OPTIONS FOR A NEW LEGAL DEFINITION OF BROADCASTING FOR CANADA

BY:

JAY A. HERRINGER

RAM S. JAKHU

CLIFF ARNOLD

SUMITTED TO:

TASK FORCE ON BROADCASTING POLICY

DEPARTMENT OF COMMUNICATIONS,
GOVERNMENT OF CANADA.

NOVEMBER, 1985.

TABLE OF CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS

1. The current legal definition of 'broadcasting' was introduced into the Broadcasting Act in 1968. The definition reads:

'Broadcasting' means any radiocommunication in which the transmissions are intended for direct reception by the general public.

2. Until the last 10 or 15 years, the definition has adequately covered the regulation of the Canadian Broadcasting System.

3. However, the development of new communications technologies which deliver program carrying signals to the public has placed strain on the statutory definition, the Broadcasting Act, and on the CRTC. The current definition is based on conventional over-the-air transmission technology. However, Canada is now in an era where signal delivery systems encorporate a mix of:
a) satellite transmissions; b) coaxal cable and fibre optics;
c) microwave facilities; d) conventional over-the-air transmissions.

4. A definition of 'broadcasting' that relies strictly on 'over-the-air' transmissions precludes effective regulation by the CRTC of the Canadian Broadcasting System.

5. Specific legal problems with the definition:

a) The definition describes broadcast services as 'intended for direct reception by the general public'. By not identifying receptions made 'indirectly', the definition has failed to encompass the fact that the majority of program signals available in Canada are delivered indirectly through a variety of facilities, including satellite and cable.

b) The definition relies on the phrase 'reception by the general public'. In an era of specialized programming services directed to a narrower portion of the public, it is not clear that these services are 'broadcasting'.

c) The definition relies on the phrase 'intended for direct reception by the general public'. The word 'intended' complicates the situation of the provision of program services for a fee, over satellite. Pay-TV is not 'intended' for direct reception by the general public, and so does not fall into the definition of 'broadcasting'. On the other hand, radiocommunications 'intended' to be received only by cable operators are considered 'broadcasting'.

d) The definition of 'radiocommunication' relies on the words 'any transmission...propagated in space without artificial guide'. Canadian courts have defined satellite transmissions of program carrying signals as being propagated in space WITH artificial guide. Thus, they do not fit into the definition of 'broadcasting' which reads 'any radiocommunication'.

e) Nowhere in the definition of 'broadcasting' does it mention cable. Cable is one of the major component in the technological mix that makes up the Canadian Broadcasting System, and yet there is no mention of it in the Broadcasting Act or its definitions.

6. It is important to clearly identify what is considered to be part of the Canadian Broadcasting System (including cable and satellite transmissions) so that the public interest considerations identified in Section 3 of the Broadcasting Act, the Canadian Content criteria in the Television Regulations, and the criteria on foreign ownership will attach to the appropriate services and technologies. If a clear delineation of these components is not made, then it is possible that the intentions of Parliament to protect and enhance the Canadian cultural fabric and national unity will be frustrated.

7. It is important to know what is considered to be part of the Canadian Broadcasting System so as to distinguish it from the private 'point-to-point' telecommunications system. 'Broadcasting' is directed to the public; the public has a 'right to receive' programming. Private point-to-point communications are not directed to the public; they are private; the public interest consideration of Section 3 of the Broadcasting Act et al do not apply to point-to-point communications. However, many of the services offered to the public now (and in the future) exhibit characteristics of both broadcasting and point-to-point communications. From the point of view of regulation by the CRTC it is important to decide which 'grey areas' will be attached by public interest considerations. From the point of view of federal/provincial jurisdiction, it is important to delineate which 'grey area' services will legitimately be controlled by the provinces.

8. 'Grey area' services include:
-Teletext (Teledon etc)
-Data transmissions utilizing over-the-air technologies;
-Low-power TV and Radio;
-Fixed Satellite Services;
-Pay-TV.

9. It is important for the Canadian Broadcasting System to remain compatable with the international regime established for the cooperative allocation of radiocommunication frequencies for the purpose of avoiding harmfull interference, administered pursuant to the ITU Convention and Radio Regulations.

10. The present Copyright Act which came into force in 1924 is outdated and does not consider the situation of rebroadcasting of live broadcasts over cable. Problems of 'reciprocity' with the U.S. over copyrighted material cause concern, as does the situation of applying copyright to data transmissions.

OPTIONS

1. Include all the communications systems that Parliament wants to be considered part of the Canadian Broadcasting System, so that public interest considerations will clearly apply:

'Broadcasting ' means the dissemination of sounds, transient visual images or both, other than telegraphic or telephonic messages, intended to be received by all or part of the public, either directly or through the medium of relay stations or satellites, by means of:
a) any form of radiocommunication utilizing Hertzian waves, or
b) cables, wires, fibre optic linkages or laser beams.

2. Depart from the technical definition, and focus instead on the 'Cultural' and 'Content' components that Parliament wishes to emphasize for the protection of Canadian culture and the fostering of National Unity. This would mean following the Clyne Committee (1978) suggestions of uniting 'broadcasting' and 'point-to-point' communications under one head, and creating new subcategories for a) producers of programming; b) information providers (news); c) private service providers (data); and c) the system (all undertakings).

3. Follow the lead of the United Kingdom and the United States. This would mean retaining the technical definition of broadcasting as 'over-the-air' services, and create specific legislation dealing with cable, satellite broadcasting, and the grey areas.

4. Utilize the 'deeming' provisions introduced in Bill C-20 to fill in the regulatory gaps.

5. Drop the notion of 'intention' now currently the hallmark of the legal definition, and focus instead on the notion of 'availability' of program carrying signals to the public. Many people receive programming irrespective of whether or not it is intended for them.

6. Replace the words 'sounds, transient images or both' as found in Option 1 with the words 'program carrying signals'. 'Program' could be defined as a body of live or recorded material, consisting of images, sounds, or both, embodies in signals emitted for the purpose of ultimate distribution.'.

RECOMMENDATIONS

It is recommended that:

1. That a new definition of 'broadcasting' utilize the factors outlined in Options 1, 5 and 6, (See OPTIONS) whereby the technologies of cable and satellite transmissions would be encorporated, and the problems raised by the notion of 'intention' would be rectified.

2. That further study be commissioned to look into:

a) The impact of a definitional change on related statutes (Radio Act, Copyright Act etc.) and on related definitions ('radiocommunication' 'network' 'broadcasting receiving undertaking' etc.)

b) The impact of a definitional change on the constitutional issues of telecommunication. Any change to the definition of 'broadcasting' will likely be the basis for questioning by the provinces.

c) The impact of a definitional change on the international regulatory regime of ITU and the Radio Regulations.

3. That the Parliament of Canada initiate a revision of the Broadcasting Act every 10 years, so as to update the legislation, including definitions, in light of new technical and social considerations. This would follow the lead taken in the federal regulation of banking, whereby Parliament must re-consider the conditions for the effective regualtion of banking every 10 years. (Banks and Banking Law Revision Act, 1980, S.C. 1980-81, C. 40, s. 6)

4. That Canada explore the introduction of changes to the international legal definitions involving 'broadcasting' at the upcomming ITU Plenipotentiary Conference to be held in 1988. Many states are now grappling with the same set of problems as Canada regarding the inadequacy of current definitions. If Canada does develop a new definition which is compatable with the ITU regulatory regime, while being flexible in its encorporation of new technologies and services, this example could assist the international community in the development of future definitional options.

5. That Canada closely monitor developments regarding new legal definitions that originate in the United Kingdom, the United States, and the European Economic Community.

END EXECUTIVE SUMMARY AND RECOMMENDATIONS

INTRODUCTION

This paper outlines the legal problems with the current definition of 'broadcasting' found in the Broadcasting Act. It addresses the question within the context of technological change and public interest considerations. A variety of options are suggested. An Appendix is included which deals specifically with Copyright issues related to a new definition of broadcasting.

The options presented must be explored in light of the recommendations made, especially regarding: a) the jurisdictional impact that any change to the definition might have; b) the compatability of a new Canadian definition with international obligations (ITU Convention and Radio Regulations); and c) the impact any new definition would have on other statutes and related definitiions.

It is important to understand that a good definition interprets a given subject in light of clearly defined policies. If the policies are ill-defined and hazy, a definition will not be of much assistance. A good definition cannot be piece-meal, or be merely a stop-gap measure. The cardinal rule of legislative drafting and interpretation is that statutory language must be clear and concise. Interpretation will be based on the plain meaning of the words. Thus, it is important to be clear as to: a) the policies on which a definition is based; and b) the definition itself.

III. STATEMENT OF THE PROBLEM

The current legal definition of broadcasting was introduced into the Broadcasting Act in 1968. Since that time there has not been a re-examination by policy makers of the scope of the Broadcast Act (and related acts), and its definitions.

The definition in the current Broadcast Act (RSC 1970, c. B-11) reads:

'Broadcasting ' means any radiocommunication in which the transmissions are intended for direct reception by the general public.

There has been little change in this definition since the first legislation dealing with 'broadcasting' as a service to the public. The Radio Act of 1938 defined 'broadcasting' as:

The dessemination of any form of radiocommunication, including radiotelegraph, radiotelephone and the wireless transmission of writing, signs, signals, pictures, and sonds of all kinds by means of Hertzian waves, intended to be received by the public either directly or through the medium of relay stations.'

Thus, it can be seen that the general format of a statutory definition of 'broadcasting', since 1938, has been programming provided for the general public from over the air services.

Untill the last 10-15 years, the Canadian definition has adequately covered the regulation of the Canadian broadcast system. This system has been largely composed of undertakings disemminating over the air programs to the public without charge. This was certainly the broadcast environment in 1968.

However, the development of new communications technologies which deliver program carrying signals have placed strain on the statutory definition, the Acts to which they relate, the CRTC (Canadain Radio-Television and Telecommunications Commission) as regulator, and the Canadian Courts. The once functional definition has become obsolete, and is now causing problems from the point of view of effective legal and administrative regulation.

The current statutory definition is based on conventional over the air transmission technology. However, we are now in an era where signal delivery systems encorporate a mix of a) satellite; b)coaxal cable and /or fibre optical cable; c) microwave signals; and d) conventional over-the-air transmissions.

A variety of telecommunication facilities are used to provide programming to the ultimate viewer. Many of these methods encorporate the above mix of technologies which make an 'over-the-air' definition of broadcasting a hinderance to effective regulation by the federal government.

IV.ANALYSIS OF THE CURRENT DEFINITON OF BROADCASTING

The present definiton is found in section 2 of the Broadcasting Act and in subsection 2(1) of the Radio Act:

Broadcasting means any radio communication in which the transmissions are intended for direct reception by the general public.

'Radiocommunication' is defined in the Radio Act as:

Any transmission , emmission or reception of signs, signals, writing or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3000 Gigacycles per second (i.e. Hertzian waves') propagated in space without artificial guide.

What are the problems with this set of definitions?

1. The Broadcasting Act describes broadcast services as 'intended for direct reception by the general public'. By failing to identify receptions made 'indirectly', the definition has failed to encompass the fact that the majority of programming signals available in Canada are delivered indirectly to the public through a variety of facilities. For example, television transmissions are beamed to either microwave facilities, or satellite, which then delivers the signal to cable heads of community based cable TV distribution systems, which then distribute the signal to the public. This is hardly 'direct transmissions', as indicatd in the definition.

2. The definition relies on the phrase 'reception by the general public' In an era of specialized programming services directed to narrower portions of the public, it is not clear that these services are 'broadcasting'. It is unclear whether or not the term 'general public' encorporates these narrower programming audiences.

3. The defintion states that broadcasting is radiocommunications INTENDED for direct reception by the general public. The impact of the word 'intended' complicates the situation in which programming

services are available via satellite. In Canada, programming services via satellite are provided as 'fixed satellite services', which are private, point to point services. Reference to the Shellbird case from the Newfoundland Court of Appeal will show that indeed, the transmissions of program services via satellite are NOT intended to be received by the general public. (R. v Shellbird Cable Limited (1982) 38 Nfld. & P.E.I. R. 224; 108 A.P.R. 224 (Nfld C.A.))
Pay-television and other satellite delivered subscription services are intended for subscription paying member of the public. This places these types of services in a category not specifically covered by the purposes of the Broadcast Act, as they fail to fit within the current definition. It is clear, however, that they are part of the Canadian Broadcasting System, but occupy an undefined position.

4. Regarding the definition of Radiocommunication, the words WITHOUT ARTIFICIAL GUIDE has proven to be a problem. Canadian Courts have defined satellite transmisssions of program signals as being propagated in space WITH artificial guide. (R. v Lougheed Village Holdings Ltd. (1981) 58 C.P.R.(2d) 108 (P.Ct.B.C.))
Thus, satellite transmissions are NOT considereed by the court as being 'radiocommunications'. Thus, they do not fit in the definition of broadcasting which reads 'any radiocommunication...'

Although a case which may rectify the judicial confusion in this manner is currently before the British Columbia Court of Appeal, the fact remains that Canadian jurisprudence has placed satellite transmissions outside the purview of the current legal definition of broadcasting. Until the courts, or better still, until a statutory definition does encompass satellite transmissions as 'broadcastting', the situation remains confusing.

5. Despite the fact that Canada is one of the most 'cabled' nations in the world, and that cable is one of the major parts of the technological mix that makes up the 'Canadian Broadcasting System', there is no direct mention of cable in the Broadcasting Act. The only legal administrative link between the CRTC and cable regulations is in the mention of 'Broadcasting Receiving Undertakings', and in the Cable Television Regulations.
Cable 'receives' broadcasting from either satellite, microwave or some other directional over-the- air radiocommunication, and distributes it to home TV sets. It is not broadcasting in itself. It merely distributes a broadcasting signal; thus it becomes a 'Broadcasting Receiving Undertaking'. The courts have upheld the administrative control of the CRTC over cable by viewing it as a necessary technological link which compliments and completes the mix that is the Canadian Broadcasting System. Still, however, it is only through creative legislative drafting and a court's willingness to see the 'system' as a whole, and allow federal regulation, that control over cable is maintained. It is not expressly integrated in the legislation that we rely on to regulate the broadcasting system. There is still

a major jurisdictional 'grey area' that surrounds cable. It must be set out explicitely what aspects of cable do in fact belong to a federally-regulated broadcasting system.

The current role of cable in the Canadian Broadcasting System is 'passive'. It receives and redistributes. It does not originate programming. However, cable enterprises can and do originate programming; community programming is encorporated into the scheme, and is considered part of the broadcasting system. When cable operators originate programming, they are considered to be 'active' cable. The fact that they do not utilize any aspect of over-the-air transmissions means that it is no longer a 'Broadcasting Receiving Undertaking'. It receives no 'broadcasting'. It is not covered by the Broadcasting Act. It is not 'radiocommunication', and is thus not attached by the Radio Act. We have no 'Cable Television Act' in Canada, as exists in the U.K. and the U.S. Thus, programming directed to the public, but not utilizing any over - the-air transmissions, is not broadcasting. It remains in the limbo of inadequate statutory definition. The implications of this type of situation (active cable) raise problems from the jurisdictional point of view. If active cacle is 'wholey within the bounds of a province', has no interprovincial or international interconnections, it is possibly attached by provincial authority to regulate. It is not 'broadcasting'. It is more 'point to point' telecommunication, a field already inhabited by some provincial jurisdictions.

Once again, an important and potentially large portion of the Canadian Broadcasting System is held beyond the lawful reach of federal regulators because of the grey area which non broadcasting cable inhabits. The 'grey area' of cable cannot be properly regulated by inadequate and obtuse definitions. If some bounds of federal cable regulation are not made clear, then the Canadian courts will have to interpret the matter. Muddy definitions do not help the courts, as we have seen in the matter of the issue of 'articifical guide'.

V. WHAT IS A BROADCAST 'SYSTEM'?

The Broadcasting Act speaks of a 'single system' of broadcasting (section 3(1)): "broadcasting undertakings in Canada constitute a single system comprising public and private elements."

The Federal Minister of Communications has stated in his announcement of a fundamental review of the Canadian Broadcasting System that:

> The activities (and) programmes of cable operators and conventional broadcasters and pay operators and Educational Broadcasters and Specialty Services...taken together,

are a single broadcasting system, charged with acheiving certain cultural goals for the nation as a whole.

(COMBROAD, June, 1985, at p.42)

Thus, it appears from the Ministers' statement that he would see the Canadian Broadcasting System as a compilation of all program originators, together with the facilities needed to distribute them, including cable, and although not mentioned, would include satellite transmissions.

Certainly the Canadian courts have looked at the mix of technologies that compose the transmission and distribution of programming as a single system (Laskin in Capital Cities et al v. CRTC et al (1977), 18 N.R. 118). Also, the Radio Reference (1932, A.C. 304) stated that the Canadian broadcast system was a 'unitary system'. The system must be looked at as a whole.

What then are the specific parts that make up this 'single system' of broadcasting for Canada?:

- over-the-air systems, including satellite services, and microwave facilities.

- all systems that connect with this over-the-air transmission for the purpose of distirbution to the public (cable, fibre optics)

The Canadian Broadcasting System is more than just 'transmitted signals'. It is a mix of technologies and services that go beyond the statutory definitions allowed by the Broadcasting and Radio Acts. It includes cable and satellite interconnections with over-the-air systems.

However, the problem is that federal control of this 'broadcasting system' is based on Acts that do not specifically define what elements ARE included in the regulation of the system. Again, the defintion of Broadcasting speaks only of over-the-air systems

VI.CULTURAL AND ECONOMIC PROTECTIONS FOR THE CANADIAN BROADCASTING SYSTEM

Now that it has been established what is considered to be part of the Canadian Broadcasting System, what is it that places this set of activities and technologies in a special position vis-a-vis other telecommunications services? Why is it so important to be clear as to what the Canadian Broadcasting System is?

It is because all aspects of the Canadian Broadcasting System become subject to the a-priori conditions of cultural, social, economic and political considerations that are outlined

in section 3 of the Broadcasting Act. In the face of 'foreign programming' the cultural complex of Canada is seen as threatened. Program carrying services that exhibit or mirror the world are a major factor in the conception or world view that persons have. As Canadians, it is considered important to have a unique 'Canadian ' world-view. The influence of television and radio in this regard is enormous. Thus, it has been determined that it is important to encourage an electromagnetic Canadian world-view through the Canadian Broadcasting System. It is the System, with all its various components that will ensure a Canadian world-view.

Section 3 of the Broadcasting Act outlines the responsibilities and identifying factors of the Canadian Broadcasting System:

(i) broadcasting undertakings in Canada consitute a single system comprising public and private elements.

(ii) the Canadian Broadcasting System should be effectively owned and controlled by Canadians so as to safeguard , enrich and strengthen the cultural, social and economic fabric of Canada.

(iii) the rights of freedom of expression and the right of persons to recieve programs, subject only to generally applicable statutes and regulations, is unquestioned;

(iv) the programming provided by each broadcaster should be of high standard, using predominately Canadian creative and other resources.

(v) (provision for a public broadcasting body, i.e. the CBC)

(vi) (regulation of the CBS by an independent administrative body: i.e. the CRTC).

Also, as required by CRTC 'conditions of licence', there are transfer of ownership controls exercised. This is all in addition to the 'Canadian content' guidelines found in section 8 of the Television Broadcasting Regulations.

Before a discussion of these factors that attach to whatever is defined as coming within the net of the Canadian Broadcasting System, it is important to note that Canada is not the only state that utilizes a special set of conditions that apply to a national broadcasting system. Even the United States, the home of deregulated enterprises, utilizes a set of special conditions that attach to its 'broadcasting system'.

"The U.S. Communications Act requires applicants to be legally, technically and finacially qualified, and to show that their proposed operation would be in the public interest. They must be citizens of the United States. Corporations with alien officers

or directors or with more than one-fifth of the capital stock controlled by foreign interests may not be licenced... stations (must facilitate) equal employment opportunities...Licencees must ascertain and meet the needs of their communities in programming...Overcommercialization (is considered) to be contrary to the public interest...Stations must keep logs showing the programming presented and records of request for political time...Commercial stations are required to broadcast 28 hours a week, at least two hours every day." (Broadcasting Services, FCC Information Bulletin, Nov 1977).

Thus, the fact that Canada utilizes Section 3 of the Broadcasting Act to identify the conditions that Parliament considers important to the 'Canadian character ' of broadcastinging is in no way contrary to trends evident in other nation states.

The importance of knowing just what is attached by the Canadian Broadcasting System is that the Canadian public interest requirements 'kick in' at that moment. In contrast is the situation of the private point to point telecommunication services. Although the point to point services utilize many of the same technological components as the Canadian Broadcasting System, they are not attached by the same public interest requirements outlined in the Broadcasting Act. Thus, if a service that carries 'programs' is styled 'point-to-point' 'rather than broadcasting, then it is free from the variety of content and other conditions of operation that attach to the Canadian Broadcasting System.

The importance of the cultural and economic contributions of the Canadian Broadcasting System to Canada are being maintained even in the era of an 'enhanced trade' agreement with the United States. Both the Prime Minister and the Minister of Communications have said that 'Cultural industries', will not be sacrificed in negotiations. Even under the retooled 'foreign investment' legislation (An Act Respecting Investment in Canada, Bill C-15) there are special restrictions that apply to Canadian cultural sectors, especialy the broadcasting system.

It is clear to see that it is important to specifically identify what is considered to be part of the Canadian Broadcasting System so that the public interest considerations discussed above will attach to the appropriate services and technologies. If a clear delineation of these components is not made, then it is possible that the intentions of Parliament to protect and enhance the Canadian cultural fabric and national unity through special conditions may be frustrated.

VII. DISTINCTION BETWEEN BROADCASTING AND POINT-TO-POINT SERVICES

One of the major reasons that a clear identification is necessary as to what is included in the Canadian Broadcasting System is in order to distinguish the broadcasting system from the telecommunications services known as 'point-to-point' services. Point-to-point services are regulated by a different set of statutes, have a set of 'public interest' considerations different from broadcasting services, and is subject to a joint jurisdictional environment where the provinces have a clear and historic involvement in regulation.

Especially in the 'grey areas' where some telecommunication services exhibit aspects of both broadcasting and point -to-point it is important to understand what characteristics attach to each type of service.

A. Elements of a Broadcasting Service

1. A broadcasting service directs programming to the public. It is immaterial whether it is the entire public, as we have come to understand 'mass audiences', or to a portion of the public. The 'public', whether termed the 'general public' as is in the Broadcasting Act, or not, is that body of persons who represent the audience for the programming, and who have bought/rented for their own use, or otherwise have access to receiving apparatus to display the programming. (Lount Corporation et al v A.G. of Canada et al (1984) 1 F.C. 332 (F.C.T.D.) at p. 350

2. A Broadcasting Service is one that is INTENDED to be received by members of the public. The term 'intended' in the definition of broadcasting is one of the main characteristics of what distinguishes broadcasting from point-to-point systems. The intent of the originators of the content is either a) to be directed to the public (it does not have to be the entire public); or b) it is private, non-public.

'Intent', as identified in the Lount case, is found through the instrumentality of the nature, capabilities, content and operational functions of the service. This adds up to an INFERENTIAL INDICATION OF INTENT. This inference is to be drawn on the balance of probabilities, and amounts to an objective test.It is not good enough for content originators to subjectively say that the service is 'not intended' to be received by the public. The guiding principles are based on good sense. (Lount, pp 346, 347, 352.)

An example of an objective test for NOT being intended for reception by the public is whether or not signals are scrambled. Once a signal is scrambled, it is no longer 'intended' to be received by the general public. It is for a more specific public.
(However, the fact that it is narrowcasted does not necessarily mean that it is not part of the Canadian Broadcasting System.)

Clearly, a telephone conversation is not 'intended to be received by the public'. However, what of the case of hate messages being automatically dialed and directed to members of the general public? The intention appears to be to direct the signal to the public. Is this an intention of broadcasting'?

3. There is a 'right to receive ' broadcasting services. This is identified in Section 3(c) of the Broadcasting Act. If a service is being directed to member of the public, it should be open to all who have acquired the sufficient receiving apparatus, to receive the programs. The public does not have a right to receive private communications (such as telephone calls, or business data transmitted to a particular address etc). However, if a service is being made available to the public, and is intended to be received by the public, then these 'public' aspects of the programming make it a condition in a free and democratic society that the signals be govered by a 'right to receive'. (In relation to Pay TV and other programming narrowcasting, there is still a right to receive; one just has to pay a fee.)

4. A broadcasting service is one in which section 3 of the Broadcasting Act conditions apply. As well, conditions of transfer of licences, foreign investment controls etc are also applicable.

An activity attached by the the broadcasting regime is also eligable for positive oriented, funded schemes, which for purposes of inducing federal policy re. Canadian content are offered to activites that fall under the schema of broadcasting.

A set of cultural and political goals (national unity, Canadian identity) attach, and distinguish a service as a broadcasting service. There is also a system of compliance.

B. Elements of a Point-to-Point Service

1.The major distinction here is that such a service is a PRIVATE one. The telecommunications system is merely the carrier of a message. The message itself is a matter of concern only to the sender and the receiver. The 'intent' is to direct a message to a 'closed set' of predetermined receivers. The rationale for privacy in relation to telephone calls, for example, is to protect the 'reasonable expectation of

privacy' that an individual has in a free and democratic society. Only if special circumstances exist can the state intrude on this privacy (i.e. through wiretapping).

The rationale for the privacy issue for data transmissions are that there is a certain value attached to the information, which necessitates that it be directed only to specific recipients who have paids for the service. As well, there may be 'business secrets' that are at stake.

Ultimately, these point to point messages are never intended for the public. If they are inteded to be received by as many menbers of the public as a sender can possible muster, then it exhibits more of the 'public' nature that is more akin to broadcasting services, than point to point. (Again, the situation of hate messages sent over telephone to as many of the public as the messages can reach.)

The issue of privacy is of such importance that in reference to data tansmision, there is a federal 'Privacy Commisioner' charged with issues relating to privacy involved in the point to point telecommunication systems. (Canadian Law of Communications, A Report for the Max-Planck-Institute (Hamburg, West Germany), by Dr. Nicholas Mateesco Matte, and Dr. Ram S. Jakhu, (1985) at p. 63)

2. The point to point telecommunciations system is regulated through a different set of statutes: The Railway Act (permits financial control over the carrier, controls tolls charged, handles agreements re. interconnections); the CRTC Act (issues rules, orders, regulations etc on telecommunications matters); and The National Transportation Act. (Ibid., Matte and Jakhu)

3. The basic principles for regulation by CRTC is that tariffs are just and reasnable; and that the services are non-discriminatory.

4. The point-to-point telecommunication system is designed and regulated to be carriers of information only. They are not to be originators of programming. They carry broadcasting signals on behalf of programer originators, but are not broadcasters themselves. This distinction is becomming blurred, however, as 'common carriers' are now pursuing opportunities to enter the 'programming' area.

5. Point-to-point telecommuncation is generally a 'two way' communications function. Instead of a 'receive only' operation that characterizes current 'broadcasting' point to point operations utilize a send and receive oepration (ex. telephone calls are a two way operation. Both parties of the communication are sending and receiving messages.)

This distinction may become less apparant as broadcasting becomes more of a two-way operation as well.

VIII. THE GREY AREAS

There are a number of telecommunication services that do not fall into one or the other of the categories of broadcasting or point-to-point services. These grey areas exhibit characteristics of both categories. The problem with grey areas is that they create problems regarding which administrative regime applies, with what conditions, and for what reasons.

Amoung the grey areas are:

1) Teletext (Telidon etc)
The expectation of policy makers in the area of commniations is that Canadian homes will have some sort of two-way communications link with a 'public access' data bank through their television sets. For the purposes of shopping, paying bills, accessing local entertainment listings etc., the public may use a Telidon style system. Because this is not the type of 'programming' that one expects on a broadcast system, it would appear that teletext is different. However, the definition of broadcasting is silent as to the nature of the programming contained in the transmissions. Looking at the definition of programming found in the Brussels Convention of 1974, 'programming' is defined as a body of live or recorded material consisting of images or sounds or both, embodied in signals emitted for the purpose of ultimate distribution.' Surely teletext material could be considered 'programming', and is certanly 'intended' for the public. However, it also exhibits some of the characteristics of a 'private' data base, accessable only to a special set of persons who pay for the service. It will not be 'direct reception' to the home through over-the-air transmissions but may originate entirely in a closed circuit system utilizing cable.

2. Marine weather forcasts/traffic information services: The 'programming' contained in these transmissions is intended for some part of the public. Are they really private services?

3. Low-power TV and Radio: These transmissions can be of a relatively 'public' nature (example, low-power transmitters in National Parks transmitting information to persons within the Parks as to fire warnings, traffic patterns etc), or could be used for exclusively private style business data transmisions. Although a system such as this is a 'radiocommunication', it may not be a broadcast transmission. Other specialty services offered over radiocommunication facilities could include 'real estate radio' where the listings of homes etc for sale are transmitted over an AM band in a city or region . Although the service may transmit 'programming', and is an over the air service, should the section 3 conditions of the Broadcasting Act apply?

4. Non-Broadcasting Services: In the case of a cable operator who originates a 'service' (e.g. a burglar alarm system in the home) it is technically a 'closed circuit ' system. However, the CRTC maintains the position that 'permission' (not a licence) is needed by the cable operator to provide the service. Although the service is not an over-the-air transmission, it is 'intended' to be received by the public (as many of the public as the cable operator can convince to subscribe). However, is the requirement of 'permission' a form of regulation that is ultra-vires the federal government? Rationale for the 'permission' is that the CRTC wants to ensure that the 'broadcast undertaking' responsibilities are not hampered by 'non-broadcasting services' provided by the licencee.

In the case of a 'radio telephone service', the transmissions are radiocommunications, and are 'intended' for the public on a subscription basis. However, the public who wishes to receive the service must obtain a 'radio receiving licence' from DOC. Only if the transmissions fall within the definition of Broadcasting will the receiver of the service be exempted from the requirement of obtaining a receiving licence'.

5. Fixed Satellite Services (FSS): Program carrying signals emminating from Canadian satellites are from 'fixed service satellites', which were designed and are operated as a fixed point-to-point telecommunication service. As such, these satellites were not designed for 'broadcasting', although until specific 'broadcasting satellites' are put into space, the FSS will assist programmers and networks to utilize satellite to distribute their signals. Special frequency bands have been reserved, by the ITU, in the Radio Regulations for the carrying of broadcast signals by DBS (Direct Broadcast Satellites). The rationale for the designation of special frequencies for broadcasting is that it will keep the other frequencies clear for the use of private pont-to-point services, without harmful interference from broadcast signals. 'Broadcast services' utilize a greater portion of the frequency spectrum, utilizing both audio and visual purposes.
Several private point-to-point messages can be carried over the same proportion of the frequency band as that utilized by one broadcast program. The problem could arise that the frequencies allocated internationally for point-to-point services become 'colonized' by broadcasting services.

Programmers who continue to utilize the fixed band for broadcasting, and who come to rely on it in the future, cannot be guaranteed an interference free delivery of services if part of the service is to direct the signals to home satellite dishes. FSS are not designed or regulated from the point of view of 'provision of services to the public'.

This situation causes concern because it is against the letter and spirit of the ITU Convention and Radio Regulations.

6. Pay TV: Technically, Pay TV, offered over satellite, and through cable to subscribers, exhibits characteristics of a 'non-broadcasting service'. It is not intended to be received by the 'general public', but only to that fixed number of payees who also have appropriate receiving equipement. Subscription services need not go over radiocommunication systems at all. They could operate entirely over cable, or fibre optics, in a closed circuit type system. What the CRTC did regarding 'licencing' a service that was essentially non-broadcasting was a creative application of the category of licence known as 'Network Licences' (the other two classes of licences available from the CRTC are a) Broadcasting Transmission Undertakings, and b) Broadcasting Receiving Undertakings.

7. Data transmissions utilizing over-the-air technologies are not intended for reception by the public (e.g. Canadian Press or Reuters business news service).

8. Cable and Data: Increasingly, cable companies are not merely broadcasters in terms of "content." A host of new alphanumeric services are provided, including general "print out" news, weather and classified ads. Videotrons of Montreal, for example, provides 12 thematic channels, only three or four of which actually involve "programming" as we have come to define it. While such channels only capture three percent of the Quebec market on a given night, it is arguable that the market will grow in the future as programming sophistication improves. Rodgers Cable now plans 10 or 12 additional channels, many of them two-way transmitters, including banking services and fire/burglar alarm protection. Many of these services are practicable and desirable in the immediate future. With computerized billing, these channels offer a wide rande of possibilities, including selected services by customers.

A new development is the possible entrance into the broadcasting market of common carriers. Bell Canada, for example, has studied the possibility of "rent-a-video," i.e. transmission of video signals via telephone lines with television hook-up.

A futher complexity is created by the direct data and telephone call transmission of major Canadian corporations for internal use. Last year, the CRTC approved such a system for the Bank of Montreal. In the future, these companies might also consider transmission of broadcast signals for internal use. Clearly, such activities are neither those of a broadcaster or a common carrier.

As these corporations expand or change their activities, the distinction between broadcasters and "common carriers" appears increasingly difficult to maintain. Should the current regulatory market be altered? Is regulation itself even feasible? Cf. CRTC's current inquiry Hearing on Non- Programming Services and Advertising on Cable, started October 28th, 1985. These developments also have serious implications for federal/ provincial relations.

IX. Other Areas of Concern

A. Constitutional Considerations

Since its inception in Canada, broadcasting has been considered entirely within federal jurisdiction. But the rapid evolution of new distribution and non-broadcasting services suggests that a new mix of jurisdictional capacities (federal and provincial) may be both desirable and inevitable. In particular, a strong argument may be made for joint federal-provincial or even exclusive provincial regulation of the activities of cable companies carried on exclusively within one province.

Sources of Federal Powers

In the "Radio Reference," [In Regulation and Control of Radio Communications in Canada, 1932, A.C. 304], the Privy Council decided that broadcasting would remain under exclusive federal authority. The court viewed the broadcasting undertaking as one closed system, refusing to distinguish between the transmitting and receiving functions. In more recent cases, the Supreme Court has extended the federal power to all aspects of cable company operations. In Capital Cities et al vs. CRTC et al. ([1978] 2 S.C.R. 141; (1977), 18 N.R. 118.), it was held that the federal government had exclusive jurisdiction over cable television distribution systems because they are receiving signals from broadcasters. A similar decision was reached in Dionne et al v. Public Services Board (Quebec) et al, ([1978] 2 S.C.R. 191, (1977) 18 N.R. 271). The provincial government's contention that the cable system was not engaged in broadcastng per se was not accepted by the court.

Laskin, J. at page 198 says:

> "It does not advance their contentions to urge that a cable distribution system is not engaged in broadcasting. The system depends upon a telecast for its operations, and is no more than a conduit for signals from the telecast, interposing itself through a different technology to bring the telecast to paying subscribers."

Interesting enough, neither Dionne nor Capital Cities considered what constituted a broadcasting operation. Nor did the court address the issue of the status of a cable company in the situation where the signal received was not a broadcast signal.

Cable Companies: Reasons for Change

As the cable companies today increasingly become transmitters of data instead of retransmitters of broadcasts (radio and television), it is questionable whether such they can be considered broadcasting undertakings within the federal power. Cable companies increasingly look like the telecommunications common carriers. As telephone companies based in most provinces are provincially-grounded, so might be the cable companies. [The source of the province's power over the cable companies in 92(10) of the Constitution Act. However, where the company is an interprovincial undertaking, like Bell Canada, it is subject to federal legislative authority. Toronto v. Bell Telephone Co. [1905] A.C. 52].

Advocates of continuing exclusive federal powers over broadcasting argue that cable companies are by their very nature "interprovincial undertakings" because their signal often originates outside the province where the

cable distribution takes place. This line of reasoning was successful in Alberta Government Telephones v. CRTC (1984) F.C., not yet reported. Here the functional integration, i.e. between long-distance and local calls, brought the Alberta system within federal jurisdiction. If this reasoning is correct, then the provinces may have no power to regulate their telephone system. Despite this decision, provincial regulation continues. They also argue that many of the data functions themselves -- notably electronic mail [91(5)] and banking [91(15)] can be considered extentions of existing federal powers. Finally, they argue that joint or exclusive provincial regulation of the cable systems may create administrative chaos and inconsistent standards.

The Current Provincial Presence

It is arguable that, at least on the administrative level, Canadians already enjoy a de facto large provincial presence in the field of broadcasting. In the 1960s and 1970s, the CRTC allowed Quebec and Ontario to establish provincially-owned educational channels -- Radio-Quebec and TV Ontario. Today, they are full-fledged networks providing a wide-range of information and entertainment functions much beyond their initial mandate. One consideration for changes to the Broadcasting Act might be a recognition of their provincial presence in the system

Further Provincial Powers

If Canada adopts a new broadcasting definition in a new Broadcasting Act, should there be a further discussion of the exclusive federal perogative in broadcasting

itself? In other federal states, including the German Federal Republic (West Germany), broadcasting is in fact a local government (state) responsibility.

Indeed, the Aird Commission in 1928 suggested a mixed system for Canada, with the provinces being responsible for regulation of local stations and transmitter licensing of local stations and transmitter licensing within the provinces. At the time of the introduction of C-20, there was discussion about the possibility of building in some kind of consultative mechanism with the provinces.

B. CHARTER OF RIGHTS

Marcel Masse, at the time of the introduction of Bill C-20, said that the federal government's ability to limit or alter a broadcasting license may be severely limited in the future because of the Charter of Rights. Indeed, a number of other Charter issues are raised by any contemplated changes in the Broadcasting Act itself.

Freedom of Expression

Currently, the right to receive signals is contained in the Broadcasting Act itself:

> "... all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;"
>
> Broadcasting Act, R.S.O. 1970, C.b-11, s.3(c).

It is arguable that this provision is now rendered largely redundant because of one of the fundamental rights proclaimed in the Charter of Rights that being the " ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." [Charter of Rights and Freedoms, s. 2(b)]. It is arguable that "media of communication" includes broadcasting; further clarity however could be provided in a revised definition of broadcasting in a new Act itself. It can equally be argued that broadcasting is included in the word "expression," which has been interpreted in the United States to signify more than speech. [Cf. Thornhill v. Alabama (1940) 310 U.S. 88, where the word was said to include picketing; United States v. O'Brien (1968) 391 U.S. 3675, right of burning a flag or draft card.]

In the future, denying Canadians the right to receive radio or television signals would almost certainly constitute a violation of these provisions. It is uncertain whether such provisions apply to the Canadian content regulations, i.e. does a Canadian have the right to receive unlimited American programming? Finally, it is difficult to know if the provisions as drafted will apply to the two-way transmission of data on cable or common carriers.

Discrimination provisions

Today, one of the traditional arguments against a provincial government presence in broadcasting regulation has been eliminated by the anti-discrimination provision of the Charter [s. 15(1) which prohibits discrimination on the

basis of "... race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"]. Should a provincial legislature or federal parliament wish to impose discriminatory programming, for example, such measures would clearly violate these provisions.

X. THE INTERNATIONAL REGIME:

A. INTERNATIONAL TELECOMMUNICATION CONVENTION AND RADIO REGULATIONS

The rules of international telecommunications law are embodied in the International Telecommunications Convention (International Telecommunication Union Convention, Nairobi, 1982), and the Radio Regulations appended to it, (Radio Regulations, 1982, ITU, Geneva). As well, there are regional treaties and conventions that apply to Canada: The North American Regional Broadcasting Agreement (between Canada, the United States, Cuba, Mexico, the Dominican Republic and Haiti, 1937); and the Canada-USA Television Agreement of 1952.

The importance of the ITU Convention and Radio Regulations is that it is an international attempt to protect radio frequencies that are already being used from the effects of harmful interference. Without the cooperation of all states and the procedures administered by the ITU regarding the registration of radio frequencies, and the regime of protection for registered frequencies, the chaos that marked the early years of unprotected and unregulated radio frequencies would have continued.

All Canadian licencees are required to observe the provisions of the ITU Convention, and are prohibited from causing harmful interference to the broadcast stations which operate in accordance with the provisions of the ITU Convention and the Radio Regulations.

The close interaction between the international regulatory regime of ITU and the federal government exhibits itself in the similar wording of the statutory definitions of 'broadcasting' and 'radiocommunication' in the Broadcasting Act and Radio Act of Canada, and the defintions found in the ITU's Radio Regulations
The ITU Radio Regulations definitions are:

"Broadcasting Service: A radiocommunication service in which the transmissions are intended for direct reception by the general public. This service may include sound transmissions, television transmissions or other types of transmissions.

Television: A form of telecommunciation for the transmission of transient images of fixed or moving objects.

Radiocommunication: Telecommunication by means of radio waves.

Radio Waves: (or Hertzian Waves) Electromagnetic waves of frequencies arbitrarily lower than 3000 Gigahertz propagated in space without artificial guide.

Telecommunication: Any transmission, emission or reception of signs signals, writing, images and sounds or itnelligence of any nature by wire, radio optical or other electromagnetic systems.

The North American Regional Broadcasting Treaty uses this definition dealing with broadcasting: 'Broadcast Station: a station, the emissions of which are primarily intended to be received by the general public.'

B. FEDERAL COMPETENCE TO IMPLEMENT INTERNATIONAL COMMUNICATION TREATIES:

The legislative jurisdiction to enact laws implementing an international treaty lies with the federal government. In the Radio Reference, the Privy Council held that in order to fulfill her treaty obbligations, "It is necessary that the Dominion should pass legislation which would apply to all the dwellers in Canada." (Re Regulation and Control of Radio Communications, 1932, A.C., 304 (P.C.) at 313) The authority to do so, according to the Privy Council, lies in Section 91 of the Constitution Act 1867, which renders 'peace order and good governement' power to the federal government. The Radio Reference became legal authority for the federal government to control and implement international agreement dealing with radio broadcasting, television, and Direct Satellite Broadcasting (DBS).

The responsibility lies with the Minister of Communciations to secure the rights of Canada in telecommunications matters. According to Section 8(1) of the Radio Act:

"The Minister shall take such action as may be necesary to secure, by international regulation or otherwise, the rights of Her Majesty in right of Canada in telecommunications matters and shall consult the CRTC with respect to all such matters that, in his opinion, affect or concern BROADCASTING."

In fulfilling his duty, the Minister is entitled under Section 7(1) of the Radio Act to make regulations "to carry out and make effective the terms of any international agreement , convention or treaty respecting telecommunications to which Canada is a party". Under his authority, the Misister has issued the General Radio Regulations Part 11 (C.R.C. 1978, c.1372) which contain detailed provisions with respect to the operation of radiocommunications. The operators of program carrying services are obliged to observe the rules of international telecommunications law under Section 10 of these regulations. The Section specifies:

"The licencee shall observe the provisions of the International Telecommunication Convention and any bilateral or multilateral telecommunication agreements for the time being in force and those regulations pertaining to the operation of radio that are made under the said convention and agreements" (C.R.C. 1978, c.1372)

The Minister of Communications is entitled to enforce the observance of rules of international telecommunications law on

ALL BROADCASTING UNDERTAKINGS, including cable TV and DBS, as they must obtain a technical construction and operating certificate from the Minister before starting their operations.

Through this processs international law becomes the domestic law of Canada.

Technical standards, internationally adopted through the ITU, are implemented in Canade through the above mentioned Section 10 of the General Radio Regulations.

C. Implications

1. If a Canadian telecommunication service provider was operating a radiocommunication service that was not in accordance with the ITU's Radio Regulations, it means that the service can not legally be protected internationally and nationally from the effects of harmful interference.

2. Canada has a treaty obligation to remain compatable with the ITU Convention and the Radio Regulations in order to:

a) prevent harmful interference to the radiocommunication transmissions of other member states of the ITU;
b) maintain international technical parameters for the construction, use and maintenance of radio stations, satellites and earth stations etc.;
c) maintain a regime of privacy for point-to-point telecommunications utilizing the radio spectrum.

Recognizing the fact that the ITU Radio Regulations utilize some of the same language as Canada in its set of 'broadcast' definitions ('transmissions intended for the direct reception of the general public'), and recognizing the fact that such language has created problems for the effective regulation of broadcasting in Canada especially to handle the new era of telecommunication technologies, the Canadian Government, through the Department of Communications, should look at ways that Canada can amend or change some of the definitions in its broadcast legislation, while at the same time maintaining a Canadian committment to compatability with ITU Convention and Radio Regulations.
Flexibility domestically is necessary, but compatability with international obligations is required as well.

Since more and more countries face similar problems, it is recommended that Canada should take a lead in getting the relevant definitions changed internationally, especially through the appropriate conferences of the ITU.

XI. OTHER NATIONAL AND INTERNATIONAL ATTEMPTS AT A DEFINITION

A. UNITED KINGDOM:

The United Kingdom is experiencing the same problems as Canada regarding the lack of a sufficiently comprehensive set of definitions to effect administrative control over new technologies related to a 'broadcast service'. There does not really exist a definition for 'broadcasting' in the U.K. Broadcasting Act. In discussions with the Home Office in London, it appears that the drafting of a new definition that deals with over-the -air program trasmissions is on the agenda. However, none of the British definitions identify the types of services to be encompassed, and thus does not define the limits of what the government wishes to regulate. There exists no case law on the point of the definition of broadcasting (In conversation with C. Scoble, Home Office, London, October 9, 1985).

The definition of broadcasting found in the Wireless Telegraphy Act states:

Broadcasting: means the emission of messages by electromagnetic energy other than over wires.

In this state, broadcasting includes data transmissions, as well as radio and television.

A more useful piece of legislation dealing with 'programming services' is the Cable and Broadcasting Act of 1984. This Act goes a long way towards developing definitions that affect the problems inherent in a narrow definition, such as the one found in Canada. It is also the base that the British governement is using to help develop definitions for 'broadcasting' per se. This Act attaches public interest considerations to the areas of Cable and Direct Satellite Broadcasting. The main advantage of this approach over the one utilized in Canada is that there is clear legislative basis for the regulation and control of cable and DBS. As noted before, there is no specific definition or mention of 'cable' in the Canadian Broadcasting Act, even though it is the most important delivery system in Canada.

According to the Cable and Broadcasting Act of 1984:

Cable Programming Service: means a service which consists wholly or mainly in the sending by any person, by means of telecommunication sysem (whether run by him or by any other person), of sounds or visual images or both, either:
a) for reception, otherwise than by wireless telegraphy at two or more places in the U.K., whether they are so sent for

simultaneous reception or at different times in response to requests made by different users of the service; or
b) for reception, by whatever means, at a place in the U.K. for the purpose of their being presented there either to members of the public or to any group of persons.

(2) In this Part 'licenceable service' means a cable programm service which consists wholly or mainly in the sending by any person, by means of a telecommunication system (whether run by him or by any other person) of sounds or visual images or both wither:
a) for simultaneous reception, otherwise than by wireless telegraphy, in two or more dwelling houses in the U.K.; or
b) for reception by whaever means, at a place in the U.K. for the purpose of their being presented there either to memebers of the public or toa grou^ of persons, some or all of whom do not have a business interest in hearing or seeing them.

(3) ----------

(4) Subsections (1) and (2) above do not apply in relation to a service which consists wholly or mainly in the sending of sounds or visual images or both by any person if it is an esential feature of the service that, while they are being conveyed, there will or may be sent from each place of reception, by means of the telecommmlunication system or (as the case may be) the part of it by means of which they are conveyed, sounds or visual images or both for reception by that person. (exception for 2 way cable telecommunication)

(5) References in subsections (2) and (4) above to sounds are references to speech or music or both.

(6) References in subsections (2) and (4) above to visual images are references to visual images which are such that sequences of them may be seen as moving pictures. (Thus, excludes 'data'?)

(9) In this section, 'dwelling-house' includes a hotel, inn, boarding house or other similar establishment.

Television Broadcasting: means visual images broadcast by way of TV, together with any sound broadcasting for reception along with those images.

TV or Sound Broadcasting and DBS: When visual images or sounds or both are transmitted to the satellite transponder.

There are several points of reference in the definitions above that should be considered:

- A 'Cable programming service' is one sent 'by means of telecommunication system'. This includes the whole technological mix, including wire and wireless.

-'whether run by him or other': this means that a carrier can run a 'service'. There is no inherent distinction and limitation between a 'programmmer' and a 'carrier'.

-'sounds or visual images, or both': Visual images are further defined in ss (6) as 'references to visual images which are such that sequences of them may be seen as moving pictures.'
This appears to be an attempt to distinguish between TV and data transmissions. However, it is not clear that such delimitation of visual images does indeed make that distiction clear.

- 'at two or more places'; 'at a place in the United Kingdom; for being presented to members of the public or any group of persons'. This appears to be a reworking of the definition 'general public'. It appears in these definitions that any group of persons is a member of the public. As well, any place which receives the cable programming service is attached by the provisions of the Act. It would appear that a private group, or a pay service cannot escape attachment by the Act by claiming that its service is more of a private 'point-to-point' service.

- 'dwelling house includes a hotel, inn, boarding house, or other similar establishment': There is no confusion about the status of large apartment houses or hotels in relation to cable and DBS. They are all included in the purvue of the Act.

There are a set of 'public interest considerations' that attach to a cable programming service:
- foreign investment criteria apply;
- control over foreign content (86% of programming material must be from the U.K. or the EEC)
- good taste and decency provisions.
(Supra, conversation with C. Scoble, Home Office, London).

In summary, the U.K. has progressed somewhat by the statutory instruments dealing with cable and DBS. However, there is still no clear or coherent defintiion of 'broadcasting' that directs itself to the programming services available. As such, this does not assist Canada much in a reworking of the Canadian definition. However, the fact that the U.K. is considering drafting a new set of definitions that will encompass and delineate over-the-air programming services should be taken note of by Canadian broadcast service administrators, and policy makers.

B. UNITED STATES:

The United States, unlike the United Kingdom, does have a specific defintion for broadcasting. It is similar in many ways to the current Canadian definition.

According to the Federal Communications Act 1942
Broadcasting means: The dissemination of radio communications intended to be received by the public directly or by the intermediary of relay stations. (47 U.S.C. S. 153, SS. 0)

It can be noted that this definition utilizes the same criteria as Canada in the use of the terms 'intended to be received'. The intention is to direct
'radio communications' to the public. The public includes any part of the public. The broadcasting is directed to the public either directly or indirectly (by the intermediary of relay stations). This definition does not include cable.

'Radiocommunication' , or 'communication by radio' is defined in The Communications Act, 1934, as:

Radiocommunication means the transmission by radio of writing, signs, pictures and sounds of all kinds, including the instrumentalities, facilities, apparatus, and services (amoung other things, the receipt, forwarding and delivery of communications) incidental to such transmission. (47 U.S.C. s. 153, ss.3)

It can be noted that this definition is a more comprehensive one than the definition utilized by Canada.

Like the United Kingdom, the United States has chosen to regulate cable services through the medium of direct legislation, rather than by regulations, as in Canada. The Cable Communications Policy Act (Public Law No. 98-549 (S.66) 98 Stat. 2779, Oct. 30, 1984, entered into force Dec. 29, 1984.) defines a cable system as:
'A commercial subscription service that picks up broadcasts of programs originated by others and retransmits them to paying subscribers.'

The Act also speaks of private satellite TV receiving dishes (TVRO). The Act authorizes the use of private dishes for the reception of non-scrambled signals. Theft provisions apply for the reception of unauthorized scrambled signals.

The notion of 'public' as it relates to broadcasting is in contrast to the 'privacy' of point-to-point communications. This basic distinction, common to Canada as well, distinguishes a broadcast type service from a point-to-point service. A 'point-to-point' service has been defined as 'communications directed to a particular person or group of persons which do not have any general interest to the public' (Robinson, J.C., 'Private Reception of Satellite Transmissions by Earth Stations, 48 Alb.L.Rev. (1984) 426, at p. 437.)

Of course, there are problems in the U.S. dealing with 'hybrid systems'. Such systems exhibit characteristics of both private point-to-point systems, and public broadcasting systems. The Federal Communications Commission (FCC), the regulator of both

point-to-point and broadcasting systems has chosen to follow a 'Functional approach' in relation to the regulation of hybrid systems. As in Canada, 'public interest' criteria attach to the 'broadcasting system' (including cable). These criteria include foreign investment restrictions, equal employment considerations, non-overcommercialization of programming etc. These criteria do not apply to private point-to-point services.

However, in the 'Functional approach' to hybrid systems, the FCC has decided to regulate these systems, together with the public interest criteria that apply, depending on the result the Commission wishes to see. (Hylton, J.D., Report to the Department of Communications, on the Legal Definition of Broadcasting, March 30, 1981.)

Both 'Subscription TV' and programming of satellite services are considered 'hybrid' systems. (In conversation with Tom Walsh, Legal Branch, Policy and Communications, Mass Media Bureau, Washington, D.C.)

Normally, however, the factors that characterize a public oriented broadcast service are: 1) the programs are directed to the public, not to a specific 'addressable' receiver; 2) the programs are defused, and are expected to be received by members of the public; 3) the programmer has control over the content of the programs.

On the other hand, A point-to-point service provider: 1)directs a message to an addressable receiver; it is not intended for the public; 2) the service provider has no control over the content of the message; 3) there is a 'mantle of privacy' that characterizes a private point-to-point service. **Section 605 of the Federal Communications Act 1942 grants a "mantle of privacy for all communications except radio and television broadcasts intended for the public".**

With regard to satellite transmissions of program carrying signals, the U.S. has not specifically introduced any legislation dealing with DBS, nor is any on the agenda. Currently, all 'satellite broadcasting services' are offered via Fixed Service Satellites. (FSS)
The 'Functional approach' to regulation sees the senders of programming signals directed to the public as merely a customer on the common carrier system. The satellite service in this case is regulated as a common carrier. The programming itself must meet public interest criteria. (In conversation with Tom Walsh, Legal Branch, Policy and Communications, Mass Media Bureau, Washington, D.C.)

Lessons for Canada From the U.S. experience are: a) the establishment of a specific statute to deal with cable, both programming and non-programming services; b) The U.S. avoids the problem Canada Faces with regard to transmissions for 'direct

reception by the public' by stating 'radio communications are intended to be received by the public directly or by the intermediary of relay stations.' This wording also includes satellite transmissions; c) Canada should consider the functional approach of the U.S. to regulation of hybrid services.

The U.S. approach allows common carriers to be programmers, and 'broadcasters' to be providers of point-to-point services. The FCC 'monitors' the performance of programmers and carriers, so as to ensure the application of the appropriate public interest considerations. Canada should explore in more depth the methods of U.S. regulation of the hybrid systems, with regard to the practicalities of implementation here.

C. AUSTRALIA:

Australia departs from the Canadian set of broadcasting definitions on several points:

1. In its definition of 'radiocommunication' there is an inclusion for communications between 'things and things'. This presumably covers communications between computer and computer.

According to the RADIOCOMMUNICATIONS ACT 1983:

Radiocommunciation: means
a) radiotrasmission; or
b) reception of radio transmission,
for the purpose of the communication of information between persons and persons, persons and things or things and things.

2. In the defintion of 'radiotransmission', the limits of a radiotransmission are those utilizing 'electromagnetic energy... without CONTINUOUS artificial guide'. This clearly identifies cable or wire telegraphy as being outside the scope of a radiotransmission.

The Radiocommunications Act further defines 'Radio Transmission' as:
a)any transmission or emission of electromagnetic energy of frequencies less than 3 terahertz; or
b) any highly coherent transmission or emission of electromagnetic energy of frequencies not less than 3 terahertz and not exceeding 1000 terahertz,
without continuous artificial guide.

3. The Australian definitions distinguish between a 'broadcast station' and a ' television station' . A 'broadcast station' is a radio station (i.e. AM or FM), while a 'television station' is for transmission, by wireless telegraphy, of television programmes. Television programmes are defined as 'images and associated sound.' As in Canada, the emphasis is on transmissions INTENDED to be received. However, the reception is

not limited by the phrase 'for direct reception'. The Australian defintiion states only that television programmes are 'intended for reception by the general public'. In Canada, recall that our defintion depends on transmissions for 'direct reception', which has caused problems for our courts in interpretation.

According to the BROADCASTING AND TELEVISION ACT 1942 (With amendments to 1979):

Wireless Telegraphy: means the emiting or receiving, over a path which is not provided by a material substance constructed or arranged for that purpose, of electromagnetic energy.

Broadcasting Station: a station for the transmission by means of wireless telegraphy of broadcasting programs, that is to say, matter inteded for aural reception by the general public and includes the studio, transmitting station and technical equipment used of for the purpose of those programs.

Television Station: means a station for the transmission by means of wireless telegraphy of television programs, that is to say, images and associated sound intended for reception by the generl public, and includes the studio, transmitting station and technical equipment used for the purposes of those programs, but does not include a television translator station or a television repeater station.

4. The Australian definitions do not deal with Pay-TV or with cable, as these are not elements of the Australian Broadcasting System. "There is no history of pay, subscription or cable television in Australia." (Bruce Allen, 'Australians Embrace the Huggable Dish', in BROADCASTER, Toronto, Sept. 1985, at p. 22)

6. A recent study commissioned by the Australian Minister of Communications was to "...Review the development of commercial broadcasting in the next decade in the light of the new generation of technology involving such concepts as full direct broadcasting to homes (by satellite) and high definition television." (Future Directions for Commercial Television, Volume 1 Report, Department of Communications, Australia, June 1985, at p. 2.) It may be that a new set of definitions, especially dealing with direct satellite broadcasting, will emerge from the current work being done in Australia.

7. Regarding satellite program carrying signals, there are currently two Bills being introduced in the Australian Parliament to deal with satellite broadcasting. One Bill will empower the licencing of up to four stellite program services for commercial television for reception in remote communities of Australia. The other Bill will empower the Australian Broadcasting Corporation, the public broadcaster in Australia, to utilize satellites to provide television services. (In conversation with Bruce Allen, Australian Broadcast Policy Analyist, November 2, 1985, Ottawa.)

The major lesson that Canada can learn from the Australian definitions is that Australia has dropped the notion of transmissions intended for 'direct reception' by the general public, and focussed instead on any reception by the general public. It is not limited to 'direct reception' as in Canada. Also, the fact that Australia is currently introducing legislation dealing with new programming technologies should be of interest to Canadian broadcast policy makers.

D. EUROPEAN ECONOMIC COMMUNITY: (EEC)

The major work done by the EEC regarding broadcasting is the 'Green Paper': 'Television Without Frontiers; Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable', Brussels, 14 June, 1984. Although the Green Paper does not specifically define what is 'broadcasting', there are several important references as to the nature of broadcasting. These refererces are useful in the discussion of a new legal definition of brcadcasting for Canada.

According to the The Green Paper (at p. 112):

Basic Nature of Broadcasting:

Broadcasting has many recipients. They receive the broadcasting irrespective of whether it is intended for them or not.

A broadcast may be picked up regardless of the intentions of the Broadcasting Organization. This is a natural and technically inevitable offshoot of broadcasting, particularily with satellite broadcasting.

Regarding the broadcasting and or transmissicn of sound and TV programs... the 'materials' comprising the service (to fit the EEC definition of 'material') are scund and ,picture signals, while 'equipement' would be directional beams, cables and wires. (Ibid., at p. 143)

Broadcasting from ground based or air borne transmitters is to be considered as being provided for any person who is able to pick it up, either directly through an individual aerial or community antenna, or indirectly via a central antenna and cable company network.(Ibid., at p. 112-113)

When a broadcast is via ground based transmitters the reception zone is small, but with satellites it is larger.

The passive cable network which retransmits other's programs is an extension of the receiving
aerial and therefore remains an accessory to it.

Active cable systems involve transmission of original programming. (There is a ban on active cable in many of the EEC countries, with few exceptions of an experimental nature eg. U.K.) (Ibid., at p. 18)

The main implication of these definitions is that Canada should consider dropping the notion of 'intention' in the current definition, and focus instead on the AVAILABILITY of the signals to the public. 'Intent' does not depend on the intention of the programmer, but on the reality of the ability to be received. This should be better identified in the Canadian definition.

E.THE BRUSSELS CONVENTION OF 1974:
CONVENTION RELATING TO THE DISTRIBUTION OF PROGRAMME CARRYING SIGNALS TRANSMITTED BY SATELLITE.

Conscious of the need not to impair in any way international agreements already in force, including the ITU Convention and the Radio Regulations annexed to that convention, and in particular in no way to prejudice wider acceptance of the Rome Convention of 26 October 1961, which affords protection to performers, producers of phonograms and broadcasting organizations the 1974 Brussels Convention prohibits the unauthorized interception of program carrying signals transmitted by satellite. However, Article 1 of the Convention contains some definitions which are quite relevant and important for our discussion of the definition of broadcasting in Canada. These definitions are:

(i) 'signal' is an electronically-generated carrier capable of transmitting programmes;

(ii) 'PROGRAMME' IS A BODY OF LIVE OR RECORDED MATERIAL CONSISTING OF IMAGES, SOUNDS OR BOTH, EMBODIED IN SIGNALS EMITTED FOR THE PURPOSE OF ULTIMATE DISTRIBUTION.

(vii) 'distributor' is the person or legal entitiy that decides that the transmission of the derived signals to the general public or any section thereof should take place;.
(viii) 'distribution' is the operation by which a distributor transmits derived signals to the general public or any section thereof.

The main implication of these definitions is that Canada should consider a definition of broadcasting which emphasizes the 'program carrying signal' aspect rather than just the technical over-the-air aspect traditionaly used to earmark a 'broadcast'. The advantage of this would be that the definition would cover what is now considered to be 'non-broadcasting material' (cable print-out news and weather; other data services).

XII. OPTIONS FOR A NEW LEGAL DEFINITION

A. Elements to Recognize and Encorporate into any New Legal Definition:

1. Parliament wishes to attach certain public interest considerations to activities that are part of the Canadian Broadcasting System (Section 3 of the Act; conditions relating to Canadian programming in the TV and Cable Regulations; foreign investment limitations for the Canadian Broadcasting System; advertising standards etc.)

2. The Canadian Broadcasting System is composed of elements that include a) conventional over-the-air radiocommunications; b) satellite program carrying signals; and c) a cable distibution system.

3. The 'intention' of program carrying services is to extend service to members of the public;

4. The 'public' or 'general public' can be considered, legally, to be any group of persons that comprise the public;

5. Members of the public to which the program carrying services are directed have a general 'right to receive' such services, unless Parliament so limits that right;

6. A 'right to receive' together with the intention to extend services to the public is not extinguished by the fact that fees are levied for the services, nor that special receiving apparatus is required to receive services;

7. The program carrying signals are comprised of: sounds, transient visual images or both.

8. 'Program' refers to a body of live or recorded material consisting of sounds, transient images or both;

9. The system for the transmission, retransmission and distribution of program carrying signals includes Broadcast Transmitting undertakings, Broadcast Receiving Undertakings (i.e. cable systems), and Networks (which includes Pay-TV) '.

10. The Canadian Broadcasting System must remain compatable with the international regime established for the cooperative allocation of radiocommunication frequencies for the purpose of avoidance of harmful interference (administered pursuant to the ITU Convention and the Radio Regulations).

11. It is important for the federal Parliament to clearly delimit the range of activities and services that comprise the Canadian Broadcasting System, which will be under the legal and administrative jurisdiction of the federal government and its agencies, and that it is better to do this through legislation rather that by ad hoc administrative decision making and the regime of regulations.

12. It is important for the federal Parliament to clarify the issues of copyright as it relates to a new definition.

B. Given the above elements the following options are available:

Option 1

The following definition encorporates the technical parameters of the definition of 'broadcasting' as an over-the-air system, together with the necessary inclusions of other telecommunication systems that make up the Canadian Broadcasting System.

'Broadcasting':
means the dissemination of sounds, transient visual images or both, other than telegraphic or telephonic messages, intended to be received by all or a part of the public, either directly or through the medium of relay stations or satellites, by means of:
a) any form of radiocommunication utlizing Hertzian waves, or
b) cables, wires, fibre optic linkages or laser beams.

At the same time, the following definition should also be included:

satellite system: means a space system using one or more artificial earth satellites;

fixed satellite service: means a radiocommunication service: between earth stations at specified fixed points when one or more satellites are used; in some cases this includes satellite to satellite links;

Broadcasting satellite service: means a broadcasting service in which signals are transmitted or retransmitted by space stations.

OPTION 2

Looking to a more 'Culturally oriented' defintiion could satisfy the requirements of the 'protections and public interest criteria' that now rest in Section 3 of the Broadcasting Act, the Cable and Television Regulations, and 'public Policy' pronouncements that identify the cultural component as something to be protected.

This option is a complete departure from the technical defintiion of broadcasting as a 'radiocommunication'. It focusses instead on the 'content' that is directed to the public. 'Radiocommunication' is still regulated, but not in relation to its content.

In this approach, 'broadcast programming' becomes a limited function of 'Program Producers', who produce programming intended for the public. The definition here encompasses the intellectual form of the thing itself. It is not a function of the technical parameters that have identified 'broadcasting' in the past.

As suggested by the Clyne Committee of 1978, (Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, March 1979., at pp. 11-15)) 'broadcasting' and 'telecommunications' (i.e. point-to-point) are united under one heading, with new subcategories under the new general head of 'communications'. The sub-groups would include:

a) Producer: The primary producer of programming designed (intended) for the public. This would be the radio and TV producer for the 'private' or 'public' networks, and would be made available free or for a fee.

The 'public interest' crieria would apply to this level; Canadian Content; positive incentives for quality Canadian productions; advertising regulation; foreign ownership criteris etc. The whole set of considerations that Parliament included for cultural identity and national unity would attach to this level.

Jurisdictionally, this could be an exclusively federal matter, or cold be shared with the provinces. However, if 'productions' are being made for use within a province, it may be that the two levels of government would have to share jurisdictional responsibility.

b) The Information Provider: This is the provider of news in some form, including for 'TV' (i.e. moving objects) or for print-out news on the screen, now offered by cable companies.

As the 'content' is for public consumption (even if it is under a subscription service), and in the case of having a 'Canadian world-view' as it relates to news, the 'public interest' considerations would apply (Canadian Content etc).

This level is still a 'producer' of a program. It is just that the 'program' is a specific type (news, weather, specialized information etc), and is not 'drama' or 'entertainment', as would be included in the previous level.

c) The Service Provider: This category is for persons or groups that provide specific services, including banking, alarm systems etc., and other forms of data transmission.

As this set of information is less 'public' and more point-to-point, 'privacy' considerations apply. The Service Provider is the 'carrier' or information, and is not involved in the origination of content. Thus, 'common carrier' considerations would apply (fair access; reasonalbe rates etc.).

Jurisdictionally, this could be a shared area. In areas already inhabited by the federal government (eg. banking), federal regulation could apply. In the area of provincial concern (eg. education, or property rights), provincial regulation would apply.

There could be restrictions on foreign ownership, but content restrictions would not be applicable to this level.

d) The System: This would be a group of undertakings that provide all or part of the above mentioned services, and could include cable companies, Bell Canada, CNCP etc. should they become involved in the provision of data services and information.

Jurisdictionally, the federal giovernment could retain control over all of these services that were 'radiocommunications' for example, as well as over parts of the system that they already control. However, it is clear that the provinces have an interest in 'the system' if it is within the bounds of the province, or is a system already regulated provincially (eg. telephones).

International Considerations

Under this scheme, Canada could very well maintain compatability with the international regime of ITU and the Radio Regulations, so as to prevent harmful interference, maintain technical standards on equipment, and maintain the privacy considerations where applicable. Option 2 would not preclude effective compliance with international obligations.

OPTION 3

Following the lead of the United Kingdom, and the United States, retain the 'technical' definition of broadcasting as an over-the-air service, and create a piece of legislation specifically for cable (both programming and non-programming services). In the United Kingdom, it will be remembered, satellite broadcasting is specifically included in the Cable and Broadcasting Act of 1984. Satellite broadcasting is not under a special Act in the United States.

In this option, the 'public interest' considerations (Canadian Content, foireign ownership restrictions etc.) would attach to the 'programming' that utilized cable that was directed to the public. Private point-to-point services of cable would be protected by the 'privacy' considerations.

Jurisdictionally, the parts of the Canadian Broadcasting System that utilized over-the-air transmissions would be regulated by the federal government. Low-power local over-the-air programming and other undertakings of 'purely a local nature' would come under provincial jurisdiction. Regarding the jurisdiction over cable, this too would have to be a shared responsibility. Those parts of a cable programming service that are defined as being part of the 'Canadian Broadcasting System' for the purposes of regulation would come under federal control. Those parts of a non-programming cable service that extended over provincial territories, or was interconnected internationally would also be controlled federally. (Also, the impact of the AGT case, where federal control has been granted by the courts because of the interprovincial and international interconnections that AGT has would apply in this situation also.) However, it is clear that there would be some services offered over cable that would be of a 'purely local nature', and provincial regulation of these types of services would be in order.

OPTION 4

It is possible, utilizing the 'deeming' provision that is outlined in Bill C-20 to have federal jurisdiction extend over whatever hardware and programming service that Parliament so wishes to regulate.

The 'Deeming' provision of Bill C-20 is this:

"2.(2) For the purposes of this Act, any person who within Canada or on a ship or aircraft registered in Canada transmits or distributes by means of telecommunication, otherwise than solely as a telecommunication common carrier and whether or not for any consideration, any programming received by radiocommunication IS DEEMED TO BE CARRYING ON A BROADCASTING UNDERTAKING.

This option provides clarity in the face of the confused scope of CRTC jurisdcition to regualte undertakings providing satellite to cable delivery of programming signals. The provisions would allow the CRTC to regulate those undertakings which formerly operated in a grey area.

Jurisdictionally, the provision is based on the reception of 'radiocommunication', which would place the activities covered by it squarely in the federal field (except for perhaps local 'low-powered TV').

However, there are problems with the Bill C-20 approach.

a) The 'deeming' provision was introduced through what is basically a 'housekeeping' Bill. It is a short-term measure that should not pre-empt a more integrated and complete definition of 'program carrying signals'.

b) It is a sweeping power that fails to delineate the particular services and systems that would come under federal control. In the case of several 'grey area' services, the provinces would argue that they have a legitimate right to be involved. The 'deeming' provision in a way pre-empts a cooperative delineation of the services and systems that are legitimatelly a federal concern. Being more specific would increase certainty and cooperation

c) The potential jurisdictional conflicts that could arise from a wide use of the 'deeming' provision, especially in the 'grey area' services, would lead to a climate of tension and unease. This is hardly the environment for the development of the economic and cultural system of programming services that will benefit Canada as a whole.

Communication businesses, including program producers, information providers, and service providers, would not be as ready and willing to invest in Canadian program services if there were a federal provincial jurisdictional conflict.

OPTION 5

Following the implications of the EEC Green Parer on the Basic Nature of Broadcasting, and recognizing that 'broadcasting' (including the distibution sytems of cable and satellite) has many recipients IRRESPECTIVE OF WHETHER IT IS INTENDED FOR THEM, Option 5 suggests dropping the notion of 'intention' of the program sender, and focuses instead on the AVAILABILITY of the signal to the public. This change also reflects the fact that a subjective definition of 'intent' on the part of the programmer has no real effect on the reality of the availability of the signal to the public. This was the issue in the Lount case, whereby the 'intention' of the program provider was irrelevant. In fact, originators of the programs did not intend the signal to be received by the public, but it was.
'Intent' does not depend on the 'intention' of the programmer, but on the reality of the ability to be received. The Court in Lount created an 'objective' standard by which to guage 'intent', but this test is really based on the fact of the 'availability' of the signal to be received by the public.

Such a definition could look like this:

Broadcasting means the dissemination of sounds, transient visual images or both, other than telegraphic or telephonic messages, AVAILABLE TO BE RECEIVED BY THE PUBLIC, either directly or through the medium of relay stations or satellites, by means of:
a) any form of radiocommunication utlilizing Hertzian waves, or
b) cable, wires, fibre optic linkages or laser beams.

Option 6

Replace the words 'sounds, transient visual images or both' with the words 'program carrying signals' in the Option 5 definition. 'Program' would be defined in light of the definition found in the Brussels Convention of 1974, i.e.:

'Program' is a body of live or recorded material, consisting of images, sounds, or both, embodies in signals emitted for the purpose of ultimate distribution.

The advantage of this approach is that it would cover what is now considered to be 'non-broadcast material', cable print-out news and weather, and other 'data' that was to be considered part of the Canadian Broadcasting System. As well, there is no mention of the 'intention' of the programmer; 'program' is a signal 'emitted for the purpose of ultimate distribution'.

XIII. Appendix: Copyright Issues in a New Definition

It is appropriate that copyright revision proceed simultaneously with revisions to the Broadcasting Act. One of the most serious omissions in the Copyright Act [Copyright Act, RSC 1970 c. C-30], as it now stands is copyright for broadcasts including retransmission. By considering copyright revision at this time, it becomes possible to include a definition that parallels and reflects the definition given in the Broadcasting Act.

1. The Present Situation

The present Act, which came in force in 1924, is very much outdated and out-of-step with present needs in Canada. The Act officially provides a limited protection for radio broadcasts:

> "Section 3(1) of the Act defines 'copyright' as:[1]
>
> > the sole right to produce or reproduce the work of 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...[2]
>
> The exclusive rights of the author include:[3]

> in the case of any literary, dramatic, musical or artistic work, to communicate[4] such work by radio communication.

'Performance' in the sense of the Copyright Act, means:

> any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means any mechanical instrument or by radio communication.[6]

[1. Copyright Act, R.C.S. 1970, c. C-30.
2. emphasis added.
3. sec. 3(f).
4. emphasis added.
5. sec. 2.
6. emphasis added.]

The phrase radio communication is, however, not defined in the Act and interpretation of this phrase comes from reading it with the definition provided in the Radio Act and the Broadcasting Act . It has been held to extend to television signals as well as radio signals.

While the content of television signals themselves are protected, [Warner Bros - Seven Arts v. CESM-TV Ltd. (1971) 65 C.P.R. 215], the protection does not extend to rebroadcasting of live broadcasts over cable. in Canadian Admiral Corp. v. Redifussion Inc. (1954) Ex. C.R. 382, it was held that where there is no material or fixed form of the thing [Cf. 3(1), Supra], there can be no copyright. Moreover, the sole right to communicate by radio communication [Cf. 3(f), Supra] did not apply to the co-axial cables of a cable service. In CAPAC v. CTV Television Network et al, (1968) SCR 676 (1968), it was held that there was no transmission or communication of a "work" when the transmission was merely communicated from a central transmitter to affiliate stations. What was

communicated was not the "work" but a "performance of the work." Finally, in Re: Capital Cities Communications Inc. et al v. CRTC et al, [(1975) F.C. 18; appealed to the S.C.C. on another matter], it was held that American broadcasters held no proprietary or other rights to signals received in Canadian airspace. Thus, they could not prevent cable companies from receiving and/or altering such signals.

2. Protecting Broadcast Activities (largely defined) in a Revised Copyright Act

The result of the decisions discussed ~~about~~ above is that today, cable operators in particular make no payments to either the original broadcaster or artistic creator of the broadcast. Such an obvious omission is addressed by the recent report of the sub-committee on the revision of copyright [A Charter of Rights for Creators, Minutes of Proceedings and Evidence of the Sub-committee of the Standing Committee and Culture on The Revision of Copyright, Ottawa, Ministry of Supply and Services, Oct. 1985] which proposes that Broadcasts be protected under the revised Copyright Act [Ibid., recommendation 75]. Recognizing that broadcasting is highly complex and multifaceted activity, the Committe also proposed that the copyright in broadcasting subsist in its many forms:

> "76. The rights attaching to broadcasts should be:
>
> (a) a right of reproduction;
> (b) a right of transmission;
> (c) a right to authorize each of the above;

and
(d) a right of retransmission.

[Recommendation 76; see also 97 and 98].

While there is no question that broadcasting must be protected, it is arguable that the correct place for broadcasting to be defined is in the Broadcasting Act and not the Copyright Act. If widely and correctly defined in its various activities, then it no longer become necessary to place such an elaborate definition in the Copyright Act. Such "cross reference" definition, however, appears to have been specifically rejected by the Committee who saw rights of retransmission as an intellectual property right; they specifically recommend taking the retransmission rights out of the Broadcasting Act regulations [Radio (A.M. Broadcasting Regulations, C.R.C. 1978, c. 379, section 15; Radio (F.M.) Broadcasting Regulations, C.R.C. 1978, c. 380, section 23; Television Broadcasting Regulations, C.R.C. 1978, c. 381, section 22] and placing them in the revised Copyright Act.

3. The U.S. Model of "Cross-Reference" Legislation

In the United States, copyright in broadcasting subsists because of the interplay between federal broadcasting legislation and copyright law. The definition is provided by the Federal Communications Act which defines broadcasting as dissemination to a general interest public (as opposed to point to point communications designed for a particular person or group). Such a definition clearly includes cable operators.

The U.S. Copyright Act , in turn, requires the payment of copyright by such broadcasting operations. One

exemption worthy of further examination is s. 111(a)(3) of the Copyright Act , which exempts from copyright the secondary transmission embodying a performance or display if the secondary transmission is done by a carrier which has no direct control in selecting signals. This exemption, the so-called "passive carrier exemption" has been criticized as being too broad and embodying many of the commercial activities that are carried on by the cable companies.

4. Avoiding a "Technological Bias" in the Definition of Broadcasting and Rebroadcasting: Some Implications for Copyright

Most broadcasting is currently by Herzian waves with rebroadcast over coaxial cable. In the future, a different technological mix may exist. Broadcasting, retransmission, etc. must be clearly defined in the Broadcasting Act and/or Copyright Act in order to meet changing technologies and to ensure the preservation of copyright. This was indeed the conclusion of the Sub-committee:

> "Any retransmission, by whatever means, of signals primarily intended for individual consumers, should attract a royalty."
>
> [Sub-committee, p. 80]

It is necessary and important therefore to re-examine the Committee's recommendations Nos. 99 and 100 regarding broadcasting transmissions [Ibid]:

"99. The government should examine the desirability of bringing all broadcasting and retransmission activities under an expanded definition of a transmission right.

100. The right of transmission should be defined in general terms and should not depend on current technologies."

It is also worthwhile to consider deeming provisions which would give either the regulatory agency for copyright and/or broadcasting the power to determine when special circumstances constitute broadcasting.

5. Differences between Signal Enhancement (and Other "Wholesale" Retransmission versus Rebroadcasting in the Copyright Context

Before entering the larger debate of the kind of copyright that might exist for rebroadcasting, it is necessary to distinguish signal enhancement (an example of "point to point" telecommunication) from dissemination to the general public over Herzian waves, co-axial cable or other technologies. It is clear that copyright must subsist in the latter commercial activity. As long as the "retail" transmission pays, the "wholesale transmission" can be ignored. To this end, the Committee recommends that these activities be granted a copyright exemption.

"80. Exceptions should be provided for the making of ephemeral recordings by broadcasters:

(a) pursuant to CRTC regulations, or
(b) in order to permit the broadcast of the program in a different time zone provided that the recording is erased after eight days.

and

101. Common carriers should be exempted from copyright liability."

Once again, if broadcasting activities were defined in a revised Broadcasting Act, such elaborate definitions within a revised Copyright Act might not be necessary.

6. The Retransmission Dilemna

Perhaps no where else is the omission in the present act more obvious than in the area of copyright for retransmission. Precisely because of competing economic interests, however, this is also one of the most contentious areas of debate in the area of Copyright revisions.

Cable and other forms of direct-to-user rebroadcasting constitutes merely a new dissemination of existing work. Seen in this light, such dissemination should lead to copyright protection. In Canada, the strongest arguments for payment of copyright comes from the artistic community. They base their claims on equity, arguing that advertisers gain from the added value of retransmission and pay according [See: R. Quinn and K. Watson, Impact of CATV on TV Advertising Revenues, 1972-1981, June 1984]. As artists, they feel that they should also be beneficiaires of retransmission. They admit, however, that it may be desirable to allow an exemption of copyright on rebroadcasting signals in their immediate broadcast (local) area; the basis for such an exemption is that the cable operator is not expanding the market, i.e.

increasing the number of viewers or listeners who receive the signal [PAC Report. Cf. The Subcommittee on Copyright, Supra; "Retransmission of a local signal should attract lower copyright," p. 79]. A further limited exemption has been proposed for small community systems serving small and isolated communities [Ibid., recommendation 109].

The argument against copyright on retransmission is made by the cable companies. They contend that the copyright fee would represent a major financial loss for them. They also express concerns that copyright might lead to higher costs for cable users, inducing some users to reject cable and turn to other forms of reception, including high antennae and/or satellite dish. While these arguments are important, it is essential to examine them in the context of:

1. keeping retransmission fees low;

2. charging copyright on other forms of transmission; and

3. changes in the federal taxes on cable operators to minimize their economic loss.

7. The Reciprocity Issue

American broadcasters seek payment from Canada for American programming which is rebroadcast by cable in Canada. They point to payments to Canadian of some $4-5 million per year by the U.S. cable companies. If the reciprocity provision of the Subcommittee [Recommendation no. 77. The rights (i.e. of Copyright) should be provided

to foreign broadcasters on the basis of reciprocity. N.B. It is necessary to determine whether this suggestion violates Canada's commitments under the Berne convention] is embodied in future Canadian copyright legislation. American broadcasters would almost certainly receive millions of dollars from a Canadian copyright tribunal. However, Canada is already a net importer of copyright materials. [Economic Council of Canada, Report on Intellectual and Industrial Property (Ottawa), 1971]. Any development which might accentuate this trend must be carefully examined. Indeed, the priority provided in the present Broadcasting Act for Canadian programming signals must be considered in the context of the outflow of copyright revenues to the United States.

It has been suggested that retransmission copyright should exist for Canadian signals only [A.A.Keyes and C. Brunet, Copyright in Canada - Proposals for Revision of the Law, (Ottawa), 1977, 130-143]. Such policy would require specific definitions in the Broadcasting Act or Copyright Act as to what constitutes a Canadian signal. Moreover, it is uncertain that Canada could provide different regimes for protection of domestically produced and international broadcast signals; such a two-tied scheme may violate the Berne Convention (to which Canada is a signatory) which provides that signatory countries must treat foreign artists as they do their own artists.

8. Domestic (Direct) Reception

If cable companies must pay royalties, what becomes of the domestic direct receivers of broadcast

signals by high antennae or satellite dish? Should they be required to pay copyright? Can any definition of broadcasting and/or copyright be wide enough to include them?

As broadcasters by satellite move to scrambled signals, the issue may become one of "signal piracy" or "theft of service" rather than copyright *per se*. Perhaps therefore the issue is better dealt with in the Criminal Code or other legislation apart from a revised Copyright Act.

9. Other Copyright Issues: Further Study

An issue remains whether data bases and data transmissions, when carried on by cable companies, should come under broadcasting provisions of new Copyright legislation. Since the property in question is different from specific broadcasting materials, it might be better left to other Copyright provisions regardings computer programs and their transmission.