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I. Introduction

While the position of cable television service before the law has tended to be a subject of uncertainty and confusion since the infancy of that service, nowhere has controversy been more pronounced than when issues of transborder transmissions of television programming between the United States and Canada are involved. Anyone familiar with the history of cable television in the U.S.-Canadian border areas is aware of the longstanding controversies over the "pre-release" of U.S. network programs to Canadian television stations that are, in turn, reimported from Canada and carried on cable systems within the United States. United States television stations have vigorously protested discriminatory Canadian legislation and policies regarding the substitution of commercial messages when their signals are carried by Canadian cable television systems[1] or when discriminatory tax treatment is threatened against Canadian firms advertising

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1. Due to the fact that the vast majority of Canadians live on a small strip of land just north of the Canadian-U.S. border, it is estimated that 90% of all Canadians can receive some American television programming over-the-air. *See* Note, *Copyright Compensation for the Canadian Use of American Broadcast Signals On Cable*, 12 SYRACUSE J. INT'L L. & COM. 359, 370 (1985) [hereinafter *Copyright Compensation*].

on U.S. stations.[2] To complicate matters, the United States and Canada have adopted diametrically opposite domestic policies on such issues as the liability of cable television systems for copyright royalties to the proprietors of television programming.[3]

Such friction is the natural result of the impact of two vibrant, expanding cultures with distinctly different views on a number of crucial telecommunications issues. The complexities of the relationship between the United States and Canada in the field of television transmissions, as well as the need for creative solutions to anomalous problems, are well illustrated by the subject of this monograph — the unauthorized distribution within Canada and parts of the United States of U.S. network television programming by Canadian Communications, Inc. (CANCOM).

II. Defining the Problem — CANCOM's Pirating of American Television Signals

CANCOM conducts a business by which it picks up the programs of the three major U.S. television networks, as well as other programming, as broadcast from Detroit, Michigan by Stations WXYZ-TV (owned and operated by the ABC TV Network), WJBK-TV (CBS TV Network affiliate), and WDIV-TV (NBC TV Network affiliate), and causes those signals to be transmitted to cable television systems throughout Canada and to some cable systems in the United States as well. Its point of pickup is near Windsor, Ontario. It delivers that programming to Telesat Canada, a corporation established in 1969 by an act of the Canadian Parliament for the purpose of providing a com-

2. The Canadian government has taken steps to limit the importation of American programming because of fears that Canadian produced programming will not be able to compete with the products of media centers such as Los Angeles and New York. *See Copyright Compensation, supra* note 1, at 372 n.73 (citing CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, ANNUAL REPORT, 29 (1982-83) (citing CRT POLICY STATEMENT ON CANADIAN CONTENT IN TELEVISION, Notice 83-18, January 31, 1983) (requiring that 60% of Canadian signals be Canadian programming; 50% of prime time programming be Canadian)); *Copyright Compensation, supra* note 1, at 373 n.82 (citing Bill C-58, An Act to Amend the Income Tax Act, April 18, 1975) (removing tax breaks for Canadian advertisers who sponsor ads on American television).

3. *See infra* text accompanying notes 37-39.

mercial, domestic satellite communciations system throughout Canada.[4] Telesat Canada, by use of its ANIK satellite system, located in the geostationary orbit,[5] transmits the television programs to CANCOM subscribers in Canada, Alaska, or elsewhere.[6]

What makes the CANCOM operation so complex and intriguing is the fact that, as a Canadian corporation doing business entirely in Canada, CANCOM lies beyond the jurisdictional reach of U.S. statutory and regulatory controls. These controls have been established within the United States to assure that the proprietors of copyrighted works carried by cable systems, and their licensees, receive compensation for the performance for hire of those works by cable systems and other secondary transmitters. Neither CANCOM nor its customers pay any copyright royalties to anyone for the U.S. network programming which it picks up and delivers.[7]

Furthermore, because the CANCOM pickup involves network programs as broadcast by U.S. network affiliate stations located in the Eastern Standard Time Zone, such programs are made available for transmission over cable television systems in western Canada and Alaska hours before they are scheduled for broadcast by U.S. television stations serving Alaska or the U.S.-Canadian border areas. The effect of such "pre-release" is to de-

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4. *See Copyright Compensation, supra* note 1, at 360 n.5.

5. The geostationary orbit, often overbroadly referred to as the geosynchronous orbit, is really a set of orbits approximately 22,300 miles above the equator. A satellite placed in such an orbit will appear to remain stationary above one spot of the equator. The geostationary orbit was first conceived of by the British (now Sri Lankan) scientist and science fiction author Arthur C. Clarke in 1945; some now rightfully call such orbits the Clarke Orbits. Clarke, *Extra-Terrestrial Relays: Can Rocket Stations Give World-Wide Radio Coverage?*, Wireless World, Oct. 1945, at 305-08. *See* B. BOVA, THE HIGH ROAD 144 (1981). For a general discussion of the development, utilization, and control over the geostationary orbit, see Georgetown Space Law Group, *The Geostationary Orbit: Legal, Technical and Political Issues Surrounding its Use in World Telecommunications*, 16 CASE WEST. RES. J. OF INT'L L. 223 (1984).

6. CANCOM is authorized by the Canadian Radio-Television and Telecommunications Commission (CRTC) to uplink American television signals which can be received in Canada and distribute, or "rediffuse," such programming to Canadian Cable systems for a fee. *See Copyright Compensation, supra* note 1, at 360 n.5.

7. *Int'l Copyright/Communication Policies: Hearing on S. 736 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 7 (1983) (statement of Sen. Patrick J. Leahy) [hereinafter *S. 736 Hearing*].

prive those U.S. television network affiliates of the network program exclusivity protection to which they are otherwise entitled under both Part 76 of the Rules and Regulations of the Federal Communications Commission and their contracts with the networks.[8] Because of such problems as the territorial limitations on U.S. domestic statutes and rules, the official Canadian government policy of *laissez-faire*, and the Federal Communications Commission's inability to fashion an effective remedy within its admittedly circumscribed jurisdiction, U.S. proprietors of copyrighted television programs and their licensees, including the network organizations and their affiliate stations, are not receiving just compensation. Additionally, the pattern of regulation within portions of the United States is being disrupted and Canadian and U.S. cable systems subscribing to CANCOM service and CANCOM itself are being unjustly enriched.

Is there an equitable solution to this problem which, in its own way, brings into play many of the issues outstanding between the United States and Canada in the field of television program transmission? The nature of the problem itself and the possible avenues upon which a solution may be sought are discussed in this article. Potential remedies will be presented in regard to both CANCOM, the entity pirating and delivering the signal, and the cable systems, the entities receiving the pirated signal.

III. Refining the Problem — The Importance of Time Zones to American Network Television Programming and the Pre-Release of Programming in Alaska

The North American continent is divided into eight time zones.[9] These time zones govern all aspects of life, including when networks run their premium programming, known as "prime time" programming. Because the greatest audience is attracted to television during the evening hours, networks broad-

8. 47 C.F.R. §§ 76.92-.99 (1985).

9. These eight time zones include the rather strange phenomenon of the Newfoundland Time Zone, wherein the clocks are set at the half hour vis-a-vis the neighboring Atlantic and Eastern Time Zones (e.g., when it is 9:00 p.m. in the Atlantic Time Zone, it is 9:30 p.m. in the Newfoundland Time Zone).

cast their most popular programming between 7:00 p.m. and 11:00 p.m. local time.[10] Yet, because of the differences in time zones, while people in New York are watching *The Cosby Show,* people on the West Coast are still working or, if they are watching television, they are watching game shows, daytime dramas, or other standard daytime fare.

For many years, the time zone differential was not a problem to television stations in Alaska because there were no live feeds of television programming from the forty-eight contiguous states. Network programs were delivered in prerecorded form. This has changed, however, with the advent of satellite communications. Television stations (and cable systems) in the State of Alaska can receive network programming as it is broadcast in the Eastern Standard Time Zone. It is now possible to watch *The Cosby Show* "live" at 4:00 p.m., Yukon Time Zone. It is also now possible for a family in Fairbanks to hear Joan Rivers provide adult-oriented entertainment during the dinner hour.[11] Since live feeds via satellite became a reality, television stations in Alaska have sought to adjust the program flow to the rhythm of life in the Yukon Time Zone by taping programs off the satellite for later broadcast.[12]

The availability of U.S. network programming to Alaskan cable systems by satellite and, in particular, by the CANCOM operation, is not only accelerating these changes, but is also placing television stations, desirous of broadcasting network prime time programming in Alaskan prime time, at a distinct disadvantage. Not only can the CANCOM-fed cable system deliver the same program live four hours before its television sta-

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10. For a variety of historical reasons, prime time in the Mountain Time Zone is between 6:00 p.m. and 10:00 p.m. This is because prior to the three networks' use of satellite systems to deliver programming feeds, such feeds were accomplished using terrestrial microwave systems. To save costs, the three networks established only three systems for the four time zones. As a result, network affiliates in the Mountain Time Zone received their programming feeds from a Central Time Zone affiliate, and would broadcast programming one hour earlier. *See Reconsideration of Cable Television Report and Order,* 36 F.C.C.2d 326, 337-38 (1972). *See also* KIRO, Inc. v. FCC, 545 F.2d 204, 208 n.10 (D.C. Cir. 1976).

11. *See Prime Time TV Appears in the Afternoon,* Anchorage Times, Feb. 17, 1986, at B-1, col. 1.

12. For an example of this kind of programming adjustment, see *infra* text accompanying notes 14-15.

tion competitor has scheduled it for broadcast, but, by doing so, it can preclude the network affiliate stations from claiming the right to network program exclusivity.[13]

One specific example will bring the problem into clear focus. Every Monday evening from September to December, ABC broadcasts live *Monday Night Football.* The NFL schedules these Monday night games to begin at 9:00 p.m., Eastern Time, to aid ABC in obtaining the largest audience share possible. Nine o'clock p.m., Eastern Time, is 5:00 p.m., Yukon Time. Many ABC affiliates in Alaska choose to tape-delay ABC *Monday Night Football* to put it into local prime time at 7:00 p.m.[14] CANCOM, by uplinking the Eastern Time Zone live broadcast, provides an opportunity for Alaskan cable systems to carry the game live. Local audiences have two choices: They can watch the game live on cable at an early hour,[15] or they can watch the tape-delayed game as broadcast over the local ABC affiliate two hours later. Given this choice, many viewers abandon the local ABC affiliate and watch the game live. As audience shares decline, the local network affiliate finds it can demand less for the local advertising spots it sells during the game, and thus loses money. In short, the local network affiliate, located in a small Alaskan television market, is unexpectedly forced to compete for audience share with a Detroit station which carries ABC *Monday Night Football* two hours earlier.

The implications of CANCOM's activities are immense. Ignoring for the purpose of this discussion the ethical problem of subjecting children to "non-prime time" mature fare, the very structure of the network affiliation system is threatened by such practices. Television stations enter into contracts with one of the national networks to air its programming in return for advertising revenues and a limited geographic monopoly on such pro-

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13. The Federal Communications Commission Rules and Regulations provide procedures whereby affiliate stations may request and obtain the exclusive right to be the sole conduit of specified network programs and to be protected against *simultaneous* duplication by any other station on the cable system. 47 C.F.R. §§ 76.92-.99 (1985) (emphasis added). *See infra* notes 86-114 and accompanying text discussing non-duplication regulations.

14. Communication Daily, Dec. 20, 1985, at 8.

15. This assumes, of course, that the viewer is a cable subscriber. Cable penetration in Alaska approaches 32%. A.C. Nielsen Media Research, *U.S. Television Household Estimates*, Sept. 1986, at 54.

gramming.[16] The introduction of another network station in the western markets, especially Alaska, where the local cable system can carry network programming *before* the West Coast affiliate, creates a potentially devastating environment for the local television station.

IV. Remedies Under Copyright Law

A. *Copyright Protection for Television Signals Retransmitted on Cable Systems*

The television signals pirated by CANCOM consist of audiovisual works "authored" by a variety of program producers and television stations themselves. The first place television authors naturally would look for relief from the CANCOM problem would be copyright law.

Under the U.S. Copyright Code,[17] television programs are copyrightable works. The Code specifically states that copyright protection shall be afforded works of authorship including "motion pictures and other audiovisual works."[18] This protection extends not only to individual programs broadcast over-the-air, but also to a television station's entire broadcast day, as a compilation.[19] Television signals are "fixed" as required by the statute[20] by recording them on videotape.[21]

The U.S. Copyright Code, with its basis in the Constitution,[22] is designed to encourage the creation of artistic works by ensuring that authors have control over their creations and are compensated for their use. Because CANCOM and Canadian

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16. *See Commercial Television Network Practices and the Ability of Station Licensees to Serve the Pub. Interest*, 62 F.C.C.2d 546, 551-53 (1977) (discussing operation of network broadcasting and relationship between networks and affiliates).

17. 17 U.S.C. §§ 101-914 (1982 & Supp. III 1985).

18. *Id.* § 102(a)(6). "Motion pictures" are defined as "audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion." 17 U.S.C. § 101 (1982). Television programming, whether recorded on celluloid film or videotape, would appear to fall within this definition. 1 M. NIMMER, COPYRIGHT § 2.09(D) (1986).

19. National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 378 (D.C. Cir. 1982).

20. 17 U.S.C. § 102(a) (1982).

21. *See* H.R. REP. No. 2237, 89th Cong., 2d Sess. 45 (1966) (reporting on H.R. 4347, an earlier version of the 1976 Copyright Act).

22. U.S. CONST. art. I, § 8, cl. 8.

cable systems do not pay the authors of television signals for their use,[23] television program creators lose control over their programming and the right to be compensated for its use. It seems clear, therefore, that under the basic intent of the U.S. Copyright Code, a copyright violation has occurred. Indeed, were the creative work involved here a written work, an author would be able to keep someone like CANCOM from expropriating the work and publishing it.[24] However, because the medium of communication here is television, and the work is an audiovisual creation, the rights of program producers are not as clear.

Whereas traditional copyright protection of literary books protects an author's work from copying, authors of audiovisual works are similarly protected from the unauthorized public performance or display of their works.[25] What constitutes a public performance or display has been the subject of heated litigation since soon after the turn of the century.[26] With the advent of cable television systems,[27] the question arose as to whether the retransmission of television signals constituted an infringement of the copyright held by television program producers. What made cable carriage of television signals different from the rebroadcast of radio signals was that cable systems were charging customers to receive these signals over coaxial cable. Nevertheless, in *Fortnightly Corp. v. United Artists Television, Inc.*,[28] and again in *Teleprompter Corp. v. Columbia Broadcasting System*,[29] the Supreme Court concluded that the retransmission of broadcast signals was not a "performance," and, hence, that cable systems did not violate the Copyright Code by carrying television signals without compensating either the television sta-

23. *S. 736 Hearing, supra* note 7, at 77 (statement of Harry R. Olsson, Jr., General Counsel, CBS, Inc.).

24. 17 U.S.C. § 106 (1982). *See generally* Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

25. 17 U.S.C. § 106(4)-(5).

26. *See* Patterson v. Century Prods., Inc., 93 F.2d 489, 493 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938) (display of motion picture copy, even though enlarged, constituted a violation of the right to copy granted in § 1(a) of the 1909 Act); Jerome H. Remick Co. v. American Auto. Accessories Co., 5 F.2d 411, 412 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925) (radio broadcast is a public performance).

27. For a discussion of the origins of cable television, see generally *Rules re Microwave-Served CATV*, 38 F.C.C. 683 (1965).

28. 392 U.S. 390 (1968).

29. 415 U.S. 394 (1973).

tion or the program copyright holder.[30]

In direct response to *Fortnightly* and *Teleprompter*, Congress, in 1976, enacted section 111 of the Copyright Code.[31] Section 111 established a compulsory licensing scheme whereby cable systems are now required to pay a percentage of their gross revenues,[32] attributable to the carriage of television programming, into a pool which is then distributed to various copyright holders by the Copyright Royalty Tribunal (CRT).[33]

By paying the section 111 compulsory license fee, cable operators in the United States are free to carry *any* television programming they can obtain. With the creation of "superstations" such as Turner Broadcasting's WTBS out of Atlanta, among others, and the increased uplinking of other television programming, cable systems now have access to large numbers of "dis-

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30. *Fortnightly Corp.*, 392 U.S. at 400-01; *Teleprompter Corp.*, 415 U.S. at 405.

31. 17 U.S.C. § 111 (1982). Section 111 states, in pertinent part:

> [S]econdary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

Id. § 111(c)(1).

"[P]rimary transmission" is defined as "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted." *Id.* § 111(f).

"[S]econdary transmission" is defined, in pertinent part, as "the further transmitting of a primary transmission." *Id.* It should be noted that pursuant to section 111(c), Canadian program producers are entitled to receive compensation for the cable carriage of their programming. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 88-89, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5702-03.

32. The Copyright Office's definition of "gross revenues" under section 111(d) was recently overturned by a federal district court. Cablevision Co. v. Motion Picture Ass'n of Am., Inc., 641 F. Supp. 1154, 1160 (D.D.C. 1986). In *Cablevision Co.*, Judge Green concluded that the compulsory copyright license was payable only upon revenues generated by the carriage of television programming. Thus, the Copyright Office's regulations that required inclusion in gross revenues of all revenues collected on cable tiers (groups of channels available for one price) that contained any television programming was overinclusive. Judge Green, however, declined to specify how "gross revenues" should be defined. *Id.* at 1162-63.

33. 17 U.S.C. § 111(d)(5) (1982) (setting forth procedures for the distribution of royalty fees). For a discussion of the compulsory copyright scheme, see generally National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982).

tant signals."[34] As long as these cable systems pay the requisite fee,[35] they cannot be held liable for copyright infringement.

This highly complex and interdependent legislative design achieves two important social goals. It seeks to grant proprietors of copyrighted program products rights similar to those afforded traditional literary works and to avoid the unjust enrichment of the cable operators for whom television programming, originally broadcast by television stations, constitutes a major part of their stock in trade. It also removes possible barriers to the wide distribution of programming by cable television systems.[36] When it comes to the operation conceived of and implemented by

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34. A "distant signal" is one that cannot normally be viewed over the air in the community in question. Under the current copyright regulations, distant signals are defined by the must-carry rules as they existed on April 15, 1976, 47 C.F.R. §§ 76.51-.65 (1976). *See* 17 U.S.C. § 111 (f) (1982).

35. Cable systems pay the compulsory fee twice a year. It should be pointed out that a cable system is liable for the full six-month fee for carrying a distant signal, even if it carries only a portion of that signal. Hence, if a cable system were to use a satellite downlink of a television station covering a live sporting event, it would have to pay the copyright fee on that station as if it carried it 24 hours a day, for the entire six-month period. The cost of adding an additional distant signal is substantial. If a cable system already has a full contingent of distant signals under the old market quota rules (47 C.F.R. §§ 76.51-.61 (1976)), to add an additional network distant signal can be expensive. If, for example, a cable system's gross revenues for a six-month period were $500,000, the base fee could increase up to $1100, and the "3.75 fee" could increase by nearly $4700, resulting in a copyright cost increase of approximately $5800 every six months. *See* 37 C.F.R. § 201.17(h) (1985) (explaining how to compute compulsory license); Copyright Office Form SA3, Statement of Account.

36. Such legislative design comports with the policy espoused in the cable communications amendment to the Communications Act:

> The purposes of this subchapter are to—
>
> (1) establish a national policy concerning cable comunications;
>
> (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
>
> (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
>
> (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
>
> (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and
>
> (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 521 (Supp. III 1985).

CANCOM, however, the system of reciprocal rights and obligations contemplated by section 111 collapses. United States program producers and television stations receive no compensation from CANCOM or Canadian cable systems under section 111.[37] Yet, due to the conflict between U.S. and Canadian policies on retransmission of audiovisual works, they are unable to prevent CANCOM from pirating and profiting from their work.

This conflict is understandable in view of the fact that the United States' current position on copyright liability of cable systems for retransmission of television signals is barely ten years old. Prior to 1976, the United States had adhered to the policy that cable retransmission of distant television signals was not a copyright infringement. Canada adopted a similar position in 1954[38] and adheres to it today. Canada has informed the United States that it is reviewing its copyright laws in this area.[39] There is, however, strong demand for American television in Canada[40] and this fact may lessen the possibility that Canada will amend its copyright laws in the foreseeable future. Thus, until such time as Canada adopts a policy consistent with section 111 of the U.S. Copyright Code, program producers and U.S. television stations cannot look to CANCOM or Canadian cable systems for compensation for the use of their works. Further, as long as the compulsory licensing scheme of section 111 remains absolute and allows U.S. cable systems to carry any broadcast signal they can receive, television stations have no ability to limit the retransmission of their signals in the United States.

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37 *See supra* note 7 and accompanying text.

38. Canadian Admiral Corp. v. Rediffusion, Inc., Can. Exch. 382 (1954). This noninfringement stance includes the importation and distribution of American television signals. *See* CRTC v. Shellbird Cable, Ltd., 60 C.P.R.2d 215, 218-19 (1981) (Defendant was found not guilty of charges that he violated the Cable Television Regulations by transmitting satellite signals because such signals did not meet the definitions of broadcasting and radio communication as set forth in the Broadcasting Act.); Regina v. Lougheed Village Holdings, Ltd., 58 C.P.R.2d 108, 112 (1981) (Court refused to exercise its discretion and permit the Crown to reopen the case after the Crown failed to prove that the defendant's transmission of satellite signals fell within the prohibitions of the Broadcasting Act because the transmissions were not radio communications.).

39. *See Copyright Compensation, supra* note 1, at 391-92 (discussing U.S.-Canadian negotiations in the copyright area).

40. *Id.* at 370-71.

B. *Passive Carriers and Section 111*

Whether CANCOM should ultimately be required to make a contribution for the performance of U.S. copyrighted works is further complicated by its status as a "middleman" which merely provides the signal to cable systems which, in turn, deliver the signal to the public. Section 111 of the Copyright Act,[41] for example, specifically provides that intermediary carriers of television programming, who do not alter the content of the signal, are themselves exempt from copyright liability.[42] This exemption was originally intended to ensure that common carriers,[43] such as microwave carriers, would not be found to be secondarily transmitting television signals.[44] In two cases,[45] however, the exemption for such "passive carriers" has been greatly and, it is submitted, erroneously expanded.

In *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*,[46] the owner of the New York Mets baseball team, attempted to keep Eastern from transmitting the signal of Station WOR-TV, New

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41. 17 U.S.C. § 111 (1982).

42. The statute provides, in relevant part:

> The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—
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> . . . .
>
> (3) 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: *Provided*, That [sic] the provisions of this clause extend only to the activities of said carrier with respect to secondary transmission and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions.

Id. § 111(a)(3) (emphasis in original).

43. "Common carrier" is defined as:

> any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 153(h) (1982).

44. Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 129-30 n.11 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) (quoting H.R. REP. No. 559, 97th Cong., 2d Sess. 4 (1982)).

45. *See Eastern Microwave*, 691 F.2d at 133-34. *See also* Hubbard Broadcasting v. Southern Satellite Sys., 777 F.2d 393, 401-02 (8th Cir. 1985).

46. 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

York, on Eastern's microwave and satellite system for distribution to cable systems around the country. WOR-TV did not object to the retransmission of its signal by Eastern.[47] Eastern was not compensated by the sender of the signal, WOR-TV, but rather by numerous cable systems that received the signal.[48] Doubleday claimed that its copyright in Mets games, sold to WOR-TV, was being infringed because it had not authorized Eastern to carry its signal nor had it delegated that power to WOR-TV.[49] The Second Circuit found that Eastern qualified under the section 111(a)(3) exemption for liability because it acted as a mere conduit for the signal and did not alter the signal in any manner.[50] The court did not find important the fact that Eastern had chosen which signal it would carry, rather than acting in the more traditional role of a common carrier who holds itself out to any customers willing to pay for transportation of signals of their choosing.[51] Further, the court concluded that Doubleday had suffered no harm because the various cable systems that received the signal were bound under section 111 to pay the copyright royalty for the carriage of WOR-TV on their systems, and Doubleday, as a copyright holder of audiovisual works, was entitled to claim its share of the royalty fee distribution.[52]

A similar decision was rendered in *Hubbard Broadcasting, Inc. v. Southern Satellite Systems.*[53] As in *Eastern Microwave,* the Eighth Circuit refused to find a copyright infringement where a carrier delivered the signal of a televison station to cable systems.[54] Southern Satellite carried Ted Turner's WTBS, Atlanta, Georgia, to a great number of cable systems across the United States. However, *Hubbard Broadcasting* differs from *Eastern Microwave* in two major respects. First, Southern Satel-

47. *Id.* at 126.

48. *Id.* at 133.

49. *Id.* at 126.

50. *Id.* at 130.

51. *Id.* The court concluded that since Eastern had only a limited capacity for carriage, there was nothing wrong with Eastern's choosing which signal it would carry, and therefore there was certainly nothing wrong with choosing a signal which would be profitable. *Id.*

52. *Id.* at 133.

53. 777 F.2d 393 (8th Cir. 1985).

54. *Id.* at 405.

lite at one time was owned by Turner Broadcasting,[55] adding a degree of privity between the parties not present in *Eastern Microwave*. Second, and more importantly, the signal carried by Southern Satellite was not identical to the signal transmitted over-the-air by WTBS. Instead, WTBS removed local commercials from the Southern Satellite signal and replaced them with national advertising.[56] In a sense, then, there were two WTBS signals. The court found that, because it was Turner that was stripping the commercials, to the extent that stripping actually occurred,[57] Southern Satellite was merely retransmitting the signal it received from Turner. Therefore, it fell within the exemption of section 111(a)(3).[58] As in *Eastern Microwave*, although Southern Satellite retransmitted no television signal other than WTBS, and did not hold itself out to any other television station, its status as a passive carrier was not diminished.[59]

The holdings in *Eastern Microwave* and *Hubbard Broadcasting*, buttressed by extremely strong language by both courts — that the only real requirement to being a passive carrier immune from infringement claims is not to tamper with the signal carried — could have broad consequences, especially as applied to the Alaskan CANCOM service described above. The key to the future application of both *Eastern Microwave* and *Hubbard Broadcasting*, it is submitted, is that neither WOR-TV nor WTBS complained about the fact that its signal was being distributed to cable systems all over the country. A question not presented in these cases, however, is the proper result if a television station itself objects to the carriage of its signal on a distant cable system. If the current trend continues, and more cable systems carry the Detroit feeds of network programming, West Coast and Alaskan network affiliate stations are bound to lose revenues and see the economic value of their network affiliation agreements as being impaired. At some point, the networks will

55. *Southern Satellite Sys.*, 62 F.C.C.2d 153 (1976). Turner gave away his 90% interest in Southern Satellite for nominal consideration. *Id.* at 154.

56. *Hubbard Broadcasting*, 777 F.2d at 397.

57. Turner argued that there was, in fact, no stripping of commercials, but rather, that *two* WTBS signals exist, both copyrightable works. Hubbard Broadcasting, Inc. v. Southern Satellite Sys., 593 F. Supp. 808, 815 (D. Minn. 1984).

58. *Hubbard Broadcasting*, 777 F.2d at 401.

59. *Id.* at 402-03.

have to step in and attempt to stop the pre-release of programming made possible by the retransmission by CANCOM or similar providers of Eastern and Central Time Zone feeds. Based on the holdings and language of both *Eastern Microwave* and *Hubbard Broadcasting*, however, it appears that, at least under a copyright infringement action, the networks will not be able to stop such retransmissions. Thus, under prevailing precedent, even if CANCOM were subject to U.S. copyright laws, it might well be exempt from copyright liability on the theory that it is acting merely as a passive carrier, retransmitting and selling the networks' signals to cable systems without stripping any of the commercials.

Such a result, however, is not in harmony with the Copyright Act of 1976. Congress could not have intended to allow such distributors to profit from the retransmission of television signals where that retransmission results in a very real harm to the copyright holder.[60] The legislative history of the 1976 amendments restates the historic principles that a copyright holder should have the "exclusive rights of reproduction, adaptation, publication, performance, and display" of his work.[61] Thus, although the networks receive a portion of the compulsory copyright fund,[62] they have lost control over the distribution of their product, and the manner in which it is being distributed is harming the very nature of their existence. Should the networks, at some future date, institute action against a U.S. domestic distributor engaged in activities similar to CANCOM's, it is hoped that the court will look beyond the compensation principle and

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60. History reveals a progression toward greater copyright protection. A review of judicial and legislative attitudes reveals a "gradual expansion in the types of works accorded protection." H.R. REP. No. 1476, 94th Cong., 2d Sess. 51, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5664.

The right to exclude others from the unauthorized use of copyrighted works has its basis in the common law and has been continuously reaffirmed. *See, e.g.*, Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) (discussing the common law right to exclude others from one's written work and the provision for redress when such right is violated); National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.D.C. 1982) (recognizing a broadcast station's copyright on its entire day as a compilation, rather than merely on an individual program).

61. H.R. REP. No. 1476, 94th Cong., 2d Sess. 61, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5674.

62. Television broadcasters received only 3.25% of the first distribution. *National Ass'n of Broadcasters*, 675 F.2d at 372.

reassert the copyright holder's statutory right to control the distribution of his work.[63]

C. *International Ramifications of Retransmission of Television Signals*

The conflicting stance of the United States and Canada on the issue of copyright infringement for the retransmission of television signals and the position of CANCOM under U.S. and Canadian laws are further complicated by the fact that, currently, the countries are not signatories to those international agreements intended to aid in the resolution of such disputes.[64] The United States is not a signatory to the Berne Copyright Convention,[65] while Canada is a signatory only to the 1928 version.[66] It was not until the 1967 version, however, that provision was made giving copyright holders control over the retransmission of their audiovisual works.[67] Thus, Canada is not bound to recognize the liability of cable systems for retransmission in the international arena. As long as Canada remains a signatory only at the 1928 "level," it is not bound to recognize rights in audiovi-

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63. 17 U.S.C. § 106 (1982).

64. For a review of the United States' and Canada's positions with respect to various major international treaties, see *Copyright Compensation, supra* note 1, at 367-69.

65. D. JOHNSTON, COPYRIGHT HANDBOOK 123 (2d ed. 1982). The Berne Convention is a union of countries formed for the purpose of protecting literary and artistic works of nationals of member countries and, to a limited extent, of the nationals of nonmember countries. *Id.*

The Berne Convention was originally signed in Berne in 1886 and has been revised on five occasions: 1908, Berlin; 1928, Rome; 1948, Brussels; 1967, Stockholm; and 1971, Paris. M. BOWMAN AND D. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 9 (1984). For the most recent version of the convention, see *Berne Convention for the Protection of Literary and Artistic Works,* July 24, 1974, *reprinted in* 1 Copyright L. Rep. (CCH) ¶ 11,402. *See generally* Comment, *Abandon Restrictions, All Ye Who Enter Here!: The New United States Copyright Law and the Berne Convention,* 9 N.Y.U. J. INT'L L. & POL. 455 (1977) (discussing the progression of U.S. copyright law in light of developments in international copyright law).

66. M. BOWMAN & D. HARRIS, *supra* note 65, at 9. By its terms, member nations of the Berne Copyright Convention are only bound by the latest version to which they have become a signatory. *Berne Convention for the Protection of Literary and Artistic Works,* July 24, 1971, art. 32, *reprinted in* 1 Copyright L. Rep. (CCH) ¶ 11,455.

67. The 1967 text provides that "authors of literary and artistic works shall enjoy the exclusive right of authorizing the broadcasting of their works and the communication to the public of the broadcast of the works if such communication is made for profit-making purposes." *Berne Convention for the Protection of Literary and Artistic Works,* July 14, 1967, art. 11, *reprinted in* 1 Copyright L. Rep. (CCH) ¶ 11,501.

sual works on an international level. Therefore, even if Canada, as a matter of national policy, recognized rights in audiovisual works for its own citizens, it is argued that it would not be required to go beyond the limited scope of the 1928 Berne Convention and extend those rights to foreign authors.[68]

The Universal Copyright Convention (UCC),[69] the copyright treaty to which the United States is a party,[70] is equally unhelpful. The United States and Canada are signatories, and, as such, are required to treat the works of each others' citizens as they would the works of their own citizens. The UCC, however, does not address the question of cable retransmission. Therefore, as one author has predicted, should Canada decide to amend its national law and provide protection to domestic television signals, it would not appear to be bound by the UCC to give similar protection to American copyright holders.[71]

Without adequate international or bilateral agreement, and with the national positions of the two countries in conflict, it would appear that for the moment, at least, Canada is unwilling (and arguably unable) to stop the delivery of CANCOM's pirated signal to Canadian cable systems.[72] Until such time as Canada chooses to change its policy on retransmission of television signals on cable systems, the United States is essentially powerless to protect its authors.

With regard to the reimportation of the pirated signal back into the United States, it appears that no remedy lies in the Copyright Code. CANCOM, which delivers the signal, is beyond

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68. *Copyright Compensation, supra* note 1, at 369. Although this might meet the letter of international law, it certainly appears to be inconsistent with the "national treatment" underpinnings of the Berne Convention.

69. Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 943 U.N.T.S. 178. The UCC was initially adopted Sept. 6, 1952, in Geneva, and has been revised only once, in 1971. M. BOWMAN & D. HARRIS, *supra* note 65, at 181.

70. The major impediment to the United States becoming a signatory to the Berne Convention has always been Article V(2) of the Paris revision which states that enjoyment of rights "shall not be subject to any formality." Although the 1976 Copyright Act eliminates a number of obstacles, the U.S. Copyright Code has always retained the formalization of a copyright notice placed on the work and a filing requirement. A. LATMAN & R. GORMAN, COPYRIGHT FOR THE EIGHTIES 306 (1981).

71. *Copyright Compensation, supra* note 1, at 369.

72. For a discussion of economic measures the United States could take against Canada to prompt it to change its position, see *id.* at 389-93.

the jurisdiction of the U.S. Copyright Code.[73] United States cable systems, which purchase the signal, are insulated from copyright infringement by the section 111 compulsory license, provided they pay the requisite fee.[74] If a present remedy exists for the reimportation of the pirated signal, it must be found outside the U.S. Copyright Code.

V. Remedies Under the U.S. Communications Act

In addition to the copyright questions discussed above, critical U.S. communication policies come into play when the CANCOM pirated signal is reimported into the United States. Section 325 of the Communications Act,[75] the non-duplication protection regulations,[76] and section 605 of the Communications Act,[77] as amended, all have a bearing as to whether the networks or their affiliate stations can stop the reimportation and carriage on cable systems of network signals pirated by CANCOM. Because of the pronounced Federal Communications Commission (FCC) policy of deregulation,[78] however, even the Communications Act may provide no relief from CANCOM's activities.[79] The only possible relief might require amending the FCC rules or the Communications Act itself.

A. *Section 325(b) and Canadian Pre-Release of American Television Programming*

Section 325(b) of the Communications Act requires that persons providing programming by electronic means to foreign stations whose signals are received in the United States, must first acquire a permit to do so from the FCC.[80] Because

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73. *See supra* text accompanying note 7.
74. *See supra* notes 31-35 and accompanying text.
75. 47 U.S.C. § 325 (1982).
76. 47 C.F.R. §§ 76.92-.99 (1985).
77. 47 U.S.C. § 605 (Supp. III 1985).
78. *Deregulation of Radio*, 84 F.C.C.2d 968, 968-69 (1981).
79. *See infra* notes 124-33 and accompanying text.
80. Section 325(b) states:

> No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there

CANCOM's pirating involves the transborder transmission of a broadcast signal, section 325 implications arise.

Section 325(b) was originally intended to prevent persons in the United States from using Mexican and Canadian border stations as a means of evading the jurisdiction of the FCC while still serving U.S. audiences.[81] The FCC's jurisdiction under section 325(b) has been limited to the electronic transfer of programming across the border. Early in the history of the Communications Act, in *Baker v. United States*,[82] the Fifth Circuit held that the "transmitted or delivered" language in section 325(b) did not include the *physical* delivering (or "bicycling")[83] of radio programming across the border.[84] The Commission recognized this limitation on its jurisdiction in 1979 and questioned the constitutionality of section 325(b).[85]

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having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.

47 U.S.C. § 325(b) (1982).

81. "Section 325(b) was enacted to curtail the activities of 'outlaw' U.S. broadcasters who use Mexican stations as a means of circumventing Commission licensing authority." *Sin, Inc.*, 101 F.C.C.2d 823, 824 (1985) (citing S. REP. No. 319, 73d Cong., 2d Sess. 1 (1934)).

82. 93 F.2d 332 (5th Cir. 1937), *cert. denied*, 303 U.S. 642 (1938).

83. The term "bicycling," genesis unknown, describes the physical carrying of videotapes or films over the border by any means of transportation, presumably even "by bicycle." With the advent of quality microwave connections, and now inexpensive satellite transponder rentals, almost all programming purchased by Canadian stations is fed electronically to the Canadian stations, at approximately the same time it is fed to U.S. stations. *Applicability of Section 325(b) of the Communications Act to Non-Interconnected Distribution of Television Programming to Certain Foreign Stations*, 75 F.C.C.2d 304, 329 (1979) [hereinafter *Pre-Released TV Programming*].

84. *Baker*, 93 F.2d at 333. The court explained that the transporting of a phonographic record that embodied recorded sound waves across the U.S.-Mexican border for purposes of broadcast back into the United States was not the type of transmission contemplated by section 325(b). It was the sending of sound waves themselves, rather than the transporting of a phonographic record embodying the sound waves, that violated section 325(b). *Id.*

85. *Pre-Released TV Programming*, 75 F.C.C.2d at 306.

The FCC recommended to Congress repeal of section 325(b) based on the fact that "[i]t can be argued that the permit requirement constitutes an impermissible prior restraint on the exercise of free speech." Federal Communications Comm'n, 97th Cong. 2d Sess., Proposal of Amendments to the Communications Act of 1934, at 51 (Sept. 17, 1981). This recommendation received support from both the Chairman and the ranking minority member of the House Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce. "[T]he requirement of obtaining a license to export programming under this section [47 U.S.C. § 325(b)] raises

In the 1960's, the FCC was asked by television interests[86] to address the question of Canadian pre-release of programming.[87] After a long inquiry, the Commission, in 1967, rejected a proposal that it invoke its jurisidiction to require cable systems, upon request by a local station, to refrain from presenting network programs when broadcast by foreign stations before their initial domestic use.[88] The request by a number of stations was prompted by the older practice of Canadian television stations of buying American programming, having it "bicycled" over the border, and then showing it prior to its initial use on U.S stations.[89] The Commission, in deciding not to promulgate regulations in this area, concluded that the pre-release problem was one that should be addressed on a case-by-case basis.[90] During the 1970's, the Commission sometimes protected the local stations,[91] but, more often, protection was denied after the Commission found that no harm would befall the local station as a

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serious First Amendment concerns of prior restraint." Memorandum from Timothy E. Wirth and James M. Collins to members and staff of the House Subcommittee on Telecommunications, Consumer Protection, and Finance (Apr. 25, 1982). Despite this support, however, the amendment to the Communications Act enacted by the 97th Congress did not repeal section 325(b). Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982).

86. *See infra* notes 88, 91.

87. The FCC first took up the problem of reimportation of American programming prior to the enactment of the non-duplication rules. Its initial analysis was under section 325(b) and dealt with the problem of over-the-air reception of Mexican radio signals which broadcast American programming. *See supra* notes 81-84 and accompanying text.

The advent of cable television has complicated the problem. The delivery of television signals to stations and cable systems via satellite creates a completely different problem than that which faced the FCC in the early 1960's. *See Pre-Released TV Programming*, 75 F.C.C.2d at 307-09 (discussion of pre-release by Canadian stations within the context of both section 325(b) and cable non-duplication rules).

Pre-release is discussed first in the historical context of section 325(b). However, it is submitted that the non-duplication rules, and their interpretation, provide a better starting point for this discussion, and ultimately, a better potential solution. *See infra* notes 103-17 and accompanying text.

88. *CATV*, 6 F.C.C.2d 309, 316 (1967).

89. The programming was often pre-released by Canadian stations and received over-the-air by U.S. border cities, sometimes as much as two weeks in advance. *See* KIRO, Inc. v. FCC, 545 F.2d 204, 208-09 n.10 (D.C. Cir. 1976).

90. *CATV*, 6 F.C.C.2d at 316.

91. *See, e.g., Jamestown Cablevision, Lakewood, New York*, 6 F.C.C.2d 635 (1967) (under certain circumstances, cable system required to refrain from broadcasting network programming in advance of local station's broadcast).

result of Canadian pre-release of some of its programming.[92]

Partly in response to the *KIRO* decisions, the Commission, in 1979, reaffirmed its position in *Pre-Released TV Programming*.[93] In response to ABC's Petition for Rule Making requesting blanket protection for "bicycled" programming to Canada,[94] the Commission again found that border stations should not automatically be given non-duplication protection against Canadian stations which cleared network programming prior to the U.S. stations.[95] The Commission continued to place a heavy burden on U.S. television stations to prove harm on a case-by-case

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92. *See Colorcable, Inc.*, 25 F.C.C.2d 195 (1970); *Vanhu, Inc.*, 47 F.C.C.2d 1244 (1974), *remanded sub nom.*, KIRO, Inc. v. FCC, 545 F.2d 204 (D.C. Cir. 1976), *Vanhu, Inc.*, 65 F.C.C.2d 986 (1977), *rev'd sub nom., United Community Antenna Sys., Inc.*, 75 F.C.C.2d 448 (1979), *aff'd sub nom.*, KIRO, Inc. v. FCC, 631 F.2d 900 (D.C. Cir. 1980). The court's decision in *KIRO* may provide aid to Alaskan stations in future actions before the FCC. There, the Commission had denied relief for television station KIRO, Seattle, Oregon, in both *Vanhu* and *United Community*, because KIRO submitted no detailed showing of the harm it would suffer by the pre-release. In deciding to remand, the court found that the Commission failed to state with particularity why a detailed showing was required. *KIRO, Inc.*, 545 F.2d at 208. More importantly, the court quoted from Commissioner Kenneth Cox's dissent in *Colorcable, Inc.* to conclude that some harm may be inferred from the facts of the case.

> It seems to me that, in terms of both logic and equity, a cable system's carriage of a Canadian station's pre-released United States network programs, . . . is a more serious threat than another domestic station's simultaneous carriage of the same network service. Our rules clearly protect against the latter. We should also protect against the greater threat.

545 F.2d at 208 (quoting *Colorcable, Inc.* 25 F.C.C.2d at 207 (Cox, Comm'r, dissenting)) (ellipsis in original). Had the Commission not readdressed this problem in 1979, Alaskan stations would have an excellent argument that harm may be inferred in the CANCOM situation warranting non-duplication protection.

93. 75 F.C.C.2d 304 (1979).

94. The Commission noted that it was addressing only the problem of physically delivered programming, and not programming which is electronically delivered. *Id.* at 306.

95. "Pre-release involves neither unfair competition nor copyright infringement. Claimed 'unfairness' to U.S. broadcasters in the exposure of their audiences to pre-released programming, is, we think too frail a need to support a general prohibition, absent demonstrated harm to the public through the consequent loss of valuable program services." *Id.* at 333.

basis.[96] In *KIRO, Inc. v. FCC*,[97] a subsequent attempt by television station KIRO to gain non-duplication protection against Canadian pre-release, the court upheld a Commission denial of non-duplication protection "only because it has made a convincing case for denying KIRO protection *regardless of the applicability of a presumption of harm.*"[98] The court nevertheless continued to criticize the Commission's lack of an adequate explanation of its policy in this area.[99]

In the only other attempts to obtain non-duplication protection from pre-released network programming, the Commission concluded that the stations had failed to meet their burden of showing the requisite harm.[100] Thus, were an Alaskan television station to seek relief under section 325(b), the Commission

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> In individual cases where the practice is shown to have injurious effects we can consider requests for protection by licensees as petitions for special relief pursuant to Section 76.7 of the Commission's Rules. This section requires petitioners to meet a substantial burden of proof by showing clearly, with reference to specific facts, that the station will be unable to continue to operate in the public interest absent relief.

Id. at 339.

The standard adopted is the same economic showing cable systems must use in requesting a waiver of the non-duplication rules. Because of the nature of the formula, the numbers almost always work out to show insufficient economic impact to warrant non-duplication protection. In *Community Tele-Communications, Inc.*, 100 F.C.C.2d 1261 (1985), the futility of trying to prove harm to a local station became evident. There, the local station complained that 55 hours per week of its programming (or 37%) was being duplicated by an imported distant signal. *Community Tele-Communications, Inc.*, 95 F.C.C.2d 239, 240 (1983) (prior decision). Nevertheless, the Commission, after applying a formula intended to determine actual audience loss due to the duplication, concluded that only 3.57% of the local station's audience would be diverted by the imported distant signal and that the station would lose only 2.68% of revenues because of the competition. *Community Tele-Communications, Inc.*, 100 F.C.C.2d at 1266-67. Non-duplication protection was therefore denied. The problem with the formula is that because of the multiplication of small fractions in the numerator, divided by a large number in the denominator, audience diversion can never be more than a small percent. Thus, under the Commission's non-duplication waiver formula, now applicable to competition from CANCOM's signal, virtually no Alaskan station can prevail.

97. 631 F.2d 900 (D.C. Cir. 1980).

98. *Id.* at 907 (emphasis in original).

99. *Id.*

100. *See, e.g., Maine Cable TV, Inc.*, 50 Rad. Reg. 2d (P & F) 247, 248 (Cable TV Bur. 1981) (petition for relief denied where "nearly 60% of [station's] weekly prime time programming" was pre-released by Canadian stations); *General Elec. Cablevision Corp.*, 50 Rad. Reg. 2d (P & F) 564, 568 (Cable TV Bur. 1981) (petition for relief denied where 47% of station's programming was pre-released by Canadian stations).

would most likely reject the request based on prior precedent indicating that insufficient adverse harm has befallen the television station to warrant intrusion by the FCC to stop the importation of the programming. Having found a different situation (pre-release of American programming by Canadian television stations by a few days or weeks) not to be a problem, the Commission has expanded this finding to include a situation far different — the pre-release of programming over cable systems by a matter of hours. The nonavailability of a remedy under section 325(b) suggests that pre-release in Alaska is now better suited for treatment under the non-duplication rules — rules which were originally adopted expressly to reduce the impact of the importation of distant signals by cable systems.[101]

There is an additional problem with trying to invoke section 325(b) in this situation. Historically, the FCC has decided section 325(b) questions only after local stations have opposed requests for permits from program providers.[102] With respect to CANCOM distributed programming, however, no request for authorization to provide programming to Canada has ever been filed; CANCOM has never sought authority from the FCC for its activities. More importantly, the party "providing" the programming, the Detroit television station, does not even approve of CANCOM's actions. Further, that station can do nothing to stop CANCOM's pirating short of turning off its transmitter. Thus, although section 325(b), in theory, could provide relief to Alaskan stations, in practice, it cannot provide help. The only effective way of preventing CANCOM from picking up the signal and uplinking it for redistribution is to shut down the Detroit stations — not a solution at all.

B. *Non-Duplication Protection for Alaskan Affiliates*

The FCC's rules[103] granted certain television stations protection from cable systems carrying distant television signals, whether domestic or imported from Canada, which duplicated the local station's programming. Originally promulgated to ensure that cable systems would not harm local licensees by im-

101. *See KIRO, Inc.*, 631 F.2d at 901.
102. *See generally Pre-Released TV Programming*, 75 F.C.C.2d 304 (1979).
103. 47 C.F.R. §§ 76.92-.161 (1972).

porting adjacent large market stations into smaller markets, the non-duplication rules forced cable systems to "black out" duplicative programming.[104] The rules applied to syndicated as well as network programming and sports broadcasts.[105] Non-duplication protection was also allowed on a "same-day" basis. For example, the local television station could request protection from an imported program no matter what time of the day it was broadcast, as long as the local station's broadcast of the program was on the same day.[106] The FCC has severely curtailed non-duplication protection in recent years. In *Reconsideration of Cable Television Report and Order*,[107] the FCC abolished same-day protection and limited protection to simultaneously broadcast programming only. The Commission concluded that non-simultaneous duplication by cable systems posed no significant harm to local television stations.[108] In *CATV Syndicated Program Exclusivity Rules*,[109] the FCC eliminated protection for syndicated programming.[110]

In *Teleprompter Cable Co.*,[111] the FCC addressed the problem of pre-release of ABC *Monday Night Football*. There, an ABC affiliate in the State of Washington attempted to obtain non-duplication protection against an imported ABC affiliate which delayed ABC *Monday Night Football* by an hour.[112] The Commission rejected the local Kennewick, Washington station's claim of non-duplication protection against the imported signal

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104. For example, the black-out would have precluded the wholesale importation of duplicative New York City television stations into smaller upstate New York markets. *See generally KIRO, Inc.*, 631 F.2d 900 (D.C. Cir. 1980).

105. 47 C.F.R. § 76.151 (1972).

106. *CATV Second Report & Order*, 2 F.C.C.2d 725, 746 (1966).

107. 36 F.C.C.2d 326, 337 (1973).

108. *Id.* "Same-day" protection was retained for the Mountain Time Zone, however, because of its peculiar history of prime time programming. *Id.* at 337-38. *See supra* note 10 (terrestrial feed of prime time programming from Central Time Zone required Mountain Time Zone stations to show such programming between 6:00 p.m. and 10:00 p.m.).

109. 79 F.C.C.2d 663 (1980), *aff'd sub nom.* Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub nom.* National Ass'n of Broadcasters, 454 U.S. 1143 (1982).

110. *Id.* at 815. Syndicated programming is programming produced primarily for non-network stations and consists either of programming previously aired on network stations, or programs produced specifically for independent stations (so-called "first-run" syndication). *Malrite T.V.*, 652 F.2d at 1143 n.1.

111. 46 F.C.C.2d 845 (1974).

112. *Id.* at 846.

of a Spokane, Washington station on the basis that the signals were not broadcast simultaneously.[113]

Teleprompter, however, can be distinguished from the situation in Alaska. In *Teleprompter*, the station that broadcast ABC *Monday Night Football* first was the local station, while the imported station was the one delaying the broadcast one hour. Thus, the potential for audience defection to the cable-carried distant signal was less in *Teleprompter*, because viewers would have to make a conscious decision not to watch the live telecast, and instead, to wait an hour until the distant station's programming began.

The situation in Alaska is exactly the opposite. The CANCOM feed of ABC *Monday Night Football* from Station WXYZ in Detroit is being carried on cable systems in Alaska *prior* to the local affiliate's showing of ABC *Monday Night Football*. The potential for loss of audience and the corresponding loss of advertising revenues is obvious. Viewers who subscribe (or have access) to cable will watch the local ABC affiliates on Monday night, only if they decide not to watch the live broadcast carried on cable, and instead, wait two hours until the local affiliate shows the broadcast in prime time.[114]

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113. We find that [the cable system's] carriage of KREM-TV's delayed broadcast did not violate the network exclusivity rules, because KREM-TV did not simultaneously duplicate KVEW's broadcast. [The complainant] is incorrect in its contention that exclusivity should apply for the duration of the program. Section 76.93(b) provides for same-day exclusivity only for stations in the Mountain Time Zone under Section 76.93(a); all other stations are entitled only to simultaneous exclusivity. As we [previously] stated . . . "to qualify for simultaneous exclusivity protection, no more than five or ten minutes of a program may be overlooked." *Teleprompter Cable Co.*, 46 F.C.C.2d at 846-47.

114. There is an additional problem with ABC *Monday Night Football* pre-releases. The live feed of the WXYZ signal is shown on cable signals paying for the CANCOM feed at 5:00 p.m. in many parts of Alaska. Many restaurants and bars take advantage of this time by featuring "happy hours" during which they show the game, enticing workers to spend the evening watching the game in the bar rather than at home on the local affiliate. ABC and the NFL have been successful in stopping bar rebroadcasts where the bar owners pick up the feed via satellite dish. *See, e.g.*, Entertainment and Sports Programming Network, Inc. v. Edinburg Community Hotel, Inc., 623 F. Supp. 647 (S.D. Tex. 1985); National Football League v. McBee & Bruno's, 621 F. Supp. 880 (E.D. Mo. 1985), *modified*, 792 F.2d 726 (8th Cir. 1986); National Football League v. The Alley, Inc., 624 F. Supp. 6 (S.D. Fla. 1983). In these cases, bar, restaurant, or hotel owners were found liable for copyright infringement for rebroadcasting football games in their establishments. In the past, the NFL and networks had not filed suit against bar owners who receive the WXYZ signal via cable, because the NFL would have to prove a violation of

If there was ever a time for the Commission to take a harder look at Canadian pre-release of programming, it is now. The potential harm to both local stations and the network affiliation system must raise questions in the Commissioners' minds as to the proper standard to be applied for measuring harm. Sheer loss of audience, calculated by a complicated formula, as has been undertaken in section 325(b) cases, is only one level of harm the stations suffer in this instance. The overall value of a network affiliation is severely eroded when the programming broadcast is no longer exclusive, nor even first in time. It is time to give credence to former Commissioner Cox's analysis in *In re Colorcable, Inc.*[115] Under any standard of logic and equity, television stations in small Alaskan markets must be given some protection against the importation of signals of large market stations that do not authorize extension of their programming into the Alaskan markets.[116] It is submitted, however, that relief cannot be granted under section 325(b). Not only is the Commission's analysis under section 325(b) outdated and ill-suited to deal with two hour pre-release of live sporting events on cable systems, it is of questionable constitutionality.[117] Rather, relief is better suited under the non-duplication rules. Although amending the non-duplication rules would fly in the face of the FCC's policy of deregulation, the foregoing discussion clearly establishes that, in this narrow factual situation, relief from pre-released duplicative programming is at least as necessary as is relief from simultaneous duplication, for which protection is now granted. This being the case, minor expansion of the non-duplication protection rules is clearly warranted.

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section 110(5) of the Copyright Act (and the "1055 square foot rule"), in order to prevail. *See* Sailor Music v. The Gap Stores, Inc., 668 F.2d 84, 86 (1981). *But see* Communications Daily, Dec. 20, 1985, at 8 (ABC and NFL to sue Alaskan bar owners for carriage of ABC *Monday Night Football*).

115. 25 F.C.C.2d 195, 207 (1970). *See supra* note 92.

116. That Detroit network stations do not want their programming exported to Alaska can be said with a great degree of confidence, especially since WXYZ, Detroit, is owned and operated by ABC. ABC must fully realize the threat WXYZ can cause to one of its own affiliates.

117. *See supra* note 85. *See also Delivery of Broadcast Matter to Foreign Stations*, 46 Rad. Reg. 2d (P & F) 1688, 1689 (FCC 1980).

C. *Section 325(a) and Originating Station Consent for Rebroadcasting*

Section 325(a) prohibits a broadcast station from rebroadcasting the program of any other broadcast station without first receiving the originating station's authority.[118] Section 325(a) has the same intent as does the Copyright Code — to vest the rights to control the use of creative works in the "authors."[119] Before a program producer or television station can invoke section 325(a) to stop CANCOM's activities, however, it must overcome two fundamental limitations in the wording of section 325(a). First, CANCOM is not "within the jurisdiction of the United States" for the purposes of section 325(a). Second, CANCOM is not a broadcasting station within the meaning of the Communications Act.[120] Under a plain reading, section 325(a) only restricts retransmission by traditional broadcasting stations such as radio and television.[121] Because the term "broadcasting station" within the meaning of section 325(a) does not include cable stations, the FCC is powerless to promulgate rules pursuant to section 325(a) that would deprive CANCOM of its cable market in the United States by prohibiting domestic

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118. 47 U.S.C. § 325(a) (1982). This section states, in pertinent part:

> No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, *nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.*

Id. (emphasis added).

119. Frontier Broadcasting Co. v. FCC, 412 F.2d 162, 164-65 (D.C. Cir. 1969).

120. " 'Broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1982).

121. " 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(b) (1982).

A federal district court has held that cable systems are not "broadcasting stations" for purposes of section 325(a). Cable Vision, Inc. v. KUTV, Inc., 211 F. Supp. 47, 55 (S.D. Idaho 1962), *vacated and remanded on other grounds*, 335 F.2d 348 (9th Cir. 1964), *cert. denied sub nom.*, KLIX Corp. v. Cable Vision, Inc., 379 U.S. 989 (1965). Under this interpretation of section 325(a), there would be no cause of action against either CANCOM, since it is not a broadcaster, or the cable systems in Alaska who purchase and carry the pirated CANCOM signal.

cable systems from purchasing the pirated signals from that source. Absent statutory revision or expanded judicial interpretation, a program producer or television station would not be able to maintain an action against CANCOM under section 325(a).

It would not take much of an extension of section 325(a), however, to bring CANCOM's activities in the United States within that section's prohibitions. In discussing the intent of Congress in enacting section 325(a), the Court of Appeals for the District of Columbia Circuit made it clear that this section is intended to vindicate the right of the originating station to control its programs after they have left the antennas.[122]

The "spirit of the law," therefore, is clear. The Detroit network affiliate should have the same right to refuse rebroadcast authority to CANCOM that it has to refuse rebroadcast authority to any television station wherever located. To allow the rights of broadcasters to be eroded by technology to this extent is unconscionable.[123] Unfortunately, return to the prior intent of section 325(a) must await action by Congress.

D. *Section 605 of the Communications Act*

What happens to a U.S. broadcast signal, such as the signal of a Detroit network affiliate, once it enters the territory of a sovereign nation like Canada is clearly a matter beyond the reach of Congress and the Federal Communications Commission. The only hope of dealing with the use of such signals once they are in the neighboring country lies in our ability to reach an agreement with that country which protects our common interests in orderly channels of communications, or to enact restrictions on the use of signals carrying copyrighted materials once they are transmitted back into the United States. At that point, a remedy may be structured through unilateral legislative action to curtail the problem.

One model for such a solution is section 605 of the Communications Act of 1934, as amended,[124] which prohibits the unau-

122. *Frontier Broadcasting*, 412 F.2d at 165.

123. The circuit court recognized the problems of new technology in *Frontier Broadcasting*, 412 F.2d at 165.

124. 47 U.S.C. § 605 (Supp. III 1985).

thorized publication or use of certain communications by wire or by radio. Section 605 began as the anti-wiretapping provision of the Communications Act.[125] It was intended to prevent eavesdropping — the unauthorized interception and use of private conversations and other point-to-point communications.[126]

In 1984, section 605 was amended to exempt from its provisions the reception and private viewing of cable program materials when transmitted by communications satellites under certain specified conditions.[127] Section 605 has also been applied to protect such services as Subscription Television (STV),[128] Multipoint Distribution Service (MDS),[129] and cable television.[130] Although it is possible that section 605 could be amended once more to regulate the reception and distribution of network or other broadcast program materials received in the United States from a foreign domestic satellite, section 605 in its present form

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125. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 1968 U.S. CODE CONG. & ADMIN. NEWS (82 Stat.) 2112, 2113, 2154. *See, e.g.*, Nardone v. United States, 302 U.S. 379 (1937) (evidence obtained in violation of section 605 held inadmissible in criminal trial).

126. As originally adopted in 1934, section 605 embodied a broad public policy against eavesdropping on point-to-point communications such as telephone conversations. Section 605 was amended in 1968 to update and clarify the basic applicability of the prohibition against interception and disclosure. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 1968 U.S. CODE CONG. & ADMIN. NEWS (82 Stat.) 2112, 2154-55. It was again amended in 1982. *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (1982). Section 605 was renumbered and further amended in 1984. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §§ 5-6, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 2779, 2802-04 (1984).

127. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 5(b)-(e), 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 2779, 2802-03 (codified at 47 U.S.C. § 605(b)-(e) (Supp. III 1985)). Owners of home satellite dishes may receive cable programming transmitted via satellite as long as such programming is not encrypted or the program distributor has not established a local marketing system. 47 U.S.C. § 605(b) (Supp. III 1985).

128. Subscription Television Service (STV) is a broadcast service in which customers pay for programming by renting a reception box which will unscramble the STV signal. United States v. Westbrook, 502 F. Supp. 588, 589 (E.D. Ohio 1980). Interception of an STV signal has been held to be a violation of section 605. *Id.* at 590. *See also* Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980).

129. Multipoint Distribution Service (MDS) is similar to STV, except it operates on frequencies outside the television channels. Again, decoder devices are required in order for a subscriber to view the MDS programming. Movie Sys. v. Heller, 710 F.2d 492, 493 (8th Cir. 1983). Section 605 protects this service. *Id.* at 495.

130. Cimineli v. Cablevision, 583 F. Supp. 158, 161 (E.D.N.Y. 1984); Cox Cable Cleveland Area, Inc. v. King, 582 F. Supp. 376, 380 (N.D. Ohio 1983).

cannot be invoked to prevent CANCOM's practices.

When viewed in terms of the problem described here, section 605 has short arms, indeed. First, section 605 exempts all reception and use through "authorized channels of transmission or reception."[131] It is clear that the cable systems in Alaska that receive the Detroit television signals via CANCOM's Canadian satellite services are recipients of "authorized channels" within the meaning of section 605. Presumably, they receive and carry the Detroit programming with the contractual consent of CANCOM.

Second, the signals CANCOM uplinks are of a broadcast nature intended "for the use of the general public."[132] When the Detroit television stations broadcast their network and other programs, they do so for reception by all within their service area.[133] Unlike the classic telephone call, the broadcast signal received and transmitted by CANCOM is entitled to no expectation of privacy, but rather, is broadcast in the primary sense of that term. Section 605, as originally drafted and as amended to date, draws a clear line between the authorized reception of broadcast signals and the unauthorized interception of signals intended to be received by a specified addressee or group of addressees. Without further amendment, therefore, section 605 appears to provide no solution to the CANCOM problem.

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131. 47 U.S.C. § 605(a) (Supp. III 1985).

132. *Id.*

133. It can be argued that since television stations are limited by the FCC to serving discrete geographic areas, such stations do not intend that their signals be received beyond the FCC-licensed area, and thus, the use of their signals beyond that intended area is a violation of section 605. Industry practice belies this, however. "Superstations" such as WTBS thrive on the fact that their signals are viewed far beyond their local service areas because they are transported by middlemen to be carried by cable systems. All stations seek the highest viewership possible over the widest area. Under the previous "must-carry" rules, 47 C.F.R. §§ 76.51-.64 (1976), stations must carry signals beyond their licensed service areas if they were "significantly viewed" in the county of the cable system on which they desire cable carriage. 47 C.F.R. § 76.61(a)(5) (1976). "Significantly viewed" status is defined by 47 C.F.R. § 76.54 (1976). In light of these must-carry provisions, courts might view an argument by a television station that it does not intend its signal to be extended as coming with ill grace.

VI. Conclusion

As can happen so readily in today's society, it appears that technology has outstripped the law. Under any theory of logic and equity, what CANCOM is doing is wrong. Having no creative input into the television programming it pirates, it should not be able to profit from such retransmissions while the copyright owner of the programming receives little or no compensation. Further, where it can be demonstrated that importation of such far distant signals into small Alaskan markets harms local broadcasters, there should be some relief under the U.S. Communications Act. Because, however, the lawmakers did not foresee the possibility of such activities, inadequate relief exists today.

A solution to this growing problem could be achieved in three ways. First, the United States and Canada can reach an accord on the protection of television programming. This can take the form of a bilateral agreement, participation in international treaties which protect television programming, or unilateral action by Canada to amend its laws to remove the conflict. Congress has called for such an agreement.[134] Since the CANCOM problem is essentially an international problem, this would be the most logical solution.

Second, the FCC could amend its rules to protect against pre-release of the CANCOM signal. The FCC has the power, pursuant to section 325(a), to require prior consent in the case of retransmissions. Only minor modification of the non-duplication rules would be necessary to ensure that Alaskan broadcasters retain the program exclusivity their affiliation contracts provide. Such modification need only expand non-duplication protection to situations in which distant signals that pre-release the programming of local signals are treated as if they are simultaneously duplicating such programming. Thus, local television stations could request protection from the pre-release of distant signals carried on local cable systems. Such a minor expansion of the rules would comport with the concerns raised by the court of appeals in *KIRO*. It would, likewise, alleviate a significant harm

134. *See* BROADCASTING, Oct. 13, 1986, at 104 (amendment to Omnibus Appropriations Bill calling for resolution of unauthorized use of U.S. programming).

to local television stations, especially those located in smaller television markets.

Third, Congress could adopt an explicit statutory solution aimed specifically at the CANCOM practice. A minor amendment to section 325(a) could be structured to bring CANCOM's activities within the jurisdiction of the FCC, by requiring U.S. cable systems to obtain the approval of originating television stations prior to using their signals. Such an enactment could ensure that program producers and television stations maintain control over the product they have created.

One final note of foreboding should be added. This Article has focused on the reimportation of the CANCOM signal into Alaska. Alaskan television markets are small and some might not appreciate the significance of what happens there. The same multiple system operators who purchase the CANCOM signal in Alaska, however, also own cable systems in Washington, Oregon, and other northern states. CANCOM's satellite footprint includes such territory. Should cable systems in these more populous states begin to purchase the pirated CANCOM signal, havoc to local stations and the network affiliation system could increase dramatically. The CANCOM problem is not limited to Canada and Alaska and, if trends continue, "creeping CANCOM" could severely damage the network television system as we know it and eliminate local television stations in smaller markets. Therefore, a remedy, such as one discussed herein, must be found.