Canadian Copyright Law and Satellite Transmissions

Peter D. Nesgos

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj

Article

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol20/iss2/2

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
The transmission of information by satellites is today a common occurrence. Radio and television transmission, telephone calls, data communications and telex all benefit from the existence of satellites; the potential utility of this means of communication seems as limitless as space itself. Man has recognized the prevalence and importance of space telecommunications, while quickly realizing the complexity of its technical functioning. The law relating to outer space has developed as a specific area of expertise touching numerous aspects of terrestrial law. And one particular aspect that is gaining considerable importance is the law of copyright as it applies to satellite communications.

It is impossible to gain an understanding of the law relating to satellite transmissions without a brief examination of the technical functioning of satellites in general. The necessity of acquiring familiarity with this field, including its jargon, will become evident in considering the application of satellite transmission to issues of copyright.

Technological development for the exploitation of outer space has increased at an extraordinary pace since the first satellite launchings of the late 1950s. Relay satellite systems can be broadly classified into active (or "retransmission") systems and passive (or "reflection") systems. Certain legal ramifications arise from this distinction and become evident upon consideration of the essential differences between these two systems. In a passive communications system a signal originating from earth is sent up to the satellite which simply reflects it back to a receiving station on earth. The great disadvantage of the reflecting system is that only a very small proportion of the original signal is actually received on earth. The more sophisticated active satellites are equipped with electronic receiving, amplifying and transmitting equipment. These satellites receive signals from an originating base on earth on a given frequency. The signal is greatly amplified and then transmitted back to earth on another frequency. A change of frequency is necessary to avoid interference with the originating signal. The need for amplification arises because of the dissipating effect of the atmosphere on the signal over its course of many

© Copyright, 1982, Peter D. Nesgos.

* B.C.L., L.L.B., L.L.M., (McGill University Institute of Air and Space Law) of the Bar of Quebec.

1 The Soviet Union was the first nation to successfully launch a satellite, Sputnik I, on Oct. 4, 1957, followed closely by the American satellite, Explorer I, on Jan. 31, 1958.

2 See generally, Matte, Aerospace Law (Toronto: Carswell, 1969) at 75-83.

3 The passive ECHO series satellites, e.g., were essentially large balloons covered with reflecting material.

4 Early examples of this type of satellite include the TELSTAR and RELAY systems both launched in 1962.
Satellite Transmissions

thousands of kilometers. Furthermore, the greater the transmitting power utilized, the greater the ability to focus the signal accurately on the receiving end.

In the case of passive satellites there can be no question that the original signal is derived from an earth-based source; yet the origin of a signal involving an active satellite may not be as clearly ascertainable. The legal issue raised is whether the active satellite has interfered with the signal to the extent that it may be characterized as effectively originating the signal itself. Tied closely to this is the capacity of an active satellite to control and focus the beam. A further question arises as to whether such direct control over a signal will cause it to be considered a tangible importation of a produced work.

There are three types of active communications satellites; the point-to-point satellite system, the distribution satellite system, and the direct broadcast satellite system. The essential feature distinguishing these systems is the effective amplification power of the satellite. The more powerful the transmitting capability of the satellite, the lesser the need for a sophisticated earth station having a strong receiving capability. Direct broadcast satellites (D.B.S.) are significantly more powerful than distribution satellites, which are, in turn, more powerful than point-to-point satellites. Consequently, their signals can be received by smaller, less costly facilities.

The term “point-to-point” was coined to describe satellites which directly link two particular earth stations. The satellite relays signals received from one ground station to a receiving station with a large-diameter parabolic receiving antenna known as a rectenna. Conventional cable or radio transmission then connects the earth receiving station with the ultimate users. A similar situation exists with respect to distribution satellites. Being of higher power however, these satellites require earth receiving stations of less sophistication and smaller size. The receiving stations, commonly known as community receivers, can either serve a group of individuals at one location or distribute the received signals to receivers within a limited area.

Finally, D.B.S. permit the direct reception of signals by individual home receivers. This is the logical consequence of increasingly powerful transmitters. The increased power permits the use of rectennas of a reasonable size and price. While these satellites are still in the experimental stage, there can be no question that this next stage in signal relay will become dominant in the near future.

The most favourable place in outer space to position a communications satellite is in what is called “geostationary” orbit. This is a belt around the earth, approximately 36,000 kilometers above the equator. An object placed at this level would rotate with the earth and would therefore appear stationary. The technical advantages of a “fixed-position” satellite are obvious, since its

---

6 The legal aspects of the two types of systems are claimed to be “virtually indistinguishable from those of ordinary long distance short wave transmissions.”

6 For a general discussion see Matte, Aerospace Law, From Scientific Exploration to Commercial Utilization (Toronto: Carswell, 1977) at 135 et seq.
beam is uninterrupted. Moreover at this height, a satellite could beam signals over a third of the earth's surface. Thus, three such satellites could ensure the whole of global communications. This kind of communications system was considered ideal for Canada due to its widely scattered population, its large geographic area and its harsh environment conducive to conventional communications systems. This recognized need for a geostationary domestic satellite system led to the establishment of TELESAT in 1969 and the subsequent launching of the Anik satellites.⁷

The proliferation of communications satellites has created numerous legal issues. Obvious examples are the potential for frequency interference, crowding in the geostationary orbit and the rights in transmitted signals. This last issue will be considered here. The need for international regulation of copyright in satellite signals is compelling. One must ensure that the originator of the signal recognizes the existence of copyright. Furthermore, there is a need to protect programme-carrying signals from being intercepted or "poached" by unauthorized receivers, for with signals being beamed over a wide geographic area, it is clear that any rectenna of suitable dimensions and frequency response could poach an emitted signal. An examination of existing international law is necessary in order to ascertain whether adequate protection of copyright in signals currently exists. There are a number of treaties and conventions in force, many with superseding protocols relating to this question. Nevertheless, until the advent of the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite of 1974 (the Brussels Convention)⁸ there was no widely accepted regime governing the matter.

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, of 1967, (The Outer Space Treaty)⁹ while considered the cornerstone of all outer space activities, could only be construed as applying to questions of copyright infringement by straining the interpretation of very general provisions. Article VI provides that:

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne both by the international organization and by the States Parties to the Treaty participating in such organization.

This provision, while sufficiently general to countenance issues of copyright liability, appears to be too vague to deal adequately with copyright questions.

---

⁷ Anik A1 was launched on Nov. 9, 1972.
⁸ 13 Intl Leg. Mat. 1447; signed May 21, 1974; in force pursuant to article 10 on Aug. 25, 1979. (See Appendix 1.)
Mention should also be made of the International Telecommunication Union (ITU), a specialized agency of the United Nations. The purpose of the ITU is "to maintain and extend international co-operation for the improvement and rational use of telecommunications." In order to achieve a more efficient use of the radio spectrum, the ITU seeks to ensure harmonization and co-ordination of state efforts and to foster collaboration among members.

To this end, states undertake to ensure the secrecy of international correspondence. The Radio Regulations, promulgated pursuant to the International Telecommunication Convention, oblige the telecommunications administration of member States to take necessary measures to "prohibit and prevent the unauthorized interception of radio-communications not intended for the general use of the public and the divulgence, without authorization, of the contents of such intercepted communications." These provisions relate to safeguarding signals from monitoring and are not directed towards the protection of copyright. In any case, though the regulations are binding on member States, the Convention does not provide for their enforcement.

Resort must be had to the international copyright conventions for more specific provisions. The Berne Convention of 1886, which has gone through a number of revisions, constitutes the signatory States as a Union for the protection of the rights of authors over their literary and artistic works. Essentially, the Convention provides that authors who are citizens of a member country shall enjoy, in all other member countries, the rights which those countries extend to their own subjects. The subsequent protocols have, moreover, sought to impose minimum standards of protection for copyrighted works. Notwithstanding the advantages of the Convention in providing a framework for international copyright protection, it is applied unsatisfactorily to questions of copyright infringement in satellite transmissions for several reasons. First, the plethora of revisions has resulted in a lack of uniformity among States since the numerous signatories are at various levels of adher-

---

10 The ITU is governed by the International Telecommunication Convention, Oct. 25, 1973, T.I.A.S. No. 8572. Canada is a long-standing member of the ITU.
11 Art. 4, para. 1(a) of the Convention, id.
12 See generally art. 4 of the Convention, id.
13 Art. 22 of the Convention, id. headed "secrecy of Telecommunications" states:
   1. Members agree to take all possible measures, compatible with the system of telecommunication used, with a view to ensuring the secrecy of international correspondence.
   2. Nevertheless, they reserve the right to communicate such correspondence to the competent authorities in order to ensure the application of their internal laws or the execution of international conventions to which they are parties.
15 Id.
16 Id.
17 Namely the additional protocols of Berlin (1908), Berne (1914), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971).
18 Supra note 16, art. 1.
19 Id. at art. 4.
ence. Moreover, neither the United States nor the Soviet Union are parties. Most importantly, the protection extended to "literary and artistic works" as defined in article 2 of the original Convention can in no way be construed to include broadcasts. The author's exclusive right to authorize the radio-communication of his work was recognized by article 11 bis of the Rome revision of 1928. Where, as is evident from the article, the signatory countries reserve the power to regulate the conditions whereby the right may be exercised, the possibility of inconsistent treatment is obvious. Canada has enacted article 11 bis in section 3(1)(f) of the Copyright Act. Finally, the Berne Convention, as amended by the Rome Protocol, does not extend copyright protection to the rediffusion of communications.

The Universal Copyright Convention (UCC) of 1952 was introduced as an alternative to what some nations considered the rather demanding requirements of the Berne Convention. The essence of the UCC is that member States agree to extend the protection offered by their own laws to nationals of other signatory States. The Convention imposes less onerous demands on the parties to comply with treaty obligations regarding the promulgation of specific domestic laws than does the Berne Convention. Nevertheless, the subsequent protocol of 1971 has imposed more demanding exigencies on signatory States. The UCC does not explicitly protect broadcasts or other radio communications although it has been noted that this does not necessarily imply that protection of broadcasts is excluded. This omission was rectified by the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention of 1961). In addition to providing for such neighbouring rights as performer's rights and rights of phonograph producers, the Convention protects broadcasting organizations by article 13:

20 Canada is currently at the level of the Rome Protocol of 1928; The Copyright Amendment Act, 1931, S.C. 21 & 22 Geo. 5, c. 8, s. 12.
21 Id., Schedule A; R.S.C. 1970, c. C-30, Schedule III.
(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radio communication.
(2) The national legislations of the countries of the Union may regulate the conditions under which the right mentioned in the preceding paragraph shall be exercised, but the effect of those conditions shall be strictly limited to the countries which have put them in force. Such conditions shall not in any case prejudice the moral right (droit moral) of the author, nor the right which belongs to the author to obtain an equitable remuneration which shall be fixed, failing agreement, by the competent authority.
22 A detailed discussion of section 3(1)(f) is contained in text, infra.
24 See text accompanying notes 27 et seq., infra. It should be noted, however, that later protocols do provide the author with the exclusive right to authorize rediffusion of his work.
25 Done at Geneva, Sept. 6, 1952; entered into force for the United States Sept. 16, 1955, 6 UST 2731; TIAS 3324; 216 UNTS 132.
26 Canada has complied with the UCC since Aug. 10, 1962.
27 Théraulaz, Propriété intellectuelle et droit de l'espace (1972), 99 J. du Droit Int'l 534 at 542.
Satellite Transmissions

Broadcasting organizations shall enjoy the right to authorize or prohibit:
(a) the rebroadcasting of their broadcasts;
(b) the fixation of their broadcasts;
(c) the reproduction.
(i) of fixations, made without their consent, of their broadcasting; ....
(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

"Broadcasting" is defined in article 3(f) as "the transmission by wireless means for public reception of sounds or of images and sounds." "Rebroadcasting" is defined in the following paragraph to mean "the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization."

While this provision might appear suited to the protection of satellite broadcasts in particular, two fundamental difficulties exist. First, there is some doubt whether protection extends to the originating organization. In the typical case, the originating earth station converts its programme into signals for relay to the satellite. At this stage, the process could not be characterized as broadcasting within the treaty definition. The receiving earth station, which would convert the signals and retransmit them to conventional receivers, would clearly fall under the provisions of the Convention. Thus, it would arguably be the case that the receiving-end station could claim the protection of the Convention as the originator of the programme while the original transmitter of the signal would be without any protection or recourse.

Many experts believe that the Rome Convention applies only when signals received by a satellite circuit are converted into signals destined for conventional home receivers, so that a pirated, unauthorized taking of signals right off the satellite and the use of them would not infringe the broadcasting right recognized by the Convention because the signal is not yet a broadcast in the technical sense used in the Convention.

The second fundamental deficiency with the Rome Convention has been summarized by a leading space jurist:

Because the Rome Convention is not a universal one, since the number of adhesions has remained small, because of the difficulties of its integration in the respective national legal systems and because of the ambiguity of its interpretation concerning space circuits; [it was discarded] as a possible solution to the problems [of the unauthorized use of space communications].

Clearly, a widely acceptable international treaty governing the protection of satellite transmissions was required.

28 See, in this regard, Masouyé, The Protection of Signals Carrying Radio and Television Programmes Transmitted by Communication Satellites (1971), 38 Telecomm. J. 389 at 390 wherein the author argues that a broad interpretation of the term broadcast could overcome this difficulty.
30 Matte, supra note 6, at 38. Canada is not a signatory.
The drafters of the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (the Brussels Convention of 1974) sought to resolve the problems with respect to copyright and neighbouring rights raised by satellite transmissions. The final draft dealt with concerns first raised in the mid-1950s and considered in a number of subsequent international meetings. The net result of the lengthy negotiating process was a treaty leaving each contracting state free to formulate appropriate national legislation to prevent the unauthorized distribution of signals. Thus, article 2(1) provides, inter alia, that "Each Contracting State undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended." This approach of requiring each contracting state to make adequate provision in its domestic law to prevent signal poaching reflects a fundamental change in the philosophy embodied in the Convention. Originally, the drafters sought to create substantive property rights in the signals themselves; at issue was how the rights of broadcasting organizations were to be balanced with the private rights of the owners of the copyright, that is, the programme contributors. Broadcasting organizations argued that the poaching of signals prejudiced their interest as well as the interests of authors, performers and other contributors since remuneration is based on the size of the audience. If these broadcasting organizations were not provided with protection from signal poachers, the legitimate programme audience would be reduced yet the organizations would have to support the total licensing fees. Still, many delegations thought it unsatisfactory to grant exclusive rights to broadcasting organizations to control the distribution of their programs.

The stalemate between the broadcasters and the programme contributors was finally resolved by not granting rights to either group. Instead, each state was left to decide for itself the best means for suppressing piratical distribution of satellite signals on or from its territory. The elimination of private rights changed the entire economic philosophy behind the convention, transporting the Convention from "the field of international private law to that of international public law."31

The treaty leaves the Contracting State completely free to adopt whatever measures it deems adequate. Thus, "[w]hile the obligation of the Convention might well be undertaken within the legal framework of intellectual property laws granting protection to signals under theories of copyright or neighbouring rights, a Contracting State could just as rightly adopt administrative measures, penal sanctions, or telecommunications laws or regulations on the subject."32 And while this diluted compromise was necessary for the treaty to gain broad acceptability, its effect is to direct one's attention to the domestic law of each Contracting State. If national legislation is to be the


determining factor in the protection of copyright, one might wonder why a state would not proceed to adapt its own laws (whether they be new, or existing laws extended to encompass a novel copyright question) rather than proceed with the complicated requirements of acceding to an international convention of limited application. Nevertheless, in order to ensure reciprocal protection of broadcasts transmitted abroad, adherence may be advantageous. Where the State is bound by international convention to formulate domestic legislation according to specified guidelines, it will be compelled to act in order to fulfill its international obligations as regards other States party.

Mention must be made of the precise ambit of the Convention. The treaty seeks to prevent the unauthorized distribution of programme-carrying signals transmitted by satellite. It does not create rights in signals. The treaty deals with the transmission of signals and not with their particular content. Thus, protection applies not to the programmes transmitted or any works or performances contained therein, but to the physical signals. As is often said, the container and not the content is protected. The Convention has a wide field of application covering all kinds of signals. The definition of "signal" is "an electronically-generated carrier capable of transmitting programmes," while a "programme is a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution." The definition of "distribution" is also broad and covers "any present or future telecommunications methods for transmitting signals, including not only traditional forms of broadcasting, but also transmission by cable or other fixed communications channels, laser transmission, and transmission by direct broadcasting satellites."

It should nevertheless be noted that the Convention does not apply where signals are intended for direct reception from the satellite by the general public. This exclusion is necessary because in the context of the treaty, as regards D.B.S., the "originating organization" and the "distributor" are considered to be one and the same. This is understandable when one considers that since D.B.S. have transmitters of sufficient strength to provide for direct reception in individual homes there is no discrete, earth-based distribution of signals. In effect, the D.B.S. is acting in much the same way as an

33 See Loriot, supra note 29, at 560.
34 It has been argued that it is not possible to dissociate the protection of signals from that of programmes (Kerever, The Ambiguities of the Brussels Convention of 21 May 1974, [1977] Rev. Int'l D.d'A. 56 at 64 et seq.). Nevertheless, pursuant to the Convention it is necessary to establish specific property rights in order to prevent unauthorized use of programmes.
35 Supra note 8, at art. 1(i).
36 Id. art. 1(ii).
37 Supra note 32, at para. 76.
38 Supra note 8, at art. 3.
39 Defined in art. 1(vi) as "the person or legal entity that decides what program the emitted signals will carry."
40 Defined in art. 1(vii) as "the person or legal entity that decides that the transmission of the derived signals to the general public or any section thereof should take place."
earth-based broadcaster emitting signals from a large antenna. Therefore, one cannot distinguish as the treaty does, between the “originating organization” and the “distributor.”

Since the Convention deals with these two entities separately, it could not be construed to apply to direct broadcast satellites. The question still remains, however, whether these satellites infringe the domestic copyright laws of any Contracting State.

It is also worthy of note that the treaty places the obligation to prevent unauthorized use of transmissions on the receiving State, rather than the transmitting State. Regulation of transmitting undertakings is not envisioned. This is understandable, since the emission or “up-link” of a signal to a satellite cannot be considered an infringement of copyright as there is no communication to the public.

The treaty deals only with issues of international copyright infringement through the unauthorized use of signals and therefore has no national application. Canada has not signed the Brussels Convention and seemingly has not expressed any interest in adopting it in the future. In order to gain an understanding of the legal issues involved in intranational copyright infringement, an examination of the issues of copyright infringement concerning satellite transmissions received in Canada must commence with an analysis of the Copyright Act.

As a preliminary matter, one must determine whether the infringing act occurred in Canada. The mere fact that a signal emanates from outside the country will not of itself deprive a Canadian court of jurisdiction. In Jenner v. Sun Oil Co., the plaintiff claimed damages for defamation resulting from a radio network broadcast originating in the United States but reaching a substantial Canadian audience. In granting leave to issue service ex juris, the Court held that it was “of no consequence that the alleged defamatory words were . . . uttered beyond the jurisdiction” as “they were so transmitted as to be published within the jurisdiction.” Similarly, the case of CAPAC v. KVOS Inc. involved leave to serve ex juris a defendant broadcasting certain musical works into Canada from the United States in breach of Canadian copyright law. At trial, Thorson P. held:

I am unable to see how it could reasonably be said that this right was infringed by a broadcast or telecast of a programme emanating from a television station outside Canada, even if such programme included musical works which would in
Satellite Transmissions

Canada be within the plaintiff's repertoire and in which it would have in Canada the copyright referred to and even if the programme was beamed towards Canada in order to reach Canadian audiences. There is nothing to indicate the commission of any tort in Canada.⁴⁷

The Supreme Court of Canada allowed the appeal, Martland J. stating that:

"It seems arguable that a person who has held himself out to advertisers as being able to communicate, by means of his American television transmitter, with some million persons in British Columbia, if he transmits musical works, of which the appellant has the Canadian copyright, to viewers in Canada who receive such programmes, has thereby communicated in Canada such musical works by radio communication, within the provisions of the Copyright Act.⁴⁸"

It therefore appears to be the case that infringement arises where the transmission is received even if it originates outside of the jurisdiction.

Section 3 of the Copyright Act states, in essence, that copyright means the sole right to produce or reproduce a work, to perform the work in public and to publish it, if unpublished. In the subsequent enumeration of further rights, it is subsection (1)(f) which is of direct concern to satellite transmissions. This clause provides that copyright includes the sole right "in case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication." It is therefore evident that copyright infringement of satellite communications of a literary, dramatic, musical or artistic work can occur where the transmission is characterized as a performance in public or if it is considered to be a radio communication.

As one might expect, there is a dearth of authority dealing with satellite communications. Both of these aspects of the Copyright Act have been considered with respect to more conventional means of communication, however. Furthermore, it must be borne in mind that currently satellite transmissions are coupled with earth-based systems. Typically, a powerful master antenna operated by a cable company receives satellite signals, and the company re-diffuses these to individual subscribers. Thus, the advent of point-to-point and distribution satellites has not yet had much effect on the issue of copyright.

Concerning the first definition of copyright mentioned above, that of performance in public, one might well argue that reception, in itself, by a master antenna for the purpose of redistribution would not constitute an infringement of copyright. Indeed, a very similar issue was considered in the case of Canadian Admiral Corp. v. Rediffusion, Inc.⁴⁹ In that case, the plaintiffs had acquired the exclusive right to telecast certain football games. The defendants proceeded to intercept the broadcast signals emitted by the plaintiff and then distribute the programme by cable to its subscribers. The plaintiff instituted action for copyright infringement.

The Court first dealt with the issue of whether there was a "work" in-

---

⁴⁷ Id. at 247-48 (C.P.R.), 137 (Fox. Pat. L.).
⁴⁸ Supra note 46, at 144 (S.C.R.), 8 (D.LR.), 8-9 (C.P.R.).
volved in the transmission. Cameron J., who rendered judgment, differentiated between live and recorded telecasts, stating that, “for copyright to subsist in a ‘work’ it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance.” Consequently, his Lordship held that only recorded telecasts could be construed as works, live transmission of signals being too ephemeral to be considered in a similar manner.

In dealing with the issue of whether the rediffusion by the cable company constituted a performance in public, his Lordship, while unhesitatingly finding that the rebroadcast was a performance, found that it was not “in public.” The test used to ascertain the “public” nature of the transmission was the often applied test of “what was the character of the audience.” Cameron J. referred to the case of Jennings v. Stephens wherein Romer L.J. distinguished the example of entertainment forming part of domestic or home life. A lengthy analysis of applicable cases led Cameron J. to the following conclusion: “In none of these cases...can I find a suggestion that a performance in a private home where the performance is given, heard or seen by only members of the immediate household, could be considered as a performance in public.”

On the same reasoning, it is unlikely that the reception of satellite transmissions by the distribution centre would be characterized as a performance in public. It is worthy of note, however, that in the Canadian Admiral case the Court held that a performance in public occurred in the defendants’ showroom where they had their system on display.

The other relevant portion of section 3 referred to above was subsection 3(1)(f), “communication of a work by radio communication.” As is evident

50 Id. at 394 (Ex. C.R.), 86 (C.P.R.), 125 (Fox. Pat. C.).
51 Id. at 404 (Ex. C.R.), 97 (C.P.R.), 135 (Fox. Pat. C.).

This issue of liability for copyright infringement for redistribution has also arisen in the U.S. The cases of Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 88 S. Ct. 2084 (1968) and Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 94 S. Ct. 1129 (1974) both held that reception and retransmission of signals does not amount to a performance and thereby constitute copyright infringement under U.S. law.


52 Rediffusion, id. at 408 (Ex. C.R.), 102 (C.P.R.), 139 (Fox. Pat. C.).
54 Id. at 481 et seq. (Ch.), 482 et seq. (L.T.), 416 et seq. (All E.R.).
55 Supra note 49, at 497-408 (Ex. C.R.), 101 (C.P.R.), 139 (Fox. Pat. C.).
56 Id. at 409 (Ex. C.R.), 103 (C.P.R.), 140 (Fox. Pat. C.).
from the clause, it is irrelevant whether the communication constituted a performance in public. This subsection was also considered in the Canadian Admiral case. Cameron J. defined radio as "a communication of messages by means of electro-magnetic or Herzian waves through the ether." His Lordship held that transmission by co-axial cables was not by the use of electromagnetic waves. The issue therefore arises whether a satellite "communicates by radio communication," thus bringing the transmission within the purview of the Copyright Act. In order to answer this, one must first determine what is meant by radio communication. As a first resort, one might feel inclined to invoke the definition of radio found in the Radio Act. This, in fact, was done in the case of C.A.P.A.C. v. CTV Television Network Ltd. by Jackett P.:

The word 'radio' is probably a word from the world of engineers but Parliament has defined it in the Radio Act... and I think it can be assumed that Parliament is using the word 'radio' in the Copyright Act with the meaning which is given to the word by the statute specially enacted to regulate 'radio.'

The definition of radio then existing read as follows:

'radio' means radiotelegraph, radiotelephone, and any other form of radioelectric communication including the wireless transmission of writing, signs, signals, pictures and sounds of all kinds by means of Hertzian waves.

The word "radio", however, has been since redefined by statute. Thus, for example, in the Interpretation Act of 1967, radio is defined as "any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by means of Hertzian waves." The latest definition found in both the Radio Act and the Interpretation Act is as follows:

'radiocommunication' or 'radio' means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electro-magnetic waves of frequencies lower than 3,000 Gigacycles per second propagated in space without artificial guide.

Clearly, satellite transmission would easily be covered by such a definition when one considers that most satellites operating today function at less than fourteen gigahertz.

---

67 Id.
68 Id. at 410 (Ex. C.R.), 103 (C.P.R.), 140 (Fox. Pat. C.).
71 Id. at 876 (Ex. C.R.), 9 (D.L.R.), 251 (C.P.R.).
72 Radio Act, R.S.C. 1952, c. 233, s. 2(1)(1).
73 S.C. 1967 (2d Sess.), c. 7.
74 Id. s. 28; Radio Act, R.S.C. 1970, c. R-1, s. 2(1).
77 Id. s. 28; Radio Act, R.S.C. 1970, s. R-1, s. 2(1).
78 A gigacycle per second is equivalent to one billion cycles per second while one Hertz equals one cycle per second.
Since it may be stated that a satellite communicates by "radio communication", would it be the case that liability for copyright infringement for unauthorized use would necessarily arise? Would a station that picks up satellite signals embodying copyrightable work be held liable for infringement simply because radio communication is involved? On the one hand it is true that on a strict reading of subsection 3(1)(f) all that is required is radio communication of a literary, dramatic, musical or artistic work regardless of whether there was a performance in public.

It is submitted that such is not actually the case. First, the applicable definition of "radio" or "radio communication" is not that found in the Radio Act, or the Interpretation Act. As mentioned above, subsection 3(1)(f) was added to the Copyright Act in order to implement the Rome Copyright Convention of 1928, and specifically article 11 bis thereof. This article states: "(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radiocommunication." The original version, in French, uses the term "radiodiffusion" which is defined as "broadcasting" in the Broadcasting Act, the Radio Act, the Canadian Radio-television and Telecommunications Commission Act and the Interpretation Act. It should be pointed out that the French translation of radio communication in subsection 3(1)(f) is "radiophonie." This term is not defined in any of the above-cited acts.

It therefore seems evident that the use of the term "radio communication" was the result of inaccurate translation and poor legislative drafting. This point of view is supported by the Supreme Court in the case of CTV Television Network. As Pigeon J. stated: "Bearing in mind that the Rome Convention is in French no other conclusion is possible but that the intent is to provide that copyright includes the exclusive right of public performance or representation by radio broadcasting (communication au public par la radiodiffusion)."

While broadcasting is defined in the Broadcasting Act as "any radio communication in which the transmissions are intended for direct reception by the general public," the tendency to apply this definition to subsection 3(1)(f) of the Copyright Act should be avoided. To apply another act to define this term would be to commit the same error of reasoning as had occurred when the definition of radio communication under the Radio Act was used. The proper construe of "communication by radio communication" is a correct translation of article 11 bis, that is, "communication of their works to the public by broadcasting." As a necessary result of this reasoning, one can

---

70 R.S.C. 1970, c. R-1, s. 2(1).
71 S.C. 1974-75-76, c. 49, s. 2.
73 Supra note 60.
74 Id. at 682 (S.C.R.), 102 (D.L.R.), 138 C.P.R.
75 It should be noted that the definition of broadcast in this article would be in the more general sense of dissemination of Hertzian waves.
argue that this provision applies to D.B.S., which provides communication to the public by broadcasting. While such transmissions would not in all likelihood constitute a performance in public, they certainly would constitute communication to the public. Therefore, the *Copyright Act* may be interpreted so as to protect literary, dramatic, musical or artistic works transmitted by D.B.S.

The D.B.S. system is relatively new: the first experiment occurred in 1974 in the United States with the launching of the ATS-F satellite to beam educational television programming. It is hoped that Telesat Canada's Anik C fixed service satellite, set for launch in November 1982, will also be able to provide direct broadcasting. Anik C will operate in the twelve gigahertz band, and have sufficient power to enable reception by earth receiving devices that are sufficiently small (0.6-1 m.) to permit their use in private homes.

A pilot project has already been implemented in Ontario, British Columbia and the Northwest Territories on an experimental basis using Anik B. Individuals, community groups and cable companies in remote areas have small antennas (1-2 m. to 1.8 m. in diameter) in service to receive television programming directly from the satellite.77

Legislative reform of the *Copyright Act* is anticipated in the near future. In July, 1981, a Department of Communications Task Force was created to assist in the preparation of legislative proposals for revising the *Copyright Act*. It is expected that the proposals will be submitted by July 1982 for Cabinet consideration and thereafter tabled for first reading.79

In the interim, it may be possible to construe the existing *Copyright Act* so as to protect works transmitted by satellite. Copyright exists in any work performed in public and, in the case of any literary, dramatic, musical or artistic work, communicated by radio communication. This definition of copyright seems wide enough to cover most satellite transmissions communicated to the public that emanate from point-to-point or distribution satellites. Finally, a proper interpretation of radio communication would extend copyright protection to D.B.S. as well.

---

76 "Television Receive Only" devices (T.V.R.O.s).
77 Dept. of Comm., Annual Rep., 1980-81 (Ottawa: Min. of Supply and Services, Canada) at 13.
APPENDIX I

CONVENTION RELATING TO THE DISTRIBUTION OF PROGRAMME-CARRYING SIGNALS TRANSMITTED BY SATELLITE

The Contracting States,

Aware that the use of satellites for the distribution of programme-carrying signals is rapidly growing both in volume and geographical coverage;

Concerned that there is no world-wide system to prevent distributors from distributing programme-carrying signals transmitted by satellite which were not intended for those distributors, and that this lack is likely to hamper the use of satellite communications;

Recognizing, in this respect, the importance of the interests of authors, performers, producers of phonograms and broadcasting organizations;

Convinced that an international system should be established under which measures would be provided to prevent distributors from distributing programme-carrying signals transmitted by satellite which were not intended for those distributors;

Conscious of the need not to impair in any way international agreements already in force, including the International Telecommunication Convention and the Radio Regulations annexed to that Convention, and in particular in no way to prejudice wider acceptance of the Rome Convention of October 26, 1961, which affords protection to performers, producers of phonograms and broadcasting organizations,

Have agreed as follows:

ARTICLE 1

For the purposes of this Convention:

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

(ii) "programme" is a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution;

(iii) "satellite" is any device in extraterrestrial space capable of transmitting signals;

(iv) "emitted signal" or "signal emitted" is any programme-carrying signal that goes to or passes through a satellite;

(v) "derived signal" is a signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have been one or more intervening fixations;

(vi) "originating organization" is the person or legal entity that decides what programme the emitted signals will carry;

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

ARTICLE 2

(1) Each Contracting State undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended. This obligation shall apply where the originating organization is a national of another Contracting State and where the signal distributed is a derived signal.

(2) In any Contracting State in which the application of the measures referred to in paragraph (1) is limited in time, the duration thereof shall be fixed by its domestic law. The Secretary-General of the United Nations shall be notified in writing of such duration at the time of ratification, acceptance or accession, or if the domestic law comes into force or is changed thereafter, within six months of the coming into force of that law or of its modification.

(3) The obligation provided for in paragraph (1) shall not apply to the distribution of derived signals taken from signals which have already been distributed by a distributor for whom the emitted signals were intended.

ARTICLE 3

This Convention shall not apply where the signals emitted by or on behalf of the originating organization are intended for direct reception from the satellite by the general public.

ARTICLE 4

No Contracting State shall be required to apply the measures referred to in Article 2(1) where the signal distributed on its territory by a distributor for whom the emitted signal is not intended

(i) carries short excerpts of the programme carried by the emitted signal, consisting of reports of current events, but only to the extent justified by the informatory purpose of such excerpts, or

(ii) carries, as quotations, short excerpts of the programme carried by the emitted signal, provided that such quotations are compatible with fair practice and are justified by the informatory purpose of such quotations, or

(iii) carries, where the said territory is that of a Contracting State regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, a programme carried by the emitted signal, provided that the distribution is solely for the purpose of teaching, including teaching in the framework of adult education, or scientific research.

ARTICLE 5

No Contracting State shall be required to apply this Convention with respect to any signal emitted before this Convention entered into force for that State.
ARTICLE 6

This Convention shall in no way be interpreted to limit or prejudice the protection secured to authors, performers, producers of phonograms, or broadcasting organizations, under any domestic law or international agreement.

ARTICLE 7

This Convention shall in no way be interpreted as limiting the right of any Contracting State to apply its domestic law in order to prevent abuses of monopoly.

ARTICLE 8

(1) Subject to paragraphs (2) and (3), no reservation to this Convention shall be permitted.

(2) Any Contracting State whose domestic law, on May 21, 1974, so provides may, by a written notification deposited with the Secretary-General of the United Nations, declare that, for its purposes, the words "where the originating organization is a national of another Contracting State" appearing in Article 2(1) shall be considered as if they were replaced by the words "where the signal is emitted from the territory of another Contracting State."

(3) (a) Any Contracting State which, on May 21, 1974, limits or denies protection with respect to the distribution of programme-carrying signals by means of wires, cable or other similar communications channels to subscribing members of the public may, by a written notification deposited with the Secretary-General of the United Nations, declare that, to the extent that and as long as its domestic law limits or denies protection, it will not apply this Convention to such distributions.

(b) Any State that has deposited a notification in accordance with subparagraph (a) shall notify the Secretary-General of the United Nations in writing, within six months of their coming into force, of any changes in its domestic law whereby the reservation under that subparagraph becomes inapplicable or more limited in scope.

ARTICLE 9

(1) This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until March 31, 1975, for signature by any State that is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice.

(2) This Convention shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State referred to in paragraph (1).

(3) Instruments of ratification, acceptance or accession shall be deposited with the Secretary-General of the United Nations.

(4) It is understood that, at the time a State becomes bound by this
Convention, it will be in a position in accordance with its domestic law to give effect to the provisions of the Convention.

ARTICLE 10

(1) This Convention shall enter into force three months after the deposit of the fifth instrument of ratification, acceptance or accession.

(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, this Convention shall enter into force three months after the deposit of its instrument.

ARTICLE 11

(1) Any Contracting State may denounce this Convention by written notification deposited with the Secretary-General of the United Nations.

(2) Denunciation shall take effect twelve months after the date on which the notification referred to in paragraph (1) is received.

ARTICLE 12

(1) This Convention shall be signed in a single copy in English, French, Russian and Spanish, the four texts being equally authentic.

(2) Official texts shall be established by the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director General of the World Intellectual Property Organization, after consultation with the interested Governments, in the Arabic, Dutch, German, Italian and Portuguese languages.

(3) The Secretary-General of the United Nations shall notify the States referred to in Article 9(1), as well as the Director-General of the United Nations Educational, Scientific and Cultural Organization, the Director General of the World Intellectual Property Organization, the Director-General of the International Labour Office and the Secretary-General of the International Telecommunications Union, of

(i) signatures to this Convention;
(ii) the deposit of instruments of ratification, acceptance or accession;
(iii) the date of entry into force of this Convention under Article 10(1);
(iv) the deposit of any notification relating to Article 2(2) or Article 8(2) or (3), together with its text;
(v) the receipt of notifications of denunciation.

(4) The Secretary-General of the United Nations shall transmit two certified copies of this Convention to all States referred to in Article 9(1).

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Convention.

DONE at Brussels, this twenty-first day of May, 1974.