

NOTES

DIRECT FOREIGN INVESTMENT IN CABLE TELEVISION SYSTEMS: AN ANALYSIS OF ALIEN OWNERSHIP IN THE CONTEXT OF THE UNITED STATES AND CANADA

I. INTRODUCTION

Alien ownership of the means of communication has been prohibited or curtailed by nations throughout the world.¹ This has been primarily true of broadcast communications,² where the owner, operator, or licensee originates and transmits radio messages indiscriminately over a geographic area. Justifications for prohibiting alien ownership include considerations of national security,³ national identity,⁴ and development of the national economy.⁵ In Canada, for example, restrictions are imposed on

1. See generally Lent, *Introduction*, in *BROADCASTING IN ASIA AND THE PACIFIC passim* (J. Lent ed. 1978); B. PAULU, *RADIO AND TELEVISION BROADCASTING IN EASTERN EUROPE 8-21* (1974); Head, *Introduction*, in *BROADCASTING IN AFRICA: A CONTINENTAL SURVEY OF RADIO AND TELEVISION 8-12* (S. Head ed. 1974); B. PAULU, *RADIO AND TELEVISION BROADCASTING ON THE EUROPEAN CONTINENT passim* (1967) (discussing the restriction imposed on ownership of communication systems).

2. See *supra* note 1. In the United States, "[b]roadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1976). In Canada, "broadcasting" means any radio communication in which the transmissions are intended for direct reception by the general public. Broadcasting Act, CAN. REV. STAT. ch. B-11, § 2 (1970).

3. Considerations of national security were the motivating factors behind the alien ownership rules included in the Communications Act of 1934, 47 U.S.C. §§ 151-607 (1976) (as amended). See *Federal Communications Commission: Hearings on H.R. 8301 Before the Comm. on Interstate and Foreign Com.*, 73d Cong., 2d Sess. 160-73 1934; *Federal Communications Commission: Hearings on S. 2910 Before the Comm. on Interstate Com.*, 73d Cong., 2d Sess. *passim* (1934) (statement of Capt. S.C. Hooper, Director of Naval Communications); H.R. REP. NO. 1918, 73d Cong., 2d Sess. 1-3 (1934); S. REP. NO. 781, 73d Cong., 2d Sess. 1-3 (1934).

4. Canadians have resisted foreign cultural domination since the birth of mass media in the early 1920's first gave Canadian citizens direct access to foreign culture and values. See P. RUTHERFORD, *THE MAKING OF THE CANADIAN MEDIA 124-28* (1978); E. HALLMAN & H. HINDLEY, *BROADCASTING IN CANADA 22-30* (1977); M. HINDLEY, G. MARTIN & J. McNULTY, *THE TANGLED NET: BASIC ISSUES IN CANADIAN COMMUNICATIONS 62-100* (1977); SPECIAL SENATE COMM. ON MASS MEDIA, I *THE UNCERTAIN MIRROR 193-226* (1970).

5. Prohibitions against alien ownership serve to keep the profits generated by communications entities in the hands of nationals, thereby making it more likely that profits will be reinvested in the national economy. See CAN. REV. STAT. ch. B-11, § 3 (1970). See also An Act to Amend the Income Tax Act, CAN. REV. STAT. ch. C-58, § 106 (1976) (an Act prohibiting

foreign ownership of broadcast stations, cable systems,⁶ and common carriers.⁷ In the United States, the Communications Act of 1934⁸ prohibits alien ownership of broadcast stations and, to a limited extent, common carriers.⁹ Current administrative inter-

Canadian advertisers from deducting advertising costs where the ads were broadcast on U.S. stations along the U.S.—Canadian border).

6. Canadian statutes do not define "cable systems," except to classify them as "broadcasting receiving undertakings." CAN. REV. STAT. ch. B-11, § 2 (1970). The United States government defines cable systems as:

A nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management.

Cable Television Service, 47 C.F.R. § 76.5(a) (1980).

7. The Canadian Broadcasting Act of 1968 provides that "the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada. . . ." CAN. REV. STAT. ch. B-11, § 3 (1970). Canadian regulations applying to broadcast and cable entities further provide that persons who are not Canadian citizens, eligible Canadian corporations, or foreign governments may not be issued licenses or renewals on or after Jan. 12, 1971. Eligible Canadian corporations are defined as any corporation:

- (a) That is incorporated under the laws of Canada or a province,
- (b) of which the chairman or presiding officer and each of the directors or other similar officers are Canadian citizens, and
- (c) of which, if it is a corporation having share capital, at least four-fifths of the shares having full voting rights under all circumstances and shares representing in the aggregate at least four-fifths of the paid-up capital are beneficially owned by Canadian citizens or by corporations other than corporations that are controlled directly or indirectly by citizens or subjects of a country other than Canada, except that, in any case where, in the opinion of the Commission, notwithstanding that the corporation is one to which subparagraphs (a) and (c) apply, the corporation is effectively owned or controlled either directly or indirectly and either through the holding of shares of the corporation or any other corporation or through the holding of a significant portion of the outstanding debt of the corporation or in any other manner whatever, by or on behalf of any person, body or authority. . . , the corporation shall be deemed not to be an eligible Canadian corporation.

376 CAN. CONSOL. REGS. §§ 2, 3, 4 (1978).

8. 47 U.S.C. §§ 151-607 (1976) (as amended).

9. Alien ownership of broadcast stations is prohibited by 47 U.S.C. § 310 (1976):

- (a) The station license required shall not be generated to or held by any foreign government or the representative thereof.
- (b) No broadcast or common carrier or aeronautical enroute or aeronautical fixed radio station license shall be granted to or held by—
 - (1) Any alien or the representative of any alien;
 - (2) Any corporation organized under the laws of any foreign government;
 - (3) Any corporation of which any officer or director is an alien or of

pretations of the Communications Act, however, do not prohibit foreign ownership of cable systems.¹⁰ The divergent treatment of cable ownership has produced tensions between the United States and Canada due to an imbalance in foreign investment opportunities.¹¹ As Canadian cable operators increasingly avail themselves of the United States' liberal cable ownership rules,¹² pressures to impose alien ownership restrictions on American cable systems are likely to recur.

This Note will explore the divergent treatment of cable ownership in the United States and Canada. The analysis will

which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by any corporation organized under the laws of a foreign country;

- (4) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representatives thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

Id.

Alien ownership of common carriers is restricted by 47 U.S.C. § 222(d) (1976): No proposed consolidation or merger of telegraph carriers pursuant to this section shall be approved by the Commission if, as a result of such consolidation or merger, more than one-fifth of the capital stock of any carrier which is subject to the jurisdiction of the Commission will be owned, or controlled, or voted, directly or indirectly, (1) by any alien or the representative of any alien, (2) by any foreign government or the representative thereof, (3) by any corporation organized under the laws of any foreign government, or (4) by any corporation of which any officer or director is an alien, or of which more than one-fifth of the capital stock is owned or controlled or voted, directly or indirectly, by any alien or the representative thereof, or by any corporation organized under the laws of a foreign government.

Id.

One court distinguished broadcasters and common carriers in the following manner: Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn on the manner and terms by which they approach and deal with their customers. The common law requirements of *holding oneself out to serve the public indiscriminantly* draws such a logical and sensible line between the two types of carriers.

National Ass'n of Regulatory Utility Comm'rs v. FCC, 525 F.2d 630, 642 (D.C. Cir. 1976) (emphasis added).

10. See *In re* Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service, 77 F.C.C.2d 73 (1980).

11. See *id.*

12. Wall Street J., Nov. 13, 1980, at 37, col. 4; *Rogers Targets U.S. for Growth*, Advertising Age, June 15, 1981, at 4, col. 1; N.Y. Times, Nov. 12, 1979, at D-1, col. 3.

begin with a discussion of the status quo and the traditional justifications for imposing alien ownership requirements on communications entities. Second, an analysis of the Federal Communications Commission's 1980 Report and Order¹³ will demonstrate that the Commission failed to apply appropriate provisions of the Communications Act, thereby unlawfully allowing continued Canadian investment in U.S. cable systems. Finally, because the regulation of cable as an extension of the broadcasting system results in the creation of discrete, highly nationalistic systems of communications, the option of regulating cable as a common carrier will be explored to determine if a common carrier scheme would lead to more balanced international investment opportunities.

II. PROHIBITIONS ON FOREIGN OWNERSHIP OF CABLE SYSTEMS

A. REGULATORY HISTORY

Both Canada and the United States generally prohibit foreign ownership or control of communications entities.¹⁴ In the United States, initial restrictions on direct foreign control were justified for reasons of national security.¹⁵ Alien ownership of cables and foreign control of radio stations during World War I caused Congress to question whether the Executive's war powers¹⁶ were sufficient to counteract foreign propaganda or foreign disruption of domestic communications in the event of war.¹⁷ The possibility that a foreign state could influence American citizens through the broadcast medium resulted in the alien ownership provisions of

13. See *supra* note 10.

14. *Supra* notes 7 & 8 and accompanying text. Scholars make the distinction between "direct" and "portfolio" investments. A direct investment provides the investor with managerial or operational control. On the other hand, portfolio investors are allowed to invest up to a certain percentage of the equity. In the case of a broadcast entity, both Canada and the United States limit portfolio investment to twenty percent of the voting stock. McCarthy, *Government Regulation of Foreign Investment in the United States*, in CURRENT LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE UNITED STATES 84-5 (A.B.A. ed. 1976).

15. See *In re G.R.C. Cablevision, Inc.*, 47 F.C.C.2d 467 (1974) (foreign control of a microwave transmission facility poses no national security threat because owner does not control message content); note 3 and accompanying text.

16. 47 U.S.C. § 606 (1976).

17. *Hearings on H.R. 8301, supra* note 3, at 26; Watkins, *Alien Ownership and the Communications Act*, 33 FED. COM. L.J. 1, 6-7 (1981).

the Radio Act of 1927,¹⁸ and the Communications Act of 1934.¹⁹ By contrast, the Communications Act does not absolutely prevent aliens from owning common carrier services. Alien-owned corporations, however, may not consolidate or merge with domestic common carrier services.²⁰

While national security is an important justification for foreign ownership restrictions, other rationales exist. Canadian laws, for example, incorporate considerations of national identity and the development of the national economy as reasons for restricting foreign control of communications entities.²¹ Canadians have been particularly sensitive to losing their unique cultural heritage if U.S. programming were allowed unfettered access to the Canadian broadcasting system. Accordingly, Canadians have decreed that both broadcast and cable entities should be in the effective control of nationals, thereby ensuring an outlet for cultural expression, as well as increasing the probability that revenues earned from the medium will be reinvested into new forms of cultural expression.²²

Given such compelling reasons for limiting alien control of communications entities, one would expect both nations to prohibit foreign ownership of broadcast stations and cable systems. The Canadian government has imposed a uniform alien ownership ban, which applies to both types of communication systems.²³ The United States, however, has adopted a different approach, barring foreign control of broadcast stations but allowing foreign control of cable systems.²⁴

18. Radio Act of 1927, ch. 169, § 12, 44 Stat. 1162 (1927) (repealed by 47 U.S.C. §§ 85-119 (1934)).

19. *Supra* note 8.

20. *Id.* Note that if cable is characterized in the future as a common carrier service, the 1934 Communications Act will not prohibit aliens from initiating new service. The prohibition will be triggered only when the alien seeks to merge with an existing service.

21. *See supra* note 7.

22. Gottleib, *The Transnational Flow of Information: A Canadian Perspective*, 1974 AM. SOC'Y OF INT'L L. PROC. 127, 133. Canadians, in addition to limiting alien ownership of communications entities, have also imposed limits on the amount of American programming which can be shown on Canadian television, as well as restrictions on the number of U.S. stations which Canadian cable operators may carry. *See* 381 CAN. CONSOL. REGS. § 8 (1978). *A Review of Certain Cable Television Programming Issues*, 4 C.R.T. 890, 891 (1979); Johansen, *The Canadian Radio-Television Commission and the Canadianization of Broadcasting*, 26 FED. COM. L.J. 183 (1973).

23. *Supra* note 8.

24. *See supra* note 10, and accompanying text.

Although the cable industry in both nations is owned by the private sector, disparate ownership rules have produced an imbalance in investment opportunity. American direct investment in Canadian cable systems ended in the early 1970's, when U.S. corporations, such as the Columbia Broadcasting System, were forced to divest their Canadian cable holdings.²⁵ Meanwhile, Canadian direct investment in U.S. systems has increased. For example, Canadian Cablesystems Ltd., owned by Rogers Telecommunications of Canada, is one of the largest multiple system operators in the United States.²⁶ Rogers, along with other Canadian cable operators, owns or controls systems in northern New Jersey; Fort Lauderdale and Clearwater, Florida; portions of central Illinois; Seattle, Washington; Portland, Oregon; Fresno, Stockton, west San Fernando Valley and Orange County, California; suburban Minneapolis, Minnesota; portions of Wayne County, Michigan; Atlanta, Georgia; and Syracuse, New York.²⁷ Industry observers predict that the trend will continue because the earning potential in the United States, measured on a per subscriber basis, is more than twice that of Canada.²⁸

B. THE STATUS QUO

In Canada, cable is regulated as an extension of the broadcasting system.²⁹ The cable industry, therefore, is subject to the

25. See Johansen, *supra* note 22.

26. See Advertising Age, *supra* note 11, at 4, col. 1. MacLean-Hunter Cable TV, Ltd., a Canadian company with U.S. cable holdings, detailed the history of a divestiture in its comments opposing the FCC's adoption of a rule that would bar alien ownership of cable in the United States:

In 1967 [when ownership restrictions were being considered in Canada] nine of the ten largest cable companies in Canada were controlled by foreign owners. The nine foreign-controlled companies accounted for over 95% of the subscribers served by the top 10. Foreign interests controlled 50% of the largest 50 companies and some three-quarters of the total subscribers served by the group. Nationwide in Canada, at that time, 55% of subscribers were served by foreigners.

In re Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service, 77 F.C.C.2d 73, 77 (1980). The time period described by MacLean-Hunter is prior to passage of the Broadcasting Act of 1968.

27. Wall Street J., Nov. 13, 1980, at 37, col. 4.

28. One industry observer has been quoted as saying that the earning potential in the United States per subscriber per year is about \$200. In Canada, the figure is closer to \$80. Wall Street J., *supra* note 27, at 37, col. 4. This disparity results from the numerous pay cable services available to U.S. subscribers, over and above the basic services included in the basic monthly fee. The recent creation of a Canadian pay cable service may lessen the disparity in earnings. See Wall Street J., Oct. 23, 1980, at 14, col. 2.

29. See CAN. REV. STAT. ch. B-11, § I(2) (1970).

same prohibition on alien ownership as broadcasters. The prohibition may be triggered in any of three situations: (1) the cable operator is a foreign citizen; (2) the domestic applicant has a foreign citizen serving on the board of directors, or as an officer; (3) foreign citizens control more than twenty percent of the domestic company's voting stock.³⁰ The alien ownership ban has been interpreted expansively by the Canadian courts.³¹ For example, the Canadian Radio-Television and Telecommunications Commission denied a cable license to a domestic firm which had proposed to finance the cable system through a Canadian subsidiary of a non-Canadian finance company.³² A federal appellate court upheld the Commission's action, finding that the Broadcasting Act of 1968 gave the Commission discretionary power to deny licenses even where there existed only the potential for foreign take-over by the applicant's creditor.³³

The United States, by comparison, has been much more indecisive with respect to cable regulation. This results from a regulatory system that has been fashioned from an antiquated legal framework. Nowhere does the 1934 Communications Act mention cable technology. Thus, the FCC, and the courts which review its decisions, have had difficulty in deciding whether cable should be regulated as a common carrier under Title II of the Act, or as a broadcaster under Title III of the Act.³⁴ Section 153(h)³⁵ creates two mutually exclusive categories under which the FCC may promulgate regulations—broadcast or common carrier.³⁶ In order to assert jurisdiction over a communications technology, the

30. See *supra* note 7.

31. See *Cable Laurentide v. C.R.T.C.*, 114 D.L.R.3d 545 (Fed. App. Ct. 1980).

32. *Id.*

33. *Id. Cf. In re Data Transmission Co.*, 52 F.C.C.2d 439, 440, (1975) (Section 310's alien ownership provisions guard against actual alien control as opposed to the mere possibility of control).

34. The cable industry itself has demonstrated an equal amount of indecisiveness in this regard. In the seminal decision endorsing FCC regulation of cable, the respondent cable company "conclude[d] that CATV, with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1967).

35. 47 U.S.C. § 153(h) (1976).

36. "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . . but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Id.

FCC needs to establish that the technology is reasonably ancillary³⁷ to either broadcast or common carrier communications services.

After an initial period of reluctance to regulate cable in any manner, the FCC decided in 1966 to regulate cable under its plenary authority to regulate broadcasting.³⁸ This satisfied the broadcast industry, which feared that, absent regulation, cable operators would gradually decrease the number of television sets receiving local broadcast signals.³⁹ As this economic rationale fell out of fashion, however, the FCC removed itself from the mainstream of cable regulation.⁴⁰

Today, the legal framework by which cable is regulated remains nebulous. The Supreme Court's holding that the FCC may regulate cable as a service reasonably ancillary to broadcasting⁴¹ has not been overruled by case law or congressional action. Nor has the FCC proposed to regulate cable as anything other than a broadcast-related service. Yet the selective enforcement of Title

37. United States v. Southwestern Cable Co., 392 U.S. 157, 172 (1967).

38. Second Report and Order, 2 F.C.C.2d 725 (1966).

The FCC's decision to regulate the cable industry resulted from the broadcast industry's insistence that cable adversely affected local broadcasting and, in particular, UHF broadcasting. The FCC did not regulate cable under Title II or III of the Act: cable regulation actually existed outside the authority of the Act but was nevertheless ancillary to the broadcast provisions. See Besen and Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77, 84-91 (1981); M. HAMBURG, ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION 543 (1979).

39. See *supra* note 38.

40. See, e.g., FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (striking down the FCC's requirement that cable systems maintain a community access channel); Cable Television Syndicated Program Exclusivity Rules, 45 FED. REG. 60186 (1980) (to be codified at 47 C.F.R. § 76); 49 F.C.C.2d 1090 (1974). For a summary of the effort to deregulate cable at the federal level, see Besen and Crandall, *supra* note 38 *passim*.

The FCC has continued to regulate cable to a limited extent:

In deleting these rules, we have maintained the distinction between programming on access type channels, whether provided voluntarily, or pursuant to state or local law, and programming subject to the system operator's editorial control. The specific requirements of the fairness doctrine (§76.205) and equal opportunities for political candidates rules (§76.209) will, as in the past, not be applied to access type programming, as long as the channels on which such programming is presented themselves have inherent in their functioning, access of a type which makes possible equal opportunities for political candidates and time for the provision of programming covering all sides of controversial issues of public importance. For the time being we believe it appropriate to leave for case by case development more detailed definitions of what types of channels will meet this requirement.

45 FED. REG. 76178, 76179 (1980).

41. FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

III⁴² provisions against the cable industry, along with the failure to ban alien ownership, demonstrates that cable has been the subject of haphazard regulation. Interestingly, Congress has recently taken steps to define the regulatory status of cable and cable ownership provisions. A bill introduced in the Senate in 1982 would have allowed the FCC to issue regulations banning alien ownership except in those cases where reciprocal investment opportunities are permitted.⁴³ A more recent version of the bill calls for the FCC to coordinate regulation of foreign ownership with the United States Trade Representative.⁴⁴

III. THE FCC'S 1980 REPORT AND ORDER

A. THE ORDER HAS NO BASIS IN LAW

If cable is to be characterized as an extension of the broadcast system, then the same policies which justify section 310's⁴⁵ application to a broadcast licensee should also apply to prohibit foreign ownership of a cable system.⁴⁶ The FCC, however, has employed various rationales in disputing this theory. In a 1976 memorandum opinion and order,⁴⁷ the FCC pointed to recent congressional liberalization of alien ownership provisions for related broadcast services. The FCC stated that "[t]he legislative history of this change indicated that the intention was to permit the grant of radio licenses in the safety and special and experimental radio services directly to aliens, representatives of aliens, and foreign corporations. *Therefore, it appears, alien ownership of cable television systems is no longer restricted.*"⁴⁸ The FCC did not explain why special and experimental radio services, which generally consist of

42. 47 U.S.C. §§ 301-607 (1976).

43. S. 2172, 97th Cong., 2d Sess., 128 CONG. REC. 1657 (1982) (reintroduced as S. 66, 98th Cong., 1st Sess., 129 CONG. REC. 325 (1983)).

44. S. 66, 98th Cong., 1st Sess., 129 CONG. REC. 325, 326 (1983).

45. 47 U.S.C. § 310 (1976).

46. This is the view adopted by the Canadians. See *supra* notes 6 & 7.

47. *In re* Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirement for Operation of Cable Television Systems and For Grant of Station Licenses in the Cable Television Relay Service, 59 F.C.C.2d 723 (1976).

48. *Id.* at 724-25 (emphasis added, footnotes omitted). The FCC noted that the 1974 amendments to the Act allowed foreign ownership of the microwave relay stations servicing cable systems for the first time. Because these relay stations—termed Cable Television Relay Services (CARS)—were directly regulated under Title III as broadcasters, section 310's prohibition on alien ownership had, up until 1974, been enforced against CARS licenses. CARS stations, often owned by local cable systems, had thus made possible the enforcement of section 310 against cable systems. *Id.* at 724.

private point-to-point or point-to-multipoint communications, are similar to cable television systems, which transmit a group of signals via wire to a large number of subscriber homes. The FCC also observed that foreign direct investment in cable, which so far has involved only Canadian citizens, has enhanced capital investment in the communications system.⁴⁹ In short, a ban on alien ownership, said the Commission, would be a "cure for which there is no disease."⁵⁰

The FCC might have thought that Congress had ample opportunity to amend section 310 so that its provisions would explicitly apply to cable. The Commission failed, however, to consider whether the policies underlying section 310 required that the ban on alien ownership be applied to cable. Instead, the Commission analogized it to related businesses, as follows:

Alien ownership restrictions do not apply to communicators generally, to newspapers, wire news services, non-license radio and television networks, film and television producers, cable system networks and channel lessees, and it is not clear that they should apply to a system operator solely because of his potential ability to influence, through his program origination efforts, the ideas and attitudes of cable subscribers.⁵¹

The analogy fails, however, because in all of the instances cited, with the exception of newspapers, the programming or information passes first through an independent local gatekeeper or editor.

In 1980, at the prompting of U.S. cable interests, the FCC issued a report and order endorsing the 1976 findings and advancing several new rationales.⁵² Among the rationales proposed were: (1) the amount of foreign ownership is insignificant and is likely to remain so; (2) the power that franchisees exercise over programming is minimal; (3) the quality of service by the foreign companies is high; and (4) franchising is subject to extensive local scrutiny. Most significantly, the FCC found that all of the ownership in

49. *Id.* at 727.

50. *Id.*

51. *Id.*

52. *Supra* note 10. Procedurally, the FCC decision arose from a cable industry request that the FCC promulgate a rule mirroring section 310, but instead applied to the cable industry.

question is connected to Canada, a country with "close and friendly ties" to the United States.⁵³

While the aforementioned rationales have been factually contested by domestic cable interests,⁵⁴ only one of the reasons advanced by the FCC explains why the policies underlying the alien ownership ban for broadcasting should not be applied to cable: all of the ownership in question is Canadian and Canada has "close and friendly ties" to the United States. According to the FCC, this factor demonstrates that the national security rationale for prohibiting foreign direct investment in broadcasting is not present to the same degree in the cable industry.⁵⁵ The FCC did not consider what effect this decision might have if an investor, from a nation with interests more hostile to the United States, were to begin investing in cable. Presumably, if such a situation were to arise, the FCC could distinguish between the Canadian cable operators and the applicant from the more hostile nation. Yet such discrimination, based on the relative hostility of a nation, has no basis in law. The Communications Act does not authorize such a test, and nowhere has the FCC been delegated the authority to establish such a policy.

Consequently, the absence of an FCC policy concerning enforcement of a foreign investment ban in cable television leaves the FCC open to attempts by other foreign investors to buy into the U.S. cable industry. Even if such policymaking authority could be found, the failure of the FCC to employ section 310 as the appropriate statute indicates that a reviewing court has little on which to rely when deciding whether a foreigner should be allowed to purchase a system. Instead of giving a court the relatively

53. *Id.* at 77.

54. For example, Canadian cable operators have recently announced plans for significant amounts of new investment in the United States. *See supra* notes 12 & 28. This contradicts the FCC's finding that the amount of foreign ownership will remain insignificant. A 1980 rule eliminating a number of program exclusivity rules formerly applied to cable has increased the amount of discretion a cable operator possesses with respect to what is transmitted in the system. 45 FED. REG. 60186 (1980) (to be codified in 47 C.F.R. § 76). This tends to refute the FCC's characterization that operators have only a minimal amount of control over programming. *See In re* Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for operation of Cable Television systems and for Grant of Station Licenses in the Cable Television Relay Service, 77 F.C.C.2d 73, 77 (1980).

55. "Suggestions that . . . foreign investment will lead to abuses of editorial discretion threatening the security of the United States are highly speculative and not supported by any evidence in this record." *Supra* note 10 at 81.

simple task of applying section 310 to potential cable owners, the FCC leaves the judiciary with the task of determining whether the foreigner's home nation is friendly to U.S. interests—a determination not generally within the judiciary's expertise.

There is a second argument which demonstrates that the FCC decision had no basis in law. Section 153(h)⁵⁶ requires that communications services be regulated either as a broadcast service or as a common carrier service. By imposing even minimal regulation on the cable industry, due to its reasonably ancillary relationship to broadcasting, the FCC should apply section 310 to cable operators. If the FCC recognizes that cable functions, in part, in a way similar to broadcasting, section 153(h) requires that it be regulated as broadcasting. The language of section 310 does not allow the FCC to apply the alien ownership prohibitions at its own discretion. The structure of the Communications Act itself, therefore, requires that cable operators be subject to section 310 as long as cable is regulated as a broadcast medium.

B. THE RECIPROCITY ARGUMENT

In urging adoption of a proposed rule to regulate alien ownership of cable, the U.S. cable industry argued that the FCC should recognize and apply a principle of reciprocity.⁵⁷ Thus, U.S. cable interests would not seek an outright prohibition against alien ownership if the corresponding country allowed U.S. investors to own or control cable systems within that country.⁵⁸ The National Cable Television Association argued that provisions of the Trade Act of 1974 demanded a level of reciprocity which the Canadians had failed to meet.⁵⁹ The FCC, however, declined to adopt reciprocity as a policy for banning alien ownership of cable.⁶⁰

56. 47 U.S.C. § 153(h) (1976).

57. The principle of reciprocity has been stated to take effect as follows:

When one foreign government pursues a policy of discrimination and restriction regarding U.S. commercial interests, the agencies and establishments of the United States are empowered to impose reciprocal limitations. Such limitations are not aimed at punishing foreign nationals or restricting foreign commerce. They are intended to expand international commerce by inducing the eliminations of barriers to it.

Supra note 10 at 76. See also Reply Comments to the National Cable Television Association, Inc., Jan. 8, 1980 (filed in response to opponent's brief in the 1980 alien ownership report and order, 77 F.C.C.2d 73 (1980)).

58. A theory of reciprocal opportunity had been employed by the Commission on two prior occasions. See *id.* at para. 6.

59. *Id.* at paras. 3-4.

60. The Commission stated that:

The Commission found that application of the principle of reciprocity "is a matter which we believe is appropriately considered by other branches of government."⁶¹ At first glance, this statement seems somewhat surprising in light of the FCC's broad powers to regulate communications in the public interest, convenience and necessity.⁶² The FCC, however, properly recognized that there are limits to an administrative agency's ability to make foreign policy.⁶³ Yet the FCC failed to realize that the agency's power to act had already been delegated by Congress through the enactment of section 310. Although the executive branch is generally considered to have been granted broad powers in the sphere of foreign relations,⁶⁴ Congress gave the FCC specific powers to regulate alien investment in broadcasting.

Reciprocity theories have recently been receiving congressional attention. In hearings before the Senate Subcommittee on Communications, domestic cable interests argued that Canadian cable operators had grown rich by importing programming from the United States, which allowed the Canadian cable companies to prosper. These windfall earnings are now being used to compete with U.S. cable enterprises.⁶⁵ The executive branch has opposed

There is no showing in this proceeding that a reciprocal agreement would improve communications service available in the United States. To the contrary, it seems likely that reciprocal treatment between the U.S. and Canada would merely reduce competition to provide cable television service in the U.S.

Id. at 80.

61. *Id.* at 79.

62. 47 U.S.C. § 303 (1976).

63. While the separation of powers doctrine has long been discredited as applied to administrative agencies, courts have recognized that limits do exist as to how far the different branches of the federal government can impinge on each other's functions:

The fundamental necessity of maintaining each of the three general departments of government entirely free from control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open, to serious question. . . . The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

Humphrey's Executor v. United States, 295 U.S. 602, 629-30 (1935). See *Hearings on S. 2172 Before the Subcomm. on Communications of the Senate Comm. on Com.*, 97th Cong., 2d Sess. 183-84 & 191 (statement of Bernard J. Wunder, Ass't Secretary for Communications and Information, NTIA, Dept. of Com.); K. DAVIS, *ADMINISTRATIVE LAW TEXT* 23-25 (3d ed. 1972).

64. U.S. CONST. art. II, § 1, cl. 1. See *Lutcher S.A. Celulose E Papel Candoi, Parana, Brazil v. Inter-American Dev. Bank*, 253 F. Supp. 568 (D.D.C. 1966), *aff'd*, 382 F.2d 454 (D.C. Cir. 1967).

65. See *Hearings on S. 2172 Before the Subcommittee on Communications of the Senate Comm. on Com.*, 97th Cong., 2d Sess. 494 (statement of William Brennan, president

sectoral reciprocity, preferring to impose reciprocal cable investment opportunities through modification of the General Agreement on Tariffs and Trade.⁶⁶

In sum, the reciprocity theory advanced by U.S. cable interests, in an effort to drive Canadian operators out of the United States, or to induce the Canadians to open their borders to U.S. investment, would have required the FCC to tread on the Executive's authority. As previously discussed, however, the FCC had no need to consider reciprocity. A strict reading of the Communications Act compels a finding that direct foreign investment in cable should not be allowed, as long as cable is regulated as a broadcast medium.

IV. INTERNATIONAL IMPLICATIONS OF REGULATING CABLE AS A COMMON CARRIER

By regulating cable as part of the broadcast system, Canada has vested ownership and control of the cable industry in Canadian citizens. Ignoring for a moment the FCC's failure to apply the appropriate provisions of the Communications Act to cable,⁶⁷ the United States should likewise prohibit alien ownership of cable systems. Thus, by regulating cable as an extension of the broadcast medium, cable must develop without the benefit of foreign investment capital or expertise. Blanket prohibitions on direct foreign investment have generally been criticized as being antithetical to the spirit of international cooperation.⁶⁸

Nations are justifiably sensitive to foreign domination of their

of Teleprompter Corp. and member of the National Cable Television Association Board of Directors).

66. William E. Brock, special trade representative, stated the Reagan administration's position as follows:

We obviously must develop a set of principles that make it clear to our trading partners that two way trade in this sector must be established consistent with international rules. At the same time, our strategy should not be fashioned in a way that narrows our considerations to the point where the telecommunications industry and the U.S. economy are the long-term losers. That is why I believe that sector-by-sector reciprocity is undesirable.

Letter from William E. Brock to Sen. Barry Goldwater (May 28, 1982), *reprinted in Hearings on S. 2172 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 97th Cong., 2d Sess. 650.

67. *Supra* note 35 and accompanying text.

68. See H. Brownell, *Foreign Investment in the United States Should Not Be Restricted*, in *CURRENT LEGAL ASPECTS OF FOREIGN INVESTMENTS IN THE UNITED STATES* 63 (A.B.A. ed. 1976). Brownell states that "[r]eactive, overly nationalistic economic policies invariably lead to a breakdown in nearly all aspects of international relations. Given the cur-

communications systems, which generally provide a vital link between a country's government and its citizens. Resolving the issue of whether or not to allow foreign direct investment, therefore, involves the international community's ability to create a regulatory structure which allows for an open and interdependent communications system,⁶⁹ but prevents foreign domination of ownership or content.

A. CABLE AS A COMMON CARRIER

Cable technology initially developed as an extension of the broadcasting system.⁷⁰ In *United States v. Southwestern Cable Co.*,⁷¹ the Supreme Court identified two functions of cable systems: first, cable supplements local broadcasting by improving the quality of local reception;⁷² and second, cable allows broadcast signals to be imported from other communities.⁷³ Moreover, because cable systems may easily originate local programming,⁷⁴ the FCC initially mandated that cable operators produce their own programming.⁷⁵ Cable systems, therefore, were initially businesses which operated to produce their own local television programming, or to transmit broadcast television programming to their customers. In essence, the cable industry operated as an arm of the broadcast business.

In Canada, the cable and broadcast industries stood in a similar relationship.⁷⁶ The Canadian Supreme Court case *In re*

rent potential for such a breakdown, a restrictive inward-looking policy towards foreign investment in the U.S. would be dangerous at this time." *Id.*

69. *Id.*

70. See Howard, *Ownership Trends in Cable Television (1972-79)*, 58 JOURNALISM Q. 288 (1981).

71. 392 U.S. 157 (1967).

72. Home reception is generally better with cable transmission as opposed to broadcasting because the signal travels along an enclosed wire and is not susceptible to atmospheric interference. See M. HAMBURG, *supra* note 38 *passim*.

73. *Supra* note 71 at 163.

74. See *supra* note 72.

75. See M. HAMBURG, *supra* note 72. Hamburg contends that the FCC did not regulate cable under the broadcast provisions of Title III. He interprets the regulatory history in a different way, arguing that the FCC regulated cable outside the scope of either Titles II and III of the Act. This theory is helpful in explaining why the FCC has been selective in enforcing the provisions of Title III against cable operators. The theory does not address the issue of whether this haphazard regulatory approach should have been tolerated by the FCC, or the courts, in light of the bifurcated regulatory scheme mandated by section 153(h). *Id.* at 543; Nat'l Ass'n of Regulatory Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976).

76. 83 D.L.R.3d 178, 181 (Sup. Ct. 1977).

Republic Service Board,⁷⁷ which upheld the authority of the federal government to regulate cable, identified the cable industry as functionally interrelated to the broadcast system.⁷⁸ The Canadian court applied Canadian law, which explicitly declares cable to be part and parcel of the broadcasting system.⁷⁹

The United States Supreme Court, applying statutes which do not define the legal status of cable, made essentially the same finding in *FCC v. Midwest Video Corp.*⁸⁰ "As the Commission, itself, has observed, both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide."⁸¹ The Court, drawing heavily on the mutually exclusive rationale of section 153(h) to reach its conclusion, found that the FCC could not regulate cable systems as common carriers.⁸²

Although both Canada and the United States have regulated cable as an extension of the broadcast medium, this method of

77. *Id.*

78. The opinion provides a cogent rationale for regulating cable as a broadcasting service:

The fundamental question is not whether the service involved in cable distribution is limited to intraprovincial subscribers or that it is operated by a local concern but rather what the service consists of. . . . There is another element that must be noticed, and that is that where televisions broadcasting and receiving is concerned there can no more be a separation for constitutional purposes between the carrier system, the physical apparatus, and the signals that are received and carried over the system, than there can be between railroad tracks and the transportation service provided over them or between the roads and transport vehicles and the transportation service that they provide. . . . Divided constitutional control of what is functionally an interrelated system of transmitting through air waves or through intermediate cable line operations, not only invites confusion but is alien to the principle of exclusiveness of legislative authority a principle which is as much fed by a sense of the constitution as a working instrument as by a literal reading of the words.

Id. at 181.

79. *Supra* notes 6 & 7.

80. 440 U.S. 689, 707 (1979). This case struck down FCC rules mandating that cable systems reserve access channels on a first-come, first-served basis. See *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (Douglas, J., dissenting).

81. *Id.*

82. In light of the hesitancy with which Congress approached the access issue in the broadcast area, and in view of its outright rejection of a broad right of public access on a common-carrier basis, we are not constrained to hold that the Commission exceeded those limits in promulgating its access rules. The Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters.

Id. at 708-09.

regulation ignores the essentially hybrid nature of the technology.⁸³ Since cable either can act as a transmission agent or originate its own programming, cable can function as a common carrier, and a broadcaster simultaneously.⁸⁴ At present, cable is neither a pure form of broadcaster nor a common carrier. Cable operators, for example, can originate programming and choose which programs will appear on their other channels. Unlike broadcasters, however, cable operators are not held to the public interest standard;⁸⁵ they have no legal responsibility for the content of this programming.⁸⁶ Nor do cable operators function as pure common carriers because most of their channels are not available on a first-come, first-served basis.

Access channels, or leased access channels, are examples of common carrier style services and may be mandated by the franchise agreement. Furthermore, the current mode of regulating cable may place the cable operator, by virtue of the local origination channel, in competition with those programming services which must depend on the system for economic survival.⁸⁷ While the United States does not mandate that systems carry origination programming,⁸⁸ many may be required to do so by their local franchise agreements.⁸⁹

83. Cable is a unique communication medium, for in addition to its ability to relay programming and information supplied by others, it can also originate its own material. This serves to distinguish the cable operator from a broadcaster who, for instance, is able to exercise control of the programming broadcast by his station, and from the common carrier who exercises very little control.

59 F.C.C.2d 723, 725 (1976).

84. *Id.*

85. See Cable Television Syndicated Program Exclusivity Rules, *supra* note 40. Besen and Crandall, *supra* note 38.

86. That is, no responsibility other than the constitutional restraints of libel or obscenity, except when the operator engages in origination programming. 47 C.F.R. §§ 76.205-76.221 (1982).

87. A Canadian study concluded:

[I]t is a desirable principle that a carrier should not be permitted to use its technological resources to compete with those who have to depend on its services. In these respects, the cable industry is in an anomalous position. A cable company is able to produce and distribute television programming of its own, potentially in competition with the signals of the broadcasting stations and networks it distributes, and is not subject to regulation on the principles that are accepted as applicable to other telecommunication carriers and to public utilities.

CONSULTATIVE COMMITTEE ON THE IMPLICATIONS OF TELECOMMUNICATIONS FOR CANADIAN SOVEREIGNTY, TELECOMMUNICATIONS AND CANADA 17 (1979).

88. Cable Television Syndicated Program Exclusivity Rules, *supra* note 40.

89. Compare Besen & Crandall, *supra* note 38 at 121 (underscoring the importance of the local franchise agreement as a regulatory method).

By contrast, treating cable as a pure form of common carrier would allow a variety of programming services first-come, first-served access to cable channels.⁹⁰ Because the owner of the common carrier service, by definition,⁹¹ has no control over content,⁹¹ the policies which underlie the prohibition on alien ownership have little applicability.⁹² A Canadian study of the regulatory framework of cable systems⁹³ recently recommended that Canada undertake regulation of cable as a common carrier, largely because the cable industry is in the process of evolving into a provider of a variety of information services.⁹⁴ The Canadians argue that cable systems, like telephone systems, constitute a natural monopoly⁹⁵ which, in the future, should carry news, information and entertainment to subscriber homes.

B. ALIEN OWNERSHIP OF COMMON CARRIERS

Unlike broadcasting, alien ownership of common carrier services is not prohibited by law in either the United States⁹⁶ or Canada.⁹⁷ The United States prohibits alien-owned corporations from merging with existing carriers, but does not prohibit an alien-owned corporation from initiating a new common carrier service.⁹⁸ Canadian law is slightly more stringent with respect to foreign ownership of common carriers, but does not absolutely preclude aliens from owning common carriers in all situations.⁹⁹ These liberalized ownership rules may be explained by reference to the policy considerations underlying the broadcasting ban.

90. See definition of common carrier, *supra* note 8.

91. *Id.*

92. See *supra* notes 1-11 and accompanying text.

93. Consultative Committee, *supra* note 87.

94. *Id.* at 21-22.

95. The Canadians distinguish the natural monopolies of cable or telephone companies from those of broadcasters on the grounds that broadcasters do not offer their facilities to third parties. "[T]his is quite different from the monopoly enjoyed by a telephone company and the exclusive right of a cable company to distribute broadcast signals in an identified geographical area free from any competition." *Id.* at 18.

96. See 47 U.S.C. § 222(d) (1976).

97. Canadian General Radio Regulations provide, for example, that some common carrier services which require use of the broadcast spectrum, such as stations which relay signals between broadcasters or cable operators, may be owned by Canadian citizens or corporations incorporated within Canada. 1371 CAN. CONSOL. REGS. § I(5) (1978). The law does not, at least facially, prohibit foreign companies from incorporating subsidiaries within Canada for the purpose of operating common carrier services.

98. 47 U.S.C. § 222(d) (1976).

99. See *supra* note 97.

National security is less important in the common carrier context since the owner of the existing service does not control the content of the messages and thus, cannot influence those receiving the messages. Considerations of national identity,¹⁰⁰ likewise, are not a concern for the same reason. Finally, due to the rate regulation¹⁰¹ associated with common carrier services, tariffs could be structured so that profits earned would be reinvested in the domestic communications system.¹⁰²

Because Canada and the United States are among the few countries in the world which are, to a significant extent, cabled,¹⁰³ there is some difficulty in drawing generalized conclusions regarding the international practice of direct foreign investment in cable. The expected growth of cable into a provider of common carrier services further complicates the analysis. If, however, Canada and the United States are considered as models, some limited conclusions can be made with respect to the commercial practices

100. The extent to which a communications system can control national identity or culture has been a major concern of those nations who advocate a new world information order. "Information is the basis of culture. The greater the foreign information, the greater the threat to a native or domestic culture." McPHAIL, *ELECTRONIC COLONIALISM: THE FUTURE OF INTERNATIONAL BROADCASTING AND COMMUNICATIONS* 244 (1981).

101. In the United States, cable systems have their rates established by agreement with municipalities. In Canada, rates are established at the federal level by the Canadian Radio-Television Commission. The way in which rates are established, however, is essentially the same: the governmental body decides on a rate that is based on "value for service" considerations. See CONSULTATIVE COMMITTEE, *supra* note 87 at 19; M. HAMBURG, *supra* note 38 at 687.

102. The Canadians have proposed separating rate regulation of content and carriage. A study committee found that such a separation would facilitate the transformation of cable to a common carrier service. The alternatives suggested by the committee were:

1. preserve status quo: allow cable to engage in content production and programming as well as carriage under regulation with traditional carriers limited to carriage only.
2. absolute separation: no carrier engaging in content.
3. remove all regulation.
4. divide market: cable distributes broadcasts and direct feed television with new services go to traditional carriers.
5. separate, but allow cable companies and other carriers wishing to engage in content operations to do so only via "arm's length" subsidiaries with separate board of directors, management and full cost separation.
6. separate, but allow exceptions if a carrier is well suited to provide the content operation.
7. combinations of 5 and 6 by allowing exceptions through subsidiaries (FAVORED BY COMMITTEE).

CONSULTATIVE COMMITTEE, *supra* note 87 at 20.

103. STATISTICS CANADA, *CABLE TELEVISION (1978) (1979)*.

regarding direct foreign investment in cable. If cable is regulated as a common carrier, there does not appear to be a legal bar to allowing foreign investment.¹⁰⁴ Nor do there appear to be compelling policies for enacting alien ownership prohibitions. At the same time, the highly regulated nature of a natural monopoly would permit a nation to limit the amount and kind of foreign direct investment. In other words, the movement to a common carrier scheme would not require that nations abandon their communications systems to alien citizens or corporations.

V. CONCLUSION

Regulation of cable systems as common carriers would have several beneficial ramifications, both domestically and internationally. First, common carrier regulation is more consistent with the new types of services cable will be providing. Canada has already begun to re-evaluate its method of regulating cable.¹⁰⁵ The United States should do likewise. Second, the recognition of cable as a common carrier would allow the United States to continue to permit Canadian investment in cable without risking the chance that a nation more hostile to the United States will gain partial control of the content of the programming or information system. Common carrier regulation would, nevertheless, allow aliens to communicate their views through the system in competition with others in society seeking to disseminate their views. An environment of balanced investment opportunities is thereby created, alleviating the current atmosphere of unfairness.¹⁰⁶

The practices established by the United States and Canada may serve as a model to other nations seeking to develop cable systems and regulations governing them. While the creation of a regulatory framework that permits balanced investment opportunities may seem trivial in the context of two communications giants, such as Canada and the United States, the consequences for other countries with less developed communications systems are important. Direct foreign investment in a cable common carrier scheme may well prove to be financially the most viable

104. See *supra* notes 96 and 97.

105. The Consultative Committee's Report is but one example. See also 8 ROYAL COMMISSION ON NEWSPAPERS, *THE NEW TECHNOLOGIES* (1981).

106. Indeed, one of the complaints levied against the FCC's current policy is the unfairness of allowing Canadian investment in United States systems while U.S. investors are barred from Canada. *Supra* note 57 at para. 3.

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means of providing new technologies. A common carrier format allows nations to take advantage of new technologies without the risk of losing control of the content of their communications systems to foreign nations.

Mary Louise Brown