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COMMUNICATIONS AND COPYRIGHT IN CANADA AND THE U.S.: A SURVEY OF CURRENT LAW AND PROPOSALS FOR CHANGE

Barbara L. Waite*

With the exception of some minor amendments, Canada’s present copyright legislation dates to 1921. The basic concepts are similar to those of U.S. copyright law,¹ and Canada is now struggling, as the U.S. did ten years ago, to bring its copyright law into conformity with modern technology.

In 1984 the Department of Consumer and Corporate Affairs and the Department of Communications jointly issued a White Paper with proposals for revision of Canada’s Copyright Act.² The White Paper was referred to the Parliamentary Standing Committee on Communications and Culture, which accepted written comments and held public hearings over several months in 1985. The Sub-committee on the Revision of Copyright issued its Report in October 1985, and the Government responded in February 1986.³ On 27 May 1987 the

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Government introduced its legislation, for which it has every expectation of passage.4

One of the more controversial Canadian-U.S. copyright issues of recent years which affects the communications industry is that of satellite/cable programming transmissions and retransmissions. This issue, although considered in the White Paper and by the Subcommittee, was omitted from the initial Government Bill. As a result of the Canadian-U.S. Free Trade Agreement, however, the Canadian Government has committed to establishing copyright liability for satellite/cable programming transmissions and retransmissions. Whether this protection will take the form of a compulsory license similar to that in use in the U.S. has not yet been decided. The U.S. compulsory license regime is itself under intense scrutiny.

This article focuses on the aspects of copyright that most directly affect radio and television broadcasters, cable system operators, and those who provide the programming that is distributed by means of broadcast and cable. The author compares existing U.S. and Canadian law along with proposed changes thereto, and identifies unresolved problems.5 Variances between U.S. and Canadian copyright law in the areas of determining copyright ownership, moral rights protection, transferability of copyrights, limitations on copyrights, and remedies for infringement are important to the mass media as both consumers and producers of copyrighted works. These differences and the resulting pitfalls and problems will take on even greater importance if either the U.S. or Canada decides not to use the compulsory license for cable or satellite transmitted programming.

The author advocates that both the U.S. and Canada should subject satellite/cable transmissions and retransmissions to full traditional copyright liability. Although there are some similarities of purpose in the origins of cable-delivered television service in both the U.S. and Canada, the U.S. compulsory license approach is based upon a political compromise unique to the U.S. The author traces the history of this compromise and its interrelationship with communications regulation to demonstrate that the compulsory license is no longer warranted in the U.S. and should not be adopted by Canada.


5. Many of the issues identified by the White Paper and the Sub-committee are not addressed in the Government Bill pending before the Canadian Parliament. The Government anticipates additional legislation to deal with many of the remaining issues and recommendations, so this article does not limit its discussion to the Bill's contents.
I. Who Owns Television Programming and What Rights do They Have?

The second part of this article focuses on the highly visible issue of establishing copyright liability for cable/satellite transmitted and retransmitted programming. The controversy has focused on whether copyright liability should exist for these uses, and both the U.S. and Canada have found the issue difficult to resolve.

The implications of copyright ownership are less obvious than whether or not a copyright should protect cable/satellite transmissions at all, but they are equally important to the creator and potential users of the work. Once liability for the use of a work is established, the questions of who owns the rights to authorize use, the extent of the rights owned, how they may be transferred, and penalties for infringement take on greater importance.

Because Canada has now committed to establishing some type of copyright liability for cable/satellite retransmissions, this article will review the issues relating to copyright ownership and focus upon issues of media interest. Among these issues in both U.S. and Canadian law is that of determining copyright ownership, particularly when there are numerous contributors to a sound recording or audiovisual work, as is the case with movies and television programming. In addition, although it is relatively uncontroversial in Canada, a major issue is developing in the U.S. over the related questions of whether creators should be entitled to "moral rights" and the extent of these copyright-related rights.

A. Who Is The "Author" of Television Programming And Broadcast Signals?

Copyright is an element of all broadcast programming, whether the type of programming is provided by the commercial networks, purchased independently by the local broadcaster, or originated by the local broadcaster. This programming is also comprised of various copyrightable elements such as music, still photographs, and textual information. Furthermore, the entire "broadcast day" representing the broadcaster's decision on how and when to air all of these disparate elements and programs may constitute a copyrightable work. All of these elements must be analyzed to determine who owns the rights so that infringement can be avoided.
Both U.S. and Canadian law consider the author of a work to be the first owner of the copyright. Defining the author, however, may not be as straightforward as it seems.

For example, current Canadian law considers the “author” of a photograph to be the person who owns the negative from which the photograph was reproduced. U.S. law considers the author of a photograph to be the person who took the photograph. Neither of these definitions is much assistance in determining the author of photographs taken by remote-sensing satellites because such photographs are computer-generated. The mass media have developed more and more interest in access to such satellite photographs for news reporting purposes, particularly since the role these photographs played in breaking the news story of the Chernobyl nuclear plant disaster.

Sound recordings and audiovisual works create different definitional problems. Current Canadian law treats sound recordings similarly to photographs: the person who owns the original plate from which a sound recording is derived is considered the author and, consequently, the owner of the copyright. The author of an audiovisual work, such as a videotape or film, is not currently defined. Consequently, it can be protected as a photograph, in which case the author is the owner of any negative(s), or as a dramatic work, in which case authorship is uncertain but probably resides with the producer.

The White Paper proposed clarifications in these areas and the Sub-committee adopted some of its recommendations: the photographer would own the copyright in a photograph, and the producer would own the copyright in sound recordings. The Sub-committee,

6. 2 R.S.C. C-30.12(1). U.S. law provides that the initial copyright owner is the author, but does not make the distinctions the Canadian Act makes based upon the subject matter. 17 U.S.C. § 201(a) (1976).
7. 2 R.S.C. C-30.9. This presumption can be changed by agreement of the parties.
9. See Office of Technology Assessment (OTA), Commercial Newsgathering from Space: A Technical Memorandum (1987). See also 15 U.S.C. §§ 4212(a), 4272(e), 4272(f) (1984). In the U.S., the Government claims no copyright in photographs from government-owned meteorological satellites. When LANDSAT was privatized, the system operator was given the exclusive right to market the LANDSAT photographs for a maximum of ten years from the date of sensing.
10. 2 R.C.S. C-30.10.
11. Id. C-30.3(1)(e).
However, did not address the White Paper's proposal that the producer be considered the author of audiovisual works. The Bill does not address authorship at all, although the Government agreed in principle with the Sub-committee's recommendations.

The Sub-committee also recommended that, in addition to protection of the copyrighted material embodied in the signals, broadcasters should have protected reproduction, transmission, and retransmission rights in the signal itself.

The Government again agreed in principle with these recommendations, but the current bill does not include such rights. In addition to the satellite/cable retransmission issue discussed in detail hereinafter, another question left open by this omission involves the vertical blanking interval (VBI) and teletext.

The VBI may be used to transmit additional information on the television broadcast signal. Some of it is already used for technical purposes to maintain the video signal and to provide captioning for the hearing-impaired. Other possible uses include news and weather services, community calendars, and notices of upcoming programming.

Consequently, the question arises as to whether there is copyright protection for the information contained in the VBI, and if so, to whom does it accrue as the author of such information. One U.S. court considered the issue in the context of whether the retransmission of a superstation's programming by a cable operator who failed to also retransmit the teletext information infringed the copyright by altering the programming content. The court held that the copyright

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14. The Sub-committee recommended establishment of a regime specifically to protect audiovisual works. Report, supra note 3, at 36-39. It concluded that the term "audio-visual" works was more generically appropriate than the White Paper's recommended term of "cinematographic" works. Id. at 36; White Paper Guide, supra note 12, at 11-12.


16. The television picture is produced by creating a series of vertical lines across the television screen, 525 in American and Canadian systems. These lines are created by an electron gun, which may be mentally compared to an electronic typewriter or computer printer, inserting elements of the typed whole or picture one line at a time. This process is quite rapid in the case of a television picture (the entire picture is scanned 30 times per second). At the end of each frame of 525 lines, the gun must return to its starting position in the upper left-hand corner. During the time it takes for it to do so, the picture is blanked out for the equivalent of 21 lines. This interval is never seen on the television receiver unless the set's vertical "hold" is out of position, and then it can be observed as a wide blank line across the screen. The interval can also be seen if the receiver has a decoder to allow it to tune into the VBI.

17. WGN Continental Broadcasting Co. v. United Video Inc., 693 F.2d 622, 626 (7th Cir. 1982). As discussed more fully later in this article, a "superstation" is a local television station whose signal is picked up by a third party for retransmission to distant markets, usually via satellite. Although U.S. law permits such retransmission if a compulsory license fee is paid, the benefits of the compulsory license are available only if the cable system operator retransmits the signal without alteration, i.e., as a "passive" transmission.
in the program included the teletext in the VBI as an integral part of the program.\textsuperscript{18} The court emphasized that its holding was based upon the teletext transmission being a "related image."\textsuperscript{19} Without discussion, the court seemed to take for granted that the teletext portion of the signal could be copyrighted by the originating station if it wished to do so.\textsuperscript{20}

It is possible that a teletext transmission could be protected under Canadian law as a literary work. A problem arises, however, from the requirement that a work be fixed. Current Canadian law requires that the work be fixed in material form, while U.S. law only requires fixation in any tangible medium of expression.\textsuperscript{21}

The Sub-committee addressed the issue of home taping of broadcast signals, whether on audio tape or videotape, separately from broadcast rights. The United States Supreme Court dealt with the home video recording issue in the \textit{Betamax} decision.\textsuperscript{22} The Court held that home recording of off-air broadcasts is a fair use, based upon its finding that the primary purpose of such recording is time-shifting, \textit{i.e.}, making a temporary recording as a convenience to watch at a different time.\textsuperscript{23} Based upon this reasoning, most home audio taping, as it is not done for time shifting purposes, would not be a fair use; therefore, it would be an infringement. The difficulties of enforcement, however, are overwhelming.\textsuperscript{24}

The Sub-committee recognized that the concept of "fair dealing" was never designed to respond to the issue of home recording.\textsuperscript{25} The Sub-committee also recognized that logistical problems limited the possible solutions to compensating the copyright owner or providing an exception for home copying.\textsuperscript{26}

\textsuperscript{18} Id. at 628.
\textsuperscript{20} \textit{WGN}, 685 F.2d at 221.
\textsuperscript{21} 2 Can. Stat. C-30.3; 17 U.S.C. § 102(a) (1976). The Sub-committee recommended redefining fixation to allow for new media, particularly computer use. \textit{Report, supra} note 3, at 41-44. The current Bill does not directly address the fixation issue but does specifically include computer programs as a protected work.
\textsuperscript{23} \textit{Sony Corp.}, 464 U.S. at 421. To the extent that teletext is not protected, the Sub-committee's recommendation of a right of retransmissions would afford limited protection to teletext.
\textsuperscript{24} For a thorough discussion of the audio taping question, \textit{see M. & D. Nimmer, 3 NIMMER ON COPYRIGHT} § 13.05(F)(ii) (1987).
\textsuperscript{25} \textit{Report, supra} note 3, at 73.
\textsuperscript{26} Id. at 73-74.
Based upon the comments it received, the Sub-committee concluded that home taping represents a use for which the copyright owner should be compensated. It recommended that a royalty system be established with tariffs to be collected from importers and manufacturers of the copying equipment and the medium used to store the work. The Copyright Board would administer the regime. The Government's response recognized "the merit of the Sub-committee's objective to compensate creators," but reserved judgment on the best way to implement it.

The issue of home taping, whether video or audio, has not yet been satisfactorily resolved in the U.S. As noted above, whether or not the factual basis for the Betamax finding is sound, it does establish a right to tape off-air broadcasts for personal nonprofit uses. Betamax, however, did not address the home taping right in the context of cable or pay television. There is little doubt that home taping which copies or reproduces a rented or borrowed prerecorded tape is considered infringement by everyone but the consumer and home taper. Whether the purchase of a prerecorded tape or record also provides consumers the right to duplicate it for their own use on the same or another medium is more highly debated. In any of these instances, however, the primary difficulty lies in convincing consumers that they do not have the right to make such home tapes.

B. What Happens When There Are Multiple "Authors"?

Additional problems exist in identifying the owner of a copyright in sound recordings and audiovisual works. U.S. law does not define author(s) in either context. Because such works are usually the product of a number of people who make discrete and original

27. Id. at 74.
28. Id. at 74-77.
29. Id. at 76-77. Such an approach would be consistent with that adopted or considered by most industrialized countries. See G. Davis, Private Copying of Sound and Audio-Visual Recordings (1984).
30. See, e.g., Copyright Issues Prevented by Digital Audio Tape, Joint Hearing before the Sub-committees on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary and the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 100th Congress, 1st Session (1987).
31. See M. & D. Nimmer, 1 Nimmer on Copyright § 2.10(A) (1987). It should also be noted that under Canadian law, sound recordings and cinematographic or audiovisual works have a copyright term of fifty years from creation. 2 R.C.S. C-30.5. This is in contrast to the usual term of life of the author plus fifty years. The White Paper proposed changing Canadian law to a term of fifty years from publication or seventy-five years from creation. White Paper, supra note 2, at 55-56.
contributions, all could be authors so that the work becomes a joint or collective work. Unless copyright ownership is established by contract or employment relationship, copyright will be determined by whether the work is one commissioned, made for hire, a joint work, or a collective work.

1. Commissioned Works and Works Made for Hire

Commissioned works are currently treated essentially the same under U.S. and Canadian law. However, Canadian law provides an exception in the case of engravings, photographs, and portraits: the copyright owner is the person who commissioned the original or plate, not the creator of it. The 1976 Copyright Act reversed U.S. law from this presumption to treating the commissioned work as a "work for hire" only if there is a written agreement to do so. Under the White Paper's proposals and the Sub-committee's recommendations, all commissioned works would be treated as they are currently treated in the U.S.: the creator would own the copyright unless otherwise agreed.

Both U.S. and Canadian law agree that when the work is one "made for hire," i.e., the work is created by an employee in the course of his employment, copyright ownership is vested in the employer unless the parties agree otherwise. No change in this treatment has been suggested. The Sub-committee recommended, however, that a definition of "employee" for copyright purposes be established. The Government agreed with these recommendations, but said it would study whether "employee" should be statutorily defined. The Bill did not include provisions based on any of these recommendations.

The U.S. Copyright Act does not define employee, so determining whether a creator is an employee or an independent contractor has

32. 2 R.C.S. C-30.12(2).
33. 17 U.S.C. § 101 (1976 & Supp. I 1980). Only commissioned works listed in the definitional section may be considered a work for hire by the agreement of the parties. These works are: a picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test or answer material to it, or an atlas. Id.
34. White Paper, supra note 2, at 31; Report, supra note 3, at 13-14.
35. 2 R.C.S. C-30.12(3); 17 U.S.C. §§ 101 (1976 & Supp. I 1980), 201(b) (1976). The duration of works made for hire are currently different under U.S. and Canadian law, and no change is proposed. Canadian law protects works produced for hire for fifty years from creation, the same duration as for other works. 2 R.C.S. C-30.12(3). In the U.S., however, works made for hire have a term of seventy-five years from first publication or 100 years from creation, whichever expires first. 17 U.S.C. § 302(c) (1976).
been left to the courts. The predominant test is that an employer-
employee relationship exists if the employer supervises and directs
the work, even though the worker may not be a regular or formal
employee.37 Supervision and direction must be active and fairly
continuous.38

It should be well noted, however, that other applications of agency
law are not necessarily analogous for the purpose of making this
distinction under U.S. copyright law.39 The policy underlying copy-
right protection of creators may support a different definition of
employee, whether that definition is established by statute or by the
courts.

Special provision is made, however, for audiovisual works under
the U.S. Act. Within the definition of works that qualify as made
for hire are those "specially ordered or commissioned as part of a
motion picture or other audiovisual work."40 Thus, the presumed
author and copyright owner of an audiovisual work would be the
employer even if parts of it were created by special order or com-
missioned from others.41

2. Joint and Collective Works

Works of joint authors and collective works are also subject to
definitional problems under current Canadian law. To qualify as a
work of joint authorship the contribution of one author must be
"not distinctive" from that of another author.42

This definition eliminates, for example, songs or musical scores in
which one individual writes lyrics and the other writes music.43
Collective works are limited to written works.44 The scope of the

38. See Annotation, Application of "Works for Hire" Doctrine Under Federal Copyright
Act (17 U.S.C. §§ 1 et seq.), 11 A.L.R. Fed. 457 (1972), for an extensive discussion of the
case law of this issue.
denied, 407 U.S. 997 (1972); Peregrine v. Lauren Corp., 601 F. Supp. 828 (D. Colo. 1983);
but see Easter Seal Soc'y v. Playboy Enterprises, 815 F.2d 323 (5th Cir. 1987).
41. For a discussion of how this works in practice in the motion picture industry, see
Colby, Copyright Revision Revisited: Commissioned Works as Works Made for Hire Under
the United States Copyright Act, 5 Whittier L. Rev. 491 (1983).
42. 2 R.C.S. C-30.2.
43. White Paper, supra note 2, at 32.
44. 2 R.C.S. C-30.2.
copyright includes the underlying works contained in the collective work.\textsuperscript{45}

U.S. law deals with joint authorship on the basis of the authors' intent that "their contributions be merged into inseparable or interdependent parts of a unitary whole."\textsuperscript{46} The White Paper had proposed a revision that would comport with U.S. law on authorship of joint works.\textsuperscript{47}

Collective works under U.S. law are protected regardless of the medium of expression,\textsuperscript{48} and the collective work copyright is limited to the work as a whole.\textsuperscript{49} Consequently, broadcast programming can be protected under U.S. law as an individual television program\textsuperscript{50} or as a collective work in the context of a program day.\textsuperscript{51}

The White Paper had proposed similar provisions,\textsuperscript{52} but these also received little attention by the Sub-committee and Government. The Sub-committee did recommend that a "broadcast day" be protected as a compilation, on the basis of broadcasters' arguments that their signals should be protected as such and not as a category of another type of work.\textsuperscript{53} The Government agreed with this recommendation in principle, but the current Bill contains no such provision. Thus, not only does authorship differ depending upon whether U.S. or Canadian law is applied, but the existence of protection itself also differs.

C. Can Authors Prevent "Colorization" or Editing of Their Work?

Canada recognizes exclusive economic rights in creators of copyrightable works,\textsuperscript{54} as does the U.S.\textsuperscript{55} As a signatory to the Berne

\textsuperscript{45} White Paper, supra note 2, at 33.
\textsuperscript{47} White Paper, supra note 2, at 32. In the case of joint authorship, U.S. and Canadian laws agree that the general term is calculated from the death of the last surviving author. 2 R.C.S. C-30.6; 17 U.S.C. § 302(b) (1976).
\textsuperscript{48} A collective work is considered a form of compilation. 17 U.S.C. § 101. (1976 & Supp. 1 1980). The definition of compilation refers to works of authorship, id., and works of authorship are protected regardless of the medium of expression, id. § 102.
\textsuperscript{49} 17 U.S.C. § 201(c) (1976).
\textsuperscript{50} Apple Barrel Productions, Inc. v. Beard, 730 F.2d 384 (5th Cir. 1984).
\textsuperscript{51} National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982).
\textsuperscript{52} Collective works would be defined by general criteria and illustrative examples, and would not be limited to written works. White Paper, supra note 2, at 32. The owner of the collective work copyright would be prohibited from using the underlying work for any other purpose. Id. at 33.
\textsuperscript{53} Report, supra note 3, at 57-58.
\textsuperscript{54} 2 R.C.S. C-30.3(1).
\textsuperscript{55} These exclusive rights are to reproduction, distribution, performance, display of the
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Convention, however, Canada also recognizes "moral rights," which include the right to claim or deny authorship and the right to maintain the integrity of the work. Present law, however, considers these rights independent of copyright and accords them more limited protection.

Both the White Paper and the Sub-committee embraced the suggestion that moral rights protection should be consistent with copyright protection. As the term of moral rights protection is not currently addressed under Canadian law, the White Paper suggested and the Sub-committee recommended a duration that would coincide with the term of copyright protection. Both also recommended strengthening moral rights by explicitly providing that the full range of copyright remedies would be available against infringement.

The Sub-committee concluded that the scope of moral rights should be expanded. Thus, it recommended that only authors have the right to authorize the use of their work in association with any products, services, causes, or institutions, and that the authors have the right to prevent any modification of an artistic work. Such rights should be limited to allow physical relocation of the work or structure in which the work is housed and legitimate restoration and

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work, and to preparation of derivative works. 17 U.S.C. § 106 (1976). In the U.S., however, copyright is not available when the creator of the work is the U.S. Government. Id. at § 105. To be a U.S. Government work, it must be prepared by an officer or employee of the U.S. Government within the scope of his official duties. Id. at § 101. Therefore, government commissioning of a work or government agency input does not necessarily make it a U.S. Government work in the public domain. See Schnapper v. Foley, 471 F. Supp. 426 (D.C. Cir. 1980); Rand McNally & Co. v. Fleet Management Systems, Inc., 591 F. Supp. 726 (N.D. Ill. 1983). In contrast, the Crown maintains the copyright in acts of Parliament and judicial decisions but is not itself specifically bound by the Copyright Act. 2 R.C.S. C-30.11.


57. 2 R.C.S. C-30.12(7). "Moral rights" do not include the droit de suite and should not be confused with it. The droit de suite gives an artist a share of any increase in the work's value after its initial sale by the artist by providing him a percentage of the increased profits from subsequent transfers of the work. See Nimmer, supra note 56, at § 8.22. The White Paper solicited public comment upon whether the droit de suite should be extended as part of the Copyright Act revision. White Paper, supra note 2, at 22. The Sub-committee recommended against such an extension. Report, supra note 3, at 28.

58. 2 R.C.S. C-30.12(17); Report, supra note 3, at 6-8.

59. White Paper, supra note 2, at 58; Report, supra note 3, at 8.

60. White Paper, supra note 2, at 58.

61. Report, supra note 3, at 6-8.

62. Id.
preservation activities. The Bill would fully implement the Subcommittee's recommendations.

That U.S. law does not recognize the doctrine of "moral rights" has become a judicial refrain preparatory to enforcing these rights under alternative theories, such as right to privacy or publicity, copyright, misappropriation, false light, unfair competition, defamation, contract, or the Lanham Act. Consequently, the expanded moral rights provisions of the Canadian Bill would not effect a dramatic difference between U.S. and Canadian law in that authors receive similar, although more limited, protection in the U.S. under other legal theories.

This effect is not widely perceived, however, in the U.S. The question of U.S. accession to the Berne Convention has received substantial attention from the communications industry due to the issue of moral rights. Bills are pending in Congress for this purpose, but communications industry opposition at House hearings has been strong. The primary concerns focus on the potential for those with authorship claims in audiovisual works to object to colorization, editing, and commercial insertions for broadcast purposes.

These concerns are similar to those voiced by U.S. cable television groups in connection with proposals to eliminate the compulsory license for broadcast retransmissions. The alternative—negotiation for individual licenses to use copyrighted material—is no more at-
tractive to cable system operators than such individual negotiation for waiver of moral rights claims is to broadcasters.

D. How Can Authors Transfer Their Rights?

The Bill adopted the White Paper's proposal that moral rights cannot be assigned but can be waived. Therefore, waiver—and not transferability—will be the broadcaster's goal as to moral rights under Canadian law. One can expect the purchaser or licensee of rights in a work to seek a contractual waiver of moral rights as part of the negotiations. As to copyrights, in the absence of a compulsory license, the parties must rely on a negotiated individual license or a transfer of copyrights to protected works. Thus, differences in U.S. and Canadian treatment of how copyrights can be transferred are significant.

1. Negotiated Licenses

Under both U.S. and Canadian law, rights acquired under copyright may be transferred in whole or in part by rights, time, and territory. The transfer can be made by means of an assignment or by an exclusive/nonexclusive license. The conveyance must be in writing and signed by the owners or their agents. Canadian law also provides for an inalienable reversionary interest, i.e., any rights under copyright transferred revert to the creator's heirs twenty-five years after the creator's death.

In contrast, U.S. law, in providing for a right of termination, specifically excludes transfers made by will and transfers of rights in works made for hire. The termination right can be exercised thirty-five years after the grant unless the grant includes publication rights, in which case the right vests at thirty-five years from publication or forty years from grant.

Although the White Paper suggested changes regarding transferability of rights, the Sub-committee did not address transferability

71. 2 R.C.S. C-30.12(5).
73. Id. § 203(a)(3).
74. The only changes contemplated by the White Paper regarding the transference of rights were the elimination of the requirement that a nonexclusive license be in writing, allowing the transference of rights in future works, and providing for testamentary disposition of
issues in its report. By the Sub-committee's establishing the rule that "silence implies assent," the conclusion is drawn that the Sub-committee approved these proposals. Nevertheless, these changes were omitted from the Government's bill.

2. Nonnegotiated Licenses and Fair Use

Copyright owners have the choice of whether, how, and to what extent they wish to license others to use their work. This is the general rule, but for various policy reasons the law places certain limitations on these choices.

There are four general categories of limitations on a copyright owner's exclusive rights under Canadian law: compulsory licenses, permisory licenses, "fair dealing," and certain specific exemptions. U.S. limitations are similar. These limitations allow others to make certain uses of a copyrighted work, whether or not the copyright owner approves, without incurring liability for infringement.

Once the copyright owner publicly distributes the work, a compulsory license allows others to make limited use of it based upon payment of established royalties. The Canadian permisory license is similar to the compulsory license in that once its application is triggered it does not require the permission of the copyright owner to be invoked. Its permissive nature is, however, demonstrated by the requirement that application must be made to invoke application of the license, rather than by an operation of law. After publication, for example, a license may be granted to one other than the copyright owner to publish the work in Canada and pay royalties if the work is not made available for publication after notice to the copyright owner. The White Paper proposed and the Bill contains a provision

copyright in unpublished works. White Paper, supra note 2, at 59-60. The White Paper recommended abolishing rights. Id. at 57.

Consequently, if the White Paper's proposals were adopted, an unwritten nonexclusive license recognized as valid in Canada would not be considered so in the U.S., and a transfer of future rights valid in Canada would not be recognized in the U.S. As the U.S. does not recognize copyright in a work not yet fixed in tangible form, there would be no rights in future works to transfer. 17 U.S.C. § 103 (1976). The U.S. already allows for testamentary disposition of unpublished works. Copyright protection attaches at fixation, not publication. Id. § 102. Therefore, the author's exclusive rights can be transferred by will, prior to publication. Id. § 106. The U.S. and Canadian provisions for reversion and termination of rights are already quite dissimilar, so that the only effect of Canada's elimination of its limited reversionary rights would be, perhaps, to make Canadian practitioners less sensitive to the existence of termination rights under U.S. law.

76. 2 R.C.S. C-30.14.
77. Id. C-30.14.
78. White Paper, supra note 2, at 63.
by which the Copyright Appeal Board would grant a permisory license when the author of a work cannot be located. U.S. law makes no provision for either of these contingencies.

The Canadian compulsory licenses extend to mechanical reproduction of literary, dramatic, and musical works; works of deceased authors; and works withheld from the Canadian market.79 In contrast to U.S. law, which subjects "jukeboxes" to a compulsory license,80 the Canadian courts have interpreted the law as exempting jukebox owners from paying royalties to copyright owners.81

U.S. compulsory licensing has also been established for cable television,82 phonorecords,83 and noncommercial broadcasting use of certain nondramatic musical, pictorial, graphic, and sculptural works.84

The Copyright Royalty Tribunal has the responsibility for setting rates for the compulsory licenses under the U.S. Copyright Act and distributing royalties from cable TV and jukebox use.85 The Copyright Royalty Tribunal has, however, been subject to increasing criticism, and the U.S. compulsory license for cable television is under intense scrutiny.

Although U.S. law provides for compulsory licenses for phonorecords and noncommercial broadcasting, the Copyright Royalty Tribunal does not distribute these royalties. The mechanism for use of

79. 2 R.C.S. C-30.13. The compulsory license can be used to force publication or performance of work withheld from the Canadian market after the author's death.
83. 17 U.S.C. § 115 (1976 & Supp. I 1984). The compulsory license is available for phonorecords of a nondramatic musical work as soon as the work has been publicly distributed in the U.S. by permission of the copyright owner. The primary purpose must be for public distribution for private use, thus eliminating such commercial uses as broadcasting, jukeboxes, and background music. The use, furthermore, cannot "change the basic melody or fundamental charter of the work." Id. § 115(a); see also H.R. REP. No. 1476, 94TH CONG., 2ND Sess. AT 107-11 (1976); S. REP. No. 473, 94TH CONG., 1ST Sess. (1975) at 91-94. See Bach, Music Recording, Publishing and Compulsory License: Toward a Consistent Copyright Law, 14 Hofstra L. Rev. 379 (1986). The U.S. Copyright Act was also amended in 1984 to establish a compulsory license in connection with the rental of phonorecords. Record Rental Amendment Act of 1984, Pub. L. No. 98-450 (§ 3), 98 Stat. 1727, 1727-28 (Codified as amended 17 U.S.C. § 109 (2) (Supp. 1987)). U.S. law now reserves to the copyright owners the right to authorize record rentals and to receive royalties for such use. 17 U.S.C. §§ 109(b), 115(c)(3) (Supp. 1984).
84. 17 U.S.C. §§ 116, 118 (1976). The provisions affecting the license's availability and use are the same as for reproduction of phonorecords. It should be noted that the noncommercial broadcasting license does not include literary works. Such use was proposed and rejected. S. REP., supra note 83.
musical works generally is a nonexclusive blanket license, which is available from two major performing rights societies, ASCAP and BMI.86

The blanket licenses are used by commercial broadcasters for payment of music royalties because almost all domestic compositions are within the repositories of one of the two societies.87 Since the rise of broadcasting in the 1930s, broadcasters have unsuccessfully challenged these arrangements for use of nondramatic musical works.88

In current practice, when a broadcaster purchases the right to broadcast a program, all performance rights except the music rights are included in the purchase price. For the music rights, the broadcaster must purchase the blanket license. Although it entitles him to use any composition in the library of the performing rights society, the broadcaster is also paying for access to music he will never use. Broadcast groups have negotiated with the societies to revise the blanket license, but no successful compromise has been reached. Consequently, they are seeking statutory change to shift the burden of obtaining the blanket license from the broadcaster to the program producer, i.e., to require the producer to deliver programming with music performance rights included—so-called "source licensing."89

In considering these types of licenses under Canadian law, the Subcommittee concluded that the existing compulsory license for mechanical reproduction after the work has first been recorded should be eliminated.90 The Government’s Bill adopts this approach, thus requiring individual licensing for reproduction of recorded literary, dramatic, or musical works.

Canadian law currently provides for copyright societies as an organized cooperative mechanism for the enforcement of rights and the collection of fees, but only specifically addresses musical per-

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86. "ASCAP" is the American Society of Composers, Authors, and Publishers. Broadcast Music, Inc. is known as "BMI."
89. Bills currently pending are S. 698 by Sen. Thurmond (R-S.C.) and its companion measure, H.R. 1195 by Rep. Boucher (D-Va.). Both the House and Senate held hearings on the issue and similar bills last year.
90. Report, supra note 3, at 33-35.
forming rights societies. These societies are regulated by a Copyright Appeal Board, which approves the rate schedules of the two existing societies.

The Government generally agreed with the recommendations of the White Paper and Sub-committee regarding these issues. Among other things, the Bill expands the availability of collective organizations for copyright as suggested, but gives the Board authority to review agreements as a check on anticompetitive behavior.

The Sub-committee also recommended extending rights in sound recordings to include transmission rights, which are already provided under U.S. law and handled in practice under the blanket license regime, as discussed above. Although the blanket license has been consistently opposed by broadcasters, it appears to be the only practical alternative to individual licensing, as the Sub-committee noted. The Government’s bill did not address this issue.

In addition to limiting the author’s rights by license arrangements, for which the author receives some compensation, the law recognizes that a certain degree of use of the work should be allowed without compensation. These are exceptions to the copyright owner’s exclusive rights to the work, and they are available by operation of law within prescribed limits. Defining and applying the limits of these exceptions to the copyright owner’s rights become difficult issues, particularly when new technology is involved.

The most important of these exceptions is the Canadian “fair dealing” doctrine, which is comparable to the U.S. “fair use” doctrine. It allows “fair dealing with any work for the purposes of

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91. 2 R.C.S. C-30.48.
92. Id. C-30.50.
93. The White Paper proposed establishing a standard licensing agreement to transfer rights to a copyright society and that the use of such societies or collectives be available to authors of all protected works. White Paper, supra note 2, at 62. It was thought that this would curb the potential for abuse by any new societies and encourage their creation. Id.
94. The White Paper also suggested that the Copyright Appeal Board be revised and expanded. Id. at 63. The Board should supervise all negotiations regarding rights and rates between societies and users and have certain duties regarding compulsory and permissive licenses. Id. The Sub-committee agreed with these proposals. Report, supra note 3, at 88-93. It also recommended a modification in name to the Copyright Board, reasoning that, as the Board does not hear appeals, the current name is a misnomer. Id. at 89.
96. Id. at 51.
97. 2 R.C.S. C-30.17(2)(a).
private study, research, criticism, review, or newspaper summary.’’

The Canadian Act does not, however, provide any guidance for determining whether a dealing within any of the mentioned categories is “fair.”

The White Paper proposed that “fair dealing” become “fair use” and defined “fair use” as “a use that does not conflict with the normal exploitation of the work or subject matter and does not unreasonably prejudice the legitimate interests of the copyright owner.” The prioritized list of factors to be considered in determining if the use is fair would be: impact on copyright owner’s economic reward, type of work and its purpose, and the amount or extent of the taking.

These factors are substantially the same, if less specific, than those to be considered under U.S. law in determining if “fair use” exists: (1) purpose and character of the use, including whether it is for commercial or nonprofit use; (2) nature of the work; (3) amount and substance of the portion of the work used; and (4) effect of the use upon the potential market for the work or upon the value of the work.

The Sub-committee differed sharply in its recommendations from the White Paper. It noted that the Canadian “fair dealing” doctrine differs from U.S. “fair use” in more than name. Under U.S. law “fair use” constitutes an exception to the copyright owner’s exclusive rights, but “fair dealing” is a defense to infringement under Canadian law. The Sub-committee recommended that existing law remain substantially the same, agreeing on the White Paper’s factors as illustrative only, with no degree of priority.

Users of radios and record players are currently exempted from paying royalties to copyright owners for the works publicly performed...
As noted above, this provision has been interpreted as including "jukeboxes" where the user pays a fee to the owner of the machine to hear the work played.

The Sub-committee recommended elimination of these exemptions unless the use is for essentially private purposes. This would be consistent with U.S. law, which finds liability for unauthorized public performance for commercial purposes.

The White Paper had also suggested an exception for broadcasters to make use of "ephemeral recordings." The Sub-committee concluded that the only ephemeral recording for which exceptions are warranted are: (a) those required by the Canadian Radio-Television and Telecommunications Commission (CRTC) for the time period so required, and (b) those necessary for broadcasting elsewhere of the program by the same network or its affiliates in different time zones, which recordings could be kept for only eight days. The latter provision is the only one recognized by the U.S. statute.

The Government's response accepted all of the Sub-committee's recommendations in principle. In addition, however, it agreed with the White Paper's broader ephemeral recording exceptions to include prior recording for transmission if authorized, a six-month duration of the exception, and maintenance of the recording for research and study purposes thereafter. The Bill, however, included none of these provisions.

107. 2 R.C.S. C-30 (1971 Amend.).

108. Numerous other exemptions from infringement are now provided for nonprofit uses, including public readings, lectures, performances, displays, and copies required for compliance with certain other statutes. Additional exemptions accrue to those who publish a newspaper report of an address of a political nature delivered at a public meeting or of a public lecture. A notice may be posted at a nopolitical public lecture that reporting is prohibited. Public performance of musical works at agricultural exhibitions or fairs are exempt as long as there is no motive of gain on the part of promoters or performers. Religious and charitable organizations are exempt from paying royalties on musical works publicly performed in furtherance of a religious or charitable object. Performance may be enjoined, however, by the copyright owner. Additional exemptions allow two-dimensional reproductions of three-dimensional objects in public places, public reading of an extract from a published work, and copying a work for deposit to comply with the export provisions of the Cultural Property Export and Import Act. 2 R.C.S. C-30.17(2)(b)-(3), C-30.18. U.S. law contains similar provisions. 17 U.S.C. § 110 (1976 & Supp. I 1987).


111. White Paper, supra note 2, at 44-45. "Ephemeral recording" refers to the practice of recording copyrighted material prior to or contemporaneous with broadcast for technical reasons.


E. What are the Penalties for Infringement?

Under current Canadian law, infringement of a copyright may be direct or indirect. Direct infringement occurs when an owner’s exclusive rights are infringed by an individual’s appropriating any of those rights. An indirect infringer is one who sells the infringing copies even if this does not infringe upon the owner’s exclusive rights. Innocence can be a valid defense for an indirect infringer in the absence of copyright registration but cannot protect the direct infringer, although such failure to register a copyright may disentitle a party to damages.

U.S. law does not distinguish between direct and indirect infringement. Innocence is not a defense, but it can affect the remedies available to the copyright owner because the U.S. imposes notice requirements upon all distributed works in order to obtain full copyright protection. Such notice must be placed “in such manner and location as to give reasonable notice of the claim of copyright.” Omission of such notice may create an “innocent” infringer, and therefore substantially limit the copyright owner’s recovery of damages. Civil remedies under Canadian law can be in damages or in injunctive relief, and criminal penalties include fines and imprisonment. U.S. law provides similar remedies.

The U.S. law makes explicit provisions, however, for infringement due to alteration of retransmitted programming by cable systems. In addition to all other remedies, the copyright owner may seek that an infringing cable system be temporarily deprived of the use of the compulsory license. The broadcaster whose signal was altered and broadcasters within whose local service area the infringing retrans-

115. Id.
116. Id.; 2 R.C.S. C-30.22.
117. See Nimmer, supra note 24, § 13.08. Lack of a copyright notice on an authorized copy may relieve an innocent infringer for liability for actual or statutory damages until he receives actual notice of registration. 17 U.S.C. § 405(b) (1976).
119. Id. The Copyright Office Regulations provide examples which will fulfill this requirement of reasonableness. 37 C.F.R. § 201.20 (1981).
120. 2 R.C.S. C-30.20, C-30.25.
121. 17 U.S.C. §§ 502, 505, 506 (1976 & Supp. I 1987). The copyright owner has a choice of claiming statutory damages or proving actual damages. Id. § 504. In addition, the court may avoid attorneys’ fees and costs. Id. § 505. In addition, the copyright owner may petition for temporary and permanent impoundment of the infringing articles. Id. § 503.
122. Id. § 510.
123. Id.
missions occur also are given standing to sue for these remedies.\textsuperscript{124}

The White Paper proposed that penalties for infringement be strengthened under the new act.\textsuperscript{125} The Sub-committee concluded that existing remedies are basically satisfactory but recommended adopting a remedy of statutory damages as well.\textsuperscript{126} It also agreed that existing criminal fines should be raised.\textsuperscript{127} The Government agreed with these recommendations, and the Bill increases the maximum monetary fines for criminal infringement.

Registration of copyrighted works currently affects the infringement remedies available to the copyright owner under both Canadian and U.S. law. Registration of work with the Canadian Copyright Office is now optional.\textsuperscript{128} The advantages to registration include, inter alia, elimination of the defense of innocence to any infringement action and preservation of the rights of a transferee who is the first to register his assignment against all others.\textsuperscript{129} Although registration is also optional under U.S. law, an action for infringement cannot be brought until such time as the work is registered.\textsuperscript{130} In addition, the copyright owner's remedies are limited for infringement which occurred prior to registration.\textsuperscript{131}

The White Paper had proposed that the registration system be abolished and replaced by a statutory presumption that the person whose name appears on the face of the work is the author.\textsuperscript{132} The Sub-committee disagreed with the White Paper's proposals,\textsuperscript{133} and the Bill does not disturb the existing registration.

\begin{itemize}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} The defense of innocence should be abolished and an indirect infringer made strictly liable, unless the infringer were an importer of authorized copies or the article were acquired for personal use. \textit{White Paper, supra} note 2, at 67-68. The strict liability system should be mitigated by limiting damages against indirect infringers in appropriate circumstances. \textit{Id.}
\item \textsuperscript{126} Criminal penalties should be strengthened. \textit{Id.} at 71.
\item \textsuperscript{127} \textit{Report, supra} note 3, at 96-98.
\item \textsuperscript{128} \textit{Id.} at 97-98.
\item \textsuperscript{129} \textit{Id.} C-30.22, C-30.20(3).
\item \textsuperscript{130} 17 U.S.C. § 411 (1976).
\item \textsuperscript{131} Statutory damages and attorney's fees are unavailable for unregistered unpublished works or for published works unless registered within three months of publication. 17 U.S.C. § 412 (1976).
\item \textsuperscript{132} \textit{White Paper, supra} note 2, at 70, 73-74.
\item \textsuperscript{133} The Sub-committee recommended maintenance of the voluntary registration system for the purpose of establishing the presumption that copyright exists in the work and that the registrant is the copyright owner. \textit{Report, supra} note 3, at 93-96. The Subcommittee considered concerns that the White Paper's proposed presumption would increase the number of infringement actions brought for nuisance value. \textit{Id.} at 94-95.
\end{itemize}
II. CABLE AND SATELLITE RELATED ISSUES

As noted above, both U.S. and Canadian copyright law recognize public performance as an exclusive right of the copyright owner. Therefore, broadcasting (over-the-air transmission) or cable transmission (by cables or wires) of a copyrighted program without permission constitutes copyright infringement.

Questions of copyright liability arise when use is made of the signal and its programming through unintended reception. Reception of off-air (i.e., cable) signals in the home is obviously the intended use of the copyright license obtained by the broadcaster. The issue therefore involves the retransmission for commercial use of an off-air broadcast signal. Similarly, when a transmission is intended and licensed for paying subscribers, the issue of copyright liability arises with regard to unauthorized reception by nonsubscribers.

When the signal is transmitted by satellite (an over-the-air signal rather than one transmitted by cable), this is not the type of "off-air" signal traditionally considered by broadcasters as one intended for reception by the public. This type of transmission has been used to provide programming to cable system operators for retransmission to paying subscribers or to "feed" national network programming to affiliated local stations for retransmission. Programming transmitted to cable system operators by satellite includes so-called "premium" services, such as Home Box Office (HBO) and exclusive sports programming (ESPN), as well as the off-air signals of a particular independent television station, the so-called "superstation." Such transmissions have obviously been unintended for reception by the general public, and the copyright owners of such programming consider unauthorized reception an infringement of their copyrights. That unauthorized reception constitutes a copyright infringement has been disputed by owners of home satellite dish systems.

A. Cable & Satellite Retransmissions under U.S. Law

Questions as to the form and degree of copyright liability for retransmission of off-air signals or unauthorized reception of satellite programming have not yet been satisfactorily resolved under U.S.

134. See supra note 54 and accompanying text.
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law. A review of these problems may be useful both for considering the task facing the reformers of Canada's copyright law and for putting U.S. concerns about unauthorized Canadian retransmission of U.S. off-air signals into perspective.

1. Traditional Cable Operations

In 1967 efforts to complete the revision of U.S. copyright law broke down over the question of liability for retransmission of signals by cable television operators. Cable television had originated as Community Antenna Television (CATV), the usual scenario being a community in a cooperative arrangement bringing in network television signals over cable due to the lack of local off-air network signals. This was considered an unobtrusive and appropriate use of the network signals. The purpose of bringing those signals to otherwise unserved areas was similar to CANCOM's initial goals.

The Supreme Court concluded that this traditional function of CATV did not constitute copyright infringement. The cable systems were passive beneficiaries of the broadcaster's licensed performance of a copyrighted work.

2. The Rise of "Distant Signals"

As more communities obtained local network off-air service, cable systems expanded their service. Operators brought in "distant signals" by microwave transmission which, in many instances, duplicated local programming. Consequently, the FCC, on the theory that cable service was a supplementary service rather than a substitute for off-air service, established in 1965 the "must carry" rules requiring the cable operator to carry local off-air signals upon request of the broadcaster. In addition, cable systems were prohibited from duplicating local stations' programming on distant signals within a fifteen-day period of the local broadcast.

137. See infra notes 216-17 and accompanying text.
139. Id. at 399.
141. Id. at 719-21.
Although initially limited to cable systems fed by microwave transmissions, in 1966 these rules were extended to cover all cable television systems. The exclusivity rule was modified, however, to limit the prohibition on program duplication to same-day retransmission. Cable system operators were also prohibited from duplicating network programming off a distant signal that would compete with the local affiliate. At the same time, the Commission required cable systems operating in the top 100 television markets to undergo an evidentiary hearing before importing distant signals. The operators had to establish to the Commission’s satisfaction that such importation would not constitute unfair competition to local off-air broadcasting, particularly UHF service.

The Communications Act prohibits any broadcast station from rebroadcasting the programming of another broadcasting station without express authority to do so, a prohibition grounded in the concept of copyright in broadcast programming. The FCC, however, did not conclude that this prohibition was applicable to cable system retransmissions.

The hearing procedure proved to be burdensome and unworkable. Recognizing this, the Commission eliminated this procedure two years later and replaced it with a twofold policy: (1) importers of distant signals would have to obtain the permission of the originating system, and (2) such importers could not bypass closer distant signals that were less popular (”anti-leapfrogging rules”).

At this time, the FCC took note of developments in Congress regarding copyright. Consequently, its 1968 rules were to be considered interim rules, until such time as Congress had resolved the

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142. CATV Hearings, supra note 136, at 15-77 (Second Report and Order re: CATV).
143. Id. at 77-79 (statement of Rosel H. Hyde).
144. Id.
145. Id. “UHF” stands for Ultra High Frequency. The F.C.C. originally assigned television service to the VHF (Very High Frequency) band (54-72, 76-88, 174-216 MHz). It became apparent that these twelve channels would be insufficient for national coverage, so additional channels were assigned to the UHF band (currently there are 56 UHF channels occupying 470-806 MHz). The later-allocated UHF stations were at a disadvantage for several reasons: the networks had already affiliated with VHF stations, TV sets were built without UHF tuners until 1964, and UHF transmitters are more expensive to install and operate. The F.C.C. was particularly solicitous of the viability of UHF stations as an “infant” service.
retransmission issue or it became clear that Congress would not be able to do so.\textsuperscript{149}

In 1970 the FCC proposed further rules but emphasized the need for copyright legislation.\textsuperscript{150} It appealed to Congress in 1971 that Congress address the issue.\textsuperscript{151} At the same time, another lawsuit was pending on the retransmission issue. CBS sued Teleprompter, who was then the largest multiple cable system operator (MSO).\textsuperscript{152}

The Teleprompter case involved a cable system operator who originated programming, sold advertising in its programming, and imported distant signals for specialized programming.\textsuperscript{153} The Court followed its own precedent, concluding that these differences did not affect copyright liability.\textsuperscript{154}

In the meantime, however, the regulatory burdens and uncertainty served to suppress development in the cable television industry notwithstanding the lack of copyright liability. Consequently, the 1971 Consensus Agreement was reached among cable system operators, program suppliers, and broadcasters.\textsuperscript{155} Cable system operators agreed to support copyright law revision creating a compulsory license for retransmitted works in exchange for support for revisions in the FCC’s regulatory environment for cable.\textsuperscript{156} As a result, in 1972 the FCC allowed distant signal importation into all markets, although the type and amount was limited.\textsuperscript{157} A complex system of program exclusivity was also established.\textsuperscript{158}

3. The U.S. Cable Retransmission Copyright Regime

In 1976 the copyright law revision was enacted with the compulsory license provision for cable system retransmission.\textsuperscript{159} The Act overruled

\textsuperscript{149} Id. at 432-33.
\textsuperscript{151} Cable Television Proposals, 31 F.C.C.2d 115, 115-17 (1971).
\textsuperscript{154} Id. at 410.
\textsuperscript{155} See Copyright Law Revision: Hearings before the Sub-committee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, 93rd Cong., 1st Sess. 278-309 (1973) (statement of Jack Valenti, President, MPAA). The text of the Consensus Agreement accompanies Mr. Valenti’s statement as Appendix D. Id. at 307.
\textsuperscript{156} Id.
\textsuperscript{157} Cable Television Report and Order, 36 F.C.C.2d 143 (1972).
\textsuperscript{158} Id.
the Supreme Court's opinions by specifically establishing that cable system retransmissions constituted a public performance and, therefore, a right exclusive to the copyright owner.\textsuperscript{160}

The compromise to which the cable operators had agreed was a compulsory license. They would not have to obtain the consent of the copyright owner for retransmission, hence the license was compulsory. Royalties would be calculated on the basis of homes served and would be administered by the Copyright Royalty Tribunal.\textsuperscript{161}

There are two basic exceptions, however. Retransmission of local off-air signals and distant signal network programming do not earn royalties.\textsuperscript{162} Neither of these retransmissions was thought to be a use injurious to the copyright owner because their transmission within the relevant geographic areas had already been licensed.\textsuperscript{163} Furthermore, the cable systems had no choice with regard to carriage of local signals under the FCC's must-carry rules.\textsuperscript{164} Consequently, copyright liability and the compulsory license attached to importation of distant signals carrying non-network programming. Other limitations on the use of the compulsory license are that the cable system must passively retransmit the signal, \textit{i.e.}, it cannot alter commercial or program content, and the retransmission must be simultaneous.\textsuperscript{165}

The Act's definition of cable systems requires the signal being retransmitted to be an off-air broadcast signal and the secondary retransmissions to be made by "wires, cables, or other communications channels to subscribing members of the public who pay for such service."\textsuperscript{165} Thus, the definition could be construed to include direct satellite to home service, and there is some support in the legislative history for such a construction.\textsuperscript{167}

\textsuperscript{161} Id.
\textsuperscript{162} 17 U.S.C. § 111(b), (d) (1976). The definition of "local signal" is derived from the F.C.C.'s must-carry rules, not the Copyright Act. 17 U.S.C. § 111(f) (Supp. 1986). Thus, the F.C.C.'s subsequent decision to license low-power television (LPTV) stations left a question as to whether cable operators retransmitting the signal of an LPTV station would have to pay royalties on the retransmission under the compulsory license regime. Congress dealt with this question by amending the Copyright Act to establish that LPTV stations are considered local signals for which no royalties are required. Low Power Cable Television Station Act of 1986, Pub. L. No. 99-397, 100 Stat. 848 (codified at 17 U.S.C. § 111(f) (Supp. I. 1986)).
\textsuperscript{163} H.R. REP., supra note 160, at 90.
\textsuperscript{164} Id.
\textsuperscript{165} 17 U.S.C. § 111(e) (1976).
\textsuperscript{166} Id. at § 111(f) (1976 & Supp. I 1986).
\textsuperscript{167} See Copyright Law Revision: Hearings before Sub-committee No. 3 of the Committee on the Judiciary, 89th Cong., 2d Sess. 1270 (1965) (exchange between Rep. Tenzer and
4. The Rise of Satellite-Delivered Programming and the 1984 Cable Act

The FCC almost immediately began easing restrictions on cable systems. In 1980 it eliminated its regulation of distant signal importation, including the exclusivity requirements. As a result, the major remaining elements of the FCC's cable-regulatory scheme were the must-carry and network non-duplication rules.

The availability of satellite transmission resulted in new developments in cable. One such development was the so-called "superstation," a broadcast station programmed and distributed not only in the local market through its off-air signal but also in distant markets by satellite to cable system operators. The availability of satellite technology also gave rise to a new type of cable programming, the premium cable satellite programmer. The cable satellite programmer originates programming for distribution to cable system operators who, in turn, retransmit to their subscribers.

These developments and the FCC's deregulation accelerated the growth of the cable television industry. When the FCC concluded that it would no longer require a license for television receive only (TVRO) satellite antennas (parabolic "dish" antennas), falling prices for home dish systems and the increasing use of satellite distribution by cable system programmers and broadcasters combined to create a home satellite dish industry similar in function to the original CATV systems. And similar copyright issues arose with regard to the two basic types of programming delivered by satellite: (1) the programming designed for reception by cable system operators for retransmission to their subscribers, including both originated programming and retransmission of superstations, and (2) network tel-

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revision "feeds" to local affiliates intended for retransmission for off-air reception.

Congress re-entered the fray by enacting the Cable Communications Policy Act of 1984. The Act addressed numerous issues related to the cable industry, but among its most important provisions was the establishment of a copyright liability regime for the cable system programmers and home satellite dish industry. The Act gave the satellite cable programmer two options: (1) if its signal was unscrambled, no copyright infringement would exist for reception of the signal by a home dish system owner, or (2) the programmer could scramble its signal but must then make the scrambled signal available to the home dish system owner for purchase.

Most satellite cable programmers have taken advantage of the option to scramble their programming and are making the programming available to home dish system owners through one or more of three distribution outlets. Some programmers are directly marketing the programming, others are marketing it through local cable system operators, and others are making use of new satellite cable distribution middlemen.

It is not yet clear whether congressional desire to have satellite programming made available to home dish system owners at reasonable prices is being fulfilled. Manufacturers of the de facto standard encoding/decoding units initially had difficulty meeting demand. Concern has also been expressed that the large multiple cable system operators are dominating the distribution market for programming and keeping the programming price high.

Pursuant to congressional direction, the FCC has continued to monitor market conditions. Its most recent report concluded that

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175. Id. at 5-13.
176. Id. at 14-16. Piracy through use of pirated decoder chips, remains an unsolved problem as well. Id. at 16-17. See Abney & Abney, The Judicial Outlook on Signal Piracy, 8 COMM. & L. 3 (June 1986).
177. Scrambling Report, 2 F.C.C. Rec. 1669 (1987). Bills are currently pending to regulate home dish programming distribution: H.R. 1885 and its companion, S. 889. The Senate Commerce Committee reported S. 889 out on Nov. 30, 1987, but the Bill remains controversial and a floor fight is likely. The House had taken no action at the time of writing.
decoders and programming distribution channels are both readily available at reasonable prices.\textsuperscript{178} The greatest danger to the developing market, the Commission noted, is increased signal piracy, which threatens the viability of the home dish programming distributions market.\textsuperscript{179} The FCC recommended that Congress increase the penalties for signal piracy.\textsuperscript{180}

5. \textit{Unresolved Issues Under the Current Regime}

Several issues arising from use of new technologies and the original consensus compromise underlying the cable compulsory license of the 1976 Copyright Act have not yet been addressed. The 1984 Cable Act did not make it clear whether superstations delivered directly to home dish owners instead of to cable system operators are entitled to use the compulsory license. The Act also failed to address the question of unauthorized reception of network feeds, which is an issue that does not involve cable system operators.

Congress is considering legislation that would make superstations received directly by home dish owners subject to the compulsory license.\textsuperscript{181} The legislation has its opponents, however, among which are the conventional networks. The networks want to protect their local affiliates from competition by superstations that are distant signal network affiliates.

The networks have already sought to enjoin a newly created distribution company from commercially distributing three network affiliates as superstations to cable systems and home dish system owners, alleging violation of the Communications Act and copyright infringement.\textsuperscript{182} The distribution company maintains it is entitled to use the compulsory license established for cable companies. At the time of writing, no decision had been issued.

The issue of network feeds is slightly different and is still unresolved. The feed has never been intended for reception by the general

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\textsuperscript{179} Id.
\textsuperscript{180} Id. The Satellite Broadcasting and Communications Association has established a toll-free nationwide Satellite Piracy Hotline to report dealers (800-356-3160) and consumers (800-533-4584) engaged in signal piracy.
\textsuperscript{181} H.R. Res. 2848 was introduced by Rep. Kastenmeier (D-Wis.) on June 30, 1987. Hearings were held by the House Copyright Sub-committee in November 1987 and January 1988.
public in the form in which it is transmitted to local affiliates. The Communications Act prohibits rebroadcasting of a signal, but the 1984 Cable Act made unauthorized reception of the signal by an individual legal if the signal is not scrambled and home distribution methods are not made available.\textsuperscript{183}

The networks have not scrambled their feeds, although some are considering doing so. Therefore, the home dish system owner considers network feeds in the same category with satellite cable programming before the 1984 Cable Act: the signals are unprotected and are therefore capable of reception by the homedish system owner who is making a fair use of the signal. As might be expected, the networks do not agree. The congressional concern is for home dish owners who are otherwise unserved by network television.\textsuperscript{184} Proposals, however, take a broad-brush approach and would not limit transmissions of network signals under the compulsory license to unserved areas.\textsuperscript{185} The FCC's current network nonduplication rules would protect local network affiliates, but the regulatory history of cable television does not inspire confidence that these rules will remain in effect.

6. Disintegration of the Consensus Agreement

Whether the compulsory license should be extended as discussed above is connected with the ongoing inquiry regarding the existence of the cable compulsory license itself. As can be observed from the development of the compulsory license regime, other regulatory issues involving program coverage and exclusivity are intimately connected with the compulsory license, and the agreement underlying the license is breaking down.

If the must-carry rules are eliminated, one justification for exempting retransmissions of local signals from the copyright region


\textsuperscript{185} For this reason there is substantial opposition to the pending superstations copyright bill (H.R. Res. 2848). NBC has already concluded an agreement with a distributor for its feeds to so-called "white" areas, i.e., those areas which do not receive the signal of any NBC affiliate. The other networks are negotiating with the same distributor.
has also been eliminated. This provides one reason for re-examining the compulsory license.

In July 1985 the U.S. Court of Appeals for the District of Columbia found that the Commission’s must-carry rules were unconstitutional. The rules were an overbroad response to a perceived problem and infringed the first amendment rights of cable operators. The FCC decided not to appeal the decision, and until the adoption of new rules in 1986 no must-carry rules were in effect. Cable systems have had to continue to reference the must-carry rules to distinguish between local and distant signals for purposes of copyright liability. The revised must-carry rules were to be in effect for five years, but these regulations have also been held as violative of the first amendment.

Programming exclusivity is another regulatory issue involving competition between the local broadcaster and the cable system operators. The retransmission of distant signal network programming is one aspect of this, as discussed above.

Another programming source for the local broadcaster are those programs originated by the station, usually local news, public affairs, and sports-related programming. If such programming is retransmitted as part of a distant signal it is protected by copyright under

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186. Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434, 1459 (D.C. Cir. 1985).
187. Id.
190. 1 F.C.C. Rec. at 864. In the meantime, cable system operators were to offer subscribers a switch to be installed in the subscriber’s home which will allow the subscriber to choose between reception of the cable signal and local off-air broadcast signals. 2 F.C.C. Rec. at 1669. The cable system operator must engage in a consumer education program to make the consumer aware of the sunset provision and the availability of the switch. Id.
191. Century Communications, Inc. v. F.C.C., No. 86-1683 (D.C. Cir. Dec. 11, 1987). The FCC asked the court to clarify whether the A/B switch and consumer education requirements of its must-carry rules were also struck down. The court clarified, over the objections of cable operators, that these requirements were not “inextricably bound” with the voided must-carry rules. Century Communications, Inc. v. F.C.C., 837 F.2d 517, 517 (D.C. Cir. 1988). Broadcasting groups have announced their intent to appeal to the Supreme Court.
the compulsory license; if it is rebroadcast it is protected by the Communications Act.

A third source of programming is that purchased by the broadcaster from a third-party, referred to as syndicated programming. The FCC had eliminated its rules protecting the local broadcaster's right to exclusive use of this programming. The FCC is now exploring the possibility of reinstituting its "syndicated exclusivity" rules. Such rules would again give the local off-air broadcaster exclusive rights to its non-network programming transmissions so that these programs could not be transmitted by a cable system in competition with the local broadcaster. If the system imported a distant signal, any non-network programming so imported that duplicates the programming of the local station would have to be blacked out. Particularly with the increasing number of independent stations, which broadcast mainly this type of programming, cable system operators are opposing the reinstatement of these rules as, at the least, an administrative nightmare. An additional problem is that the cable system operator's use of the compulsory license is contingent upon a passive retransmission. Blacking out programming to comply with syndicated exclusivity rules could imperil use of the compulsory license.

At most, reimposition of syndicated exclusivity could be considered a breach of the assumptions underlying the 1971 Consensus Agreement by reinstating restrictions on the cable industry for which it bargained away its exemption from copyright liability. Indeed, an argument can be made that the Copyright Act and the Cable Act eliminated the FCC's jurisdiction to regulate in an area covered by the compulsory license.

These pressures, most particularly the must-carry issue, have undermined the basis for the 1971 Consensus Agreement. The National Telecommunication and Information Administration (NTIA) supports elimination of both the must-carry rules and the compulsory

195. Id. The Commission also sought comments on whether the network nonduplication rules should also be amended.
196. The Commission avoided this point on the basis that the Compromise Agreement itself covered only distant non-network programming. 52 Fed. Reg. at 2805 n. 17.
197. Discontent with the compulsory license was not long in arriving. See Note, Cable Television's Compulsory License: An Idea Whose Time has Passed?, 25 N.Y.L. SCH. L. REV. 925 (1980).
license on the basis that such elimination would make a wider diversity of programming available to the consumer.\textsuperscript{198}

Proposals for elimination of the compulsory license were considered in the 99th Congress, but no steps were taken other than holding hearings on the issue.\textsuperscript{199} Although the FCC has no authority over the copyright compulsory license, it has instituted an inquiry on the license's continuing viability in light of FCC regulatory changes, preparatory for making recommendations to Congress on the license's retention or amendment.\textsuperscript{200}

The Commission identified several problem areas in which it is seeking comments. It noted that subjecting broadcasters, but not cable system operators, to full copyright liability is inappropriate in a fully competitive video marketplace and questioned the extent of existing competition between the two.\textsuperscript{201} The Commission also questioned the effect of the license on the availability of programming\textsuperscript{202} and the effectiveness of a governmentally administrated royalty tribunal.\textsuperscript{203} Furthermore, the Commission sought comments on the overall costs and benefits of alternatives to a compulsory license.\textsuperscript{204}

B. Cable or Satellite Retransmissions under Canadian Law

From the U.S. viewpoint, a notable omission in the Bill to revise Canadian copyright law is any treatment of cable or satellite retransmission of copyrighted works. Because the extent to which international conventions offer protection under copyright against unauthorized reception and/or retransmissions due to satellite technology is unclear,\textsuperscript{205} the copyright law of the U.S.'s northern neighbor takes on more importance.

\textsuperscript{198} NTIA, \textit{Cable Retransmission of Broadcast Television Programs Following Elimination of the "Must-Carry" Rules} 36-37 (1985).


\textsuperscript{200} Compulsory Copyright License for Cable Retransmission, 52 Fed. Reg. at 15765 (Notice of Inquiry, April 30, 1987).


\textsuperscript{202} Compulsory Copyright License for Cable Retransmission, 52 Fed. Reg. at § 10-13.

\textsuperscript{203} \textit{Id. at §§ 14-17}.

\textsuperscript{204} \textit{Id. at §§ 18-19}.

\textsuperscript{205} \textit{Id. at §§ 20-26}.
Judicial interpretation of the 1921 Act has created immunity from copyright liability for cable or satellite retransmissions of off-air broadcasts.\footnote{206} This issue is of particular concern to U.S. broadcasters not only because of Canadian cable system operators, but also because of the activities of Canadian Satellite Communications, Inc. ("CANCOM"), a private company licensed\footnote{207} to bring television service to outlying areas.\footnote{208}

CANCOM was established to fulfill the same type of need for television service in rural areas as was the traditional CATV industry in the U.S.\footnote{209} The primary difference, however, is that CANCOM's service has not been limited to the so-called basic cable service that CATV offered, \textit{i.e.}, retransmission of nearby Canadian stations.\footnote{210} Because CANCOM relies upon satellite distribution methods, it transmits programming or retransmits signals to the same extent as the most sophisticated cable systems, including premium services and superstations.\footnote{211} The CANCOM package of signals includes retransmission of three or more U.S. broadcast stations, affiliates of the commercial networks, and the public network (PBS).\footnote{212} In effect, CANCOM has made these U.S. television stations whose signals extend across the Canadian border into superstations without the permission of the stations, the networks, or the programming copyright owners. Because no copyright liability attaches to signal retransmission, CANCOM pays no royalties.\footnote{213}

CANCOM has since received authorization to extend its coverage into more populated areas.214 Expansion of CANCOM’s service out of underserved areas into prime markets of profitability for program rights holders has prompted a more substantial protest by the U.S. copyright owners involved.

The White Paper did not make specific proposals on the retransmission issue,215 but the Sub-committee received numerous comments.216 The Sub-committee also commissioned a study on the financial implications of improving copyright liability.217

From the Canadian viewpoint, this is one of the two primary problems with imposing copyright liability on retransmissions. The economic effects of imposing royalty requirements of any type upon CANCOM’s retransmission of off-air programming would be substantial.218 This is particularly true when the needs of the “core” market of CANCOM, the outlying and underserved areas, are considered. Cost of service was one of the main obstacles identified by a Canadian task force studying the issue of providing television service to underserved areas.219 The two major components of the high cost are a small subscriber base and a high capital cost from satellite-delivered services.220 Consequently, there has been little incentive to increase these costs still further by paying for U.S.-originated programming currently obtained for free.

Ironically, the task force noted at the time that one of CANCOM’s problems was the difficulty of selling programming that home dish owners could obtain for free from U.S. satellite signals.221 This was, of course, prior to the institution of signal scrambling by U.S. satellite programmers. A similar impact upon the salability of U.S. programming obtained for free by CANCOM seems to have been overlooked.

The second problem with imposing copyright liability on retransmissions is that it would recognize and legitimize this high degree of

216. Report, supra note 3, at 77.
217. Study Commissioned by the Parliamentary Standing Committee on Communications & Culture, Probable Cost of a Retransmission Right: Adoption of the American System to Canada (1985).
220. Id.
221. Id. at 24.
imported programming, contrary to Canada's national broadcasting policy of encouraging Canadian programs. U.S. satellite signal scrambling has provided unexpected assistance to this national policy. Limitations are imposed upon the amount of imported programming cable operators may offer, and until recently no channels for distribution of U.S. satellite-delivered programming existed in Canada. The CRTC has recently authorized cable services to offer such U.S. programming services. Thus, net importation has decreased as home dish owners can no longer pick up these free signals.

Most observers have been pessimistic regarding the likelihood of Canada's imposing any copyright liability for retransmission of off-air copyrighted material. Contrary to expectations, however, the Sub-committee acknowledged that copyright principles dictate a retransmission right in the copyright owner, and it concluded that the financial impact would be manageable. First, although there are no requirements on cable operators similar to the FCC's "must-carry" rules, the Sub-committee noted that excessive demands by copyright owners for retransmission of local signals that could be received off-air would result in cancellation of cable services. It did not suggest an exception for local signal retransmission as exists under U.S. law.

The impact of CRTC regulations on exclusivity of local programming would, the Sub-committee concluded, further reduce the impact of copyright liability. These regulations are similar to those now abandoned but under consideration for reinstatement by the FCC. In addition, however, the Sub-committee noted that current discussions focused upon retransmission of an off-air signal by different media. It suggested that such limitations would not take changing technology fully into account, and that the Government study the

223. See Public Notice CRTC 1987-261 (Nov. 30, 1987). It should be noted that these rules are not considered a "Canadian content" requirement, although they do link the amount of imported programming carried to the amount of domestic programming carried.
225. Report, supra note 3, at 77-78.
226. Id. at 78-79.
227. Id. at 79.
228. Id.
229. See supra note 200 and accompanying text.
possibility of subsuming retransmission rights into a general transmission right.  

Finally, the Sub-committee recommended a compulsory license for retransmission rights to be administered by the Copyright Board. In setting rates the Board should take into consideration the economic realities facing small cable systems in underserved areas.

The Government’s response to these proposals was limited. It agreed on the need for a retransmission right to be defined in general terms and that a compulsory license administered by the Copyright Board would be appropriate. In addition, however, the Government stated that local signals should be excluded from the regime, a right of appeal from Board decisions regarding rates should be established, and the Board would be asked to study the scope, implementation, and operation of the system.

Significantly, the response omitted any reference to reciprocal treatment of retransmission rights with other countries, and whether these rights would be limited to Canadian authors. The Bill omitted any treatment of retransmission rights.

The Canadian Government has now agreed to provide copyright protection to retransmissions no later than 1 January 1990. A joint advisory committee will be formed and will make recommendations on the form that protection will take. The agreement to provide protection was part of the U.S.-Canadian Free Trade Agreement, which must be approved by both the U.S. Senate and the Canadian Parliament. Notwithstanding the Sub-committee’s recommendations, Canadian negotiators have expressed reservations on adopting a system similar to that of the U.S. because of the dissatisfaction with it expressed in the U.S.

III. Conclusion

The difficulty in resolving the cable/satellite retransmission issue is obviously not limited to a determination that copyright liability is or is not warranted. Many other difficult questions are involved, e.g., who owns the copyright, what rights does ownership entail, and

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231. Id.
232. Id. at 80-81.
233. Id. at 81-83.
what constitutes a fair use? How to resolve these issues is not always clear. The extent of governmental regulation in these areas makes resolution even more difficult, not least because regulations are subject to change due to policy considerations that have nothing to do with copyright law.

As discussed above, the FCC's regulation of the cable industry embraces the policies of encouraging new video technology and signal sources, as well as preventing unfair competition between local off-air, or "free" video sources and pay TV, such as cable systems. Manipulation of the copyright law is unnecessary to accomplish these goals and, indeed, can result in subverting them.

Copyright encourages the creation of works by providing a sanctioned monopoly on the profits. To the extent that this policy is subverted, less incentive derives for creation of works. The stakes are very high in the case of video programming due to the expense of creation. Minimizing copyright protection reduces available programming, and multiple video sources without programming are mere redundancies.

Any copyright regime for cable/satellite retransmissions should be as independent as possible from the industry regulatory regime. For example, when regulations require that a signal be retransmitted, then copyright liability must be determined by who receives the economic benefits and losses of such a requirement. In the case of local signals, the presumption has been that retransmission is neutral because the cable operator is merely delivering signals that the subscriber could receive off-air. It would seem, however, that if this is a valid presumption there is no need to require carriage. In practice, homes provided with cable service have tended to have outside antennas disconnected and rely upon the cable transmission alone. The FCC's phasing out of its must-carry rules recognizes that this reliance is merely the result of perception, not a technical problem, and is designed to educate the cable service consumer and maintain the option of receiving signals from both sources.

If, however, the cable service is providing retransmitted signals that the subscriber could not otherwise receive, the effect is not neutral. Both the subscriber and the cable operator benefit. Notwithstanding the effect on the broadcaster whose signal is being retransmitted, a benefit is accruing at the expense of the copyright owner's right to authorize the work's use and to be compensated for it.236

236. For a discussion of the broadcasters' viewpoint and problems when their signals are
The compulsory license scheme eliminates the first right and, in the view of copyright owners, minimizes the second.

The alternative to compulsory licensing is an individually negotiated license. Cable system operators have traditionally opposed this as too burdensome, based on the assumption that cable system operators would have to negotiate individually with the copyright owners of every program carried on every signal they retransmit.

This, however, is not necessarily the case. The cable system operator must negotiate with the broadcaster for the right to retransmit the entire signal in the absence of regulated mandatory carriage. Broadcasters, in turn, must negotiate the individual licenses for their programming, so the negotiation mechanism is already in place. If broadcasters wish to allow signal retransmission, they can negotiate a license for that use at the same time they obtain a license for the initial transmission. The additional cost for the retransmission right would be an issue of perceived benefits as between the broadcaster and the cable system.

Although previously unstated as the basis for opposition to individual licensing by cable system operators, it is becoming apparent that a substantial basis for their opposition is similar to CANCOM's: economics. Cable system operators fear the ability of the local broadcaster to outbid them for exclusive rights to the most popular syndicated programming. This underlies opposition to the FCC's proposals on syndicated exclusivity for the same reason.

The FCC's proposed syndicated exclusivity rules and network nonduplication rules are, in effect, carving out exceptions to the compulsory license's elimination of the copyright owner's right to authorize use. The FCC's focus has been upon protecting the broadcaster from unfair competition. A copyright focus would arrive at the same results through a negotiated license between the parties, yet protect the copyright owner's rights.

In the absence of a compulsory license, the broadcaster's license would be negotiated with the copyright owner as the sole holder of rights to authorize use. If broadcasters wanted market exclusivity they would pay for it, and the copyright owner could not license other use within that market. The process would operate in the same manner with regard to network programming and solve the question...
as to retransmission of network feeds because the copyright owners would control the use of their works.

In this scheme, the issue of unauthorized reception on a home dish system would become the problem of copyright licensees. The licensees would be incurring the economic loss, and the burden would fall upon them to enforce it.

The issue of making programming available to home dish system owners, however, like the issue of "must-carry" regulation, is a policy question distinct from the issue of copyright liability. The political trade-off regarding scrambling and distribution mechanisms in exchange for copyright protection has, like the cable compulsory license, engendered dissatisfaction among its purported constituencies. Canada has acknowledged the goal of eliminating unserved or underserved areas as the policy basis for CANCOM's services, although the U.S. has been reluctant to acknowledge this as the basis for any of its own legal and regulatory regimes. If this is indeed the policy, it can and should be accomplished through other means, not at the expense of a statutory subsidy from copyright owners. Copyright protection should not be held hostage to a policy of universal video service. In the long run, the public loses.