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COMPUTER LAW

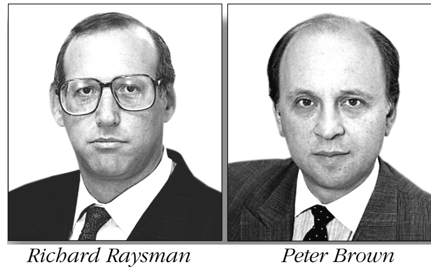
BY RICHARD RAYSMAN AND PETER BROWN

Internet Streaming of TV Broadcasts: The Canadian 'Legal Void'

ONE OF THE latest big challenges that the Internet has posed for United States copyright owners comes from Canada, where two companies, iCraveTV and JumpTV, have been seeking to retransmit television programming — much of it American programming — over the Internet.

iCraveTV and JumpTV have created Internet rebroadcast business models based on a perceived "legal void" in the Canadian Copyright Act. In so doing, they have caught the attention of United States companies, who are fearful that in the borderless expanse of cyberspace, a void in the laws of one jurisdiction can quickly become a black hole for the copyright protections intended by another jurisdiction. Copyright holders in the United States worry that Internet retransmission within Canadian borders, no matter what the intent and efforts of the retransmitters, would inevitably make the programming available outside Canada and seriously damage their carefully constructed licensing and distribution networks.

Richard Raysman *and* **Peter Brown** *are partners at Brown Raysman Millstein Felder & Steiner in New York.* **Alexis B. Hart,** *a summer associate, assisted in the preparation of this article. Brown Raysman Millstein Felder & Steiner offers legal services in Canada through its exclusive affiliation with Mann & Gahtan which provided assistance with this article.*


Richard Raysman *Peter Brown*

The Canadian 'Legal Void'

Under U.S. law, a company that tried to broadcast copyrighted television programming over the Internet without permission from the copyright holders — likely by a process known as "streaming" — would face daunting legal obstacles. Most notably, the U.S. Copyright Act, 17 USC §106, grants copyright owners certain exclusive rights, including the rights to perform and display audiovisual works publicly. Arguably then, the iCraveTV and JumpTV models would not be permissible in the U.S. unless they had a broadcast license from every program copyright owner.

The current disputes, however, have centered on Canadian copyright law. Specifically, §31 of the Canadian Copyright Act exempts rebroadcasts of local or distant television and radio signals from the standard copyright fee requirements in Canada. Instead, rebroadcasters may apply for a compulsory retransmission license and pay a set fee to the Canadian federal government that is then redistributed to the networks. The compulsory retransmission license is not limited to just Canadian programming either; it includes the programming of U.S. broadcast networks as well.

Until very recently, only cable and satellite television companies have been approved for the compulsory retransmission license. But the text of §31 of the Canadian Copyright Act does not limit the issuance of a compulsory license only to cable companies and satellite providers. This "legal void" results from the fact that technically Internet retransmissions of broadcasts would seem to be permissible provided a compulsory license was obtained.

Jumping Into the Void

It was somewhat inevitable that Internet-based services would attempt to jump into this legal void. The first major controversy surrounding Internet television retransmissions came in 1999, when iCraveTV rebroadcast approximately 17 television channels over its Web site, including the U.S. networks ABC, NBC and CBS. iCraveTV did not have authorization from the programming copyright holders and did not pay compensation to the copyright holders for the rebroadcasts. It launched its banner-advertising-based service and promised to pay royalties whenever the Canadian Copyright Board figured out what the tariff would be for Internet retransmis-

sions, since Canada's statutory licensing system was designed only to collect a portion of monthly subscriptions (i.e., cable and satellite subscriptions).

iCraveTV believed that the legal void was just the opportunity it needed to become the first major Internet rebroadcaster. The company claimed that broadcasting via the Internet technically fell under the same model as cable and satellite providers, just that the broadcasting medium was different; hence it should be able to take advantage of the exemption from the copyright requirements and be allowed to receive a compulsory retransmission license.

The Entertainment Industry Strikes Back

iCraveTV's attempts to exploit the Canadian copyright void put other companies, namely large U.S. entertainment conglomerates, into an uproar. They argued that their intellectual property rights were being violated and that legalizing Webcasts in Canada could have the effect of destroying their entire business models. Essentially, the revenue model of television and film broadcasters is based on individually negotiated exclusive licenses for a particular geographical area. Currently, the Internet does not heed easily to geographical limitations, and the studios and broadcasters argued that Webcasting could effectively eviscerate the exclusive license model by devaluing the price for an exclusive license for any one particular area. Broadcasts over the Internet could be viewed in areas where the broadcast license did not permit or infringe upon another entity's exclusive license. iCraveTV was unable to guarantee that the TV broadcasts would not be viewed in areas where the broadcast license did not permit.

In early 2000, the Motion Picture Association of America (MPAA) filed suit in U.S. federal court on behalf of 13 film and television plaintiffs, including Twentieth Century Fox, Disney, Paramount Pictures, Time Warner, Universal City Studios and Columbia Pictures Television claiming that iCraveTV violated their broadcasting copyrights by carrying programming on its Web site that was not authorized or paid for. The National Football League and the National Basketball Association also joined the suit against iCraveTV, stating that their ability to negotiate separate contracts in each market would be injured because their broadcast signals would be available worldwide. The NFL mentioned that alternative broadcasting methods would be considered in order to protect its copyright in the face of such a threat, including a pay-per-view model. On Feb. 8, 2000, a U.S. district court judge in Pittsburgh issued a preliminary injunction against iCraveTV banning it from retransmitting unauthorized U.S. copyrighted television programs, films and sports telecasts.[1]

The court found likely copyright and trademark violations, notwithstanding iCraveTV's assertion that their activities were legal under Canadian law. Shortly after the injunction, iCraveTV agreed to an out-of-court settlement in which iCraveTV would refrain from retransmitting U.S. copyrighted signals though the Internet or any other online or wireless technology whatsoever.

If at First You Don't Succeed

Another Canadian company now wants to jump headfirst into the "legal void" that iCraveTV sought to exploit. In 2001 JumpTV filed for a compulsory retransmission license to rebroadcast local or distant signals via the Internet (i.e., Webcast). Just like iCraveTV, JumpTV stated that it qualified for the exemption from the Canadian Copyright Act's requirements because it will broadcast a local or distant signal that is similar to the cable and satellite providers' broadcasts. Because the compulsory retransmission license had never been applied to Internet retransmissions, JumpTV has asked Canada's Copyright Board for a single, low-royalty fee structure that would be conducive to its distribution medium.

Canadian and U.S. copyright holders, cable and satellite broadcasters argued against JumpTV's compulsory retransmission license. Collectively, they contended that JumpTV's request for royalty fees for Internet retransmission of TV programs was inappropriate because the Canadian Copyright Act did not cover such retransmissions.

Additionally, JumpTV suggested that the Canadian Copyright Board establish an interim tariff exclusively for its venture, and then decide whether or not to allow other Webcasters to rebroadcast on a case-by-case basis, so as to not open the floodgates for Internet rebroadcasts. JumpTV believed that an interim tariff was necessary because heightened opposition from copyright holders, cable and satellite broadcasters would kill Webcasting, as evidenced by the result in the iCraveTV settlements.

One difference between JumpTV and iCraveTV is that JumpTV has not attempted to broadcast any U.S. signals without authorization from the copyright owners prior to requesting a compulsory retransmission license. JumpTV also claims that it has the technology to black out programming in areas where permission to broadcast has not been obtained. In fact, JumpTV claims that its border-control technology would be no worse than the cross-border leakage of direct-to-home satellite TV systems, where piracy is known to exist. Skeptics, of course, remain: according to one Canadian broadcasting official, "there has not been a technology that a whole bunch of bright college kids couldn't crack."[2]

Canadian Authorities Answer

Although the Canadian government announced last year that the Copyright Act would be amended to specifically account for Internet retransmission and other newer technologies, it also delayed the regulations that would govern the specifics for one-year, pending further investigation. Despite JumpTV's claims that the effective one-year moratorium on the regulations would be fatal to its business and to Webcasts in general, the Canadian government maintained that it needed the one-year time-period in order to study and provide comprehensive regulations governing newer retransmission technologies. The delay was largely due to pressures from U.S. interests, which claimed that the amendments as currently drafted insufficiently protected U.S. copyright holders. Additionally, the Canadian regulators made clear that JumpTV would have to prove that its signal protection software actually works by showing that only Canadians would have access to the broadcasts.

In October 2001, JumpTV withdrew its bid for a compulsory retransmission license. JumpTV's lawyers stated that JumpTV was reviewing its business model and would likely be moving from a banner-advertising model to a subscription-based service. The company made clear that its decision to withdraw its bid was not due to government pressures or opposing broadcasters. JumpTV also noted that the tariff application process was tedious and extremely costly for new companies.

Canadian copyright authorities made clear their need to approve any revenue model that JumpTV pursued if its purpose was to rebroadcast TV signals via the Internet. Michael McCabe, president of the Canadian Association of Broadcasters (CAB) stated, "We will continue to oppose any effort on their part to, in effect, use our signals for their business, pay us a pittance for it and then open us to potentially significant damage by making them [the signals] available all over the world on the Internet."[3] CAB called for a "carve-out" in the existing Canadian copyright law that would make new media and Internet retransmitters ineligible for the compulsory license regime.

Legislation in Canada

On June 18, 2002, the House of Commons of Canada passed Bill C-48, which would effectively amend the Canadian Copyright Act. The Canadian Senate is set to consider the bill this fall. To erase the legal void in the Copyright Act, Bill C-48 distinguishes between the terms "retransmitter" and "new media retransmitter" and makes it perfectly clear that Internet-based retransmitters that want to retransmit distant signals must pay royalties first and comply with further regulations to be promulgated.

Bill C-48 defines the term "retransmitter" in §31 as "a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter." A "new media retransmitter" is defined to mean a person whose retransmission is lawful only by virtue of a 1999 ruling that exempted the Internet from broadcasting regulation, so the bill makes clear that Internet retransmitters will be regulated.

The House of Commons indicated that the new regulation-making power established with Bill C-48 will allow new types of distribution systems, including the Internet, to be used to retransmit broadcast signals if they meet the conditions set out in the regulations. This bill sends an apparent signal to Internet companies that any unlicensed retransmission action on their part dealing with local (Canadian) or distant (foreign) signals will most likely not be tolerated. However, the ultimate effect of the new law depends upon whether the governing regulations will make it easier or harder for Internet retransmitters to operate in Canada. It is expected that the licensing fees may be too onerous for Internet-based companies to operate. Although these amendments do not amount to a complete carve-out as sought by CAB, it does put the Internet retransmitter business on effective notice until the regulations are promulgated.

Conclusion

The proposed amendments to the Canadian Copyright Act make Internet retransmissions a real possibility in Canada, depending of course, upon the standards established by the regulations. iCraveTV resurfaced this past spring claiming that it now has the technology to territorialize who watches and is able to black out broadcasts in areas where permission has not been obtained. JumpTV too, may decide to test the legal waters by launching without a license. Needless to say, copyright owners in the U.S. and broadcasting authorities in Canada are likely to once again consolidate and wage a lobbying war if these plans go forward.

(1) *Twentieth Century Fox Film Corp., et al., v. iCraveTV, et al.*, 53 U.S.P.Q.2D (BNA) 1831 (W.D. Pa. Feb. 8, 2000).

(2) ICrave Plans Comeback This Spring, NATIONAL POST, March 16, 2002, quoting Ben Ivins, Senior Associate General Counsel, National Association of Broadcasters.

(3) JumpTV.com Pullout Doesn't End Debate on Streaming TV Copyright, COMMUNICATIONS DAILY, Oct. 15, 2001.

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