

# SHOULD CABLE SYSTEMS PAY COPYRIGHT ROYALTIES\*

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## I. INTRODUCTION

The copyright law of Canada is being revised<sup>1</sup> and one of the most difficult issues which must be resolved is whether cable systems should be required to pay copyright royalties for the rediffusion of broadcast signals, and, if so, to whom and for which signals. This paper will examine the question of entitlement to copyright payment. Probable positions of the cable system operator, the copyright owner and the broadcaster will be reviewed, and submissions made as to what, in the writer's opinion, the revised law should contain.

### A. *The Present Law*

Copyright in Canada is a statutory creation<sup>2</sup> intended to better secure the property rights of the creator through the grant of negative rights to prevent others from copying the form of expression adopted by the creator. Although the property right theory is only one of some ten identifiable theories of copyright,<sup>3</sup> this author maintains that copyright in Canada has its theoretical base in concepts analogous to property rights.<sup>4</sup> The Copyright Act grants to the creator of a literary, dramatic, musical or artistic work, a number of exclusive rights, set out in section 3 of the Act, which include, *inter alia*, "the sole right . . . to perform the work or any substantial part thereof in public" and "to communicate such work by radio-communication".<sup>5</sup>

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<sup>1</sup> See pp. 196-98 *infra*.

<sup>2</sup> Copyright Act, R.S.C. 1970, c. C-30, s. 45.

<sup>3</sup> F.J. KASE, *COPYRIGHT THOUGHT IN CONTINENTAL EUROPE. ITS DEVELOPMENT, LEGAL THEORIES AND PHILOSOPHY* 1-15 (1967).

<sup>4</sup> See A.A. KEYES & C. BRUNET, *COPYRIGHT IN CANADA: PROPOSALS FOR A REVISION OF THE LAW* 4-5 (1977) [hereinafter cited as the KEYES/BRUNET REPORT]. For an interesting debate on copyright theory, see Roberts, *Canadian Copyright: Natural Property or Mere Monopoly*, 40 C.P.R. (2d) 33 (1979); Keyes & Brunet, *A Rejoinder to "Canadian Copyright: Natural Property or Mere Monopoly"*, 40 C.P.R. (2d) 54 (1979).

<sup>5</sup> Copyright Act, s. 3(1), 3(1) (f).

The present operations of the cable industry, relevant to copyright, are diffusion and rediffusion. "Diffusion" occurs where a cable system originates its own programs and distributes them by cable. For practical purposes, copyright liability for the diffusion function of a cable system is no different than for any broadcaster.<sup>6</sup> When a cable system simultaneously retransmits to its subscribers broadcast signals received by an antenna, the function is referred to as "rediffusion". The copyright problems that arise in respect of the rediffusion function are complicated by the necessity of having to consider whether the signals being rediffused are local or distant, whether the signal impacts on the local, the distant or the fill-in market,<sup>7</sup> and whether the signal is national or foreign in origin or both. The rediffusion operation of a cable system is not an infringement of copyright because rediffusion is not the doing of any of the things reserved exclusively to the copyright owner under section 3 of the Copyright Act. Thus, the present law does not require Canadian cable systems to pay either the copyright owner for this use of his work, or the broadcaster for the use of his signal.

#### B. *Proposed Revision of the Law*

The first of three comprehensive reports on Canadian copyright legislation was published by a Royal Commission in 1957.<sup>8</sup> The Ilesley Report opposed the imposition of copyright liability on cable systems on the ground that the copyright owner should not be entitled to prevent rediffusion by a cable system if he has authorized the original broadcast of his work. The Commission was of the opinion that the copyright owner's royalty was based on total audience size and consequently there was no justification for an additional fee being levied. No action was taken pursuant to the Commission's recommendations.

In 1966 the Economic Council of Canada was requested by the federal government to examine copyright legislation. The report,<sup>9</sup> published in 1971, opted for a system of compulsory licences whereby, in the Council's opinion, both public access and private compensation

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<sup>6</sup> *Canadian Admiral Corp. v. Rediffusion Inc.*, [1954] Ex. C.R. 382, at 408-10, 20 C.P.R. (Sec. II) 75, at 101-03, held that "rediffusion" was not an infringement of copyright as a multiplicity of private performances was not a performance in public nor a communication of the work by radio communication. The same arguments could be applied to the issue of copyright liability for the diffusion function. In any event, there is copyright liability for recording for later diffusion. See *Warner Bros.-Seven Arts Inc. v. CESM-TV Ltd.*, 65 C.P.R. 215 (Ex. 1971). The present practice of payment for diffusion is predicated upon access and not copyright law.

<sup>7</sup> See pp. 205, 207 *infra*.

<sup>8</sup> ROYAL COMMISSION ON PATENTS, COPYRIGHT, TRADE MARKS AND INDUSTRIAL DESIGNS: REPORT ON COPYRIGHT [ILSLEY REPORT] (1957).

<sup>9</sup> ECONOMIC COUNCIL OF CANADA, REPORT ON INTELLECTUAL AND INDUSTRIAL PROPERTY (1971).

could be ensured. Specifically, the Council recommended that cable systems not pay copyright royalties for simultaneous rediffusion of unaltered broadcast signals. However, copyright liability should be imposed where the broadcast signal contained no advertisements, where the cable system deleted or substituted advertisements, or where the signal did not originate with a wireless operator.<sup>10</sup>

With the publication of the Economic Council's report, the Minister of Consumer and Corporate Affairs, whose department has legislative responsibility for the administration of the Copyright Act, announced the formation of a working group to formulate proposals for a new law. The Keyes/Brunet Report,<sup>11</sup> published in April, 1977, recommended that liability be imposed on cable systems for the rediffusion of Canadian broadcasts containing Canadian copyright material.

Canada is a net importer of copyright material. To avoid copyright royalties leaving the country, the Keyes/Brunet Report proposed the grant of a rediffusion right to Canadian broadcasters for Canadian broadcasts. The authors felt that the proposal did not violate the national treatment provisions<sup>12</sup> of either the Berne Convention<sup>13</sup> or the Universal Copyright Convention,<sup>14</sup> and avoided the administrative problems of dealing with multiple copyright owners and further aggravation of the copyright imbalance of payments.<sup>15</sup>

The subordination of foreign creators' rights to the development of Canada's cultural identity and economic well-being is an acceptable

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<sup>10</sup> *Id.* at 175-77.

<sup>11</sup> KEYES/BRUNET REPORT, *supra* note 4, at 142-43.

<sup>12</sup> The principle of national treatment requires that a member country provide the nationals of all other member countries the same rights it provides its own nationals in respect of works coming within the scope of those "literary" and "artistic" works protected by the Conventions (*infra* notes 13, 14).

<sup>13</sup> The Berne Convention for the Protection of Literary and Artistic Works (1886), *as revised* at Paris (1896), Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971). Canada is presently bound by the 1928 Rome text, the national treatment provision of which is contained in Article 4(1).

<sup>14</sup> The Universal Copyright Convention (1952), *as revised* in Paris (1971) [hereinafter cited as U.C.C.]. Canada is presently bound by the 1952 text. The national treatment provision is contained in Article II(2).

<sup>15</sup> Broadcasts, performances, sound recordings and published editions of public domain material could be classified as either neighbouring rights or editions of public domain material. Both categories are outside the ambit of the Conventions as they do not fall within the operative phrase "literary and artistic works". See S.P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 424-26, 487-501 (1974). The Australian Copyright Act protects published editions and sound recordings of Australian nationals on the basis of reciprocity and not national treatment. The protection of broadcasts is for the benefit of Australian nationals only. See J. LAHORE, INTELLECTUAL PROPERTY IN AUSTRALIA: COPYRIGHT 400, 404, 409, 410 (1977). Canada is not a signatory to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961).

practice.<sup>16</sup> Indeed, Canada's signatory level in the U.C.C. and Berne conventions reflect Canada's status as a net importer of copyright material. Canada should not enact legislation which would protect foreign creators at the expense of its own economic or cultural state of development. If cable liability is imposed for the use of Canadian broadcasts containing Canadian program material alone, the revenue generated thereby could be regulated in such a way as "to ensure that Canadian creators receive their fair share of the royalties paid to broadcasters" and "to ensure the transfer of payment from broadcasters to Canadian creative elements".<sup>17</sup>

## II. SHOULD CABLE SYSTEMS PAY COPYRIGHT ROYALTIES?

Each of the parties affected by copyright legislation adopts a position which reflects its respective interests. Cable systems maintain that the payment of copyright fees would restrict their expansion; the broadcaster complains of the unfairness in permitting cable systems to carry the same programs without having to bargain and pay for them; and the copyright owner seeks to end the unpaid use of his property. These positions, which are often dramatically opposed, may be evaluated under four headings:<sup>18</sup>

1. The Economic Issue;
2. The Function Performed by a Cable System;
3. The Copyright Clearance Problem;
4. Policy Considerations.

Apart from the stated purpose and philosophy of copyright legislation, those charged with revising that law are confronted with opposing allegations of fact. For example, the broadcaster and copyright owner allege that they derive no compensation from the distant market audience of a cable system, whereas cable systems allege that full compensation exists. The following is a discussion of this and other conflicting allegations. The views of the copyright owner, the broadcaster and the cable industry will be juxtaposed and examined under each of the main categories of disagreement.

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<sup>16</sup> The United States, in its recently enacted copyright legislation, adopted a law which reflects its position as a net exporter of copyright material. Not only are cable systems within the United States required to make royalty payments by virtue of a compulsory licence in their favour, but also those American cable systems located within 150 miles of the United States-Canada border benefit from any importation of Canadian signals by having the same compulsory licence in respect thereto. Copyrights, 17 U.S.C.A., s. 111.

<sup>17</sup> KEYES/BRUNET REPORT, *supra* note 4, at 143.

<sup>18</sup> The arguments summarized herein are drawn largely from the hotly contested AMERICAN HEARINGS BEFORE SUBCOMMITTEE NO. 3 OF THE COMMITTEE ON THE JUDICIARY, H.R. 89th Cong., 1st Sess., Serial No. 8, Part 2 (1965) [hereinafter cited as SUBCOMMITTEE HEARINGS].

### A. *The Economic Issue*

In order to better understand the effect of cable systems upon program production and distribution, the structure of the distribution system will be briefly examined. The two methods of distribution which are of primary concern to the copyright owner are network programming and syndication.<sup>19</sup> Network selling involves granting a licence for a single and simultaneous broadcast on network stations. Syndication is the licensing of programs locally to stations on a market-by-market basis. Programs first broadcast on a network are usually distributed again by syndication, but a program first released by syndication is rarely thereafter broadcast on a national network basis. The high cost of production and the competitive nature of the program distribution industry usually mean that little or no profit is made from a single network run of a program. Copyright owners depend upon post-network syndication for the return on their capital investment.

A program brings its highest price for its first showing. Thereafter the value drops with each individual showing. Hence, a multiplicity of single uses enhances returns to the copyright owner. Because of this, the licence for syndication is usually restricted as to territory, and prevents the licensee station from broadcasting by any other station, or from authorizing a cable system to carry the program. These restrictions are intended to maintain program exclusivity, and are well known to all parties involved, including the licensee station and its advertisers. Similarly, a non-network station will not pay first-run fees for a network program which has already been shown in that market on cable. However, where the program has been shown by a network station, the copyright owner has been compensated and can only demand subsequent-run fees for use of the program.

Three types of programming are subject to "exclusive" licence arrangements:<sup>20</sup> first, recorded non-network programming created and owned by others for which a station purchases exclusive territorial broadcast rights (motion picture films and syndicated programs are examples);<sup>21</sup> secondly, national, regional and network programming, live or recorded, to which the station has geographic exclusivity by contract with the particular network;<sup>22</sup> and thirdly, local programming

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<sup>19</sup> While local programming created and owned by the station, or created and owned by others which the station broadcasts under exclusive territorial licences, is important to the broadcaster, it is not of major concern to the copyright owner.

<sup>20</sup> Local programming created and owned by the station falls into a different category because the broadcaster is the copyright owner and therefore does not require a licence. See SUBCOMMITTEE HEARINGS, *supra* note 18, at 1223-40.

<sup>21</sup> In the United States, a low royalty rate has been assigned to this type of programming for a network affiliated station, and a higher rate (four-fold) for the same program carried by an independent station.

<sup>22</sup> The station does not usually pay for this type of programming, but rather is paid by the network to carry the program. The advertising revenue obtained by the network is distributed to the stations who have given advertising time to the network advertiser.

created and owned by others which the station broadcasts under exclusive territorial licence. Sporting events are a good example of this last type.<sup>23</sup>

Television stations and networks spend millions of dollars on program licensing and production. This cost is met and a profit is made through advertising revenues. The broadcaster sells advertising time and buys or licences program material for broadcast. The selling price of advertising time is a function of rate cards which reflect the audience size at a particular time. Audience size, in turn, is a reflection of its propensity for the program offered and of the time at which it is shown. Thus, the audience drawing power of a program dictates the revenue derived from its televising. In the case of a television network, advertising revenue will depend on whether the network stations are the exclusive outlet for the network in any particular market.<sup>24</sup>

It is within this framework of industry contractual relationships that cable systems operate and from which arguments of unjust enrichment and unfair competition arise. These arguments will be examined subsequent to a discussion of the cable industry's view of its effect on the existing structure of the broadcasting industry.

### 1. Cable Systems

The cable industry alleges that the copyright owner and the broadcaster receive greater royalties and advertising revenues respectively as a result of the existence of cable systems.<sup>25</sup> The revenues of both are a direct function of audience size. The cable system, in expanding

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<sup>23</sup> The C.R.T.C. imposes a condition of licence on cable systems prohibiting the carriage of any local sports event broadcast by distant television stations which is not available on local television stations. Local television sports blackouts ensure the payment of the admission price for viewing the event, and protects exclusivity in the immediate area of those offering the event. By analogy, the copyright owner and the broadcaster are demanding the same thing: namely, that cable systems respect program exclusivity. This raises an interesting question: why does the C.R.T.C. not prohibit cable systems from carrying programs broadcast by distant stations which are the exclusive property of the copyright owner and, by licence in a particular market, of the broadcaster?

<sup>24</sup> The new United States copyright legislation exempts from copyright liability any network program, whether local or distant in origin. The network licence covers the showing of network programs anywhere in the country. The non-network programming of a network affiliated station, on the other hand, is subject to limited royalty payments. The reasoning behind this limited liability is that the importation of the distant signal containing such a program (the so-called syndicated program) could precede the showing of the same program by the local station and consequently destroy the potential market for the copyright owner. Copyrights, 17 U.S.C.A., s. 111.

<sup>25</sup> Evidence adduced at the Subcommittee Hearings showed that the broadcaster sought out cable systems in order to increase its viewing audience and consequently its advertising revenue. In these circumstances, it was argued that an implied licence for cable systems to receive that station's signal clearly exists. *Supra* note 18, at 1281-87, 1302-06.

audience size, increases the revenues of both. Cablesystems maintain that the cable viewer is anticipated in the fees charged by the copyright owner to broadcasters<sup>26</sup> and by the broadcaster to the advertiser on the basis of audience size. Imposing liability on cable operators would, therefore, result in double payment.

In addition, cable systems may argue that the lack of an exemption from copyright liability is inconsistent with C.R.T.C. regulation. With the imposition of liability, the copyright owner will have the right to withhold use of the program. This would create a conflict with the C.R.T.C. compulsory carriage requirements. The C.R.T.C. is concerned with the integration of cable systems into the overall Canadian broadcasting system.<sup>27</sup> One of the methods adopted to achieve this integration is to require cable systems to rediffuse the signals of local television stations within the community in which the cable system operates.<sup>28</sup> The cable system is required to rediffuse specific local signals within the local market. This means that the cable system has no choice with regard to some of the signals it rediffuses. If the cable system is unable to pay the copyright owner's price, or is refused clearance, it has the choice of infringing the proposed copyright law by rediffusing the signal without clearance,<sup>29</sup> or of violating the C.R.T.C. regulation by not rediffusing the signal.

## 2. The Copyright Owner

The copyright owner alleges that the rediffusion of television programs by cable operators seriously diminishes the value of the copyright, affords the cable operators a competitive advantage over television stations which must pay for the right to broadcast, and infringes the property rights of producers and distributors. For these reasons, the copyright owner opposes an exemption from copyright liability for cable operators.

The copyright owner contends that cable systems are depreciating his property by undermining program exclusivity in markets. When a cable system operates within the same market as a television station, it weakens the licensing system by depreciating the value of the program to

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<sup>26</sup> Royalties for the use of music by private broadcasters are calculated as a percentage of gross revenues. The Copyright Appeal Board's royalty calculation for the CBC, however, is based on Canada's total population and not gross revenues. Royalties for the use of other copyright material are not always based on gross revenue. When the program is not sponsored there is no advertising revenue in which the copyright owner can share. See 1977-1978 ANNUAL REPORT OF THE CANADIAN BROADCASTING CORPORATION 42-43.

<sup>27</sup> CANADIAN BROADCASTING A SINGLE SYSTEM (C.R.T.C. Policy Statement, July 16, 1971).

<sup>28</sup> Cable Television Regulations, C.R.C., c. 374, s. 6(1).

<sup>29</sup> See recommendations for reform of the copyright law in this area in KEYES/BRUNET REPORT, *supra* note 4, at 143-44.

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

Where a local television station and a cable system compete for the same local market, the copyright owner has difficulty selling to the local station a program which the cable system has already imported. Even where there is no local television station, the unlicensed use of programs by cable operators still results in a loss of revenue to the copyright owner as the possibility of licensing that market in the future has been lost,<sup>30</sup> or at least seriously diminished. The copyright owner is not really interested in the small, mutually-owned cable system which services people who otherwise would not be supplied. His concern is with the multi-million dollar cable system operating in a large city which already has adequate television service.

The copyright owner rejects the theory that his loss can be met through the charging of higher fees to television stations whose programs are or may be carried by a cable system. There is no reason why a television station should act as a bargaining agent for the cable operator. Further, television stations are unwilling to pay higher fees for various reasons:

1. television stations are not willing to pay for programs shown outside their markets;<sup>31</sup>
2. local advertisers are unwilling to pay for advertising in a market where there are no facilities to sell their product or, alternatively, no customers to buy it;
3. national advertisers will not pay for duplicate coverage; that is, the advertiser of a national product whose advertisement is shown on a distant station and also imported into a local market on cable will not pay the local broadcaster again for the same exposure.

The copyright owner contends that he will not receive double payments in the distant, duplicated market because cable subscribers are not included as viewers in the fees charged to advertisers by copyright owners for the program material. Indeed, there is frequently no payment

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<sup>30</sup> This discussion has been restricted to simultaneous rediffusion by a cable system. A cable system which copies off-air for later diffusion has been held to infringe the copyright in the work contained in the off-air broadcast, as this constitutes a reproduction of the work without authorization. *Warner Bros.-Seven Arts Inc. v. CESM-TV Ltd.*, *supra* note 6.

<sup>31</sup> It may be that the broadcaster is playing one side against the other. As against the copyright owner, the broadcaster uses a rate card which reflects his own viewers, but as against the advertiser he may use a rate card which includes the cable audience.

at all to the copyright owner. Local stations are not started up because of financial inability to compete with cable operators. The copyright owner is also unable to sell to large city markets where cable has brought in, or will bring in, the copyright owner's program. Imposition of copyright liability on cable systems would result in payment, but not double payment.

The copyright owner contends that the party who has paid the cost of production is entitled to a fair price for any and all use of that program, regardless of the type of user. In the duplicated local market, cable systems, as another class of user, should pay in the same way as advertisers and broadcasters.<sup>32</sup> The cable industry is presently permitted to sell to its subscribers the very thing which it obtained for free.

### 3. *The Broadcaster*

The broadcaster's licence, with its restrictions on geographical territory<sup>33</sup> and airing time, prevents any program from being broadcast in other markets. The broadcaster argues that program exclusivity is essential because advertisers are unwilling to pay as much (or at all) for a program already shown or simultaneously shown in the same market. The development of the cable industry has weakened the advertising base of the broadcasting industry, and will continue to do so unless cable systems are required to pay their fair share.

A cable system picks up the signal of the distant station, which has paid for the broadcast rights to the copyright material, and sells it to its subscribers, in competition with the local station. The broadcaster views this competition as unfair to:

1. the distant station because the cable system is getting for free that which the distant station has paid for;
2. the local non-network station which has bargained and paid for exclusive rights in the local market, which it is not, in fact, getting;<sup>34</sup>
3. the local network station which, although it does not pay for the programming, is affected by audience fragmentation and the refusal of the network advertiser to pay for coverage on network stations which are not the exclusive outlet for the program; and
4. the copyright owner because he receives no compensation from the cable systems.

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<sup>32</sup> This argument of the copyright owner is relatively weak. The cable system must carry the local station as a prerequisite to carrying any distant stations, and is therefore in a bad bargaining position. Further, the audience size of the local market available through the broadcaster may be fragmented but it is the same.

<sup>33</sup> The station's territory is limited by the antenna height and power.

<sup>34</sup> Non-duplication provisions may alleviate this problem but the solution is temporary and does not give the station the program exclusivity for which it has bargained. *See* Cable Television Regulations, C.R.C., c. 374, s. 19.

#### 4. *Analysis*

Part of the difficulty in resolving these conflicting points of view lies in the fact that the broadcaster and the copyright owner direct their arguments to the free use of *distant* signals in the local and fill-in markets, whereas the cable operator has directed his arguments primarily to the free use of *local* signals in the local market. Resolution of the debate depends on which of these three functions the cable system is performing.<sup>35</sup>

##### (a) *Rediffusion of the Distant Signal in the Local Market*

An economic study conducted in the United States by the Federal Communications Commission<sup>36</sup> found that any increase in advertising revenue to the originating station for the *distant* cable audience was insignificant.<sup>37</sup> Local advertisers will not pay the originating station for an audience outside the advertisers' markets because there is no outlet to sell the product in the distant market. For example, a car dealer in one city will not pay for an audience in another city. Regional and network advertisers value audiences according to needs which are not dictated by the character of the audience as distant or local. Criteria such as sales outlets in the market, duplicate coverage and area sales campaigns dictate advertiser behaviour. Further, national advertisers will not pay for the distant cable audience unless it represents a significant share of the prime time audience.<sup>38</sup>

##### (b) *Rediffusion of the Local Signal in the Local Market*

As cable systems are required by C.R.T.C. regulation<sup>39</sup> to "distribute" the signals of local stations, copyright legislation should not permit the copyright owner to prohibit the distribution by the cable system of these signals. Such prohibition would not only create a conflict

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<sup>35</sup> See SUBCOMMITTEE HEARINGS, *supra* note 18, at 1225-26.

<sup>36</sup> *Selection of Television Signals for Cable Television Carriage*, Report and Order of the Federal Communications Commission, 57 F.C.C. 2d 625 (1976). See also L. JOHNSON, *THE FUTURE OF CABLE TELEVISION: SOME PROBLEMS OF FEDERAL REGULATION* (1970).

<sup>37</sup> This is due to the non-existence of an outlet for the advertiser's product in the distant market, the difficulty of documenting and convincing advertisers of the value of the additional exposure, and the inadequacy of most distant market exposure in reaching the advertiser's target audience. *Selection of Television Signals for Cable Television Carriage*, *supra* note 36, at 640. See also WOODS, GORDON & CO., *THE IMPACT OF CABLE TELEVISION ON THE CANADIAN BROADCASTING SYSTEM* (Report prepared for the C.C.T.A., May, 1975).

<sup>38</sup> *Supra* note 36, 57 F.C.C. 2d at 640.

<sup>39</sup> See note 40 *infra*.

between the C.R.T.C. compulsory carriage regulations and the proposed Copyright Act, it would also place cable systems in a bad bargaining position. It is submitted that cable systems should be granted a compulsory licence for the rediffusion of local signals within the local market.<sup>40</sup> The royalty rate for compulsory licences should take into account the fact that the copyright owner has already been paid by the broadcaster for the use of his work within the local market.

(c) *Rediffusion of Any Signal in the Fill-In Market*

Rediffusion in the fill-in market refers to the operation of a cable system in areas not within the broadcast range of any broadcasting station. The copyright owner has not licensed the use of his work in that "market". The cable system is thus exploiting the copyright owner's property without compensation. The unfairness of the competitive situation as between the cable operator and a potential local broadcaster is obvious.<sup>41</sup>

B. *The Function Performed by Cable Systems*

1. *Cable Systems*

Cable systems can be expected to assert that they are not engaged in broadcasting. Television stations originate programs produced by them or obtained from a variety of sources. Cable operators, on the other hand, function only as a receiving device in aiding or making possible the reception of broadcast signals. They do not select programs, nor do they charge for them. They do not solicit advertising, nor do they sell time. They only receive signals intended for public reception.<sup>42</sup> The cable system merely provides an antenna and a working connection from the antenna to the viewer's receiving set.

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<sup>40</sup> A compulsory licence, while permitting the cable system to rediffuse without prior authorization, would require the payment of a royalty. This royalty could be set in a variety of ways. The Copyright Act could, for example, set a fixed statutory rate, or direct the parties to negotiate and, in the absence of agreement, direct a regulatory body such as the proposed Copyright Tribunal to set the royalty amount.

The C.R.T.C. compulsory carriage requirements do not justify a continued exemption of cable systems from copyright liability. No proper analogy can be drawn to the mechanical recording compulsory licensing provision in s. 19 of the Copyright Act. See KEYES/BRUNET REPORT, *supra* note 4, at 140-41.

<sup>41</sup> The possibility of voluntary contributions by cable systems has been suggested, but is unacceptable for various reasons. For a discussion, see JOHNSON, *supra* note 36, at 24-25.

<sup>42</sup> This function is not performed where the cable system acts as a "broadcaster" by rediffusing in a fill-in market.

The cable industry maintains that its function is the equivalent of a master antenna rented to subscribers except that a connection makes the antenna available to a community rather than an individual or a group of individuals. As the person who installs a private home roof-top antenna is not subject to copyright liability, neither should the owner of a master or community antenna, regardless of the number of people served by the antenna. The function of receiving and amplifying the off-air signals remains the same. A cable system, in providing an instrument for television reception, is not in the business of selling or using copyright material.

A number of leading American cases have accepted this argument of the cable industry. In *Fortnightly Corp. v. United Artists*,<sup>43</sup> the United States Supreme Court held that the reception and retransmission of copyright material, contained in a local signal, by a cable system did not infringe copyright. The court found that a cable system merely provided an antenna which was connected to the viewer's television set and which was not dissimilar to the ordinary reception equipment of an individual television viewer. In *Teleprompter v. C.B.S.*,<sup>44</sup> the same issue arose, this time with regard to the importation of distant signals which could not have been received but for the cable antenna. The United States Supreme Court held that the importation of distant, as opposed to local, signals did not alter the cable system's function. Rediffusion, in the court's opinion, did not constitute public performance within the meaning of the American copyright law, and therefore was not an infringement of copyright. These decisions were legislatively reversed by the new American Copyright Act which imposed liability on cable systems for the rediffusion of broadcast signals.<sup>45</sup>

## 2. *The Copyright Owner*

The copyright owner may argue that a cable system provides a diversified program service, not an antenna service to improve program reception. The cable system receives and transforms a broadcast and pipes it by cable to the subscriber at a profit. It brings in a clear signal not intended to be received in that market. The fact that the broadcaster distributes programs through the air and the cable system by wire cannot change their basic function. Both are distributors of programs.

## 3. *The Broadcaster*

The broadcaster, like the copyright owner, maintains that in general the technological mode of transmission, be it Hertzian wave or coaxial

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<sup>43</sup> 392 U.S. 390, 30 L. Ed. 2d 1176 (1968).

<sup>44</sup> 415 U.S. 394, 39 L. Ed. 415 (1974).

<sup>45</sup> Copyrights, 17 U.S.C.A., s. 111 (in force Jan. 1, 1978).

cable, should not make any difference to the copyright status of the works being transmitted. It is a distinction without legal merit. The effect of the cable system on off-air broadcasting, in the broadcaster's opinion, depends upon the type of function being performed by the system.<sup>46</sup>

(a) *The Community Function*

This type of cable system operates in areas where television reception is poor and provides to subscribers only the signals of *local* television stations which would not ordinarily be received. The true community antenna television system has played, and will continue to play, a useful function in Canada's broadcasting system. The function being performed is merely the perfection of the broadcaster's market.

(b) *The Fill-In Function*

This type of cable system operates in areas which are *not* within the broadcast range of any television station, and provides television reception which would not otherwise be available. This type of system may or may not adversely affect the broadcaster. The pre-existence of a cable system in the community might well deter the establishment of a local station. A local station may be unable to compete with the cable system as the latter does not have to pay for that which it sells. It is unlikely that a television station would enter such a market. However, to the extent that this type of cable system does not displace present or future local television stations, it performs a supplementary function.

(c) *Distant Market Function*

This type of cable system operates in areas where reception is already satisfactory in terms of quality and diversity. The cable system imports one or more distant station signals for rediffusion in the local market. Here, the broadcaster argues that the cable system goes beyond providing a community service and becomes a competitive threat to local and area broadcast service. As the same programs are broadcast in many different markets, the importation by a cable system of a signal intended for one market into another destroys local stations' exclusive programming. In addition, the cable system, by carrying the distant signal, deprives the local broadcaster of advertising revenues by divesting him of part of his audience.<sup>47</sup>

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<sup>46</sup> See SUBCOMMITTEE HEARINGS, *supra* note 18, at 1225.

<sup>47</sup> The extension of the audience has a minimal value to the broadcaster of the imported signal. Advertising revenue obtained from the distant market does not compensate for audience fragmentation. See JOHNSON, *supra* note 36, at 22, and *Selection of Television Signals for Cable Television Carriage*, *supra* note 36, at 640-41

#### 4. *Analysis*

The present law is based on a view of print technology which did not envision television, much less cable television. This is an era of rapid technological development of not only cable television but also pay television and direct satellite broadcasting. The technological mode of transmission of programs is not the proper criterion for deciding copyright liability. Rather, legislative solutions should be dictated by the function performed by the cable system.

Within the local market, cable systems perform a function analogous to that of an antenna. Cable systems should be granted a compulsory licence for local signals within the local market, with royalty rates adjusted to reflect the copyright owner's authorization of use of his work in the local market.

The function performed by the cable systems in importing distant signals in the fill-in and distant markets is analogous to that of a rebroadcast. The technological mode of transmission is without significance. The cable systems should be required to pay for the rediffusion of copyright material in these markets.

### C. *The Copyright Clearance Problem*

#### 1. *Cable Systems*

Cable systems argue that if liability is imposed, the required clearances would pose serious practical problems. A cable system is unconcerned with the actual program content of the signal it rediffuses; it does not know whether a program is protected by copyright, or the identity of the copyright owner; and it cannot ascertain the broadcast content in sufficient time to negotiate a clearance. Many individuals and organizations hold copyright in the programs rediffused by cable systems. It would be impossible for the cable operator to identify and obtain clearances from literally hundreds of copyright owners. Because cable systems, unlike broadcasting stations, do not have control over program content, the normal industry practice of copyright licensing is clearly inapplicable.

#### 2. *The Copyright Owner*

The copyright owner argues that anyone who wants to use his property must assume full responsibility for obtaining an appropriate licence. Television stations obtain licences for the very same programs and, if they can obtain the required clearances, so can cable systems. As a practical matter, the hundreds of copyright owners are represented by a much smaller number of program distributors who are very willing to licence in a competitive market.

It can be argued that the content of most television broadcasts is known well in advance through wide publicity to viewers. Schedules are made up well in advance of broadcast dates. There is no reason why a cable operator cannot know which company controls the distribution rights in plenty of time to obtain the appropriate licence.

The view that imposition of copyright liability would render cable systems a captive market is, in the copyright owner's opinion, without merit. The ordinary market forces in a free enterprise system are the appropriate criteria to apply to cable systems. Legislation, such as the Competition Act or the Combines Investigation Act, is the appropriate vehicle to deal with anti-competitive conduct if and when the problem arises. With a willing buyer and many willing sellers in a highly competitive industry, there is no difficulty in providing the notice and clearance required.

The copyright owner, like any other business person, welcomes new customers and is, therefore, not opposed to the growth of the cable industry. Any attack on the cable industry should not be confused with a desire to hinder the growth of the industry; on the contrary, the copyright owner has a vested interest in the encouragement of that growth.

### *3. The Broadcaster*

The broadcasting industry supports the argument that normal industry practices of program licensing should be applied. Broadcasters are able to arrange clearances in advance, without the necessity of being granted any particular exemptions. If the cable systems could not obtain clearance, then those programs would have to be deleted.

### *4. An Alternative Solution*

The administration of copyright clearance poses certain difficulties. The above discussions have been confined to either a blanket exemption or the adoption of the licensing procedures of the broadcasting industry. Neither solution is acceptable. To exempt the cable industry from liability would be to permit the use of property without compensation to the owner. To require the cable industry to delete programs for which it cannot obtain clearance and substitute alternative programming would alter the function of cable television from that of rediffusion to that of originator.

An alternative solution, which overcomes both problems, is to grant to the broadcaster, pursuant to the Copyright Act, a rediffusion right in broadcast signals.<sup>48</sup> The broadcaster may then obtain payment from the

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<sup>48</sup> The rediffusion right would be restricted to Canadian program material contained in that signal, and would be statutorily defined along the lines presently used in the Canadian content regulations.

cable system for the use of the broadcasts. Similarly, the copyright owner, in licensing his program to the broadcaster, would base his fee on the anticipated revenue of the broadcaster which would include payment received from the cable system. Thus, the practical administrative difficulty of dealing with multiple copyright owners under separate contracts is alleviated.

#### D. *Policy Considerations*

##### 1. *Cable Systems*

It could be argued that if a cable system must pay in the same manner as a broadcaster, then the system should be able to operate as a broadcaster, including being able to sell "air time" for commercial purposes. The money to pay the copyright owner's fees must come from somewhere. Either the cable subscriber must pay, or the money must be raised through advertising revenues. If copyright liability is imposed, cable systems may be driven by economic necessity to originate their own programming and advertising and thereby assume a function akin to, and in direct competition with, that of the local broadcaster.<sup>49</sup> Cable systems may also submit that because most creators relinquish their rights to large companies, any royalties paid by cable would only increase the profits of the broadcasters and copyright owners.

##### 2. *The Copyright Owner*

The copyright owner argues that the primary object of copyright is to grant rights to creators. This philosophy, as reflected in the Copyright Act, accords to the creator a property right to authorize, or prohibit use of his material, and to demand compensation for use. The right to licence, sell or refuse its use rests exclusively with the owner. The exclusion of cable systems from this scheme is wholly unjustified. That a cable system may use the creator's property for his own profit and without authorization or payment offends the purpose and principles of copyright law.

The copyright owner may further argue that if royalties were calculated at a rate similar to that paid by the broadcaster, funds could be made available for the production of Canadian programs. Communications policy in the form of Canadian content regulations could ensure that the revenue generated was allocated to Canadian program production.

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<sup>49</sup> Admittedly, this is a way of integrating cable systems into the broadcasting system. However, this method of integration is undesirable because cable systems would then be in direct competition with broadcasters.

### 3. *The Broadcaster*

The broadcaster may adopt the position that the decrease in broadcasting revenue resulting from the competitive threat posed by cable systems may have three undesirable effects:

1. programming may be curtailed because the broadcaster has less revenue to allocate to programming;
2. the local station, as a result of competition with the cable system, may be forced off the air; and
3. the pre-existence of a cable system may prevent development of new local broadcasting stations.

Viewers unable or unwilling to pay for cable service, or those in an area which is uneconomical for cable, would receive a degraded off-air service or, in the extreme, no service at all. Such effects are contrary to the long established broadcasting policy of "free" television, program diversity and the desirability of local broadcast service.<sup>50</sup>

### 4. *Analysis*

Copyright law revision must take into account cultural policy, and particularly communications policy. Because the imposition of copyright liability will affect cable systems as part of Canada's communications system, public policy requires that the question of entitlement be approached from a broader perspective than that of copyright owners. Government policy-makers regard cable television and broadcast television as integrally united parts of the Canadian broadcasting system.<sup>51</sup>

Since as early as 1971,<sup>52</sup> the C.R.T.C. has advocated a policy of integration of cable systems and television broadcasting. In the Commission's opinion, the fundamental consideration is the complete dependence of cable systems on television broadcasting in the form of programming, scheduling and promotion, which constitute the very services cable systems sell to their subscribers:

Stated simply the fundamental relationship is: *television stations are the suppliers, and cable television systems are the users.*

Thus the basic principle involved is: *one should pay for what he uses to operate his business.* Even if there were no damage or if the cable television systems increased profits of the television stations this principle would still be true.<sup>53</sup>

Former Chairman Boyle, in a speech to the Canadian Cable Television Association, in May of 1977, stated that with payment for use, cable systems could

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<sup>50</sup> See Broadcasting Act, R.S.C. 1970, c. B-11, s. 3.

<sup>51</sup> CANADIAN BROADCASTING A SINGLE SYSTEM, *supra* note 27.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 21.

then play a natural and full role in that broadcasting system, be responsible for its future and derive reasonable benefits from its development. . . . If the major broadcasting responsibility now is accepted, then is it necessary for cable to be dragged into the next logical step and the most important responsibility — payment for the programs transmitted?<sup>54</sup>

In the Commission's view, without this payment, the very stations upon which cable systems depend may no longer be able to supply service. Copyright is viewed by the Commission as a method through which payment for use may be made and through which the inequity which has developed within the broadcasting system may be corrected.

Encouraging the development of local broadcasting is another primary objective of Canada's broadcasting policy.<sup>55</sup> Audience fragmentation attributable to cable television penetration of broadcast markets has resulted in a decline in advertising revenues. This fact, together with the unfair competitive situation, has reduced the economic feasibility of local broadcast undertakings.<sup>56</sup> The imposition of liability on cable operators would assist in equalizing the competitive status of the industries concerned.

The interests involved include not only cable systems and broadcasters, but a wide range of creators including composers, performing rights societies, film makers and sound recording organizations. All these interests would benefit from payment by cable systems. The cultural community itself attaches great importance to the potential of copyright to encourage and develop creativity.<sup>57</sup>

The imposition of liability would also assist in alleviating another recurring problem in the Canadian broadcasting system — the lack of Canadian program production. The current dominance of American programming in Canada is caused, at least in part, by a shortage of investment capital. Various solutions have been advocated to generate revenue to stimulate Canadian program production.<sup>58</sup> The grant of a rediffusion right to Canadian broadcasts containing Canadian programs would generate a flow of royalties from the cable system to the private broadcaster. By restricting the proposed rediffusion right to Canadian broadcasters alone, cable royalties would not flow out of Canada. The Canadian creative community could demand higher fees based on the broadcaster's higher anticipated revenues. Amendments to the C.R.T.C.

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<sup>54</sup> Toronto Star, May 25, 1977, p. F1, col. 7. Similar views were expressed by former Chairman Camu in a speech to the C.C.T.A. in May of 1978.

<sup>55</sup> Broadcasting Act, R.S.C. 1970, c. B-11, s. 3.

<sup>56</sup> K. Swinton, *Advertising and Canadian Cable Television — A Problem in International Communications Law*, 15 OSGOODE HALL L.J. 541 (1977).

<sup>57</sup> KEYES/BRUNET REPORT, *supra* note 4, at 15.

<sup>58</sup> Solutions which have been advocated to alleviate the problem include proposals for spending a percentage of Pay TV revenues on Canadian programming, cross-ownership of cable and broadcasting organizations, the new Bill 58 tax amendment, simultaneous program substitution, commercial deletion and substitution, and copyright royalty payments.

Canadian content regulations would ensure that revenues generated by copyright royalties were allocated to Canadian program production.

### III. CONCLUSION

The effect of audience fragmentation, with the resulting loss of advertising revenue, and the demonstrated insignificant value of the distant cable audience, dictate that the imposition of copyright liability on cable systems will not result in double payment but rather in payment for what is presently an unpaid use of copyright material. An exception, in the form of a compulsory licence, is required with respect to local signals in the local market due to the compulsory carriage requirements of the C.R.T.C. for these signals, and because the royalty negotiated by the broadcaster and the copyright owner envisages the local audience.

The issue of the function performed by a cable system is a question usually addressed in terms of an antiquated law, based in a print technology, straining to encompass a recent phenomenon of technological development. The technological mode of transmission should not dictate the copyright status of the works transmitted. Rather, payment for use should be the criterion utilized in determining the issue.

The complex licensing practices of the broadcasting industry pose serious problems in the imposition of copyright liability particularly as the broadcaster requires clearance for the works contained in one signal whereas the cable system must clear many times that number. To exempt the cable system for this reason, however, is unacceptable. The solution lies in granting the rediffusion right in the broadcast rather than in the material contained in the broadcast, thereby overcoming both objections.

Policy formulation, in both the cultural and communications sectors, must approach this issue from a perspective which balances the public interest and therefore transcends the vested interests of the parties involved. The public interest has been defined in the area of communications policy in terms of integrating cable systems into the Canadian broadcasting system, the development of local broadcast service and encouraging both quality and quantity of Canadian program production. The imposition of copyright liability on cable systems will assist in achieving these objectives. In terms of cultural policy the development of an indigenous Canadian culture is a function of the degree of encouragement and protection afforded copyright material.

It is submitted copyright law revision must be governed by the imperatives of that law. Those imperatives are that a copyright owner should be permitted to authorize, or not, the use of his work and to be paid, in this case, according to the audience receiving his work. This is so regardless of the technology used. Cable use can, and in the case of distant signal importation clearly does, extend the scope of the use. The question, whether cable systems should pay copyright royalties, should be answered in the affirmative.

