center and to the negotiating table. Copyright trade, however, is fundamentally different from trade in ordinary sorts of goods and services. It is trade in instruments of culture, freighted with values and ways of thinking. The terms of that trade can affect the health of indigenous cultures in any country and, as such, copyright questions are often highly political and highly charged. This political dimension places a premium on negotiation and accommodation which takes important national sensitivities into account.

The ideals which engendered the Berne and UCC copyright treaties include a will to regard authors and their works as worldwide and human, as well as national, treasures and a quest for significant protection for them in all countries. The United States, in the service of those ideals and its own interest, should support multilateral arrangements and avoid measures which would curtail or compromise the protection that they afford.

At the same time, the United States, like any nation, should

seek to confirm and extend such protection for authors everywhere, including its own, and support the adaptation of multilateral agreements — or the promulgation of new ones like the Brussels Satellite Convention — to assimilate change, including that of the new technologies. In this effort, the United States should seek to use whatever means available to it to support the rightful claims of the world of authorship. If multilateral solutions are not timely (if, for example, nations harboring piracy elect to stand outside the treaties and the protection they afford) the United States should consider a parallel policy of seeking adequate bilateral agreements. The works of authorship and the products of U.S. copyright industries are, culturally and financially, as important as wheat and steel.

With respect to the broader question of unauthorized hemispheric, or global, satellite signal redistribution, several steps are possible:

1) *Ratify the Brussels Satellite Convention.* There is now broad support for U.S. adherence within copyright, broadcast and educational communities which once questioned that treaty's utility. United States ratification will not, of course, solve the problem of unauthorized satellite signal use in other states. It will, however, provide a basis for protecting the U.S. market and establish a flexible framework for the pursuit of parallel measures throughout the world. If the United States ratifies the Brussels Satellite Convention, that act should be followed by a campaign to secure its widest acceptance, particularly in the Western Hemisphere.

2) *Marshall the resources of international organizations to develop recommendations or principles for the protection of copyrighted works vulnerable to unauthorized satellite signal use.* This year, the World Intellectual Property Organization (WIPO),[42] held a worldwide symposium on broadcast piracy, which cast a needed spotlight on the effects of piracy on authors, film makers and performers all over the world. This essentially educational effort should be built upon. Further work, perhaps looking toward model enforcement legislation, may be desirable.

3) *Examine whether the regional nature of the copyright-satellite problem calls for a regional, multilateral solution.* The CBI experience has shown that this nation's neighbors are, in general, prepared to refrain from systematically injuring U.S. copyright industries. Beyond CBI, two problems remain: first, how to translate

42. The World Intellectual Property Organization (WIPO) is based in Geneva and serves as Secretariat for the Berne Convention.

this spirit of cooperation into a harmonious legal framework for all of Latin America and the United States; second, how to find licensing arrangements by which American program production industries can meet the demands of our Caribbean neighbors for more high-quality programming. The United States might consider exploring whether the objectives of the CBI initiative should be sought in a regional, multilateral negotiation at the governmental level.

The last effort to create a hemispheric copyright agreement was made at Washington in 1946. It went nowhere. No one can say for sure that any particular "inter-American solution" is feasible, or even desirable. However, this nation's intellectual property dialogue with Latin America has been allowed to lapse for too long. This may be a sign that business goes on as usual; but, as the satellite signal problem demonstrates, copyright business in this Hemisphere is rapidly becoming quite unusual. In the interests of comity and as good neighbors, the United States might do well to share its concerns with Latin America as a whole, and, building upon the good will which is there, strive for a consensus solution.

Satellites are in the sky, and they will grow in number and sophistication, testing international copyright controls as never before. While the technical and legal problems of bringing their footprints into step with legal controls are formidable, the sky is the limit for opportunities for creative statecraft.