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THE INTERNATIONAL IMPLICATIONS OF CANADA'S CANCOM POLICY:  
A HISTORICAL/CRITICAL ANALYSIS

©

by

James Andrew Love

A Thesis  
submitted to the  
Faculty of Graduate Studies and Research  
through the Department of Communication Studies  
in partial fulfillment of the requirements for the Degree  
of Master of Arts at  
the University of Windsor

Windsor, Ontario, Canada  
1989



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## ABSTRACT

Since the mid-1950's Canadian cable television systems have redistributed television signals of American over-the-air broadcasters. As a result of a 1954 Court decision, however, these cable systems were not required to provide royalty payments to the copyright owners of the programs carried in these broadcasts.

Since the United States adopted a copyright payment scheme for cable rebroadcasts in 1976, it has been pressuring Canada to update its Copyright Act to provide a similar "retransmission right" to copyright owners.

This thesis provides a historical/critical analysis of this copyright issue. It follows the regulatory history of the carriage of U.S. signals by Canadian cable companies from the introduction of the technology to the present. It examines how this international copyright "irritant" has been exacerbated by the Canadian Radio-television and Telecommunications Commission's (CRTC) authorizing of Canadian Satellite Communications Inc. (CANCOM) to distribute U.S. signals throughout Canada.

The thesis surveys the arguments which each of the industry groups have put forward in support of its position on this matter. It also examines the issue from the perspective of the copyright owners and broadcasters in the United States. Those sections of the Canada-U.S. Free Trade Agreement which relate to the retransmission issue are reviewed. This Agreement represents



a monumental step in resolving this dispute because, as a result, Canada has committed itself to introducing a retransmission right for cable rebroadcasts. Finally, the potential reactions of the copyright owners and retransmitters may have to this development are discussed.

DEDICATION

For my wife Karen, and my parents Bob and Helen

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The completion of this thesis was made possible only through the assistance, time, and patience of my friends and colleagues.

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## INTRODUCTION

Since the mid-1950's Canadian cable television systems have redistributed the television signals of American over-the-air broadcasters. The extent of this activity increased substantially after 1970 when the Canadian Radio-television and Telecommunications Commission (CRTC) permitted the distribution of U.S. signals to distant markets within Canada by microwave. Within the last decade the CRTC has promoted the carriage of U.S. network stations to most regions of Canada with the licensing of Canadian Satellite Communications Inc. (CANCOM).

As a result of a Court decision in 1954, however, Canadian cable systems simultaneously redistributing over-the-air broadcast signals are not required to provide royalty payments to the copyright owners of the programs contained in those broadcasts. Since the United States adopted a copyright payment scheme for cable rebroadcasts in 1976, it has been pressuring Canada to update its Copyright Act to provide a similar "retransmission right" to copyright owners.

This thesis provides a historical analysis of the cable/copyright retransmission issue. It chronicles the regulatory history of the carriage of U.S. broadcast signals from the introduction of cable television to the present and examines the arguments which have been presented to the Canadian government, from both Canada and the United States, on this issue. The steps which the Canadian government has recently

taken to update its Copyright Act are discussed. A critical assessment of the copyright payment scheme which it has chosen to adopt is also provided.

Chapter one provides an overview of the regulatory history of cable television and related distribution systems within Canada. Particular attention is paid to the manner in which the Canadian Radio-television and Telecommunications Commission has regulated the use of over-the-air broadcast signals by cable companies. The CRTC, which was originally opposed to allowing cable companies to "import" the signals of distant broadcasters into their service areas, was forced to modify its position on this "distant signal" issue as a result of the unfavorable public response to it.

The CRTC's attempt to provide greater programming choice to "remote and underserved communities" through the licensing of the Canadian Satellite Corporation Inc. (CANCOM) is examined. The regulatory history of CANCOM illustrates that, in addition to its initial mandate to provide programming for underserved regions, it has subsequently been permitted to provide larger and less remote markets with a number of signals from Canadian and U.S. broadcasters.

Finally, this chapter will examine the CRTC's attempt to regulate the cable companies and CANCOM, in light of its long-standing concerns over the issues of program owner's rights and copyright. This is viewed within the context of Canadian copyright law and Canada's international obligations to various

international copyright conventions.

Chapter two examines six studies published by the government between 1957 and 1984. The various arguments and recommendations which have been suggested in each of these reports are surveyed. This discussion demonstrates how the opinion within Canada has evolved from being strongly opposed to the implementation of a retransmission right to a position in which it approves such a right given specified conditions are met. In light of the focus of this thesis, that is, to examine the international pressures which have arisen as a result Canada's willingness to permit the uncompensated use of broadcast signals on cable, the reviews of these studies address the possible treatment of copyrighted works in foreign broadcast signals.

Chapter three surveys the arguments which the various Canadian industry groups have put forward in support of their position on the retransmission issue.

Chapter four examines this same issue from the perspective of the copyright owners and broadcasters in the United States. Their attempts to persuade Canada to protect retransmitted programming stems from the fact that the United States government passed a revised Copyright Act in 1976 which includes a retransmission right for cable companies. Under this revised Act the copyright owners receive royalty payments when their works are simultaneously retransmitted by cable. This chapter analyzes how the debate has intensified as a result of CANCOM being permitted to expand its services into more populous regions of



Canada.

Chapter five reviews the diverse approaches which the United States government has investigated as a means of encouraging the Canadian government to recognize the retransmission rights of the American broadcasters and copyright owners. These approaches are categorized under the headings of multilateral treaties and forums, direct retaliation, and linkage to other trade issues. The relative merits provided by each of these methods of "persuasion" are examined from a U.S. perspective. The use of these methods by the United States in responding to similar international copyright and trade problems are examined. This analysis helps summarize the approaches the U.S. government may adopt if Canada does not work to resolve this cable/copyright issue.

Chapter six investigates a number of positive developments which have occurred since 1985 which suggest that Canada and the United States may soon resolve this dispute. It will provides an outline of the recommendations dealing with cable retransmissions and copyright suggested in the Subcommittee on the Revision of Copyright's report "A Charter of Rights for Creators". This report represents a "turning point" as it is the first government document which recommends that Canada should amend its Copyright Act to include a retransmission right which treats both nationals and non-nationals in an equal manner.

In addition, this chapter examines the aspects of the Canada-U.S. Free Trade Agreement which relate to the issue of

retransmission. This agreement represents a monumental step in resolving this issue because, as a result, Canada has committed itself to including a retransmission right for cable rebroadcasts in its Copyright Act. The legislation introduced to implement the Free Trade Agreement is examined. Finally, the reaction which the copyright owners and the retransmitters may have to the new regime is discussed.

## CHAPTER 1

### THE DEVELOPMENT OF THE CRTC'S CABLE AND CANCOM POLICY

This chapter provides an overview of the regulatory history of cable television and related distribution systems within Canada. Particular attention is paid to the manner in which the Canadian Radio-television and Telecommunications Commission has regulated the use of over-the-air broadcast signals by cable companies. The CRTC was originally opposed to allowing cable companies to "import" the signals of distant broadcasters into their service areas but was forced to modify its position on this "distant signal" issue as a result of the unfavorable public response to it.

The manner in which the CRTC has attempted to provide greater programming choice to "remote and underserved communities" through the licensing of the Canadian Satellite Corporation Inc. (CANCOM) is also examined. The regulatory history of CANCOM illustrates that, in addition to serving these underserved regions, it has been permitted to provide larger and less remote markets with a number of signals from Canadian and U.S. broadcasters.

Finally, this chapter examines how the CRTC has attempted to regulate the cable companies and CANCOM, in light of their long-standing concerns over the issues of program owner's rights and copyright. This is done within the context of Canadian copyright law and Canada's international obligations to various international copyright conventions.

The Development of Cable Television in Canada<sup>1</sup>

Although there has been some dispute over the issue, it is generally felt that the first cable television system was introduced in 1952 in London, Ontario by E.R. Jarmain. In the early fifties the only signals available in the London region originated in Cleveland, Ohio. These signals, however, were beyond the reach of the existing antennas. Using his background from his electronics hobby, Mr. Jarmain built a special antenna to receive these distant signals. Mr. Jarmain's system remained quite small (35 subscribers) until the Famous Players Corporation entered into a partnership with Mr. Jarmain in 1959 forming London TV Cable Service Ltd. By 1962, the company had rapidly expanded and was serving over ten thousand households.

In the same year another cable system was introduced in Montreal by Rediffusion Inc. This company was originally established in 1949 as a distribution system for radio signals to Montreal subscribers. By 1952, Rediffusion would rent the subscriber a television set and offered them two channels of programming. One channel carried the then new station CBFT, the other offered three to four hours a day of films, locally produced news, and entertainment programs. When CBMT began offering service in 1954, Rediffusion substituted this signal for its in-house programming. In 1955 Rediffusion decided to enter

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<sup>1</sup> The material for the following two sections was derived from Canadian Radio-Television Commission, Cable Television in Canada, (January, 1971) pp.4-10.

into the converter business because it found that Canadians preferred owning rather than renting their television sets. Its system was, therefore, re-designed to distribute the signals from Burlington, Plattsburgh and Poland Spring, Maine. Rediffusion's service reached a total of 6,000 subscribers during its peak years. Its name was later changed to National Cablevision and was later to become one of Montreal's largest cable systems.

Cable television operators also flourished in British Columbia during the mid-1950's. By 1954 signals from Spokane, Washington were being received by cable systems over 100 miles away in communities such as Trail and Roseland, B.C. In 1958 Vancouver Television was established by Fred Welsh and Sons and served Vancouver and surrounding communities. After it entered into partnership with the Columbia Broadcasting System this cable system was the largest of its type in North America.

It has been suggested that the cable television industry in Canada reached its maturity with the creation of the trade association, the Canadian Television Association, in 1957. This association has represented the majority of Canadian CATV systems before the various regulating bodies in Canada.

#### Early Regulation of the Cable Television Industry

Prior to the passing of Canada's Broadcasting Act in 1968 the regulation of the cable industry fell under the duties of the Department of Transport (DOT). Although it was responsible for the licensing of cable systems, the Department's primary concern

at this time was the setting of technical standards for cable undertakings.

There were, however, some general policy decisions made by the DOT. One of its concerns was that cable systems might erode the economic base for existing or planned television stations in Canada. As a measure to prevent this possibility, in December of 1963, the Department decided not to issue new licences to cable undertakings which proposed to carry the signals of U.S. stations. After consultation with the Board of Broadcast Governors this policy was dropped in July of 1964. Another important policy established by the DOT was that of the "passive" role of cable. It maintained that cable systems should faithfully retransmit the signal of the originating station with no substitutions or deletions. Many of these general policy directions established by the Department of Transport and the Board of Broadcast Governors formed the basis for the general principles which were incorporated into Canada's Broadcasting Act of 1968.

Section 3(a) of Canada's Broadcasting Act declares that the Canadian radio frequencies are public property and that "all broadcasting undertakings in Canada constitute a single system."<sup>2</sup> Section 3 of the Act also defines Parliament's intent with respect to "Broadcasting Policy for Canada." These policies

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<sup>2</sup> Broadcasting Act, R.S.C. 1970, c.B-11, as amended in R.S.C. 1970, c.16 (1st Supp.), s.42(2), and R.S.C. 1970, c.10 (2nd Supp.), s.65.

declare that:

3(b) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;

3(d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunities for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominately Canadian creative and other resources;

3(e) all Canadians are entitled to broadcasting service in English and French as public funds become available;

3(j) the regulation and supervision of the Canadian broadcasting system should be flexible and readily adaptable to scientific and technical advances;<sup>3</sup>

Part II of the Act also establishes that the objectives found in Section 3 will be carried out by an independent authority to be known as the Canadian Radio-Television Commission (later to be renamed the Canadian Radio-Television and Telecommunications Commission). Section 15 of the Act states that:

the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in Section 3 of this Act. 1967-68 c.25, c. 15;

As the regulatory control over cable policy shifted from the Department of Transport to the CRTC, the cable industry

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<sup>3</sup> Ibid.

experienced a period of rapid expansion. Because the cable industry was playing a more important role in Canadian communications the CRTC felt that it should develop more precise regulatory guidelines to ensure that the service which cable offered was consistent with the objectives established in the Broadcasting Act. One of the first issues which the Commission had to consider as part of this comprehensive cable policy was whether or not cable systems should be permitted to redistribute signals originating from broadcasters in the United States.

The CRTC's Regulation of the Carriage of U.S. Stations by Canadian Cable Systems

During the regulatory period of the Department of Transport cable systems were permitted to distribute non-Canadian television signals to their subscribers as long as they were able to receive them locally over-the-air by antenna. The CRTC was acutely aware, however, that this policy could threaten the ability of Canadian broadcasters to provide local service. Accordingly, in an attempt to strengthen its commitment to both the local broadcasters and the objectives established in Section 3 of the Broadcasting Act, the CRTC established a number of policy guidelines which would provide for an increased emphasis on Canadian programming. In particular, it proposed a set of signal priorities for cable companies which requested that the signals on cable systems be carried in the following order of precedence; i) CBC English and French networks; ii) private



Canadian networks; iii) independent Canadian television stations; iv) local educational programming; v) non-Canadian television stations; duplicate channels.<sup>4</sup> This priority system meant that cable systems would first be required to provide the Canadian services (including network, independent, and educational) to their subscribers before they could begin to carry any non-Canadian signals.

As cable penetration began to increase rapidly during the late 1960's in Canada, many parties living in communities which were unable to receive the U.S. stations with conventional antennas began to approach the CRTC about the possibility of importing broadcasting programs from distant foreign stations with microwave. Since the CRTC's primary involvement with cable television prior to these requests, other than the signal priority proposal, had been with the processing of licensing applications for communities in which signal were available over-the-air, it felt that it was necessary to hold a formal public hearing to investigate this issue. The Commission thought that these hearings would assist it in developing some type of public statements on cable television policy which would act as a "guide" for cable television operators.<sup>5</sup>

After holding a series of public hearings in Vancouver and Ottawa, the CRTC, on December 3, 1969 issued an announcement

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<sup>4</sup> CRTC Public Announcement, Community Antenna Television, (13 May 1969).

<sup>5</sup> CRTC, Cable Television in Canada (January 1971).

which clearly outlined its position on the importation of U.S. television signals into distant communities in Canada by microwave. This statement read in part:

The problem facing the Commission is not whether the technology of microwave should be used to help the development of cable television. It is to decide whether the use of additional techniques should be authorized to enlarge the coverage area of U.S. networks and the U.S. stations and therefore their advertising markets in Canada.

The rapid acceleration of such a process throughout Canada would represent the most serious threat to Canadian broadcasting since 1932 before Parliament decided to vote the first Broadcasting Act. In the opinion of the Commission, it could disrupt the Canadian broadcasting system within a few years.

The fact that through force of circumstances many U.S. stations now cover other parts of Canada, and that some of them seem to have been established mainly to reach Canadian audiences does not justify a decision of the Commission which would further accelerate this process.

In consequence the Commission will not license broadcasting receiving undertakings (CATV) based on the use of microwave or other technical systems, for the wholesale importation of programs from distant U.S. stations and thereby the enlargement of the Canadian audience and market areas of U.S. networks or stations.<sup>6</sup>

There was an immediate and vocal outcry against this statement by citizens and companies who lived and operated in the

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<sup>6</sup> CRTC Public Announcement, The Improvement and Development of Canadian Broadcasting and the Extension of U.S. Television Coverage in Canada by CATV, (3 December 1969).

cities which would be denied access to the U.S. stations.<sup>7</sup> As one author explained, "access to U.S. stations had become to be perceived not merely as a pleasant spillover effect caused by geographic proximity, but as a right to which all Canadians were entitled."<sup>8</sup> The CRTC's action was even raised in Parliament by the member representing Calgary-South. He stated:

...does the CRTC really feel that it is serving the national interest by creating yet another division in an already overly-divided Canada; those who should be permitted access to U.S. stations because of a fact of geography prevents the CRTC from denying such access to U.S. stations and those who should be denied it because of a fact of geography permits the CRTC to deny such access.<sup>9</sup>

As a result of the enormous amount of public pressure the CRTC was forced to quickly modify its position on the importation of distant U.S. signals by microwave. In a Public Announcement released April 10, 1970 the CRTC revised its list of signal priorities for cable television systems which used either a local head end or "distant head end connected to the distribution cable by a broadband system" (i.e. a microwave relay) In addition to the higher priority Canadian stations, the list also approved the

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<sup>7</sup> For a complete account of the various opinions (both pro and con) advanced by broadcasters, the public, interest groups and politicians following this announcement see CRTC Annual Report 1967-1970, pp.97-101.

<sup>8</sup> Theodore Hagelin and Hudson Janisch "The Border Broadcasting Dispute in Context" in Cultures in Collision: A Canadian-U.S. Conference on Communications Policy (Toronto: Praeger, 1984).

<sup>9</sup> P.M. Mahoney, M.P., Commons Debates, 13 January 1970, p.2350.

carriage of channels from one non-Canadian commercial station and service from one non-Canadian non-commercial station.<sup>10 11</sup>

<sup>10</sup> CRTC Public Announcement, Guidelines for Applicants Regarding Licenses to Carry on CATV Undertakings, (10 April 1970). In addition to the approval for "distant head-end[s] connected... by a broadband" the exact wording of the May 13, 1969 announcement with respect to the signal priorities was revised to read:

- a) CBC network service
- b) Canadian private network service
- c) Canadian B contour TV stations
- d) A channel for community programs
- e) The Commission may require reception from additional Canadian stations which have significantly different program schedules categories (a) to (c)
- f) Service from one non-Canadian commercial station
- g) Service from one non-Canadian non-Commercial station
- h) If a system carries FM stations, it should carry all available Canadian FM stations in both official languages.

<sup>11</sup> Since this policy was introduced in 1971 numerous Canadian communities receive U.S. signals off the air, or in some cases from terrestrial microwave systems with head-ends located near the Canada/U.S. border. The major "entry points" for these U.S. signals and the Canadian regions they serve are:

<u>Canadian Regions Served</u>	<u>U.S Source Point</u>
Newfoundland, Prince Edward Island, New Brunswick, Nova Scotia	Bangor, Maine Presqu'ile, Maine
Quebec (Except West Quebec)	Burlington, Vermont Plattsburg, New York
Eastern Ontario/Western Quebec	Rochester, New York
Toronto/Hamilton Kitchener/Niagara Sudbury/North Bay	Buffalo, New York
Southwestern Ontario	Erie, Pennsylvania Detroit, Michigan Cleveland, Ohio
Northwestern Ontario	Sault Ste. Marie, Michigan Duluth, Minnesota

This priority carriage policy was later reiterated by the CRTC in its July 1971 policy statement entitled "Canadian Broadcasting: 'A Single System'". The issues of program duplication and commercial deletion on cable were also addressed in this document.

With respect to program duplication the CRTC attempted to protect the Canadian broadcasters by requiring that, in instances where a program was carried simultaneously by two stations, the program of a lower priority station be deleted by the local cable company. In the case of a program deletion the cable system would carry the entire signal, including the advertisements of the higher priority signal, on the channel of the lower priority signal.<sup>12</sup> At this time the CRTC also introduced a policy that the cable systems, in co-operation with Canadian television

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Manitoba

Grand Forks/Fargo/  
Devil's Lake, North  
Dakota

Saskatchewan

Williston/Minot/  
Devil's Lake, North  
Dakota

Alberta/interior British  
Columbia

Spokane, Washington

British Columbia-lower mainland  
and Vancouver Island

Seattle/Tacoma/  
Bellingham,  
Washington

From Petitions of CAB, CTV, TVA, and CBC to the Governor-In-Council with respect to Decisions CRTC 84-915 and 84-916, (19 November 1984) "Appendix A" p.20.

<sup>12</sup> Canadian Radio-Television Commission, Canadian Broadcasting: "A Single System", (16 July 1971), p.27.

systems, would be able to delete the commercials from non-Canadian stations and replace them with commercials sold to the local Canadian stations.<sup>13</sup>

The granting of permission by the CRTC to Canadian cable systems to carry distant U.S. signals contributed greatly to the expansion of the industry in the early 1970's. Since many Canadians had formerly been able to receive only a very limited number of Canadian stations they found the U.S. network programming to be quite attractive. The cable industry in Canada used these new services as part of their marketing strategy to attract new cable subscribers.

The penetration figures for cable television during this period demonstrated that the operator's efforts had been very effective. For example, in 1970 cable television service was available to only 42.4 percent of Canadians, by 1980 this figure had increased to 76.6 percent. These figures, however, were somewhat misleading since not everyone who has access to cable subscribes. Nevertheless, the trend toward subscribing to cable service had also increased dramatically over this same period. In 1970 the percentage of households taking cable was 20.6 percent, by 1980 the penetration rate had reached 54.4 percent. Some authors noted that the growth of cable had been somewhat uneven throughout the 1970's and 1980's. In the early 1970's the penetration rate increased by approximately 20 percent per year.

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<sup>13</sup> Ibid., pp.28-29.

By the mid-1970's and early 1980's this rate began to taper off. In 1983 the growth rate fell to approximately 3 percent per year.<sup>14</sup>

In many of the largest Canadian cities the penetration rates were quite high. In 1984 the following figures for cable penetration were compiled by Statistics Canada: Vancouver - 95%; Edmonton - 83%; Winnipeg - 90%; Toronto - 84%. Since the majority of the programming carried on Canadian cable was in English, the cable penetration in cities which were predominately French speaking was substantially lower. For example, Quebec City's rate was 60%, and Montreal's penetration was only at 55%.<sup>15</sup>

Although these penetration figures for cable services for the 1970's seem impressive, many Canadians felt that they were still not receiving a suitable amount of broadcasting services. Many of these "underserved" Canadians lived outside of the larger population centers and were not served by any local broadcasters or cable systems.

In the late 1960's the CRTC first acknowledged this problem and concentrated on extending television and radio service to persons living in all parts of Canada. The CRTC encouraged the

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<sup>14</sup> Department of Communication, Report of the Task Force on Broadcasting Policy, (Caplan/Sauvageau Report), (Ottawa: Ministry of Supply and Services Canada, 1986) pp.551-555.

<sup>15</sup> Report of the Task Force on Broadcasting Policy, (Caplan/Sauvageau Report), p.552. Also See CRTC Facts Digest on Broadcasting and Telecommunications in Canada, (Ottawa: January, 1984) pp.7-9.

extension of services by means of licence conditions, whereby private broadcasters were required to establish rebroadcasters to serve underserved areas.<sup>16</sup> The Canadian government also allocated special funds to assist the Canadian Broadcasting Corporation (CBC) in its Accelerated Coverage Plan (ACP). The objective of this project was to "provide radio and television service, in the appropriate official language, to every community or area with a population of 500 or more".<sup>17</sup>

In the late 1970's the CRTC recognized that there were still thousands of Canadians in remote regions of Canada who had little or, in some cases, no television or radio service. Therefore the CRTC, in January of 1980, appointed Real Therrien, a Vice-Chairman of the Commission, to lead a committee which would investigate the extension of service to remote and underserved areas of Canada.

#### The Therrien Committee Report

The Committee's report "The 1980's: A Decade of Diversity", provided some startling insights into the attitudes of people living in these communities. The report noted that, in contrast to Canadians living in the Southern metropolitan areas who had

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<sup>16</sup> Video World Inc., The Role of Satellites in the Canadian Broadcasting System, Study prepared for the Task Force on Broadcasting Policy, (February 1986), pp.74-75.

<sup>17</sup> Committee on the Extension of Service to Northern and Remote Communities, The 1980's: A Decade of Diversity, (Therrien Report) (Ottawa: Canadian Radio-Television and Telecommunications Commission, 1980), p.1.



very wide choice of programming services, there were tens of thousands of citizens in other parts of Canada who, because they lived in communities geographically too remote to receive television service by conventional or microwave delivery systems, had no alternative programming and no programs of direct or local interest.<sup>18</sup> Based upon discussions with people living in these remote and undeserved areas the Committee unanimously concluded that "immediate action must be taken to meet the needs of Canadians who believe that, as regards to broadcasting, they [were] being treated as second-class citizens."<sup>19</sup>

Furthermore, the report explained that it was not only those living in the North who felt deprived, but that many people living in the more Southern areas were also not receiving what they perceived as being adequate programming choice. The Committee stated that, in many cases, they found communities within hundreds of miles of major metropolitan centers that were "remote in a broadcasting sense."<sup>20</sup> The Committee therefore adopted what it described as a "wider approach" intending to direct its investigation, and subsequent recommendations, at all parts of Canada where "essential needs had not yet been met."<sup>21</sup>

One of the most important findings that the Committee

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<sup>18</sup> Ibid., p.1.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid., p.4.

<sup>21</sup> Ibid.

brought to the immediate attention of the CRTC was that many Canadians living in these underserved areas were satisfying their needs through the unauthorized reception of broadcast signals from American satellites. The Committee was concerned not only about the damaging effects of foreign broadcasts on Canadian culture, but also the potential for international legal disputes regarding issues of copyright or property rights. In its report the Committee argued that it would be "very unwise" to give the impression of condoning these illegal activities by "inaction."<sup>22</sup>

The Committee, therefore, made various recommendations as to the most appropriate method for extending broadcast services to these underserved areas. Its first recommendation was that:

The CRTC should immediately call for licence applications for the delivery, in remote and underserved areas, of a range of Canadian satellite television services that would be attractive to Canadian audiences.<sup>23</sup>

Conceding the fact that many Canadians felt that increased television choice tended to be equated with the increase in availability of U.S. programming the Committee report also addressed the issue as to whether or not U.S. stations should be carried on the Canadian satellite service. The report acknowledged that many presentations to the Committee suggested that the proposed satellite service should be permitted to carry the three U.S. commercial stations and one non-commercial

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<sup>22</sup> Ibid., p.19.

<sup>23</sup> Ibid., p.3.

station. These parties generally maintained that, since the CRTC permitted companies to pick-up broadcast signals close to the U.S. border and transmit them to distant cable systems, this same policy should be applied to the proposed satellite delivery system. Parties opposed to this suggestion argued that such a plan might lead to a situation in which the U.S. stations carried on the satellite service might begin to, in part, aim their advertising at the Canadian market. Other parties also argued the carriage of the U.S. signals would consume satellite capacity at a time of expected shortage.<sup>24</sup>

After considering all of these submissions the Committee seemed to be particularly influenced by the presentations of several operators of unauthorized satellite and delivery facilities who stated that they would "gladly switch to a Canadian satellite if an attractive service were made available."<sup>25</sup> Noting that many of the most popular U.S. television programs were already carried by Canadian stations, the Committee stated that it felt the needs of audiences in remote areas would be met by the carriage of "a broad range of Canadian service which included the best of U.S. programming."<sup>26</sup> The Committee, therefore, recommended:

In determining priorities for services to be carried on Canadian satellites, the carriage of US stations or programming services should not

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<sup>24</sup> Ibid., pp.16-17.

<sup>25</sup> Ibid., p.19.

<sup>26</sup> Ibid., p.20.

be permitted, subject to a review of this policy should surplus capacity become available.<sup>27</sup>

While this recommendation was primarily based on the limited amount of satellite capacity, its overall effect seemed to be consistent with the CRTC's long-standing objective of protecting the Canadian broadcasting system from the potential harmful effect of importing large amounts of U.S. television programming into Canada. In this respect, this recommendation to restrict the carriage of U.S. stations by satellite revived the position which the CRTC adopted in 1969 of not allowing the distribution of U.S. signals by microwave in Canada. The following sections will demonstrate that the Commission came under pressure similar to what it experienced in the early 1970 to revise policies to permit the retransmission of U.S. signals to cable companies by satellite.

#### The CRTC's Licensing of Canadian Satellite Communications Inc.

After accepting and endorsing the recommendations advanced in the Therrien report, The 1980's: A Decade of Diversity the CRTC called for applications for licences for broadcasting undertakings to serve those Canadians living in remote and underserved areas. It was anticipated that the applicants would propose a service which would offer an attractive variety of

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<sup>27</sup> Ibid., p.17.

radio and television programming services.<sup>28</sup> After a public hearing held during the week of February 9, 1981 at which four applicants appeared, the CRTC announced that it approved the licensing of Canadian Satellite Communications Inc. (CANCOM) to operate a multiple channel television and radio broadcasting network via satellite. CANCOM was authorized to distribute the television signals of CHAN-TV Vancouver, CITY-TV Edmonton, CHCH-TV Hamilton and the radio signals of CFQM-FM Moncton, CKAC-AM and CITE-FM Montreal, CKO-FM-2 Toronto, CIRK-FM Edmonton, CFMI-FM Vancouver and two native language radio signals.<sup>29</sup>

CANCOM is a public Canadian company established in 1980 by Whitehorse resident Rolf Hougen to extend Canadian radio and television signals to audiences living in northern and remote regions of Canada. Hougen organized a joint venture in which he held 28% of CANCOM's shares, while British Columbia Television Ltd. (licensee of CHAN-TV), Allarcom Broadcasting Ltd. (licensee of CITY-TV, Edmonton), Selkirk Communications Ltd. (licensee of CHCH-TV) and Telemedia Ltee. (licensee of TCTV) each held 18% of the shares.<sup>30 31</sup>

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<sup>28</sup> Public Announcement CRTC, Call for Applications for Licenses for Broadcasting Undertakings for Remote and Underserved Areas, (16 October 1980).

<sup>29</sup> Decision CRTC 81-252, Canadian Satellite Communications Inc., (14 April 1981), 7 C.R.T., p.20.

<sup>30</sup> Video World Inc., The Role of Satellites in the Canadian Broadcasting System, Study prepared for the Task Force on Broadcasting Policy, (February 1986) p.80.

The CRTC noted in its decision that one of its fundamental concerns was "the early implementation of service [to] its target audience."<sup>32</sup> The Commission was acutely aware of the fact that the myriad of arrangements necessary to begin an operation which entailed extending service to numerous parts of Canada could result in considerable delays. The CRTC felt that the broadcasting experience of CANCOM's principle shareholders would assist in implementation of service. The decision suggested that the experience of these shareholders would also be of assistance when CANCOM was to acquire consent for the use of the signals which were to be carried by the service. The licensing decision noted that:

the CANCOM proposal [was] predicated on the consent of the participating broadcasters for the distribution of their signals. This represent[ed], in the Commission's view, the most satisfactory arrangement for the early and uninterrupted implementation of the service.<sup>33</sup>

It was apparently assumed that these arrangements would be expeditiously completed as a result of the fact that the broadcasters who would be providing this consent also had a

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<sup>31</sup> This financial arrangement has changed considerably since CANCOM has been established. By 1986, BCTV's interest had increased to 46% of the shares, while all other broadcasting shareholders have each reduced their interests to 8.07%. Hougen's shareholdings have been reduced to 3.51%, while the remaining shares are held by other Canadian institutional investors. From Video World Inc., 1986, p.80

<sup>32</sup> Decision CRTC 81-252, p.21.

<sup>33</sup> Ibid.

substantial financial interest in CANCOM.

In its decision the CRTC reiterated CANCOM's objective to serve remote and underserved communities which received only two or fewer television signals and noted that for that reason, its application was given particular consideration. The fact that CANCOM was pursuing markets that were relatively small quelled some of the CRTC's concerns that the stations being carried by the service had the potential to be transformed into "superstations."

CANCOM was able to begin offering commercial service to its affiliates on January 1, 1982. The company leased transponders from Telesat Canada and earned its revenues by charging cable affiliates a monthly fee for each television signal taken. At the time of its licensing CANCOM's maximum monthly fee was set at \$4.00 for each subscriber of a cable system receiving the full package of four signals.<sup>34</sup> The radio signals were offered to subscribers free of charge. CANCOM also used a sophisticated scrambling technology so that its package could not be received by unauthorized parties. Each authorized cable affiliate was provided with a decoder which was electronically "addressed" at the company's central control centre in Oka, Quebec.

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<sup>34</sup> Ibid., p.24.

The 3 + 1 Option

In the early months of CANCOM's operation it became apparent that both the CRTC and CANCOM had underestimated the time which it would take to process and approve affiliate cable applications. In addition to this unforeseen problem, CANCOM also had very high fixed costs as a result of the rental fees it paid to Telesat Canada for the use of its transponders.<sup>35</sup> Both of these problems placed CANCOM in a very precarious financial position. Some authors have even suggested that CANCOM's situation was so poor that some type of alteration to its marketing strategy was necessary to prevent the "financial collapse" of the company.<sup>36</sup>

Subsequently CANCOM began to examine the options available to alleviate its financial dilemma. On July 22, 1982 CANCOM applied to the CRTC for permission to amend its licence to include the carriage of four signals from the U.S. networks. CANCOM proposed to uplink the signals of WJBK-TV (CBS), WTVS (PBS) Detroit, Michigan, KING-TV (NBC), KOMO-TV (ABC) Seattle, Washington. By taking two signals from the Eastern time zone (Detroit) and two from the Pacific time zone (Seattle) CANCOM attempted to provide service to Canadians across the country at

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<sup>35</sup> CANCOM pays Telesat Canada \$12.3 million per year for the leasing of eight transponders and unlink facilities. Department of Communication, Report of the Task Force on Broadcasting Policy, (Caplan/Sauvageau Report), (Ottawa: Ministry of Supply and Services Canada, 1986), p.607

<sup>36</sup> Video World Inc., p.79.



times which were close to normal viewing hours.<sup>37</sup>

Although Canada's major broadcasters protested the possible creation of U.S. superstations, the CRTC believed that this was unlikely given the small size of the markets CANCOM served. CANCOM's application to carry the U.S. stations was, therefore, approved. In its decision the CRTC stated that CANCOM's carriage of the U.S. stations would be a "completion of the process which began in 1971 when it first approved microwave importation of U.S. television signals."<sup>38</sup> The Commission viewed the proposal as a means of equalizing the "viewing opportunity for all Canadians."<sup>39</sup> The CRTC was particularly persuaded by Rolf Hougen's testimony defending the need to permit the distribution of the U.S. signals. He stated:

We are here seeking to add U.S. network television stations to CANCOM's service for a very compelling reason. Our market insists that we do so! The residents in remote and underserved communities are demanding additional services comparable to those available in other parts of Canada, and they well know that satellite delivery can now make them available.<sup>40</sup>

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<sup>37</sup> Although CANCOM was authorized to uplink the signals from KING-TV (NBC) and KOMO-TV (ABC) Seattle, the network did not choose to carry these signals until 1986 contending that their subscriber base was not large enough in British Columbia to offset the added costs of uplinking the signals to their satellite. See Decision CRTC 85-423, (7 June 1985) and Canadian Satellite Communications Inc., Annual Report 1987., p.7.

<sup>38</sup> Decision CRTC 83-126, Approval for the distribution of CBS, NBC, ABC, PBS by CANCOM, (8 March 1983), 8 C.R.T., p.752.

<sup>39</sup> Ibid., p.751.

<sup>40</sup> Ibid., p.752.

At this same hearing the CRTC also considered CANCOM's proposal to distribute the 3+1 signals to markets not receiving any U.S. signals and to locations receiving fewer than the full complement of the 3+1 service. CANCOM identified the two markets which it proposed to serve as the "core market" and the "extra-cable market." The core market was defined as:

...existing CANCOM licensees as well as those communities currently eligible to receive the CANCOM package of Canadian services identified... as those remote and underserved communities that presently receive two or less television signals.<sup>41</sup>

The newer extra-cable market was defined as "small centers served by cable systems, but not currently distributing one or more of the U.S. network signals."<sup>42</sup> CANCOM's research concluded that this extra-cable was, in fact, "a relatively small market compared with the total Canadian market."<sup>43</sup> For example, CANCOM demonstrated that the market for CBS was ten communities with over 10,000 households and 142 communities with under 5,000 households.

At the public hearing Mr. Hougen also explained why the extra-cable market was necessary to prevent financial disaster for CANCOM.

Access to this market is essential in order to make this project financially viable and particularly affordable to the underserved Canadians. ...if the provision of the 3+1 option

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<sup>41</sup> Ibid., p.753.

<sup>42</sup> Ibid., p.753.

<sup>43</sup> Ibid.

were to be restricted only to CANCOM's existing core market, the company's cumulative five year loss would rise from \$5.8 million to a prohibitive \$11 million.<sup>44</sup>

Hougen also stated that it was not CANCOM's intention to begin distributing service to communities already served by microwave. This was further supported Christopher Johnston's statement, CANCOM's secretary and legal counsel, that serving the microwave markets "certainly [wasn't] part of CANCOM's business plan or expectation at this point."<sup>45</sup> CANCOM was, therefore, given permission to serve the extra-cable markets. The CRTC explained, however, that the applications for the extension of this type of service would be considered on a case-by-case basis.

One month after this decision, the CRTC, on April 27, 1983 announced that CANCOM had applied to uplink an additional Detroit station, WDIV (NBC) from its Windsor monitoring post. The CRTC, accepted CANCOM's argument that this uplink would make the NBC signal available to eastern subscribers at appropriate viewing hours and approved the application on July 13, 1983.<sup>46</sup>

As a result of the CRTC's willingness to amend CANCOM's licence, by mid-1983 the company had evolved into a service which was considerably different from its original mandate of providing Canadian television and radio services to remote and underserved

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<sup>44</sup> Transcript of CRTC Public Hearing, 23 November 1982, International Reporting Inc., p.74.

<sup>45</sup> Ibid., p.116.

<sup>46</sup> Decision CRTC 83-547, Amendment of CANCOM's license to add WDIV (NBC) Detroit, (13 July 1983), 9 C.R.T., p.269.

communities. While the Therrien Report's findings clearly indicated that there was a real need to provide service to these communities, CANCOM quickly found this proposition to be plagued with financial roadblocks.

In order to remain financially viable CANCOM found it necessary to increase their subscriber base by expanding into the "extra-cable" markets. In addition CANCOM was able to convince the CRTC that their licence should be amended to include the carriage of the 3+1 U.S. stations. Although neither of these services were part of CANCOM's original business plan, both the CRTC and CANCOM felt that these changes were necessary so that CANCOM could continue to serve its original "underserved" markets. While CANCOM was struggling to serve the needs of these underserved markets, some cable companies approached the CRTC about the prospect of "replacing" their microwaved 3+1 U.S. signals with those offered from satellite by CANCOM.

#### The "Replacement" Markets

As stated earlier, since 1971 it has been CRTC policy to permit Canadian cable systems to distribute to their subscribers U.S. signals which have been received from distant head-ends close to the U.S./Canada border and microwaved to their community. Cable companies in Saskatchewan, Manitoba, and Alberta made extensive use of this type of transmission/distribution method. In particular, distant head-ends in Saskatchewan at Outram and Oxbow, and in Tolstoi, Manitoba

received over-the-air signals from Williston (KUMV-TV [NBC], KXMB-TV [ABC/CBS]), Fargo (KTHI-TV [ABC]), and Minot, North Dakota (KSRE-TV [PBS]) and delivered them to a number of cable television undertakings in the Prairie provinces via common carrier facilities.

At a public hearing held on August 24, 1983, the CRTC heard applications for eight cable television undertakings serving 49 communities in Saskatchewan requesting permission to delete the North Dakota signals from their service and replace them with the 3+1 service available from CANCOM. The applicants stated that the purpose of this replacement was to improve the quality of the signals. They maintained that CANCOM's satellite service would provide superior reliability and improved overall technical quality compared to their existing over-the-air/microwave relay system.

While the 49 communities which these cable systems served only represented a total of 120,000 subscribers (including the communities of Moose Jaw, Regina, Saskatoon and Swift Current Saskatchewan) the CRTC expressed its reluctance to approve these applications since none of the communities fell under the "core" or "extra-cable" definitions established in Decision CRTC 83-126.

A joint intervention presented at the hearing by the Canadian Association of Broadcasters (CAB), CTV Television Network, TVA Television Network Inc., and the Canadian Broadcasting Corporation (CBC) strongly opposed the proposal on the grounds that it would "open the way for the creation of

Detroit and Seattle superstations with implications on broadcasters' commercial revenue potential."<sup>47</sup> These parties maintained that multi-national corporations might find it unnecessary to advertise on Canadian stations because they could reach a large percentage of the Canadian market by continuing to purchase air-time on the Detroit and Seattle stations.<sup>48</sup>

Ultimately, the CRTC was not convinced by the applicant's contention that poor quality signals were being received at the head-ends. The Commission stated that the applicants had failed to provide any clear evidence though engineering reports that showed that the technical problems originated at the distant head-end. In addition, the CRTC noted that the applicants had not produced any subscriber surveys or documented complaints that would demonstrate the subscribers desired a substitution of the microwaved signals with those of CANCOM. The applications were, therefore, denied.<sup>49</sup>

In early 1984, Sascable Services Inc., on behalf of seven of the cable television licensees whose applications had been denied, filed a modified application requesting permission to delete the microwaved North Dakota signals and to replace them

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<sup>47</sup> Decision CRTC 83-957, Denial of the applications by eight Saskatchewan cable companies to delete the carriage of NBC, ABC, CBS and PBS signals of North Dakota and replace them with the CANCOM CBS, NBC, PBS Detroit and ABC Seattle signal (3+1), (15 November 1983), 9 C.R.T., 647.

<sup>48</sup> Video World Inc., p.82.

<sup>49</sup> Ibid.

with the CANCOM delivered Detroit/Seattle signals.<sup>50</sup>

At the hearing the applicants filed evidence which the CRTC said was needed at the previous hearing. This evidence included engineering reports documenting the poor quality of the microwaved signals. It was determined that the poor signal quality was a result of factors such as distance, climate, and topography. In addition Sascable provided results from a survey which indicated that their subscribers were dissatisfied with the quality of the North Dakota signals, and that they favoured the replacement of these signals with the service offered by CANCOM. After reviewing this evidence the CRTC stated that it was convinced that there was a "serious problem" with the signals. The CRTC therefore stated in the conclusion of its decision that it was now satisfied that "the particular circumstances that exist in the province of Saskatchewan warrant[ed] the approval of the Sascable applications."<sup>51</sup> In a related decision released that same day, the CRTC also approved an application filed by the Battleford Community Cablevision Co-operative (serving 9 communities in Saskatchewan) to delete the four U.S. network

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<sup>50</sup> In this application, Sascable Services Inc. (on behalf of the cable licensees) requested the replacement of WDAZ-TV (ABC) Devils Lake, KUMV-TV (NBC), KXMD-TV (ABC/CBS) and KWSE-TV (PBS) Williston, North Dakota with the signals of KOMO-TV (ABC) Seattle, Washington, WDIV (NBC), WJEK-TV (CBS) and WTVS (PBS) Detroit, Michigan.

<sup>51</sup> Decision CRTC 84-915, Amendment of a consortium of seven Saskatchewan cable licenses (Sascable) to delete the carriage of North Dakota stations and replace them with the CANCOM 3+1 package, (23 October 1984), 10 C.R.T., p.606.

signals from North Dakota and substitute them for the four network signals available from CANCOM.<sup>52</sup>

In November 1984, the CRTC applied the same logic to permit Cablenet Limited to change the authorized services which it provided to the communities of Weyburn and Estevan Saskatchewan. This decision also approved the deletion of the U.S. network signals received via microwave and permitted the carriage of the CANCOM 3+1 service. The CRTC stated that the approval of this application was based on the signal quality evidence presented at the Sascable hearings. In addition Cablenet also introduced the results of a subscriber survey which suggested that an overwhelming majority of the cable subscribers were dissatisfied with the quality of the North Dakota signals and preferred to receive the signals available from CANCOM.<sup>53</sup>

A number of Canadian and American parties filed petitions to the Governor In Council requesting that the Sascable and Battleford decisions be set aside or referred back to the CRTC for reconsideration. The joint petition of the Canadian Association of Broadcasters, the CTV Television Network, Le Reseau de Television TVA Inc., and the Canadian Broadcasting Corporation argued that the CRTC's decisions were contrary to

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<sup>52</sup> Decision CRTC 84-916, The Battleford Community Cablevision Co-operative, (23 October 1984), 10 C.R.T., p. 609.

<sup>53</sup> Decision CRTC 84-957, Replacement of North Dakota signals with the CANCOM's Detroit/Seattle package in Weyburn and Estevan, Saskatchewan (Cablenet Ltd.), (15 November 1984), 10 C.R.T., p.629.



government policy, would damage the local and regional broadcasters, would establish U.S. superstations in Canada which would drain advertising dollars from Canadian stations; and would exacerbate the existing difficulties between Canada and the U.S. concerning copyright and licensing agreements.<sup>54</sup>

In addition a group called the "North Dakota Television Broadcasters", consisting of WDAZ-TV, Devil's Lake, KUMV-TV, KXMD-TV, KWSE-TV, Williston, also filed a petition with the Governor In Council. This petition first questioned the evidence regarding the poor technical quality of the signals presented by the Canadian cable companies, and second argued that there existed a "community of interest" between North Dakota and Saskatchewan which would be lost if the decision was not overturned.<sup>55</sup>

The Governor In Council, however, after considering the arguments of the petitioners announced that it would not set aside or refer back to the Commission these decisions because to do so would "not [be] in the public interest."<sup>56</sup>

Therefore, by 1985 CANCOM's television operation had evolved

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<sup>54</sup> Petition of the Canadian Association of Broadcasters (CAB), the CTV Television Network Ltd. (CTV), Le Reseau de Television TVA Inc. (TVA) and the Canadian Broadcasting Corporation (CBC) in the matter of Decision CRTC 84-915 and 84-916, (19 November, 1984), pp. 10-17.

<sup>55</sup> Petition of North Dakota Broadcasters in the matter of CRTC 84-915 and 84-916.

<sup>56</sup> Governor-In-Council, Order Declining to Set Aside or to Refer Back to the CRTC Certain Decisions, (9 January 1985), Canada Gazette Part II, Vol. 119, No. 1, p.332.

from one which served "remote and underserved" communities with Canadian programming, to one which distributed both U.S. and Canadian television programming throughout the country. As the CRTC noted in 1985, CANCOM was permitted to extend its service beyond the original "core" markets to include both "extra-cable" and "replacement" markets. These replacement markets were later defined by the CRTC as:

markets or systems which perceive their current level of service to be inadequate due to the poor quality of the U.S. signals received either over the air or by microwave, where satellite delivery is a feasible solution.

Although the request to serve these replacement markets came from the cable companies rather than CANCOM, the additional revenue generated from serving these types of communities has contributed to the financial stability of CANCOM.<sup>57</sup>

The CRTC, throughout the licensing history of cable television and CANCOM, was primarily interested in the programming choices which these services provided to Canadian audiences. In doing so, it was necessary for the CRTC to be aware of the rights held by the owners of the materials which are redistributed by cable systems. The CRTC generally attempted to balance the rights of the program owners with the interests of both the cable services and the audiences.

The remainder of this chapter will examine how the CRTC has

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<sup>57</sup> Canadian Satellite Communications Inc., 1987 Annual Report, pp.6-7.

dealt with this complex issue. This will be explained in the context of Canadian copyright law and the country's obligations to international copyright conventions.

#### Canadian Copyright Law and International Copyright Conventions

Copyright law in Canada is a statutory creation which is intended to provide creators of works with the right to determine the use of a work and to provide them with a share of the benefits which may be accrued from its use. With only very minor revisions, the Copyright Act introduced in Canada in 1928 remains in place to this day. The Copyright Act grants the creator of literary, dramatic, musical, or artistic work a number of exclusive rights which are established in Section 3 of the Act. Section 3(1) states that the owner of copyright in a work has the:

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

(f) in the case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication;<sup>58</sup>

As a result of the amount of technological change which has occurred since the drafting of this act, there have been many instances in which the courts have attempted to interpret the

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<sup>58</sup> Copyright Act, R.S.C. 1970, c.C-30, s.3(1), 3(1)(f).

definitions and rights of the Act in a manner which would retain the original intentions of the Act and protect the interests of the creators. In some cases, however, the courts have not been overly successful in meeting this objective. One case which has had a dramatic effect on the cable television industry in Canada is Canadian Admiral Corp. v. Rediffusion Inc.<sup>59</sup>

Rediffusion Inc. redistributed to its over 100 subscribers the live and film broadcasts of the Montreal Allouettes' football games which were originally broadcast over-the-air by station CBFT in Montreal. The Canadian Admiral Corporation, through a 1952 contract with the football club, had exclusive right to these broadcasts. Consequently it sought to protect the right on the theory that the retransmission of the games on cable constituted an infringement of their copyright.

The Court, in its decision, determined that Rediffusion's actions constituted a "performance" of Canadian Admiral's work.<sup>60</sup> Establishing that a performance occurred, however, did not necessarily mean that the owner's copyright had been violated. The Copyright Act clearly states that this performance must occur "in public". Because the act itself did not define "in public" the Court took the position that it should at least determine

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<sup>59</sup> Canadian Admiral Corp. v. Rediffusion Inc., [1954] Ex.C.R. 382, and 20 C.P.R. (Sec. II), p.75.

<sup>60</sup> 20 C.P.R. (Sec II), p.97., A "performance" is defined in Sec. 2(q) of the Copyright Act as "any acoustical representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication."

what it did not mean. It stated that it would be inappropriate to define "in public" and merely decided that it would "regard it as the antithesis of 'in private'." Guided by precedent <sup>61</sup>, the Court concluded that the determination of whether the performance was either "in public" or "in private" would depend on "...the character of the audience."<sup>62</sup>

After reviewing the facts of the case, the Court was satisfied that only households which had subscribed to Rediffusion's service had seen the performance. After observing that the performances which occurred in these homes and apartments of the subscribers were not "in public", the Court determined that there had not been an infringement of Canadian Admiral's copyright. The Court also noted that it was not persuaded by Canadian Admiral's argument that the aggregate number of people, individually subscribing to the service, could constitute a performance in public. The Court, in assessing this position stated that:

"it cannot see that even a large number of private performances, solely because of their numbers, can become public performances. The character of the individual audiences remains exactly the same; each is private and domestic, and therefore not "in public".<sup>63</sup>

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<sup>61</sup> Duck v. Bates, 13 Q.B.D. 843, Harms (Inc.) Ltd. & Chappel & Co. v. Martan's Club, [1927] 1 Ch 526, Performing Right Soc. Ltd. v. Hawthorns Hotel (Bournemouth) Ltd., [1933] Ch. 855, Jennings v. Stephens, [1936] 1 All E.R. 409.

<sup>62</sup> Canadian Admiral Corp. v. Rediffusion Inc., p.97.

<sup>63</sup> Ibid., p.102.

With respect to the right established for radio communication in Sec. 3(1)(f) the Court was faced with the challenge of determining whether cable television fell under the definition of radio communication <sup>64</sup>. Here the Court found that:

...radio is a communication of messages by means of electro-magnetic or Hertzian waves through the ether. But in this case the defendant communicated the work not by the use of electro-magnetic waves, but by the use of co-axial cables to its subscribers... It is true that it picked up the telecasts of the plaintiff from the ether... But the communication by the defendant was not, in my opinion, by radio.<sup>65</sup>

Since the technology used for cable television did not use the electromagnetic spectrum "through the ether" to distribute its services the Court determined that Rediffusion's activities were not a radio communication. The Court therefore found that Rediffusion had not violated Canadian Admiral's copyright under Sec. 3(1)(f) of the Copyright Act.<sup>66</sup>

As a result of the ruling in this case cable systems which simultaneously rebroadcasted the signals emitted over-the-air by television stations were not subject to copyright liability. Thus Canadian cable companies were not required to make payments

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<sup>64</sup> Currently the term "radio communication" as used in the Copyright Act is defined as "any transmission, emission or reception of signs, signals, writing, images, sounds of intelligence of any nature by means of electro-magnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide."

The Interpretation Act, R.S.C. 1970 c.I-23 s.28.

<sup>65</sup> 20 C.P.R. (Sec. II), p.103.

<sup>66</sup> Ibid.

to either the copyright owner or the broadcasters<sup>67</sup> for the use of their works. Also, under Canadian law, when satellites were used to retransmit the over-the-air broadcasts to distant location, such as in the case of CANCOM's operations, it was not deemed to be performed in public or to be broadcast directly to the public.<sup>68</sup> These types of operations were, therefore, also shielded from copyright liability.

Canada is also bound by a number of international conventions which dictate the amount of copyright protection which must be afforded to the works of individuals who are not citizens of Canada. In all of these agreements, the state is responsible for interpreting the language of the convention and decides the conditions under which its rights will be carried out.

Canada is presently a signatory to the Rome Text (1928) of the Berne Convention.<sup>69</sup> The Berne Convention is a national treatment convention, in that each member country gives the same level of protection afforded by its law to nationals of other countries.<sup>70</sup> Reflecting the fact that cable television was not

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<sup>67</sup> "Broadcasting" is defined as "any radio communication in which the transmissions are intended for direct reception by the general public."

Broadcasting Act, R.S.C. 1970, c. B-11, s.2

<sup>68</sup> Video World Inc. p.91-92.

<sup>69</sup> The Berne Convention for the Protection of Literary and Artistic Works (1886), revised at Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971).

<sup>70</sup> Ibid.

yet conceived in 1928, this text does not protect works against "retransmissions." The area of broadcasting is covered in Article 11 bis which reads:

Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radio-communication.<sup>71</sup>

Only later texts of the Berne Convention (1948, 1967, 1971) make specific mention of communication by wire and by rebroadcasting. These texts include revisions which state that only the copyright owner has the right to authorize any further broadcasts of their works to the public if these rebroadcasts are carried out by any party other than the original broadcaster. Some authors have noted that Canadians have generally felt that this absence of any specific reference to retransmissions in the 1928 Rome Text excuses them from any obligations in this area.<sup>72</sup>

Canada also adheres to the Geneva Text (1952) of the Universal Copyright Convention (UCC). This convention is, again, a "national treatment" convention, and does not specifically mention the area of "broadcasting".<sup>73</sup> The 1971 text includes an article which grants the exclusive right to the copyright owner

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<sup>71</sup> Ibid., Article 11 bis.

<sup>72</sup> See E. Carb, "Copyright compensation for the Canadian use of American broadcast signals on cable", (1985), 12 Syracuse Journal of International Law and Commerce, p.368. and Department of Communications and Department of Consumer and Corporate Affairs, From Gutenberg to Telidon: White Paper on Copyright, (Ottawa: Ministry of Supply and Services Canada, 1984), pp.92-93.

<sup>73</sup> Universal Copyright Convention, (1952), revised at Paris (1971).



to authorize any broadcast or public performance of their works.<sup>74</sup>

Although opinions vary on the extent of protection that must be afforded by the signatory under each of these conventions, it is generally felt that, although aspects Canada's 1928 Copyright Act are somewhat antiquated, it provides the same amount of protection to its citizens as it does to nationals of other countries.

The CRTC's Considerations of Program Owner's Rights with Respect to CATV

The CRTC first recognized in 1971 that the owners of programming should be compensated for the use of their material when it was broadcast on cable. In its policy statement on cable television, entitled "Canadian Broadcasting: A Single System", the CRTC made the observation that cable television systems relied on the services of television stations for their existence and concluded that some financial recognition should be made of this fact.<sup>75</sup> The CRTC noted that the cable system operated in such a way that the "television stations [were] the suppliers, and the cable television systems [were] the users". Thus, the report concluded:

...one should pay for what he uses to operate his business. Even if there were not damage or if the cable television systems increased profits of the

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<sup>74</sup> Ibid., (1971), Article IV.

<sup>75</sup> CRTC, Canadian Broadcasting: "A Single System", p.21.

television stations this principle would still be true.<sup>76</sup> (emphasis in original)

The Commission stated that it would consider some type of copyright compensation for the holders of the program rights to ensure the continued development of programs. In seeming reference to the Canadian Admiral v. Rediffusion decision, the policy statement also recognized that "the concept of copyright is somewhat limited in the context of the television-cable relationship."<sup>77</sup> The CRTC, therefore, announced that:

The Commission believes that it is imperative that the broadcasters and the cable television operators develop a method which will correct the inequity that has developed in the system. However, if no solution is forthcoming, the Commission will take the necessary steps to achieve this goal.<sup>78</sup>

Subsequent to this 1971 report numerous studies were issued which assessed a variety of recommendations for revising the Copyright Act with respect to the copyright holder/cable television copyright "imbalance". The CRTC, however, never acted independently to provide its own solution to this problem. This issue was also addressed on a number of occasions during CANCOM's licensing hearings. CANCOM's statements at its original hearing suggested to the Commission that its service would, at least, attempt to provide the program owners with some control over their property. Although CANCOM did not specifically state

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<sup>76</sup> Ibid., p.22.

<sup>77</sup> Ibid., p.23.

<sup>78</sup> Ibid.

that copyright royalties would be paid to the owners, it suggested that it would not distribute any signal for which permission had not been obtained from the broadcaster.<sup>79</sup> While the copyright owners would not be compensated for the use of their work, this concession seemed to suggest that they might at least be able to deny CANCOM the right to carry their material. Mr Hougen described CANCOM's reasoning for this decision in response to the Commission's questioning.

Well it is a principle I suppose. It is not based on legality necessarily, or copyright necessarily, it is a principle. We believe that within the orderly development of broadcasting in Canada no one should be permitted to go out and take a signal and put it on a satellite if the originating station objects.<sup>80</sup>

This, of course, was not an overly risky commitment because, as previously explained, CANCOM's investors were primarily made up of the owners of stations whose signals it planned to carry. The Commission attempted to make these statements conditions of licence in its initial decision to approve the service. The decision stated:

With respect to arrangements for the distribution of its service, CANCOM is required to enter into an affiliation agreement with all broadcasting undertakings licensed for the carriage or transmission of this service and to file such agreements with the Commission. The Commission further expects CANCOM to file any agreement it enters into with broadcasters for the uplinking of

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<sup>79</sup> Transcript of CRTC Public Hearing (10 February 1981), Toronto: Angus Storehouse & Co., p.304.

<sup>80</sup> Ibid.

their signals.<sup>81</sup>

The first sentence of this condition referred to the cable affiliates which would receive the CANCOM service while the second, referred to the broadcasting stations whose signals CANCOM would uplink. Although the Commission merely "expected" rather than "required" CANCOM to file the uplinking agreements, the CRTC was apparently under the impression that CANCOM would obtain consent from the local broadcasters before their signals would be retransmitted to the cable companies.<sup>82</sup>

CANCOM was later asked by the CRTC's legal counsel, Ken Katz, at a subsequent hearing on November 23, 1982 whether any uplinking arrangements had been entered into between CANCOM and the originating broadcast stations. Christopher Johnston, who was legal counsel for CANCOM, explained that CANCOM had never negotiated with the originating stations for their consent. He further replied that CANCOM:

...took note of the fact, of course, that the decision stated not that we were to file an agreement, but that if an agreement were entered into it should be filed.<sup>83</sup>

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<sup>81</sup> CRTC 81-252, p.21.

<sup>82</sup> At a later hearing the CRTC's legal counsel, Ken Katz, made the statement that: "there was a great deal of discussion [at the February, 1981 hearing] about the business of consent and the Commission was left with the impression that there would be an agreement for the uplinking of that signal, the agreement would subsequently be filed with the Commission."

Transcript of CRTC Public Hearing, (23 November 1982), International Reporting Inc., p.240.

<sup>83</sup> Ibid., p.241.

As a result of this very technical reading of this licensing decision, CANCOM maintained that it was not necessary for its company to negotiate any agreements with the contributing broadcast stations. Johnston further revealed that CANCOM did not enter into any agreements with the stations that it was uplinking because of "copyright concerns."<sup>84</sup> The program supply contracts which bound the stations contained clauses which prevented them from authorizing the redistribution of the program by satellite and cable.<sup>85</sup> Therefore, even if these "partner stations" desired to enter into an agreement with CANCOM, they could not give consent without being in violation of their contracts with the program providers.<sup>86</sup>

This same copyright/consent issue surfaced when CANCOM applied to carry the U.S. 3+1 stations in 1982. All three U.S. commercial networks filed interventions with the Commission<sup>87</sup> requesting that they not grant CANCOM's request "except on terms that would require the appropriate authorizations to be obtained from copyright owners and broadcasters."<sup>88 89</sup> The U.S. networks

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid., p.383.

<sup>86</sup> Ibid.

<sup>87</sup> The law firm Herridge, Tolmie of Ottawa filed these interventions on behalf of CBS, ABC and NBC on November 3, 1982. Except for the names and specific information (addresses, phone numbers etc.) relating to the companies, the interventions were identical.

<sup>88</sup> CBS, ABC, NBC interventions, 3 November 1982, p.2.

claimed that CANCOM's use of programs without the permission of the copyright holders would be "inequitable and unfair" to the copyright owners.<sup>90</sup>

This statement was based on an interpretation of Section 3 of the Canadian Copyright Act and Canada's obligations under the international conventions of which it was a signatory. Noting that the Canadian Copyright Act provided that the owner of a work had the sole right "to communicate such work by radiocommunication" and the sole right to authorize such communication, the interventions claimed that CANCOM's proposed activities would "be in flagrant disregard of Canadian copyright law."<sup>91</sup>

The interveners also based their argument on the fact that Article 21 of the Inter-American Radiocommunications Convention of December 13, 1937, of which Canada was a signatory, provided that:

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

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<sup>89</sup> Johnston stated at the November 23, 1982 public hearing that representatives from CANCOM had visited three of the U.S. networks to inform them of CANCOM's intentions to uplink these signals. He revealed, however, that these discussions were: "not to obtain their consent, because we know that they cannot give their consent, but simply to advise them of what we had in mind." From: Transcript of CRTC Public Hearing, (23 November 1982), p.82.

<sup>90</sup> CBS, ABC, NBC interventions, p.1.

<sup>91</sup> Ibid., pp.1-2.

station of origin.<sup>92</sup>

At the November 23, 1982 public hearing, when asked to comment on these interventions, CANCOM's legal counsel explained that under the principles established in the Canadian Admiral Corp. v. Rediffusion Inc. and the CAPAC v. CTV rulings, CANCOM would be within Canadian law in carrying the U.S. stations without their consent and without compensating the copyright owners. The existing case law applied to CANCOM because its activity was no different than of a cable system which received U.S. signals via microwave from distant head-ends. As CANCOM's Christopher Johnston explained:

...one could roughly equate a satellite transmission system with a microwave system albeit the hop is a very long hop, but the radio communication and the frequencies being used are equivalent.<sup>93</sup>

Furthermore, CANCOM's counsel noted that the decision by the Supreme Court of Canada in the Capital Cities Inc. v. CRTC case made it clear that the 1937 Havana Treaty was not binding on the CRTC since the Commission was not an arm of the government.<sup>94 95</sup>

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<sup>92</sup> Ibid., p.2.

<sup>93</sup> Transcript of CRTC Public Hearing, (23 November 1982) p.81.

<sup>94</sup> Ibid., p.85.

<sup>95</sup> The Supreme Court of Canada ruled in Capital Cities Inc. v. CRTC that they were "unable to appreciate how it can be said that the [Canadian Radio-Television] Commission is an agent of the Canadian Government and is such bound by the Convention provisions in the same way as the Government. There is nothing in the Broadcasting Act, nor was our attention directed to any other legislation which would give the Commission any other status than that of a federal regulatory agency established with defined regulatory powers" [1978] 81 D.L.R. (3d), pp.630-631.

CANCOM counsel conceded, however, that he could not definitely say that CANCOM's exhibition of U.S. signals would not constitute and infringement on copyright since the precise issue had not yet been litigated in Canada.<sup>96 97</sup> Since CBS, ABC, and NBC, preferred to stand on their written submission, they did not appear at the public hearing. The legal points raised in their interventions were, therefore, not elaborated.

As a result of these explanations, the CRTC was seemingly satisfied with CANCOM's legal interpretation of its activities. The Commission, however, was disturbed by the fact that CANCOM's service to remote and underserved communities could fail if the 3+1 option was not approved. Therefore, the CRTC, in its decision to permit the carriage of the U.S. signals, included a copyright/consent condition which was much weaker than the one which was attempted in CANCOM's original licensing decision. The condition in Decision CRTC 83-126 merely stated:

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Furthermore, the court also noted that Article 21 of the Havana Treaty made reference to retransmissions by "any other stations." The court's interpretation was that "stations" was meant to mean "broadcasting stations." In this particular case, however, the companies were "broadcasting receiving undertakings" and the Article would therefore not apply. [1978] 81 D.L.R (3d) pp.632-633.

<sup>96</sup> Transcript of CRTC Public Hearing, (23 November 1982) p.238.

<sup>97</sup> The Buffalo stations requested that the Court make some decision on their property rights after their signals had entered Canadian airspace. The Court decided not to address this issue since this question was before the Ontario Supreme Court. This issue of proprietary rights still remains unclear however, since the case was later settled out of court.



The Commission recognize[d] that, in certain circumstances at the local exhibition phase, various problems may arise related to the issue of potential copyright infringement and the associated issue of "broadcaster consent". The Commission expects the parties involved to take steps to make such contractual or other arrangements as may be necessary in such circumstances.<sup>98</sup>

This reference to "contractual or other arrangements" was perhaps included because CANCOM had stated publicly its willingness to pay for the retransmission right. In light of the "fairness and equity" concerns of the U.S. broadcasters that CANCOM stated that it was "ready and willing to pay copyright at any time that somebody [could] tell us to whom and how and under what mechanism."<sup>99</sup> Considering the extensive delays which had plagued attempts to revise copyright legislation CANCOM must have known that they would not be called on this promise in the near future. Christopher Johnston further stated that what CANCOM...

...would like to see in place is a mechanism whereby one could make one payment to somebody, clear the rights, and have it done with.<sup>100</sup>

Although the U.S. networks continued to file interventions with the CRTC with respect to the unauthorized use of their signals on the CANCOM network the CRTC merely provided them with the terse statement:

...these concerns were already discussed at some length in the context of CANCOM's original

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<sup>98</sup> Decision CRTC 83-126, p.755

<sup>99</sup> Transcript of CRTC Public Hearing, (23 November 1982), p.82.

<sup>100</sup> Ibid.

applications of the distribution of the Canadian and 3+1 U.S. network signals.<sup>101</sup>

Therefore, to this date, CANCOM has not made any contractual arrangements with either the Canadian or American broadcasters for the uplinking and subsequent redistribution of their signals.

#### SUMMARY

The cable industry in Canada owes much of its success to its ability to provide subscribers with "distant" signals that they would not normally be able to receive with conventional antennas. Many of these signals carried by Canadian cable systems originate from U.S. broadcasting stations located close to the Canada/U.S. border. Although the CRTC attempted to restrict the "importation" of these U.S. signals in Canada, it was forced to modify its position as a result of public pressure. As an alternative the CRTC, in 1970, adopted a "signal priority" list which obligated the cable companies to give preferential access to Canadian television signals. While all cable companies were required to carry the Canadian public and private networks signals, as well as a community channel, many cable subscribers were attracted to the programming offered by the U.S. network stations.

Although many of the larger markets were receiving programming from a full complement of Canadian and U.S. broadcasters via cable, the CRTC recognized in the late 1970's

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<sup>101</sup> Decision CRTC 84-915, p.605.

that there were still thousands of Canadians who had little or no access to television service. In 1980 the CRTC created the Therrien Committee to investigate this problem. As a result of the Committee's report, the CRTC was made aware that many of these people living in "remote and underserved" communities felt as though they were being treated as "second-class citizens" in terms of the television and radio programming they received. Furthermore, the Committee's report highlighted the need to provide these citizens with Canadian programming so that they would not continue receiving illegally U.S. materials with private dish antennas.

The CRTC, upon the recommendations of the Therrien Committee, licensed CANCOM to serve these "underserved" communities with a number of signals from Canadian broadcasters through a satellite transmission system. As a result of the high costs of renting satellite transponders and the relatively few communities which CANCOM was licensed to serve, the company quickly found itself in a precarious financial situation. In attempt to increase the attractiveness of the service to subscribers, CANCOM was authorized in 1983 by the CRTC to carry the signals of the four U.S. networks. At the same time, CANCOM was also permitted to provide service to the "extra-cable" markets which because of their remote locations, received only two or less television signals. The market which CANCOM was authorized to serve continued to expand as cable companies in Western Canada approached the CRTC for approval to substitute

their U.S. signals brought in by microwave with the service offered by CANCOM.

Throughout the licensing history of cable television in Canada, the CRTC has been concerned with the rights of the program owners whose works are redistributed by cable systems. As this chapter has explained, these efforts have been restricted by a 1958 court decision which established that copyright liability did not apply to cable systems when they simultaneously retransmit the signals of over-the-air broadcasters. However, in its Policy Statement published in 1971 the CRTC noted that this system was somewhat inequitable in that it did not compensate the program owners for the use of their works. Although at that time it suggested that it would take steps to correct this imbalance, to date, the CRTC has not introduced any system through which the copyright owners would receive any royalties.

This chapter also addressed how the CRTC has dealt with the issue of the rights of the program owners when their materials are redistributed by CANCOM. Although CANCOM originally suggested that they felt no one should use the signals of another if the originating station objects, their actions have not been consistent with this principle. In its original licensing decision for CANCOM, the CRTC stated that they "expected" CANCOM to enter into licensing agreements with the broadcasters. This expectation was not realized, however, since CANCOM found that the broadcasters would be in violation of their contracts with the program producers if they authorized these retransmissions.

This same issue of consent arose when CANCOM applied to carry the signals of the four U.S. networks. Although the U.S. commercial networks vehemently opposed the use of their signals, the CRTC did not require CANCOM to acquire consent from the parties in the U.S.

This chapter has shown that the CRTC throughout the licensing history of cable, has been aware that copyright owners are not compensated when their works are simultaneously retransmitted by cable. The CRTC, although it has suggested that some type of compensation would be equitable, has not been able to implement any specific solution to this problem. The following chapters will examine how the Canadian government, through its studies and reports, has approached the issue of establishing copyright liability for cable retransmissions. Subsequent chapters will investigate the potential problems which may arise in Canada's trade relationship with the United States as a result of this issue.

## CHAPTER 2

### REVIEWS OF THE CANADIAN COPYRIGHT ACT

Subsequent to the Canadian Admiral decision of 1954 the Canadian government received pressure from parties in Canada, notably the copyright owners themselves, suggesting that a system whereby the cable companies could use the works of others without providing them with any form of compensation was inequitable. As the cable industry began to import "distant signals" by microwave, and later satellite, the government received an increasingly larger number of suggestions to revise the Copyright Act from both broadcasters and copyright owners in Canada and the United States.

Since 1957 the government has published a number of studies which have investigated the appropriateness of revising the Copyright Act to include a right for copyright owners whose material has been retransmitted by cable. The approaches and arguments used by the authors of these reports varies greatly. Generally the earliest reports only considered the economic arguments surrounding the issue. The authors of later studies, published in the 1970's and 1980's, have attempted to widen the scope of their research to include both the political, economic and cultural implications of introducing what has come to be known as a "retransmission right."

This chapter will examine six studies published by the government between 1957 and 1984. It will survey the various

arguments and recommendations which have been suggested in each of these reports. This discussion will demonstrate how the opinion within Canada has evolved from being strongly opposed to the implementation of a retransmission right to a position in which it would consider such a right under specific conditions. In light of the focus of this thesis, that is, to examine the international pressures which have arisen as a result Canada's willingness to permit the uncompensated use of broadcast signals on cable, the reviews of these studies will pay particular attention to how copyrighted works in foreign broadcast signals would be treated.

I) Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs: Report on Copyright (Ilsley Report)

This report, commissioned less than a month after the decision in Canadian Admiral, maintained that the copyright owner should not have the right to prevent an authorized broadcast of a work to be retransmitted by a cable system and was therefore opposed to the introduction of a retransmission right. The authors maintained that when a copyright holder authorized a broadcast it was deemed to be authorized in "a wide sense."<sup>1</sup> Cable simply provided another method of reception for a broadcaster's signal. They did concede, however, that this logic

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<sup>1</sup> Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, Report on Copyright, (Ilsley Report) (1957), p.28.

did not necessarily hold for the cable audience which was out of reach of the original broadcast signal.

The Ilsley Report recognized that the royalty fee paid by the broadcaster to the copyright owner was based on the size of the audience which received the broadcasts. The Commission assumed that the calculation of the audience size would include those persons who reviewed the broadcasts via cable. The Commission felt that since this meant the royalties for the entire viewing audience had already been paid, the collection of any additional fees for the cable audience was unjustified.

As some authors have noted, however, these observations and recommendations might have become somewhat outdated and "less relevant to the issue as now defined".<sup>2</sup> In particular, the Ilsley Report was written at a time in which cable primarily served to retransmit the signals of local broadcasters within their own community.<sup>3</sup> As noted in the previous chapter cable systems presently have a number of new functions, including the importation of distant signals (both American and Canadian).

Although the cable industry had expanded significantly since

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<sup>2</sup> Department of Communications and Department of Consumer and Corporate Affairs, From Gutenberg to Telidon: White Paper on Copyright, (Ottawa: Ministry of Supply and Services Canada, 1984), p.95.

<sup>3</sup> At the time the Ilsley Report was published there were "111 stations rediffusing television broadcasts to subscribers" in the following provinces: "Quebec, 70; Ontario, 18; British Columbia, 14; New Brunswick, 4; Alberta, 3; Saskatchewan, 2. Normally a Canadian rediffusion station supplies services to fewer than 200 subscribers." Report on Copyright, (1957), p.25.



1957, some authors publishing reports on copyright in the late 1960's and 1970's seemed to have felt that the basic premise of the Ilsley Report's argument was still valid. As the following sections will illustrate, some authors considering this cable/copyright question subsequent to the publishing of the Ilsley Report, used the argument that copyright owners would be compensated for the use of their works on cable through the increased fees they would receive from broadcasters.

II) Economic Council of Canada: Report on Intellectual and Industrial Property

In 1966, the federal government requested the Economic Council of Canada to complete a comprehensive review of copyright to assist the Department of Consumer and Corporate Affairs in developing its policies. The final report, published in 1971, recommended that a system of compulsory licensing be implemented in particular circumstances. When signals contained no advertisements, or when the cable operator altered the signal by dropping or replacing advertisements, or when the original signal did not originate with a wireless broadcaster (i.e. from the studios of a cable system), royalties would have to be paid.

The Council's logic for excluding the right to copyright payments for the simultaneous rediffusion of unaltered commercial broadcast signals was based on the assumption that the copyright owners would be compensated through the higher royalty rates which they would receive from broadcasters in recognition of the extended coverage of the signal. Thus, as a result of the

extended market coverage provided by the cable system, the broadcaster would be able to charge its advertisers higher rates. In turn, this increased revenue would provide the copyright owners with the leverage to demand larger royalties in their negotiations with the broadcasters.

It seems that the Economic Council's recommendations were based on the same arguments introduced eleven years earlier in the Ilsley Report. The Economic Council, like the Ilsley Committee, suggested that copyright owners should not receive royalty payments from cable operators since they were already being compensated for the cable audience by the broadcasters. Recognizing that commercial deletion would alter this market structure, the Economic Council recommended that a compulsory licensing scheme apply for cases in which the cable company altered the signal (i.e., the deletion of commercials). Authors which reviewed the recommendations of the Ilsley Commission and the Economic Council leveled some criticisms at the argument that broadcasters would compensate the copyright owners for the retransmission of signals on cable. The critics stated that:

there is no reason why a broadcaster should act as a bargaining agent on behalf of copyright owners. Furthermore, even if a broadcaster did obtain a better price from a sponsor, on the grounds of increased coverage, there would be no guarantee that such increase in revenue would be passed on to copyright owners.<sup>4</sup>

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<sup>4</sup> A.A. Keyes, C. Brunet, Copyright in Canada: Proposals for the Revision of the Law, (Ottawa: Queen's Printer, 1977). p.139.

Recognizing that the recommendations of both the Economic Council and the Ilsley Report may have contained some weaknesses, other authors have looked for more innovative solutions to the question of whether cable companies should be required to make copyright payments for the materials they retransmit.

III) A.A. Keyes and C. Brunet: Copyright in Canada: Proposals for a Revision of the Law

After the publication of the Economic Council's report, the Minister of Consumer and Corporate Affairs created a planning group to review the Council's report and develop more specific policy recommendations for the revision of the copyright law. As a result of the efforts of this group, the Keyes/Brunet Report was published in April of 1977. The report observed that the proposal offered in the Economic Council's Report did not address the problem created by the out-flow of copyright payments to non-nationals. Because Canada was a net importer of copyrighted material (primarily from the United States) the extension of a rediffusion right to all signals carried on cable would tend to aggravate the imbalance of international copyright payments.

As a possible solution to the copyright imbalance problem the Keyes/Brunet paper recommended that a retransmission right should only apply to Canadian broadcasters for Canadian broadcasts. Although it seemed that this proposal was a violation the "national treatment" provisions of both the Berne Convention and the UCC, the authors maintained that it was not.

A distinction was made between "broadcasts", which were not protected by the conventions, and a "work embodied in the broadcasts" which was protected. The authors therefore stated:

A rediffusion right attaching to convention works would have to be extended to non-nationals, but a rediffusion right attaching to broadcasts can be limited to Canadians alone.

This solution is in accordance with both the Berne Convention and the UCC, as they do not require the granting of a rediffusion right in convention material.<sup>5</sup>

To carry out the task of distributing the copyright royalties the report recommended that a Copyright Royalty Tribunal be established. The Tribunal would have the responsibility of establishing the conditions and manner in which the royalties would be collected and distributed to the copyright owners. In general this Tribunal would ensure that the royalties for Canadian broadcasts would be "distributed in accordance with the objectives sought in granting a right of rediffusion: that Canadians receive their fair share of royalties."<sup>6</sup>

IV) S. Liebowitz: Copyright Obligations for Cable Television: Pros and Cons<sup>7</sup>

This study was one of a series of papers commissioned by the Research and International Affairs Branch of the Department of

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<sup>5</sup> Ibid., p.142.

<sup>6</sup> Ibid., p.143.

<sup>7</sup> S.J. Liebowitz, Copyright Obligations for Cable Television: Pros and Cons, (1980).

Consumer and Corporate Affairs which investigated various aspects of the revision of Canada's Copyright Act. Professor Liebowitz, by applying econometric modelling techniques examined the feasibility of imposing copyright payments on cable television companies for the retransmission of programming. The study was based on the assumption that copyright liability should only be imposed if cable systems had the overall effect of reducing the advertising revenues of broadcasters. Liebowitz claimed that if cable caused advertising rates to increase there should be no justification for the introduction of copyright liability for cable since the copyright owners would be compensated by the higher royalties they would receive from the broadcaster.<sup>8</sup>

Liebowitz maintained that there were a variety of ways in which cable television might influence the advertising revenues of broadcasters, each of which was related to the altering of the pre-existing "link" between audience size and advertising rates.<sup>9</sup>

One possible result of cable television which might reduce advertising rates was that of "market fragmentation." This phenomenon would occur when viewers, having access to more stations on cable, would begin to watch signals from distant stations, thus reducing the time spent watching local stations. Liebowitz maintained that this fragmentation would reduce the

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<sup>8</sup> Ibid., pp.23-26.

<sup>9</sup> Ibid., pp.30-32.

rates which local stations might charge for advertising because their market share had decreased. This reduction, however, was not necessarily offset by an increase in rates by the distant station since its advertisers did not necessarily value these "distant viewers" as much as local ones. This was based primarily on the fact that viewers not living in the communities where these "distant" stations originate were less likely to patronize the establishments paying for the advertising.<sup>10</sup>

Employing a variety of statistical techniques, Liebowitz determined that market fragmentation, as a result of cable television, had the overall effect reducing advertising rates by 13%.<sup>11</sup>

The study, however, also identified a number of positive effects related to the audiences viewing habits which might cause advertising rates to increase. These included the fact that cable might increase an individual's overall amount of television viewing or might increase his valuation of television. Although the results did not support the hypothesis that cable increased overall television viewing, the author maintained that viewers who subscribe to cable were able to find a television program which more closely matched their tastes. It was, therefore, concluded that these viewers watched these programs more

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<sup>10</sup> Ibid., p.38.

<sup>11</sup> Ibid., p.50. This figure, however, is considered to be somewhat of an overstatement. Further analyses performed by Liebowitz place the figure at 11%, p.73.

intensely and would ultimately be more receptive to advertising messages.<sup>12</sup>

Through his analysis using advertising rate cards, cable penetration rates, and other demographic data as variables Liebowitz arrived at the conclusion that cable television was responsible for an estimated 19.6% increase in television advertising rates.<sup>13</sup> From this figure Liebowitz concluded that cable should not have to pay copyright royalties because:

CATV does not decrease advertising revenues... It invalidates the arguments for most copyright proposals put forth in the area. New justifications are needed if logic is going to imply a need for copyright payments by CATV.<sup>14</sup>

Liebowitz also very briefly examined whether Canadian cable companies should make royalty payments for the material of copyright owners when it was carried on their systems. He emphasised that, although the majority of these payments would go to owners in the United States, this might not necessarily have negative consequences. He felt that these payments might ultimately improve the quality of the programs made outside of Canada. Since Canadians apparently valued the quality of these U.S. programs it was maintained that this would have the result of improving the welfare of Canadians.<sup>15</sup>

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid., p.50, p.73.

<sup>14</sup> Ibid., p.58.

<sup>15</sup> Ibid., p.28.

Liebowitz attempted to explain, however, that Canadians were reluctant to implement these payments. He further identified what he felt was the underlying rationale for this hesitancy:

There is a tendency to feel that Canada can get something for nothing by restricting copyright payments abroad... this is not always true... but it is probably close to the truth with present day realities.<sup>16</sup>

Liebowitz extended this reasoning by proposing the hypothesis that Canada could "reduce its copyright payments to zero (say by eliminating all Canadian broadcasters)" thereby permitting it to "free ride entirely on the American coattails."<sup>17</sup> This statement was qualified, however, by explaining that this proposal would "probably be unacceptable to many Canadians."<sup>18</sup>

V) R.E. Babe and C. Winn: Broadcasting Policy and Copyright Law<sup>19</sup>

In response to the differing solutions advocated by these previous reports the Department of Communications, in 1980, commissioned Robert Babe and Conrad Winn to assess the strengths and weaknesses of the Keyes/Brunet and Liebowitz reports with

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<sup>16</sup> Ibid., p.27.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> R. Babe and C. Winn, Broadcasting Policy and Copyright Law: An Analysis of a Cable Rediffusion Right, (Department of Communications: 1981).



respect to Canada's overall broadcasting policy.

In light of the fact that a primary focus of Canada's broadcasting policy was to protect the culture of Canada the authors identified four general principles of federal cultural policy. These were:

- 1) To enhance the cultural awareness and identity of Canadians.
- 2) To emphasize mass culture, especially broadcasting.
- 3) To augment the resources of Canadian cultural producers so that they can compete more effectively in the marketplace.
- 4) To promote the ideal of cultural liberty so that consumers are provided with cultural freedom of choice.<sup>20</sup>

The paper acknowledged that Canadian broadcasting policy had historically followed these principles of cultural policy.<sup>21</sup> In evaluating the Keyes/Brunet proposal of limiting a rediffusion right only to Canadian broadcasts, the paper found that it was consistent with these main principles of Canadian cultural and broadcasting policies.<sup>22</sup>

In addition to this "cultural" perspective Babe provided an economic analysis of both the Keyes/Brunet and the Economic Council proposals. The Keyes/Brunet proposal would have the beneficial effect of making Canadian-originated programming more economically attractive to Canadian broadcasters (although it may

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<sup>20</sup> Ibid., pp.116-118.

<sup>21</sup> Ibid., p.118, p.120.

<sup>22</sup> Ibid., p.121.

be somewhat less attractive economically to Canadian cable companies).<sup>23</sup> This approach would not be overly effective in stimulating Canadian program production, especially in the private sector. The royalty payments envisaged in the proposal, however, would offer some incentive to the CBC and other public broadcasters to increase program production.<sup>24</sup>

Babe was somewhat less critical of the Economic Council's proposal since the groups which would gain the most were the CBC, the provincial educational broadcasters, and PBS. His evaluation was based on the judgement that "public broadcasting [is] superior to advertiser-financed television in transmitting important cultural values..."<sup>25</sup>

The section of this report most germane to this thesis was Winn's analysis of how Canada's copyright law might affect her long-term relationship with the United States. Canada's decision on rediffusion rights should be within the letter, if not the spirit, of its international treaty obligations. The Keyes/Brunet proposal, which would protect only Canadian broadcasts, was, first, consistent with the requirements of treaties such as the UCC, second did not contravene the General Agreement on Tariffs and Trade (GATT) which provided exemptions

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<sup>23</sup> Ibid., p.80.

<sup>24</sup> Ibid., p.89.

<sup>25</sup> Ibid., p.90.

for cultural products.<sup>26</sup>

Winn also assessed whether or not the "discrimination in favour of Canadian broadcasts"<sup>27</sup> would be consistent with Canada's long-term relationship with the U.S. and, more generally, the development of international codes of conduct. Believing that "culture ought not be subject to the rules of international efficiency"<sup>28</sup> Winn maintained that all countries should be permitted to "encourage indigenous self expression."<sup>29</sup> The Keyes/Brunet proposal, therefore, were not contradictory to our international obligations of "order and economic integration."<sup>30</sup>

Winn was unconvinced that the payment of copyright royalties to the U.S. for the rediffusion of their signals was required merely because Canadian signals were protected by the compulsory licensing scheme created in the U.S. Copyright Act of 1976. On the one hand this protection afforded by the U.S. seemed to be "equitable and generous"<sup>31</sup> giving "moral justification to the argument that compensation should be paid."<sup>32</sup> On the other hand

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<sup>26</sup> Ibid., pp.137-138.

<sup>27</sup> Ibid., p.138.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid., p.139.

<sup>32</sup> Ibid., p.196.

the scheme was a "loss leader",<sup>33 34</sup> in that the administrative practices established in the Act might be discriminatory to the interests of Canadians.<sup>35 36</sup>

Winn suggested that if Canada decided to adopt a "protectionist" rediffusion right in which royalty payments would not be provided to the U.S. copyright holders, a lively response might follow. Winn felt, however, that in comparison to the U.S. reaction over the Bill C-58, this dispute would be "less vigorous".<sup>37</sup> The Bill C-58 dispute entailed an actual loss of income for the U.S. border broadcasters, while this copyright case would represent only the loss of potential income.<sup>38</sup> Winn defined that four phenomena would influence the U.S.'s response to a protectionist retransmission policy adopted by Canada. These were:

(a) the increasing difficulty experienced by the

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<sup>33</sup> Ibid., p.138.

<sup>34</sup> Winn suggested that the United States may have provided copyright protection to Canadian works retransmitted by U.S. cable companies in their revised Copyright Act with the expectation that the Canadians would reciprocate by including a similar compulsory licensing scheme in their revised act. R. Babe and C. Winn (1981), p.138.

<sup>35</sup> Ibid., p.138-140.

<sup>36</sup> Winn argues that the U.S. Copyright Act discriminates against Canadians since it "selectively imposes compulsory licensing on rediffused broadcasts from Canada (and Mexico) while permitting free market negotiations in the case of other foreign rediffused broadcasts." R. Babe and C. Winn (1981), p.139.

<sup>37</sup> Ibid., p.140.

<sup>38</sup> Ibid.

- U.S. in securing compliance around the globe,
- (b) the relative importance of rediffusion rights as compared to energy, water, and other items of bilateral interest,
  - (c) whether the threat to U.S. income is immediate or potential, and,
  - (d) the will or determination of the Canadian government to assert its views in the cultural domain.<sup>39</sup>

Winn was skeptical of assertions that the U.S. would respond with extreme retaliation to Canada's protectionist measures. He suggested that, although the broadcasters were able to influence the political agenda of the U.S. government, there were "at least a half a dozen continental issues more important... than the absence of income from potential rediffusion rights in Canada."<sup>40</sup>

After evaluating the proposals of Keyes/Brunet and Liebowitz, Babe and Winn offered the following recommendations:

We recommend a system of compulsory or statutory licensing for cable rediffusion television broadcasts whereby royalties from cable systems would be determined as a percentage of gross revenue. This percentage should be substantial (initially, perhaps 20 per cent of gross revenue) and should be adjusted each year by an administrative tribunal or appeal board so that the bulk... flow to the broadcasting and program production sectors.

We recommend that royalties from each cable system be distributed to non-commercial broadcasters and to independent producers whose programs are diffused by non-commercial broadcasters...<sup>41</sup>

The authors provided a relatively simple "point system"

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid., pp.201-204.

which the cable systems would apply to their gross revenues in order to calculate the payments which they would be required to make to the non-commercial broadcasters and independent producers.<sup>42</sup>

With respect to Canada's treatment of all foreign non-commercial broadcasts and independent productions contained within, their proposed compulsory licensing plan would only take effect after...

...the federal government has satisfied itself that Canadian broadcasting interests have been treated equitably in the given foreign jurisdiction and after an appropriate order-in-council has been issued.<sup>43</sup>

In particular, Babe and Winn emphasized specifically their contention that Canadians were "discriminated" against by the provisions in the United States Copyright Act. Although Canada's revised Copyright Act should provide protection for U.S non-commercial broadcasts (i.e. PBS) and the independent productions encompassed in these broadcasts, such a recommendation should be implemented only after the Canadian government was "satisfied with the treatment of Canadian interests under the U.S. copyright licensing scheme."<sup>44</sup>

VI) Consumer and Corporate Affairs Canada: From Gutenberg to Telidon: A White Paper on Copyright

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<sup>42</sup> Ibid.

<sup>43</sup> Ibid., p.203.

<sup>44</sup> Ibid.

This White Paper did not advocate any particular policy position on the topic of whether copyright payments should be made for the retransmission of broadcast signals. Instead, the study juxtaposed the options advocated by interested parties and requested that they comment when the paper was referred to the Parliamentary Standing Committee on Communications and Culture. An entire Appendix was devoted to the question: "Should Copyright Liability Attach to Retransmission?"<sup>45</sup> Interestingly, the observation was made that most of the previous studies and papers on the topic of copyright liability for cable retransmissions examined the issue from a strict legal perspective. The White Paper recommended that the issue should be viewed in a "larger whole" which would include Canada's overall cultural and communications policy. Whatever option was chosen, it should be consistent with Canada's cultural and communications policy while simultaneously balancing the interests of all parties involved (the copyright owner, the broadcaster, the retransmission operator and the viewing public).

The White Paper defined the options which the parties, wishing to debate the issue of copyright liability for cable retransmissions, should consider. The parties were warned of the complex issues which the government would address in rendering a decision on this matter. The most important issue was, of

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<sup>45</sup> Department of Communications and Department of Consumer and Corporate Affairs, From Gutenberg to Telidon: White Paper on Copyright, (Ottawa: Ministry of Supply and Services Canada, 1984), pp.89-112.

course, whether or not liability should be imposed. The paper recommends that if it were not imposed, then the Act "must explicitly state this in order to avoid litigation."<sup>46</sup>

The White Paper, however, suggested a number of different options which may be considered if copyright liability was to be imposed. One option suggested was the establishment of an "exclusive right" for copyright owners. Under this scheme the copyright owners would have the "unrestricted ability to... permit or deny the retransmission of their works."<sup>47</sup> Prior to retransmitting copyrighted works, the cable systems would have to obtain permission from the copyright owner and negotiate a fee for the use of the material. The White Paper suggested that this type of system might have the disadvantage of interfering with public policy. To demonstrate this point, the paper outlined a hypothetical situation in which a cable system could not receive the authorization from the copyright owner to redistribute programming carried on a local signal. Since the carriage of all local signals was required under the CRTC's cable regulations, the paper noted that an unrestricted exclusive licensing system may have the potential to "create a conflict between the CRTC regulations and the Copyright Act" and "would also place cable systems in a poor bargaining position".<sup>48</sup> To rectify this

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<sup>46</sup> Ibid., p.109.

<sup>47</sup> Ibid. p.110.

<sup>48</sup> Ibid.



situation the White Paper suggested that if an exclusive licensing scheme were adopted in Canada, the cable companies should not be denied the right to redistribute the "must carry" signals defined by the CRTC's cable regulations. The paper noted, however, that this should not imply that the cable companies would not have to pay the owners for the use of these works.

Another scenario suggested by the White Paper was a system called "compulsory licensing". Under this system the cable companies would be permitted to retransmit signals without prior authorization from the copyright owner, provided that the predetermined copyright payments were made to the copyright owner.

The White Paper also addressed the issue of what type of compensation mechanism would be necessary if a retransmission right was adopted. It noted that under an exclusive licensing arrangement open negotiations would normally occur between the copyright owner and the retransmitter. The paper noted, however, that this type of system had a number of drawbacks such as "high transaction costs and the refusal to permit retransmission."<sup>49</sup> To deal with the possible situation in which an agreement could not be reached between the parties for the "must carry" signals, it was suggested that an independent authority could be mandated to establish the fees.

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<sup>49</sup> Ibid., p.111.

As an alternative to this system of open negotiation the White Paper noted that the government could also adopt a system, based entirely on compulsory licensing, in which the royalties would be determined by a formula. The White Paper suggested that the formula could be based on either:

a percentage of retransmission revenue, with the rate established (and periodically reviewed) by statute, or by the Copyright Appeal Board; [or]

the number of subscribers times the number of must-carry retransmitting channels, with rates established by the same means.<sup>50</sup>

The paper noted, however, that this type of compulsory licensing system would not reflect the marketplace value of the works and would also entail some administrative costs and delay.

#### SUMMARY

This chapter has examined six studies published between 1957 and 1984 which deal with the issue of whether copyright royalties should be paid to the owners of works retransmitted by cable. It has illustrated that the opinion within Canada has slowly evolved from being strongly opposed to the implementation of a retransmission right to a position in which it would consider such a right under specific conditions.

The reports of the Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs (Ilsley Report), the Economic Council of Canada, and Liebowitz were all opposed to the

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<sup>50</sup> Ibid.

introduction of a retransmission right. All of these studies based their opposition on the argument that copyright owners would be compensated through the higher rates which they would receive from broadcasters in recognition of the extended coverage provided by cable. While the Ilsley Report and the Liebowitz study recommended against the establishing of copyright liability under all circumstances, the Economic Council suggested that a liability should apply when the broadcasts were non-commercial.

The study by Keyes and Brunet broadened the scope of the research on the cable/copyright issue to include a discussion of the international implications of establishing a retransmissions right. As a result of this work, Keyes and Brunet noted that there was the potential for a net outflow of copyright payments to the United States if a copyright liability for cable was established. The Keyes/Brunet study attempted to address this outflow problem in their recommendation that a retransmission right should only apply to Canadian broadcasters for Canadian broadcasts.

In a critical review of the Liebowitz and Keyes/Brunet reports, Babe and Winn argued that the most appropriate solution would be for Canada to establish a system in which royalty payments would be provided to non-commercial broadcasters and independent producers whose works were carried within non-commercial broadcasts. In recognition of the pressures which Canada was receiving from the United States, this proposal suggested that all non-commercial broadcasts, including those

originating in the U.S., would qualify for royalty payments.

The final paper examined in this chapter was "From Gutenberg to Telidon", a White Paper published by the Department of Consumer and Corporate Affairs. While this paper did not advocate any specific policy option, it reviewed a number of issues which related to the topic of copyright payments for cable retransmissions. Although the intent of the paper was to encourage discussion on the cable/copyright issue, the options which it presented seemed to suggest that Canada should amend its Copyright Act to include some type of copyright payments for cable retransmissions. The discussion in the paper seemed to suggest that the authors tended to favour a system of "compulsory licensing" rather than the establishment of an "exclusive right" for copyright owners. Later chapters will demonstrate that discussion prompted by this paper was instrumental in prompting the Government of Canada to revise the Copyright Act.

### CHAPTER 3

#### POSITIONS OF THE VARIOUS PARTIES IN CANADA

As the Canadian government was conducting these various studies which examined the necessity to amend Canada's Copyright Act to include a retransmission right, many groups representing the various communication industries were closely following the developments. These groups may be categorized into three groups- the cable operators, copyright owners, and the broadcasters. Since the introduction of a retransmission right could affect the revenues of these companies, they were very concerned that the government chose an option which was favorable to their organization's best interests. In many cases, these industry groups were quite vocal about making their positions known to the government.

This chapter will survey the arguments which each of these industry groups have put forward in support of their position.<sup>1</sup> Each of these parties, depending on whether they would be receiving or paying the copyright royalties, maintained a different position on the issue. Generally the cable companies, since they would be paying for the use of the copyright owner's property, opposed any type of licensing arrangement for

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<sup>1</sup> Except when noted the material for these sections was derived from Canada, Department of Communications and Department of Consumer and Corporate Affairs, From Gutenberg to Telidon: White Paper on Copyright, (Ottawa: Ministry of Supply and Services Canada, 1984), pp.100-106., and Wanda Noel, "Should cable systems pay copyright royalties?" 12 Ottawa Law Review, (1980), pp.195-213.

retransmissions. Copyright owners, on the other hand, saw the unauthorized use of their works as unfair, and were demanding that the Copyright Act be revised. The broadcasters, having to pay for the programs they transmit, maintained that they were placed at a competitive disadvantage to the cable companies which were able to acquire much of their programming free of charge. With reference to the submissions which the three groups have made at various public hearings, each of these arguments will be examined in greater detail.

#### I) Cable Operators

For a number of reasons the cable operators were strongly opposed to the introduction of copyright liability for cable retransmissions. They identified their function as that of a delivery system, providing their subscribers with a service which improved the reception of free, over-the-air signals. Michael Hind-Smith, President of the Canadian Cable Television Association, stated that cable was essentially "passive", charging subscribers for the service of redistribution rather than for the programs themselves. In 1985, he stated to the Subcommittee considering the revision of copyright:

An analogy often used is if there is a well in a village, a person can, if he wishes, walk through the village with his bucket and put his bucket down and take the water out. We simply draw the water, which I take to be free, and pump it around the village, which is a convenient saving to the subscriber of his efforts at a very nominal charge

for the distribution.<sup>2</sup>

Using this logic the cable operators felt that cable service was equivalent to a "master antenna" system which served a community rather than an individual or small group.<sup>3</sup> Since the owners of master antennas, or even roof-top antennas, were not subject to copyright liability the cable operators felt that this same privilege should be extended to their industry. They did not select the programs which they carried, nor did they sell advertising time. Therefore they should not be treated in the same manner as broadcasters, who had to pay fees to the copyright owners for the carriage of their programs.

The cable operators also argued that the copyright owners were not harmed by retransmission of their material on cable because compensation, in fact, already occurred by means of the payment structure of the broadcasting industry.<sup>4</sup> Because the broadcaster's audience size was increased as a result of cable, and since advertising rates were dependent on audience size, the cable industry alleged that the broadcasters were able to charge higher rates for their advertising time. This increased revenue

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<sup>2</sup> Statement of Michael Hind-Smith, President, Canadian Cable Television Association, Canada, House of Commons Study Committee on Communication and Culture, Minutes of Proceedings on the Revision of Copyright, (Ottawa: Ministry of Supply and Services Canada, 1985), 25:19. [Hereinafter, Minutes of Sub-committee Proceedings]

<sup>3</sup> From Gutenberg to Telidon, p.105.

<sup>4</sup> Michael Hind-Smith, Minutes of Sub-Committee Proceedings, 25:7.

was then passed on to the copyright owner in the increased fees which they charge the broadcaster for the use of their material.<sup>5</sup> Therefore the introduction of liability for the retransmission of broadcast signals would constitute a "double payment."<sup>6</sup>

The cable operators further maintained that copyright liability should not be introduced because it would necessitate an added expense for their subscribers (in an already price-sensitive industry). They were also concerned about the fact that the majority of these copyright royalties would go to creators in the United States. In a study conducted for the Canadian Cable Television Association (CCTA) by the Nordicity group, the authors estimated the royalties which will be generated if a copyright scheme similar to that in the United States were adopted in Canada. Using a variety of modifications related to exemptions for local signals and the size of the cable systems, the study produced a number of different scenarios. In what the CCTA has referred to as the "best-scenario" (identical to the U.S method: local off-air signals not liable, small cable systems paying a flat-rate fee) it was calculated that the cable industry would pay \$35 million per year in retransmission fees. If the retransmission of all U.S. signals (distant or local) created a liability, the Nordicity study calculated that payments \$64 million would be made per year. Under their "worst-case"

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<sup>5</sup> From Gutenberg to Telidon, pp.105-106.

<sup>6</sup> Ibid., p.106, and Michael Hind-Smith, Minutes of Subcommittee Proceedings, 25:6.



scenario (no distinction for the size of the cable system, and all signals considered as distant) the study's calculations placed the total cost of liability for a retransmission right at \$82 million per year.<sup>7 8</sup>

In addition to the fact that even the lowest of these estimates represent an amount almost equal to the profits of the Canadian cable industry<sup>9</sup>, the cable operators maintained that 80% of these royalty payments would go to parties in the United States.<sup>10</sup> They argued that this out-flow of funds was contrary to the government's long-standing policy of promoting Canadian production. The cable companies felt that this "extra" payment was not justified since the cable companies must already contribute to the development of Canadian programming through a 7% tax which cable subscribers were paying to the Broadcast Program Development Fund since July of 1983.<sup>11</sup>

Furthermore, the cable operators argued that the

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<sup>7</sup> Michael Hind-Smith, Minutes of Sub-committee Proceedings, 25:6-7, and Secor Inc., Probable Cost of a Retransmission Right in Canada: An Adaptation of the American System to Canada, Study commissioned by the Subcommittee of the Standing Committee on Communications and Culture on the Revision of Copyright. September 1985.

<sup>8</sup> Hind-Smith claims that the Nordicity Study suggests these payments for retransmissions would result in increases of between 13% to 15% on subscriber's bills. Hind-Smith, Minutes of Sub-Committee Proceedings, 25:18.

<sup>9</sup> Ibid., 25:18.

<sup>10</sup> Ibid., 25:22.

<sup>11</sup> Hind-Smith claims that the federal government has collected \$40 million from cable subscribers for this fund. Ibid., 25:17.

introduction of copyright liability might result in their being unable to meet the compulsory carriage obligations included by the CRTC in their licences. The cable operators suggested if an exclusive licensing arrangement were adopted for cable, it was conceivable that the copyright owners might refuse to provide them permission to carry the programming. If this situation arose, they would be faced with only two options; infringing on the copyright by retransmitting the material without the authorization, or violating the conditions of their licences by not carrying the material.<sup>12</sup>

## II) The Copyright Owners

The copyright owners maintained that the retransmission of their material by the cable companies was a "use" for which they should receive compensation. They argued that the continued use of their property without authorization or compensation was a violation of "the purpose and principles of copyright law."<sup>13</sup> They felt that retransmission systems were engaged in an activity which resembled broadcasting rather than merely providing an antenna service. In responding to Michael Hind-Smith's "water carrier" analogy, Mr. N. Alterman, Vice-President of the Canadian Motion Picture Distributors Association, expressed the opinion held by many copyright owners.

If he is merely carrying water from the well to the

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<sup>12</sup> From Gutenberg to Telidon, p.107.

<sup>13</sup> Ibid., p.101.

home, he is a common carrier. If he is bringing other beverages as well and he is selecting the beverages that are offered, than he is doing something more than merely acting as a common carrier... In my view he is offering something more than water... Specifically, no cable system merely brings in what is available locally.<sup>14</sup>

The copyright owners were not convinced that retransmission operators should be treated differently with respect to copyright obligations on the basis that they carried the signal by wire rather than over-the-air. Because the cable operator distributed signals which viewers were not normally able to receive, some type of compensation must be paid to copyright owners for the retransmission of their property.

The copyright owners argued that the retransmission operators were making it difficult for them to control the distribution of their property. In some cases this hampered their ability to honour the "exclusivity" clauses in their licensing agreements with broadcasters. As Noel has explained:

When a cable system operates within the same market as a television station, it weakens the licensing system by depreciating the value of the program to the broadcaster, and the return to the copyright owner. The copyright owner will usually license his program in each market separately. For example, the Ottawa market will be licensed independently of the Montreal market. A cable system operating in Ottawa could import into that city the programs of a Montreal broadcaster which had not been authorized for release in Ottawa. The Ottawa market would thus be lost to the copyright owner as a first-run market. The value of the program to an Ottawa station would be substantially

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<sup>14</sup> Mr. N. Alterman, Vice-President, Canadian Motion picture Distributors Association, Minutes of Sub-committee Proceedings, 25:40.

diminished.<sup>15</sup>

Furthermore, the copyright owners had become involved in disputes with the writers, performers and director's guilds as a result of these additional "plays" by cable retransmitters. In general the copyright owner's contracts with these guilds stated that "set up" fees would be paid to the guild if the film or television program was retransmitted by satellite or cable. The copyright owners maintained that the system was unfair because they must pay these guilds for additional uses (even though they have no control over them), but received no compensation from the retransmission operators.<sup>16</sup>

The copyright owners rejected the argument that they already received compensation for retransmission because of the higher licensing fees which they charged the television stations. There were two basic reasons for this. First, they did not support the notion that broadcasters be put in a position in which they acted as a "bargaining agent"<sup>17</sup> between the copyright owner and retransmission operator. Second, they argued that, in most cases, the broadcaster would not pay the higher fees for a number of reasons. These were:

- Television stations that are not "super-stations" are unwilling to pay for programs shown outside their markets.

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<sup>15</sup> Wanda Noel, (1980), pp.201-202

<sup>16</sup> Hylton, John, Maavara, Gary A., The Interaction of Copyright Law and Broadcasting Policy, Study prepared for the Task Force on Broadcasting Policy, (December, 1985), p.14.

<sup>17</sup> From Gutenberg to Telidon, p.101.

- Local advertisers are unwilling to pay for advertising in a market where there are no facilities to sell their products or, alternatively, no customers to buy them.

- The advertiser of a national product whose advertisement is shown on a distant station and also imported into a local market on cable will not pay the local broadcaster again for the same exposure.<sup>18</sup>

The copyright owners suggested that they should be compensated for the retransmission of their works through a system of voluntary negotiations among the collectives which represented the copyright owners and the cable operators.<sup>19</sup> Because television schedules were available in advance of the actual broadcasts, cable operators had enough time to obtain the proper licenses. They have recognized, however, that some parties had serious reservations about whether or not this type of arrangement was practical. The Canadian Motion Picture Distributors Association (representing the Canadian organizations of the major U.S. producers and distributors of motion pictures and television programs) had therefore recently stated that it was prepared to accept a compulsory licensing system for the redistribution of their property contained in over-the-air

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<sup>18</sup> Ibid., pp.101-102.

<sup>19</sup> Executive Summary of the Submission of The Canadian Motion Picture Distributors Association to the Sub-committee on the Revision of Copyright of the Standing Committee on Communications and Culture of the House of Commons with respect to: "From Gutenberg to Telidon" The White Paper on Copyright, (April, 1985), p.3.

television signals originating in Canada and the United States.<sup>20</sup>

### III) The Broadcasters

The broadcasters complaints were similar to those advanced by the copyright owners. Agreeing that the means of distributing the signals did not make any difference, they maintained that the same licensing requirements which applied to broadcasters should be extended to retransmission system. The broadcasters' primary objection to the activities of cable operators was that they interfered with the broadcaster's opportunity to receive an "exclusive licence" in the geographical area which they serve. These exclusive licenses were essential to the industry's market structure because the broadcasters' ability to sell time to advertisers was seriously impaired if the programs had already been shown in their area. Although the CRTC's simultaneous substitution policies had been an effective measure of protecting the local broadcasters from signals imported by cable, the introduction of the CANCOM system presented a new set of problems.

As explained earlier, CANCOM uplinked its signals from a variety of points and distributed them throughout Canada. In many instances, because the signals were received in one time zone and distributed to communities in another time zone, a "non-simultaneous program exhibition" occurred. The CRTC's

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<sup>20</sup> Ibid., pp.3-4.

simultaneous substitution policy, however, did not "correct" for differences in time zones. For instance, CANCOM might distribute a program received from a head-end in the Eastern time zone (Detroit) to cable companies in the Central time zone (Saskatchewan region). The local Saskatchewan broadcaster, although he might have "exclusive" rights to that same program, could not request the cable company to delete it and substitute the local programming since it was not being "simultaneously" shown locally.<sup>21</sup>

The broadcasters argued that the present system of no copyright liability provided the cable operators with an unfair economic advantage over a number of parties. The White Paper "From Gutenberg to Telidon" provided a concise summary of the broadcasters' position on this issue. It stated:

These broadcasters maintain[ed] that this competition [was] unfair to:

- the distant station, because the retransmission system has free access to material that the distant station has paid for;
- any local non-network station that has bargained and paid for exclusive rights in the local market that it is not actually getting;
- any local network station, for it does not pay for the programming it is affected by audience fragmentation and the refusal of the network advertiser to pay for coverage on network stations that are not the exclusive outlet for the program; and

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<sup>21</sup> For a full discussion of the issues relating to "Simultaneous Program Substitution and Non-Simultaneous Program Deletion" see Video World Inc., The Role of Satellites in the Canadian Broadcasting System, Study prepared for the Task Force on Broadcasting Policy, (February 1986), pp.93-96.

- copyright owners, because they receive no compensation for the retransmission of the program.<sup>22</sup>

In addition to these arguments, broadcasters were also been concerned that the retransmission of signals might be in violation of their licensing agreements with the distributors. They stated that clauses existed in these contracts which prohibited them from permitting the retransmission of programs. Some parties suggested that as a result of CANCOM's activities "the broadcaster [might] be liable to the production company for failing to take steps to prevent retransmission without compensation."<sup>23</sup>

#### SUMMARY

This chapter examined the positions held by the various Canadian industry groups on the issue of whether or not a retransmission right should be granted to copyright owners when their works were retransmitted by cable systems. It has illustrated that the parties were highly polarized in their positions on this issue. Generally, the cable industry, since they would be making royalty payments to the copyright owners, opposed the implementation this scheme. The copyright owners and broadcasters, however, favoured an amendment to the Copyright Act which would make the cable companies liable for the simultaneous

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<sup>22</sup> From Gutenberg to Telidon, p.104.

<sup>23</sup> John Hylton, Gary Maavara (1985), p.15.



retransmission of over-the-air broadcast signals.

The cable companies based their argument on the grounds that they were simply a "passive carrier" of programming which was made available, free of charge, to the public. They argue that their service was equivalent to an antenna system which serves an entire community. They also maintained that the copyright owners could be compensated for the cable audience by charging higher rates to the broadcasters for the use of the copyrighted material. Finally, the cable operators opposed the imposition of a royalty payments scheme on the basis that the revenues collected would go primarily to American copyright owners rather than to the Canadian production industry.

The copyright owners argued that the retransmission of their material by cable was a "use" for which they should be compensated. They disagreed with the cable companies "passive carrier" argument, claiming that cable provided audiences with programming which they would not be able to receive otherwise. The copyright owners also disputed the cable industry's claim that they could be compensated through the higher fees charged to the broadcasters. They argued that, in many cases, both the broadcasters and the advertisers did not value these "extra markets" provided by cable, and were therefore unwilling to pay extra for them.

The broadcasters were concerned that the present systems impeded their ability to take full advantage of their "exclusive licenses". They maintained that in some cases it was difficult

to sell advertising in programs which were already imported into their geographical markets by cable. The broadcasters whose signals were carried into distant markets by cable systems were also concerned that this activity might violate their licensing arrangements which they held with their distributors.

This discussion suggests that the primary incentive for all of the industry parties involved in this debate is one of economics. The cable operators recognize that the introduction retransmission right will require them to make payments to the copyright owners. The copyright owners feel that the lack of a retransmission right results in the loss of a potential source of revenue. The broadcasters were concerned that if the arguments of the cable operators become accepted, they may be expected to increase their payments to the copyright owners for the acquisition of programming.

## CHAPTER 4

### THE UNITED STATES' POSITION ON CANADA'S COPYRIGHT LAW

The previous chapter examined the positions of the various Canadian industry groups on the issue of whether cable companies should continue to be permitted to simultaneously retransmit the signals of over-the-air broadcasters without making copyright payments to the owners of the programs. This chapter will examine this same issue from the perspective of the copyright owners and broadcasters in the United States.

Although the Canadian cable companies have retransmitted American broadcast signals since the mid-1950, the copyright owners and broadcasters in the United States have become increasingly distressed as this practice has become more widespread since the early 1970's. During this period, as explained in Chapter 1, Canadian cable companies began to import distant U.S. signals by microwave into areas further away from the Canada/U.S. border. In 1983 CANCOM was authorized to serve "remote and underserved" markets with the U.S. 3+1 signals. Later, the CRTC permitted CANCOM to provide their satellite service to increasingly larger markets in all parts of Canada.

Because the extent of this activity seemed to be steadily increasing many U.S. copyright owners became frustrated with the Canadian copyright law since it did not provide them with the opportunity to collect royalties for the use of their works. The growing level of concern on the part of the American parties

(primarily the U.S. commercial networks, CBS, ABC, NBC, and the copyright owners, represented by the Canadian Motion Picture Distributors Association) might be evidenced by their participation in the CRTC's CANCOM hearings and their submissions to the Sub-Committee of the Standing Committee on Communication and Culture's hearings on the Revision of Copyright.<sup>1</sup>

The basis of the American's argument stemmed from the fact that the United States government passed a revised Copyright Act in 1976 which included a retransmission right for cable companies. Under this revised Act the copyright owners received royalty payments when their works were simultaneously retransmitted by cable. Since the passing of this legislation, the U.S. copyright owners increased their efforts to persuade the Canadian government to amend its Copyright Act to include a similar right. The position of the American parties is, therefore, best understood within the context of the historical development of their copyright law with respect to cable retransmissions.

#### History of the 1976 U.S. Copyright Act

The cable copyright law which existed in the United States prior to 1976 was similar to that of Canada at present. As in Canada, the cable industry in the U.S. began to emerge in the 1950's. At this time the cable system's primary role was to

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<sup>1</sup> "America nets complaint to CRTC of unfair treatment by cable", Cinema Canada, (1985), p.47.

provide subscribers with a convenient method of overcoming reception problems caused by obstacles such as hilly terrain. During the late 1960's, however, some cable systems began to offer "distant" stations to their subscribers. These stations were imported using powerful antennas or microwave relays.

The first case establishing copyright liability for cable retransmitters was Fortnightly Corp v. United Artists. The Fortnightly Corporation owned and operated cable systems in West Virginia which retransmitted the signals of five nearby television stations to its subscribers. Fortnightly, however, did not receive any type of authorization from the broadcasters to use their signals and did not pay any type of royalty payments to the copyright holders of the material broadcasted. United Artists Television, one of the copyright holders involved, sued Fortnightly seeking damages and an injunction to stop the distribution of its material to cable subscribers.

Both the District and Appellate Courts decided that Fortnightly was engaged in a "performance" as defined by the, then applicable, Copyright Act of 1909.<sup>2</sup> The Supreme Court, however, reversed the lower courts' decision in 1968.<sup>3</sup> Its decision noted that the 1909 Act lacked any direction with respect to cable systems since at the time of its drafting television yet to be invented. The Court was, therefore, forced

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<sup>2</sup> Fortnightly Corp. v. United Artists Television Inc., [1968] 392 U.S 390, 88 S.Ct. 2084, 2090.

<sup>3</sup> Ibid., p.2084.

to "read the statutory language... in light of drastic technological change."<sup>4</sup> In deciding whether or not the activities of Fortnightly constituted a "performance", the Court applied a "functional analysis" test to determine the nature of the activity of CATV and the role that it played in the total process of television broadcasting and reception.

Applying this approach, the Court attempted to distinguish between the activities of the viewer and the broadcaster. The Court found that CATV operators had little in common with the functions of broadcasters, in that they "simply carr[ied], without editing, whatever programs they receive[d]."<sup>5</sup> Therefore the activities of CATV essentially fell on the side of the viewer. The Fortnightly decision concluded that the retransmission of copyrighted material by cable television systems did not constitute a "performance" within the meaning of Section 1(c) and 1(d) of the Act. The Court determined that Fortnightly simply offered a means for viewers to enhance their reception of a performance.<sup>6</sup>

Although the Fortnightly case defined the status of local signals, the issue of whether or not copyright liability applied to distant signals was not resolved until 1974 in Teleprompter

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<sup>4</sup> Ibid., p.2087.

<sup>5</sup> Ibid., p.2089.

<sup>6</sup> Ibid., p.2090.

Corp. v. Columbia Broadcasting Systems, Inc.<sup>7</sup> Teleprompter owned and operated a system consisting of television antennas and a microwave system which retransmitted broadcast signals to the homes of subscribers. In some cases the distances between the subscribers and the originating stations were over 450 miles, a distance which would have made it impossible to pick-up the signals with a conventional rooftop antenna. Columbia Broadcasting Systems (CBS), a television network, maintained that Teleprompter because of its importation and distribution of distant signals was essentially acting in the capacity of a broadcaster and was, therefore, liable under copyright law. As a result of the decision in the Fortnightly case, the District Court rejected the complaint, but it was later accepted by the Court of Appeals.<sup>8</sup>

The Court of Appeals determined that Teleprompter was involved in a less "passive" activity than Fortnightly, since it was importing the signals by means of microwave. Its decision noted that:

when a CATV system is performing the second function of distributing signals beyond the range of local antennas... it is functionally equivalent to a broadcaster and thus should be deemed to "perform" the programming distributed to subscribers on their imported signals.<sup>9</sup>

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<sup>7</sup> Teleprompter Corp. v. Columbia Broadcasting System Inc., [1974] 415 U.S. 394, 94 S.Ct. 1129.

<sup>8</sup> Ibid., p.1133.

<sup>9</sup> 476 F.2d at 349 (1973).

The Supreme Court, however, reversed the decision, applying the same "functional analysis" logic used in Fortnightly to Teleprompter. The Court stated that:

By importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers. When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing of the contents of that program... The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.<sup>10</sup>

It was, therefore, decided that Teleprompter had not infringed on CBS's copyright, and no copyright payments were necessary. The fact that it had imported the signals to a distant location was not material because the copyrighted works had already been made available to the public.<sup>11</sup> The Court stated that copyright owners probably were compensated for the use of their works "on the basis of the size of the direct broadcast market augmented by the size of the CATV market."<sup>12</sup> The Court, as it had done in its Fortnightly decision, noted that it had little other choice given the restraints presented in the 1909 Copyright Act. Congress was, therefore, urged to revise the Act if it wished to impose some type of copyright liability on cable systems. The Court concluded that the changing

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<sup>10</sup> [1974] 94 S.Ct. 1138.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid., p.1143



relationship among copyright owners, broadcasters, and cable systems should not be restrained "by means of litigation based on copyright legislation enacted more than a half century ago."<sup>13</sup>

During the period which these cases were in the courts Congress conducted exhaustive investigations in an attempt to determine whether copyright liability for cable retransmissions was appropriate. In 1965 two bills were introduced in both the House and Senate<sup>14</sup> which proposed the establishment of full copyright liability for all retransmissions on cable. Hearings were held to examine these bills in 1965 and 1966. After 22 days of heated testimony the positions of the various groups were clearly established. Representatives of the broadcasting industry, authors, and performing rights societies maintained that cable retransmissions should be subject to full copyright liability. The broadcasters argued that the "importation" of distant signals into other areas violated the local broadcasters' exclusive contracts which they held for a specific geographical area. The cable representatives, however, claimed that they simply improved reception of a signal which was available over-the-air.<sup>15</sup>

While Congress unsuccessfully struggled with a number of

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<sup>13</sup> Ibid., p.1144

<sup>14</sup> H.R. 4347, S. 1006.

<sup>15</sup> Cambridge Research Institute, Omnibus Copyright Revision: Comparative Analysis of the Issues, American Society for Information Science: Washington, 1973, pp.52-53.

copyright proposals the Federal Communications Commission (FCC) introduced a number of regulations which had the effect of minimizing the effect cable operators would have upon broadcasting. Some authors have suggested that, at times, the FCC rules...

had the effect of compensating for Congressional inaction and the effects of the Court decisions. Indeed, the Commission and the Congress seemed, at times to be working in tandem, with the FCC cable rules often functioning in lieu of the copyright legislation which Congress could not seem to pass.<sup>16</sup>

In 1966, the FCC extended its jurisdiction over all cable systems in order to protect local broadcasters from its impact. At this time a variety of different schemes were attempted. In 1966 the FCC introduced rules which restricted the importation of distant signals in the top 100 markets. In 1968 the FCC dropped these rules and introduced regulations which required the cable companies to obtain "retransmission consent" for the carriage of distant signals. These rules permitted the broadcasters to exert, at least temporarily, some type of control over the use of their signals.

In 1971, after prolonged discussions, Congress, the FCC and the cable industry were able to negotiate a compromise in the form of a "Consensus Agreement". Under this agreement the FCC relaxed its cable regulations, in order to permit cable operators

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<sup>16</sup> Shooshan and Jackson Inc., "Cable Copyright and Consumer Welfare: The Hidden Cost of the Compulsory License", Washington: 1981, p.14,

to expand into major markets and to import some distant signals. The FCC's syndicated exclusivity rules, whereby the cable company was required to delete any program in which the local broadcaster has exclusive rights, would remain. In turn, all parties would agree to endorse a revision of the copyright law which would require the cable companies to pay copyright royalties for the material which they carried.<sup>17</sup>

The FCC upheld its part of the agreement when it introduced its Cable Rules in February of 1972. In order to protect the local broadcasters from the importation of distant stations by cable, these new rules required cable systems to carry all local stations and limited the number of additional distant stations they could carry according to a formula which depended on the size of the market.

The cable industry, however, was unable to devise a suitable fee schedule for copyright payments. This issue became moot when the District Court ruled in the Teleprompter case that cable systems did not have to assume copyright liability for the importation of distant signals. This case provided Congress with an added incentive to continue its work to revise the 1909 Copyright Act. A comprehensive copyright legislation was finally introduced in 1974. Since the House did not act on the bill

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<sup>17</sup> For a complete discussion of the various legislative and regulatory approaches suggested prior to the approval of the 1976 Copyright Act see: Shooshan and Jackson Inc., "Cable Copyright and Consumer Welfare: The Hidden Cost of the Compulsory License", Washington: 1981, pp.7-18, and Appendix A.

during the 93th Congress, it had to be reintroduced in 1975. With some revisions the legislation was finally passed in 1976.<sup>18</sup>

Under this new Act the cable companies would only be liable for copyright payments for "distant non-network" programming. Congress was convinced that similar payments for both local and distant network signals were unnecessary since they did not feel that the retransmission of either of these types of signals harmed the copyright owners. Congress maintained that any royalties for the retransmission of local signals would be inappropriate since the copyright owners had already sold the rights and received payment for that particular area. Similarly, it was also determined that copyright payments for "distant network" signals would be unnecessary since the network had already contracted for the national distribution of the material to all markets regardless of the manner in which it was transmitted.<sup>19</sup>

The Act adopted a system of licensing , called "compulsory licensing", which was based on a compromise solution developed by the National Cable Television Association and the Motion Picture Association of America. In essence, compulsory licensing gave the cable companies the right to use the copyrighted works as long as the author was provided with royalty payments. Thus, the

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<sup>18</sup> P.L. 94-553, 90 Stat. 2541, 17 U.S.C. Secs. 101 (October 19, 1976).

<sup>19</sup> H. Rep. 1476, 94th Congress, 2d Sess. (1976), Copyright Law Revision, p.90.

cable operator, if he complied with the requirements established in the Act, could not be denied access to the material by the copyright owner. The House Committee's report on the revision of the Act explained that Congress felt that compulsory licensing was the most appropriate method of establishing copyright liability for cable television. The report stated:

In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.<sup>20</sup>

The Act also outlined certain requirements that the cable company must meet before the compulsory license was granted. These requirements were defined in Section 111 of the Act and may be summarized as follows:

1. With some exceptions for cable systems located outside of the continental United States, retransmissions had to be simultaneous;
2. Cable systems were prohibited from intentionally altering the content of a retransmitted program, except in specific limited situations pertaining to television commercial advertising research. They could not delete or alter commercial advertising or station announcements;
3. Cable systems could transmit only those signals which they were authorized to carry under the signals carriage and program exclusivity rules of the FCC supra;

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<sup>20</sup> Ibid., p.89.

4. Cable systems were prohibited from importing foreign television and radio signals pursuant to the compulsory licenses, with the exception of Canadian and Mexican signals receivable within limited zones along out borders. With respect to Canadian signals, the compulsory license would apply in an area located "150 miles from the U.S.-Canada border, or south from the border to the 42nd parallel of latitude, whichever is greater"<sup>21</sup>;

5. Cable systems must file and keep current Notices of Identity and Signals Carriage Complement and Statements of Account, and pay their statutory royalty fees to the United States Copyright Office.<sup>22</sup>

Furthermore, this revised Act established that the fees which were to be made by the cable companies. The formula for calculating these payments is a two step process which uses a value called a "distant signal equivalent" and a scale of set percentages. A distant signal equivalent was calculated by assigning a value of one distant signal equivalent for each independent station, and a value of one-quarter for each network station or non-commercial station whose signals were imported by the cable company.<sup>23</sup> The cable system's total royalty fee was then calculated by applying the following percentages to the cable company's gross receipts:

1. 0.675 of 1 percentum of such gross receipts for the first distant signal equivalent;

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<sup>21</sup> Ibid., p.94.

<sup>22</sup> Adapted from Falconi, Robert J., "To pay or not to pay?: A study on the copyright-cable controversy in the United States and Canada." unpublished paper, Osgoode Hall Law School, (Toronto: March, 1982), p.21.

<sup>23</sup> Interpretation of the Copyright Act of 1976, Chicago, Ill.: Commerce Clearing House Inc., (1976), para. 256.

2. 0.425 of 1 percentum of gross receipts for each of the second, third, and fourth distant signal equivalents;

3. 0.2 of 1 percentum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter;<sup>24</sup>

This new Act also created the Copyright Royalty Tribunal (CRT), which would be primarily responsible for the collection and distribution of the licensing fees. This body, however, would also serve to consider adjustments in royalty rates and resolve conflicts which might arise as the result of fee distribution. Although these functions would be very complex, even Congress at the time of its passing recognized that the Act provided very little guidance as to how the CRT was to carry out the duties of dividing the copyright royalties.

The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty [Tribunal] in determining the appropriate division among competing copyright owners... The Committee concluded that it would not be appropriate to specify particular, limiting standards for the distribution. Rather, the Committee believes that the Copyright Royalty Tribunal should consider all pertinent data and considerations presented by claimants.<sup>25</sup>

When the first year's royalties were to be divided, the copyright claimants spent many months in unsuccessful negotiations attempting establish an equitable allocation formula. The Copyright Royalty Tribunal, therefore, intervened

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<sup>24</sup> P.L. 94-553, Sec. 111(d)(2)(B)

<sup>25</sup> H. Rep. 1476, (1976), Report on Copyright, p.97.

and used the provision established in the Act to decide on an appropriate allocation schedule.<sup>26</sup> After applying a variety of general criteria, the Tribunal announced on July 30, 1980 that it was prepared to allocate the 1978 royalty payments in the following proportions:

<u>Claimants</u>	<u>Percentage of Total Fees</u>
Motion Picture Association and other Program Syndicators	75.00%
Joint Sport Claimants and NCAA	12.00%
Public Broadcasting Service	5.25%
Music Performing Societies	4.50%
U.S. and Canadian Television Broadcasters	3.25%
National Public Radio	.25%

Immediately following this announcement numerous claimants filed appeals with the CRT protesting the payments which they were to receive. After a number of delays the entire matter was heard before the Court of Appeals. The list of those who complained about the CRT's formula was extensive and included groups such as: The National Association of Broadcasters; the Motion Picture Association of America; the Public Broadcasting Service; the NCAA; the National Basketball Association; the National Hockey League; and the Canadian Broadcasting Association. Almost four years after the royalty payments had been collected the Appeals Court finally issued its decision. The Tribunal's percentage allocations were generally upheld, although the Court did not agree entirely with all of the Tribunal's

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<sup>26</sup> Ibid., Sec. 801(b)(3).



rationale.<sup>27</sup>

It was understandable that the Tribunal had some difficulty in allocating its first year's royalty payments because Congress did not provide them with any guidance for carrying out the complex and controversial task. Many cable operators and copyright owners affected by the "compulsory licensing" scheme became extremely disenchanted with the entire process. They noted that it was somewhat ironic that a system [compulsory licensing] which was put in place to minimize, in part, costs for the cable industry, had created an enormous amount of new costs which generally fell on those who were attempting to protect their own creative efforts.<sup>28</sup> In fact, the National Association of Broadcasters calculated that it had spent more money on legal costs for CRT and related proceedings surrounding the 1978 allocations than it would ever collect in royalties for that year.<sup>29</sup> In 1981, the Chairman of the Copyright Royalty Tribunal expressed his dissatisfaction with the existing licensing method:

My personal view is that Congress should eliminate the compulsory license so that the marketplace can set the true value of secondary transmission... The legislative history is clear that there is absolutely no economic justification for the statutory [fee] schedule initially adopted by Congress for the cable industry. The rates for cable were not adopted on the basis of any objective standard... It is unwise an unnecessary

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<sup>27</sup> National Association of Broadcasters v. Copyright Royalty Tribunal., 675 F.2d 367 (D.C.Cir 1982).

<sup>28</sup> Shooshan and Jackson, (1981), p.21.

<sup>29</sup> Television Digest, (February 9, 1981) p.5 in Shooshan and Jackson, (1981), p.21.

to continue to spend taxpayers' money on a program which is clearly unworkable and impractical.<sup>30</sup>

### Concerns of Parties in the United States

Many parties in the United States noted that under the provisions established in the U.S. 1976 Copyright Act, Canadian copyright holders were entitled to file claims with the Copyright Royalty Tribunal so that they might receive compensation for the use of their works by parties in the United States. Since relatively few Canadian works were used by the cable systems these payments tended to be quite small compared to the total amount of royalties which were distributed. For instance, the CRT authorized the following amounts to Canadian copyright claimants: 1979 - \$172,670, 1980 - 198,550, 1981 - 236,170.<sup>31</sup> Some U.S. parties even maintained that, because of the wording of their Copyright Act, works contained in foreign broadcast signals were given better protection than those in domestic signals.<sup>32 33</sup>

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<sup>30</sup> Comments of Clarence L. James, Jr., Chairman, Copyright Royalty Tribunal, Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, (March 4, 1981), p.5, p.8, in Shooshan and Jackson, (1981), p.22.

<sup>31</sup> United States of America, Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary United States Senate on S.736, (Washington: U.S. Government Printing Office, November 15, 1983). p.127. [hereinafter cited as S.736 Hearings]

<sup>32</sup> S.736 Hearings, p.79.

<sup>33</sup> Sec. 111(d)(4)(A) and (C) of the 1976 Copyright Act determines that copyright payments are only applicable to "non-network" television programs. The Act also defines "network" as those operating within the United States. Networks in Canada are therefore omitted from this definition and may make claims to the

In light of the payments made to Canadians under the 1976 Copyright Act, some parties in the U.S. felt that Canada's treatment of the U.S. broadcasters and copyright owners was unfair. They noted that the Canadian Copyright Act did not include a royalty payment scheme whereby the copyright owners received payment when their works were retransmitted by cable. While these parties recognized that Canada had been retransmitting U.S. signals since the 1950's they had become more concerned with the activities of Canadian cable systems since the CRTC authorized them to import distant U.S. signals by microwave in 1971. Furthermore, since the U.S. had been compensating the Canadians under the revised 1976 Copyright Act, these parties maintained that it was appropriate for Canada to revise its Copyright Act to include a similar type of compensation scheme.

The CRTC's licensing of CANCOM to distribute the network signals of ABC, CBS, NBC, and PBS, also aroused the concerns of both the broadcasters and the copyright owners in the United States. The American program producers had also claimed that it might be more difficult to sell their products in Canadian markets which were served by CANCOM. These parties maintained that some Canadian television stations might be reluctant to purchase their programs if a local cable company carried the same

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Copyright Royalty Tribunal. For this reason some authors have maintained that the law gives preferential treatment to foreign works. See: "Olsson Statement, S.736 Hearings pp. 79-80."

show via the CANCOM service.<sup>34</sup>

The unfavorable attitude which many U.S. parties held might be observed in the unflattering manner in which these groups described CANCOM to their domestic media. In one article appearing in Forbes Magazine entitled "If You Can't Trust Your Friends..."<sup>35</sup> the author noted that the issue of the copyright payments is not primarily a matter of money but is an issue of "fairness".<sup>36</sup> The article stated that when CANCOM "snitche[d] signals from the Detroit stations", many broadcasting officials "call[ed] it stealing."<sup>37</sup> One particular activity which irritated the Americans was the fact that CANCOM delivered its signals in scrambled form to prevent unauthorized reception. They perceived this scrambling to be an attempt by the "pirate" to avoid being pirated. The Forbes article conceded, however, that this controversy first, demonstrated the difficulty legislatures had in keeping laws current in the face of rapidly advancing technological innovation and, second, noted that the Canadian government had been working on revising their Copyright Act. The U.S. broadcasters, however, acting as both broadcasters and copyright owners, vehemently argued against the cable operators'

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<sup>34</sup> Janet L. Fix, "If you can't trust friends...", September 23, Forbes Magazine, (1985), p.144.

<sup>35</sup> Ibid.

<sup>36</sup> The article maintained, however, that under U.S. rules CANCOM would have to pay Americans as much as \$12 million per year for the material they used.

<sup>37</sup> Ibid.

claim that they were compensated for the use of their material through increased advertising rates. As Harry R. Olsson, General Attorney for CBS Inc., stated before the Standing Committee on Communications and Culture:

Let us pose a simple hypothetical case which will illustrate the possibilities of injury to those in the legitimate marketplace from the cable and CANCOM retransmission which now are not subject to the marketplace. The advertiser wishes to buy advertising on an American network for one of his products which is not distributed in Canada. If, in accordance with the theory of the apologists (but contrary to all present practices), the network were to seek payment, nevertheless, for the Canadian coverage, the advertiser, if he paid, would suffer. If the network were not paid, but the network had paid an outside program producer from which it bought the program for the involuntary exposure in the Canadian market, the network would suffer. If the program producer were not paid for the Canadian exposure of his copyrighted program, the producer would suffer since the retransmission in Canada would have lessened the value of the producer's program in Canada in the existing legitimate marketplace for Canadian broadcast rights in which Canadian television stations must deal.

But let us make the hypothetical case a better one for the apologist -- one in which the American advertiser does sell his product in Canada. After the network has bought American network broadcast rights from the program producer and the negotiation with the advertiser takes place, the American network must admit to the advertiser -- if there is any discussion of Canadian exposure of the advertising which is highly unlikely -- that the American network advertising may be blacked out on cable systems in Canada because the program may appear simultaneously on Canadian stations carried by Canadian cable systems. So the network can give no assurance to the advertiser about what his

coverage in Canada will be.<sup>38</sup>

Another related worry was that CANCOM may be authorized by the CRTC to expand into the larger markets, thereby reducing the opportunity to sell Canadian programming which originated in the U.S.<sup>39</sup> In light of the fact that CANCOM was permitted to serve "replacement" and "less remote" markets, this concern held some merit. Recommendations issued in 1985 by a CRTC Task Force which updated the work of the Therrien Committee provided further support for this argument. This document entitled "The Costs of Choice" made two particularly important recommendations with respect to CANCOM in order to further the company's development.

The CRTC should allow CANCOM to compete with common carriers for the delivery of the 3+1 service in all areas of the country, where feasible and cost effective. (emphasis added)

The CRTC should consider licensing CANCOM, as the local service provider in core market communities, where appropriate.<sup>40</sup>

The Task Force further suggested that CANCOM "should investigate the feasibility of marketing its service in areas outside of Canada."<sup>41</sup> The fact that CANCOM has recently begun to

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<sup>38</sup> Harry R. Olsson Jr., General Attorney CBS Inc., Prepared statement of CBS Inc. Before the Standing Committee on Communications and Culture, (March 15, 1985).

<sup>39</sup> Martin statement, S.736 Hearings, p.71.

<sup>40</sup> Task Force on Access to Television in Underserved Communities, The Costs of Choice, (Ottawa: Canadian Radio-Television and Telecommunications Commission, 1985). p.26.

<sup>41</sup> Ibid.

offer its service to cable systems operating in Alaska seems to indicate that CANCOM has already taken steps to adopt this suggestion into their business plan.<sup>42</sup>

Some have suggested that the concerns of the U.S. networks were largely unwarranted because CANCOM's activities would not appear to harm their existing markets or sources of revenue (potential or actual). One U.S. author explained:

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.<sup>43</sup>

While the networks might complain that CANCOM's action is "unfair", members of CBS's Law Department explained that a major concern was that they were "uncomfortable with the loss of control over the use of its signal and copyrighted programs."<sup>44</sup> As an example of the potential effect of this loss of control, NBC noted that the distribution of its signal in Canada forced

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<sup>42</sup> Alaska Broadcasters Association, Submission to the CRTC in the matter of Public Notice CRTC 1985-60, (May 23, 1985).

CANCOM also noted in 1987 that:  
 "As a result of an agreement with United Video Inc., CANCOM's network signals from Detroit are also being distributed to certain remote regions of the U.S., where a small underserved market is beyond the reach of one or more U.S. network signals"  
 From: Canadian Satellite Communications Inc., 1987 Annual Report, p.7.

<sup>43</sup> D. Tarbet, "Use of American broadcast signals by Canadian cable networks: The CANCOM decision", 32 Buffalo Law Review, (1983), p.738.

<sup>44</sup> Ibid., p.738, Note 30.

them to defend themselves in a defamation suit filed in an Ontario court.<sup>45 46</sup>

A more important concern of U.S. copyright owners, however, was that CANCOM's activities seemed to set a precedent for the unauthorized use of U.S. copyrighted material both within Canada and worldwide. Communications industry officials were very concerned about the copyright violation by foreigners, rating it

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<sup>45</sup> National Broadcasting Company Inc., "Transborder Broadcasting Defamation Laws; And the Copyright Law Revision" A submission of the National Broadcasting Company, Inc. to the Department of Communications and Consumer and Corporate Affairs, (no date avail.)

<sup>46</sup> See Pindling v. National Broadcasting Corp. et.al. [1984] 14 D.L.R. 4th, 391. In this case, Sir Lynden O. Pindling, the Prime Minister of the Bahamas, alleged that NBC had defamed him during news broadcasts shown in September 1983, and February of 1984. Since NBC refused to appear in Bahamian court, Pindling commenced an action in the courts of Ontario. A number of Canadian parties, including Ontario cable companies and CANCOM, were also named in the suit.

In attempting to obtain a motion to set aside the action, NBC explained that the primary motivation for Pindling to pursue this case in Ontario was that, contrary to the U.S. laws, the plaintiff would not have to establish "actual malice". The court, however, denied this application, noting that the case was originally brought forth in its "natural forum" (i.e., the Bahamas), but NBC had refused to appear.

In expressing their concern over the implications of this case NBC has stated:

It makes it impossible for American broadcasters to rely on American law in preparing broadcasts for Americans. It creates enormous potential liabilities which the broadcaster would not face in the United States. It creates the possibility for broadcasters to be sued in an inconvenient and unfamiliar forum at the whim of a plaintiff having not a thing to do with the forum...

National Broadcasting Company Inc., "Transborder Broadcasting Defamation Laws; And the Copyright Law Revision", p.15.



the most serious problem facing international trade in a 1984 poll.<sup>47</sup> Many Americans familiar with CANCOM's activities claimed that other nations seeking to revise their copyright laws may look upon Canada's treatment of U.S. programming on cable as an appropriate example. As a result, it is maintained that it may be "philosophically difficult" for the United States in the future to persuade these other nations to afford greater protection of U.S. works in foreign countries.<sup>48</sup>

#### SUMMARY

This discussion has illustrated that the arguments of the U.S. copyright owners and broadcasters stem largely from the fact that the United States Copyright Act was revised in 1976 to include a retransmission right for cable companies. The Act established a system of "compulsory licensing" under which the cable companies were provided with the right to simultaneously retransmit copyrighted works as long as the owners received royalty payments. Under the terms of this Act the cable companies made royalty payments to the Copyright Royalty Tribunal for the distribution of distant, non-network television signals.

The parties in the U.S., noting that Canadians are compensated through the U.S. system, feel that Americans should

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<sup>47</sup> "Copyright Infringement Tops List of International Problems", 42 Broadcasting, (1984), p.82.

<sup>48</sup> Statement of David Ladd, Register of Copyrights, Library of Congress, S.736 Hearings, p.22.

receive similar treatment when their works are retransmitted by Canadian cable companies. The U.S. parties, seeing this issue as one of "fairness", have begun to pressure the Canadian government to revise its Copyright Act to include some type of mechanism for compensating copyright owners when their works are retransmitted.

Some parties have suggested that this right should not be adopted since they are compensated for the use of their works through the increased rates which they charge to broadcasters. The U.S. copyright owners reject this argument since the advertisers (who would be paying higher rates charged by the broadcasters), in most cases, do not value this "extra market" provided by cable and are, therefore, unwilling to pay any additional fees to reach that audience. Furthermore these parties note that even if the advertiser wanted to reach the Canadian market through cable, there is the possibility that the commercials may be deleted as a result of the CRTC's simultaneous substitution policy.

Compounding this debate are the additional problems created by CANCOM. Noting that CANCOM has been permitted to expand into "less remote and underserved" markets, the U.S. broadcasters feel that the CANCOM service may eventually replace most of the existing microwave links which serve some of the larger markets in Canada. The U.S. broadcasters (especially those whose signals are presently carried on Canadian microwave systems) fear that the few instances in which the advertisers can take advantage of the Canadian market through this microwave system, may be

eliminated if CANCOM is permitted to expand further.

Probably the most important concerns surrounding this debate, however, is the perceived "loss of control" on the part of the U.S. broadcasters and copyright owners. These parties feel that the manner in which Canada treats the property of U.S. copyright owners sets a poor example for other countries which also use intellectual property owned by U.S. citizens. At a time when the communications industry in the U.S. is attempting to negotiate increased protection for its intellectual property worldwide, it is concerned that other countries may look at Canada's lack of protection of U.S. works on cable as an appropriate example to follow. Many parties in the U.S. feel that if they can solve this cable/copyright dispute with Canada, they may persuade other countries to offer increased copyright protection to American works.

## CHAPTER 5

### POSSIBLE RESPONSES OF THE UNITED STATES TO THE UNCOMPENSATED USE OF U.S. SIGNALS BY CANADIAN CABLE SYSTEMS

Most parties in the United States realize from their own experiences that the revision of copyright law can be a long and complex task. Some groups, however, have begun to voice their opinion that Canada may be taking advantage of fact that its Copyright Act does not provide compensation for works distributed on cable as a means to promote the growth of its communication industries. While the U.S. parties realize that cable companies in Canada have been rediffusing American signals without payment for many years, they claim that the activities of CANCOM have begun to exacerbate the already unsatisfactory situation.

The American broadcasters and copyright owners fear that their ability to sell their products in Canada will be undermined if CANCOM continues to expand its service area to include the more populated regions of the country. The Canadian government seems to encourage CANCOM's expansion into these larger markets so as to ensure the company's economic success.<sup>1</sup> This activity, sanctioned by the CRTC, gives CANCOM financial leverage so that it can continue with its original mandate of serving remote and underserved communities of Canada.

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<sup>1</sup> Statement of Harry R. Olsson Jr., general attorney, CBS, Inc., S.736 Hearings, p.91 and E. Carb, "Copyright compensation for the Canadian use of American broadcast signals on cable", 12 Syracuse Journal of International Law and Commerce, (1985), p.363.

While not doubting (and in many cases providing encouragement to) Canada's right to promote Canada's unique culture through its communications industries, some parties in the U.S. feel that the use of their property by CANCOM and the Canadian cable companies violates the principles of "fairness" and "equity". Some individual's have claimed that the Canadian government's policies, while benefiting at least the economic interests of Canadians, come at the expense of American copyright holders.<sup>2</sup> In particular, the passage from Liebowitz's paper, "Copyright Obligations for Cable Television" which states that "[t]here is a tendency to feel that Canada can get something for nothing", has been quoted by the Americans as an example of how Canadians feel about using the property of others.<sup>3</sup> Skepticism has been expressed at the likelihood of Canada revising its Copyright Act without pressure from the United States because the present system acts in favour of the interests of Canadians.<sup>4</sup> As CBS's attorney, Harry Olsson, has pointed out, "a system that does not pay for what it uses is a very efficient system."<sup>5</sup>

For these reasons, the United States government has become actively involved in investigating a number of diverse approaches which would encourage the Canadian government to revise its

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<sup>2</sup> E. Carb (1985), p.362.

<sup>3</sup> Statement of Senator Patrick Leahy, S.736 Hearings, p.10.

<sup>4</sup> E. Carb (1985), p.380.

<sup>5</sup> Statement of Harry R. Olsson Jr., S.736 Hearings, p.71.

Copyright Act so that the rights of the American broadcasters and copyright owners are recognized when their products are distributed by Canadian cable systems. It is convenient for the purposes of this study to examine the possible solutions which have been suggested under the headings of; multilateral treaties and forums; direct retaliation; and linkage to other trade issues.<sup>6</sup>

The following section will examine the relative merits provided by each of these methods of "persuasion" from a U.S. perspective and will outline how some of these methods have been used in the past by the United States in responding to similar international copyright and trade problems. This analysis will be used to summarize the approaches the U.S. government may adopt if Canada does not work to resolve this cable/copyright issue.

#### I) Multilateral Treaties and Forums

Presently there exists a number of multilateral treaties which address the issue of copyright protection for the retransmission of foreign signals. The U.S. has examined the possibility of using two of these treaties, the Universal Copyright Convention and the Berne Convention, to persuade Canada to begin making copyright payments for retransmitted programs.

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<sup>6</sup> These categories and some information for the following sections was derived from E. Carb, "Copyright compensation for the Canadian use of American broadcast signals on cable", 12 Syracuse Journal of International Law and Commerce, (1985), pp. 359-394.

Their efforts, however, have not met with much success.<sup>7</sup>

As explained earlier, both Canada and the United States are signatories of the Universal Copyright Convention. Since Canada adheres to the Geneva Text, which does not address the area of broadcasting, its current copyright law fulfills its convention obligations. Furthermore, since Canada does not have a "retransmission right" for its own citizens, the lack of payments to U.S. copyright holders also meets the U.C.C.'s "national treatment" provisions. Similarly, Canada's national treatment obligations under the Berne Convention are also met since its copyright law, with respect to cable retransmissions, does not discriminate against U.S. copyright holders. In any event, the United States has little basis for recourse under the Berne since it is not a signatory.

Some parties in the U.S. have recommended to Congress that, considering the fact that the 1976 revision of the Copyright Act places them in close conformity to the provisions of the Berne, it should consider becoming a signatory. It has been suggested that this type of "good faith" effort may persuade other nations to treat the works of U.S. copyright holders in a more equitable manner. Harry Olsson has submitted that this may persuade Canada to accept the Berne's present higher standards which cover cable retransmissions. He stated, before a Senate sub-committee which considered the possibility of the U.S. becoming a member of

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<sup>7</sup> Ibid., p.381.

Berne, that:

U.S. adherence to the present text of the Berne Convention would not be a panacea for the Canadian broadcast retransmission problem. However, U.S. adherence would have the effect of encouraging entry into Berne by other nonmember countries and of encouraging the acceptance of Berne's present standards by countries like Canada.

Adherence would remove the international embarrassment of the United States, the world's largest exporter of intellectual works, urging higher standards protection while it is not a member of the higher standards international convention.<sup>8</sup>

...if we go persuading our Canadian neighbors, or trying to persuade them to raise their standards either to modern Berne or perhaps above that... we are constantly faced with the reproach that we are freeloaders in Berne; that we do not even belong to a lower level Berne.

Others have proposed that the United States investigate the possibility of using the General Agreement on Tariffs and Trade to assist in settling international copyright problems. Similar efforts to use the GATT have not been overly successful in the past since the agreement does not currently include trade in service industries. A report prepared by CBS Inc., however, has suggested that the U.S. government should increase its efforts to persuade other members to include intellectual property in the

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<sup>8</sup> Statement of Harry Olsson, General Attorney, CBS Inc. Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary United States Senate on "The Implications Both Domestic and International, of U.S. Adherence to the International Union for the Protection of Literary and Artistic Works", (Washington: U.S. Government Printing Office, May 16, 1985, and April 15, 1986), p.378-379.

<sup>9</sup> Ibid., p.402.



GATT. Some U.S. authors have noted that this attempt to resolve the copyright problems through the GATT, although relatively time consuming, is nonetheless a "noteworthy approach" since it is generally consistent with the objectives of the United States' 1984 Trade and Tariff Act.<sup>10 11</sup>

## II) Linkage to Other Trade Issues

In 1975 the government of Canada investigated the possibility of passing legislation to reduce the outflow of Canadian advertising dollars to the United States. Prior to this Canadian advertisers had been reaching their home markets by buying time on American broadcasts which spilled over into Canada. At this time it was estimated that over 20 million dollars per year were flowing from Canada to American broadcasters.<sup>12</sup> Some of these U.S. stations, primarily located in Buffalo, N.Y., Pembina, North Dakota, and Bellingham, Wash., received a substantial portion of their advertising revenue from

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<sup>10</sup> E. Carb (1985), p.385.

<sup>11</sup> "The general purpose of the Act is to encourage the expansion of international trade and services through the negotiation of agreements (both bilateral and multilateral) which reduce or eliminate trade barriers to international trade in services." E. Carb (1985), p.385, Note 154.

<sup>12</sup> Commons Debates, May 8, 1975, p.5596, in Hagelin, T and H. Janisch "The Border Broadcasting Dispute in Context" in Cultures in Collision: The Interaction of Canadian and U.S. Television Broadcasting Policies, Praeger Publishers (Toronto: 1984), p.49.

Canadian companies.<sup>13</sup> At this time there was a great deal of concern that this "siphoning of advertising revenues" from Canadian stations would jeopardize their financial viability.<sup>14</sup> It was felt that this would restrict the Canadian border broadcasters' ability to produce local material, thus reinforcing the American's domination of the communication industries.<sup>15</sup>

As a result of these concerns, the Canadian government passed Bill C-58, an Amendment to the Income Tax Act, in September of 1976. C-58 was designed to eliminate tax breaks for Canadians advertising on U.S. television stations. The law provides:

In computing income, no deduction shall be made in respect of an otherwise deductible outlay or expense of a taxpayer made or incurred after the section comes into force, for advertisement directed primarily to a market in Canada and broadcast by a foreign broadcast undertaking.<sup>16</sup>

The passage of C-58 began quickly to affect the revenues of the U.S. border broadcasting stations. One study estimated a 50% loss in Canadian business for these stations.<sup>17</sup> The United

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<sup>13</sup> D. Alper and R. Monahan, "Bill C-58 and the American Congress: The politics of retaliation", 4 Canadian Public Policy, (1978), p.186.

<sup>14</sup> T. Hagelin and H. Janisch (1984), p.49.

<sup>15</sup> D. Alper and R. Monahan, (1978), p.186.

<sup>16</sup> Statement of Leslie G. Arries, United States of America, Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary United States Senate on S.736, (Washington: U.S. Government Printing Office, November 15, 1983), p.136.

<sup>17</sup> E. Carb (1985), p.374.

States reacted immediately to this problem, claiming that C-58 constituted an "unfair trade practice" and was also

"unjustifiable, unreasonable and burdened U.S. commerce"<sup>18</sup>

Though a number of high-level government meetings and diplomatic exchanges with the Canadians, the United States attempted to open negotiations in order to resolve this issue. The Canadian government, however, was adamant in its position and rejected all requests for negotiation.<sup>19</sup>

As a result of Canada's unwillingness to compromise on this matter the United States began to consider the adoption of a more direct response which would involve the U.S. government "linking" C-58 with some type of trade policy. It was felt that this approach would place the United States in a more favorable bargaining position with Canada. The opportunity to develop this "link" presented itself when the U.S. Congress in 1977 began to revise its Tax Reform Act. Part of the proposed modifications to Sec. 602 of the Act allowed U.S. citizens to deduct the expenses accrued for business conventions attended in North America. The proponents of the bill maintained that it would be:

the height of hypocrisy for us to enact laws which discourage reciprocal travel by our citizens in foreign countries at the same time we are enjoying great benefits from the same kind of travel.<sup>20</sup>

Opponents of the bill stated that Canada had not always

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<sup>18</sup> Leslie Arries, S.736 Hearings, p.139.

<sup>19</sup> S.736 Hearings, p.137.

<sup>20</sup> D. Alper and R. Monahan (1978), p.188.

dealt with the United States in a fair manner and noted the C-58 experience as a particular example of the unfair treatment which they had received in the past.<sup>21</sup> Persuaded by this argument, some U.S. Senators (including a majority of the border state Senators whose constituents were effected by C-58) shifted their support away from the proposal. As a result, the amendment was narrowly defeated.<sup>22</sup>

As some authors have noted, the effect of this tax legislation on Canadians has been quite different from the effect which C-58 has had on businesses in the U.S. While the effect of C-58 has been relatively localized, involving a small number of border broadcasters, the effect of the U.S. tax policy has been widespread, costing Canadian businesses hundreds of millions of dollars in revenues.<sup>23</sup> This fact would seem to suggest that, at least in the short term, each side has had substantial losses as a result of this "border war". To this date the dispute surrounding C-58 remains unresolved since the Canadian government has refused the persistent appeals of various U.S. parties to negotiate on this matter.<sup>24</sup>

On the issues related to international copyright protection, the U.S. government has attempted to protect the interests of

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<sup>21</sup> Ibid., p.188.

<sup>22</sup> Ibid., p.189.

<sup>23</sup> T. Hagelin and H. Janisch (1984), p.53.

<sup>24</sup> See T. Hagelin and H. Janisch (1984), p.52-55., and D. Alper and R. Monahan (1978), p.137-140.

their citizens through a number of trade practices. One method gives certain countries preferential access to the U.S. marketplace or economic aid on the condition that they provide "adequate and effective protection"<sup>25</sup> for intellectual property owned by Americans. Essentially the United States has attempted to "link" the protection of materials owned by U.S. copyright owners with trade benefits and economic assistance.<sup>26</sup> One example of this type of "carrot and stick"<sup>27</sup> approach was the conditions which were included in the Caribbean Basin Economic Recovery Act (or Caribbean Basin Initiative)<sup>28</sup>.

The CBI attempts to promote economic development for twenty-seven countries in the Caribbean Basin region by providing them with tariff benefits for imports into the U.S. and economic aid. To become eligible to receive these benefits, however, the countries must meet a number of mandatory and discretionary requirements. One of these mandatory criteria is that the recipient country:

Not engage in the rebroadcast of United States copyright material through a government-owned entity without the express consent of the copyright

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<sup>25</sup> Statement of David Ladd, S.736 Hearings, p.43.

<sup>26</sup> D. Ladd, L. Flacks, D. Liebowitz, "Footprints over the Caribbean: Bringing program protection in step with satellite technology", 1 Entertainment and Sports Law Journal, (1984), p.11.

<sup>27</sup> Statement of David Ladd, S.736 Hearings, p.45.

<sup>28</sup> The Caribbean Basin Economic Recovery Act, Pub. L. 98-67, Stat. 369 (1983).

holder.<sup>29 30</sup>

Furthermore, the CBI also includes a number of other discretionary considerations which are intended to promote the purpose of the Act. These provide the President, when deciding whether or not a country will be provided with a CBI designation, with the right to consider:

The extent to which such country provides its nationals from engaging in the broadcast of copyrighted material, including film or television material, belonging to United States copyright owners without their express consent.

The extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise and enforce exclusive rights in intellectual property, including patent, trademark and copyright rights.<sup>31</sup>

The representatives of the United States claim that their experience using this approach to prevent the unauthorized use of their programming has been "quite positive".<sup>32 33</sup>

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<sup>29</sup> Pub. L. 98-67, Sec. 212(a)(5).

<sup>30</sup> This requirement is primarily directed at state-owned broadcasting systems such as the Jamaica Broadcasting Company. See J. Weinstein "International Satellite Piracy: The Unauthorized Interception and Retransmission of United States Program-Carrying Satellite Signals in the Caribbean, and Legal Protection for United States Program Owners" 15 Georgia Journal of International and Comparative Law, (1985), p.21.

<sup>31</sup> Pub.L. 98-67., Sec. 212(c)(9) and (10)

<sup>32</sup> Statement of David Ladd, S.736 Hearings, p.45

<sup>33</sup> The government of Jamaica signed a "Statement of Principles" in February of 1984 with the Motion Pictures Export Association of America which states that they will enter into licensing agreements with MPEAA members for the satellite delivery of television signals. (20 U.S. Export Weekly (BNA) 694 (Feb.28, 1984) in T.J Cyran and J.S. Crane "International Telecommunications

The United States has also employed two other methods which serve to link foreign assistance to the protection of copyrights owned by American citizens. In 1984 the Generalized System of Preferences (GSP) was renewed by the U.S. government. This program attempts to stimulate the economies of developing countries by providing them with a preferential tariff scheme for products that these countries import into the United States. Eligibility for this system, however, is contingent on the manner in which that country treats intellectual property belonging to the United States. The GSP provides that the President cannot designate a country as a beneficiary of GSP benefits if that country:

has nationalized, expropriated, or otherwise seized ownership or control of property, including... copyrights owned by a United States citizen.<sup>34</sup>

Like the CBI, the GSP also includes the provision that the President must also consider...

the extent to which such country is providing adequate and effective means under its laws for foreign nationals to secure, to exercise and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights.<sup>35</sup>

Another program, the International Security and Development

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Pirates: Protecting U.S. Satellite Signals From Unauthorized Reception Abroad" 17 New York University Journal of International Law and Politics, (1985) p.887, Note 146.

<sup>34</sup> T.J. Cyran and J.S Crane, (1985), p.878. Note 151.

<sup>35</sup> Ibid., 878.

Cooperation Act of 1983 (ISDC)<sup>36</sup> links foreign aid, such as "economic assistance, food for the hungry, special humanitarian assistance, and trade opportunities"<sup>37</sup> to the benefactor's level of copyright protection which it affords to foreigners. In similar language as the CBI, the ISDC directs the President, when determining the amount of assistance to be provided to a county, to consider:

the extent to which the foreign government permits a government-owned entity or national of that country to engage in the broadcast of copyrighted material belonging to United States copyright owners without their express consent.<sup>38</sup>

While it is highly unlikely that Canadians would ever be in a position even to be considered as benefactors of assistance under plans such as the GSP, CBI, or ISDC, the U.S. has explored the options of either restricting foreign investments in the U.S. or the imposition of tariffs on Canadian products entering the U.S. as a response to the cable retransmission controversy. To this date, only one piece of legislation has been introduced. This Bill, S. 2282, 98th Congress, 2nd Sess. (1984), introduced by Sen. Barry Goldwater, would limit the amount of ownership which a foreigner could have in a United States television network or cable system. It was intended that this bill would

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<sup>36</sup> L. Yarvis, "Signal piracy: The theft of United States satellite signals", 8 Fordham International Law Journal, (1984), p.90, Note 195.

<sup>37</sup> Ibid., p. 90, Note 196.

<sup>38</sup> Ibid., p.90, Notes 195-197.



have the effect securing more favorable treatment for U.S. copyright owners in Canada.<sup>39</sup>

It is still uncertain whether or not this type of legislation can influence the Canadian government to revise its Copyright Act. However, the United States' lack of success so far in finding an effective method of "persuasion" cannot be taken as an indication that Canada should continue without a retransmission right in its Copyright Act. The case of Bill C-58, and the resulting linkage of that bill to the convention tax deduction, demonstrates that the United States is not totally opposed to implementing measures which may be economically damaging to Canada.

For example, David Ladd, the Register of Copyrights in the U.S. Copyright Office, in his 1984 report to the Subcommittee on Patents, Copyrights and Trademarks recognized that this option was still available to the United States. He stated that "there [was] theoretically no reason why Congress could not legislate increases in the duties applicable to particular Canadian exports to the United States."<sup>40</sup> This type of measure has tended to be used as a "last resort". However, when one considers the strong

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<sup>39</sup> Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary United States Senate on How To Protect the Nation's Creativity by Protecting the Value of Intellectual Property considering material submitted by Hon. David Ladd "To Secure Intellectual Property Rights in a World Commerce", (Washington: U.S. Government Printing Office, September 25, 1984), p.177.

<sup>40</sup> Ibid.

influence that organizations such as the Motion Picture Association of America have on the U.S. government, it is conceivable that this type of legislation may be enacted if the other channels of "persuasion" are not found to be effective.

### III) Mirror Legislation

In most cases the United States has been hesitant to retaliate against countries in trade cases by implementing policies such as "mirror legislation". The Americans see it as contrary to their general policy of removing protectionist barriers with their international trading partners. This practice, however, has been used when the United States has felt that it had exhausted its other options.

After the United States' lengthy efforts to persuade Canada to eliminate C-58, it resorted to this type of retaliation. President Carter first initiated this type of response when he sent a message to Congress which requested it to consider passing mirror legislation of C-58. This legislation, through an amendment to the Internal Revenue Code, would deny to U.S. businesses any income tax deductions for advertising placed on foreign broadcast undertakings which is directed primarily at the U.S. market. This proposal, however, died since the 96th Congress adjourned before considering it.

After reviewing the case, and noting that other "good faith" efforts had failed to convince Canada to eliminate C-58, President Reagan on November 17, 1981 raised the issue of mirror

legislation with Congress. This recommendation was introduced by Congress in H.R.3398 and was passed into law with the Trade and Tariff Act of 1984.<sup>41</sup>

Some authors have observed that this response seems to be largely symbolic and may not resolve the C-58 dispute since the practice of U.S. businesses using Canadian media to advertise in American markets is not widespread.<sup>42</sup> More importantly, however, it has been noted that passing this type of legislation seems to indicate a movement on the part of the Americans to begin responding with firmer responses to what they perceive as "protectionist trade policies".<sup>43</sup>

This trend towards an increased acceptance of retaliatory measures by the U.S. may also be observed in its response to Canada's copyright retransmission policy. The Americans' frustration with Canada's reluctance to revise its Copyright Act, coupled with strong pressure from interest groups, prompted U.S. Senator Patrick Leahy to introduce legislation which would prohibit Canadians from receiving copyright payments when their material was used by U.S. cable companies.

This Bill, S.736 (introduced March 9, 1983), provided that non-resident foreign nationals would not be compensated unless

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<sup>41</sup> Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 298, 3001, Sec. 232, at 2991 (Denial of Deduction for Certain Foreign Advertising Expenses [amendment to 26 U.S.C. 162]).

<sup>42</sup> E. Carb, (1985), pp.386-387.

<sup>43</sup> Ibid., p.387.

American citizens were, in turn, compensated for when their copyrighted materials were used in these foreign countries.<sup>44</sup> This would be done through a proposed revision of the United States Copyright Act<sup>45</sup>. The Bill proposed that:

All amounts claimed by nonresident foreign nationals shall be in controversy and withheld from distribution. The Tribunal shall deem these amounts as no longer in controversy and shall distribute these amounts finding that-

(ii) the nation of which the nonresident foreign national is a citizen provides royalty or equivalent treatment to United States citizens for the secondary transmission of a primary transmission embodying a performance or display of a work in which the copyright is owned by such citizens.<sup>46</sup>

While the wording of S.736 was carefully constructed to appear not to single out the nationals of any particular country, it was obvious from the discussion at the hearings conducted on the bill that it was primarily directed at Canadians.<sup>47</sup>

Some authors have noted that Leahy's bill was quite attractive to groups concerned with the protection of works of U.S. copyright holders abroad since it attempted to "impose a penalty which [was] closely related to the problem it [sought] to

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<sup>44</sup> The wording of the bill reads: "non-resident foreign nationals [would] not be compensated unless such claimant's country compensates United States citizens for materials they own." S.736 Hearings, p.3.

<sup>45</sup> This bill would create an amendment to Sec. 111(c)(5) of title 17, United States Code, [1976 Copyright Act].

<sup>46</sup> S.736, pp.3-4.

<sup>47</sup> Statement of Senator Patrick Leahy, S.736 Hearings, pp.9-11.

remedy."<sup>48</sup> It has been observed, however, that even if the legislation were passed, it may not be overly effective in convincing Canadians that they should revise their Copyright Act. The revision is based on the assumption that the Canadians value the royalties they receive from the U.S. enough to revise their Copyright Act.<sup>49</sup> Because the royalties which the Canadian interests receive from the U.S. are not overly large, it is unlikely that Leahy's bill would convince the Canadian government to pass legislation which would result in Canadians making large payments to copyright owners in the United States.

The greatest amount of opposition to this bill, however, arose not over its potential effectiveness, but rather over its possibly violating the United States' commitment to the "national treatment" provisions in the international treaties of which it is a signatory. David Ladd pointed out in his comprehensive analysis of S.736 that the bill would have the effect of discriminating against those claimants who were not U.S. citizens. He, therefore, contended that this would violate the "language, the rationale, and the spirit" of the United States commitment to the Universal Copyright Convention. He further warned that the passage of S.736 could have other implications which go beyond the United States' relationship with Canada.

In short, there are already enough incentives for many concerned States to seek ways of evading the

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<sup>48</sup> E. Carb (1985), p.388.

<sup>49</sup> Statement of David Ladd, Register of Copyrights, Library of Congress, S.736 Hearings, p.36.

consequences of the Berne and Universal Conventions' rule of national treatment without the United States adding to them.

...by violating the UCC in this respect against Canada we would be putting the interests of our film and television industries at risk in other UCC states, cumulatively more valuable than Canada.<sup>50</sup>

The general consensus of most parties was that S.736 would violate the United States' U.C.C. obligations and the bill was, therefore, not passed. As some parties noted, however, the fact that the bill was even introduced and went to the hearing stage had the effect of sending a strong signal to the Canadian government that the United States was serious about reaching a solution of this issue (either on favorable or unfavorable terms).<sup>51</sup> Even Ladd, one of the most outspoken critics of retaliatory actions, made the ominous conclusion that, as a result of the failure of S.736, the United States next course of action could possibly be determined by asking "what other trade interests of comparable value does Canada have in the U.S. market?"<sup>52</sup>

#### SUMMARY

This chapter has demonstrated that the United States has a number of options available if it decides to exert pressure on Canada to revise its Copyright Act. Some of the remedies which

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<sup>50</sup> Ibid., p.39.

<sup>51</sup> Ibid., pp.48-49.

<sup>52</sup> Ibid., p.49.

the United States has considered including, the use of multi-lateral treaties and forums, linkage to other trade issues, and mirror legislation. The United States has used each of these approaches in the past with varying degrees of success.

The first approach examined was the use of multi-lateral treaties such as the Universal Copyright Convention and the Berne Convention. The United States has not found this type of approach to be overly successful. The Canadians have maintained that its current Copyright Act meets all of their obligations for their current level of commitment to both the U.C.C. and the Berne. Some parties in the United States have suggested that the U.S. should sign the latest text of the Berne Convention as a "good faith" measure. They maintain that this may encourage Canada also to agree to update its commitment to Berne, or possibly to update its Copyright Act to include a retransmission right for cable operators. Since the United States has not as yet become a signatory to the Berne, these developments have not materialized.

Another avenue available to the United States is the use of "mirror legislation". The U.S. has used this type of action in the past in response to the Canadians passage of Bill C-58. In 1983 the U.S. briefly considered adopting mirror legislation to deal with the cable copyright controversy. This legislation was not passed, however, since it was determined that it would probably violate the United States' commitment to providing "national treatment" to foreigners under the Universal Copyright

Convention.

A second unilateral option still available to the United States is "linking" the cable/copyright issue to some other trade issue. The United States has used this course of action with other nations in "persuading" them to provide more protection to materials owned by U.S. citizens. Although these actions have taken many forms, generally the U.S. has conditioned the granting of tariff benefits to foreign countries on whether the U.S. perceives that country to be providing adequate protection for U.S. owned intellectual property. It is extremely doubtful that the U.S. could use this approach since it is unlikely that Canada would ever become a recipient of this type of U.S. "developmental aid".

Taking note that most of the Canadian reports on copyright have recommended that copyright liability should not be extended to the United States, some authors have suggested that the U.S. should "use whatever leverage is available to procure reasonable protection for copyrighted American works in Canada."<sup>53</sup> With inspiration from this type of commentary, the option which the U.S. government may find most viable is the "linking" measure in which they would place increases on duties for Canadian exports entering the United States. Although Canada and the U.S. are generally friendly trading partners, the events surrounding Bill C-58 suggest that the United States is not entirely opposed to

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<sup>53</sup> E. Carb (1985), p.393.



the implementation of these types of retaliatory tax policies. At this time, however, the cable/copyright dispute has not escalated to the point where the U.S. has specifically identified the products to which these tariff would be attached.

Other than one brief instance in 1984, the United States has not introduced any legislation which would place tariffs on Canadian exports as a direct result of copyright concerns. This can be attributed to the fact that Canada has shown signs that it has been seriously considering the introduction of a retransmission right in its Copyright Act. Recognizing that retaliatory pressure could interfere with these positive developments, the U.S. has most recently adopted a less hostile "wait and see"<sup>54</sup> approach to this dispute.

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<sup>54</sup> Video World Inc., The Role of Satellites in the Canadian Broadcasting System, Study prepared for the Task Force on Broadcasting Policy, (February 1986), p.86.

## CHAPTER 6

### PRESENT STATUS OF THE RETRANSMISSION RIGHT IN CANADA

The previous chapter explained some of the options which the United States may choose to exercise in order to deal with the trade dispute over copyright royalties for cable retransmissions in Canada. This chapter will investigate a number of positive developments since 1985 which suggest that Canada and the United States may soon resolve this dispute. It will provide an outline of the recommendations dealing with cable retransmissions and copyright suggested in the Subcommittee on the Revision of Copyright's report "A Charter of Rights for Creators". This report represents a "turning point" since it is the first government document which recommends that Canada should amend its Copyright Act to include a retransmission right and to treat both nationals and non-nationals in an equal manner.

In addition, this chapter will examine the aspects of the Canada-U.S. Free Trade Agreement which relate to the issue of retransmission. This agreement represents a monumental step in resolving this issue because, as a result, Canada has committed itself to including a retransmission right for cable rebroadcasts in its Copyright Act. The legislation introduced to implement the Free Trade Agreement will be examined. Finally, the reaction which Canada may receive from the copyright owners and the retransmitters as this new system is implemented will be examined.

### A Charter of Rights for Creators

In February of 1985 the Canadian House of Commons formed a Sub-Committee of the Standing Committee on Communications and Culture to consider all aspects of the revision of copyright. Of particular interest to the Sub-Committee during their work was the consideration of the issue of cable retransmissions and copyright law. The final report noted that the issue of retransmission, because of the variety of opinions held by the interested parties, "generated the most vigorous and lengthy debate among the members of the Sub-Committee."<sup>1</sup>

As suggested by the authors of "From Gutenberg to Telidon" the most difficult challenge which the Sub-Committee faced was the initial decision of whether or not a retransmission right should be introduced at all. On one hand the committee members realized that the introduction of this right would be consistent with the general principle that copyright owners should be compensated when their creations were used. On the other hand, however, it was recognized that the introduction of this right would entail a net outflow of copyright royalties, primarily to the United States.

To alleviate this outflow problem the Committee considered adopting a system such as that proposed by Keyes/Brunet whereby

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<sup>1</sup> House of Commons, Standing Committee on Communications and Culture, A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright, (Ottawa: Ministry of Supply and Services Canada, 1985), p.77.

only Canadian copyright owners would be compensated. This approach was rejected since the Committee felt "it [was] only equitable to compensate all those who own[ed] the copyright in the programs... regardless of where they [were] produced."<sup>2</sup>

The Sub-Committee eventually decided to recommend that a retransmission right be included in the revised Copyright Act and that this right should be extended to foreigners.<sup>3</sup> One factor which influenced the recommendation was the observation that, although demand for cable services was sensitive to price, subscribers seemed willing to pay the extra fees which would be passed on to them. This decision was further supported by evidence submitted to the Sub-Committee which suggested that the estimates for the cost of a retransmission right might be substantially lower than Canadians were originally led to believe. A study commissioned by the Sub-Committee and conducted by Secor Inc. made some adjustments and qualifications to the CCTA study (Nordicity Study) and arrived at the conclusion that, if the American system of copyright collection for cable retransmission were adapted to the Canadian context...

...between \$9.1 and \$11.2 million could be recovered in Canada. These royalties represent respectively 1.4 per cent and 1.7 per cent of the revenues of cable systems for 1985.<sup>4</sup>

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<sup>2</sup> Ibid., p.78.

<sup>3</sup> Ibid., p.78, Recommendation 97.

<sup>4</sup> Secor Inc., Probable Cost of a Retransmission Right in Canada: An Adaptation of the American System to Canada, Study commissioned by the Subcommittee of the Standing Committee on Communications and Culture on the Revision

The Sub-Committee was also sensitive to the cable operators' concern that the increase in subscriber rates resulting of the introduction of retransmission payments would lead to the cancellation of services by customers. The Sub-Committee stated that they felt the tariffs set by Copyright Appeal Board would not be so high as to greatly affect cable penetration rates. In any event, the Sub-Committee noted that the government might consider reducing the 7% tax which cable companies were paying to the Broadcast Program Development Fund if the royalty rates became prohibitively high.

The Sub-Committee recommended that a compulsory licensing scheme should be utilized to implement this retransmission right. While the Sub-Committee did not favour compulsory licensing, it saw no other viable option.<sup>5</sup> The alternative of "exclusive licensing" might give to copyright owners the right to prohibit cable companies from carrying some signals if the parties could not reach an acceptable agreement. The Sub-Committee was of the opinion that "[c]opyright owners should not be permitted to stop retransmission because this activity is too important to Canada's communications system."<sup>6</sup>

The tariffs would be established by the Copyright Appeal Board. This board, to be renamed the Copyright Board, would

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of Copyright. September 1985, p.43.

<sup>5</sup> A Charter of Rights for Creators., p.80.

<sup>6</sup> Ibid.

continue its task of maintaining a balance between the interests of both users and creators through its rate-fixing. The Sub-Committee recommended that an evaluation of the total economic value of all retransmissions in Canada should be performed to assist the Copyright Appeal Board in determining the tariffs for retransmissions.<sup>7</sup> The tariffs should be based on this total value rather than on the composition of the package offered by any individual cable system. The use of this method would reduce the possibility for regional "discrimination" arising from the carriage of "distant" signals. Discrimination would occur because U.S. signals which are retransmitted by cable systems in markets close to the border would be considered "local", while in other parts of the country, farther from the border, the same U.S. signal would be considered "distant". Since higher royalty rates were generally charged for distant signals, in terms of the cable companies costs, these distant stations would be the most expensive to retransmit. The Sub-Committee noted that in some cases these extra costs might cause cable companies to eliminate some of the channels which they carried. Another negative consequence envisaged was that this increased cost would be passed on to the cable subscriber. The Sub-Committee noted that the formula to be used for generating royalties from cable companies should recognize these regional differences. It suggested the adoption of a more equitable

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<sup>7</sup> Ibid., p.81, Recommendation 103.

approach which would avoid instances in which communities farther away from the U.S. stations "would end up paying significantly more for the same programs merely because of where they live."<sup>8</sup>

Since the Sub-Committee was attempting to avoid using the traditional "contour" definitions for defining what they were obligated to provide, some type of alternative was necessary for determining the type of market which a broadcaster was serving. Generally a broadcaster's local market was defined as the audience which was within its "grade A contour".<sup>9</sup> The Sub-Committee, however, preferred to adopt a solution which was determined by economics rather than the somewhat arbitrary definition imposed by topography. Because both commercial and non-commercial broadcasters might consider the enlarged audience

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<sup>8</sup> Ibid., p.81.

<sup>9</sup> These official service "contour" definitions are used by the Canadian Department of Communications and the Federal Communications Commission in the United States. There are two types of contours; "Grade A" and "Grade B". These have been defined as follows:

"Grade A contour: geographical reception area of a broadcast station wherein satisfactory reception is estimated to be available 90 percent of the time at 70 percent of the receiver locations."

"Grade B contour: geographical reception area of a broadcast station wherein satisfactory reception is estimated to be available 90 percent of the time at 50 percent of the receiver locations. Often spoken as 35 miles, but actually could be far more or less, depending on terrain factors and on antenna efficiencies at the transmitter"

From: The Cable/Broadband Communications Book, Vol. 3, 1982-1983, Mary Louise Hollowell (ed.), Washington, 1983, P.154, 156. in Secor Inc., Probable Cost of a Retransmission Right in Canada: An Adaptation of the American System to Canada, September 1985, p.24.

provided by cable as their "target" market this information should be used to determine whether a signal should be classified as local or distant. It proposed that, rather than the contour definitions, the local market should depend on the "audience towards which the originating broadcaster aim[ed] its programs."<sup>10</sup> This target audience would be determined by the marketing behaviour of each broadcaster. The Sub-Committee provided the following explanation:

...a target audience is not necessarily the "local market" as originally defined, but this local market plus some further markets reached through cable systems. For example, if a broadcaster aims its programming and solicits advertisements or other revenue in a distant market then it can be presumed to be part of the target market. The broadcaster's success in effectively reaching the target audience is less significant than its efforts in doing so. The actions of the broadcaster are the determining factor.<sup>11</sup>

In light of this opinion that the definition of "local" markets should be revised as a result of cable, the Sub-Committee recommended that:

In assessing the economic value of retransmission activities, the Copyright Appeal Board should assign a lower value to the retransmission of local signals.

Local signals should be defined as those reaching the broadcaster's target market by whatever means. The target market of the broadcaster should be determined by reference to such factors as the content of the programming involved, the marketing activity of the broadcaster, and the origin of the broadcaster's advertising revenues.

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<sup>10</sup> Ibid., p.82.

<sup>11</sup> A Charter of Rights for Creators, p.82.



Retransmission systems should be considered within the scope of a broadcaster's target market irrespective of the broadcaster's success in deriving income from it, as long as the broadcaster's own behaviour demonstrates an intent to benefit from it financially.<sup>12 13</sup>

In addition, the Sub-Committee made other recommendations meant to protect the interests of specific parties who might be harmed by the compulsory licensing scheme. Small and isolated communities were exempted from the scheme because the costs of providing service to these communities was so high that increased subscriber fees resulting from retransmission royalties might affect penetration rates. Thus, cable systems serving these types of communities were "shielded from any material impact arising from the introduction of a retransmission right."<sup>14</sup>

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<sup>12</sup> Ibid., pp.82-83, Recommendations 105-108.

<sup>13</sup> Some authors, however, have been opposed to the deviation from the traditional "contour" definitions in determining a broadcaster's target audience. As John Hylton and Gary Maavara have written:

"...the Report does not suggest whether the test for this "target audience" would be established on an objective or subjective basis. Further it does not describe the consequences of a finding that a broadcaster has a large target audience (which would result in a low compulsory license tariff) and the rights of the copyright owner as against that broadcaster. Could the copyright owner bring an action against the broadcaster for the difference in its original license fee which was based on the local audience and the so-called target audience which was found by the Copyright Appeal Board?"

From: John Hylton, Gary A. Maavara, The Interaction of Copyright Law and Broadcasting Policy, Study prepared for the Task Force on Broadcasting Policy, (December, 1985), p.17.

<sup>14</sup> A Charter of Rights for Creators (1985), p.83, Recommendation 109.

Furthermore, the Sub-Committee was also concerned about the possibility of double payments occurring as a result of intermediary retransmission activities conducted by telephone or satellite companies (i.e., CANCOM). The Sub-Committee concluded that copyright payments should only be made for the "retail" stage of retransmissions rather than the "wholesale" stage. Thus, "Common carriers [would] be exempted from copyright liability."<sup>15</sup>

Some members of the Sub-Committee disagreed with some of the recommendations in their final report. In particular, Lynn McDonald (M.P. Broadview-Greenwood), although signing the report, included a "Dissenting Opinion".<sup>16</sup> Although conceding that the arguments in favour of compensating creators was "persuasive", she believed the creation of a retransmission right would result in an outflow of funds to the United States. McDonald asked that the Sub-Committee insure that the predicted "drain of resources" would not have a negative effect on the Canadian communications industries.

Opposing the recommendation to reduce the 7% tax paid to the Broadcast Development Fund on the basis that it was a "mistaken sense of priorities", she recommended that this tax be increased and directed to copyright collectives, or to Telefilm Canada. McDonald also suggested that Keyes and Brunet's 1977 recommendation to compensate only Canadian broadcasters should

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<sup>15</sup> Ibid., p.80, Recommendation 101.

<sup>16</sup> Ibid., Appendix A, (Dissenting Opinion of Lynn McDonald, M.P.), pp.99-101.

also be considered.<sup>17</sup> Although she stated that either the increase in the Telefilm Canada tax or the adoption of the Keyes/Brunet proposal would "better serve the interests of Canadians", she admitted that they would probably not satisfy the major parties from the United States (i.e. "ABC, CBS, NBC, or the Hollywood majors")<sup>18</sup>.

#### Diplomatic Negotiations Between Canada and the U.S.

While the Sub-Committee on Copyright was holding its hearings and preparing its final report a number of discussions occurred between Canada and United States which dealt with this dispute. Most notably, Prime Minister Brian Mulroney and President Reagan met in March of 1985 at the "Shamrock Summit" to discuss topics of interest to both countries. On the agenda at this conference was the issue of the manner in which Canada had dealt with the rights of U.S. copyright owners when their works were redistributed by Canadian cable systems. After their meetings leaders of both countries stated that they would cooperate to "protect intellectual property rights including... abuses of copyright and patent law."<sup>19</sup> The Communique for the

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<sup>17</sup> Keyes, A.A., Brunet, C., Copyright in Canada: Proposals for the Revision of the Law, (Ottawa: Queen's Printer, 1977).

<sup>18</sup> A Charter of Rights for Creators, p.101.

<sup>19</sup> Fowler, Mark S. (Chairman, FCC), and David Markey (Assistant Secretary for Communications and Information, Dept. of Commerce), Letter to CRTC Chairman Andre Bureau regarding the CRTC's CANCOM policy of permitting the redistribution of U.S. broadcast signals in Canada, (April 15, 1985).

Summit stated:

The Prime Minister informed the President that it is the Government's intention to meet the challenge of creating an appropriate and balanced copyright environment... The Prime Minister assured the President that revision of the [Copyright] Act is a priority. The Prime Minister undertook best efforts to accommodate U.S. concerns on the protection of programming retransmitted by cable or satellite when the Government develops legislative proposals.<sup>20</sup>

This tentative agreement represented a monumental step since it suggested to the United States that Canada would afford greater protection to works owned by U.S. citizens when they were used in Canada.<sup>21</sup> This position was later supported in the recommendations presented by the Sub-Committee on the Revision of Copyright in its final report "A Charter of Rights for Creators" which was released in October of 1985..

Soon after this summit conference was held, this commitment to cooperate was strained somewhat during an exchange of letters between the Chairman of the FCC and the Chairman of the CRTC. On April 15, 1985, FCC Chairman, Mark Fowler, and the Assistant Secretary for Communications and Information, David Markey, wrote to the CRTC Chairman, Andre Bureau, explaining their objection to the CRTC's policy direction with respect to CANCOM's distribution of the four U.S. network signals. These renewed concerns of

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<sup>20</sup> Bruce McDonald, "Cable/Satellite Retransmission in Canada - A New Era", Notes for a presentation to the Canadian Institute conference on Copyright: Business & Legal Issues, (Toronto: January 11, 1989), p.F-7.

<sup>21</sup> "America nets complaint to CRTC of unfair treatment by cable", Cinema Canada, (1985), p. 47.

Fowler and Markey were raised primarily as a result of the CRTC's acceptance and endorsement of the Klingle Report "The Costs of Choice" on March 22, 1985.<sup>22</sup> As explained earlier, many parties in U.S. felt that the adoption of these recommendations<sup>23</sup> would open the way for the widespread use of CANCOM's 3+1 signals by cable systems in less remote and more populous regions of Canada.

Fowler and Markey stated their concern about the problems which this policy created for American copyright holders'.

[This policy] does not fully recognize copyright protection afforded Canadian copyright owners whose material is retransmitted via cable in the United States and the commensurate need to compensate for Canadian use of U.S. programming.<sup>24</sup>

Bureau replied to Fowler's and Markey's comments in a letter dated May 8, 1985 in which he explained:

All applications to provide service by Canadian licensees are made and are considered by the Commission in the context of provisions of the existing Canadian copyright legislation. When the Government of Canada enacts new copyright legislation all Canadian licensees will, of course, be required to comply with its provisions.<sup>25</sup>

As to be expected Fowler was not fully satisfied with Bureau's response because it still did not resolve the issue of

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<sup>22</sup> Public Notice CRTC 1985-60, CRTC Response to the Report of the Task Force on Access to Television in Underserved Communities, (22 March 1985), p.4

<sup>23</sup> Canada, Task Force on Access to Television in Underserved Communities, The Costs of Choice, (Ottawa: Canadian Radio-Television and Telecommunications Commission, 1985), p.26, Recommendations 5, 6 and accompanying text.

<sup>24</sup> Ibid.

<sup>25</sup> Andre Bureau, Response to Mark S. Fowler, (May 8, 1985).

CANCOM's unauthorized and uncompensated use of U.S. broadcast signals. Fowler, in an attempt to make this exchange more productive suggested that the interests of both countries might be benefited if they improved their communications relationship. He, therefore, noted that experts in the U.S. were very interested in this issue and would like to hold discussions on this matter in Ottawa.<sup>26</sup> As a result of Fowler's request an Interagency Group from Washington, D.C. visited Ottawa from September 30 to October 2, 1985 to discuss the activities of CANCOM and gather information on the Canadian position with respect to copyright payments for the retransmission of U.S. signals by cable.

#### The Canada-U.S. Free Trade Agreement

The most successful effort on the part of the United States to obtain a formal commitment from Canada to introduce a retransmission right occurred during the negotiations surrounding the Canada-United States Free Trade Agreement. The final text of the agreement, which was signed by Prime Minister Mulroney and President Reagan on January 2, 1988, included an Article (Article 2006) which stated that both Canada and the U.S. would include a retransmission right in their respective Copyright Acts. Because the United States included this provision in their Act since 1976 one must assume that this particular article referred primarily

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<sup>26</sup> Mark S. Fowler, Reply to Andre Bureau regarding May 8, 1985 response, (August 8, 1985).

to Canada. This article reads:

1. Each Party's copyright law shall provide a copyright holder of the other Party with a right of equitable and non-discriminatory remuneration for any retransmission to the public of the copyright holder's program where the original transmission of the program is carried in distant signals intended for free, over-the-air reception by the general public. Each Party may determine the conditions under which the right shall be exercised. For Canada, the date on which a remuneration system shall be in place, and from which remuneration shall accrue, shall be twelve months after the amendment of Canada's Copyright Act implementing Canada's obligations under this paragraph, and in any case no later than January 1, 1990.
2. Each Party's copyright law shall provide that:
  - a) retransmission to the public of program signals not intended in the original transmission for free over-the-air reception by the general public shall be permitted only with the authorization of the holder of copyright in the program; and
  - b) where the original transmission of the program is carried in signals for free over-the-air reception by the general public, willful retransmission in altered form or non-simultaneous retransmission of signals carrying a copyright holder's program shall be permitted only with the authorization of the holder of copyright in the program.
3. Nothing in paragraph 2(b) shall be construed to prevent a Party from:
  - a) maintaining those measures in effect October 4, 1987 that
    - i) require cable systems to substitute a higher priority or non-distant signal broadcast by a television station for a simultaneous lower priority or distant signal when the lower priority or distant signal carries programming substantially identical to the higher priority or non-distant signal,

- ii) prohibit the retransmission of a distant signal by a cable system where
    - A) broadcast of the program is blacked out in the local market, or
    - B) the cable system distributes a network-carried program broadcast by a local network-affiliated television station.
  - iii) prohibit the retransmission of certain programming content, such as abusive and obscene material, alcoholic beverages or other prohibited products, provided that these measures are applied on a non-discriminatory basis and that the program or advertisements in which the programming content appears is deleted in its entirety,
  - iv) prohibit the retransmission of certain programs, advertisements or announcements during an election or referendum,
  - v) authorize the preemption of programs at the request of a Party for urgent and important non-commercial communications,
  - vi) require a cable system, whose licence as of October 4, 1987 contained an invocable condition requiring the system to delete commercial materials and substitute therefore non-commercial materials, to implement such a condition; provided that with respect to those cable systems that were not implementing such licensing conditions as of that date, such conditions shall be eliminated upon licence renewal, or
  - vii) permit non-simultaneous retransmissions in remotely-located areas where simultaneous reception and retransmission are impractical; or
- b) introducing measures, including measures such as those specified in subparagraphs (a)(i) and (a)(ii)(B), to enable the local licensee of the copyrighted program to exploit fully the commercial value of its license.

4. Immediately following the implementation of the



obligations in paragraph 1, the Parties shall establish a joint advisory committee comprised of government and private sector experts to review outstanding issues related to retransmission rights in both countries to make recommendations to the Parties within twelve months.<sup>27</sup>

The most noteworthy section in this Article was, of course, the statement which stated that each Party's copyright law will provide "a right of equitable and non-discriminatory remuneration for any retransmission" of the copyright owner's work. This meant that Canada would be required to amend its Copyright Act so that copyright owners would receive royalties when their works were retransmitted by cable operators.

The wording of the Agreement suggested that a "compulsory licensing" regime would be acceptable, rather than marketplace negotiation between the copyright owner and the cable company. Thus, cable companies would be able to use the copyrighted works as long as the owner was granted royalty payments. This right, however, was provided on the condition that the signals being retransmitted were originally intended for "free over-the-air

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<sup>27</sup> Canada, Department of External Affairs, The Canada-United States Free Trade Agreement, (Ottawa: December 10, 1987), pp. 297-299, Article 2006.

reception to the general public."<sup>28</sup> In addition, these signals would have to be retransmitted simultaneously by the cable company. Under this compulsory licensing scheme, the copyright owners would not be able to stop the retransmission of their programs, or control the markets in which the programming would be shown.

The Agreement included further provisions which enable the regulators in both Canada and the United States to maintain some degree of control as to which distant signals could be carried by cable systems. Paragraph (3) of Article 2006 identified a number of rules and regulations which either the CRTC or the FCC might adopt in order to protect the markets of local broadcasters. Some of these acceptable measures included: the simultaneous substitution of higher priority local signals for the lower-priority distant signal when the programming carried on both was identical, and the deletion of commercial materials from distant stations and the substitution of non-commercial materials by the cable company. Legislation to implement the Canada/U.S. Free Trade Agreement was introduced in the Canadian House of Commons

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<sup>28</sup> As a result of this limitation any signal which is scrambled (i.e., First Choice), or is distributed to cable homes only (i.e., MuchMusic, TSN, Arts and Entertainment Network) would not come under the compulsory licensing scheme. See Peter S. Grant, "Free Trade and the retransmission of program signals: New developments in program rights payment and protection in Canada", Notes for a presentation to the Law Society of Upper Canada Conference on Canadian Communications Law and Policy, (Toronto: March 25, 1988), p.D4-D5.

as Bill C-130 on May 24, 1988.<sup>29</sup> After a great deal of debate from the opposition parties the Bill cleared the House on August 31, 1988. Since the Prime Minister dissolved the government on October 1, 1988 for a federal election the Bill died in the Senate.

After the Conservative party won a majority of the seats in the November 21, 1988 election they re-introduced the Act to implement the FTA as Bill C-2 on December 14, 1988. The bill was passed by Senate and given royal assent on December 30, 1988.

#### The Implementation of the Free Trade Agreement Between Canada and the United States of America

This section will discuss the parts of the Bill which pertain to the revision of the Copyright Act and will explain how the compulsory licensing regime for cable retransmissions will be implemented in Canada.

The passage of Bill C-2 implemented the retransmission right by amending Section 3(1)(f) of the Copyright Act. Previously this section stated that the author of a work had the sole right "in the case of any literary, dramatic, musical, or artistic work, to communicate such work by radio communication." As

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<sup>29</sup> The House of Commons Canada, Minister for International Trade, Bill C-130: An Act to implement the Free Trade Agreement between Canada and the United States of America, First Reading, May 24, 1988, pp.46-52. This legislation, however, was not passed before the government was dissolved October 1, 1988 for a federal election. A similar Bill was introduced after the election as Bill C-2, First Reading, December 14, 1988.

explained earlier, the Court in Canadian Admiral Corp. v. Rediffusion determined that the retransmission of works by cable systems was not an infringement on the owners copyright since the activities of cable did not fall under the definition of radio communication. The revised Act created a copyright liability for cable by eliminating the words "radio communication" and substituting "telecommunication".<sup>30</sup> Section 3(1)(f) of the revised Act, therefore, stated that the author of a work has the sole right to "communicate the work to the public by telecommunication."<sup>31</sup>

The revised Act, however, defined a number of instances in which copyright liability would not apply for the transmission of broadcast signals by telecommunication. In particular, Subsection 3(1.3) of the revised Act made a specific exemption for telecommunication carriers which provide the "means of telecommunication necessary for another person to so communicate the work".<sup>32</sup> Companies such as Telesat Canada or Alberta Government Telephones, which merely lease transmission facilities to the cable companies, do not have to make copyright royalty payments. This section is similar to the "passive carrier"

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<sup>30</sup> "Telecommunication" is to be defined in the revised Copyright Act as "any transmission of signs, signals, writing, images, or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system."

<sup>31</sup> Bill C-2: An Act to implement the Free Trade Agreement between Canada and the United States of America, S. 62(1).

<sup>32</sup> Ibid. S.62(2).

exemption in the U.S. Copyright Act of 1976 <sup>33</sup> in which telecommunications carriers are exempted from copyright liability when they retransmit signals for broadcasters or cable systems.

The activities of networks, however, did not receive this type of "intermediary" exemption. Under the revised Copyright Act, the transmission of copyrighted works from the network to their affiliates, and the subsequent transmission of these works to the public would constitute "a single communication to the public".<sup>34</sup> The revised Act made both the network and its affiliates "jointly and severally liable" for the use of the copyrighted works they transmit.<sup>35</sup> This suggested that both the affiliates and the network are responsible for making one "joint" royalty payment for the works which they distribute over-the-air.

The Act also provided an exemption for satellite retransmitters such as CANCOM. Under Subsection 3(1.5) of the revised Act, it is stated that a work is not considered to be communicated to the public as long as that signal is being retransmitted to a cable retransmission system.

The revised Copyright Act included a new section which

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<sup>33</sup> Section 111 (a)(3) of the U.S. Copyright Act of 1976 exempts telecommunication carriers where:  
"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..."

<sup>34</sup> Bill C-2, S. 62(2)

<sup>35</sup> Ibid.

defined the conditions under which copyright payments for the retransmission of off-the-air broadcasts will be made. The new Act specifically stated that it will not be an infringement of an owner's copyright for a cable system to retransmit the signal of a local broadcaster. This provision, however, will only apply if the local the signal is retransmitted simultaneously and in its entirety.

The matter of distant signals, however, were dealt with somewhat differently. The revised Act stated that it will not be an infringement of an owner's copyright for a cable system to retransmit the signal of a distant broadcast station, provided that they make the appropriate licensing payments to the Copyright Board. The Governor in Council was responsible for introducing regulations which will define the terms "local" and "distant" signals.<sup>36</sup>

Another important issue which the revised Act addressed was the procedure through which the copyright royalties for retransmissions would be collected and distributed. It was proposed that the copyright societies, acting on behalf of the individual copyright owners, would file statements with the Copyright Board outlining the royalties the copyright owners expect to recover when their programs were retransmitted. After these proposed statements were made available to the public, the cable companies were provided with the opportunity to file any

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<sup>36</sup> Ibid., S.63.

objections they might have over these proposed royalties with the Board. After considering these submissions by the copyright owners and the retransmitters, the Board would be responsible for establishing the amount of royalties to be paid by each cable system.<sup>37</sup> The revised Act also provided the Governor in Council with the authority to make regulations establishing the criteria the Board must follow in determining the manner in which the royalties were to be collected. Specifically, these criteria were to be used to ensure that the royalties to be paid by the retransmitters were "fair and equitable".<sup>38</sup> The revised Act, however, also provided for an exemption for small retransmission systems. It stated that this class of system (to be defined later by the Governor in Council) would receive a "preferential rate" when the Board determines the royalties to be paid by the retransmitters.<sup>39</sup>

The revised Act also provided the Board with the authority to determine the portion of the royalties which each of the collecting bodies would receive. The section of the Act most relevant to this thesis was the conditions which apply to the Board when it was collecting and distributing the royalties. The revised Act stated that neither the Board, nor the Governor in Council, in their capacity to determine both the rates to paid by

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<sup>37</sup> Ibid., S.70.62, 70.63.

<sup>38</sup> Ibid., S.70.63(4).

<sup>39</sup> Ibid., S.70.64(1)

the retransmitters and the apportioning the royalties to the collecting societies "[might] discriminate between copyright owners on the ground of their nationality or residence".<sup>40</sup> This section made it emphatically clear that the copyright owners from the United States would be provided with royalty payments when their works were redistributed by Canadian cable systems.

#### Reaction to the Revised Act

Although this proposed revision to Canada's Copyright Act would seem to satisfy the interests of broadcasters and copyright owners in Canada and the United States, its introduction would create a new set of problems which still must be addressed.

The most controversial question still to be resolved was the manner in which the Governor in Council would define the terms "local" and "distant" signals. The defining of these terms was very important since it would have a great effect on the payments which cable retransmission companies would have to make to the Copyright Board.

Since the establishment of these definitions would have a significant effect on copyright royalties which the copyright owners would receive, and conversely the amounts which the retransmitters would have to pay one should expect that there would be a vigorous debate on this issue.

The Government published proposed definitions for local and

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<sup>40</sup> Ibid., S.70.63(2).



distant signals in the Canada Gazette on 4 March 1989.<sup>41</sup> In terms of a cable system it was proposed that an over-the-air television signal would be considered "local" if its Grade B contour plus 32 km fell within the service area of the retransmission system. The definitions also included a new concept called "proportionality". Under this system, only the portion of the cable system's service area covered by the "local" signal of a broadcaster would be exempt from copyright liability. In the cable service area outside the Grade B plus 32km line, copyright payments would be required. This means that a broadcast signal could be considered both "distant" and "local" within a single cable service area. The initial drafts of the definitions proposed that a signal would be considered "local" for an entire system if any part of the Grade B plus 32km line intersected with the cable company's licensed service area. The introduction of the proportionality concept, however, meant that the cable companies will be paying more copyright royalties than they had originally anticipated.

Interest groups such as the Canadian Cable Television Association (CCTA) voiced their complaints about the proposed definitions. The CCTA accepted the Government's "mechanical" definition of Grade B plus 32km for local signals, but recommended that it should also adopt a "functional" component.

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<sup>41</sup> Canada, Department of Communication, "Definition of Local Signal and Distant Signal Regulations" Canada Gazette, Part 1, (March 4, 1989), pp.980-990.

As a suggestion, the CCTA had proposed that the definition for local signals should be expanded to include signals which were "readily receivable directly from the terrestrial station by a significant proportion of the public within a licensed service area of the retransmitter."<sup>42</sup>

The CCTA's expanded definition would capture more signals under the "local" definitions, thereby reducing the amount of copyright royalty payments to be paid by cable companies.

The CCTA also noted that a number of anomalies could arise if the Government's proposed definitions were adopted. It stated:

CCTA members in British Columbia are particularly concerned that Seattle signals currently received off-air in the Vancouver Lower Mainland and Spokane signals in the Southern Kootenay region will be defined as distant under these regulations.<sup>43</sup>

In addition to the definitions for "local" and "distant" signals the Government also released its proposed definition for "small retransmission systems". It recommended that to qualify for the preferential copyright rates, a system should serve "no more than 1,000 premises in the same community".<sup>44</sup> The CCTA also

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<sup>42</sup> Canadian Cable Television Association, "Representations regarding proposed regulations on definition of local signal and distant signal and definition of small retransmission system [Canada Gazette, Part 1, March 4, 1989]", (April 3, 1989), pp.3-4.

<sup>43</sup> "Key copyright definitions published", 13 Canadian Cable Television Association: Cable Communique, (1989), pp.1-2.

<sup>44</sup> Canada, Department of Communication, "Definition of Local Signal and Distant Signal Regulations" p.988-990.

had some concern about this definition. It suggested that the threshold of 1,000 premises might be too low since "many underserved communities in rural and remote areas that relied heavily on distant signals would not be eligible for preferential treatment"<sup>45</sup> As an alternative, the CCTA recommended that "a preferential rate should apply to the first 6,000 subscribers of all licensed cable systems."<sup>46</sup>

The next major problem under this new system may arise when the Copyright Board must determine the amount of royalties which are to be paid to each collecting body. The Board faces a difficult task since it has not been provided with any guidance from the government with respect to the amounts which each group should receive. Its only source of direction will come from the "statements of royalties" which will be filed by the copyright "collecting bodies". One may expect that the statements filed by the collecting bodies will attempt to acquire the largest possible amount of royalties and therefore may not reflect the true monetary value of their programs. If the amounts which the collecting bodies request are simply passed on to the retransmission operators the cost to their subscribers may become prohibitively large. The Board will therefore be faced with the task of determining a realistic and equitable royalty rate for both the retransmitters and the copyright owners.

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<sup>45</sup> Canadian Cable Television Association, (April 3, 1989), p.8.

<sup>46</sup> Ibid., p.10.

It may also be useful to look at the U.S. Copyright Royalty Tribunal's experience in dividing the royalties in that country as an example of the problems which may arise in Canada. As explained in Chapter 4, the CRT divided the royalty pool on a percentage basis with the majority of the proceeds going to the Motion Picture Association and other Program Syndicators. A number of these groups have protested the amounts which they were awarded taking their complaints to the Court of Appeals.<sup>47</sup>

Many of the parties which will file statements with the Canadian Copyright Board have been actively involved in these events in the United States. One should expect that, similar to the tactical measures used by the copyright claimants in the United States, these groups may attempt to acquire larger copyright settlements by challenging the Copyright Board's decisions in the Canadian courts. The overall result of this process may mean that the some copyright owners may face long delays in receiving their royalties.

#### SUMMARY

This chapter has examined a number of developments which have occurred on the issue of retransmission since 1985. It has shown that a major "turning point" in terms of Canada's position on the issue occurred when the Subcommittee on the Revision of Copyright released its final report "A Charter of Rights for

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<sup>47</sup> National Association of Broadcasters v. Copyright Royalty Tribunal., 675 F.2d 367 (D.C.Cir 1982).

Creators". This document represented the first time that the Canadian government acknowledged that Canada should amend its Copyright Act to include a retransmission right for all types of simultaneous broadcasts and treat both nationals and non-nationals in an equal manner.

The second major development towards resolving this dispute occurred after the 1985 "Shamrock Summit" when Prime Minister Brian Mulroney pledged that Canada would take steps to afford greater protection to works owned by U.S. citizens when they were used in Canada. Canada followed through on this promise when the Prime Minister signed the Free Trade Agreement on January 2, 1988. This agreement required Canada to amend its Copyright Act so that copyright owners would receive royalties when their works were retransmitted by cable operators in Canada. The legislation to implement this agreement was passed by the government on December 14, 1988.

This chapter has demonstrated that there are still a number of procedural and definitional issues which still remain to be resolved. In particular, the government has yet to formally adopt the definitions which would establish whether a broadcast signal qualifies as "local" or "distant". These definitions are of paramount importance since they will determine the royalty payments which the cable operators will have to pay to the Copyright Board. The cable industry is, therefore, pressuring the government to adopt definitions of local and distant signals which would limit the amount of these royalty payments.

Additionally, the Copyright Board must still implement the collection and distribution scheme established in the revised Copyright Act. Although the Act provides an outline of the process, the Copyright Board must still develop the specific procedures which are to be followed. The Board will, therefore, be faced with a number of very difficult and potentially troublesome decisions in the near future. If it decides to award the collecting bodies large royalty payments, the cable operators will undoubtedly complain that they are being forced to endure extraordinary financial hardship. Conversely, if the Board sides with the interests of the cable operators and reduces the payments requested by the collecting societies, the copyright owners will claim that the Board is in violation of the "fair and equitable" compensation provision established in the Copyright Act.

## CONCLUSION

This thesis has provided an overview of the cable/copyright retransmission issue. In following the regulatory history of cable television in Canada it has shown that the CRTC has been concerned with the rights of the program owners whose works are redistributed by cable systems. It has explained that these efforts have been restricted by a 1954 court decision which established that copyright liability did not apply to cable systems when they simultaneously retransmit the signals of over-the-air broadcasters. However, in its Policy Statement published in 1971 the CRTC noted that this system was somewhat inequitable in that it did not compensate the program owners for the use of their works. Although at that time it suggested that it would take steps to correct this imbalance, to date, the CRTC has not introduced any system through which the copyright owners would receive any royalties.

It has also addressed how the CRTC has dealt with the issue of the rights of the program owners when their materials are redistributed by CANCOM. Although CANCOM originally suggested that it felt no one should use the signals of another if the originating station objects, its actions have not been consistent with this principle. In its original licensing decision for CANCOM, the CRTC stated that it "expected" CANCOM to enter into licensing agreements with the broadcasters. This expectation was not realized, however, because CANCOM found that the broadcasters

would be in violation of their contracts with the program producers if they authorized these retransmissions. This same issue of consent arose when CANCOM applied to carry the signals of the four U.S. networks. Although the U.S. commercial networks vehemently opposed the use of their signals, the CRTC did not require CANCOM to acquire consent from the parties in the U.S.

This thesis has shown that the CRTC has been aware that copyright owners are not compensated when their works are simultaneously retransmitted by cable. The CRTC, although it has suggested that some type of compensation would be equitable, has not been able to implement any specific solution to this problem.

In the review of the six papers and reports published by the government on this cable/copyright issue this thesis has shown that the reports of the Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs (Ilsley Report), the Economic Council of Canada, and Liebowitz were all opposed to the introduction of a retransmission right.

These studies based their opposition on the argument that copyright owners would be compensated through the higher rates which they would receive from broadcasters in recognition of the extended coverage provided by cable. While the Ilsley Report and the Liebowitz study recommended against the establishing of copyright liability under all circumstances, the Economic Council suggested that liability should apply when the broadcasts were non-commercial. Keyes and Brunet noted that there was the potential for a net outflow of copyright payments to the United



States if a copyright liability for cable was established and attempted to address this problem in their recommendation that a retransmission right should only apply to Canadian broadcasters for Canadian broadcasts.

Babe and Winn argued that the most appropriate solution would be for Canada to establish a system in which royalty payments would be provided to non-commercial broadcasters and independent producers whose works were carried within non-commercial broadcasts. The White Paper "From Gutenberg to Telidon", rather than advocate any specific policy option, reviewed a number of issues which related to the topic of copyright payments for cable retransmissions. Although the intent of the paper was to encourage discussion on the cable/copyright issue, the options which it presented seemed to suggest that Canada should amend its Copyright Act to include some type of copyright payments for cable retransmissions.

This thesis also provided an overview of the viewpoints held by the various industry groups on this issue. For clarity, these positions were examined from three perspectives - the cable operators, copyright owners, and the broadcasters. The cable companies, since they would be paying for the use of the copyright owner's property, opposed any type licensing arrangement for retransmissions. Copyright owners, on the other hand, saw the unauthorized use of their works as unfair, and were demanding that the Copyright Act be revised. The broadcasters, having to pay for the programs they transmit, maintained that

they were placed at a competitive disadvantage to the cable companies which were able to acquire much of their programming free of charge.

This thesis has also illustrated that the U.S. copyright owners and broadcasters began to pressure Canada to update its Copyright Act after that the United States Copyright Act was revised in 1976 to include a retransmission right. This Act established a system of "compulsory licensing" under which the cable companies were provided with the right to simultaneously retransmit copyrighted works as long as the owners received royalty payments. Under the terms of this Act the cable companies made royalty payments to the Copyright Royalty Tribunal for the distribution of distant, non-network television signals.

As a result of these revisions some parties in the U.S., noting that Canadians are compensated through the U.S. system, felt that Americans should receive similar treatment when their works were retransmitted by Canadian cable companies. The U.S. parties, seeing this issue as one of "fairness", began to pressure the Canadian government to revise its Copyright Act to include some type of mechanism for compensating copyright owners when their works were retransmitted.

This debate was compounded by the additional problems created by CANCOM. Noting that CANCOM had been permitted to expand into "less remote and underserved" markets, the U.S. broadcasters felt that the CANCOM service might eventually replace most of the existing microwave links which serve some of

the larger markets in Canada. The U.S. broadcasters (especially those whose signals are presently carried on Canadian microwave systems) feared that the few instances in which the advertisers could take advantage of the Canadian market through this microwave system, might be eliminated if CANCOM were permitted to expand further.

This thesis has explained, however, that one of most important concerns surrounding this debate was the perceived "loss of control" on the part of the U.S. broadcasters and copyright owners. These parties felt that the manner in which Canada treated the property of U.S. copyright owners set a poor example for other countries which also used intellectual property owned by U.S. citizens. Some parties in the U.S. felt that if they could solve this cable/copyright dispute with Canada, other countries might be persuaded to offer increased copyright protection to American works.

A number of options were outlined which the United States had available if it decided to exert pressure on Canada to revise its Copyright Act. Some of the remedies examined included: the use of multi-lateral treaties and forums; linkage to other trade issues; and mirror legislation. This thesis demonstrated that the United States use of any of these approaches have not met with a great deal of success. The United States seemed to have recognized that retaliatory pressure could interfere with these positive developments, and therefore adopted a less hostile "wait and see" approach to this dispute. The United States found it

unnecessary to pursue this confrontational course of action since Canada began to show signs that it might seriously consider the introduction of a retransmission right in its Copyright Act.

A major "turning point" in terms of Canada's position on the issue occurred when the Subcommittee on the Revision of Copyright released its final report "A Charter of Rights for Creators". This document represented the first time that the Canadian government acknowledged that Canada should amend its Copyright Act to include a retransmission right for all types of simultaneous broadcasts and treats both nationals and non-nationals in an equal manner. In early 1985 after a summit conference between Canada and the United States, Prime Minister Brian Mulroney pledged that Canada would take steps to afford greater protection to works owned by U.S. citizens when they were used in Canada.

Canada followed through on this promise when the Prime Minister signed the Free Trade Agreement on January 2, 1988. As part of this agreement Canada was required to amend its Copyright Act so that all copyright owners would receive royalties when their works were retransmitted by cable operators in Canada. The legislation to implement this agreement was passed by the government on December 14, 1988.

With the passage of the revised sections of the Copyright Act, the liability for retransmission was broadened to include all forms "telecommunication". The revisions also make it clear that copyright owners from the United States would receive

copyright payments since the Copyright Board might not "discriminate between copyright owners on the grounds of their nationality or residence."

In reviewing the legislation this thesis outlined a number of procedural and definitional issues which must yet be resolved. Specifically, the government has yet to adopt the definitions to establish the meanings for the terms "local" and "distant" broadcast signals. Since these definitions will determine the royalty payments which the cable operators will have to pay to the Copyright Board, this thesis suggested that there will be intense lobbying by both the cable operators and the copyright owners in attempt to encourage the government to adopt definitions which are favorable to their interests. Additionally, the Copyright Board must still implement the collection and distribution scheme established in the revised Copyright Act. Although the Act provides an outline of the process, the Copyright Board must still develop the specific procedures which are to be followed.

In following the history of this copyright dispute between Canada and the United States it seems that at this time the issue seems to have been largely resolved. One should expect that some debate will arise among the industry groups and the Copyright Board regarding the amounts of the royalty payments. These issues will probably include both the amounts which are to be paid and the manner in which they are to be distributed. These confrontations will probably be restricted to the industry groups

and should not escalate to a degree where they require the intervention of the governments of either Canada or the United States.

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## VITA AUCTORIS

James Andrew Love was born in Oakville, Ontario on October 3, 1964. Shortly after he moved with his family to Windsor, Ontario. James graduated from Riverside Secondary School in June of 1983. He continued his post-secondary education at the University of Windsor where he received his Bachelor of Arts (Honours Communication Studies) in June, 1987. During his undergraduate years James specialized his research in the areas of broadcasting and telecommunications policy.

He enrolled in the Master's programme in Communication Studies at the University of Windsor in September of 1987. Prior to beginning his graduate work James was awarded the C.P. Crowley Scholarship from the Faculty of Graduate Studies and Research.

In January, 1989 James began working as a Policy Analyst in the Cable, Pay and Specialty Services Branch of the Canadian Radio-television and Telecommunications Commission. He presently lives with his wife Karen in Nepean, Ontario.