CANADIAN SIGNAL PIRACY REVISITED IN LIGHT OF UNITED STATES RATIFICATION OF THE FREE TRADE AGREEMENT AND THE BERNE CONVENTION: IS THIS A BLUEPRINT FOR GLOBAL INTELLECTUAL PROPERTY PROTECTION?

I. INTRODUCTION

More than twenty years ago, Marshall McLuhan, a visionary Canadian, observed that the world was becoming a "global village" due to the homogenizing effect of available electronic technologies.[1] Since his observation, the world has grown increasingly smaller through the evolution of technologies, such as satellite broadcasting, and as industrialized nations have entered the Information Age.[2] Although the world is dominated by fewer images, the voracious audience for these images continues to expand on a global scale. Resultant electronic piracy of television signals, a recent global problem that is on the rise, owes its impetus to advances in communications technology.[3]

The United States is the world's largest exporter of intellectual property,[4] an export that generates a trade surplus in excess of 1.5 billion dollars annually.[5] Despite a black bottom line, United States intellectual property industries are plagued by sophisticated global piracy of their copyrighted products.[6] To date, neither the public nor the private sector has found a successful means of ending this piracy despite the use of negotiation and consultation with offending nations, international conventions, retaliation and linkage, and sophisticated deterrent technology.[7] Piracy costs the television and film industries approximately 1.5 billion dollars an-

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1. *See* DEPARTMENT OF COMMUNICATIONS, GOVERNMENT OF CANADA, VITAL LINKS: CANADIAN CULTURAL INDUSTRIES 11 (1987) [hereinafter VITAL LINKS].

2. *See* Parker, *The Free-Trade Challenge*, CAN. F., Feb.-Mar. 1988, at 29, 31.

3. *See* Price, *International Copyright Protection, Licensing and the Collection and Distribution of Royalties in the Satellite Era*, in 5 INTERNATIONAL SATELLITE AND CABLE TELEVISION RESOURCE MANUAL 86 (1987).

4. *See* Leahy, *How to Protect Copyright in World Markets*, N.Y. Times, Apr. 21, 1988, at A31, col. 2.

5. *See* Bollier, *U.S. to Upgrade Standing in World Copyright Community—Finally*, CHANNELS, Sept. 1988, at 22.

6. *See id.* Sales losses from piracy seriously diminish market values. *See id.*

7. *See id.* Many attempts have been made to resolve the problem, but it is difficult to harness or confine this new technology. *See id.*

nually,[8] but the cost in foreign sales lost is between six and eight billion dollars.[9]

Satellite footprints[10] have opened the door both to signal interception by foreign cable systems and retransmission without permission from copyright owners. Enforcement of copyright treaties may be moot, because they expressly address hard copy and do not apply to transmission of intellectual property via satellites, the conduit through which this signal piracy most often occurs.[11] For example, Canadian cable systems have intercepted American television signals carried by satellite or broadcast by border television stations for domestic viewers and have then blatantly retransmitted them to Canadian viewers without compensating United States copyright holders.[12] From the perspective of the United States television industry, electronic piracy lessens international demand for its product and strongly affects economic remuneration.[13]

In 1988, two historic developments occurred which had a direct bearing upon the longstanding signal piracy problem within Canada. First, the United States entered into the ground breaking Canada-United States Free Trade Agreement (FTA).[14] Second, the United States ratified the Berne Convention for the Protection of

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8. *See Copyright Office Seeks to Stem Foreign Losses*, BROADCASTING, Oct. 8, 1984, at 81.

9. *See id.* at 82.

10. *See generally* UNITED STATES TRADE REPRESENTATIVE, PIRACY OF U.S. COPYRIGHTED WORKS IN TEN SELECTED COUNTRIES: A REPORT BY THE INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE TO THE U.S. TRADE REPRESENTATIVE 3-4 (Aug. 1985) (Discussing problems posed by piracy). Depending on power and positioning, a footprint can be as wide as a continent or as narrow as a metropolitan area. It is the earth's surface on which a satellite transmission can be received. *See also* Motion Picture Exporting Association of America, Memorandum on the Uses of Satellite Technology 56-61 (1984) [hereinafter MPEAA Memo on Satellites]. The size of a footprint is determined by environmental conditions, the receiving dish and the technical properties of the satellite. *Id.*

11. *See* The Berne Convention for the Protection of Literary and Artistic Works, *revised* July 24, 1971, 33 U.N.T.S. 218 [hereinafter Berne Convention]; *see also* Universal Copyright Convention, Dec. 6, 1954, 6 U.S.T. 2731, T.I.A.S. No. 3324 at 2732, 216 U.N.T.S. 132 [hereinafter UCC]; The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, *opened for signature*, May 21, 1974, art. I, *reprinted in* 13 I.L.M. 1444, 1447 [hereinafter Brussels Convention]; *see infra* notes 254-56 and accompanying text.

12. *See Foreign "Piracy" of TV Signals Stirs Concern*, N.Y. Times, Oct. 13, 1983, at A1, col. 6.

13. *See id.*

14. *See* Rowen, *Canadian Pact Opens Way for Other Accords*, Wash. Post, Jan. 10, 1988, at F1, col. 1. President Reagan and Prime Minister Mulroney signed the Canada-United States Free Trade Agreement on January 2, 1988, and it went into effect at midnight on December 31, 1988. *See also* Farnsworth, *Wide Effect Seen from Trade Pact*, N.Y. Times, Jan. 2, 1989, at 29, col. 6.

Artistic and Literary Works.[15]

This note will examine the Canadian piracy problem in light of these recent developments. Next, it will analyze whether the FTA and the Berne Convention can provide an adequate means of preventing unauthorized retransmission of United States intellectual property in the future. Finally, this note will consider practicable alternatives, which would alleviate electronic piracy on a global scale. This note will conclude that if a practicable remedy can be enacted in Canada, then such a remedy could act as a blueprint for global implementation.

II. Piracy of Copyrighted Signals

Within the "global village," Canada is not only one of our closest neighbors, but also our leading trading partner.[16] We share a common border and language, relative economic stability, and certain cultural similarities. This commonalty makes Canada a desirable testing ground for measures to solve the signal piracy problem.[17]

As the number one exporter of intellectual property, the United States is the nation most seriously affected by signal piracy and the unauthorized retransmission of copyrighted works.[18] Although United States cable operators are compelled to remunerate Canadian copyright holders for use of their works,[19] there has been an evident lack of reciprocity regarding the protection of United

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15. *See* Motion Picture Association of America, U.S. Accession to the Berne Convention 1 (1988). The United States acceded to the Berne Convention on November 3, 1988 and officially became a member on March 1, 1989. *See id.*

16. *See* Rowen, *supra* note 14, at F5, col. 1. Canada takes twenty percent of United States exports. The United States had $125 billion in bilateral merchandise trade with Canada in 1985, $108 billion in trade with Japan and $108 billion in trade with the European Economic Community. *See id.*

17. *Id.* With such crucial similarities and with the proximity of the two nations, this is a good place to begin implementing solutions. *See id.*

18. *See* Bollier, *supra* note 5, at 22.

19. *See* Copyright Act, § III, 17 U.S.C. § 501(c) (1976). Section III of the Copyright Act protects broadcast signals with the compulsory licensing system. The CRT collects royalties for foreign copyright owners whenever their programs are retransmitted by United States cable companies. United States copyright law remunerates Canadian copyright owners for use of their works in the United States. *Id.* § 501(c). *But see Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 98th Cong., 1st Sess. 124 (1983) [hereinafter *Fairness Bill Hearing*] (finding that under Canadian copyright law, signal interception and retransmission of broadcast signals by cable companies was not an infringement of copyrighted works carried by the signals. Canadian distribution of foreign and domestic copyrighted programming was legal without compensation).

States copyrighted works in Canada.[20] Clearly, under United States copyright law[21] and under the Communications Act of 1934[22] as amended by the Cable Communications Act of 1984,[23] Canadian interception and retransmission of United States signals is illegal and deprives copyright owners of their rights.[24] Prior to the FTA, the Canadian government was not willing to address this sensitive issue.[25]

Signal piracy gives rise to four specific areas of concern in the United States: unauthorized retransmission, tax disincentives disfavoring Canadian businesses that advertise on American border stations, simultaneous retransmission in western time zones and Canadian jurisdiction over United States network programming in foreign libel suits.[26] This note will confine its analysis to the first two issues.

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20. *See Fairness Bill Hearing*, *supra* note 19, at 27. Canadian copyright owners earned approximately $1.25 million from United States retransmissions of their programming in 1986. *See id.* If CRT statutory rates increase, Canadian remuneration will increase. *Id.* United States copyright owners are angry, because Canadian cable companies earn money from their products without paying for them. *Id. See also Canadian Copyright Problems Focus of Hill Hearing*, BROADCASTING, Nov. 21, 1983, at 54. Until recently, policy makers did not address copyright liability for cable retransmission. *Solution Evolving to Canadian Copyright Problem*, BROADCASTING, May 21, 1984, at 42. Other nations, aware of the situation between Canada and the United States may follow suit. *See Fairness Bill Hearing*, *supra* note 19, at 22.

21. Copyright Act, 17 U.S.C. § 106(4). Subject to §§ 107 through 118, owners of copyrights under this title have the exclusive rights to do and to authorize the following: in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.

22. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified at 47 U.S.C. § 151) (1934).

23. *See* Communications Act of 1934, § 605, *amended by* Cable Communications Policy Act 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C. § 705 (1984)).

24. *See* Communications Act of 1934, 47 U.S.C. § 605 (1982). When read with United States copyright law provisions, § 605 has been regarded as "adequate implementing legislation" in the United States. *See Fairness Bill Hearing*, *supra* note 19, at 32-3. *See also* Copyright Act, § III, 17 U.S.C. § 501(c). Under § III(b) of the Copyright Act, unauthorized secondary transmission to the public of a first transmission of a work is an infringement and subject to remedies provided in §§ 502-506, 509. *Id.* § III(b).

25. *See Fairness Bill Hearing*, *supra* note 19.

26. *See generally* National Association of Broadcasters, Broadcast Regulation '88: A Mid-Year Report 186 (July 1988) [hereinafter NAB Report]. NBC is now being sued for libel by the Prime Minister of the Bahamas, who recognizes it is easier to win libel suits in Canada. *See id.* For an in-depth analysis of the western time zone problem, *see* W. Potts & J. Dunstan, *Creeping Cancom: Canadian Distribution of American Television Programming to Alaskan Cable Systems*, 7 PACE L. REV. 127 (1986).

A. Unauthorized Retransmission

Canada is the most heavily cabled nation in the "global village."[27] Penetration is at seventy-five percent nationally.[28] Four out of five homes are cable ready and three out of five subscribe.[29] Canada uses satellites to link together its cable systems and to extend service to virtually the entire population.[30] These satellites can also be used to retransmit United States television signals obtained from terrestrial broadcasts, border broadcasts, or United States satellite networks.[31]

The first concern relates to Canada's unauthorized retransmission of United States copyrighted signals. Unauthorized retransmission was sanctioned by the Canadian government because of high consumer demand for United States programming and subsidization for the developing cable industry.[32] Thus, Canadians believe that they are allowed to access signals of United States border stations and premium services.[33] For over three decades, Canada ignored its obligation to United States copyright holders by its evident approval of this piracy.[34] This policy has permitted the Canadian cable industry to develop and thrive.[35]

In relation to retransmission, a distinction must be made be-

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27. *See Broadcasters in Canada Told to Shape Up*, BROADCASTING, July 21, 1986, at 42; *see also* T. BALDWIN & D. MCVOY, CABLE COMMUNICATION (2d ed. 1988).

28. VITAL LINKS, *supra* note 1, at 61.

29. *Id.* at 65. Canadian communities of one hundred residents or more implement local broadcasting distribution systems.

30. *See* P. Grant & G. Westcott, Copyright and New Technology: The Case of Unauthorized Reception From Communications Satellites 4 (Feb. 15, 1985) (unpublished manuscript from lecture given at Vancouver). Point-to-point communication is a direct link between a transmitting earth station and receiving station and the signal is weak. In point to multi-point, satellites distribute signals to cable head-ends and local television stations for network broadcasting. The signal is stronger. A direct broadcast satellite has the strongest signal and it transmits it for direct reception. *See id.*

31. *See id.*

32. *See* T. BALDWIN & D. MCVOY, *supra* note 27, at 366.

33. *See* Hagelin & Janisch, *The Border Broadcasting Dispute in Context*, in CULTURES IN COLLISION: THE INTERACTION OF U.S. BROADCAST TELEVISION POLICIES 43 (1984).

34. *See* P. Grant, Free Trade and the Retransmission of Program Signals: New Developments in Program Rights, Payment and Protection in Canada D1 (Mar. 25, 1988) (notes for presentation to the Law Society of Upper Canada Conference on Canadian Communications Law and Policy).

35. *See id.* Peter Grant, a Canadian communications law attorney, has said:

> In 1954, when the Exchequer Court of Canada ruled, simultaneous rediffusion of broadcast signals to private homes did not constitute a radio communication to the public or a performance in public, the cable industry has since operated under an umbrella of immunity from copyright infringement.

Id.

tween local and distant broadcast signals.[36] Because the majority of the Canadian population lives along the United States-Canadian border, it has the capacity to receive United States programming from off-air local signals.[37] Generally, retransmission of local, conventional off-air, broadcast signals is not piracy so long as the signals remain intact and are not delayed.[38] Both the Federal Communications Commission (FCC) and the Canadian Radio-Television and Telecommunications Commission (CRTC) use the Grade "B" contour, the official contour used for television stations, to determine a local signal.[39] This contour establishes the area in which there is acceptable reception fifty percent of the time at the best fifty percent of receiving locations.[40] Because of this local signal definition, implementation of the FTA cannot act alone in resolving the border broadcaster problem.[41] Royalty payments may only accrue to retransmission of distant, conventional broadcast signals.[42]

Piracy occurs when Canadian satellite carriers intercept United States border television signals and then retransmit them by point to multi-point distribution.[43] This method facilitates broad distribution.[44] With government approval, Canadian Satellite Communications, Inc. (CANCOM), Canada's national satellite service, has distributed United States broadcast signals without compensating appropriate networks, affiliates, or copyright owners for use of the copyrighted programming contained in them.[45] Ini-

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36. *See id.* at D8. Distant signals are outside the B contour and are subject to royalty payments. Local signals are within the B contour, and may be received off-air. *See also* NAB Report, *supra* note 26, at 206. Piracy and redistribution of United States border signals are also accomplished by terrestrial microwave. Deletion of United States commercials and other alterations occur in some instances. *See id.*

37. *See* Cooke, *Introduction*, in CULTURES IN COLLISION: THE INTERACTION OF U.S. BROADCAST TELEVISION POLICIES, *supra* note 33, at xi.

38. P. Grant, *supra* note 34, at D8. In the U.S., signals are exempt if retransmitted by cable systems to subscribers in the local service area of primary transmitters. *See id.*

39. *See id.*

40. *See id.*

41. *See* Letter from Smith, Lyons, Torrance, Stevenson & Mayer to Hillel Gedrich, MPEAA Deputy Director Legal Affairs 2 (Oct. 26, 1988) [hereinafter Gedrich Letter] (stating that economic hardships of local signal definition increase).

42. *See* P. Grant, *supra* note 34, at D8.

43. *See* T. BALDWIN & D. MCVOY, *supra* note 27, at 182; *see also* P. Grant & G. Westcott, *supra* note 30, at 3.

44. *See* P. Grant & G. Westcott, *supra* note 30, at 3.

45. *See Fairness Bill Hearing*, *supra* note 19, at 144-45. Canadian cable systems such as CANCOM intercepted U.S. broadcast signals for distribution to Canadian viewers, and U.S. copyright owners were not remunerated. *See also* NAB Report, *supra* note 26.

tially, such retransmission was only to remote areas where off-air reception was poor; however, urban centers were soon included.[46]

CANCOM sells these signals, offering "3 plus 1" service (the for profit distribution of ABC, CBC, NBC, and PBS affiliates' pirated signals) to the entire Canadian cable network.[47] Canadian cable systems pay a fee to CANCOM, but they have neither been liable for retransmission poached from United States domestic satellite transmissions nor for retransmission from United States network border affiliates.[48] Copyrights of border broadcasters have been violated along the entire breadth of the United States-Canada border from Bellingham, Washington, to Presque Isle, Maine, and United States "super stations" have also been retransmitted without consent.[49]

Commercial and premium channels use satellites to transmit television signals to cable system "headends" for redistribution.[50] These signals are also susceptible to unauthorized reception by individuals, hotels, and apartment complexes having a satellite dish of comparable size to the cable headend dishes.[51] This technology resulted in widespread unauthorized reception of competing signals carrying programming, including Home Box Office, ESPN, and the Arts & Entertainment Network, on United States communication satellites.[52] In 1984, approximately seventy-eight thousand apartment suites in Canada received these signals through satellite master antenna television (MATV) even though copyright holders were never compensated.[53]

By 1988, most United States premium signals were encrypted and could no longer be poached by satellite dish owners who were consequently forced to pay for reception.[54] For a brief time pre-

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46. *See id.*

47. *See* Address by M. Berg, Senior Associate General Counsel with the NAB, *House of Commons* (June 21, 1985)(opening statement to the Subcommittee on the Revision of Copyright of the Standing Committee on Communications and Culture) [hereinafter Berg Address]; *see also The Canadian Copyright Problem*, BROADCASTING, May 21, 1984, at 42.

48. *See* Motion Picture Export Association of America, Memorandum on Canadian Trade Barriers § 2, ¶ 8 (May 1988).

49. *See* Berg Address, *supra* note 47.

50. *See* T. BALDWIN & D. MCVOY, *supra* note 27, at 9 (a headend is the control center at which all program sources are received, assembled and processed for transmission by the cable distribution network); *see also* 17 U.S.C. § III(f) (1982) (definition of cable system); *see generally* M. HAMBURG, ALL ABOUT CABLE (1979).

51. *See* P. Grant & G. Westcott, *supra* note 30, at 4.

52. *See id.* at 1, 2; *see also* T. BALDWIN & D. MCVOY, *supra* note 27, at 333.

53. *See* P. Grant & G. Westcott, *supra* note 30, at 2.

54. *See* T. BALDWIN & D. MCVOY, *supra* note 27, at 333.

mium signals were secure, because decoders were needed to unscramble them. By 1987, however, a covert industry in the manufacture and sale of contraband decoders had become operative.[55] This industry manages to keep pace with changes in the encryption system and is almost impossible to police.

Illegal decoders are as sophisticated as the technology they decode.[56] Paradoxically, they can be purchased in the United States for about twenty dollars. The circuitry is modified and then sold for 300 dollars in Canada where approximately eighty thousand illegal decoders are now in use.[57] These illegal devices cost Canadian cable operators fifty million dollars in lost revenue in 1988,[58] not to mention the loss to United States premium services.

United States premium services cannot approve decoders for their services in Canada, because they rarely acquire Canadian programming pay television rights.[59] Furthermore, under CRTC license regulation, Canadian premium services must contribute substantially to Canadian program development even though their services are unmarketable to television receive-only (TVRO) dish owners, who illegally intercept United States premium services.[60] The Canadian Criminal Code supports encryption and should, to some measure, discourage signal piracy; however, the wide interpretations by lower courts make prosecution uncertain.[61]

B. Canadian Income Tax Legislation

The second area of United States concern involves the use of Canadian income tax legislation as a deterrent to Canadian advertising on United States border broadcasting stations.[62] In 1971, the CRTC implemented a policy permitting cable licensees to delete commercials from signals of television stations not licensed to pro-

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55. *See* P. Grant, *supra* note 34, at D11. Increasing numbers of "walking descramblers" are imported into Canada by people using an illegal United States mail drop. *Id.*

56. *See GI to Revamp Videocipher II*, BROADCASTING, Sept. 5, 1988 at 89. General Instruments estimates that 319,000 of the 1,012,000 VCIIs shipped have been altered to allow unauthorized reception of satellite-delivered television programming. *Id.*

57. *See* Byrne, *West Coast Cable-TV Companies Banding Together to Battle Pirates*, Globe & Mail, Nov. 2, 1988, at 2, col. 1.

58. *See id.*

59. *See* P. Grant, *supra* note 34, at D11.

60. *See id.* The Canadian courts are reluctant to prosecute these pirates. *See id.*

61. *See id.*

62. *See* Hagelin & Janisch, *The Border Broadcasting Dispute in Context*, in CULTURES IN COLLISION: THE INTERACTION OF U.S. BROADCAST TELEVISION POLICIES, *supra* note 33, at 47.

vide service in Canada.[63] The goal was to encourage Canadian advertising on Canadian programming and to discourage expenditure of Canadian advertising dollars on American border stations if the same Canadian target audience could be reached through commercial deletion.[64] This policy was originally implemented in Calgary and Edmonton, but by 1973 was occurring randomly in the Toronto market.[65] Angry American border broadcasters unsuccessfully challenged this practice in the Canadian courts.[66] By 1977, the CRTC suspended the policy, because it was recognized as an ineffective, costly and inappropriate stimulus for advertising on local Canadian programming.[67] Commercial deletion is only permitted in the Calgary and Edmonton markets and has been grandfathered by the FTA.[68]

Equally problematic for American border broadcasters is Bill C-58, which amends the Canadian Income Tax Act.[69] This corporate tax provision, which denies business tax deductions to Canadian advertisers on American border stations and was enacted to bolster the Canadian broadcast industry as part of Canadian culture, makes the cost of advertising on American stations one hundred percent higher than it is on Canadian stations.[70] Once again the Canadian government's goal was to stimulate increased spending on domestic productions which would, in turn, seduce Canadian viewing audiences back to Canadian-content programming.[71] A secondary motive was to reduce the outflow of Canadian dollars to the American market.[72] This amendment is both effective and

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63. *See id.*

64. *See* S. Globerman & A. Vining, Bilateral Cultural Free Trade: The U.S.-Canadian Case 8 (1988) (unpublished manuscript available at Simon Fraser University).

65. *See generally* Hagelin & Janisch, *The Border Broadcasting Dispute in Context*, in CULTURES IN COLLISION: THE INTERACTION OF U.S. BROADCAST TELEVISION POLICIES, *supra* note 33, at 47.

66. *See* Capital Cities Communications, Inc. v. CRTC, 2 S.C.R. 141 (1981).

67. *See* Hagelin & Janisch, *The Border Broadcasting Dispute in Context*, in CULTURES IN COLLISION: THE INTERACTION OF U.S. BROADCAST TELEVISION POLICIES, *supra* note 33, at 48.

68. United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1851.

69. Bill C-58, An Act to Amend the Income Tax Act, April 18, 1975. "In computing income, no deduction shall be made in respect of any otherwise deductible outlay or expense of a taxpayer made or incurred after the sanction comes into force, for an advertisement directed primarily to a market in Canada and broadcast by a foreign broadcast undertaking." *Id.*

70. *See* NAB Report, *supra* note 26, at 69.

71. *See* S. Globerman & A. Vining, *supra* note 64, at 9.

72. *See id.*

strictly enforced.[73] However, the government's primary goal has not been achieved, because there is no compulsion or incentive for Canadian-owned media to spend resulting windfall profits on the production of Canadian content programming.[74]

Moreover, Canadian border stations are hard pressed to turn a profit in view of the competition from American border stations, the greater interest of Canadian audiences in American programming and the lack of American interest in Canadian programming.[75] Instead, they have used those windfall profits to underwrite operating expenses.[76] As a result, the cost to American border stations is as high as twenty million dollars annually in lost advertising revenues.[77]

Numerous negotiations between the United States and Canada on the easing of C-58 have failed to yield an agreement. As a result of the failure of these initiatives, the United States government was finally compelled to introduce mirror legislation.[78] Moreover, during the 1985 Shamrock Summit, C-58 was a topic of discussion between former President Ronald Reagan and Prime Minister Brian Mulroney.[79] Finally, United States trade representatives again raised the issue during FTA negotiations. Except in relation to the printing industry, American negotiators have been unable to move Canadian negotiators from their intransigence on this issue.[80] The prospect for repeal of C-58 in relation to American border stations looks bleak; the Canadian position has not altered since its initial implementation and appears to be as firm as it is in relation to the culture exemption.

C. The Canadian Cultural Incentive

In the information age, intellectual property industries are the

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73. *See Law & Regulation*, BROADCASTING, at 66-68 (Jan. 30, 1984). Border broadcasters suffered a fifty percent loss in Canadian business, because cost of advertising for Canadians almost doubled according to this Canadian study. Bill C-58 generated in excess of $28 million in revenues for Canadian broadcasters in 1982. *See also Chapter IV: Programming and Advertising Issues*, NAB Report, *supra* note 26, at 67.

74. *See* S. Globerman & A. Vining, *supra* note 64, at 9.

75. Telephone interview with Robert Tritt, Director of Trade Policy and Canada/USA Telecommunications, Canadian Department of Communications, Canada (Jan. 23, 1989) [hereinafter Tritt Interview].

76. *See id.*

77. *See* NAB Report, *supra* note 26, at 69.

78. *See infra* text accompanying notes 277-81.

79. *See* P. Grant, *supra* note 34, at D1.

80. *See* NAB Report, *supra* note 26, at 68; *see also* Bill C-58, *supra* note 69.

principal conduits for the exchange of ideas; through these industries, a nation produces and disseminates the cultural products, which mold and reflect its society. Canadians are heavy cultural product consumers, even though those products are essentially American in origin.[81] Canada believes that it should seek a more equal balance between Canadian and foreign perspectives.[82] As Former Communications Minister Flora MacDonald stated, "culture is the very essence of our national identity. Nourishing that identity are the cultural industries, whose institutions . . . face long odds against success. We want to shorten those odds."[83] The cultural sector generates in excess of ten billlion dollars in the Canadian economy and employs over three hundred thousand.[84]

Currently, CRTC regulation in broadcasting places national content viewing at thirty percent. Nonetheless, the actual share of audience captured is much lower because of the higher interest in American programming.[85] The American market is approximately ten times greater, because it is possible to reach eighty percent of the Canadian population by cable television whereas cable penetration in the United States is about fifty-three percent.[86] The distinction between these percentages becomes even more graphic when the size of the Canadian population is compared to the size

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81. VITAL LINKS, *supra* note 1, at 1. Seventy-six percent of all books are imported; ninety-seven percent of films shown are also imported; over ninety percent of dramatic television is foreign; eighty-nine percent of revenue from the sound-recording industry accrues to twelve foreign controlled firms. *See id.*

82. *Id.*

83. *See* VITAL LINKS, *supra* note 1, at 5; *see also Rewriting the Communications Rules in Canada*, BROADCASTING, Jan. 16, 1989, at 102 [hereinafter *Rewriting the Rules*]. In the policy paper, "Canadian Voices: Canadian Choices," which describes the new Canadian broadcasting policy, Ms. MacDonald asserted:

> It is of fundamental importance to our political and cultural sovereignty that our broadcasting system be an accurate reflection of who we are, of how we behave, of how we view the world. It plays a major role in defining our national, regional, local, and even our individual identities. It is, therefore, much more than just another industry.

Rewriting the Rules, *supra*, at 102.

84. *Canada-U.S. Free Trade Agreement Implementation Act*, COMMONS DEBATES, 16,892 (June 28, 1988) (address by Flora MacDonald, former Minister of Communications, before debate on Bill C-130, which was enacted as C-2, the copyright implementing legislation). *See Rewriting the Rules*, *supra* note 83, at 103.

85. *See Rewriting the Rules*, *supra* note 83, at 103; *see also* Parker, *The Free-Trade Challenge*, CAN. F., Feb.-Mar. 1988, at 34. The CRTC requires sixty percent daytime and fifty percent prime time Canadian programming from television stations, but reports that less than ten percent of prime time English language programming is Canadian. *See* Parker, *supra*, at 34.

86. *See* Parker, *supra* note 85, at 34.

of the American population.[87]

Some commentators have gone so far as to refer to post-industrial Canada as a developing nation in cultural terms, thereby excusing its protectionist attitude.[88] Because pirated American television signals have subsidized the Canadian cable industry with Canadian government approval, Canada cannot claim to be protecting its culture when, for example, over ninety percent of dramatic television programming is foreign and, of that percentage, seventy-five percent is of American origin.[89] Simply put, this is a question of economics.[90] Canadian producers cannot financially compete in the market place with the negligible cost of American programming, especially when that programming is abstracted at no cost to Canadian cable systems who retransmit it.[91] Furthermore, even when Canadian broadcasters purchase American programming, the rates are much lower than those of the Canadian cultural producers.[92]

The economics of program production are linked to the sale of advertising.[93] Because American programming has greater appeal, it generates higher advertising revenues.[94] The combination of the relatively small Canadian market and the fierce competition for American programming in export markets makes production of Canadian programs a high risk.[95] The government sought to

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87. *See Defining the Accord*, MACLEANS, Nov. 21, 1988, at FT6. There are 246 million American citizens and only 26 million Canadian citizens. *Id.*

88. Address by Ambassador Simon Reisman, Canadian Television and Film Association (June 17, 1988) [hereinafter Reisman Address]. Reisman said:

> [Film] and television were never the subject of negotiations at my negotiating table. . . . This is also true for the cultural industries generally . . . . Canada was not prepared to enter into any substantive commitment that would in any way limit our freedom to do whatever we considered necessary to further the interests of our cultural industries and to advance our national goals in the realm of cultural activity broadly defined. The U.S. side . . . [g]ot nowhere and in the end came to accept it even though . . . [t]hey don't really understand the reasons for it.

Id.

89. VITAL LINKS, *supra* note 1, at 5.

90. *See id.*

91. *See id.*

92. *See id.* at 63. Imported programming is available at five to ten percent of the cost for similar quality Canadian programming. *See also Rewriting the Rules*, *supra* note 83, at 103. Canadian broadcasting rights to one hour of *Dallas* cost $60,000. One hour of original Canadian programming can cost almost $1 million to produce. In 1984, Canadians spent ninety-eight percent of their viewing time watching foreign dramatic programs despite the thirty percent CRTC rule. *Id.*

93. VITAL LINKS, *supra* note 1, at 59.

94. *See id.* at 60.

95. *See id.*

strengthen the economic base for Canadian broadcasting with Bill C-58,[96] which did repatriate Canadian advertising expenditures from American border broadcasters. However, this did not achieve the goal of increased spending on Canadian programming development.[97]

III. The Canada-United States Free Trade Agreement

The present volume of trade and investment between the United States and Canada is the largest of any two nations in the world.[98] Eighty percent of all Canadian trade is conducted with the United States.[99] More than half of the capital in Canada is foreign-owned with United States investment comprising a substantial portion of that figure.[100] Furthermore, Canada is the single largest importer of United States intellectual property.[101]

Canada and the United States exchanged goods and services in excess of 160 billion dollars in value in 1987; this figure is expected to rise as a result of the FTA.[102] Following Congressional and Parliamentary approval, the FTA, signed by former President Ronald Reagan and Prime Minister Brian Mulroney in 1988, came into force on January 1, 1989.[103] A joint Canada-United States trade commission was established to monitor its implementation.[104]

Under the FTA, elimination of tariffs and other trade barriers over a ten year period will enhance both nations competitiveness on an international scale by increasing mutual economic growth, lowering prices, and expanding employment.[105] Unless terminated by either nation upon six months notice, the FTA will remain in place indefinitely. However, the agreement may be amended at any

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96. *See id.* at 61; *see also* Bill C-58, An Act to Amend the Income Tax Act, April 18, 1975.

97. *See* S. Globerman & A. Vining, *supra* note 64, at 9.

98. *See U.S.-Canada Free Trade Agreement*, Dep't St. Bull., July 1988, at 24 [hereinafter *Free Trade Agreement*].

99. *See id.*

100. *See* Parker, *supra* note 2, at 29.

101. *See id.*

102. *See Free Trade Agreement*, *supra* note 98, at 24.

103. *See* Farnsworth, *supra* note 14, at 29.

104. *See Free Trade Agreement*, *supra* note 98, at 24. There will be a secretariat in Ottawa and Washington, D.C., which will be the principal government office responsible for implementation. Article 103 obligates Canada to ensure provincial laws and changes will be made. *See id.*

105. *See id.*

time by mutual consent.[106] The FTA is the most comprehensive bilateral trade accord ever entered into by the United States [107] and its provisions are consistent with the obligations of both nations under the General Agreement on Tariffs and Trade (GATT).[108] As such, the FTA establishes precedents for similar negotiations with other nations and promotes global trade liberalization.[109]

Although the agreement covers most areas of trade, it grants specific exemption to Canadian cultural industries including broadcasting, film, and publishing.[110] The Canadian cultural industries, like Bill C-58, proved to be a non-negotiable issue during the trade talks.[111] Nevertheless, if the cultural exemption restrains trade, either nation has a "right to redress" under the "notwithstanding" clause of the FTA and may institute reciprocal commercial measures without resorting to arbitration in the binational commission empowered to resolve disputes.[112]

There are four express exceptions within the cultural exemption.[113] The first eliminates tariffs on cultural goods such as cassettes, film, and records.[114] The second relates to Canadian investment policies, stating that "[a]ny requirement to sell a foreign-owned cultural enterprise acquired directly by a United States citizen will be balanced by an offer to purchase the enterprise from the United States investor at fair open market value, as deter-

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106. *See id.*

107. *See* Rowen, *supra* note 14, at F8, col. 1. The U.S. has a two year-old free trade agreement with Israel, and trade experts speculate there may be one soon with Japan or Taiwan. *See id.*

108. *See Free Trade Agreement*, *supra* note 98, at 24, 25. The FTA reaffirms the GATT principle preventing discrimination against imported goods. *Id.* at 25.

109. *See id.* The United States and Canada are promoting the inclusion of goods and services in the GATT system. *See id.* at 24.

110. *See Bow to Culture*, MACLEANS, *supra* note 87, at FT21 [hereinafter *Bow to Culture*].

111. *See* Reisman Address, *supra* note 88.

112. Grant, *Canadian Communications Law and the Canada-U.S. Free Trade Agreement*, 6 COMM. LAW. 8 (1988). The "notwithstanding clause" states:

> Notwithstanding any other provision of this Agreement, a party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for [the cultural industries exemption].

Id.

113. *See* International Trade Commission Group, Department of External Affairs, The Canada-U.S. Free Trade Agreement, ch. 20, art. 2005, at 292 (Nov. 17, 1988) [hereinafter Canada-U.S. Free Trade Agreement]. The two governments agreed that with four limited exceptions nothing in the FTA affects the ability of either to follow its cultural policies. *Id.*

114. *See id.* ch. 4, art. 401, at 49.

mined by an independent, impartial assessment."[115] Under the third exception, both nations will provide copyright protection to owners of programs broadcast by distant stations and retransmitted by cable companies.[116] Furthermore, Canada must amend its Copyright Act, providing a retransmission right for copyright owners on a nondiscriminatory basis.[117] Once Canadian copyright legislation is implemented, both nations will have the opportunity to review outstanding issues.[118]

The fourth exception obligates Canada to repeal the section of C-58 that requires that publications be typeset and printed in Canada so that Canadian advertisers may qualify for tax deductions.[119] Thus, Canadian businesses may deduct advertising expenses for periodicals printed in the United States, but only if they meet Canadian content rules and are owned by Canadians.[120]

A. United States and Canadian Copyright Law

Because the United States is currently the most prolific exporter of intellectual property,[121] domestic copyright law developed to fulfill the needs of United States copyright owners.[122] Domestic copyright law did not evolve in this manner in other nations, because fewer commercially popular exports have been produced and comprehensive copyright protection has not been as critical.[123] For instance, domestic copyright protection is accomplished in Canada by the copyright statute and the CRTC.[124] Prior to the FTA, Canada's copyright statute did not give copyright protection to cable or satellite retransmissions of distant signals.[125] Further, unautho-

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115. *See id.* ch. 16, art. 1607, ¶ 4 at 237, 238.

116. *See id.* ch. 20, art. 2006, at 297, 298.

117. *Id.*

118. *See id.* art. 2006(1) at 297.

119. *See id.* art. 2007, at 299. Canada must repeal printing provisions in § 19(5) of the Income Tax Act (amended by Bill C-58, which extended to broadcasters and eliminated an exemption for *Time* and *Reader's Digest*). The FTA did not change the requirement that seventy-five percent of the publication be owned by Canadians and that it be edited and published by Canadian residents. *Id.*

120. *See Bow to Culture*, *supra* note 110, at FT21.

121. *Fairness Bill Hearing*, *supra* note 19, at 27. "In the telecommunications field—particularly program production—the United States is already the largest copyright exporting state." *Id.* at 17, 18.

122. *See id.*

123. *See e.g., id.* at 19-22 (comparison of Canadian and United States copyright law). *See also* MPEAA Memo on Satellites, *supra* note 10, at 56-61.

124. Copyright Act, R.S.C., ch. C-30 § 1 (1985); MPEAA Memo on Satellites, *supra* note 10, at 56.

125. Copyright Act, R.S.C., ch. C-30, § 1; *see* MPEAA Memo on Satellites, *supra* note

rized interception of satellite signals and cable television programming is not addressed in CRTC regulations.[126]

Under the 1976 United States Copyright Act and through FCC authorization, a cable system's retransmission of a copyrighted program is considered to be a public performance.[127] The rights of copyright proprietors, who have financial interests in cable redistribution of their works, are limited by the compulsory licensing system established in the 1976 Copyright Act and administered by the Copyright Royalty Tribunal (CRT).[128] Under this system, United States cable companies can legally redistribute intellectual property so long as they follow the fee schedule established by the CRT.[129]

The CRT is comprised of five presidentially-appointed commissioners who serve seven year terms.[130] Their responsibilities include the adjustment of royalty rates and the distribution of royalties to copyright owners after a deduction for administrative costs.[131] As of 1980, royalty rates were to be reevaluated every five years.[132] If copyright holders have claims regarding non-network retransmission of their works, they may file individual or joint claims with the CRT.[133] The CRT guarantees that copyright holders are properly compensated for each use of their copyrighted work by a United States cable system.[134] In addition to the compulsory licensing system, the United States also utilizes voluntary licensing.[135] Under the voluntary licensing system, cable operators may negotiate directly with program owners for the use of program carrying signals, including the cable satellite channels of ESPN, Home Box Office and the USA Network. Compulsory licensing is

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10, at 56.

126. MPEAA Memo on Satellites, *supra* note 10, at 56.

127. *But see* M. NIMMER, NIMMER ON COPYRIGHT, § 8-196-97 (1984). "Perform" in the 1976 Copyright Act does not adequately encompass retransmission and may not give affirmative statutory protection to copyright owners in secondary transmissions. *See id.*

128. 17 U.S.C. § III(c)-(d)(2).

129. *Id.*

130. *See* T. BALDWIN & D. MCVOY, *supra* note 27, at 188.

131. *See id.*

132. *See id.*

133. 17 U.S.C. § 801(b)(3).

134. *Id.*

135. *See* Wolfe, *Ruling May Bring Down Cable's Copyright Costs*, CABLEVISION, Aug. 18, 1986, at 57; *see also In re Compulsory Copyright License for Cable Retransmission*, S. Doc. No. 87 FCC, 2 F.C.C. Rcd. 2387 (1987). Cable systems may negotiate directly with copyright owners for retransmission rights, a more costly system allowing the market to reflect the value of the copyrighted signals. *See id.*

more common.[136]

Although compulsory licensing is binding on domestic cable companies, it is not binding on foreign cable systems, because United States copyright laws do not have extraterritorial jurisdiction.[137] Resale common carriers are not subject to copyright liability by virtue of FCC authorization.[138] When the FCC ruled that resale common carriers could distribute television signals to global markets, it stated that "all individuals are expected to comply with all copyright laws and other program requirements."[139] The FCC further stated that "the proper forum to raise [copyright] issues would be the transborder locations where the programming is received."[140] This raises the issue of international copyright enforcement, and enforcement is dependent upon international copyright laws.[141]

B. The FTA Retransmission Exception

Of the four exceptions to the cultural exemption under the FTA, the retransmission exception is perhaps the most influential. The short term benefit is that it compels Canadian broadcasters and cable systems to pay for use of intellectual property.[142] The

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136. *See Compulsory License*, BROADCASTING, Jan. 16, 1989, at 18. The FCC voted in 1988 to recommend that Congress abolish the compulsory copyright licenses for distant signals. *See also FCC Wants Congress to Dump Compulsory Licenses*, BROADCASTING, Oct. 31, 1988, at 30.

137. *See* M. NIMMER, *supra* note 127, § 17.02, at 17-5. *See also* Kirios, *Territoriality and International Copyright Infringement Actions*, 22 COPYRIGHT L. SYMP. (ASCAP) 53 (1972).

138. *See* M. NIMMER, *supra* note 127; *see also* 47 U.S.C. §214(a). Under the Communications Act, the FCC has jurisdiction over common carrier operations. The FCC authorized resale technology as a common carrier communications service when it granted the request of Southern Satellite Systems, Inc., to operate as a common carrier. Southern Satellite Sys., Inc., 62 F.C.C.2d 153 (1976). Evaluating the request under the "public interest standard," the FCC said:

> Among the many benefits we foresaw from an open entry policy for resale carriers was the more efficient utilization of existing communication capacity. This appears to be a particular benefit here since SSS's proposal will permit a more efficient utilization of high capacity domestic facilities by carriers with a special expertise in certain communications submarkets. . . . [It] would also result in an increase in the diversity of cable television programming available to the public. . . .

Id. at 159-60.

139. Eastern Microwave, Inc., I-P-C-81-049 et al., Mimeo No. 2617, at 37 released Mar. 1, 1983.

140. *Id.*

141. *See id.* Because of U.S. ratification of the Berne Convention, it may be easier to seek redress provided by the minimum standard rule. *See* Berne Convention, *supra* note 11.

142. Additional net outflow to the United States from retransmission royalties is esti-

long term benefit is that Canada is required to update its copyright law in order to implement the retransmission right promised by the FTA.[143] The ramifications of this revision could affect all foreign intellectual property and ultimately provide compensation to foreign copyright holders under the aegis of "national treatment."[144]

Amendments to Canada's Copyright Act, which implement the FTA, make unauthorized cable or satellite retransmission of copyrighted works to the public a liability.[145] Under this cultural exception, copyright owners receive royalties if retransmission of a distant broadcast signal is unaltered and simultaneous.[146] If the retransmission is of a local broadcast signal, no remuneration is required.[147] Negotiated consent of the copyright owner is needed for any other communication to the public.[148] For the first time, Canadian cable systems will be required to pay royalties for retransmitting the distant broadcast signals of United States premium services and border stations.[149]

C. Bill C-2

Bill C-2 implements the FTA.[150] Proclaimed into force by Parliament on February 19, 1989, the bill creates a compulsory licensing scheme for distant signal transmissions, as well as a copyright royalty tribunal, which establishes the royalty rate.[151] The bill further provides that distant signals are to be defined by CRTC regulation.[152] In confidential negotiations prior to FTA passage, Cana-

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mated to be in the 100 million dollar range annually. Parker, *supra* note 85, at 33.

143. *See id.*

144. *See National Treatment*, MACLEANS, Nov. 21, 1988, at FT7. National treatment is a GATT concept that bars discrimination against the goods of other nations. In the FTA, both nations agreed not to impose higher internal taxes, more stringent laws, or rigorous regulations on foreign goods than on domestic goods. *See id.*

145. *See* Canada-U.S. Free Trade Agreement, *supra* note 113, § 2006(2) at 297.

146. *Id.* § 2006(2)(b).

147. *Id.* § 2006(3)(a)(ii)(B) at 298.

148. *Id.* § 2006(2)(a) at 297.

149. *Id.*

150. *See* C-130, Canada-United States Free Trade Agreement Implementation Act, 33d Parliament, 2d Sess., §§ 35-36-37 Elizabeth II (1988). C-130 was enacted on February 13, 1989 as C-2. C-130 includes the amendments that revise the Canada Copyright Act and implements Article 2006. *See id. See also* Copyright Act, R.S.C., ch. C-30 §§ 2 ¶ 3(1)(f), 3(1), 28, 48, 50.6 (1985), *amended by* R.S.C., ch. C-42 (Supp. 4 1988).

151. *See Retransmission Regulations Adopted by Cabinet*, COMM. FACT SHEET No. 89-3802 E (May 9, 1989) [hereinafter *Retransmission Regulations*]; *see also* Grant, *supra* note 112.

152. *Id.*

dian negotiators assured United States negotiators that the definition would be within the grade B contour.[153] Nevertheless, the definition of local signal was determined as B contour plus 32Km.[154] This addition is viewed as arising from Canadian Cable Television Association pressure and its claim that this definition resembles the United States local signal definition.[155] The effect is to severely reduce the number of so-called distant signals, especially in the Ontario market, and the amount of royalties, originally estimated at between 9.1 and 11.2 million dollars, which would be generated for United States intellectual property industries.[156]

B contour plus 32Km does not simulate the United States system because the two broadcasting systems are so diverse, especially in relation to the border significance.[157] The United States definition does not recognize the border. However, Canadian signals are not viewed heavily by American consumers.[158] On the other hand, ninety percent of the programming watched by Canadian consumers is American.[159] According to Robert Tritt, a director of the Canadian Department of Communications, the 32Km spill-over from the B contour was appended to the local signal definition in order to arrive at an equitable definition of distant signal.[160] Canada's

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153. *See* Gedrich Letter, *supra* note 41.

154. *See Retransmission Regulations*, *supra* note 151, at 3. A signal is considered local and exempt from royalty payments when it completely covers a cable system's service area. *See id.* When the coverage is partial, the cable system must pay royalties for coverage of the distant part of the service area. *See id.*

155. *See* Gedrich Letter, *supra* note 41.

156. SUB-COMMITTEE ON THE REVISION OF COPYRIGHT, STANDING COMMITTEE ON COMMUNICATION AND CULTURE, A CHARTER OF RIGHTS FOR CREATORS 1, 43 (1985). These figures represent 1.4% to 1.7% of revenues of cable systems for 1985.

157. 17 U.S.C. § 501(c). American copyright owners believe a border should not be a determinant when their works are retransmitted without authorization. Transborder spill over does not release Canadian abstracters from responsibility, especially when Canadian copyright owners are compensated by United States broadcasters for retransmission of Canadian copyrighted works. *See id.*

158. *See* Tritt Interview, *supra* note 75.

159. VITAL LINKS, *supra* note 1, at 62.

160. *See* Tritt Interview, *supra* note 75; *see also Retransmission Regulations*, *supra* note 151, at 3. By legislation, the Canadian Copyright Board ensures a preferred rate for small retransmission systems, which are located in isolated or remote areas and serve one thousand households or less. *Id.* Legislation, defining local and distant signal and small retransmission systems, became effective on May 9, 1989. *Id.* at 1. Cabinet approval of these regulations was announced by Canadian Communications Minister Marcel Masse. *See* Retransmission Rights, Communications News Release No. 89-5292E 1 (May 9, 1989); *see generally* Letter from Norman Altermann, MPEAA Vice President of Legal Affairs, to Kenneth Hepburn, Assistant Deputy Minister, Canadian Department of Communications (April 7, 1989). Mr. Altermann suggested implementation of the following regulation defining small

perception of this issue is that United States concern about the addition of 32Km is based upon loss of the coveted Ontario market.[161]

1. Compulsory Licensing

Within C-2, the compulsory licensing scheme is specifically limited to simultaneous retransmission, but there are two conditions wherein a copyright owner's authorization must be obtained.[162] The first is where the intent of the original transmission was not for the general public.[163] In this instance, a cable system would be compelled to contract directly with the rights holder.[164] Encrypted premium satellite services such as Home Box Office and the Arts & Entertainment Channel, which are for cabled homes, fit this classification.[165] United States treatment is similar under the 1976 United States Copyright Act.[166] The second condition concerns retransmissions of conventional broadcast signals that are intentionally delayed or retransmitted in a changed format.[167] Further, there are exceptions to these conditions.[168] As of January 1, 1990, Canadian cable systems will begin paying royalties.[169]

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retransmission systems for the purpose of subsection 70.64(1) of the Copyright Act as enacted by S.C. 1988, c. 65, s. 63:

> Small retransmission systems mean cable retransmission systems (other than master antenna systems) and terrestrial retransmission systems utilizing Hertzian waves that retransmit a signal, with or without a fee, to no more than 1,000 premises in the same community.

Id.

161. *See* Tritt Interview, *supra* note 75.

162. Canada-U.S. Free Trade Agreement, *supra* note 113, art. 2006(2).

163. *Id.*

164. *Id.*

165. *Id.*

166. *See* Canada-U.S. Free Trade Agreement, *supra* note 113, § 111(b). This section excludes secondary transmission of a primary transmission when controlled and limited to reception by particular members of the public, such as MUZAK and premium TV signals. Under compulsory license, signals may not be altered by the retransmitter. *See id.*

167. *See* Canada-U.S. Free Trade Agreement, *supra* note 113, art. 2006. Exceptions include blackouts, programs distributed by local network affiliates, transmission of obscene or abusive material, transmission during an election, public service announcements, grandfathering of commercial deletion in Calgary and Edmonton and retransmission to remote areas where simultaneous reception is impractical. *Id.* art. 2006(3)(a). A local licensee must be allowed to exploit the full commercial value of his license. *Id.* art. 2006(3)(b).

168. *See id.*

169. Background Note, *Provisions Affecting the Cultural Industries in the Canada-United States Trade Agreement* 4 (Jan. 1988). The Regime will apply to retransmission of Canadian and United States broadcast signals on a non-discriminatory basis. *See id. See also* O'Neil, *Cable and Copyright in Canada: The New Retransmission Right Environment*, CABLE COMM. MAG., June 1989, at 14. The projected cost in royalties to the Canadian cable

In the United States, compulsory licenses apply to distant Canadian signal carriage carried by United States cable systems located within 150 miles of the border or north of the forty-second parallel.[170] Under that scheme, cable systems in, for example, Cleveland, Detroit and Seattle would fall under the compulsory licensing scheme. Chicago, New York City and San Francisco would not.[171] Since the majority of the Canadian population is located within 150 miles of the border, it would be considered discriminatory for more distant Canadian cable subscribers not to enjoy the benefits of the compulsory license approach for United States broadcast signals.[172] This perceived inequity became the foundation for the 32Km addition to the distant signal definition.[173]

Bill C-2 repeals section 3(1)(f) of the Canadian Copyright Act.[174] C-2 addresses MATV systems, which serve multiple unit dwellings.[175] Individuals who occupy units in the same building are considered part of the public, and therefore, are entitled to receive a communication exclusively intended for transmission to that entity.[176] Section 1.3 defines a telecommunications carrier as one who merely provides the technology needed by another entity to communicate a work to the public.[177] This amendment parallels the "passive carrier" exemption in the 1976 United States Copyright Act.[178] As a result of the "passive carrier" rule, United States resale carriers, or "superstations," that uplink conventional television station signals to transponders, which deliver them to cable systems, are not infringing upon copyrighted works because they do not alter the signal.[179] In Canada, CANCOM controls both the

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industry is from 15 to 20 million dollars annually. *See id.*

170. P. Grant, *supra* note 34, at D6.

171. *See id.*

172. *See id.*

173. *See* Tritt Interview, *supra*, note 75.

174. *See* C-130, Canada-United States Free Trade Agreement Implementation Act, 33d Parliament, 2d Sess., §§ 35-36-37, ¶ 62(1) at 46 (enacted as C-2). *See also id.* § (f).

175. *Id.* ¶ 62(2)(1.2).

176. *Id. See* O'Neil, *supra* note 169, at 15. Under narrow interpretation of the Canadian government's definition, urban MATV systems qualify as small retransmission systems and are entitled to the preferential royalty rate; however, MATV systems in urban service areas of cable licensees serving more than one thousand premises were excluded by an amendment to the definition. Such systems are classified as equivalent to cable systems in whose areas they operate. *See id.*

177. *See* C-130, Canada-United States Free Trade Agreement Implementation Act, 33d Parliament, 2d Sess., §§ 35-36-37, ¶ 62(2)(1.2) (enacted as C-2).

178. *Id.*

179. Copyright Act, 17 U.S.C. § 111(a)(3). This is the "passive carrier" exemption where

selection and the use of signals it transmits; it would not be considered a resale carrier by United States definition.[180] Nonetheless, it would be exempt from liability under the Canadian Copyright Act, because CANCOM cable affiliates are responsible for remitting royalty payments for use of program signals[181] and also for fees payable to CANCOM as the resale carrier.[182]

2. *Retransmission*

The implementing legislation also includes a section on retransmission.[183] That section specifically defines a distant and local signal, a retransmitter and signal and retransmission of local signals.[184] Furthermore, by repealing section 48.52 following subsection (4), it grants the Copyright Appeals Board the right to establish parameters for the application for royalty rates for distant signals.[185]

Section 66.52 substitutes section 48.52 and addresses the func-

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> the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others . . . .

Id.

180. *See id. See also Copyright Update*, 13 CABLE COMMUNIQUE 1, 4 (1989). The CRTC has authorized four United States "superstations," WTBS, WPIX, WOR and WGN, for cable system carriage in Canada, but these signals cannot be exported because of a United States State Department embargo which will be in place until retransmission royalties are established and are being paid. Once this is in process, the United States government will authorize United States common carriers to export the "superstation" signals. *See id.*

181. *See* C-130, Canada-United States Free Trade Agreement Implementation Act, 33d Parliament, 2d Sess., §§ 35-37, ¶ 62(2)(1.3)(1.4) (enacted as C-2).

182. *Id. But see* Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 COMM/ENT 477, 481 (1979-80). In the United States, resale common carriers are paid a monthly fee by cable companies receiving the forwarded television signals, and fees are based on the companies' average number of monthly subscribers.

183. *See* C-130, Canada-United States Free Trade Agreement Implementation Act, 33d Parliament, 2d Sess., §§ 35-37, ¶ 63 (*amending* § 28 *with* § 28.01) (enacted as C-2).

184. *See id.* §§ 28.01(1), 28.01(2)(a)-(d), 28.01(3).

185. *See* Canada Copyright Act, *supra* note 124, at § 48.52 *repealed by* C-130, Canada-United States Free Trade Agreement Implementation Act, 33d Parliament, 2d Sess., § 66.52 (enacted as C-2); *see also Copyright Update*, 13 CABLE COMMUNIQUE 1 (1989). Eleven copyright collectives, acting on behalf of copyright claimants, filed fourteen proposed tarriffs, statements of proposed royalties, with the Copyright Board on July 1, 1989, which was the filing deadline. *See id.* The Copyright Board published these tariffs, and, by law, cable licensees were given twenty-eight days to file written objections to the proposed royalties. Canadian Cable Association CEO, Michael Hind Smith, stated that "[t]he copyright collectives have filed for two to three times the amount they should receive in the United States and at least seven or eight times what Parliament envisioned when it endorsed copyright liability." *Id.*

tion of the Board.[186] The new subsection establishes guidelines regarding royalties for retransmission, royalty statements, filing and time for filing, period of effectiveness, as well as rules for publicizing approved statements.[187] In addition, they speak to small retransmission system exceptions, royalty collection, nonmember claims, and proper exclusion of remedies.[188] Another establishes that the Governor in Council of the Board may vary the date of royalty distribution but not their apportionment.[189]

D. The CRTC Role

The role of the CRTC will continue to be important even after copyright revision. CRTC rules on distant signal import will continue to determine the extent of market exclusivity that can be maintained for specific programs.[190] Financing of Canadian television programs, in particular, will depend on the suppliers' abilities to sell the programs based on exclusivity and on market differentiation.[191] The FTA provides that existing measures imposed by the FCC or the CRTC will be maintained, and new measures may be introduced to enable local licensees of copyrighted programming to exploit the commercial value of their licenses.[192] Because compulsory licensing does not speak to all program rights issues related to distant signal importation, both agencies will continue to function in maintaining and improving those rights.[193]

Former United States Secretary of the Treasury James Baker III perceives the FTA as a "win-win" enterprise.[194] Nevertheless, the exemption of Canadian cultural industries is of particular concern to the billion dollar United States intellectual property industries that view the agreement as a "win-lose" enterprise.[195] The Canadian stand is perceived as protectionist, paradoxical and

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186. *See* C-130, Canada-United States Free Trade Agreement Implementation Act, 33d Parliament, 2d Sess., § 66.52 (enacted as C-2).

187. *See* Canada Copyright Act, *supra* note 124, at § 50.6 *amended by* C-130, Canada-United States Free Trade Agreement Implementation Act, 33d Parliament, 2d Sess., §§ 70.6, 70.64(1)(2) (enacted as C-2).

188. *Id. See also Retransmission Regulations*, *supra* note 151, at 3.

189. *Id.*

190. P. Grant, *supra* note 34, at D11.

191. *See id.*

192. *See* Canada-U.S. Free Trade Agreement, *supra* note 113, at art. 2006(3)(b).

193. *See* P. Grant, *supra* note 34.

194. *See* Rowen, *supra* note 14, at F8, col. 1.

195. *See id.* These industries had hoped that the FTA would address video cassette tape piracy and were disappointed about the local signal definition, etc. *See id.*

confusing.[196] The revised Canadian Copyright Act, in conjunction with the FTA, has the potential for controlling the unauthorized retransmission of intellectual property.[197] But its effectiveness for the United States and Canadian broadcasting industries has yet to be ascertained.[198]

E. Public Sector and Private Sector Positions Regarding the FTA

Several United States agencies and intellectual property industries have taken specific positions regarding the final provisions of the FTA in relation to the cultural exemption.[199] These include the National Association of Broadcasters (NAB),[200] the Motion Picture Export Association of America (MPEAA),[201] and the United States Trade Representative (USTR).[202] The Canadian Department of Communications has taken a position as well.[203]

Since the Canadian legislature passed Bill C-58, the NAB has been vehemently opposed to it and has vigorously supported efforts for its repeal.[204] The NAB was disappointed that the FTA made no provision for repeal of the section of C-58 which it believes discriminates against the United States border broadcasters.[205] It considers the retransmission exception a small concession on the part of Canada and has resolved to continue strong opposition against the unfair treatment accorded border broadcasters

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196. *Fairness Bill Hearings*, *supra* note 19, at 144-45. On the one hand, the Canadian government seeks ethnocentrism, yet on the other, it ignored piracy to develop the cable industry and to quench consumers' thirst for American cultural diffusion. *See id.*

197. *See* Berne Convention, *supra* note 11; *see also* UCC, *supra* note 11. Because of the revision, international copyright conventions will come into focus. *See id.*

198. *See id.*

199. *See* Telephone Interview with Ben Ivens, Counsel for NAB Legal Dep't, Washington, D.C. (Jan. 17, 1989) [hereinafter Ivens Interview]; Telephone interview with Mark Kalmansohn, Director North American Anti-Piracy Operations, Sherman Oaks, California (Jan. 19, 1989) [hereinafter Kalmansohn Interview]; Telephone Interview with Charles Roh, Associate General Counsel to the USTR, Washington, D.C. (Jan. 23, 1989) [hereinafter Roh Interview]; Tritt Interview, *supra* note 75. The National Association of Broadcasters, The Motion Picture Association of America, The United States Trade Representative and the Canadian Department of Communications have all worked toward furthering their individual goals in relation to the FTA. Impressions of the results and ramifications of the negotiations are included in this note with their permission. *See id.*

200. *See* Ivens Interview, *supra* note 199.

201. *See* Kalmansohn Interview, *supra* note 199.

202. *See* Roh Interview, *supra* note 199.

203. *See* Tritt Interview, *supra* note 75.

204. *See* Ivens Interview, *supra* note 199.

205. *See id.*

which it believes directly contradicts the spirit of FTA trade barrier elimination.[206]

Although the MPEAA is gratified that the FTA obliges Canada to pass legislation subjecting cable companies to liability for unauthorized retransmission of distant signals, it is greatly concerned over the addition of 32Km to the B contour.[207] This addition imposes an afflictive restriction on the royalties that can be collected for retransmission.[208] The MPEAA's belief is that all signals entering a foreign nation should be deemed distant signals.[209] The MPEAA position is that Canada should not compare its signal definition to the definition the United States has adopted.[210] It finds such a comparison to be erroneous, because advertising revenues generated by the United States from Canadian signals is minuscule while the revenues generated in Canada by American signals is monumental.[211] The MPEAA will continue to lobby all concerned for an equitable signal definition in the best interest of United States copyright owners.[212]

The USTR is satisfied with results of its FTA negotiations.[213] In simplistic terms, trade is barter, the exchange of one commodity for another.[214] During the exchange process, negotiators must prioritize commodities that are on the table and must sacrifice the less significant to gain an accord but still leave room for their future negotiation.[215] The USTR attempted to gain concessions on C-58 and sought a broad agreement on intellectual property.[216] The USTR admits to falling short of that objective. However, its position is that the FTA is a distinct improvement over the status quo.[217] Canadian copyright revision and resultant remuneration for retransmission in distant signals is far better than brazen abstraction of all United States signals without any remuneration.[218] To have aborted the FTA on these grounds in hopes of obtaining the perfect accord would have been ludicrous in the opinion of the

206. *See id.*
207. *See* Kalmansohn Interview, *supra* note 199.
208. *See id.*
209. *See id.*
210. *See id.*
211. *See id.*
212. *See* Kalmansohn Interview, *supra* note 199.
213. *See* Roh Interview, *supra* note 199.
214. *See id.*
215. *See id.*
216. *See id.*
217. *See id.*
218. *See* Roh Interview, *supra* note 199.

USTR.[219]

Relinquishing retransmission was definitely in Canada's interest, as well as in the interest of the United States, because copyright holders in both countries feel the effect of piracy.[220] Furthermore, Canada simply could not have sustained unauthorized retransmission on cultural grounds.[221] Although intellectual property has not been designated for further negotiation, the USTR has not forgotten and will not ignore the industry's concerns.[222] The USTR believes that the only way to resolve the border broadcasting dilemma is to persuade Canada that this specific means of culture insulation is not necessary.[223] At the moment, that simply is not possible.[224]

According to the Canadian Department of Communications, copyright revision is modeled on American copyright law, including the compulsory licensing scheme.[225] It believes that United States special interest groups want to dispose of the licensing scheme in the United States and would prefer that Canada implement a system that provides more adequate compensation in view of the local signal definition.[226]

The Canadian position is that the 32Km addition to the B contour is equitable and in the spirit of the FTA.[227] The addition was adopted because it is needed to give an accurate definition that encompasses a signal's total local coverage.[228] United States special interest groups do not want the 32Km addition because it means there will be fewer distant signals and, therefore, less remuneration.[229] If Canada considered all foreign signals distant, it

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219. *See id.*
220. See Tritt Interview, *supra* note 75.
221. *See id.*
222. *See id.*
223. *See id.*
224. *See id.*
225. *See* Tritt Interview, *supra* note 75.
226. *See id.*
227. *See id.*
228. *See id.*
229. *See id. See also FCC Wants Congress to Dump Compulsory Licenses*, BROADCASTING, Oct. 31, 1988, at 29. The FCC will urge the 101st Congress to abolish all or parts of the twelve year-old compulsory copyright license. It believes this has hurt broadcasters and cable programmers by permitting cable companies to carry "underpriced" broadcast signals. If the licenses were abolished, copyright owners could negotiate licensing arrangements in a competitive marketplace instead of being governed by the CRT's predetermined licensing system. *Id.* at 30. The MPEAA believes that § 605 of the Communications Act could be strengthened although it could represent "substantial compliance" with the "adequate measures" requirements of the Brussels Convention. MPEAA Memo on Satellites, *supra* note

would be applying a discriminatory standard.[230] For example, just as local Buffalo signals are available in Toronto, Toronto local signals are available in Buffalo. Whether or not Americans make use of them is not of concern. The point is they are equally available.[231]

The FTA requires non-discriminatory treatment.[232] If Canada treated all United States signals as distant, when according to United States copyright law they are not, Canada would be applying a more favorable standard to the United States, and that would not be in accord with the FTA.[233] Canadian intent is that its copyright law will apply equitably to the signals of both nations.[234]

E. The FTA as a World Class Player

In bilateral terms, the success of the FTA is of major consequence to the United States.[235] On an international scale, however, the impact of the FTA has an even greater significance because of the precedent it sets in redefining the international order of cultural investments and services.[236] The FTA legitimates United States attempts to extend free trade principals in those areas on a global basis.[237] The premise is that if Canada has approved the FTA, it is reasonable to expect that other nations would follow suit, because United States penetration into their cultural service and investment spheres is at a much lower level than in Canada.[238]

Assuredly, international redefinition of intellectual property rights would guarantee a higher rate of return to United States intellectual property industries in royalty and patent payments, in remuneration to cultural producers, and in motivating revision of existing international copyright conventions and trade agreements to include technology and cultural forms of information process-

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10, at 44.

230. *See* MPEAA Memo on Satellites, *supra* note 10, at 44; *see also* Canada-U.S. Free Trade Agreement, *supra* note 113.

231. *See* Canada-U.S. Free Trade Agreement, *supra* note 113, at art. 2006.

232. *See id.*

233. *See id.*

234. *See id.*

235. *See* Bacon, *Will North America Follow Europe's Lead?*, Wall St. J., Sept. 26, 1988, at 1, col. 4. The success or failure of the FTA will greatly influence the possibility of entering into similar agreements with Mexico and perhaps Japan. *See id.*

236. *See id.*

237. *See Free Trade Agreement*, *supra* note 98.

238. *See* Rowen, *supra* note 14, at F8, col. 1.

ing.[239] The FTA appears to be a first step toward that end, especially in terms of signal piracy.[240]

For the past two years, United States trade negotiators have attempted to liberalize GATT global trading rules to include the cultural services and investment areas, and in the Uruguay Round of negotiations, the United States and Canada are working together to expand GATT coverage to include those areas.[241] FTA ratification and implementation should be a motivating factor in these negotiations and should also encourage global trade liberalization.[242] United States chief GATT negotiator, James Baker III, stated that "the United States-Canadian agreement is a lever to achieve more open trade; . . . . nations are forced to recognize that the United States will devise ways to expand trade with or without them."[243]

As a move toward economic harmonization in North America, the FTA is even weightier.[244] During the 1988 presidential campaign, President Bush suggested a North American Compact to open trade between Canada, Mexico and the United States.[245] Because this prospect appeals to both political factions, the evolution of a North American Common Market could materialize in the future.[246] Canada is resource rich but population poor.[247] Mexico is debt-ridden, has an abundance of oil, but is an over-populated developing nation in need of investment and technology to spur economic growth.[248] The United States needs resources, workers and more markets for its exports.[249] The North American population is at 355 million.[250] This is ten percent larger than the European community, which is moving toward economic integration in 1992.[251] If the FTA is successfully implemented and works well, the face of North America will be forever altered.[252] In the future,

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239. *See id.*

240. *See* Canada-U.S. Free Trade Agreement, *supra* note 113.

241. *See Free Trade Agreement*, *supra* note 98.

242. *See id.*

243. *See* Rowen, *supra* note 14, at F8, col. 1.

244. *See* Bacon, *supra* note 235, at 1.

245. *See id.* Both economies will be improved by this agreement. *See id.*

246. *See id.* Republicans and Democrats recognize the power inherent in this type of an agreement.

247. *See id.*

248. *See* Bacon, *supra* note 235, at 1.

249. *See id.*

250. *Id.*

251. *Id.*

252. *See id.* Economic integration will resemble that of the EEC.

if a North American free trade area becomes a reality, Canada, Mexico and the United States would emerge as a unified influential force in the global economic arena.[253]

IV. Potential Remedies for Unauthorized Copyrighted Signal Retransmission

Although there are no simple answers to the signal piracy problem on an international scale, a workable solution may evolve in applying one or more of the following measures: international copyright treaties in conjunction with bilateral trade accords that implement copyright revisions, retaliatory mirror legislation, or criminal prosecution for the sale or possession of illegal decoders.

A. The Berne Convention

The United States and Canada are signatories to both major international copyright agreements, the Berne Convention[254] and the Universal Copyright Convention (UCC).[255] Although the United States is a signatory to the only international agreement that specifically refers to satellites, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Satellite Convention), Canada is not a signatory.[256]

On October 31, 1988, the United States became the seventy-seventh signatory to the Berne Convention.[257] That Convention

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253. *See id.* By virtue of the combined population and the combined resources, products, and size, the bargaining and buying power of Canada, Mexico, and the United States would be the strongest in the "global village." *See id.*

254. *See* Berne Convention, *supra* note 11; *see also* E. Ploman & L. Hamilton, Copyright: Intellectual Property in the Information Age 49-54 (1980).

255. *See* UCC, *supra* note 11; *see also* UCC, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868 *reprinted in* UNESCO, Copyright Laws and Treaties of the World, Item B (1971). There is no minimum level of protection for foreign copyright holders. If a nation has no copyright laws which specifically address redistribution of copyrighted signals, then a U.S. copyright holder will not have enforceable rights against piracy. Canada recognizes the 1952 text and was not obligated to give "national treatment" prior to its copyright revision. *See also* E. Ploman & L. Hamilton, *supra* note 254, at 57-61. *See generally* David, *Basic Principles of International Copyright*, 21 Bull. Copyright Soc'y 1 (1974).

256. *See* Brussels Convention, *supra* note 11. For non-copyright protection against misuse of private satellite signals, this convention does not apply to signals intended for the general public or retransmissions by authorized recipients. The property transmitted in signals is unprotected. Signatories may exclude cable operations from treaty provisions which depend on regulation according to each signatory's standard. A signatory may take definitive action to counter signal piracy and has autonomy in determining appropriate copyright law. *See id.*

257. *See* Motion Picture Association of America, *supra* note 15. The Senate resolution ratifying the Berne Convention, H.R. 462, was signed by President Reagan on Oct. 31,

provides specific protection to copyright owners of artistic and literary works, as well as protection to the authors of these works.[258] In addition, it grants authors the exclusive right to communicate their works to the public through broadcasting or any other means.[259] The Berne Convention further permits signatories to implement compulsory copyright licenses relating to telecommunications.[260] Any and all sanctions follow national legislation.[261] Nations that are signatories to the Berne Convention, must provide foreign authors with the same treatment that they afford their nationals.[262] Under Berne, signatories are also bound by minimum mandatory rights, which state that foreign copyright owners must receive a minimum level of protection regardless of the protection that nationals are afforded.[263]

Despite this rule, controversy exists over the applicability of the Berne Convention to satellite telecommunications.[264] For some time, there has been a debate over whether cable retransmission of copyrighted television broadcast signals violates Article 11bis, which pertains to broadcasts.[265] Some experts maintain the literal language of Berne precludes finding liability.[266] Those concerned about copyright owners' economic rights believe that liability may

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1988.

258. Berne Convention, *supra* note 11, at arts. 1, 2, 14bis.

259. *Id.* art. 11bis. The primary importance of the Berne Convention is that it is the only international treaty that expressly grants rights to authors instead of only protecting against unauthorized use of their copyrighted works. *Id.* art. 1. *See* MPEAA Memo on Satellites, *supra* note 10, at 48.

260. Berne Convention, *supra* note 11, at art. 11bis.

261. *Id.* art. 36.

262. *Id.* art. 5(1). This article states:

> Authors shall enjoy, in respect of works for which they are protected under this convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

Id.

263. *See id.* arts. 2.2bis, 7(4) (examples of regulations).

264. Berne Convention, *supra* note 11, at art. 11bis. This article addresses broadcasting and communications by "wireless diffusion of signs, sounds or images" but does not refer to satellite communications. In the industry, it is argued that relevancy to satellites can be inferred. *See id. See also* MPEAA Memo on Satellites, *supra* note 10, at 47.

265. Berne Convention, *supra* note 11, at art. 11bis. *Id.*

266. *See, e.g.*, Dittrich, *Cable Television and Copyright Problems*, 15-16 W.I.P.O. 26, 28-31 (1979-89) (Insisting that "communication to the public," exempts cable systems from liability, because transmissions are to select subscribers and not off-air). *See also* Szilagyi, *Questions of Broadcasting by Satellite with Special Reference to Authors' Rights*, 17 COPYRIGHT 222 (1981) (discussing the meaning of "communication to the public" in relation to satellite broadcasts).

be found within the ambit of Article 11bis.[267] Two European cases have dealt with this problem.[268]

In its present state, the Berne Convention does not protect against signal piracy unless a nation has ratified at least the 1948 Brussels revision, which expanded Article 11bis.[269] For example, Canada is only a signatory to the 1928 revision, which does not address retransmission by cable.[270] Such protection is inferred in Article 11bis of the 1948 revision.[271] In view of Canadian cable systems' abstraction of American border broadcasting and premium television signals, it appears that Canada exempted itself from any obligation to United States copyright holders, because it was not liable under the 1928 Berne revision prior to its copyright revision.[272]

Furthermore, no minimum treatment level exists under the UCC, and signal protection is not available under the 1952 accord

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267. *See, e.g.*, Walter, *Diffusion by Wire in the Copyright Law of the Federal Republic of Germany and of Austria, with Particular Reference to the Rediffusion of Broadcasts*, 12 W.I.P.O. 279, 281-83 (1976). *See generally Working Group on the Problems in the Field of Copyright and So-Called Neighboring Rights Raised by the Distribution of Television Programmes by Cable*, 13 W.I.P.O. 246 (1977).

268. Coditel SA v. Cine Vog Films SA, 1980 E. Comm. Ct. J. Rep. 833. The Court of Justice of the European Communities found:

> The owner of the copyright in a film, and his assigns, have a legitimate right to expect that their revenue will be based on a certain number of performances in a set geographic area.
>
> The owner of a copyright in a film has a legitimate right in authorizing a television showing of his work only after it has appeared in movie theatres for a set period of time.
>
> The rules of the EEC treaty relating to freedom to provide services do not preclude a copyright owner or his assignee from contractually limiting the geographic limits of the performance.

Id. at 833. *See also* Columbia Pictures Indus., Inc. v. Stichting tot Exploitatae Centrale Antenne-Inrichting Amstelveen, Supreme Court of the Netherlands, Case No. 11.739 (1981), *reprinted in* MPEAA Press Release, Jan. 18, 1982 (cable systems must now obtain permission by contract prior to retransmission of copyrighted works).

269. *See* S. RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 § 3.1, at 81, 81-125 (1987).

270. The United Kingdom gave notice for Canada on January 1, 1924. *Id.* § 3.22, at 98 & n.108. The 1928 text of Article 11bis speaks only to public performance and does not address specific methods of communication to the public. *Id. See also* § 3.43. Article 11bis(1)(i) was extended to include television broadcasts, retransmissions, and transmissions to the public. It states: "(i) the public performance of their works, including such public performance by any means or process." *Id.*

271. *Id.* §§ 8.74-8.88, at 435-53. Under Article 11bis(1)(ii), "authors may authorize any communication to the public . . . by rebroadcasting of the broadcast of the work, where this is done by an organization other than the original one." *Id.*

272. *See* S. RICKETSON, *supra* note 269, at 98.

to which Canada has acceded.[273] Finally, Canada is not a signatory to the Brussels Satellite Convention.[274] Thus, Canada had no accountability to the United States until it signed the FTA, which obligated it to implement its copyright act that enables the "national treatment" aspect of the Berne Convention and the UCC.[275] This same defect applies to other nations that have not changed their copyright laws.

B. Retaliatory Remedies

At the present time, the United States can invoke retaliatory action against discriminatory foreign practices that injure its export of goods or services.[276] In 1976, the United States began retaliation against Bill C-58 by enacting mirror legislation,[277] which included non-deduction of convention expenses in Canada,[278]

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273. UCC, art. I, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868 *reprinted in* UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD, Item B (1971). The protection outlined in the UCC is available to an American author regardless of where the work is first published. The requisite for protection is the requirement that the symbol (c), the name of the copyright owner, and the year of first publication appear. *Id.* art. III(1). The UCC was revised in 1971 in Paris. At that time, Article IVbis was added. Canada did not accede to the 1971 revision and it is evident that it did not regard signal retransmissions as protected works. *Id.* art. IVbis(1).

274. Brussels Convention, *supra* note 11. Adopted in 1974, this Convention has been ratified by only nine nations. *See also* Price, *supra* note 3, at 93 (Requirement that each nation takes measures to prevent distribution on or from its territory of program carrying signals by a distributor for whom it is not intended). *See also* E. PLOMAN & L. HAMILTON, *supra* note 254, at 82 (stating that one of the key problems for Brussels Convention drafters was to work out the "balance between the rights of broadcasting organizations and rights of contributors to programming; i.e., authors, performers and other holders of rights"); Szilagyi, *supra* note 266, at 223 (states that background to the Brussels Convention suggests that drafters were mainly concerned with the economic interests of the broadcasting organizations and their right to exclusive control over programming transmitted by satellite).

275. *See* Berne Convention, *supra* note 11, at art. 5(1). *See also* Smith, *Should the Motion Picture Industry Support or Oppose U.S. Adherence to the Berne Convention?*, 10 ENT/SPORTS L. 19 n.5 (1987)(stating that the 1952 UCC does not include art. IVbis(2), which can be construed to address broadcasting).

276. See D. STEGER, A CONCISE GUIDE TO THE CANADA-UNITED STATES FREE TRADE AGREEMENT 93 (1988)(stating that this right is established under § 301 of the Trade Act of 1974).

277. *See* Hagelin & Janisch, *The Border Broadcasting Dispute in Context*, in CULTURES IN COLLISION: THE INTERACTION OF U.S. BROADCAST TELEVISION POLICIES, *supra* note 33, at 50-55. Various mirror legislation bills were introduced. However, Canada remained firm. *See id.*

278. *Id.* at 53. As Andrew Stoller stated:

> Linkage of U.S. action on para. 602 of the Tax Reform Act of 1976 with Canadian action on C-58 . . . severely restricted income tax deductions by U.S. taxpayers for the costs of attending conventions outside the United States, and its enactment was said to have cost Canadian businesses hundreds of millions of dollars in lost

possible FCC limitation on Canadian investments in United States cable systems,[279] tax restrictions for advertising on Canadian stations,[280] and a restriction on the Telidon videotext import.[281]

In addition, Congress passed different versions of H.R. 3, the 1987 Omnibus Trade Bill, which extensively altered United States trade laws.[282] The cumulative effect is to facilitate obtaining import relief for United States industries.[283] These bills will transfer authority from the President to the United States Trade Representative (USTR), who will then make the determinations regarding offending issues.[284] Mandatory retaliation is provided against nations that consistently indicate a pattern of import barriers such as Japan.[285] These bills also define actionable acts and practices, for example, "export targeting," and allow shortened time periods for discussions on taking action.[286] By limiting presidential discre-

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revenues.

Id.

279. *See A Bill to Amend the Constitution Act of 1934*, S. 2172, 97th Cong., 2d Sess. (1982). This solution was proposed by Senator Barry Goldwater, but the concept had been rejected by the FCC in 1980. *Id.* at 55.

280. *See* NAB Report, *supra* note 26, at 67, 68. Legislation sponsored by Senator John Danforth (R-Mo.) in 1984 was amended to section 162 of the Internal Revenue Code of 1954, by the 98th Congress, denying tax deductions to United States advertisers for commercials placed on foreign stations in nations whose tax laws resemble C-58. *Id.* The amendment states:

> § 232(j)(1) In General. No deduction shall be allowed . . . for any expenses of an advertisement carried by a foreign broadcast undertaking and directed primarily to a market in the United States. This paragraph shall apply only to foreign broadcast undertakings located in a country which denies a similar deduction for the cost of advertising directed primarily to a market in a foreign country when placed with a United States undertaking.
>
> § 232(j)(2) Broadcast Undertaking. For purposes of ¶ 1, the term broadcast undertaking includes (but is not limited to) radio and television stations. (b) The amendment made to subsection (a) shall apply to taxable years beginning after the date of enactment of this Act.

Id.

281. *See A Bill to Amend the Internal Revenue Code of 1954 to Deny the Deduction for Amounts Paid or Incurred for Certain Advertisements Carried by Certain Foreign Broadcast Undertakings*, S. 2051, 97th Cong., 2d Sess. (1982). This bill was amended by the addition of § 280 E which created an "Expanded Mirror Bill." Added by Senator Patrick Moynihan, the amendment denied tax deductions and credit for the purchases of Canadian videotext technology. *Id.* at 54.

282. *See* D. STEGER, *supra* note 276, at 92.

283. *See id.* at 96. Ambassador Simon Reisman believes the enactment of either bill would impair the benefits and objectives of the FTA. *See id.*

284. *See id.* at 93, 94. Changes to § 301 of the 1974 Trade Act will protect and promote United States industries rather than just settle disputes.

285. *See id.* This would be enforced against nations with an established pattern of import restrictions.

286. *See id.* at 93. Foreign policies or practices denying "national treatment" to goods,

tion and by requiring mandatory action in specific instances, Congress hopes to make Section 301 more responsive to United States industry needs.[287] If these changes are implemented, it is reasonable to expect that there will be more investigations and retaliatory actions instituted within shorter time frames.[288]

The Omnibus Bill would also amend Section 337 of the Tariff Act of 1930, which authorizes the International Trade Commission (ITC) to exclude foreign imports that violate intellectual property or antitrust laws that injure United States industries.[289] The bill contains amendments that would eliminate the injury requirement in cases involving intellectual property rights.[290] Actions brought under this section are more expeditious than court actions because the ITC must complete its investigation within an eighteen month period while court actions take several years.[291]

For aggrieved intellectual property industries, relief from unfair foreign trade practices is available under the appropriate sections of the 1974 Trade Act and the Tariff Act of 1930.[292] By amending the pertinent sections, Congress gives these industries powerful legislative ammunition with which to counter piracy of intellectual property in foreign nations.[293] It is possible, however, that Canada will be exempted from the Omnibus Trade Bill, because in the future, such problems will be addressed bilaterally under the dispute settlement provisions of the FTA.[294] In any event, other nations certainly will not be exempt, and in United States dealings with those nations, the intellectual property industries will continue to have a powerful friend in Congress.[295]

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services, or investments become actionable in the Senate bill.

287. *See id.* at 94.

288. If § 301 is amended, the intellectual property industries can expect less bureaucracy when redressing their grievances.

289. *See id.* at 94. The ITC can order offending entities to curtail their unfair trade practices.

290. *Id.* Both bills also expand the definition of a United States industry, i.e. coverage for intellectual property will include trade secrets and common law trademarks. *Id.*

291 *See id.* ITC action would vastly accelerate import relief because of the legislated time frame. There are no specific time frames in court actions. *See id.*

292. *See* Trade Act of 1974, § 201, 19 U.S.C. § 15201 (1982) (used to implement Article XIX of the GATT where a domestic industry is endangered); Tariff Act of 1930, § 337, 19 U.S.C. § 1001 (1958) (empowering the ITC to ban imports that impair an established, well run intellectual property industry).

293. *See generally*, D. STEGER, *supra* note 276. Retaliatory action available in appropriate legislation should act as a disincentive to international signal piracy. *See id.*

294. *See* Canada-U.S. Free Trade Agreement, *supra* note 113, at ch. 18, art. 1805.

295. *See* D. STEGER, *supra* note 276. Congress is making a serious attempt to address the intellectual property industry's problems, because it recognizes its importance to U.S.

C. Direct Action Against "High-Tech Pirates"

In the 1970s, the Canadian Parliament redrafted Section 287(1)(b) of the Criminal Code to include telecommunications and broadly defined it to cover services provided by wire or cable.[296] Two provisions specifically apply to theft of telecommunications services.[297] Section 287.1 makes possession, sale, or use of a decoder without payment for a telecommunications service a punishable offense.[298] A violation of this section is punishable for up to two years.[299]

Although some relief is possible under these sections, amendments to the Criminal Code, and further judicial definition, interpretation, and enforcement may be required to enhance remedies.[300] In 1984, the United States addressed this same problem by amending the Communications Act of 1934.[301] Because Canadian copyright revision focuses directly on retransmission of distant signals and not on reception, no liability is imputed to equipment vendors of illegal decoders.[302] But, because Canada recognizes piracy as a criminal act in its own laws, some relief will be imputed to United States television signals under "national treatment," as provided in the Berne Convention and the UCC, when Canadian copyright revision is complete.[303]

If the United States and Canada combine efforts to prosecute

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trade. *See id.*

296. *See* Brief for MacLean-Hunter Cable TV Ltd. 17; Memorandum Concerning § 287 of the Criminal Code (1988) [hereinafter Criminal Code Memo]. Under § 287(1)(b), anyone who uses a telecommunications service fraudulently, commits theft. Under § 287(2), telecommunications means any reception or transmission of signals by electronic or magnetic system. Under § 287.1(1), anyone who illegally sells, manufactures, or distributes a device to obtain signal reception without payment for telecommunication services is liable to imprisonment for two years. Under § 287.1(2), such devices are confiscated and may be destroyed. *See id.*

297. *See id.*

298. *Id.* § 287.1.

299. *Id.* § 287.1(1).

300. *See* Criminal Code Memo, *supra* note 296.

301. *See* Communications Act of 1934 § 705 (codified at 47 U.S.C. § 605). In the United States, vendors and users of unauthorized decoders can be prosecuted. *See also* Letter from FCC Chairman Dennis Patrick to United States Attorney General Edwin Meese (May 1988) [hereinafter FCC Letter]. Criminal actions are prosecuted by the Department of Justice under the discretion of local United States Attorneys after FBI or local police investigations. The FCC provides technical assistance. Various prosecutions are brought by the state authorities under state theft of services statutes. *See id.*

302. *See* C-130, Canada-United States Free Trade Agreement Implementation Act, 33d Parliament, 2d Sess., § 18.1 (enacted as C-2); *see also* P. Grant, *supra* note 34.

303. *See* P. Grant, *supra* note 34; *see also* Claridge, *Two Rulings May Spur Crackdown on Sale of Pay-TV Descramblers*, Globe & Mail, Jan. 3, 1989, at 1, col. 4.

offenders under the domestic laws of both nations, the manufacture, illegal import, subsequent sale, and use of these unauthorized decoders would be frustrated.[304] This could cripple satellite signal piracy in both nations.[305] During the summer of 1988, United States federal law enforcement officers began a crackdown on satellite dealers in Indiana, Montana, New York, Oklahoma and Texas who trafficked in illegal decoders such as VideoCipher II.[306] Moreover, the Federal Bureau of Investigation conducted the first legal search of a satellite consumer's home and seized illegal descrambling equipment.[307] Although there were no arrests in those investigations, indictments may be handed down following analysis of the decoder units.[308] Because the import and export of restricted communications technology is illegal, both United States customs officials and the Canadian Customs Service are involved in apprehending pirates.[309] United States violators face criminal charges and fines; Canadian violators face prosecution under the Criminal Code.[310] If successful, such direct action could motivate other nations to implement similar enforcement policies against piracy.

Whatever remedy the United States intellectual property industries apply—whether international conventions in league with the FTA, specific domestic mirror legislation, or reciprocity between the United States and Canada in penalizing sellers and consumers of illegal communications technology under respective criminal codes and through a bilateral tribunal—as a result of the FTA, there is now a viable means of signal piracy control in Canada.[311] Determination of the most effective method will certainly produce strong debate among the affected United States intellectual property industries before enactment of the most helpful remedy.[312]

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304. *See id.* If each nation does its share in convicting offenders and in upholding and enforcing stiff penalties, the risks would outdistance the gains from these illegal acts. *See id.*

305. *See* FCC Letter, *supra* note 301.

306. *See* Buckman, *Feds Crack Down on Illegal Descramblers*, ELECTRONIC MEDIA, Aug. 1988, at 1, col. 3.

307. *See id. See also* FCC Letter, *supra* note 301.

308. *See* Criminal Code Memo, *supra* note 296, at 17.

309. *See* Buckman, *supra* note 306.

310. *See Pirates Nabbed at Canadian Border*, Hollywood Rep., Oct. 5, 1988, at 19, col. 3.

311. Any of these remedies will have a positive anti-piracy effect and, if enforced, could neutralize or even eliminate the problem.

312. These industries must act uniformly against piracy once they agree upon the best remedy.

V. Conclusion

It is likely that the FTA will act as a blueprint for accords with other nations, not only regarding bilateral trade, but also in the struggle for adequate intellectual property protection and compensation. Canada's recognition of copyright in distant signals will set a standard for other nations, and may fortify the United States position on signal piracy in the Caribbean Basin nations and in Mexico.

Canada's copyright revision will strengthen and enhance the value of international copyright conventions by validating their "national treatment" provisions and making them functional. In addition, the revision could motivate other nations to take similar initiatives in their copyright laws. The best way of eliminating piracy of intellectual property is through the coordinated use of properly amended copyright laws and international copyright conventions that have also been revised to meet advanced technology requirements. The FTA should prove to be a giant step toward equitable treatment on an international scale and should act as an inspiration to and throughout the "global village."

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