INTERNATIONAL SATELLITE PIRACY: THE UNAUTHORIZED INTERCEPTION AND RETRANSMISSION OF UNITED STATES PROGRAM-CARRYING SATELLITE SIGNALS IN THE CARIBBEAN, AND LEGAL PROTECTION FOR UNITED STATES PROGRAM OWNERS

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I. INTRODUCTION

Government and private entities in the Caribbean Basin countries recently have been intercepting United States domestic satellite signals carrying pay-television programs intended for United States cable viewers and have rebroadcast the programs without the consent of the United States copyright owners. The unauthorized interception of the broadcast signal and the unauthorized rebroadcasting of the program material, otherwise known as satellite piracy, deprives those United States contributing artists and broadcasting organizations of their property without compensation.

United States program owners currently lack assurances of effective international legal protection of their property rights against international satellite piracy because United States copyright laws do not apply outside of United States territory. In addition, existing multilateral agreements provide only limited protection because they either fail to provide necessary sanctions against satellite piracy or are so outdated that they do not specifically address current satellite broadcasting issues.¹

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Until a new multilateral copyright agreement is designed to provide comprehensive multinational legal protection against international satellite piracy, the most effective immediate solution for dealing with satellite piracy in the Caribbean is through bilateral agreements and congressional initiatives as provided for in the Caribbean Basin Initiative. The Caribbean Basin Initiative attempted specifically to combat satellite piracy by conditioning trade benefits on copyright protection for the United States program owners.

II. BACKGROUND: WHAT IS SATELLITE PIRACY AND WHOSE INTERESTS ARE AT STAKE?

Television broadcasts generally are made on the basis of contracts under which broadcasters agree to pay program owners a fee to show their programs to a specified audience located in a defined geographic area. Prior to the use of satellite communications, the area of broadcast in the conventional broadcasting system was geographically limited to the line-of-sight paths between the originating broadcaster's transmitter and the receiving antennae. With a defined area of broadcast, both the originating broadcasters and a program's copyright holders could control through contractual terms the area capable of receiving the conventional broadcast. As a result, the contracting parties had little fear of unauthorized interception. Similarly, where a program was to be broadcast in a country or territory not within line-of-sight transmission, agreements or international copyright conventions provided for the purchase of broadcasting rights by the rebroadcasting organization in return for royalty payments to the contributing artists. Consequently, if no copyright treaty or royalty agreement existed, the program material would be withheld from that particular country.

With the advent of satellite technology, however, the range of signal coverage has increased far beyond that of the defined, line-
of-sight paths of conventional broadcasting. Organizations and program contributors consequently have begun to lose complete control over the area of intended coverage.

Broadcast signals transmitted by satellite begin their journey at the transmitting center of a ground station and then are transmitted to a high altitude domestic satellite. From there, the satellite converts the signal to a different frequency and retransmits it down to a cable system or other authorized receiver. The space between the distribution satellite in outer space and the receiving station on earth extends over one-third of the globe. This area covered by satellite retransmission, or "footprint," permitting unauthorized parties having the necessary equipment to intercept the broadcast signals. This unauthorized intercepting and rebroadcasting is known as "satellite piracy" or "poaching."

Over the last decade, as satellite technology became more advanced, it became increasingly simple for unauthorized ground receivers to intercept and relay satellite signals to an unintended audience. The satellites in use in 1972 were exclusively point-to-point satellites, carrying programs from one point to another. Point-to-point satellites are relatively low-powered, are capable only of transmitting weak signals, and require highly sensitive, powerful, and very expensive ground stations for conversion and redistribution of signals. The point-to-point signal is transmitted to a specific ground station and is incapable of diffusion into expanded areas. In addition, because of the satellite's high costs, only a limited number of operative ground stations existed at the time point-to-point satellites were introduced, so interception and rebroadcast rarely occurred.

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9 Id.
10 See id. at 207-08.
11 Id. at 208.
13 Dealing With the Footprints Fallouts, Broadcasting, July 4, 1983, at 66 [hereinafter cited as Footprints].
14 See generally id.; see also infra notes 112-13 and accompanying text.
15 See UNESCO Records, supra note 12.
16 Id.
17 Id.
18 See supra note 1 at 207.
19 UNESCO Report, supra note 12.
20 Id.
21 Id.
The possibility of satellite piracy increased, however, with the advent of the distribution satellite in the mid 1970's. Distribution satellites were much more powerful than the point-to-point satellites, and their broadcast signal could be received by many more ground receiving stations by using much simpler and less costly equipment than had been previously required.

The latest addition to the satellite broadcasting technology is the direct broadcasting satellite, which will further simplify and lower the cost of the communication process. Unlike point-to-point and distribution satellites, whose satellite signals must be converted at highly sophisticated ground stations and then distributed to home television sets, the direct broadcast satellites are sufficiently powerful to send signals directly to home receiving antennae without passing through a ground station. As a result, direct broadcast satellites provide the greatest potential for satellite piracy because the program carrying signal can be intercepted directly by the public with home receiving sets.

Satellite transmission piracy of a program of literary, intellectual or artistic content violates the rights of the originating broadcasters and program contributors, such as authors, directors, and performers. Satellite piracy, therefore, represents both the theft of works of the contributing artists as well as the theft of the transmissions of the originating broadcasting organizations. In the case of program-carrying signal theft of a sports event, for example, the theft would violate the rights of the organizations sponsoring and financing the event. Similarly, the piracy of filmed news programs transmitted by satellite would violate the rights of news agencies, television organizations, and the journalists involved.

Ownership rights in the program material generally are renumerated only in proportion to the size of the intended audience. Yet,
when unauthorized parties redistribute programs for commercial advantage, neither program contributors nor broadcasting organizations profit from the additional coverage. Because originating broadcasters are unlikely to grant program contributors additional compensation for the increased viewer exposure caused by the theft of their program-carrying signal, relationships between broadcasters and program contributors who hold copyrights in the programs are in a state of flux.\textsuperscript{31}

If program contributors cannot be ensured copyright protection, or at least compensation for the theft of their intellectual property, they may instead choose not to use the satellite at all. Likewise, originating broadcasters might decide to abandon satellite broadcasting if they have to pay additional royalty fees for the increased audience exposure, especially when the fee is excessive.\textsuperscript{32} Yet, a high additional fee or abandonment of the broadcast undermines the very purpose of using satellites, namely, to achieve both a more effective and cost efficient means of communication.\textsuperscript{33}

Within the next four years alone, several countries, including Brazil, France, West Germany, Japan, and Saudia Arabia, plan to launch a total of twenty-five satellites designed to transmit television programming.\textsuperscript{34} These satellites will broadcast an enormous amount of copyrighted material over a vast area of the globe.\textsuperscript{35} The more commonplace satellite broadcasting becomes, the greater the chance of satellite piracy, which grows commensurately with the increased capability of signal reception in an expanded geographic area. Therefore, to maximize the benefits of using satellite communication and to encourage more creative programming, effective international laws must be designed to adequately protect the property rights of program contributors and broadcasting organizations against theft of their program material and broadcast transmissions.

III. INTERNATIONAL LEGAL PROTECTION FOR AMERICAN PROGRAM CONTRIBUTORS AND BROADCASTING ORGANIZATIONS: THE MULTILATERAL AGREEMENTS

Acts of copyright infringement which occur outside of the juris-

\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} N.Y. Times, Oct. 13, 1983, at C26, Col. 6.
\textsuperscript{35} Id.
duction of the United States are not actionable under the United States Copyright Act36 because United States laws lack extraterritorial authority.37 As a result, when Caribbean countries pirate United States satellite transmissions, carrying copyrighted material intended for United States cable viewers, those countries are not subject to the United States Copyright Act because the infringement (i.e., rebroadcasting the video performance without the authorization of the American owners) occurs outside of United States jurisdiction.38

Therefore, it is important to design a legal framework which ensures United States program owners adequate international copyright protection. Such a legal framework may appear in the form of multilateral or bilateral treaties which bind member states. Treaties which merely provide for good faith agreements or cooperation, and do not include binding obligations and sanctions as a means of enforcement, are not strong enough to guarantee United States program owners protection against satellite piracy.39

Furthermore, a foreign nation may accord copyright protection to United States works by unilateral action. The unilateral action may take the form of granting national treatment, that is, granting United States citizens the same copyright protection as that nation accords its own nationals.40 The unilateral action also may grant reciprocal treatment to United States copyright owners by giving those owners the same copyright protection as the United States grants the foreign nation's nationals.41

Although acts of piracy are inconsistent with the principles included in existing multilateral agreements, such multilateral agreements fail to adequately protect United States program owners against satellite piracy. The existing multilateral treaties either lack sanctions necessary to prevent satellite piracy, or are outmo-

40 See id., § 17.04[A] n.2.
41 Id.
ded because of their exclusive application to conventional broadcasting and thus do not specifically address the problem of satellite piracy.\textsuperscript{42}

A. \textit{International Telecommunications Union and the Radio Regulations}

1. \textit{Purpose}

The International Telecommunications Union (ITU) is an independent intergovernmental organization related to the United Nations by a special agency agreement.\textsuperscript{43} The ITU's goals are to maintain and extend international cooperation for the improvement and rational use of telecommunications, to promote the development and efficient operation of telecommunications facilities, and to harmonize the actions of nations in the attainment of these ends.\textsuperscript{44} The ITU is responsible for regulating international communication services, allocating the radio spectrum, increasing the usefulness of telecommunication services, and making such services generally available to the public.\textsuperscript{45} With the advent of satellite communications, the ITU also became the primary body for the formation of international space law.\textsuperscript{46} Furthermore, as a technically oriented body, the ITU is responsible for seeking more efficient use of both radio frequencies and geostationary satellite orbits.\textsuperscript{47} ITU functions include allocating the radio frequency spectrum, registering radio frequency assignments, coordinating efforts to eliminate harmful interference between radio stations of different countries, and improving the use of the radio frequency spectrum.\textsuperscript{48}

\textsuperscript{42} See generally Note, supra note 1, at 223.


\textsuperscript{44} 1973 ITC, supra note 43, art. 4, § 1(a).

\textsuperscript{45} Id. § 1(b).

\textsuperscript{46} See Note, supra note 1, at 212.

\textsuperscript{47} See 1973 ITC, supra note 43, art. 33, § 2.

\textsuperscript{48} Id., art. 4, § 2.
2. Relevant Provisions

The United States and most Caribbean countries are parties to the International Telecommunications Convention (ITC) and the annexed Radio Regulations. The agreements are binding on the member states.

Article 42(1) of the 1973 ITC provides that "[t]he provisions of the Convention are completed by the Administration Regulations which regulate the use of telecommunication and shall be binding on all members."

Article 17 of the 1959 Radio Regulations provides:

The administrations bind themselves to take the necessary measures to prohibit and prevent:

a) the unauthorized interception of radio communications not intended for the general use of the public;

b) the divulgence of the contents or any use whatever, without authorization, of information of any nature whatever obtained by the interception of radio communications mentioned in [the preceding paragraph].

In regard to the Caribbean situation, Article 17 of the 1959 Radio Regulations would require member Caribbean states to prohibit and prevent unauthorized interception of American domestic satellite signals not intended for the general public in the Caribbean countries. This requirement, as a practical matter, is unenforceable.

In addition, Article 7, paragraph 428A, § 2A of the 1971 Partial Revision of the Radio Regulations states that "[i]n devising the characteristics of a space station in the broadcasting satellite service, all technical means available shall be used to reduce, to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries."

Paragraph 428A has received varying interpretations. One view

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50 See 1973 ITC, supra note 43, art. 2., § 1.

51 See 1973 ITC, supra note 43, art. 42(1), para. 147.

52 See 1963 Partial Revision, supra note 43, art. 17.


54 See Note, supra note 1, at 213 n.52.
maintains that paragraph 428A gives approval and recognition to the principle of prior consent, and thus regards direct satellite broadcasting without the prior consent of a receiving state as a violation of international law. In contrast, the majority view dismisses the issue of prior consent, and interprets paragraph 428A on strictly technical grounds. This view maintains that the paragraph was adopted merely for technical purposes such as avoiding harmful interference in broadcast transmissions and problems of unavoidable overspill.

Unfortunately, the ITU regulations are limited to technical matters, and the Radio Regulations were designed to control the transmission rather than the content of the signal. The problems involving copyrighted program material contained within the signal therefore probably exceed the scope of the convention. Furthermore, the ITU is incapable of providing legal protection to the program owners because the ITU has no regulatory or judicial authority to enforce its technical regulations, which are complied with voluntarily on the basis of mutual cooperation. Therefore, the ITU, as it presently stands, is an inappropriate forum to combat satellite piracy.

B. The Universal Copyright Convention and the Berne Convention

The Universal Copyright Convention and the Berne Convention are the two major multilateral copyright treaties offering

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55 Id.
56 Id.
57 Id. at 214 n.54.
58 Id.
59 Straschnov, Legal Protection of Television Broadcasts Transmitted Via Satellite, 17 BULL. COPYRIGHT Soc'y U.S.A. 27, 39 (1970). Straschnov proposes creation of a new treaty to provide protection for the signal itself, regardless of content, and regardless of whether the content is protected by copyright. Id. Essentially the Brussels Satellite Convention serves this purpose, except it does not provide protection for direct broadcast satellite signals. See infra notes 90-113 and accompanying text.
60 See Note, supra note 1, at 213.
61 Id. at 214.
copyright protection to authors of literary and artistic works. The most significant protection for American nationals under foreign laws is derived from the Universal Copyright Convention. The United States is not a party to the Berne Convention.

The Universal Copyright Convention grants national treatment to works of United States nationals regardless of where the works are published. Such works must be accorded equal copyright protection in other states which adhere to the Universal Copyright Convention as those states accord works of their own nationals first published in their own territory. Problems occasionally arise when the Universal Copyright Convention's national treatment obligation has limited effect, such as when one state's copyright laws insufficiently protect copyrights held by another state's nationals.

In such situations, as in most agreements which provide for national treatment, the question arises as to a state's obligation to accord national treatment to foreign claimants and whether such an obligation applies to rights which are not specifically contained in the state's copyright laws, but which constitute rights merely in the nature of copyright.

As noted above, the United States is not a party to the Berne Convention, yet works of United States nationals may still obtain Berne protection under the "back door" Berne approach of simultaneous publication. Pursuant to this "back door" Berne approach, an author who is a national of a non-Berne Convention country is still entitled to copyright protection for his work in all Berne member countries, if such work was either first published in

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65 See Note, supra note 1, at 218-19; see also Nimmer, supra note 37, § 17.04[B].

66 See M. Nimmer, supra note 37, § 17.04[B].

67 Id.

68 Id. at n.6.

69 Id. This problem also applies to the Caribbean nations whose copyrights laws are too antiquated to effectively deal with those rights involved in satellite broadcasting. See also infra notes 134-35 and accompanying text.

70 See M. Nimmer, supra note 37, § 17.04[D][1].
a Berne country, or if it was published in any given Berne country. Many United States works accordingly have acquired Berne protection by being simultaneously published in the United States and in a Berne country such as Canada or the United Kingdom. Simultaneous publication of motion pictures occurs when the United States film is distributed in a Berne country, in a "scheduled, deliberate and comprehensive manner."

Authors' rights with respect to broadcasting are set forth in the 1971 Revision of the Universal Copyright Convention and in the 1971 Revision of the Berne Convention. Article IV(b)(i)(s) of the Universal Convention protects the authors' "economic interest, including the exclusive right to authorize reproduction by any means, public performance and broadcasting." Article 11(b)(i)(s) of the Berne Convention provides that:

authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

In addition, Article 11 of 1971 Revision of the Berne Convention applies to the rights of "authors of dramatic works," i.e., motion picture owners, and gives them exclusive right of authorizing "(i) the public performance of their works, including such public performance by any means of process; (ii) any communication to the public of the performance of their works." This article would appear to be particularly applicable to film artists and owners whose works are rebroadcast by Caribbean broadcasters without the artists' and owners' consent.

While the Berne Convention and the Universal Copyright Con-

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71 Id. § 17.04[D][2][a].
72 Id.
73 Id. § 17.04[D][2][c][iii].
74 See supra note 63.
75 See supra note 64.
76 See supra note 64.
77 See supra note 63, art. IV(b)(i)(s).
78 See supra note 64, art. 11.
vention offer protection to authors of literary, artistic, and dramatic works, these Conventions fail to protect other interests involved in broadcast transmissions, such as performers, producers of phonograms, and broadcasting organizations. Furthermore, it is questionable whether the two conventions offer adequate protection against international pirating of domestic satellite transmissions.

The question of adequacy arises because the conventions fail to address satellite broadcasting within their definitions of broadcasting. Ambiguity exists because the legal definition of "broadcast" fails to include signals which are not received directly by the public. The injection of wireless signals into the satellite circuit accordingly is not a broadcast direct to the public, and therefore is not governed by copyright laws.

Originating broadcasters, who normally are required to pay program contributors an additional fee for additional broadcast coverage, criticize the existing definitions of broadcast because they believe that the "emitted signal" (i.e., the signal sent to a satellite of program-carrying signals) should not be subject to a royalty because it is encoded and not directly receivable by the public. Alternatively, a broader definition of broadcast would encompass the use of broadcast satellites because the emitted signal would be considered merely a "step" in the entire broadcasting process.

With respect to direct broadcast satellites (DBS), the satellite
signal is relayed directly to the public without an intervening third party, and home receiving antennae receive the originating broadcaster's signal directly from the satellite. As a result, DBS transmissions have been held to be within the conventional meaning of broadcast.\(^8\)

Even when the definition of broadcast is expanded to include DBS, compliance with the Conventions remains troublesome.\(^8\) The Universal Copyright Convention and the Berne Convention both require contractual obligations between the author and broadcaster in order to assess the payment of royalties in proportion to the intended audience.\(^8\) Because it is impossible to ascertain and delimit the area of the intended broadcast when using DBS, compliance with the Conventions is difficult to enforce at best.

While satellite piracy clearly is contrary to the uniform concerns of protecting private intellectual property rights that the Universal Copyright and the Berne Conventions address, it remains questionable whether the copyright protection provided by these Conventions also pertains to broadcasts transmitted via satellite.\(^8\) Furthermore, observance of the provisions of the Conventions is confined to its member states and would not apply to territories or countries not signatories of the respective Conventions. Thus, United States program owners still lack total international legal protection of their program material transmitted via satellite.

C. The Brussels Satellite Convention

The Brussels Conference, officially known as the International Conference of State on the Distribution of Programme-Carrying Signals Transmitted by Satellite, was held in Belgium in May...
1974.\textsuperscript{88} The Conference sought to prevent the retransmission of satellite signals by unintended distributors.\textsuperscript{89} The Conference was the first international conference which attempted to address the specific legal problems raised by unauthorized interception and retransmission of satellite signals.\textsuperscript{90} Forty-seven nations, including the United States, participated in the drafting of the Brussels Convention in 1974.\textsuperscript{91} During the next ten years, however, only nine states ratified or acceded to the Convention.\textsuperscript{92} The United States recently ratified the treaty.\textsuperscript{93}

The Brussels Satellite Convention does not solve all the problems raised by satellite piracy though. More specifically, the Convention fails to address sufficiently the interests of all the parties affected by satellite piracy, such as the interests of performing artists.\textsuperscript{94} The treaty also suffers from being a product of compromise, and was drafted at a time when satellite piracy was still in its infancy.\textsuperscript{95}

The Brussels Convention essentially regulates the distribution of


\textsuperscript{89} Id.

\textsuperscript{90} The central question at the preparatory session of the Brussels Conference was whether affirmative rights granted to the originating organization as a matter of private law should be counterbalanced by granting correlative rights to the program contributors. See Draft Report of the General Rapporteur, Brussels Convention, 13 I.L.M. 1449, 1450, para. 10 (1974) [hereinafter cited as Brussels Convention]. Consequently, as a matter of compromise, no new rights were granted, leaving the states to take their own "adequate" measures to prevent piracy. See id.

\textsuperscript{91} See id. at 1445.

\textsuperscript{92} Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 20 COPYRIGHT (WIPO) 10 (1984). These nations include: Nicaragua, Kenya, Mexico, Yugoslavia, West Germany, Italy, Austria, Morocco, and the United States. Id.


\textsuperscript{94} See generally Note, The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite: A Potshot of Poaching, 7 N.Y.U. J. INT'L L. POL. 575 (1974). Satellite piracy infringes on the rights of several diverse interest groups. Id. at 576. The originating broadcaster is not compensated for the unauthorized retransmission of his signals, nor do the authors, performers and other contributors to the pirated retransmissions receive additional compensation and suffer the loss of a potential new market. Id.

\textsuperscript{95} Id. at 579.
program-carrying signals transmitted by satellite. The Brussels Convention deals exclusively with the satellite signal rather than messages carried by those signals. "the subject of the treaty was the container and not the content." Direct broadcast satellite signals, however, are expressly not addressed in the Brussels Convention.

The Brussels Convention distinguishes between the "emitted signal" and the "derived signal." As defined in the Convention, the "emitted signal" covers any signal that is transmitted up to a satellite (the "up-link"). As soon as the emitted signal passes through the satellite it becomes a "derived signal" whose technical characteristics are modified to beam the signal back without interference (the "down-link"). Although the program-carrying signal undergoes technical changes during its journey, its program content nonetheless remains the same.

The Brussels Convention applies to the originating broadcasters and broadcasting distributors to the extent they fall within the Convention's definition of "originating organization" and "distributors." The "originating organization" is the person or legal entity that decides what program the "emitted signal" will carry. This definition includes the broadcasters and cable origination services, but excludes the producers, artists, and creators of the programs because the former control the content of the program rather than the transmission of the signal itself. This definition of "originating organization" also excludes the telecommunication authorities and the common carriers. Accordingly, while the Convention addresses the interests of the originating broadcasters, it ignores the interests of authors, performers, producers of phonograms, and other program creators. Protection for the artists and program creators is provided only indirectly through the general

96 Id. at 585.
97 Id.
98 Brussels Convention, supra note 90, at 1456.
99 Article 3 of the Brussels Convention provides: "[t]his 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." Id. at 1447.
100 See id.
101 See id.
102 See id.
103 See id.
104 Id.
105 See id.
106 See id. at 1457.
prevention of piracy.107

The Brussels Convention defines the "distributor" as the person
or legal entity which transmits the "derived signal" to the general
public anywhere on earth.108 The Convention's definition of "dis-
tribution" would not include, however, the physical distribution
of "pirated" phonograms or videotapes made from program-carrying
signals.

A final shortcoming of the Brussels Convention is that it con-
tains no enforcement provision to ensure compliance with its
terms.109 The Convention does, however, require signatory coun-
tries to, at a minimum, recognize the problem of satellite piracy
and act affirmatively to correct it. The Convention fails to define
what such affirmative action should entail nor does it specify sanc-
tions for noncompliance.110 In sum, although the Brussels Conven-
tion moves in the right direction toward offering program owners
comprehensive protection against satellite piracy, the Convention
fails to provide concrete measures to effect that comprehensive
protection.

Because no existing multilateral agreement provides United
States program contributors and broadcasting organizations with
adequate and effective protection against satellite piracy, the most
effective immediate solution may be accomplished through bilat-

107 See id., art. 6, at 1448. The limitation of the scope of the Convention meant that the
interests of authors and other program contributors were not addressed in the Final Draft of
the Convention as proposed in a compromise by the Australian delegation. See Note, supra
note 94, at 593. The Australian proposal suggested that any questions concerning authors
and other program contributors be determined in a separate protocol. UNESCO/WIPO/
SAT. 3/23 para. 16 (1973); see also Note, supra note 94, at 593.

108 See Brussels Convention, supra note 90, art. 1, at 1447. Another shortcoming of the
Brussels Convention is that it leaves each contracting state a choice of means for sup-
pressing piracy within its territory, provided that the state chooses to recognize that satellite
piracy is occurring within its territory. See id., art. 2. Article 2 of the Convention states:
"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." Id. Regardless of whether
a contracting state adopts its own criminal, civil, or administrative sanctions to prevent
piracy, the fact that any sanction will be domestic in nature precludes adequate protection
against piracy. See Ulmer, supra note 25, at 8.

109 See generally Brussels Convention, supra note 90.

110 The Draft Report of the General Rapporteur noted: "[s]ince the wording of the Nai-
robi draft . . . was accepted as the basis for the Brussels Convention, the Conference did
not discuss at any great length the meaning of the operative words used in Article 2(1). It
was clear, however, that Contracting States are left completely free to implement the basic
requirement of the Convention as they see fit . . . . The good faith of the States in provid-
ing effective measures against piracy could and should be assumed." Brussels Convention,
supra note 90, at 1149.
eral negotiations and Congressional initiative as evidenced by the Caribbean Basin Initiative. This approach is preferable to seeking a new multilateral agreement because the latter approach would demand years of extended negotiation to complete.

IV. THE UNAUTHORIZED INTERCEPTION AND TRANSMISSION OF U.S. DOMESTIC SATELLITE SIGNALS IN THE CARIBBEAN AND THE CARIBBEAN BASIN INITIATIVE

A. The Caribbean Problem: Satellite Piracy and the Motion Picture Industry

Both government and private entities in the Caribbean Basin countries recently have been intercepting pay-television signals carried by United States domestic satellites intended for American cable viewers and have rebroadcast motion pictures and other United States programs without the consent of the United States copyright owners.\footnote{Foreign 'Piracy' of TV Signals Stirs Concerns, N.Y. Times, Oct. 13, 1983, at A1, col. 6. The broadcasts include programs from Home Box Office, Cinemax, Spotlight, Cable News Network, Satellite News Channel, USA Network, and from the “Superstations” of WOR-TV (N.J.) and WGN-TV (Chicago). Id. at C26, col. 3.} The problem of satellite piracy occurs in the Caribbean because United States satellite transmissions currently are receivable by anyone with an earth receiver station within the area covered by satellite retransmission, or “footprint,” of the satellites.\footnote{See MPAA Urges Action Against Countries Stealing Satellite Feeds, Broadcasting, Oct. 24, 1983, at 57 [hereinafter cited as MPAA].} The footprint of United States satellites covers the continental United States and extends into large areas of Canada, Central America, and the Caribbean.\footnote{Footprints, supra note 13. A possible solution to the Caribbean problem would be the scrambling or encoding of satellite transmissions, but it remains to be seen if the encoded system will be sufficiently cost effective for most broadcasters to use, and effective enough to thwart highly professional pirates. N.Y. Times, Oct. 13, 1983, § 3, at 26, col. 5. Home Box Office has plans to scramble its signal in 1985. See id.}

The unauthorized performance of United States works deprives the owners of their property without compensation. The unauthorized rebroadcast of films to unintended audiences in the Caribbean especially harms the United States motion picture industry.\footnote{The theft of satellite transmissions threatens to seriously damage the overseas markets of American films. See id., § 1, at 1, col. 6. In Jamaica, for example, the government-owned broadcast company showed “Poltergeist,” “Missing,” “Victor/Victoria,” “Rocky III” and other films not yet released to Jamaican theatres during the summer of 1983. Id.} The film industry often depends on foreign sales to make its
motion pictures profitable.\textsuperscript{115} Theatrical and television revenues from the Caribbean, for example, total over $20,000,000 a year.\textsuperscript{116}

Motion pictures generally are not released to theaters in the Caribbean until long after they have been shown on United States domestic cable television by satellite transmissions.\textsuperscript{117} Consequently, once a film is shown on Caribbean television, the market for the film in Caribbean theaters virtually vanishes. Satellite piracy accordingly threatens the revenues ordinarily collected by theatrical and television divisions of United States motion picture companies.

The motion picture industry is more concerned with the interests of program contributors than it is with the interests of the broadcasting organizations.\textsuperscript{118} Therefore, in regard to satellite piracy, the film industry's primary concern is to secure copyright protection for the content of the signal rather than protection for the signal itself.\textsuperscript{119} Preventing piracy of the signal itself affords the program contributors only indirect protection, similar to the protection furnished by the Brussels Convention.

Jamaica is one of the Caribbean countries which has engaged in satellite piracy through a governmental agency.\textsuperscript{120} The Jamaican Broadcasting Corporation is a government-run monopoly and regularly intercepts pay-television movies from United States satellites and rebroadcasts them on Jamaica's only channel without the consent of the American program owners.\textsuperscript{121} Jamaica has offered to pay a flat fee, but rejects a per-film royalty system as too expensive.\textsuperscript{122} The Motion Picture Association of America (MPAA) negotiated with the Jamaican Broadcasting Company about certain unauthorized broadcasts, and in September 1983, the Jamaican government stopped airing the disputed broadcasts.\textsuperscript{123}

Other nations in the Caribbean Basin region which permit their
nationals to intercept United States satellite signals and retransmit the programming carried by those signals without the owners authorization include Panama, Belize, Honduras, Costa Rica, the Dominican Republic, Haiti and the Cayman Islands. In Belize, Panama, Honduras and Costa Rica, private businessmen have established pay cable (subscription) television systems and are intercepting and retransmitting United States domestic satellite signals to local subscribers for a fee without royalty payments or the consent of the copyright owners. In the Bahamas and the Dominican Republic, hotels have installed televisions which receive only earth station broadcasts. These hotels intercept them and retransmit satellite transmissions to individual hotel rooms by using closed circuit television systems. In the Cayman Islands, over 300 individuals own satellite dishes enabling them to intercept without authorization United States satellite signals carrying cable and pay television programming.

In justifying their actions, some Caribbean broadcasters argue that they are giving their citizens an opportunity to share in the abundance of information and entertainment on which the more developed world has long held a monopoly. Others argue, correctly, that United States copyright laws may not be imposed on Caribbean broadcasters because United States laws are inoperative outside United States jurisdiction. Caribbean broadcasters further maintain that the United States government should be pleased, from a political standpoint, with the additional exposure to Western ideals that Caribbean residents receive from the unauthorized broadcasts.

124 See id.
125 Id. col. 1. For example, the Cable Color Television Company in Costa Rica has charged its local cable television subscribers between $11 and $31 per month to receive programming which includes unauthorized broadcasts of CNN, WGN, ESPN, HBO, CBN, WTBS, and Nickelodeon programming. Id.
126 See generally id. col. 4. A suit filed by MPAA member companies alleging copyright infringement is pending against a Bahamian hotel. The suit, however, has been pending for over two years. See Nassau Guardian, March 16, 1983.
127 See supra note 114, cols. 1-2; see also Footprints, supra note 13, at 67.
128 See supra note 114; see Cayman Compass, April 14, 1983.
129 See supra note 114, col. 2. Furthermore, owners of the foreign television stations that receive the satellite signals assert that their actions are legal because the laws involving copyrights and satellite transmissions in their countries are often ambiguous or nonexistent. Id. col. 1.
130 Id. col. 4.
131 Jamaica's Prime Minister claims that United States movies help keep his nation stable. A Jamaican lobbyist told the United States Congress that "Jamaica is the West Berlin
The MPAA companies have been frustrated in enforcing their copyrights through litigation in the Caribbean Basin area. A number of the Caribbean countries are not members of the Universal Copyright Convention and have no copyright relations with the United States, other than possibly through the "back-door" Berne approach. Moreover, some of the countries' laws are antiquated and do not address the legal problems of advanced satellite technology. Panama's copyright laws, for example, are particularly unclear as to the protection granted a copyright owner whose work is intercepted from a satellite transmission and redistributed to local cable subscribers.

United States claimants in a Caribbean nation's jurisdiction also must deal with complicated and burdensome local procedures in order to both protect their copyrights and secure powers of attorney. Such procedures often prolong litigation and make it extremely costly. A statute typically may require registration of every motion picture and a deposit of a copy of every film shown in the country in order to prove copyright ownership.

Given these difficulties, Caribbean nations obviously do not offer a desirable forum to litigate copyright violations resulting from unauthorized interception and retransmission of United States program-carrying satellite signals. As a result, the United States motion picture companies have turned to the United States political process to attain adequate protection of their property rights in the Caribbean Basin area.

of the Caribbean . . . the East bloc would sell Jamaica its films for a dollar." Newsweek, supra note 122.

133 See generally Hearings, Caribbean Basin Initiative, supra note 93, at 391 (letter of Jack Valenti). For example, the MPAA has gone to court in Freeport, the Bahamas, to stop a hotel from picking up satellite delivered movies and piping them into guests' rooms. See Footprints, supra note 13, at 57.

134 Hearings, Caribbean Basin Initiative, supra note 93, at 402-03. The companies asserting infringement must attempt to show that the motion pictures had been published simultaneously in the United States and Canada. Id. at 403. See supra notes 70-73 and accompanying text.

135 See Hearings, Caribbean Basin Initiative, supra note 93.

136 Id. at 403. The copyright law of Panama, a country that like the United States, adheres to the Universal Copyright Convention, does not provide for the protection of motion pictures. Inasmuch as Panama does not protect Panamanian motion picture producers, it is under no obligation to protect foreign producers.

137 See generally id. at 403-04.

138 Id.

139 Id. at 404. In Venezuela, such registration requires the filing of a Spanish synopsis of the plot of each motion picture and program. Id.

140 The MPAA was instrumental in having a provision included in the CBI authorizing
B. The Caribbean Basin Initiative: Bilateral Agreements and Congressional Initiatives

1. Copyright Provisions

The Caribbean Basin Initiative (Caribbean Economic Recovery Act or CBI) is a bilateral agreement between the United States and twenty-seven countries and territories in the Caribbean Basin region. The CBI seeks to promote the economic development of the area by providing duty-free treatment and other economic benefits to countries designated by the President of the United States as eligible to receive such benefits. Of the twenty-seven countries eligible to be designated as beneficiaries, only seven have yet to be designated as such.

Section 212 of the CBI authorizes the President to proclaim, in the form of a one-way free trade arrangement, duty-free treatment for eligible articles from designated Caribbean countries which satisfy both the mandatory and discretionary requirements for attaining beneficiary status. The seven mandatory require-
ments and eleven discretionary considerations are expressed in Presidential directives.

The designation requirements which specifically secure copyright protection for United States owners include prohibiting the President from designating a country as a beneficiary "if a government entity in such country engages in the broadcast of copyrighted material, including films or television material belonging to the United States without their express consent." 147

In addition, discretionary considerations, which promote the purpose of the act but are not mandatory, require the President to take into account:

- the extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights; 148
- the extent to which such country prohibits its nationals from engaging in the broadcast of copyrighted material, including films or television material belonging to United States copyright owners without their express consent. 149

The mandatory requirement is directed at government owned broadcasting systems, such as the Jamaica Broadcasting Company. 150 The discretionary criteria complement the mandatory condition by requiring the President to consider the effectiveness of a particular nation's laws in preventing private individuals from engaging in satellite piracy. 151

The mandatory requirement is subject to presidential waiver if the President determines that the designation of a country as a beneficiary country would be in the United States' national or economic interest. 152 Congress intended that the President exercise this waiver only in exceptional circumstances, as shown by the legislative history:

In agreeing to make the broadcast piracy condition subject to a

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145 The seven mandatory requirements may be found at CBI, § 212(b), 97 Stat. 384, 386-7 (1983) (to be codified at 19 U.S.C. § 2702).
146 Id. § 212(c).
147 Id. § 212(b)(5).
148 Id. § 212(c)(9).
149 Id. § 212(c)(10).
150 See MPAA, supra note 112, at 120.
151 Id.
152 See CBI, § 212(b). The President, however, may only waive paragraphs (1), (2), (3), and (5) of § 212. Id.
national interest waiver by the President, the conferees do not intend to permit any lessening of efforts to ensure that Caribbean nations cease unauthorized interception of satellite signals embodying programs owned by U.S. Copyright owners. . . . The waiver should only be exercised where the interests of American copyright holders will be protected in regard to both the permissible scope of acquisitions and compensation.153

Once the President designates a country as a beneficiary country, he also is authorized to withdraw or suspend that designation if he determines that as a result of changed circumstances the nation in question no longer meets the mandatory condition.154

The CBI explicitly protects the interests of program contributors when it addresses the unauthorized "broadcast of copyrighted material,"155 including program material received not only in the form of broadcast signals but also in the form of videocassettes. The CBI does not expressly mention the theft of satellite signal transmissions though,156 accordingly, the CBI's copyright provisions focus on the content of the signal, rather than on the signal itself. The CBI's focus, therefore, is the opposite of that of the Brussels Convention, which does not regulate the content of satellite signals.157 As a result, the interests of broadcasting organizations are only indirectly protected. If program contributors have copyright protection, and broadcasting organizations are assured of royalty payments to Caribbean users because of the CBI, broadcasting organizations will not have to pay program contributors additional fees when broadcast coverage is expanded by unauthorized broadcasts. On the other hand, the legislative history of the CBI often explicitly refers to the act of intercepting and retransmitting satellite signals for rebroadcast.158 Protection of the satellite signal as well as the interests of the broadcasters thus should be implied from the CBI's definition of "broadcast."

154 See CBI, § 212(e). The President may not terminate such a designation unless at least sixty days before such termination, he has notified the House of Representatives and the Senate, and has notified such country of his intention to terminate the designation, together with the considerations entering into such a decision. Id. § 212(a)(2).
155 Id. § 212(c)(10).
156 See generally CBI, § 212.
157 See supra notes 96-98 and accompanying text. See generally Hearings, Caribbean Basin Initiative, supra note 93, at 399-401.
158 See, e.g., Hearings, Caribbean Basin Initiative, supra note 93.
2. Sanctions

The significance of the CBI to United States program owners is that it offers them more effective protection than could be obtained from the other international agreements which afford copyright protection. The CBI succeeds because it provides sanctions that ensure the observance of the treaty's obligations. Particularly effective is the sanction excluding offending countries from receiving economic aid. If a Caribbean nation should offend the property rights of United States nationals, punishment is applied indirectly; the United States tells that nation in effect, "if you don't cooperate, you can't participate and reap the benefits."

Under the CBI's mandatory criteria, if a government of a Caribbean country engages in the unauthorized rebroadcast of material copyrighted in the United States without paying the obligatory royalty fees, that country is barred from participating in the treaty and may not receive the benefits of duty-free concessions. Failure to observe the discretionary criteria, such as when a country permits its nationals to engage in the rebroadcast of copyrighted program material, also will be relevant in determining whether or not the sanction should be applied.

Denying economic benefits to those countries which fail to protect the property of United States nationals is for the most part a novel approach in United States bilateral trade relations and inasmuch as the copyrights of American owners are protected, is unique to the CBI. While foreign aid has rarely been denied to those countries which fail to protect United States property rights, the Hickenlooper Amendment to the Foreign Assistance Act of 1961 and the Trade Act of 1974 provide authority for such

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160 Hickenlooper Amendment, 77 Stat. 386 (1963) (as amended, 78 Stat. 1013 (1964)), 22 U.S.C.A. § 2370(e)(1970). It is arguable that the sanction of non-participation is an arbitrary exercise of a superpower's advantageous position of strength and wealth over a dependent developing country. When the developing country, however, realizes the advantage of relations with the United States as provided for in the CBI, the sanction restrains the Caribbean country from acting against both its best interest and the interest of the international community, should it be tempted to disregard the customary standards and moral obligations of protecting another nation's citizens' property rights from an unlawful taking without compensation.
161 See generally CBI, § 212(b)(2)(B), (C)(5). This designation will be withheld unless the President determines that "prompt, adequate, and effective compensation has been or is being made to such citizen, corporation, partnership, or association." Id. § 212(b)(2)(C)(i).
162 See generally id. § 212(c).
163 First and Second Hickenlooper Amendments, 77 Stat. 379, 386 (1963), 78 Stat. 1009,
The Hickenlooper Amendment requires the President to suspend assistance to any government which has “nationalized, expropriated or seized ownership or control of property owned by U.S. citizens or by business associations which are more than 50 percent beneficially owned by U.S. citizens, unless the expropriating country promptly arranges to compensate such taking at full value.” Whether the Hickenlooper amendment also addresses copyrighted intellectual property which may be unlawfully taken by a foreign government is unclear.

Similarly, the Generalized System of Preferences of the Trade Act of 1974 provides that the President shall not grant beneficiary status for unilateral preferential duty-free treatment to those developing countries that nationalize, expropriate, or otherwise seize United States property either without making provisions for “prompt, adequate, and effective compensation,” or without entering into “good faith negotiations” to provide such compensation in accordance with international law, or without submitting a dispute over compensation to arbitration. The protection of United States copyright material is not explicitly addressed in this provision. As with the Hickenlooper Amendment, therefore, it is unclear whether the Trade Act provision conditioning tariff preferences on the protection of United States property encompasses copyrighted intellectual property unlawfully taken by a foreign government.

A similar copyright provision to that of the CBI has been proposed recently in the House of Representatives as an amendment to Section 620 of the Foreign Assistance Act of 1961. An identical amendment to the proposed House amendment was introduced in the Senate as a part of a Senate bill amending the Foreign Assistance Act of 1961 to authorize appropriations for fiscal year 1984

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1013 (1964) (codified as amended at 22 U.S.C. § 2370(e) (1976)).
107 See id. §§ 2462(b)(4)(A), (D)(i)-(iii). This provision of the Trade Act prohibiting preferential treatment also applies to those countries that have taken steps to repudiate or nullify an existing contract or agreement with either a United States citizen or a corporation, partnership, or association at least 50% owned by United States citizens. Id. § 2462(b)(4)(B).
108 See id. § 2462(b).
for international security and development assistance. The Senate Committee on Foreign Relations adopted the amendment proposed in the Senate.

These proposed amendments direct that the President, "in determining the level of assistance to a country under the Foreign Assistance Act, the Agriculture Trade and Development and Assistance Act of 1954, or the Arms Export Control Act, shall consider the extent to which the government of that country permits a government-owned entity or nationals of that country to engage in the broadcast of copyrighted material (including films and television material) belonging to the U.S. copyright owners, without their express consent."

The amendments further provide that if the President determines that a government-owned entity of a country engages in satellite piracy, the level of assistance provided that country for the fiscal year 1984 may not exceed one-half of the amount proposed for that country in the congressional presentation materials. The President may waive this restriction on the funding level if he reports to Congress that a waiver is in the national interest. If these amendments become law, then all bilateral trade agreements must conform to the amendments and the extent of trade benefits will be tied to the extent of copyright protection provided.

In practice, the ultimate success of the CBI in providing adequate protection to the American program owners remains to be seen. Given the Reagan administration's increasing foreign policy interest in this sensitive region, it is questionable whether the Administration will enforce the CBI sanction and withhold economic benefits should there be a violation of the agreement. The Reagan administration possibly may justify the application of the CBI's national interest waiver by claiming that without the expanded trade opportunities offered by the CBI, the developing countries of the Caribbean will be unable to deal with their eco-

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171 Id. at 8. The original bill was ordered reported on May 12, 1983 by a vote of 15-0. Id. at 8.
172 See H.R. REP. No. 192, supra note 169.
173 See id. at 82.
174 See id. at 81-82.
175 See generally Pastor, Sinking in the Caribbean Basin, 60 FOREIGN AFFAIRS 1038 (1982). The Report of the National Bipartisan Commission on Central America issued in January of 1984, known as the Kissinger Report, identifies Central America as an area of vital interest to the United States, and, as such, recommends that the United States support a commitment of financial and other resources to the region to help strengthen and insure stability in the region.
nomic problems and will remain vulnerable to Marxist interven-
tion.\textsuperscript{176} Most Caribbean nations, however, have agreed to comply
with the CBI conditions.\textsuperscript{177} They have agreed to take steps to deter
the unauthorized broadcasts of United States satellite programs
without compensation and to negotiate with United States pro-
gram owners to permit further satellite reception.\textsuperscript{178} These comply-
ing countries accordingly have been designated as CBI benefi-
ciaries.\textsuperscript{179} The President has yet to exercise the waiver provision.

Thus, because the existing multilateral agreements to which the
United States is a party fail to provide adequate protection to
United States program owners, and until an effective scrambling
system can be devised, the United States' recent move toward bi-
lateral copyright relations and congressional initiative is the most
effective immediate solution for dealing with satellite piracy in the
Caribbean Basin region.

\textsuperscript{176} See id.
\textsuperscript{177} See generally supra notes 150-52 and accompanying text.
\textsuperscript{178} See generally id.
\textsuperscript{179} See supra note 142.