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INTRODUCTION

On March 8, 1983 the Canadian Radio-Television and Telecommunications Commission (CRTC) approved the application of Canadian Satellite Communications Inc. (Cancom) for an alteration in its network license which would allow Cancom to distribute the television signals of the major United States networks to remote areas of Canada.[1] The CRTC decision permits Cancom to receive "off-air"[2] the signals of the CBS and PBS affiliates in Detroit and the NBC and ABC affiliates in Seattle at head ends in Windsor and Vancouver.[3] Cancom will charge the broadcasters who use this service, but has neither a current plan to compensate the United States networks for the use of their signals nor arrangements to pay fees to those who hold copyrights in the programs they will distribute.[4]

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1. Decision CRTC 83-126, 117-I Can. Gaz. 2490 (Mar. 8, 1983).

2. "Off-air" reception is interception of a signal transmitted on a frequency which makes it available to anyone within broadcast range who erects an appropriate antenna.

3. Decision CRTC 83-126 at 1, 117-I Can. Gaz. at 2490. The local stations in question were WJBK-TV (CBS) and WTVS (PBS) in Detroit, and KING-TV (NBC) and KOMO-TV (ABC) in Seattle. *Id.* The decision also permits Cancom to receive the signal of radio station VOCM in St. John's, Newfoundland. *Id.* The original Cancom proposal submitted to the CRTC proposed taking all four signals from Detroit; in addition to the two stations noted above, Cancom proposed to use the signals of WDIV (NBC) and WXYZ-TV (ABC). Application to Add Satellite Services to the Network License of Canadian Satellite Communications Inc. 7 (Sept. 1, 1982) [hereinafter Application]. It is interesting to note that Cancom proposed using the Detroit signals because Detroit is not adjacent to any large Canadian metropolitan market and, therefore, "the potential for siphoning Canadian retail advertising dollars is greatly reduced." *Id.* Cancom certainly was aware of commercial consequences in drafting their proposal.

The signals are relayed in scrambled form via Anik A2/A3 satellites. *Id.* at 2. They then are picked up by licensed broadcasters operating earth receiving dishes who decode and distribute them to subscribers through coaxial cable or by local retransmission.

4. Cancom testified at the hearings on its application that it felt it had no obligation under Canadian law to pay for the use of the U.S. signal and programming. Cancom added, however, that as a matter of "fairness and equity . . . Cancom is ready and willing to pay copyright at any time that somebody can tell us to whom and how and under what mechanism." *Canadian Satellite Communications Inc.: Hearings on Application to Add Satellite*

Not suprisingly, the three American commercial networks filed written interventions with the CRTC prior to the November 23, 1982, hearing on Cancom's proposal protesting the uncompensated use of their programming.[5] They claimed that Cancom's actions

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Services, CRTC, Nov. 23, 1982, 81-82 [hereinafter *Hearings*]. Harry Olsson of the Law Department of CBS has stated that Cancom did not seek any practical guidance on the payment of copyright fees from the U.S. networks. Interview with David Tarbet (May 15, 1983).

5. Letters from the Ottawa law firm of Herridge, Tolmie on behalf of CBS, ABC, and NBC to J.G. Patenaude, Secretary General of the CRTC (Nov. 3, 1982) [hereinafter Letters]. The text of the letters was exactly the same (except for the information relating to the specific intervenor):

> This intervention is submitted on behalf of _____, in opposition to application number 820811800 submitted by Canadian Satellite Communications Inc. to amend its network license by adding to its four existing Canadian television services distributed via satellite, stations affiliated with the CBS, NBC, ABC and PBS networks.
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> 1. The ____ Television Network has a number of affiliated broadcasting stations in the United States including _____ in Detroit.
>
> 2. ____ supplies its affiliated stations with copyrighted programs that it produces and owns, as well as copyrighted programs that it licenses from others.
>
> 3. It is obvious from the application and applicant's behavior that the applicant plans to proceed without permission from, or payment to, the copyright owners of the programs contained in the broadcast signals of ____'s affiliated station _____.
>
> 4. This use of copyright property without permission or payment would be inequitable and unfair to the copyright owners.
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> 5. It also would be in violation of their legal rights. At the very least, the proposed low power TV station use of the programs without the permission of the holders of copyright, and the authorization of such use, would be in flagrant disregard of Canadian copyright law. Under Section 3 of the Canadian Copyright Act, R.S.C. 1970, c. C-30, the owner of copyright in a work has the sole right "to communicate such work by radio communications" and the sole right to authorize such communication. Yet the applicant proposes not only the communication by radiocommunication of programs in which it holds no copyright, but also proposes that the programs be scrambled and that the public be charged a fee for receiving them.
>
> 6. Implementation of the arrangements proposed by the applicant would also be contrary to Canada's obligations under the Inter-American Radiocommunications Convention of December 13, 1937 to which both Canada and the United States of America are parties. Article 21 of the Convention provides, in part, as follows:
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> > "The contracting Governments shall take appropriate measures to ensure that no program transmitted by a broadcasting station may be retransmitted or rebroadcast, in whole or in part, by any other station without the previous authorization of the station of origin."
>
> Neither ____ nor ____ has given its authorization.
>
> 7. It is respectfully submitted that the Commission should not grant the requested license except on terms that would require that appropriate authorizations be obtained from copyright owners and broadcasters.

were inherently unfair and that use of their signals violated both their legal rights and treaty agreements between Canada and the United States.[6] The CRTC did not condition its approval on the resolution of these questions, however, and Cancom was encouraged to begin distribution "at the earliest possible date."[7]

Disputes over cable television retransmissions have arisen frequently between broadcasters in Canada and the United States.[8] The proximity of the countries and the unavoidable spillover of television signals make disagreements likely, but the increased use of satellite transmission could, as the Cancom proposal shows, multiply problems. Canadian and American satellite signals overlap large areas of North America.[9] Canada has one of the world's highest per capita rates of cable television subscription,[10] and the United States has the greatest television production capacity. Outside the province of Quebec, there are no language barriers between the countries, and the above elements have combined to produce a strong demand by Canadian viewers for access to the full range of American television programs.

If there were no other considerations, a "free trade" response would be the most economically efficient way of satisfying Cana-

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8. It is the wish of ____ to appear as an intervener at the Public Hearing to be held in Hull commencing on the 23rd day of November, 1982.

6. The networks made identical claims that the use of "copyright property" was "inequitable and unfair" (see the fourth enumerated item in Letters, *supra* note 5), and that Cancom's action "would be in flagrant disregard of Canadian copyright law" (*see id.*, the fifth enumerated item). They also claimed that the transmission would be "contrary to Canada's obligations under the Inter-American Radiocommunications Convention" (*see id.*, the sixth enumerated item) and requested that the CRTC not grant the license to Cancom "except on terms that would require that appropriate authorizations be obtained from copyright owners and broadcasters" (*see id.*, the seventh enumerated item).

7. Decision CRTC 83-126 at 3, 117-I Can. Gaz. at 2491. The date for initiating the Cancom service depended, according to Cancom, on the speed of CRTC licensing of local distributors. Application, *supra* note 3, at 15. Nevertheless, Cancom proposed to start carrying the CBS and PBS signals by July 1, 1983. CRTC 83-126 at 2, 117-I Can. Gaz. at 2490.

8. A 1974 dispute between Buffalo, New York, commercial broadcasters and three Toronto-area cable companies resulted in the most significant judicial consideration to date. *See* Capital Cities Communications Inc. v. Canadian Radio-Television Comm'n, 81 D.L.R.3d 609 (1977) (discussed *infra* notes 43-64 and accompanying text). *See also* Regina v. Maahs and Teleprompter Cable Communications Corp., 6 Ont. 2d 774 (1974).

9. COMMITTEE ON EXTENSION OF SERVICE TO NORTHERN AND REMOTE COMMUNITIES, CRTC, THE 1980S: A DECADE OF DIVERSITY—BROADCASTING, SATELLITES, AND PAY-TV 14-20 (1980) [hereinafter Therrien Committee]. Many U.S. signals cross Canada because they are beamed toward stations in Alaska.

10. PELLETIER, PROPOSALS FOR A COMMUNICATIONS POLICY FOR CANADA 19 (1973) (Canadian government "position paper" prepared by the Minister of Communications).

dian demand, with full allowance and protection for the entry of U.S. programming into the Canadian broadcast market. But there is more at stake for Canada. This opportunity to import U.S. programs appears to threaten the survival of a separate Canadian television production industry and, consequently, to undermine Canadian cultural independence.[11] Communications policy in Canada always has mixed economic and nationalist considerations and any discussion of broadcasting disputes between the two countries must balance market calculations against Canadian sensitivity to U.S. cultural domination.[12]

While this Comment will analyze the legal issues raised by Cancom's proposal, it necessarily will refer to the background considerations which shape Canadian legislation and CRTC regulatory policy and which, consequently, constrain and influence the decisions of Canadian courts.[13] Such considerations have inhibited the recognition of a property right in U.S. television signals entering Canadian airspace, and there is no sign of a change in Canadian judicial opinion. Any extension of property rights in signals to U.S.

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11. The CRTC mandate to guarantee a broadcasting system which would be "effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" is given in subsection 3(b) of the Broadcasting Act (CAN. REV. STAT. ch. B-11 (1970)). The Commission has executed this charge by issuing regulations on the priority carriage of Canadian signals on cable television, Cable Television Regulations, CONSOL. REG. CAN. ch. 374(6), and by attempting to prohibit any unlicensed reception of U.S. satellite signals in Canada, 1981-1982 CRTC ANN. REP. 42-45 [hereinafter ANNUAL REPORT]. But one week before the Cancom decision was issued, the Minister of Communications, Francis Fox, released a new broadcast policy which would remove all Canadian restrictions on individual television receive-only earth stations (TVROs). TOWARDS A NEW NAT'L BROADCASTING POLICY 11-13 (pages unnumbered) (Mar. 1, 1983) [hereinafter NEW NAT'L BROADCASTING POLICY]. The policy also would permit cable licensees to distribute more foreign signals "subject to regulatory approval, the conclusion of contractual agreements, and the pertinent international arrangements." *Id.* at 6 (pages unnumbered). This greater openness to imported signals is countered by government support of television production in Canada. *Id.* at 7-10 (pages unnumbered). The Minister's statement does not, however, resolve the legal issues presented by the importation of U.S. satellite signals discussed in this Comment. It also postpones for further consideration the idea of a completely noncommercial CBC network which would be established to guarantee a Canadian cultural presence in television broadcasting outside the usual commercial concerns affecting television broadcasting.

12. *See generally* NEW NAT'L BROADCASTING POLICY, *supra* note 11, at 1-10 (pages unnumbered).

13. In his policy statement, Mr. Fox proposed that "the federal government be given the ability to issue directives to the Canadian Radio-Television and Telecommunications Commission on broad policy matters . . . ." *Id.* at 10 (pages unnumbered). This would guarantee that the CRTC would reflect government policy more directly and immediately.

broadcasters would likely originate in a Canadian effort to export television programming. Such a desire would require reciprocal rights to compensation under international agreements or the right to exclusive use of broadcast signals.

I. THE ORIGINS AND CONTEXT OF CANCOM'S PROPOSAL

Cancom was licensed originally in April 1981 to provide a package of Canadian television and radio signals to "remote and underserved communities" across Canada.[14] The company had its satellite transmission in operation by January 1982, and by 1983 it reached 700 local cable communities with a package of Canadian network television programs.[15] Cancom has not, however, satisfied the demands of Canadians in remote communities for an even greater choice of television programming. There is a well documented popular sense of the "right" of all Canadians to equal access to U.S. television broadcasting.[16] Those located close to the Canadian/American border can receive the U.S. signals directly, and other larger population centers in southern Canada have U.S. signals imported by microwave. Quite naturally, northern Canadians desire the same programming available in the south, even though the Cancom package already includes a significant portion of U.S.-produced programs in its Canadian network offerings.[17] Permission to allow Cancom to add the so-called "3+1"[18] transmission of U.S. network signals, therefore, would extend uniformly

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14. Decision CRTC 81-252, 115-I Can. Gaz. 2727 (Apr. 14, 1981).

15. Decision CRTC 83-126 at 4, 117 Can. Gaz. at 2491. The CRTC also indicated that approximately 800 more local distributors were yet to be licensed. *Id.*

16. *See generally* Therrien Committee, *supra* note 9, at 1-3.

17. Foreign programs represent 85% of peak evening hours viewing and 77% of the total offerings on Canadian television networks. NEW NAT'L BROADCASTING POLICY, *supra* note 11, at 8 (pages unnumbered). Most, if not all, of these programs are made in the United States.

There is an additional difficulty involved with the necessary duplication that Cancom services create. The CTV network holds exclusive Canadian rights to broadcast many of the U.S. programs that will be included in Cancom's offerings. CTV intervened to protest the Cancom licensing, saying that "it couldn't and wouldn't consent to its programs being carried on Cancom, and to the extent Cancom applies to carry foreign signals containing programs to which CTV holds all Canadian broadcast rights, then CTV cannot and does not consent to this application." *Hearings*, *supra* note 4, at 309.

18. "3+1" refers to a CRTC policy which permits cable television systems to carry three commercial and one non-commercial U.S. distant television station imported via microwave. *See* Application, *supra* note 3, at 5. *See also* Decision CRTC 83-126 at 5, 117-I Can. Gaz. at 2492.

the allowance created either by mere border proximity or microwave carriage to all of Canada.[19] Many northern communities in fact have not waited for permission but have set up unlicensed receiving dishes (TVROs) and use them to pick up signals from U.S. satellites.[20] These dishes can intercept a wide variety of U.S. television programming, including pay-TV services such as Home Box Office.[21] The desire to inhibit the continuation of these unlicensed receivers is a secondary goal of the Cancom licensing allowance.[22] Unauthorized TVRO operations threaten to undermine what the CRTC calls the "orderly development of broadcasting" in Canada and pose a challenge to CRTC regulatory authority.[23]

If the Cancom expansion of its network services was merely an extension of the freely available local reception of U.S. television signals in border areas of Canada, there would be no reason for concern over Cancom's uncompensated use of the U.S. signals. The analysis of broadcast economics always has been based upon the assumption of limited low-power signal distribution protected by local license.[24] A broadcaster's right to exclusive use of a broadcast

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19. Decision CRTC 83-126 at 7-8, 117-I Can. Gaz. at 2493; Application, *supra* note 3, at 4-6.

20. Therrien Committee, *supra* note 9, at 1.

21. This problem demonstrates that the Cancom application is already out of date and insufficient if its purpose includes the discouragement of pirating. The Cancom proposal to add commercial U.S. network programs will increase the total percentage of American programs only slightly. It will add PBS, but will not offer any of the news stations, sports networks, children's services, or movie channels which have been added to cable services in the U.S. Also, the broadcast policy announced March 1, 1983, will make it possible for individuals and businesses such as hotels to receive these U.S. signals legally if they are not commercially distributed. The demand for these new program services and questions about their direct reception and uncompensated use will generate new problems that the Cancom proposal does not address.

22. Application, *supra* note 3, at 3. The presumption among Canadian broadcasters is that the number of such unlicensed receivers is increasing. *See generally* Therrien Committee, *supra* note 9.

23. ANNUAL REPORT, *supra* note 11, at 45. Note also the problems raised by The Queen v. Shellbird Cable Ltd., Provincial Ct. of Newfoundland (Oct. 29, 1981) (copies available through *Buffalo Law Review*) (discussed *infra* notes 84-91 and accompanying text). In that case the trial court found that the reception and distribution of a U.S. satellite signal was not "broadcasting." The appeals court agreed, but did not think the definitional problem was the only issue in the case, and therefore refused to exempt the cable company from the CRTC regulation.

24. *See, e.g.*, Noel, *Should Cable Systems Pay Copyright Royalties*, 12 OTTAWA L. REV. 195, 199-208 (1980). *See also* Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366 (1965). *Cf.* Comment, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, 69 CALIF. L. REV. 527 (1981).

frequency within a limited area allows the calculation of audience size and appropriate charges to advertisers.[25] Within this local service area, even the introduction of cable retransmission of a signal causes no economic or legal problems. It makes no difference to the broadcaster whether signals reach viewers through the air or through cable so long as the signal is unaltered and audience size can be documented. The same local limits allow appropriate calculation of copyright licensing fees paid by broadcasters who use copyrighted programs. The charge depends on audience size within the station's broadcast area.[26] On this analysis, the cable system functions as a substitute for an individual antenna.[27] If Cancom were the equal of any private viewer in Windsor or Vancouver who could tune in a Detroit or Seattle station, there would seem no need for further concern.

Cancom is not, however, equivalent to a home viewer in Windsor or Vancouver, nor to a cable retransmitter providing local service from signals otherwise available off-air. It makes commercial use of U.S. television signals without obvious benefit to either the local stations involved or the networks. Cancom will not increase or even provide local viewing, and viewers in remote Canadian communities are unlikely to attract advertisers to the stations in Detroit and Seattle.[28] It is likely that long-distance distribution will not increase network advertising rates and may decrease the value of copyrighted programs now licensed to other television network distributors in Canada.[29]

On the other hand, Cancom does not appear to damage any

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25. *See* Noel, supra note 24, at 200.

26. *See id.*

27. This analysis was adopted by the United States Supreme Court in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 399 (1968).

28. There appears, however, to be some concern for this possibility given the potential drain on Canadian advertising revenues. For a discussion of the reasons for choosing the Detroit stations' signals, see *supra* note 3. The CRTC also noted concern that the four stations in Detroit and Seattle might develop into versions of "superstations" by Cancom's relay, and promised to give this question "particular consideration during the exhibition phase." Decision CRTC 83-126 at 9-10, 117-I Can. Gaz. at 2494.

29. CTV complained that damage would result to its contract rights to exclusive Canadian distribution of a number of U.S. programs. *Hearings*, *supra* note 4, at 309-10. *See also id.* at 318-20. They also pointed out that Cancom's earlier license was conditioned upon "the consent of the participating broadcasters for the distribution of their signals." *Id.* at 308. The broadcasters included CTV, which did not give its consent although Cancom did receive consent from one of CTV's affiliated stations: CHAN-TV in Vancouver.

existing markets or sources of revenue for the U.S. stations or networks, and, therefore, the broadcasters might be seen as having little cause for complaint.[30] Since U.S. citizens or U.S.-controlled corporations cannot operate broadcast undertakings in Canada, the networks can not broadcast to these remote areas themselves, and insofar as viewers in these areas now pirate signals from U.S. satellite transmissions, no benefits otherwise flow to the networks.[31] Cancom's use of copyrighted material gives the networks no clear ground for legal action under present Canadian law.[32] The initial question, therefore, is why should there be any network complaint? While they are not benefitted, the networks also do not appear to be harmed. What then creates a problem?

It is useless to speculate on the networks' motives. Their limited written intervention merely lists the grounds of complaint,[33] and no extensive clue to their concerns is available. The networks' complaint begins with an assertion that Cancom's action is "inequitable and unfair";[34] although the CRTC did not agree with the characterization in this case, past statements by the CRTC show a greater recognition of the problem.[35] In a 1971 statement on cable television policy,[36] the CRTC described the "fundamental" relationship between broadcast stations and cable systems as that of "suppliers" and "users,"[37] and announced a basic principle: "[O]ne should pay for what he uses to operate his business."[38] While this

30. Harry Olsson of the Law Department of CBS admitted that the prospects for damage to CBS were remote but that the network was uncomfortable with the loss of control over the use of its signal and copyrighted programs. Interview with David Tarbet (May 15, 1983).

31. The Therrien Committee did, however, call this sort of unlicensed reception "pirating." Therrien Committee, *supra* note 9, at 19.

32. *See generally* Directions to the CRTC, CONSOL. REG. CAN. chs. 376-77 (1978). *See also infra* notes 92-125 and accompanying text.

33. *See* text of Letters, *supra* note 5.

34. *See* the fourth enumerated item in Letters, *supra* note 5.

35. There might also be a quite different problem for Canadian broadcasters who wish to establish stations in the areas served by Cancom. "The pre-existence of a cable system in the community might well deter the establishment of a local station." *See* Noel, *supra* note 24, at 207.

36. CRTC, CANADIAN BROADCASTING—A SINGLE SYSTEM (Policy Statement, July 16, 1971), *discussed in* 1971-1972 CRTC ANN. REP. 1, 2, 9, 21-22.

37. *See* 1971-1972 CRTC ANN. REP. at 22.

38. *Id.* This principle would still apply, the policy statement explained, even if there were no damage or if the cable television system were to increase the profits of the television stations.

appears to address the issue of copyright liability for cable system operators—a liability which a recent Canadian government policy statement chooses not to recognize or impose[39]—the principle implies a more basic admission of a property right in broadcast signals that could apply more broadly to cases such as the Cancom application.[40]

Nevertheless, this same CRTC statement sanctioned the deletion of commercials from U.S. television signals and their replacement by advertisements sold through other Canadian broadcasters.[41] By so doing, it not only failed to extend recognition to U.S. stations as "suppliers" to the cable operators, but also encouraged actions by Canadian cable operators which would damage the U.S. stations since border stations frequently carried advertising directed at local Canadian viewers.[42] Nothing could display more clearly the tension between the CRTC's equitable sense of property rights and the need to protect Canadian broadcast undertakings from the threatened dominance of American broadcasters.

The CRTC's commercial-deletion policy was challenged immediately in court. Three Toronto-area cable companies began to delete commercials from the signals they received from the three Buffalo, New York, commercial network television affiliates.[43] The cable companies simultaneously sought revision of their broadcast licenses in order to authorize their action.[44] The Buffalo stations brought suit in Canadian federal court in a case which eventually was decided on appeal to the Supreme Court of Canada. In *Capital Cities v. Canadian Radio-Television Commission*,[45] the Court allowed commercial deletion and upheld the authority of the

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39. In his recent policy statement, Francis Fox referred only once to exclusive rights in broadcasts, and this reference was in connection with regulatory protection, not copyright liability or protection. NEW NAT'L BROADCASTING POLICY, *supra* note 11, at 19 (pages unnumbered).

40. *See generally id.* at 11-12 (pages unnumbered).

41. The commercial deletion allowance is no longer CRTC policy. The main restraint on Canadian advertisers wishing to buy commercial time on U.S. stations is Bill C-58, which eliminates income tax deductions for advertisements placed on U.S. stations. Swinton, *Advertising and Canadian Cable Television—A Problem in International Law*, 15 OSGOODE HALL L.J. 543, 580-86 (1977).

42. *See* Capital Cities Communications Inc. v. Canadian Radio-Television Comm'n, 81 D.L.R.3d 609, 633 (1977) (Pigeon, J., dissenting).

43. *In re* Capital Cities Communications Inc., 52 D.L.R.3d 415 (1975).

44. *Id.*

45. 81 D.L.R.3d 609 (1977).

CRTC, but the Court failed to rule on the question of property rights in broadcast signals.[46] The Buffalo stations invited the Court to determine what property rights the Buffalo television stations had in their signals after they entered Canadian airspace, but the Court declined to settle that issue since the question of proprietary rights was pending in a parallel action before the Ontario Supreme Court.[47] That case was later settled out of court, so the issue of property rights remains open. The issue seems to be raised again by the Cancom application. It is important, therefore, to investigate the likelihood of a legal resolution of the problem and to ask whether there is any way an American broadcaster could maintain a claim to a property right in a signal received by a Canadian cable company.

II. Theories of Ownership

A. *Licensing and Property*

The Supreme Court of Canada heard *Capital Cities* on appeal from the Federal Court of Appeals.[48] In his separate concurrence to the Court of Appeals decision, Judge Thurlow took an unqualified stand on U.S. broadcasters' property rights in their signals, asserting that they had

> no proprietary or other legal rights in their signals in Canadian air space. The radio frequencies in that space are public property under s. 3(*a*) of the *Broadcasting Act*. When the appellants put out signals on any of such frequencies, they make use of the public property in such frequencies but they do not by so doing acquire any right either in the frequency or the signals they have generated on it, and they have no right to have their signals received in Canada in any form, whether altered or unaltered. Nor have they any right to require that the licence of a Canadian broadcasting receiving undertaking conform to their requirements or demands.[49]

Subsection 3(a) of the Broadcasting Act, to which Judge Thurlow refers, declares that "broadcasting undertakings in Canada make use of radio frequencies that are public property and such under-

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46. *See id.* at 616.

47. *See id.* at 612-13. The action in Ontario court continued after the *Capital Cities* decision, but it resulted in settlement. Telephone interview with Mr. Allan R. O'Brien of the Ottawa law firm of Gowling and Henderson, who represented the Buffalo television stations (Sept. 1982).

48. The Court of Appeals decision is found at 52 D.L.R.3d 415 (1975).

49. *Id.* at 417.

takings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements."[50] When quoted in full, it is clear that whatever else it may mean to assert that radio frequencies are "public property," the Act does not preclude "private" commercial use of those frequencies. The mandate of this section is merely to integrate private broadcasting into a single system which includes "public" components. It authorizes regulation to achieve this integration, but does not, by its description of radio frequencies, preclude their use for the transmission of privately owned and controlled programming.[51] Section 3(b) of the Act, by limiting ownership and control of the Canadian broadcasting system to Canadians, does preclude direct United States participation in private Canadian broadcasting, but not on the grounds that such ownership is impossible.[52] Furthermore, by international agreement, U.S. broadcasters effectively possess use of designated frequencies which overlap into Canada and could use those treaties as grounds for complaint if Canadian transmissions interfered with their signals.[53] If a Canadian company such as Cancom receives and retransmits a U.S. television signal for sale, it seems rather arbitrary to declare that U.S. broadcasters may not comment on the action. In fact, this practice is not followed at the CRTC's public hearings.[54]

Judge Thurlow's comments ultimately are directed at the issue of standing and indicate that U.S. broadcasters have no status to appear before either the CRTC or Canadian courts. The Supreme Court did not adopt this position, however, as is evident from its

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50. CAN. REV. STAT. ch. B-11, § 3(b) (1970).

51. Discussion of copyright in broadcast signals and the programs they carry often generates confusion on the question of whether the protection of programs carrying signals deals with the signals themselves (the container) or with their particular content (the contained). There is no protection of the programs transmitted, but just of the physical signals themselves. Nesgos, *Canadian Copyright Law and Satellite Transmissions*, 20 OSGOODE HALL L.J. 232, 239 (1982).

52. *See supra* note 11.

53. Besides the Inter-American Radiocommunications Convention discussed *infra* notes 126-43 and accompanying text, Canada and the U.S. have maintained channel allocation agreements which allow unimpeded reception of signals from stations in each country. *See* 3 BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA; 1776-1949, 502, 509-10; 55 Stat. 1005, 1011-12.

54. With regard to the Cancom application, the network interventions requested that each network "appear as an intervener at the Public Hearing to be held in Hull commencing on the 23rd day of November, 1982." *See* the eighth enumerated item in Letters, *supra* note 5.

decision to hear the appeal.[55] While the Court took no position on the issue of proprietary rights, Judge Pigeon's dissent saw the action of the Toronto cable companies as "economic aggression" and "the appropriation by the CATV operators of some of the commercial value of appellants' broadcasts."[56] This statement presumes some recognizable interest held by the Buffalo stations in their signals, although the grounds of that interest were not specified. He begins, however, by criticizing Judge Thurlow's argument saying that "[w]e must not be misled by the statement that licencees do not own the channel assigned to them, that they only enjoy a privilege which may be revoked by the licencing authority. The licence is not revokable at will but only for cause . . . ."[57] American stations cannot, of course, claim the benefits of a Canadian license, but Judge Pigeon's point is not that they have direct protection of property rights, but rather indirect protection imposed by the constraints which regulate a licensing authority such as the CRTC.[58] The CRTC must operate within legal notions of property. It may not, as in this case, allow a licensee to interfere with or damage the rights of others.[59]

1. *Local license.* In *Capital Cities*, the rights of the Buffalo broadcasters arose under international conventions prohibiting "interference" with U.S. broadcast signals which Judge Pigeon extended to include interference with the commercial value of the Buffalo television signals.[60] Whatever their source, their effect for Judge Pigeon is to extend the logic of the local broadcasting license to the Buffalo signals. He believes that interference with the Buffalo signals constitutes a tort which could not be authorized validly by the CRTC and which supports a possible action against the

55. *Capital Cities*, 81 D.L.R.3d at 616. A liberal allowance for standing is recommended in 14 LAW REFORM COMMISSION OF CANADA, REPORT ON JUDICIAL REVIEW AND THE FEDERAL COURT 39 (1980) [hereinafter 14 LAW REFORM COMMISSION].

56. *Capital Cities*, 81 D.L.R.3d at 636-37.

57. *Id.* at 636.

58. It is ironic that Judge Pigeon's argument against Judge Thurlow is supported by Judge Thurlow's own opinion in Radio Iberville Limitee v. Board of Broadcast Governors, [1965] 2 Can. Exch. 43. *See also* Re North Coast Air Services Ltd. and Air Transportation Committee of the Canadian Transport Commission, 32 D.L.R.3d 695, 709 (1972) (the "requirements of natural justice are just as applicable to the cancellation or amendment of a license . . . as they are to the deprivation of property").

59. *Capital Cities*, 81 D.L.R.3d at 638-40.

60. *Id.* The majority, of course, did not agree with the extension granted in Judge Pigeon's dissent.

cable companies.[61] Because he conceives of possible damages in terms of the local licensing protection considered earlier, however, he believes it doubtful that the stations "would suffer injury by alteration of their signals in an area where they otherwise would not be received."[62] On this view, Judge Pigeon's analysis would not apply to the Cancom transmission of signals to remote areas of Canada where they ordinarily would not be received because the action would not damage any existing commercial interest in the broadcasts. Other applicable common law actions for unfair competition or unjust enrichment might be maintained, however, and under Judge Pigeon's model could be substituted as applicable constraints on the licensing authority.[63]

More generally, Judge Pigeon's dissent raises the issue of the extent to which Canadian courts should review the actions of administrative agencies and on what grounds the Federal Court Act gives the courts jurisdiction to review agency decisions.[64] Canadian courts traditionally have been reluctant to exercise that power vigorously.[65] Following the Supreme Court decision in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*,[66] however, the federal courts have shown a new willingness to review administrative actions. The courts have based their review on the need for procedural requirements which accord with "natural justice" and on the recognition of a substantial "duty of fairness."[67] These procedural requirements have been given the closest scrutiny in cases where individual rights to liberty or property have

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61. *Id.* at 642-43.

62. *Id.* at 637.

63. Notions of unfair competition are codified in § 7 of the Trade Marks Act, CAN. REV. STAT., ch. T-10 (1970), and are applicable to any citizen of a country that is party to the Paris Convention for the Protection of Industrial Property, Oct. 31, 1958, 13 U.S.T. 1, T.I.A.S. No. 4931, 343 U.N.T.S. 369. *But see* MacDonald v. Vapour Canada Ltd., 66 D.L.R.3d 1, 30 (1976) . The developing requirements for an action for unjust enrichment are set out in Klippert, *The Juridical Nature of Unjust Enrichment*, 30 U. TORONTO L.J. 356 (1980).

64. CAN. REV. STAT. ch. 10 (2d Supp. 1970).

65. *See* Goldie, *The Federal Court*, in PROCEEDINGS OF THE ADMINISTRATIVE LAW CONFERENCE 10-18 (1979); *Independent Administrative Agencies*, LAW REFORM COMMISSION OF CANADA WORKING PAPER No. 25 at 148-49 (1980) [hereinafter WORKING PAPER No. 25].

66. 1979 S.C.R. 311.

67. WORKING PAPER No. 25, *supra* note 65, at 145-48. Garant, *Fundamental Freedoms and Natural Justice*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 258-90 (W. Tamopolsky & G. Beaudoin, eds. 1982). *See also* the recommended broadening of the grounds of review in 14 LAW REFORM COMMISSION, *supra* note 55, at 27.

been threatened and where there appears to be evidence of unfairness.[68] Although a question was raised during the Cancom hearing which challenged the appropriateness of dealing with Cancom's application as a licensing rather than a policy decision,[69] no other procedural irregularities were charged and none are revealed in the record.[70]

2. *Constitutional rights of property.* More serious questions may arise, however, in connection with claims under the Canadian Charter of Rights and Freedoms.[71] Decisions by the CRTC seem to come within the scope of "government action" subject to Charter provisions.[72] They must, therefore, preserve the guarantees in section 7 of the Charter to "life, liberty and security of the person."[73] While this section does not include the right to the protection and enjoyment of property, and, according to some commentators,[74] must be read as if it specifically excluded such claims, there is some evidence that courts will construe the provision differently. In *The Queen in Right of New Brunswick v. Fisherman's Wharf Ltd.*,[75] the New Brunswick Court of Queen's Bench invoked the Charter of Rights and Freedoms to support an argument prohibiting the province of New Brunswick from attaching a tax lien to property owned by parties other than the business in default.[76] The court noted that while the Charter is

> silent in specific reference to property rights . . . it can only be assumed . . . that the expression "right to . . . security of the person" as used in s. 7 must be construed as comprising the right to enjoyment of the ownership of property which extends to "security of the person" and that in consequence the

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68. WORKING PAPER No. 25, *supra* note 65, at 145.

69. *Hearings*, *supra* note 4, at 306. Such a challenge would require extensive public hearings across Canada.

70. *Id.* at 306, 323-24.

71. This became part of the Constitution of Canada by virtue of the Canada Act 1982, ch. 11 (U.K.), of the British Parliament.

72. Swinton, *Application of the Canadian Charter of Rights and Freedoms*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 67, at 58. The Court in *Capital Cities* was "unable to appreciate how it can be said that the Commission is an agent or arm of the Canadian Government." 81 D.L.R.3d at 630. The Minister of Communication's recent policy statement, however, indicates a desire to maintain closer direction of the CRTC. *See* NEW NAT'L BROADCASTING POLICY, *supra* note 11, at 10 (pages unnumbered).

73. *See* THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 67, at 531.

74. D.C. MCDONALD, LEGAL RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 23 (1982).

75. 135 D.L.R.3d 307 (1982).

76. *Id.* at 315-16.

> further words of s. 7, *viz.*, "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" must extend to the right not to be deprived of property rights which tend to extend to the security of the person.[77]

The court further assumed and stated that the "right to enjoyment of property free from threat of confiscation without compensation has unquestionably been a right traditionally enjoyed by Canadians and may therefore be a right embodied in our Constitution, quite regardless of proclamation of the present Charter."[78]

The breadth of the court's second statement is certainly subject to challenge. While Canadians have in fact enjoyed appropriate compensation in expropriation cases, courts have held that provinces may take real property for any purpose without being required to pay compensation.[79] Provinces also have been unfettered by the provisions of the Canadian Bill of Rights' guarantee of the "enjoyment of property" in enacting and effecting expropriation legislation.[80] Nonetheless, the Charter has broader application than the Bill of Rights and certainly applies to federal government legislation and related agency action.[81] Accordingly, any interpretation of section 7 which reads the right to the enjoyment of property into the guarantee of the right to the "security of the person" could constrain actions by the CRTC.

3. *Unregulated broadcasting.* There is one final consideration which must be added to complete the discussion of the limits which apply to CRTC action. It has long been established that the regulation of broadcasting in Canada is a federal government prerogative and responsibility.[82] Under the Broadcasting Act, the government has delegated effective control of broadcast regulation to the CRTC, which operates autonomously in its licensing decisions

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77. *Id.*

78. *Id.* at 316.

79. McNair v. Collins, 6 D.L.R. 510 (1912); Nelson v. Pacific Great E. Ry., [1918] 1 W.W.R. 597. In Florence Mining Co. v. Cobalt Lake Mining Co., 18 Ont. L.R. 275, 379 (1909), the court noted that "the prohibition 'Thou shalt not steal,' has no legal force upon the sovereign body."

80. Peloquin v. Boucherville (City), [1967] Que. C.S. 503.

81. Hogg, *A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, *supra* note 67, at 1-25.

82. The constitutional question was settled by the Regulation and Control of Radio Communications; *see* Attorney-Gen. of Quebec v. Attorney-Gen. of Canada, [1932] 2 D.L.R. 81, [1932] A.C. 304, *aff'g* [1931] 4 D.L.R. 865, [1931] S.C.R. 541.

and with a large degree of independence in matters of policy and broadcasting supervision.[83] A recent Newfoundland decision, however, suggests that some forms of satellite signal reception and distribution may fall outside the ambit of CRTC control. In *CRTC v. Shellbird Cable Ltd.*,[84] Judge Seabright of the Provincial Court found that the reception and distribution of the PBS network signal transmitted from Washington, D.C., did not constitute "broadcasting" as defined by the Broadcasting Act. He ruled, therefore, that Shellbird's action had not violated the terms of its broadcast license. The Newfoundland Supreme Court reversed, holding that the terms of Shellbird's license made it subject to Regulation 5 of the Cable Television Regulations[85] which prohibited Shellbird from using its "undertaking" for anything other than activity authorized by license.[86] The court did not, however, reverse the finding that the reception and distribution of the PBS signal was not "broadcasting."[87]

Given the above decisions, the possibility exists that the Cancom operation could fall outside the regulatory scope of the CRTC. Cancom's satellite distribution of U.S. network signals would not be broadcasting because the signals are not "intended for direct reception by the general public."[88] If they were received by an unlicensed distributor and delivered to customers by coaxial cable, the distribution would not be broadcasting because it would not be a transmission "propagated in space without artifical guide."[89] A distributor without any license would not be subject to other CRTC constraints, and, therefore, could not be, as Shellbird

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83. CAN. REV. STAT. ch. B-11, § 3 (1970).

84. Decision of Provincial Court of Newfoundland, Oct. 29, 1981 (copies available through *Buffalo Law Review*).

In the Broadcasting Act, CAN. REV. STAT. ch. B-11, § 2 (1970), "broadcasting" is defined as "any radiocommunication in which the transmissions are intended for direct reception by the general public," and "radiocommunication" is defined as "any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3000 Gigacycles per second propagated in space without artificial guide." The PBS network signal was transmitted via Westar 1 satellite.

85. CONSOL. REG. CAN. ch. 374 (1978).

86. The Queen v. Shellbird Cable Ltd., No. 276 Supreme Court of Newfoundland (Apr. 20, 1982), 4-5, 7, 12 (copies available through the *Buffalo Law Review*).

87. *Id.* at 12-13.

88. This follows from the fact that the Cancom signals would be delivered in scrambled form.

89. Broadcasting Act, CAN. REV. STAT. ch. B-11, § 2 (1970).

was, directed to cease distribution of U.S. signals. This escape from CRTC regulation obviously would make all earlier considerations of limits on CRTC action moot; it would also remove Cancom's actions from the protective ambit of CRTC approval and open them more fully to the possible tort and common law actions discussed earlier. This result, however, is unlikely.

While finding that Shellbird's actions did not constitute "broadcasting" within the definition of the Broadcasting Act, the Newfoundland Supreme Court nonetheless recognized that the regulation of "television signals emanating from a source outside of Canada" which are received and transmitted in Canada were subject to the federal Parliament's *legislative* authority.[90] The Minister of Communications has noted the problems posed by the current definition of "broadcasting" and has promised parliamentary action to redefine the term and to revise the Broadcasting Act "in light of . . . new technologies."[91] Consequently, there likely will be a legislative resolution of this problem and activity directed at bringing satellite transmissions within the regulatory control of the CRTC.

B. *Copyright*

Canadian considerations of copyright protection for television programs, and particularly for cable retransmissions, are never immune from international questions. As a net importer of copyrighted materials, Canada has an interest in limiting copyright protection.[92] Even those Canadian commentators who have recommended the extension of copyright protection to require royalty payments by cable television companies would limit protection to works produced in the country.[93] Canada is particularly reluctant to sign international agreements that would compel domestic legislation increasing copyright protection for foreign broadcast signals.[94] The result of this Canadian reluctance to extend international copyright protection is that any U.S. television network as-

90. *Shellbird*, at 5 (quoting from the majority opinion in *Capital Cities*, 81 D.L.R.3d at 623).

91. NEW NAT'L BROADCASTING POLICY, *supra* note 11, at 19 (pages unnumbered).

92. A. KEYES & C. BRUNET, COPYRIGHT IN CANADA: PROPOSALS FOR REVISION OF THE LAW 17, 19 (1977).

93. Noel, *supra* note 24, at 212.

94. Nesgos, *supra* note 51, at 240.

serting a copyright claim in its television transmissions would have to depend on the Canadian Copyright Act.[95] Both Canada and the United States subscribe to the Universal Copyright Convention[96] which, while not explicitly protecting television broadcasts, does not exclude them, and essentially permits member states to extend the protection of domestic law to nationals of other signatory states.[97]

The statutory basis for any Canadian claim to copyright protection of a U.S. network television signal or program carried by that signal is section 3 of the Copyright Act. Its relevant parts assert that copyright means "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever"[98] or "to perform . . . the work or any substantial part thereof in public."[99] This sole right includes "in the case of any literary, dramatic, musical or artistic work, [the right] to communicate such work by radio communication."[100] Since Cancom "proposes a simultaneous retransmission of U.S. network signals, no issue arises in this instance of a reproduction of U.S. programs in any material form."[101]

The only questions which remain, therefore, are whether Cancom's distribution of U.S. network programs constitutes a performance of works in public, or alternatively, whether it is a communication of such works by radio communications.[102] *Canadian*

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95. CAN. REV. STAT. ch. C-30 (1970).

96. Sept. 6, 1952, 6 U.S.T. 2731, T.I.A.S. No. 2937, 216 U.N.T.S. 132.

97. Nesgos, *supra* note 51, at 236. Universal Copyright Convention, art. II. *See* Swinton, *supra* note 41, at 577.

98. CAN. REV. STAT. ch. C-30, § 3 (1970).

99. *Id.*

100. *Id.* § 3(1)(f).

101. It is clear from the holding in Warner Bros.-Seven Arts Inc. and Warner Bros.-Seven Arts Ltd. v. CESM-TV Ltd., 65 C.P.R. 215 (1971), that videotape recording and subsequent rebroadcast over a cable system is an infringement of the sole right of the copyright holder to reproduce the work.

102. In the case of some live broadcasts of sporting events or other spontaneous performances, there might be some question of whether the program transmitted by television is a "work." In Canadian Admiral Corp. v. Rediffusion, Inc., [1954] Can. Exch. 382, the court held to qualify as a "work" the creation in question "must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance." *Id.* at 394. A script, shooting instructions and videotape copy of a program apparently would qualify under this definition, so most network broadcasts would be regarded as "works" for the purpose of Canadian copyright protection.

Admiral Corp. v. Rediffusion, Inc.[103] is the only Canadian case which addresses the first of these two questions. The plaintiff had telecast football games which the defendant received and retransmitted to the homes of subscribers by coaxial cable. Writing for the Exchequer Court, Judge Cameron found that the retransmissions were "performances" of the broadcasts in question, but that they were not performances "in public," and, therefore, did not infringe the plaintiff's copyright.[104] There were only a hundred or so subscribers to Rediffusion's service, but the court was not influenced by issues of scale. Judge Cameron asserted he could not see that "even a large number of private performances, solely because of their numbers, can become public performances."[105]

Others, however, have questioned whether a cable company's commercial distribution of television service to thousands of subscribers can continue to be characterized as "domestic or quasi-domestic and not a public performance."[106] The *Canadian Admiral* decision, in any case, is currently the law in Canada, and given the nature of Cancom's operation, the decision appears to protect Cancom from copyright claims. Its satellite transmission is not available to the public, but rather may only be received and used by local distributors who may in turn invoke the shelter of the same decision to keep them from copyright liability. Nevertheless, the inherent weakness in Judge Cameron's analysis makes Cancom's position less secure.

The Copyright Act also protects the communication of radio signals, and since "radiocommunication" is defined in the Radio Act, the Interpretation Act, and the Broadcasting Act as "any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3000 Gigacycles per second propagated in space without artificial guide,"[107] the reception and retransmission of U.S. network signals containing copyrighted materials seems in clear contravention of section 3(f) of the Copyright Act.[108] The construction of this section of the Copyright Act

103. [1954] Can. Exch. 382.
104. *Id.* at 404, 408.
105. *Id.* at 408.
106. *See* Swinton, *supra* note 41, at 578.
107. CAN. REV. STAT. ch. B-11 § 2 (1970).
108. CAN. REV. STAT. ch. C-30 (1970).

does not follow, however, from any of the above statutory sources. Section 3(1)(f) of the Copyright Act was added in order to implement article 11 *bis* of the Rome Copyright Convention of 1928.[109] In *Composers, Authors and Publishers Association of Canada v. CTV Television Network*[110] (CAPAC), Judge Pigeon rejected the technical interpretation of "radiocommunication" and argued that in translating the Rome Convention from French, the drafters had mistaken the sense of *radiodiffusion*, which they should have rendered in English as "broadcasting."[111]

As a result of this Supreme Court construction, section 3(f) must be understood as prohibiting the communication of copyrighted works to the *public* by *broadcasting*. This appears to give Cancom a double insulation from liability: first, because its transmission is not to the public, and second, because it is not technically engaged in "broadcasting." Broadcasting, as already noted in connection with the *Shellbird* case, is presently understood to include only transmissions "intended for direct reception by the general public."[112]

Once again, however, it is possible that the local distributors of Cancom's service may infringe protected copyrights.[113] An estimated seventy percent of local Cancom distributors retransmit Cancom's signal over the air to subscribers rather than by coaxial cable.[114] They would, therefore, be "broadcasting" as that term is understood in the Broadcasting Act[115] and as it applies in section 3(1)(f) of the Copyright Act.[116] They could avoid this characterization by sending the local signal through cable, but in the words of Judge Pigeon in *CAPAC*, that would have the "anomalous result that the extent of copyright with respect to the communication or transmission of . . . works, would depend on the means employed

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109. Nesgos, *supra* note 51, at 244.

110. 68 D.L.R.2d 98 (1968).

111. *Id.* at 101.

112. CAN. REV. STAT. ch. B-11 § 2 (1970). *See supra* note 84 and accompanying text for an analysis of this assertion with regard to the *Shellbird* case.

113. This is recognized in the Cancom decision; CRTC 83-126d at 3, 117-I Can. Gaz. at 2490, 2491 (Mar. 8, 1983).

114. *Hearings, supra* note 4, at 315-16.

115. *See supra* note 112 and accompanying text.

116. The local transmission would be a radiocommunication "intended for direct reception" which was "propagated in space without artificial guide." CAN. REV. STAT. ch. B-11 § 2 (1970).

for such communication or transmission."[117]

If licensed local distributors of U.S. network signals supplied through Cancom were found guilty of copyright infringement, they might attempt to plead CRTC authorization of Cancom service and their own local license as a defense. This would present a direct test for Judge Pigeon's contention in his *Capital Cities* dissent[118] that the CRTC could not authorize action by a broadcaster that would otherwise be illegal, and would place in issue a precedent established in *Warner Bros.-Seven Arts v. CESM-TV Ltd.*[119] In *Warner Bros.*, Judge Cattanach, after finding a violation of section 3 of the Copyright Act in the defendant's videotaping and subsequent rebroadcast of the plaintiff's film telecast, addressed the defendant's two major contentions: 1) even if it had violated a copyright, its broadcasting license allowed its actions; and 2) the Broadcasting Act superseded the Copyright Act and removed the plaintiff's copyright privileges.[120] The court concluded that although section 2(a) of the Broadcasting Act states that radio frequencies are public property, "the section does not go on to say that what is sent out on those carrier radio frequencies is also public property."[121] Further, according to Judge Cattanach, section 2(c) of the Act provides that the provisions of the Act are subject to "generally applicable statutes and regulations"[122] such as those of the Copyright Act—an allowance that must be made both on its own terms and because of "the well-known canon of construction that private property rights of individuals must not be deemed to be taken away or extinguished unless it can be shown that by express words or necessary implication such was the intention appearing in a statute."[123]

The *Warner Bros.* decision makes the important distinction, overlooked by Judge Thurlow in the trial court hearing of *Capital Cities*, between carrier frequencies (which may be considered public property) and the material which is transmitted over those fre-

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117. 68 D.L.R.2d 98, 102 (1976).
118. 81 D.L.R.3d at 637.
119. 65 Can. Pat. Rep. 215 (1971).
120. *Id.* at 238-39.
121. *Id.* at 238.
122. *Id.*
123. *Id.* at 238-39. Judge Thurlow's position on the meaning of § 3(a) of the Broadcasting Act, by contrast, assumes the removal of private property rights to be a necessary implication of the Act.

quencies (which is entitled to copyright protection). Once this distinction is made, Judge Pigeon's model for CRTC conduct in his *Capital Cities* dissent may be applied to prohibit any CRTC interference with private property rights.

An uncomfortably technical construction of copyright protection would still exist since cable operators would either be subject to or exempt from copyright liability according to the means of transmission they employ. Cable transmission would also be generally exempt on the questionable assumption that cable transmission does not result in the "public" performance of copyrighted works.[124] Establishing the violation of copyright by cable television operators remains, therefore, a difficult task under Canadian law. Currently, protectionist sentiments and the apparent economic forces which make Canada reluctant to broaden copyright protection also suggest that there is little likelihood of legislative action to ease the difficulty.[125]

C. *International Conventions*

Canada and the United States were original signatories and remain parties to the Havana Inter-America Radio Communications Convention of 1937.[126] Article 21 of the Convention concerns "retransmissions" and it states:

> The contracting Governments shall take appropriate measures to ensure that no program transmitted by a broadcasting station may be retransmitted or rebroadcast, in whole or part, by any other station without the previous authorization of the station of origin.
>
> The rebroadcasting station shall announce at suitable periods during the retransmission the nature of the broadcast, the location and the official call letters or other identification of the station of origin.[127]

If the terms of Article 21 were found to apply to the proposal made by Cancom, its retransmission of U.S. television signals clearly would receive protection. This would be the equivalent of a recognized proprietary interest in a station's signal.[128] Article 21,

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124. Even in *Canadian Admiral*, the court recognized the possibility of "public" performances if, for example, the program were shown in the cable television operator's showroom. [1954] Can. Exch. 382, 408. There might, therefore, be questions raised about television programs on view in restaurants, taverns and clubs.

125. A. KEYES & C. BRUNET, *supra* note 92, at 106-07.

126. 3 BEVANS, *supra* note 53, at 462, 468; 53 Stat. 1576, 1582.

127. 3 BEVANS, *supra* note 53, at 468; 53 Stat. 1576, 1582.

128. The right of exclusive authorized use is, in fact, a definition of property right. In

however, promises subsequent "measures."[129] These measures presumably would require legislation, and this need for implementing legislation as well as the more general and recognized requirement that Parliament give its approval before treaties have effect, forces an initial search for the evidence of Parliamentary adoption.[130]

Section 3(1)(c) of the Radio Act of 1938 authorized the Governor in Council to "accede to any international convention in connection with radio, and make such regulations as may be necessary to carry out and make effective the terms of such convention . . . ."[131] This action, following on the heels of the Havana Convention, appears to apply the Convention agreement to the action of regulatory agencies, and the substance of Article 21 was incorporated into section 7(1)(d) of the current Radio Act and in the General Radio Regulations, Part II, section 10.[132] But while all licenses to broadcasting stations formerly were issued to broadcasting stations under the Radio Act, the Act currently applies to technical equipment licensing only; the Broadcasting Act determines questions having to do with the regulation of broadcast contents.[133]

Capital Cities, the Buffalo stations also invoked the Convention's prohibition of "interference" under Article 11 as a protection of their signals. Since that case involved alteration of a signal by commercial deletion, there were grounds for their reference to Article 11. The Cancom proposal, however, seeks only to use the U.S. network signals, not to alter them. Such use is not a technical interference with the signal and would not involve the terms of Article 11 unless "interference" were defined as interference with the right commercial exploitation of a broadcast signal. Nothing in Article 11 suggests such an intended extension of the meaning of "interference."

129. 3 BEVANS, *supra* note 53, at 462, 468, 53 Stat. 1576, 1582.

130. The case which established the requirement that international treaties while made by the executive had no effect until adopted and enacted into law by Parliament was Attorney-Gen. for Canada v. Attorney-Gen. for Ontario, [1937] 1 W.W.R. 299, 301-02, [1937] 1 D.L.R. 673, 674-75. *See also* Spitz v. Secretary of State of Canada, [1939] 2 D.L.R. 546; Swait v. Board of Trustees of Maritime Transp. Unions, 61 D.L.R.2d 317 (1966). *See generally* R. MacDonald, *The Relationship Between International Law and Domestic Law in Canada*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION, 88, 117-23 (1978).

131. 1938 Can. Stat., ch. 50.

132. [1970] CAN. REV. STAT., R-1 § 7(d) authorizes the Minister "to carry out and make effective the terms of any international agreement, convention or treaty respecting telecommunications to which Canada is a party." CONSOL. REG. CAN. ch. 1372 (1978). Section 10 requires that "the licensee shall observe the provisions of the International Telecommunications Convention and any bilateral or multi-lateral telecommunication agreements for the time being in force and those regulations pertaining to the operation of radio that are made under the said Convention and agreements." [1970] CAN. REV. STAT. R-1 § 10.

133. *Capital Cities*, 81 D.L.R.3d at 632. The Supreme Court held that the Broadcasting Act was "not a statute in implementation of the Convention." *Id.* In any case, the Court also

Since the Cancom application concerns the approval of programming and not its equipment license, the terms of the Broadcasting Act would apply to its consideration.[134] There is some ambiguity here since sections 22(1)(b) and (2) of the Broadcasting Act require original and continuing conformity to the terms and regulations in force under the Radio Act. The Supreme Court in *Capital Cities*, however, restricted the relevance of this section to the above technical concerns. Since the Radio Act gave effect to the Inter-American Convention, the Court seemed to presume either that the Convention addressed only technical matters, or that the Broadcasting Act, despite its stated incorporation of the Radio Act, overrode the nontechnical issues raised in the Convention.[135]

In *Federal Electric Corp.*,[136] a Manitoba court found that a concluded treaty lacking parliamentary sanction could not be pled as a bar to a decision by the Labor Relations Board which was inconsistent with the treaty. Furthermore, in *Arrow River and Tributaries Slide and Boom Co. v. Pigeon Timber Co.*,[137] two of the justices concurring in the Supreme Court's unanimous decision asserted that even if domestic legislation breached the terms of a treaty, the legislation had conclusive domestic effect. This would seem to leave the networks with no resources under the Convention to object to an unfavorable CRTC decision. Judge Pigeon, in his *Capital Cities* dissent, found this position "an over-simplification."[138] He invoked the general international law rule of construction which requires the Court to presume "that the Crown did not intend to break an international treaty."[139] This allowance, however, can only be made if there were some ambiguity in the legislation, and that would only be the case if the Court chose to reconsider the relationship between the Radio Act and the Broadcasting

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held that the terms of the Convention would not apply to a cable system since a cable operation was not a "broadcasting station," but rather a "broadcasting receiving undertaking." *Id.* at 633. The Broadcasting Act was enacted in 1968.

134. CAN. REV. STAT., ch. B-11 §§ 22-24 (1970).

135. Insofar as the Convention dealt with questions of broadcast "interference," that conclusion is correct, but Article 21 has no bearing on these technical considerations. The existence of this inconsistency between technical concerns and the protection of authorized use of a signal is discussed *infra* at notes 136-43 and accompanying text.

136. Regina v. Canada Labour Relations Board, *ex parte* Federal Elec. Corp., 44 D.L.R.2d 440 (1964).

137. [1932] 2 D.L.R. 250, 260.

138. 81 D.L.R.3d at 642.

139. The rule is quoted from Post Office v. Estuary Radio Ltd., [1968] 2 Q.B. 740, 757.

Act.[140]

The *Capital Cities* Court also doubted whether the Convention could apply to cable distributors at all since Article 21 refers to retransmission by "any other station," and the cable companies involved in the case were not broadcasting stations, but rather "broadcasting receiving undertakings."[141] Both the Cancom satellite transmission and local distribution could, therefore, escape any possible application of the Convention's terms, but this once again rests important legal determinations on what seem merely technical distinctions. The resolution of this particular issue would again require a reconsideration of what "broadcasting" entails. If Cancom or the local distributors were considered to be broadcasters, then they might appropriately be held to be "stations" for the purposes of Article 21. They could still argue that the Convention lacks domestic effect, but this would acknowledge that the CRTC was acting contrary to the terms of an apparently valid international agreement made by the government of Canada. While the CRTC is an independent agency, its actions are controlled by government policy and the Minister of Communication's recent statement would increase government involvement with the agency.[142] That closer tie implies the need for consistency between Canadian international agreements and the regulatory actions of the agency.

The U.S. networks cited Article 21 and made contravention of the terms of the Havana Convention one of their grounds of protest against the Cancom licensing.[143] The protest was not acknowledged in the CRTC's decision, however. Without renewed Canadian government concern for the implementation of the Convention or new bilateral agreements making Article 21 or its equivalent effective, the *Capital Cities* decision makes the Convention a dead letter for U.S. networks who wish to claim proprietary rights in their broadcasts when those broadcasts enter Canadian

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140. The Court denies any ambiguity. *Capital Cities*, 81 D.L.R.3d at 631. It also cites Regina v. Chief Immigration Officer, Heathrow Airport, *ex parte* Salamat Bibi, [1976] 3 All E.R. 843, 850, a British case, to support its holding that the Convention cannot in any case prevail against the express stipulations of the Act. *Capital Cities*, 81 D.L.R.3d at 631. Following the *Arrow River* concurrence, however, the Court admits that this latter position raises questions which "relate to the obligations of Canada under the Convention towards other ratifying signatories." *Id.*

141. 81 D.L.R.3d at 632-33.

142. NEW NAT'L BROADCASTING POLICY, *supra* note 11, at 10 (pages unnumbered).

143. *See* the sixth enumerated item in Letters, *supra* note 5.

airspace and are received and retransmitted by a satellite relay or cable operator.

CONCLUSION

It appears that U.S. networks currently have a valid claim under Canadian law only against the local broadcasters who retransmit Cancom signals over the air to their subscribers. The local broadcasters would be violating section 3(f) of the Copyright Act. However, since a technical escape from prosecution would be possible if they altered their mode of distribution to coaxial cable, any United States action would do little more than force this change and expense on the distributors. Only a wholesale amendment of Canadian broadcasting legislation and accession to international copyright protection would provide more extensive protection to U.S. broadcasters asserting a property right in signals entering Canada. Canadian legislation and CRTC regulation always have had a double concern for economic and cultural matters. While general economic efficiency might be promoted by unimpeded commercial access to the Canadian market by U.S. broadcasters, such access is viewed as threatening to independent Canadian television production capacity and Canadian cultural independence. The general effect of Canadian broadcasting and copyright legislation, therefore, has been to limit United States access and exploitation of the Canadian broadcast market.

Increased satellite transmission has made practical limits on access to United States programming impossible, and the recent statement by the Minister of Communications indicating that CRTC licensing is no longer needed for TVRO operators shows that Canada will not attempt to block access.[144] While the allowance for the entry of U.S. signals into Canada and for their use and distribution will be extended, there is no recognition of the need to protect the commercial value of the signals to U.S. broadcasters. At the same time, the Minister hopes that Canada will enter United States and world markets for television programs and pro-

144. NEW NAT'L BROADCASTING POLICY, *supra* note 11, at 11-13 (pages unnumbered). The policy statement is ambiguous, however, since it at once removes the need for CRTC licensing yet states that "operators of earth stations may still require permission to receive satellite programming from their originators." Does this mean individual requests from perhaps thousands of Canadians to U.S. broadcasters?

poses subsidies for Canadian producers.[145] This will only sharpen current inequities. If Canada enters the international marketplace expecting broadcast and copyright protection for television programming, the demand for reciprocal protection from Canada will certainly increase. A renewed commitment to implement the Havana Convention could give that protection to U.S. broadcasters, but beyond that, major revision of Canadian copyright law would be necessary. Such a revision is being studied,[146] and when completed, it will have to be integrated within Canadian views of the country's role in international communications.

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145. *Id.* at 7-10. The government has promised to establish a Canadian Broadcast Program Development Fund (Memorandum of Understanding, Feb. 21, 1983, at 2).

146. Proposals for revision have been discussed steadily since publication of the Keyes and Brunet proposals. *See* A. KEYES & C. BRUNET *supra* note 92. *See also* S. LIEBOWITZ, COPYRIGHT OBLIGATIONS FOR CABLE TELEVISION: PROS AND CONS (1980).