REPORT TO THE TASK FORCE ON COPYRIGHT

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INTRODUCTION

Canada's Copyright Act[1] became law over 60 years ago and only now is the subject of revision. For the broadcasting industry, the revision of copyright law is sometimes portrayed as the solution to some of the broadcasting policy issues facing the Task Force. While it may be attractive to consider that copyright law can be used as a technique for satisfying certain policy goals of the Broadcasting Act, it may be unwise to consider that a statute designed to compensate creators for their labours should become the foundation for broadcasting policy in Canada. As the Task Force is well aware, and as noted by one member in the Report of the Subcommittee on the Revision of Copyright (hereinafter referred to as the "Subcommittee Report"), copyright is but one means to be used in association with other policy tools to achieve our cultural and industrial goals for the broadcasting industry. The fact that revision of copyright law is taking place at the same time as we examine our broadcasting system places a heavy burden on policy makers. Can the two reports be made compatible? Should they be? Various sectors of the broadcasting industry at one time or another have argued that our outdated copyright law was the central issue to be resolved in broadcasting policy revision. For example, copyright plays a fundamental role in the distant signals and CANCOM[2] issues. However, and notwithstanding the expectations of some broadcasters, the introduction of copyright liability for retransmission of broadcast signals will not answer the policy questions concerning distant signal carriage, equalization of service or the Americanization of our broadcasting system.

For the creators of copyright works, the revision of the law is paramount. It is one of the few tools the creator can use to protect his works from unauthorized use. To this end, the existing broadcasting policies are of minimal benefit. For example, broadcasting policies have not helped creators to control the cable rediffusion or retransmission of local, regional and distant signals which has taken place over the last two decades. This, coupled with a weak Copyright Act, meant that

owners could no longer ensure territorial exclusivity for their works or be compensated for new copyright uses. In addition, contractual remedies are not helpful because the contracting parties are often not at fault, rather the harm is caused by third parties. And if a copyright owner could convince the Canadian Radio - Television and Telecommunications Commission (the "CRTC") to prevent cable rediffusion of certain signals or programmes, no compensation is forthcoming for the breach. In the case of systems not authorized by the CRTC, the copyright owner has no recourse at all. In sum the copyright owner is without a remedy.

Conversely while broadcasting policy has little influence on copyright owners' rights, it is apparent that copyright law will affect the broadcasting policymaker's hand. The distant signals issue can no longer be approached without consideration of fair compensation for copyright owners. This compensation issue will have a significant impact upon the policymaker's flexibility in dealing with issues such as extension of service, priority carriage of broadcast signals, and the development of incentives for programme production. A trite but important example of this is Canada's position as a net importer of copyright materials and the impact this has on the balance of payments in the cultural/communications sector of our economy.

This paper will examine the existing copyright law as it affects broadcasting, the proposals for change and the policy issues arising from these changes. The subjects of interest to the Task Force include a review of protection for broadcasts, performer's performances, new rights for sound recordings, a tax on home taping, an exemption for ephemeral recording, and copyright liability for retransmission.

EXISTING LAW AND PROPOSALS FOR REFORM

Introduction

Although there are many views of the nature of copyright law, for our purposes we believe the most appropriate view was expressed by Mr. Justice Willard Estey of the Supreme Court of Canada:

> "... Copyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in the statute."[3]

It is important to recognize that rights arise only from the Copyright Act and the courts' interpretation of its provisions. While this may seem obvious, it is often forgotten in the heat of debate.

The Copyright Act was passed in 1921 and, aside from a number of specific amendments, has not been substantially amended since. As a result, the courts have been and must continue to be creative with the arcane language of the Act. New technologies were given old labels in order to attract protection. Computer software was classified as a "literary work". Video cassettes must be identified as either "cinematographic works", a series of photographs, or as "mechanical contrivances" for the "acoustic representation" of a musical work. Often the courts have been unable to effectively protect creative works utilizing or affected by new technologies. Particularly telling is a quote of Cameron, J. of the Exchequer Court in holding that cable rediffusion was not an infringement of copyright in a television programme;

> "It follows, therefore, that no matter how "piratical" the taking by one person of the work of another may appear to be, such taking cannot be an infringement of the rights in the latter unless copyright exists in that "work" under the provisions of section 3."[4]

International Copyright Conventions

There are at present two international conventions to which Canada is a signatory. The first is the Berne Convention which was originally signed in 1886 and which has been revised on several occasions. Canada is a party to the 1928 text (the Rome text) of the Convention. The basic purpose of the Berne Convention is set out in Article 4(1) which provides that authors who are nationals of countries that adhere to the Convention

are entitled in member states, other than the country of origin of the copyright work, to the rights which the laws of the respective countries grant to "natives" as well as the rights expressly granted by the Convention. The United States is presently not a member of the Berne Convention.

The second international convention of which Canada is a member is the Uniform Copyright Convention ("UCC"). The 1952 text of the UCC imposes less stringent requirements on its members than does the Berne Convention in that it merely requires each country to give the protection of its own laws to nationals of other member countries. However, the most recent 1971 text of the UCC goes beyond the 1952 text dramatically in that it sets certain minimum levels of protection that must be granted by member states. Canada and the United States were signatories to the 1952 text but have not ratified the latest 1971 text.

Any revision of the copyright law must refer to the standards provided in these conventions. Our level of accession to these apparently does not pose conceptual difficulties with revision of the law. However, the requirement of national treatment for citizens of other member states poses significant issues concerning the potential outflow of funds for use of foreign copyright material. It is important to note that sound recordings, performers' performances, and broadcasts are not subject matter and are therefore are not protected by the conventions described above. They also do not provide for simultaneous rediffusion or retransmission rights. As such Canada is not compelled to protect these rights. However, international policy and political considerations are significant and must be taken into account in framing domestic copyright legislation dealing with such issues.

In several instances, proposals to amend copyright law may result in an out-flow of funds to foreign producers and creators, particularly U.S. rights holders on whom we depend for so much of our entertainment programming. To the extent that we pay fairly for what we consume, this may be the price Canada should pay for such international imports.

This paper will not discuss Canada's options with respect to adherence to the various texts of these Conventions as this is not of significant importance at this time. For the most part, the revision of copyright law is taking place within the existing standards and obligations set out by the 1928 Rome text of the Berne Convention and the 1952 text of the UCC.

The Structure of the Copyright Act

Section 4(1) provides that copyright shall subsist in every original literary, dramatic, musical and artistic work created by a qualified author. The qualifications relate to the nationality or status of the author in Canada or in a Berne Convention country. Canada also has a 1924 bilateral agreement with the United States that protects works created by nationals of that country. This agreement is brought within the operation of the Act through Section 4(2).

Section 3(1) defines "copyright" as the

> "sole right to produce or reproduce the work or any substantial part thereof in any material form 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
>
> (a) to produce, reproduce, perform or publish any translation of the work;
>
> (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;
>
> (c) in the case of a novel or other non-dramatic work, or of an artistic work, convert it into a dramatic work, by way of performance in public or otherwise;
>
> (d) in the case of a literary, dramatic, or musical work, make any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed or delivered;

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present such work by cinematograph, if the author has give such work an original character; but if such original character is absent the cinematographic production shall be protected as a photograph;

(f) in the case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication; and

to authorize any such acts as aforesaid."

Section 17(1) states that copyright in a work is deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything that only the owner of the copyright has the right to do.

Therefore, in order to attract the protection of the Copyright Act, a qualified author must create an original work which is defined in the Act. Section 2 provides the definitions of the various types of works. In copyright law, the term "original" with respect to works simply means that it is not copied. An infringement of copyright can only arise out of an act which is described in the Act as being within the bundle of exclusive rights provided to the copyright owner. One difficulty which the creative community faces relates to the definitions of the types of "works" which are based upon technologies in existence in 1920. In addition, the copyright owner must be able to bring certain activities within the exclusive rights provided by the Act to successfully sue another party for infringement. Examples of these difficulties will be discussed under specific headings below.

SUBJECT MATTER

Broadcasts

The Act does not protect broadcasts as separate copyright works. Broadcasters often have complained that the absence of copyright protection for their broadcasts restricts their ability to control unauthorized

uses. From Gutenberg To Telidon, A White Paper on Copyright, 1984, (the "White Paper") noted that the material contained in broadcasts (films, for example) were protected and as a result protection of broadcasts would add an unnecessary layer of proprietary rights. The White Paper took the position that this would complicate the exploitation of material and add to negotiating costs of both owners and users. It also noted that broadcasts were not protected in many other countries. In particular, this is the case in the United States. The Subcommittee Report recommends that broadcasts be protected under the revised Act on the ground that broadcasts contain the requisite amount of original creative input to attract protection.

It would seem that this recommendation is an example of broadcast policy and copyright law becoming intermingled. Some observers suggest that the creation of a copyright in a broadcast would allow broadcasters to control the retransmission of their signals. However, if a compulsory licencing system were to be adopted for retransmission activities, then broadcasters would continue to be unable to control the exclusive use of their broadcasts. The broadcaster would be paid but would not have the right to refuse to have his signal retransmitted. As a result, a broadcaster would again be forced to look to the CRTC and its policies for relief. The addition of copyright liability merely adds a layer of compensation which for the most part would be immediately transferred to the actual owners of the copyright in the underlying works. As a result, the broadcaster would be left in virtually the same position as he is now.

Performers' Performances

The Copyright Act does not provide performers with protection for their performances. Under the existing regime, performers are usually compensated pursuant to contracts. However, they seek copyright protection to guard against unauthorized "bootleg" recordings of live

performances and to exact damages or royalties for repeated use of bootleg and authorized recordings.

The White Paper noted the practical difficulties that could result and recommended that a specific copyright not be created. However, it recognized that performers should have some mechanism to control the unauthorized recording of their performances and proposed amendments to the Criminal Code.

The Subcommittee recommended that the performances of performers be established as a new category of subject matter. The Report also recommends that this protection be extended to nationals of those foreign countries which provide similar protection to Canadians (i.e. reciprocity).

This new right will require all broadcasters to clear all copyrights in performances prior to the broadcast of works which contain these works. In the ordinary course, this should not cause undue difficulty and would give performers increased bargaining power at the negotiating table. However, serious practical difficulties could affect the broadcasting system as it exists today. The United States does not protect performers' performances. If we assume that the existence of this right will make production more expensive in Canada, there may be a further incentive to purchase American programming for exhibition in Canada. In addition, the definition of a "performers' performance" also raises other questions. Who could properly be characterized as a "performer"? Will the broadcaster be required to clear all rights for anyone who appears in any programme and carries out any of the activities which normally would be associated with a performance? Are the participants in the local amateur hour performers? Or if someone sings a song on a television news broadcast, will they have an action in copyright for damages or for an injunction if they are not compensated?[5] Will Canadian performers working in Hollywood be discriminated against if producers foresee a sale of the program in Canada? If the rights are administered collectively, on what basis will individual performances be compared?

How does the "value" of Anne Murray on network television compare with a local music program in Winnipeg? What reporting mechanisms will be required? Will Canadian performers be discriminated against in Canadian productions? And finally, will the existence of such a right give performers a higher degree of protection than they already have contractually with shell corporations? In other words if you can't recover damages from an impecunious company in contract will a copyright suit make any difference? Indeed, the introduction of a remedy in criminal law could have a more salient effect in controlling piracy because of the potential for punishment against individuals which in other areas of the law has proven more effective than the potential for civil liability against corporations.

RIGHTS

Sound Recordings

Sound recordings are presently protected under the Copyright Act but are granted limited rights. The Act provides for only a right of reproduction and only the owners of the music contained in sound recordings are compensated for performances of these works. The Subcommittee has proposed the creation of a performing right in sound recordings. This protection would also, as with the performers' performances, be offered to nationals of other countries on a reciprocal basis. The United States does not presently have such a right in its copyright law.

The absence of such a right in the United States could have a number of consequences. For example, a broadcaster would be required to compensate the owner for performances of a sound recording that is of Canadian origin and not those from the United States. This might encourage the use of non-Canadian sound recordings generally. In addition, television broadcasters might not be inclined to use Canadian recordings in their productions because use of American music would not result in a fee payment. There are no Canadian content requirements for music use on television. Provided that a television programme meets the

other criteria provided in the Canadian content rules under the Broadcasting Act, there is no requirement to include any Canadian music in these productions. American stations and other signals which are carried on cable or by CANCOM in Canada would also be required to compensate owners for any performance of Canadian sound recordings. As a result, for practical and economic reasons, these stations would not be inclined to use Canadian music in their productions. This could hurt the promotion of Canadian artists in Canada and in the United States.

Home Copying

The Subcommittee Report proposes a levy on blank tapes and recording machinery to compensate copyright owners for home copying of their works. Home taping is increasing in Canada and copyright owners claim they are suffering a decrease in sales of original works as a result. Under existing law, home copying is clearly an infringement of copyright. However the copyright owner is faced with a tremendous problem of enforcement of this right as against millions of infringers. The Subcommittee's proposal has been adopted in a number of countries and for these reasons is arguably the best solution.

The Subcommittee has proposed that access to the fund developed from these royalties should only be by nationals of countries who protect works in this manner on a reciprocal basis. At this time, the United States, as with performers' performances and the performing right in sound recordings, does not have a copyright royalties system for home copying. In fact the Supreme Court of the United States recently held that home copying was not an infringement of copyright in programme material because it was a "fair use".[6]

If the United States creates a similar system we again face the balance of payments problem. As with other areas of copyright, the use of American materials by home copyists would result in most royalties leaving Canada. This would be true both in the video and music industries notwithstanding that some Canadian musical performers have

enjoyed increased success in the American marketplace. As a matter of "tonnage", the Americans would dominate.

Ephemeral Recording

The making of a copy of a copyright work such as a television programme without the consent of the copyright owner is an infringement of copyright. Broadcasters and especially affiliates of networks have difficulty with a strict application of the law in the context of modern programme distribution practices. Networks "feed" programmes by satellite or microwave to affiliates who tape these productions for broadcast at a later date. This practice is also used to provide stations with a "back-up" tape for network programming should transmission difficulties occur between the network and the affiliate at the time of actual broadcast. In essence, the old practice of shipping a physical tape has been replaced to a large extent by electronic means.

Broadcasters sometimes pre-tape local programmes that were once broadcast "live". This is often known as producing "live to tape" and is done for scheduling purposes. The term ephemeral recording is also applied to this practice because the tapes are erased after broadcast. This practice was recently held to be an infringement of copyright by the Federal Court of Canada.[7]

Broadcasters have the contractual authorization of the programme owner when they actually broadcast these tapes. However, because these tapes are copies of copyright works, the broadcaster could be liable for infringement if all "mechanical" rights are not cleared with every rights holder. Difficulties have arisen with music rights holders who have not granted mechanical or copying rights to the producers of programmes.

A so-called ephemeral recording right grants the broadcaster the flexibility to make these recordings for time delay or network distribution purposes without liability for infringement.

The White Paper recommended the establishment of such a right and called for comments concerning the time period that ephemeral copies could be retained by a broadcaster.

The Subcommittee Report also recommends that an exception to liability be provided with the conditions that it be done pursuant to CRTC regulations, or in order to permit the broadcast of the programme in different time zones and provided that the recording is erased after eight days.

The reference to CRTC regulations concerns the duty of broadcasters to maintain tape "air checks" or logs of their broadcast days. The stipulation that ephemeral recording only be permissible where time zones are involved and only for a period of eight days is not helpful to the CBC or CTV networks who both have affiliates within the same time zone as the central transmission point. For example, CTV transmits programming from Toronto to affiliates in Ottawa, Montreal and Sault Ste. Marie. Under the proposed scheme, because they are all within the same time zone, the ephemeral recording right would not apply. In addition, the eight day restriction flies in the face of normal programme acquisition practice. Programmes are most often purchased on a one repeat basis. This repeat takes place within six months. Seldom, if ever, does a repeat occur within an eight day period. In the United States ephemeral recordings may be held for six months.

If this proposal makes its way into the new Act, networks in Canada would essentially be precluded from electronic distribution of programming to their largest affiliates without the threat of liability for infringement of the copyright in those programmes. In this sense the Subcommittee proposal would appear to be of no benefit to most of Canada's broadcasters and may be very expensive.

Retransmission

In Canada television signals are distributed utilizing a variety of technologies. Originally over-the-air transmitters were the only method used until small cable systems sprang up to enhance reception in urban and suburban areas of Canadian local signals and to import U.S. signals which were received off air by master antennas. Today, signals are received by cable systems off air, by microwave, and via satellite. Local, regional, distant, and international signals are distributed. The cable systems also originate some programming.

The simultaneous retransmission or rediffusion of broadcast signals by cable systems is presently carried on in Canada without compensation to the owners of the copyright in the works contained in these signals. This is the result of a decision of the Exchequer Court of Canada which in 1954 held that simultaneous rediffusion to private homes of a broadcast signal did not constitute an infringing act because it was not a "performance in public" or "radio communication" of the work. Therefore, the cable system in question was not doing any of the acts which section 3 of the Copyright Act provided exclusively to the owner of the copyright[8]. In addition under the current law it is arguable as to whether satellite or low power UHF distribution systems would be infringing copyright in works broadcast.[9]

None of these activities attract copyright liability although in practice cable systems pay fees to pay television services and other non-broadcast services for the right to offer them to subscribers. Most of the controversy exists in the area of simultaneous retransmission.

In the United States, the courts have taken a similar view of retransmission although based on slightly different legal principles. However, the U.S. Copyright Act of 1976[10] provides for liability for the retransmission of over-the-air broadcast signals that a cable system is authorized to carry.

For the owners of copyright material, the cable retransmission of works constitutes a "use". They view such use without compensation as a case of manifest unfairness. Copyright owners argue that it is primarily they who suffer from cable rediffusion as it is their works which are being used. They argue that they lose their ability to control the territories in which their works are exhibited and when. They point out that a broadcaster pays a licence fee based on a calculation which takes into account various factors including a description of its intended market. When a broadcast signal containing the program is taken beyond this market, owners contend that;

(a) it is done without the consent of the owner;

(b) there is no fee paid for this extended territory;

(c) there is a loss of exclusivity within this new territory if the program has been licenced to another party; or

(d) the owner loses an opportunity to licence that territory.

The owners of television programmes and films also have a particular difficulty resulting from their contracts with the various performers, writers, and director's guilds which require "step up" fees if additional "plays" of a program take place. This additional compensation applies to satellite or cable retransmission. As a result the owner is forced to compensate the guilds for uses that are beyond his control and for which he receives no compensation.

Broadcasters have similar arguments. They strongly desire and will pay for territorial and temporal exclusivity. They complain that distant imported signals constitute unfair competition because these signals do not pay copyright royalties for the territory they invade and because they have no responsibility to serve the local audience. Broadcasters also face a danger of breach of contract with program owners if they allow the owner's works to be retransmitted. The agreements between the guilds and the production companies described above have forced these studios to expressly preclude any form of retransmission in

their licence agreements with broadcasters.[11] Under the terms of these licence agreements the broadcaster may be liable to the production company for failing to take steps to prevent retransmission without compensation.

U.S. network broadcasters are particularly concerned about Canadian rediffusion because they are also under contract with film distributors; because they receive no compensation for this retransmission; and as a result of a recent decision of the Supreme Court of Ontario[12], they can now be exposed to suits in Canada for defamation under Canada's relatively plaintiff-oriented libel and slander laws.

In response, cable operators argue that copyright liability should not be imposed because:

(a) it will aggravate the balance of payments problem;

(b) the broadcasters benefit from the increased exposure of their signals by way of increased advertising revenues and pay higher license fees; and hence there is no harm to copyright owners;

(c) there is no duty under the Conventions to do so;

(d) cable does nothing more than merely improve reception;

(e) cable (or more precisely, its subscribers) presently pay for programming through the 7% tax used to sustain the Telefilm fund to aid Canadian production;

(f) through policy mechanisms such as Bill C-58, simultaneous substitution and the priority carriage rules in the CRTC Cable Television Regulations, the broadcaster is not hurt by the cable retransmission; and

(g) cable systems pay for non-broadcast programming services which they originate (for example pay television and specialty services).

CANCOM, the Canadian satellite delivery service, echoes some of these points and states further that it is an instrument of government policy designed to serve remote areas that do not have access to broadcast signals. CANCOM suggests that the continued provision of its

service would be endangered in the event of higher costs produced by copyright liability.

A Retransmission Right

The White Paper and the Sub-committee Report both propose the creation of a transmission or origination right for the owners of copyright in broadcasts and the underlying works. Most origination activity in Canada is now subject to compensation by broadcasters and cable operators and therefore this recommendation will probably not be controversial.

The White Paper did not propose the establishment of a retransmission right but asked for comments. The Sub-committee recommended the establishment of a retransmission right which would be provided to foreigners on a reciprocal basis. However, the Report identifies a number of difficulties associated with retransmission rights. These include the balance of payments problem; the impact of retransmission payments, especially upon small cable systems; the implementation of the right and the associated administration costs; and the question of equalization of service to remote, isolated communities.

The Sub-committee suggests that the royalty payments will "in all probability" not be prohibitively high. It further suggests that the impact of this liability could be softened with a reduction of the 7% tax payable to the Broadcast Program Development Fund and that royalties should reflect the economic realities of retransmission services. To this end, it recommends that where signal enhancement is merely taking place the royalty should be low especially where local signals are freely available off-air and where simultaneous substitution in favour of these signals takes place.

The Sub-committee expects that the new retransmission right would be collectively exercised with supervision by an expanded Copyright Appeal Board. To this end it recommends a compulsory licencing system to

enhance the ability of cable systems to carry a variety of signals. This is also important in the context of the CRTC Cable Television Regulations priority carriage rules.[13]

A difficulty which relates to the balance of payments issue is the question of the value of retransmission activities. The Sub-committee Report proposes that the total economic value of Canadian retransmission should be determined and individual systems would pay royalties based on this value. The Report suggests that the royalties would not and should not be related to the number or composition of signals on a system. The Sub-committee further proposes that small cable systems servicing small and isolated communities be shielded from any "material impact" arising from the introduction of this right.

If we are to accept that the generally applied retransmission royalty would initially be small, then certainly it will become relatively smaller if local signal carriage and small cable systems are used to discount the total value of retransmission.

The Report also proposes that the definition of local signal be determined as a question of fact related to the "target audience" of a broadcaster. Additional economic value would be recognized wherever a protected work is retransmitted to any audience other than the one originally intended. However, 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 licence 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 licence fee which was based on the local audience and the so-called target audience which was found by the Copyright Appeal Board? In order to avoid this dilemma perhaps a system should be based on a technologically defined broadcasting "contour" basis. This method would

be predictable and would aid broadcasters and copyright owners in their negotiations for the original license rights to broadcast.

Two areas of intersection of broadcasting and copyright policy are simultaneous substitution rules and the priority of carriage regulations found in the Cable Television Regulations. Cable operators argue that priority of carriage rules necessitate a compulsory license system and a low royalty because these operators have no choice as to which signals they must carry. If we are to assume that cable priority carriage regulations are a fundamental aspect of Canadian broadcasting policy then it would seem that the compulsory licensing system will prevail. However, in the context of cable TV converters and thirty plus channel systems one must question how relevant the question of priority is.

CONCLUSIONS

Many forces drive broadcasting policy development in Canada. Assuming that the support and development of Canadian production, programming, and broadcasting generally remain at the heart of government policy, then copyright law revision should be examined in this context.

However, we should not view copyright and cultural industrial concerns as antithetical simply because Canadians choose to import a relatively large volume of foreign copyright material. Canadian creators will also benefit from expanded copyright protection. As such, a revision of copyright law should be approached with a presumption that a creator's best interests should be paramount as opposed to some other interest. This does not mean that non-copyright considerations should be excluded from the discussion but, simply that the interests of the creator outweigh the interests of anyone else.

Meanwhile, the best interests of creators are not always best served by bald statements of principle which do not take into account the existing creative environment. For example, the introduction of performing rights for sound recordings and a copyright in performers'

performances might not result in any net benefit to individual Canadian creators. A sound recording performing right could result in less use of Canadian records. We must also question who would benefit - the composer or performer or the record company (many of which are foreign owned)? Similarly, a performers' performance right could lead to practical and substantive difficulties resulting in discrimination against Canadian performers.

Similarly, the proposals for the introduction of a home taping levy and retransmission rights might not benefit the system as a whole in the short term but the individual creator could most certainly benefit. These rights could result in a negative balance of payments. But the individual creator would benefit without the risks associated with the proposals for sound recordings and performers' performances.

We recognize that the creation of these new rights could result in a smaller share of cultural expenditures remaining in Canada which in the long run could have a negative impact on individual creators. However, this possibility would seem to fly in the face of existing trends whereby Canadians have shown a propensity for increasing expenditures on copyright works. Even the most dramatic predictions as to the potential effects if these new rights might not have a significant impact on total cultural expenditures.

We are concerned about the Sub-committee proposal that the 7% Telefilm tax could be used to ease the burden on cable systems created by a new retransmission right. This recommendation could have a negative effect on the production industry and could also exacerbate the balance of payments problem by decreasing the amount of Canadian television programming available for broadcast in Canada and hence the volume of Canadian copyright materials eligible for compensation from the retransmission fund. It would also decrease the potential for international sales of Canadian materials. As a result, we would be shrinking the Canadian share of the retransmission fund while dismantling an excellent tool for expanding it.

The creation of new subject matter and new rights will certainly lead to an outflow of funds from Canada. It will also help ease some of the negative American reaction to Canadian policies such as Bill C.58. With proper government incentives for development of the cultural sector, and proper compensation for Canadian creators, Canadians may cease to be such massive importers of copyright materials and begin to look to their own industry for supply of copyright materials. Copyright, in conjunction with policies that ensure fair distribution and exhibition coupled with significant research and development, could result in a flourishing indigenous market. If this were the case, compensation of creators for their copyright works would take its proper place as a fundamental aspect of Canadian cultural policy.

By now the Task Force is no doubt aware of the complexities related to copyright law and broadcasting policy. Unfortunately, most of the debate has been made in the context of proposals for substantive reforms. Perhaps it would be beneficial for the Task Force to meet informally with representatives of the various copyright industries, experts in the field, and government officials to discuss the administration of and impact of these substantive proposals. We suggest this would be most helpful to all concerned.

There are many other issues which touch on broadcasting indirectly or tangentially but these go to the heart of copyright and are incidental to the major policy concerns that we consider of importance to the Task Force. A short list would include moral rights, Crown copyright, works by employees, audio visual works, computers, fair dealing and fair use, and the procedural aspects relating to remedies for infringement and the role of the Copyright Appeal Board.

We would be happy to review these if the Task Force so wishes. Meanwhile, the other issues we have discussed are of much greater importance to broadcasting.

FOOTNOTES

1. R.S., c.55, s.1.

2. The simultaneous distribution of Canadian and American signals via satellite by Canadian Satellite Communications Inc. (CANCOM) to cable and to low power UHF television transmitters throughout Canada.

3. Compco Co. Ltd. v. Blue Crest Music Ltd. (1980), 45 C.P.R. (2d) 1 at 13

4. Canadian Admiral Corporation Ltd. v. Rediffusion Inc., [1954] Ex. C.R. 382 at 390.

5. We recognize that any use in a news context could be construed as fair dealing. However, we note that the decision Zamacois v. Douville and Marchand, [1943] 2 D.L.R. 257 where the Exchequer Court held that the reproduction for news purposes of all of a copyright work could not be characterized as "fair dealing" in that work.

6. Sony Corporation of America et al v. Universal City Studios, Inc. et al January 17, 1984. Note that the American concept of fair use is broader than our concept of fair dealing.

7. Michael Bishop et al v. Martin Stevens et al unreported decision, Federal Court-Trial Division, April 15, 1985, per Strayer, J.

8. Canadian Admiral Corporation Ltd. v. Rediffusion Inc., Supra at note 4.

9. For a more detailed discussion, please refer to "Satellite Communication and Copyright Law" by J. Fraser Mann and Gary A. Maavara attached hereto.

10. 17 U.S.C.

11. A standard Canadian television licence agreement granted by a major Hollywood studio provides that:

> "None of the Pictures shall be broadcast, telecast, cable casted, exhibited or transmitted by Licencee or under authority of Licencee over facilities using increased radiated power, . . . or over the facilities of any additional stations, booster stations, translators, satellites, cable television systems, earth transmission and receiver stations, networks, microwave or close circuit systems of any kind, relay broadcast or otherwise, except to the extent that such facilities are in use by Licencee on the date of this Agreement. Licencees shall refuse its consent to parties who seek to or who broadcast, telecast, cable cast, exhibit or transmit the Pictures outside of the area described in Schedule "A" hereof. Licencee further covenants to advise such party, and all other parties with an interest (including government agencies and tribunals) of its objection to this carriage of the Pictures and to advise the Licensor of any such objection made."

A further problem arises for the so called "superstations" carried on satellite who do not wish to pay for rights to the actual territories they cover. These territories often approach regional or network proportions. Costs of programming considerations force these stations to deny that they are superstations and to this end they charge advertising rates based simply upon their own market. In turn they expect to pay a licence fee which reflects only the home market. Program owners argue that these stations should pay fees based upon actual audience because they consent or tacitly consent to distant carriage from which they derive benefits. For example, although their rate card may be based on the home audience, advertisers recognize the increased efficiencies derived from the existence of the distant signal market. In effect, the advertiser gets a bonus for purchasing advertising spots on a local market basis. Although this is purely a contractual issue, the absence of a retransmission right puts the rights owner at a disadvantage at the bargaining table.

12. Lynden O. Pindling v. National Broadcasting Corporation et al, unreported, November 28, 1984, per Montgomery, J.

13. The Cable Television Regulations set out a priority scheme which favours local signals over regional or distant signals and Canadian signals over foreign. Cable operators have argued that they would lose bargaining leverage in the face of these priority regulations. Therefore a compulsory license system would be the fairest method to implement this right. In the United States the mandatory carriage regulations, the so called "must-carry" rules, of the Federal Communications Commission ("FCC") require cable operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast signal that is significantly viewed in the community or otherwise considered local under the FCC rules. These regulations were recently struck down by the United States Court of Appeal in Quincy Cable TV, Inc., et al v. FCC, et al July 19, 1985. In response, the U.S. broadcasting community has advocated abolition of the compulsory licencing system on grounds that full copyright liability should be established where cable systems are no longer required to carry particular signals. Cable operators had originally argued for the compulsory licencing system because they did not have flexibility as to which signals they could carry in certain circumstances. In the Canadian context the cable operator faces the same difficulty in that it must carry certain signals to continue operations. Therefore full copyright liability, which could lead to some copyright owners denying carriage of their signals, and result in an unfair bargaining position for the cable operators, would not seem the best recommendation in this context. The Subcommittee seems to have accepted this view.

SATELLITE COMMUNICATION AND COPYRIGHT LAW

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ABSTRACT

This paper considers the implications of copyright legislation for the satellite communication of television programming. A review of the provisions of two international copyright conventions and of the so-called Satellite Convention indicates that international law has not kept pace with new satellite technology. A comparative review of the copyright laws of Canada and the United States indicates the inadequacy of the definitions and terminology of Canadian legislation which has not substantially changed for more than a half century. It is noted, however, that notwithstanding the deficiencies of existing legislation, satellite users may take various steps to prevent the unauthorized interception of satellite-transmitted signals and to facilitate the continued expansion of satellite services.

INTRODUCTION

The scope of the use of satellites as a communications tool is expanding day by day. Coupled with this growth are new imaginative forms of unauthorized use of satellite signals. These acts range from outright piracy of signals to bona fide disputes over what property rights attach to satellite transmissions.

National copyright laws provide creators of original intellectual works with the exclusive right to control the reproduction, public performance, broadcasting and similar uses of their works. Most such laws as well as international copyright conventions were adopted prior to the widespread use of satellites as a communication device. The failure of legislators to keep pace with new technology has made it necessary for the courts to apply outdated legal principles and terminology to situations not envisaged at the time the relevant laws were enacted.

There are three ways in which a satellite may be used for the delivery of television programming to the viewing public. First, a satellite may be used for point-to-point program distribution, to enable a television network or pay-television operator to distribute programming to affiliated stations or cable companies for transmission to the public. Second, a satellite may be used to retransmit programming broadcast in a local area to distant broadcast stations or cable systems for further distribution to the public. Finally, direct broadcast satellites (D.B.S.) are used to transmit television signals for direct reception by the viewing public through the use of home receiving dishes.

In considering how the principles of copyright law apply to each of these activities, it should be recognized that in many jurisdictions, television signals themselves are not entitled to copyright protection. Instead, copyright attaches only to the programming contained in the signal, which is protected as cinematographic productions or audiovisual works. Copyright protection also extends to the material used in television programming such as a film script or music.

The following sections of this paper review some of the provisions of two international copyright conventions as they relate to satellite communication, as well as the provisions of the so-called Satellite Convention. The relevant principles of national copyright laws in Canada and the United States are also considered. Finally, some practical suggestions are made to enable network operators and other users of satellite services to comply with copyright legislation and to prevent the unauthorized interception of satellite-transmitted signals.

INTERNATIONAL COPYRIGHT CONVENTIONS AND THE SATELLITE CONVENTION

Canada and many other countries are

parties to two international copyright conventions, namely, the Berne Convention and the Universal Copyright Convention.

Article 11 (bis) of the 1971 text of the Berne Convention states that authors of literary and artistic works shall enjoy the exclusive right to authorize (i) the broadcasting of their works or their communication to the public by any other means of wireless diffusion, and (ii) any communication to the public by wire or by rebroadcasting of the broadcast of a work, when made by an organization other than the original broadcaster. The Convention provides that it is for member states to determine by legislation the conditions under which these rights are to be exercised.

It is not clear to what extent these provisions apply to satellite communication. In view of the references to the broadcasting of works or their communication "to the public", such provisions may apply only to satellitte transmissions intended to be received directly by the public, without the use of any further delivery system.

Neither Canada nor the United States has acceded to the 1971 text of the Berne Convention. However, Canada is a party to the 1928 text, which gives creators the right to authorize the communication of their works to the public by radiocommunication (or in the case of the French version, "par radiodiffusion").

The other copyright convention, to which both Canada and the United States are parties, is the Universal Copyright Convention (the "UCC"). Article IV (bis) of the Paris text of the UCC, which was adopted in 1971, states that authors shall enjoy the exclusive right to authorize any public performance or broadcasting of their works. Any contracting state may make exceptions to any such right if they do not conflict with the spirit and provisions of the Convention, provided that the state accords a reasonable degree of effective protection to each right.

The right of broadcasting is not provided for in the 1952 text of the UCC, which is the only text to which Canada has acceded.

In addition to the copyright conventions, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (the "Satellite Convention") was signed in Brussels on May 21, 1974. Article 2 of this Convention requires each Contracting State to take "adequate measures to prevent the distribution on or from its territory of any programming-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended". The Convention does not apply where the signals of the originating organization are intended for direct reception from the satellite by the general public.

Neither Canada nor the United States has acceded to the Satellite Convention, and it has been ratified by only seven states.

In summary, it is clear that international agreements dealing with the protection of copyright material or program-carrying signals are inadequate to deal with the full range of satellite technology. These agreements also do not provide the nationals of a member country with any recourse directly against the nationals of other member countries who may infringe their rights. Instead, such agreements look to the domestic laws of each nation for specific relief. The following sections examine the domestic copyright laws of Canada and the United States as they relate to satellite communication.

CANADIAN COPYRIGHT LAW AND SATELLITE COMMUNICATION

Canada's Copyright Act provides protection for original literary, artistic, dramatic and musical works, as well as cinematographic productions and sound recordings. Among the exclusive rights given to copyright owners are the rights to perform their works in public and to communicate such works by radiocommunication.

The right of performance in public, as set forth in Canada's Copyright Act, has been given a restrictive interpretation by Canadian case law. In Canadian Admiral Corporation Ltd. v. Rediffusion, Inc.,[1] it was held that a cable company that retransmitted a television signal off-air was not publicly performing the programming embodied in such signal. Cameron J. held that a large number of performances in the private homes of cable subscribers did not constitute a

public performance solely because of their numbers.

The Canadian Copyright Act does not define the term "radiocommunication". However, the term is defined in both the Radio Act[2] and the Interpretation Act[3] to mean "any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electro-magnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artifical guide."

Satellite transmissions would appear to come within this definition, in that satellites operate at substantially less than 3,000 Gigacycles per second. The directional focus provided by a satellite would also not appear to constitute an artificial guide in the same way as a wire, cable or fibre, although contrary views have been expressed in some lower court decisions.[4]

Notwithstanding that satellite transmission may meet the technical requirements of "radiocommunication", the term as used in the Copyright Act has been interpreted more restrictively. In the case of CAPAC v. C.T.V. Television Network Ltd.,[5] the Supreme Court of Canada held that the right of radiocommunication should be interpreted in light of the French version of the 1928 text of the Berne Convention which granted authors the right to authorize "la communication de leurs oeuvres au public par la radiodiffusion". Accordingly, Pigeon J. of the Court concluded that the right of radiocommunication in the Copyright Act means "the exclusive right of public performance or representation by radio broadcasting (communication au public par la radiodiffusion)".[6]

The term "broadcasting" is defined in the Broadcasting Act to mean "any radio communication in which the transmissions are intended for direct reception by the general public."[7]

Based on the principles set out in the foregoing cases, it is arguable that copyright liability would attach to the satellite transmission of television programming only where the programming is intended to be received directly by the viewing public by the use of home receiving dishes. The use of a satellite for point-to-point program distribution would not constitute the public performance of such programming by broadcasting. Similarly, if a satellite is used to retransmit signals broadcast in a local area to other broadcast stations or cable companies, the programming contained in such signals should not be deemed either to be performed in public or to be broadcast directly to the public by the satellite carrier.

In considering how the Copyright Act applies to satellite communication, it should be emphasized that most cases dealing with the Act were decided long before satellites became the important communication tool that they are at present. The widespread use of satellites may require the courts to re-examine such concepts as public performance, radiocommunication and broadcasting. In particular, the courts may have to consider whether the unauthorized interception of satellite-transmitted programming would result in such transmissions coming within the scope of the Copyright Act even if they are primarily intended only for authorized broadcasters or cable systems.

The manner in which the Copyright Act applies to satellite communication will be clarified if Parliament enacts proposed amendments to the Copyright Act set forth in a White Paper released in May, 1984. The White Paper proposes that copyright owners have the exclusive right to control all forms of "originating activities", including primary transmissions from satellites, which involve the communication of a work from one place to a number of persons.

The White Paper also considers whether copyright liability should attach to retransmission of television programming, whether by satellite, cable or other means. In this context, the term "retransmission" means the delivery of an off-air signal to viewers by an organization other than the original broadcaster.

The White Paper notes various public policy considerations as to whether copyright liability should attach to retransmission activities. These include the need for the expansion of program choice available to Canadians by broadcast, cable and satellite means, the integration of retransmission activities into the Canadian broadcasting system, the development of local broadcast service and the encouragement of both quality

and quantity in Canadian program production. The White Paper also notes the relationship between copyright law and regulatory rules established by the C.R.T.C. and indicates that copyright owners should not be entitled to prevent the carrying of signals which cable systems or satellite operators are required to distribute. However, this will not necessarily imply that the activity be free of copyright compensation.

The Government of Canada has invited further submissions on how the Copyright Act should deal with retransmission activities. Insofar as satellites are becoming an increasingly important tool for the retransmission of television programming, it will be important for users of satellite services to make their views on this issue known to the Government.

SATELLITE COMMUNICATION AND THE UNITED STATES COPYRIGHT LAW

The United States revised its Copyright Law in 1976 to take into account new technology. Among the exclusive rights given to copyright owners under the United States Law is the right to perform or display their works publicly.

The concept of public performance in the U.S. Copyright Law is not limited by reference to particular technology, and would appear to include the transmission of works to the public either directly or indirectly by means of satellite. In the case of WGN Continental Broadcasting Company et al. v. United Video Inc.[8] the Court of Appeals for the Seventh Circuit found that a satellite carrier which was retransmitting a broadcast station's signal over the air to various cable systems was "publicly performing" the programming contained in such signals by transmitting it indirectly to subscribers of the cable companies.

The U.S. Copyright Law contains a limitation on the rights of copyright owners known as the "passive carrier" exemption. Under this exemption, a carrier may retransmit a performance embodied in a primary transmission if the carrier has no control over the content or selection of the primary transmission or over the recipients of the secondary transmission, and if its activities are limited to providing communication channels for the use of others.

In the WGN case[9] the Court held that United Video was not entitled to rely on the passive carrier exemption since it altered WGN's off-air signal by replacing teletext material contained in the vertical blanking interval before retransmitting the signal to various cable systems. The Court noted that WGN's teletext messages were intended to be viewed in conjunction with the news programs and were entitled to the same copyright protection.

In the case of Eastern Microwave, Inc. v. Doubleday Sports, Inc.[10] the Court of Appeals for the Second Circuit considered the liability of a satellite carrier for retransmitting a broadcast station's signal to various cable systems. In this case, the broadcast signal was distributed unaltered to the cable systems' subscribers. Although the satellite carrier itself did not obtain the authorization of copyright owners for such retransmission, the cable companies were entitled to deliver the programming to their subscribers pursuant to the compulsory licence provisions of the U.S. Copyright Law.

The Court found that the satellite carrier was entitled to rely on the passive carrier exemption since it did not alter the television station's signal and its activities were limited to being an intermediate carrier. The Court noted that if satellite carriers were required to negotiate with individual copyright owners, cable systems would be denied access to programming and the compulsory licence scheme of the Copyright Law would be frustrated.

In summary, it appears that under the United States Copyright Law, satellite carriers which transmit programming directly to the public must obtain the consent of copyright owners. However, satellite carriers may retransmit program-carrying signals broadcast in a local area to distant cable systems without liability provided that the signal is not altered, and provided that its activities are limited to providing communication channels for the use of others.

CONCLUSIONS: SOME SUGGESTIONS TO PROTECT COPYRIGHT WORKS TRANSMITTED BY SATELLITE

The foregoing review indicates that domestic laws, particularly in Canada, as well as international conventions may be inadequate to deal with the satellite uses of copyright works. Notwithstanding such inadequacies, there are various steps that broadcasters and owners of copyright in satellite-transmitted programming may take to protect their property interests and to prevent the unauthorized interception of signals. The following is a list of some of these steps:

1. Canada does not require any formalities such as labelling to establish copyright in works. However, to ensure that works created by Canadian nationals are protected in the United States, the word "Copyright" accompanied by the name of the copyright owner and the year of publication should be prominently displayed on all works.

2. When signals are transmitted by satellite for reception by cable systems, intended recipients should be advised that both the main signal and the vertical blanking interval and all programming and other material contained therein are the property of the broadcaster or copyright owner. This may enable claimants to rely on the laws of contract and unfair competition to prevent the unauthorized interception of signals even if they are unable to rely on copyright legislation.

3. In Canada, a live sports event does not have copyright protection at its creation, but only after it is fixed. The U.S. Copyright Law, on the other hand, extends protection to live sports or other events by vesting the owners of these telecasts with the exclusive right to perform them publicly. To be eligible for this protection, the broadcasts must be "fixed" or recorded simultaneously with the transmission. This simultaneous recording grants immediate protection, while in Canada it only protects subsequent transmissions of the recordings.

4. If practicable, the transmission of a live event should be delayed in order to play the tape instead of the live performance. This will establish protection in Canada for the event itself. A delay long enough to tape and replay the work is all that is required to establish the copyright.

5. Scrambling of signals, if technically feasible, may be helpful to prevent piracy for the obvious reason of making reception more difficult. Also, by forcing the unauthorized user to descramble the work he may be in law, adapting the work for his own use. It is not clear in Canadian law whether this descrambling of a signal (or adaptation) would be considered an infringing act. The American law would seem to be somewhat clearer on this point as it grants the copyright owner the exclusive right to make derivative works based upon the copyright work (i.e. the descrambled version may be a derivative work of the scrambled copyright work). Further, scrambling prevents an unauthorized user from arguing that he was an innocent infringer.

FOOTNOTES

1. [1954] Ex. C.R. 382.
2. R.S.C. 1970, c.R.-1 s. 2(1).
3. R.S.C. 1970, c.I.-23, s. 28.
4. See CRTC v. Shellbird Cable, Nfld. Provincial Court, October 29, 1981 (appeal allowed on other grounds by Nfld. Court of Appeal, April 30, 1982), and The Queen v. Lougheed Village, County Court of Westminister, B.C., September 4, 1981.
5. [1968] S.C.R. 676.
6. Ibid, at p. 682.
7. R.S.C. 1970, c. B-11, s. 2.
8. 693 F. 2d 622, (1983).
9. Ibid.
10. 691 F. 2d 125 (1982).