

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
CARIBBEAN CROSSINGS LTD.) File No. SCL-T/C-20090506-0009
)
Application for Authority pursuant to)
Cable Landing License Act)
for transfer of control)

**Comments regarding
Transfer of Control Application**

The Television Association of Programmers (TAP) Latin America hereby submits public comments on the application for a transfer of control of a Submarine Cable Landing License filed by Caribbean Crossings Ltd. on May 6, 2009.

TAP requests that the Commission consult with its interagency colleagues regarding the current legal situation in The Bahamas that harms the ability of U.S. companies to distribute authorized program-encrypted programming in that market. TAP member companies are being harmed by inadequate laws of The Bahamas and the practices taken by Cable Bahamas, one of the of parties involved in this transfer of control application. In order to complete such consultation involving violations of U.S. treaty rights, TAP respectfully requests that this transfer of control application be reviewed under normal procedures, and not the streamlined process requested by Caribbean Crossings Ltd.

About TAP: The Television Association of Programmers (TAP) Latin America is an industry trade group representing more than 30 pay television channels in Latin America. TAP's

members are: Animal Planet, AXN, A&E, Boomerang, Canal Fox, Cartoon Network, Casa Club TV, Cinemax, CNN en Español, CNN International, Discovery Channel, Discovery Kids, Discovery Home & Health, Discovery Travel & Living, Discovery Civilization, Discovery Science, Discovery Turbo, Disney Channel Latin America, ESPN International, ESPN Dos, ESPN+, ESPN2, E! Entertainment, Speed, Fashion TV, FX, Fox Sports, HTV, HBO, HBO Plus, HBO Family, History Channel Latin America, I-Sat, Infinito, Jetix Channel Latin America, Max Prime, MGM Channel, MTV, MuchMusic, Mundo, National Geographic, Nickelodeon, People + Arts, Retro, Space, Sony, TCM, TNT, VH1, Universal Channel and Warner Channel. TAP's mission is to improve the regulatory and business climate for the pay television industry in Latin America by fostering open dialogue among its members, government regulatory agencies, and other industry institutions throughout the region.

The application pending before the Commission: Caribbean Crossings Ltd. (“Caribbean Crossings”) pursuant to the Cable Landing License Act, requests authority to effectuate a transfer of control in its parent corporation, Cable Bahamas Ltd. (“Cable Bahamas”) from Columbus Communications Ltd. (“Columbus”) to the remainder of the shareholders of Cable Bahamas. Caribbean Crossings indicated that the grant of its application would serve the public interest and requested that the application should be granted on a streamlined basis.

To be clear, TAP does not raise any issue regarding the specific facts of the transfer of control proposals contained in Caribbean Crossing’s application.¹ The corporate structure and

¹ TAP notes that there also is pending before the Commission a related transfer of control application by Trinity Communications Ltd., an affiliate of Caribbean Crossings with Section 214 operating authority (see fine number ITC-T/C-20090506-00204, filed May 6, 2009). The Commission's streamlining procedures apparently are not applicable to that application. Trinity's application presumably would be encompassed by the same interagency consultations as requested for Caribbean Crossings' application, since many of the pertinent issues are likely intertwined with both applications with respect to Cable Bahamas' activities.

various equity arrangements of the entities responsible for this license are not of our concern. We are not asking that the Commission revoke the current license.

Request that the FCC consult with its interagency colleagues on this issue: Rather, TAP requests that the FCC consult with its interagency colleagues, as contemplated by Executive Order 10539, regarding the legal deficiencies in Bahamian law that adversely affect the rights and interests of U.S. companies in the premium pay television sector to protect their copyrighted products and signals in that market. This is important because the actions not taken by the Government of The Bahamas to resolve an untenable situation are causing harm to U.S. companies. As the pending application for the transfer of control makes clear, the Government of the Bahamas itself is an investor in Cable Bahamas, one of the entities involved in this application for transfer of control.

With respect to submarine cable landing licenses, the Code of Federal Regulations provides: “The President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed.” 47 CFR 35 (emphasis added).

TAP herein takes a broad view of the phrase “in maintaining the rights or interests of the United States or of its citizens in foreign countries.” The “rights and interests” of its member companies in protecting their respective copyrighted programming in The Bahamas is severely undermined by actions taken, and not taken, by both the Government of the Bahamas and Cable Bahamas. Other U.S. laws -- such as the Caribbean Basin Economic Recovery Act -- similarly

require the President to evaluate whether intellectual property rights (here, copyright) of U.S. entities are protected in foreign countries.

Summary of overbroad compulsory license problem in The Bahamas: TAP provides below a summary of the both the legal and practical problem our members faces in The Bahamas.

On January 5, 2000, the Government of The Bahamas implemented its 1998 Copyright Act. The law authorized a new compulsory license for the retransmission of television programming by licensed cable operators. Compulsory licenses for spill-over over-the-air broadcast channels are common, and legal, practice internationally. This new compulsory license, however, expanded the scope beyond the internationally accepted limits of such a license (e.g., authorizing retransmission of free, over-the-air broadcast networks by cable operators) to the unprecedented step of permitting retransmission of any copyrighted work transmitted over its territory, including the encrypted signals of U.S. basic cable and pay TV services. Such a compulsory license far exceeded the bounds permitted under the Berne Convention for the Protection of Literary and Artistic Works, to which both The Bahamas and the United States are signatories, as well as violates The Bahamas' obligations to provide "adequate and effective protection" for U.S. copyright, as required by the Caribbean Basin Economic Recovery Act (CBERA), a U.S. preferential trade program. In fact, the implementation by the Bahamas of its compulsory license for encrypted pay television satellite signals is unprecedented anywhere in the world, and could have far-reaching, adverse repercussions for the exportation of legitimate U.S. audiovisual entertainment. The violation is also extensive, as is obvious from Cable Bahamas'

program listing², which includes a very long list of U.S. pay television channels obtained through compulsory licensing without authorization of the owners of these programming rights.

The CBERA requires that beneficiary country status be denied if such country has nationalized, expropriated or otherwise seized ownership or control of property owned by a U.S. citizen (19 U.S.C. § 2702(b)(2)(A)) or has taken steps to repudiate or nullify any intellectual property (19 U.S.C. § 2702(b)(2)(B)). Furthermore, if a government-owned entity broadcasts U.S. copyrighted material, including films or television material, belonging to United States copyright owners without their consent (19 U.S.C. § 2702(b)(5)), the President shall not designate that country a CBERA beneficiary. In addition, beneficiary countries must meet the two discretionary IPR criterion of the CBERA, which include taking into account: first, 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; and second, the extent to which such country is prohibits its nationals from engaging in the broadcast of copyrighted materials, including films or television material, belonging to United States copyright owners without their express consent (19 § U.S.C. 2702(c)(9) and (10)).

The U.S. government has been involved with the Bahamian government since 2000 in efforts to resolve this troubling issue. The Parliament adopted legislative amendments in 2004 but these were never signed by the Prime Minister and as a result, have never been implemented. Meanwhile, the local market for legitimate premium pay television programming has changed and grown in recent years, and much English language programming is available. Indeed, members of TAP have expended millions of dollars to develop English language Caribbean feeds to service the

² See Exhibit 1.

Caribbean market, including The Bahamas.

Unfortunately, the compulsory license continues to be used to allow Bahamian cable operators to downlink, dc-encrypt, retransmit and sell premium pay television networks from the U.S. without authorization, thereby completely undermining U.S. programmers ability to market their legitimate Caribbean feeds in The Bahamas.

In 2007, the Office of the United States Trade Representative (USTR) forthrightly labeled The Bahamas' compulsory licensing scheme as "piracy."³ Recently, USTR indicated in its 2009 Special 301 Report that it will examine The Bahamas in the context of that country's compliance with its CBERA IPR obligations. Specifically:

As part of its bi-annual review of the operation of the Caribbean Basin Economic Recovery Act, USTR will review the IPR practices of beneficiaries, including The Bahamas, to assess compliance with the preference program's eligibility criteria, which include the extent to which a country prohibits its nationals from broadcasting U.S. copyrighted materials without permission.⁴

For the above reasons, TAP believes that the Commission should consult with its interagency colleagues regarding the actions taken by the Government of The Bahamas and Cable Bahamas regarding their protection of rights and interests (in this case, copyright rights) of U.S. entities.

In addition, TAP calls attention to the claim at pages 5-6 of Caribbean Crossings' application that The Bahamas . . . has **recently** submitted its application for [WTO] membership." (Emphasis added.) WTO membership would require Bahamian adherence to the WTO's Agreement on Trade-Related Aspects of International Property Rights (TRIPS), which would clearly prohibit The Bahamas' compulsory licensing of pay television signals. In reality, according

³ USTR, Seventh Report to Congress on the Operation of the Caribbean Basin Economic Recovery Act (Dec. 31, 2007), at pages 23-24.

⁴ USTR 2009 Special 301 Report, April 30, 2009, at pages 3-4, posted at <http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf>.

to the most recent documents on file at the WTO, while The Bahamas submitted a one-page application for WTO membership in 2001, no steps have been taken since that time by The Bahamas Government to advance that application.⁵

Conclusion: TAP believes that the continued inaction by the Government of the Bahamas to resolve an almost decade-long problem involving an onerous compulsory license applied to pay television programming represents that government's egregious failure to provide adequate and effective copyright protection to U.S. copyright owners, as required by the Berne Convention and CBERA.

Nations in the Caribbean region generate an estimated \$250-\$270 million in programming revenue for U.S.-based cable television companies each year. This Bahamian legislation, in the form of this overbroad compulsory license, already results in major losses to pay television companies, although TAP is not able to calculate an exact estimate. Coupled with a possible legislative "domino effect" already threatened in other Caribbean countries through adopting similar objectionable compulsory licenses (as threatened in the cases of St. Kitts and Nevis, Barbados and Jamaica, for example), the potential market disruption could threaten the entire legitimate industry's ability to complete programming carriage deals throughout the region.

TAP respectfully requests that this transfer of control application be reviewed under normal procedures, and not a streamlined process requested by Caribbean Crossings, so that the Commission consult with its interagency colleagues regarding the current legal situation in The Bahamas that harms the ability of U.S. companies to distribute legitimate program-encrypted

⁵ Please refer to Exhibit 2, which contains Commonwealth of The Bahamas Request for Accession Pursuant to Article XII (May 10, 2001), Technical Note on the Accession Process (May 18, 2007), and Summary Table of WTO Accessions (April, 2009).

programming in that market and to review the role that investors involved in the pending application play in this situation.

Respectfully submitted,

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