

The Technological Revolution Will Not Be Televised:  
Canadian Copyright and Internet Transmissions

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In a small, isolated village, residents are frustrated by the spotty reception of their local broadcast television stations. With every storm or atmospheric disturbance, the already snowy picture becomes a blizzard. One day an entrepreneur puts an ad in the local paper offering high quality signal reception through a wire! What's more, you will even be able to watch distant broadcast signals that you could never receive with even the best rooftop antenna. The local stations are alarmed. Distant signals will compete for viewers, reducing ratings and eventually revenues. The program producers who own the copyrights in the programs delivered through the wire are more than alarmed, they are outraged. How dare some upstart with a new technology get rich off of my content without paying for it! This is blatant copyright infringement. The case goes to court. The court rules there is no infringement. Broadcasters and copyright owners lobby hard and the legislature passes a new law restricting the use of the new technology to redistribute broadcast signals.

Now it's time to test your knowledge. (Don't worry, this should be easy if you are a telecommunications or copyright scholar, right?) Is the above scenario a description of:

- a) the U.S. cable controversy in the 1950s-70s.
- b) the Canadian cable controversy in the 1950s-80s
- c) the Canadian internet controversy in the early 21<sup>st</sup> century

The correct answer is "D: all of the above." Perhaps this article should have been titled "Back to the Future" for while the names and technologies have changed, the concerns remain the same. In 1999, a Canadian entrepreneur started "icravetv," an internet company based in Toronto that began streaming Canadian broadcast signals online. The company was quickly sued and lost in U.S. court but appeared headed for a victory in Canada. In

response to heavy lobbying pressure from broadcasters and copyright owners, the Canadian parliament changed its copyright law to bar internet retransmitters from operating under the same license as cable and satellite retransmitters. In the process, Canada retreated from its attempt to create a technology-neutral information policy and took a large step toward becoming more like its large neighbor to the south with a copyright law so arcane and filled with special provisions that it is a wonder the copyright statute is smaller than the tax code.

This article will examine the events leading up to the recent statutory change and discuss its likely impact. The first part will provide an overview of the key broadcasting and copyright policy decisions that led to the controversy. This overview will be necessarily brief and will only highlight key portions of Canadian law. The second part will discuss the attempt by icravetv and jumptv to work within that legal framework. The third part will discuss the policy changes that have been adopted in the past two years and their likely outcome.

This case study reveals the difficulty in creating a technologically-neutral regulatory regime in an era of convergence and rapid technological change. In fact it suggests that regardless of how worthy and noble a goal that may be, such aspirations will always remain unfulfilled. In addition, the Canadian experience highlights the problems created by a truly global network where all domestic policy decisions have international ramifications. Ultimately, the new Canadian policy regarding internet retransmissions is yet another example of how established stakeholders have a significant advantage in manipulating the regulatory and political system to protect their interests.

## **PART ONE: Canadian Broadcasting and Copyright Policy Related to Internet Broadcasting**

### *The Broadcasting Act*

Canada's Broadcasting Act lists a series of goals for the Canadian broadcasting system which are supposed to guide regulatory decision-making by the Canadian Radio-television and Telecommunications Commission (CRTC).<sup>1</sup> For example, section 3(1)(d) states in part that the Canadian broadcast system should:

- (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
- (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view.<sup>2</sup>

All entities that “broadcast” must be licensed by the CRTC. In 1998, the CRTC commenced a proceeding to evaluate new media, loosely defined as content delivered over digital interconnected networks.<sup>3</sup> The Commission specifically asked whether new media (1) would affect currently regulated broadcasting and telecommunications industries, (2) whether new media should be classified as broadcasting or telecommunications services, (3) whether new media should be regulated by the CRTC, and (4) do new media raise any other broad policy issues?<sup>4</sup> The Commission issued its report in May 1999, concluding that most new media services do not meet the definition of broadcasting and those that do should be exempt from regulation for five years.

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<sup>1</sup> The CRTC is the Canadian equivalent of the FCC. Section 3 of the Broadcasting Act establishes the policy framework for broadcast regulation in Canada. Many of the guidelines are specific while others are general in nature, the equivalent of the public interest standard in the United States.

<sup>2</sup> Broadcasting Act, R.S.C., ch. 11. § 3(1)(d) (1991) (Can.).

<sup>3</sup> Canadian Radio-television and Telecommunications Commission, Telecom Public Notice CRTC 99-14, Broadcasting Public Notice 1999-84, New Media (May 17, 1999) ¶ 1, available at: <<http://www.crtc.gc.ca/archive/ENG/Notices/1999/PB99-84.HTM>> [hereinafter New Media Report].

<sup>4</sup> *Id.* at ¶ 6.

In its report, the CRTC defined new media as “services delivered by means of the Internet.”<sup>5</sup> Noting a 1995 report that many new media services might fall under the category of broadcasting, the Commission used the 1999 report to issue a ruling on what new media services would fall under its jurisdiction. Broadcasting is defined under Canadian statute as:

any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.<sup>6</sup>

This definition suggests that almost any transmission via telecommunication constitutes a broadcast.<sup>7</sup> However, to qualify as a broadcast, the transmission must be of a “program:”

sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.<sup>8</sup>

Therefore, content consisting of primarily alphanumeric text would not be considered a “program,” and hence does not constitute broadcasting.<sup>9</sup> Thus, only audio and video and other visual works will be considered programs. Another aspect of the definition is that content transmitted to “a public place” is not considered a broadcast. The Commission declared that most Internet content is meant to be received in a private space (home or office), but that content available only on a public computer terminal would not be considered a form of broadcasting.<sup>10</sup>

The definition of broadcasting also includes the phrase “for reception by the public.” The CRTC reasoned that highly customizable content is essentially created *by* the end user,

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<sup>5</sup> *Id.* at ¶ 15.

<sup>6</sup> Broadcasting Act, R.S.C., ch. 11, § 2 (1991) (Can.).

<sup>7</sup> However, the Broadcasting Act does not apply to any telecommunications common carrier. *Id.* at § 4(4).

<sup>8</sup> *Id.* at § 2.

<sup>9</sup> New Media Report, *supra* note 3 at ¶ 35.

<sup>10</sup> *Id.* at ¶ 36-37.

rather than being transmitted for the public. Therefore, “content that is ‘customizable’ to a significant degree does not properly fall within the definition of ‘broadcasting’ set out in the Broadcasting Act.”<sup>11</sup> However the Commission rejected the argument of some commentators that “on-demand” content should be considered customized.<sup>12</sup>

Based on the CRTC’s analysis of the statutory definitions, any audio or video streaming would appear to qualify as a broadcast, meaning that the website operator would be classified as a broadcaster and subject to licensing and regulatory requirements. While this outcome may seem strange from an American perspective where broadcasters, cable operators, satellite operators and other wireless television distributors each face a distinct set of regulations, it reflects a basic Canadian policy goal of technological neutrality—a goal that appears to be a major casualty of the recent copyright ruling. The goal of technological neutrality was expressed in the CRTC’s New Media Report:

The Commission notes that the definition of "broadcasting" includes the transmission of programs, whether or not encrypted, by other means of telecommunication. This definition is, and was intended to be, technologically neutral. Accordingly, the mere fact that a program is delivered by means of the Internet, rather than by means of the airwaves or by a cable company, does not exclude it from the definition of "broadcasting".<sup>13</sup>

The Commission rejected the argument that computers and other unconventional devices should not be considered “broadcasting receiving apparatus.”<sup>14</sup>

Ironically, because of its desire to adhere to a technologically-neutral definition of broadcasting, the CRTC felt compelled to use its forbearance authority to exempt “new media broadcasting undertakings” (those that would normally be classified as broadcasting)

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<sup>11</sup> *Id.* at ¶ 45 (emphasis added). The Commission then notes that the user’s ability to select camera angles or lighting would not make a program sufficiently customizable to exempt it from broadcast regulation. *Id.* at ¶ 46.

<sup>12</sup> *Id.* at 44.

<sup>13</sup> *Id.* at ¶ 38.

<sup>14</sup> *Id.* at ¶ 40.

from all broadcast regulations for five years. The Commission concluded that forcing Internet “broadcasters” to comply with the regulations would not contribute to the policy objectives laid out in the Broadcasting Act.<sup>15</sup> In its exemption order, the CRTC stated that it “expects that the exemption of these services will enable continued growth and development of the new media industries in Canada, thereby contributing to the achievement of the broadcasting policy objectives, including access to these services by Canadians.”<sup>16</sup> The CRTC’s order exempted Internet broadcasters from all broadcast regulations until December 2004.

### ***The Copyright Act***

While Internet broadcasters were made exempt from broadcast regulations, they still faced statutory requirements under the Canadian copyright act. While the Canadian law is similar to U.S. copyright law in many respects, there are a few pertinent differences.

Under Canadian law, authors have the right “to communicate the work to the public by telecommunication.”<sup>17</sup> Telecommunication “means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.”<sup>18</sup> This right is separate from the public performance right, which basically excludes such transmissions: “A person who communicates a work or other subject-matter to the public by telecommunication does not by that act alone perform it in public, nor by that act alone is deemed to authorize its performance in public.”<sup>19</sup>

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<sup>15</sup> *Id.* at ¶ 47-51. Two of those policy objectives are discussed at the beginning of Part One of this article. *See supra* note 2 and accompanying text.

<sup>16</sup> Canadian Radio-television and Telecommunications Commission, Public Notice 1999-197, Exemption Order for New Media Broadcasting Undertakings, ¶ 9 (Dec. 17, 1999), available at: <<http://www.crtc.gc.ca/archive/ENG/Notices/1999/PB99-197.HTM>> [hereinafter Exemption Order].

<sup>17</sup> Copyright Act, R.S.C. C-42, §3(1)(f), (1985) (Can.).

<sup>18</sup> *Id.* at § 2.

<sup>19</sup> *Id.* at § 2.3.

The “right of communication” as it is known, was originally written in technology-specific language and limited to over-the-air transmissions.<sup>20</sup> In 1954 the Exchequer Court held that cable retransmissions of over-the-air broadcast signals did not infringe the public performance right or the communication right.<sup>21</sup> This decision foreshadowed similar rulings by the U.S. Supreme Court that held cable retransmissions to be noninfringing.<sup>22</sup> However, the U.S. Congress closed the loophole fairly quickly in 1976, while the Canadian Parliament did not amend its communication right until 1989, thirty-five years after the Exchequer Court decision. Canada changed its communication right to include the technology-neutral language that exists today.<sup>23</sup>

Parliament adopted the 1989 change in large part to come into compliance with the recently signed Canada-United States Free Trade Agreement.<sup>24</sup> The U.S. had placed a great deal of pressure on Canada during the negotiating process to implement a retransmission right. At that time Canadian cable operators were retransmitting American broadcast signals without paying any royalties to the copyright owners of the programs. Thus, American copyright owners saw the retransmission right as a way to earn extra revenues<sup>25</sup> In addition,

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<sup>20</sup> Intellectual Property Policy Directorate (Industry Canada) & Copyright Policy Branch (Canadian Heritage), Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission Licence (sic) to the Internet 2, (June 22, 2001) [hereinafter Consultation Report], available at <[http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwGeneratedInterE/h\\_rp01103e.html](http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwGeneratedInterE/h_rp01103e.html)>.

<sup>21</sup> *Can. Admiral Corp. Ltd. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382.

<sup>22</sup> *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974).

<sup>23</sup> See *supra* note 18 and accompanying text.

<sup>24</sup> Dr. Sunny Handa, *Retransmission of Television Broadcasts on the Internet*, 8 Sw. J. of L. and Trade Am. 39, 53 (2001).

<sup>25</sup> *Id.* at 56.

providing copyright owners a right to control retransmissions of their works helped bring Canada into compliance with the Berne Convention.<sup>26</sup>

The arguments in the cable retransmission debate were similar on both sides of the border. Copyright owners felt they should be compensated for this exploitation of their works. Broadcasters wanted remuneration for the use of their signals and protection from the importation of distant broadcast signals that would reduce audience share and hence, revenues. On the other side, cable operators argued that they were providing a valuable service, extending the audience for local broadcasters, who would then be able to amply compensate the copyright owners. Furthermore, the cable operators argued, negotiating a license fee with each individual copyright holder would be almost impossible, effectively prohibiting any retransmission of broadcast signals.

In the United States, a compromise was reached whereby cable operators were granted a compulsory license to retransmit broadcast signals.<sup>27</sup> The license was technology-specific, and with the development of direct-to-home (DTH) satellite broadcasting, Congress had to adopt a separate compulsory license to cover the new technology.<sup>28</sup> When Canada's Parliament finally acted in 1989, it chose to create a simple, technology-neutral compulsory license:

It is not an infringement of copyright to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

- (a) the communication is a retransmission of a local or distant signal;
- (b) the retransmission is lawful under the *Broadcasting Act*;

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<sup>26</sup> Berne Convention, art. 11 *bis* (1971 Paris revision); see Handa, *supra* note 24 at 51; Danistan Saverimuthu, *The Regulation of New Media Broadcasting in Canada Post-iCraveTV.com*, 19 J. Marshall J. Computer and Information L. 331, 334 (2001).

<sup>27</sup> 17 U.S.C. §111 (2000).

<sup>28</sup> Satellite Home Viewer Act, Pub. L. No. 100-667 (1988), codified at 17 U.S.C. § 119.

- (c) the signal is retransmitted simultaneously and in its entirety, except as otherwise required or permitted by or under the laws of Canada; and
- (d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act.<sup>29</sup>

Under subsection (a) the communication must be of a local or distant signal, with a signal defined as one that is “transmitted for free reception by the public by a terrestrial radio or terrestrial television station.”<sup>30</sup> Thus, the compulsory license covers traditional, free broadcast signals, but does not include encrypted or pay signals or satellite delivered signals such as cable networks.

Under subsection (b), the retransmission must be lawful under the Broadcasting Act. Broadcast stations, cable and satellite operators, and other distributors must obtain a Broadcasting Distribution Undertaking (BDU) license from the CRTC. A distribution undertaking “means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking.”<sup>31</sup> Notice the technology-neutral language whereby all broadcasters require a license regardless of the technology used.

The CRTC’s 1999 decision to exempt new media (Internet) content providers from all broadcast regulations meant that iCraveTV.com and other internet websites that transmit programs did not need a BDU license. The exemption was crucial, otherwise any website that offered audio or video streaming (on-demand or continuous) would be required to

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<sup>29</sup> Canadian Copyright Act, C-42, § 31(2).

<sup>30</sup> *Id.* at § 31(1).

<sup>31</sup> Broadcasting Act, § 2(1).

obtain a license, based on the CRTC's conclusion that such offerings qualify as broadcast.<sup>32</sup> As long as the exemption remains in force, streaming broadcast signals on the Internet would not violate subsection (b).

Subsection (c) required that the retransmission be simultaneous and unedited to qualify for the compulsory license. Opponents argued that Internet retransmission are not simultaneous because of the inherent delay in processing the signal (10-15 seconds).<sup>33</sup> One commentator has argued that Canadian courts would likely consider the time delay trivial and only prohibit delayed broadcasts such as those offered at a later time for the convenience of the audience.<sup>34</sup>

Subsection (c) also required that the broadcast be retransmitted in its entirety. This raised two issues with iCraveTV. First, iCraveTV did not transmit the vertical blacking interval, which contained closed captioning information. Second, iCraveTV added advertising to the signal which was displayed outside the border of the viewing window. It is unclear whether either of these factors would have made iCraveTV ineligible for the compulsory license. As a part of its settlement with broadcasters and copyright owners, the company withdrew its application to establish a royalty system.<sup>35</sup>

Subsection (d) required the retransmitter to pay royalties for the use of distant broadcast signals. Those royalties are set by the Canadian Copyright Board. Since the board had not foreseen Internet retransmissions, there was no established royalty scheme established at the time iCraveTV began operating. As noted above, iCraveTV withdrew its application before the Copyright Board could act.

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<sup>32</sup> See *supra* notes 6-14 and accompanying text.

<sup>33</sup> Handa, *supra* note 24 at 67; see also Michael A. Geist, *ICraveTV and the New Rules of Internet Broadcasting*, 23 U. Ark. Little Rock L. Rev. 223, 236 (2000).

<sup>34</sup> Handa, *supra* note 24 at 67-68.

<sup>35</sup> Geist, *supra* note 33 at 237.

## **PART TWO: Revolutionary Entrepreneurs Rage Against the Machine: iCraveTV and JumpTV**

The controversy began in November 1999 when Bill Craig started a Canadian company called iCraveTV. Based in Toronto, iCraveTV used a rooftop antenna to obtain the signals of seventeen Canadian and U.S. broadcast stations which it then streamed live over the Internet.<sup>36</sup> The signals were digitized and then advertising was added which appeared below the small screen of the television signal on the user's monitor. Rather than charging a subscription fee, iCraveTV provided the streaming signal for free, with the hope of earning profits from the sale of the advertising that appeared below the screen. Users were required to enter a Canadian area code and agree to two clickwrap licenses stating that the user was in Canada.<sup>37</sup>

The website was quickly sued in both the United States and Canada by an assortment of movie studios, television networks and sports leagues.<sup>38</sup> The hyperbole escalated quickly: "Its one of the largest and most brazen thefts of intellectual property ever committed in the United States."<sup>39</sup> Said one broadcast industry consultant, "Broadcasters have told me if they lose this case, it's the end of their world."<sup>40</sup> The U.S. court quickly issued a temporary restraining order.<sup>41</sup> One week later, the same court issued a preliminary injunction barring iCraveTV from allowing the website to be accessed from the United States.<sup>42</sup> The Canadian lawsuit was settled alongside the U.S. suit.<sup>43</sup>

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<sup>36</sup> *Id.* at 225.

<sup>37</sup> *Id.* at 225-26.

<sup>38</sup> Todd Spangler, *ICrave Slapped with Injunction*, *The Gazette* (Montreal), Feb. 9, 2000 at D3.

<sup>39</sup> Jack Valenti, head of the Motion Picture Association of America, quoted in Kevin Maney, *Lit le Net Firm Rocks TV Giants*, *USA Today*, Feb. 8, 2000 at A1.

<sup>40</sup> *Id.*

<sup>41</sup> *Twentieth Century Fox Film Corp. v. ICraveTV*, 2000 U.S. Dist. LEXIS 1013 (Jan. 28, 2000).

<sup>42</sup> *Twentieth Century Fox Film Corp. v. ICraveTV*, 2000 U.S. Dist. LEXIS 11670 (Feb. 8, 2000).

<sup>43</sup> Geist, *supra* note 33 at 224.

After iCraveTV settled its Canadian and U.S. lawsuits and ceased operations in 2000, a new company emerged, this time in Montreal. JumpTV did not begin transmitting right away, but instead requested that the Copyright Board of Canada establish a tariff so that it would comply with section 31(d) of the Canadian compulsory license.<sup>44</sup> A new method of calculating the appropriate royalties was required because all other Canadian retransmitters use a subscription model and pay royalties based on monthly subscriptions. JumpTV's strategy was to object to the proposed tariff for the 2001-2003 period and propose an alternative metric for its own royalty payments.<sup>45</sup> Amid much protest from Canadian and U.S. broadcasters and copyright owners, a hearing was scheduled to determine whether JumpTV was eligible for the compulsory retransmission license and what the proper royalty payment should be. But JumpTV withdrew its royalty application before the Copyright Board could rule on the issues. At least one commentator has argued that JumpTV would be eligible for the compulsory license to retransmit broadcast signals.<sup>46</sup>

### **PART THREE: Canadian Legislative Response to Internet Retransmission**

If iCraveTV was an alarm call to broadcasters, their rapid and effective lawsuit was the equivalent of hitting the snooze button. JumpTV's attempt to secure a compulsory license less than six months after the iCraveTV settlement got the broadcasters out of bed for good. While the Copyright Board prepared to hold a hearing, broadcasters and copyright owners began lobbying the Canadian legislature quite strenuously to prohibit Internet

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<sup>44</sup> Handa, *supra* note 24 at 61.

<sup>45</sup> *Id.* at 62.

<sup>46</sup> *Id.* at 68.

retransmitters from taking advantage of the license.<sup>47</sup> In 2001, the Canadian government released three studies on copyright reform, including one that focused specifically on the application of the compulsory license to the Internet.<sup>48</sup> At the end of 2002, Parliament amended the Copyright Act, eliminating the technologically-neutral compulsory license and specifically excluding Internet retransmissions.<sup>49</sup> A month later the CRTC issued a report evaluating the costs and benefits of Internet retransmission. The CRTC chose not to amend its 1999 new media exemption order. Instead, it noted that the exemption order would come under review in 2004 and that the recent change to the copyright law eliminated the need for the CRTC to act on the matter. This next section will summarize the arguments and proposals detailed in the government's consultation report and the CRTC's internet retransmission review and evaluate the changes made to the compulsory license requirements.

The Consultation Report<sup>50</sup> along with two other copyright reports issued at the same time, were supposed to recommend changes to Canada's copyright law to facilitate the goals of enhancing the benefits of the new (information) economy and promoting the creation of Canadian cultural content.<sup>51</sup> While the Report spends two paragraphs discussing the arguments in favor of extending the license, it then proceeds to spend more than three pages outlining the arguments against extending the license.

The Report notes that the policy objective of the original compulsory license was to make sure copyright owners received compensation for their content while ensuring that the

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<sup>47</sup> Tony Atherton, *Why U.S. Ads Matter*, The Ottawa Citizen (Can.), Nov. 3, 2001 at J1. *See also*, Handa, *supra* note 24 at 63.

<sup>48</sup> *Id.* *See* Consultation Report *supra* note 20.

<sup>49</sup> Bill C-11, An Act to Amend the Copyright Act.

<sup>50</sup> *See* Consultation Report *supra* note 20.

<sup>51</sup> Handa, *supra* note 24 at 70.

cable and satellite broadcasting industries could continue to provide local broadcast signals for the majority of Canadians.<sup>52</sup> The compulsory license is seen as especially important in rural and remote areas where cable and satellite may be the only way to obtain broadcast signals.<sup>53</sup>

Proponents of extending the compulsory license to Internet retransmissions argued that the Internet is simply a new technology for providing the same service as satellite and cable offerings. They also noted that to exclude the Internet would unfairly benefit older technologies and prevent established distributors from switching to newer, more efficient technologies.<sup>54</sup>

Opponents of the compulsory license distinguished Internet retransmission from conventional cable systems on a number of fronts. First, Internet websites are accessible worldwide, while each cable operator serves a limited and well-defined geographic region within Canada.<sup>55</sup> While noting that satellite distribution, like the Internet, “spills over” into the United States, the satellite signal is encrypted to prevent unauthorized viewing. No reliable technology existed to similarly limit Internet transmissions to Canada.<sup>56</sup> This spillover would reduce the value of the distribution rights in territories where the spillover occurs. If a viewer in Kansas can watch a program via the Internet transmitted from Canada, then the value of that program is reduced in the Kansas market.<sup>57</sup> This is a classic justification for the right of exclusivity in both the United States and Canada whereby a cable system must block the transmission of a distant signal when a local broadcast station

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<sup>52</sup> Consultation Report *supra* note 20 at 4.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 7.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 8.

has the exclusive rights to that program in the local market. In Canada, the cable system is required to duplicate the local signal on the channel normally reserved for the distant signal.

Another argument made by opponents was that the compulsory license, though written in a technology-neutral fashion, is actually a very limited exception to the basic principle that the copyright owner controls the rights to the work and that the exception should not be extended to include a very new market.<sup>58</sup> In addition, Internet retransmitters are currently exempt from the regulations of the Broadcasting Act. They don't have to comply with must-carry laws or exclusivity restrictions, nor do they have to contribute revenues to the creation of Canadian programming. Therefore, they don't deserve the benefits of the compulsory license. Finally, opponents argued that cable and satellite companies must invest huge sums in building and maintaining their infrastructure, while the Internet transmitters simply use an existing infrastructure. The Report does acknowledge that through their lease of facilities, Internet retransmitters do indirectly support investment in crucial communication infrastructure.<sup>59</sup>

Having outlined arguments for and against extending the compulsory license to Internet retransmitters, the Report then developed a list of principles to guide decision-making. Among these are: making sure all Canadians have access to content provided by the broadcasting system, making sure the rights of copyright owners are restricted as little as possible and maintaining technological neutrality whenever possible.<sup>60</sup> The Report then recommended that any compulsory license granted to Internet retransmitters should contain a territorial restriction, in part to protect the ability of Canadian copyright owners to obtain

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<sup>58</sup> *Id.* at 9.

<sup>59</sup> *Id.* at 10.

<sup>60</sup> *Id.* at 11.

the maximum value for their works in foreign markets.<sup>61</sup> While acknowledging that another solution might be to exclude Internet retransmitters from the license altogether, the Report cautions that such an exclusion must be worded carefully to avoid preventing innovation in broadcast distribution, *i.e.* making sure that current broadcasters and cable systems can use Internet protocols for distribution over secure, virtual paths.<sup>62</sup> Ultimately, the Report seems to come down in favor of instituting a territorial restriction that would apply to all retransmitters seeking a compulsory license. This would maintain technological neutrality under the Copyright Act.<sup>63</sup>

Six months after the Report was issued, Parliament did amend the Copyright Act with the passage of a bill to exclude Internet retransmitters from the compulsory license. The original version of the bill would have followed the Consultation Report's recommendation and provided a technology-neutral law that required nontraditional retransmitters to adhere to a territorial restriction.<sup>64</sup> However, that version was scrapped in favor of a bill that abandoned the goal of technological neutrality.

The bill which finally became law amended section 31 of the Copyright Act to exclude Internet retransmitters from taking advantage of the compulsory license. The new section 31 reads as follows:

31(1) “retransmitter” means a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter;

“new media retransmitter” means a person whose retransmission is lawful under the *Broadcasting Act* only by reason of the *Exemption Order for New Media Broadcasting Undertakings* issued by the Canadian Radio-television and

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<sup>61</sup> *Id.* at 12.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 15-16.

<sup>64</sup> Legislative History of Bill C-11, available at:

<<http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/summaries/c11-e.pdf>>.

Telecommunications Commission as Appendix A to Public Notice CRTC 1999-197, as amended from time to time;

“signal” means a signal that carries a literary, dramatic, musical or artistic work and is transmitted for free reception by the public by a terrestrial radio or terrestrial television station.

(2) It is not an infringement of copyright for a retransmitter to communicate to the public by telecommunication any literary, dramatic, musical or artistic work if

(a) the communication is a retransmission of a local or distant signal;

(b) the retransmission is lawful under the *Broadcasting Act*;

(c) the signal is retransmitted simultaneously and without alteration, except as otherwise required or permitted by or under the laws of Canada;

(d) in the case of the retransmission of a distant signal, the retransmitter has paid any royalties, and complied with any terms and conditions, fixed under this Act; and

(e) the retransmitter complies with the applicable conditions, if any, referred to in paragraph (3)(b).

(3) The Governor in Council may make regulations

(a) defining “local signal” and “distant signal” for the purposes of subsection (2); and

(b) prescribing conditions for the purposes of paragraph (2)(e), and specifying whether any such condition applies to all retransmitters or only to a class of retransmitter.

The new definition of a retransmitter eligible for the license specifically excludes “new media retransmitters” as defined by the CRTC’s exemption order; that is, those who transmit programs using the public Internet.<sup>65</sup>

Two key changes were also made to the requirements that retransmitters must meet in order to be eligible for the compulsory license. The language of section 31(2)(c) was

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<sup>65</sup> See *supra* notes 5-15 and accompanying text discussing who qualifies a new media broadcaster. Note that the definition is limited to content made available on the Internet. Those who use internet protocols (such as TCP/IP) to transmit programs on a virtual private network would not be considered new media broadcasters.

changed from “the signal is retransmitted simultaneously and *in its entirety*” to “the signal is retransmitted simultaneously and *without alteration*.” While the old definition meant that nothing could be deleted from the signal, the new definition implies that nothing can be added to the signal either. One of the most troubling aspects of iCraveTV and JumpTV from the perspective of broadcasters was that banner ads would be included in the webcast and appear below the broadcast window on the user’s monitor. Broadcasters felt this was direct competition with their own advertising efforts and would significantly reduce the value of their own commercial inventory.

Finally, sections (2)(e) and 3(b) provide a mechanism to impose additional requirements on either some or all classes of retransmitters in order to qualify for the compulsory license. This new regulatory flexibility was added in anticipation that new media transmitters may become eligible for the compulsory license at some point in the future. Internet retransmitters are not eligible as long as they are covered by the CRTC’s new media exemption. However, that exemption may be rescinded in favor of some type of broadcast license at some point in the future. In January 2003, the CRTC issued an order maintaining the new media exemption for now.<sup>66</sup>

The CRTC’s Retransmission Order is the most recent and most complete analysis of the issues surrounding Internet retransmissions of broadcast signals. As such, it offers many insights regarding the future of Canadian Internet television regulation. The first issue addressed by the Order is whether Internet retransmissions should be considered a complement or substitute to over-the-air transmissions. Noting that over-the-air signals and

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<sup>66</sup> Canadian Radio-television and Telecommunications Commission, Public Notice 2003-2, Internet Retransmission (Jan. 17, 2003), available at: <<http://www.crtc.gc.ca/archive/ENG/Notices/2003/pb2003-2.htm>> [hereinafter Retransmission Order].

conventional cable and satellite retransmissions enjoy a significantly higher penetration rate than high-speed Internet access, the Commission concluded that Internet retransmission is not a substitute for other distribution technologies. The Commission noted that Internet radio, already widely available, appears to be a complement to radio broadcasting rather than a substitute.<sup>67</sup>

The Canadian Broadcasting Corporation (CBC), the National Film Board, and a group of telephone and Internet companies argued that Internet retransmission could advance the goal of making sure all Canadians have access to diverse, Canadian content. The Internet could help reach younger, nontraditional audiences and provide new revenue streams through banner ads, subscription services, and niche programming to support Canadian content.<sup>68</sup>

One of the biggest fears among broadcasters is the potential effect of Internet retransmissions on the value of program rights. Currently, programs are licensed to specific geographic territories. The value of program rights would drop dramatically if viewers could access the program from another territory, resulting in lost revenues for program suppliers. This would also reduce advertising revenues for the local station since some viewers would watch the distant signal instead.<sup>69</sup>

The opponents of Internet retransmission were very effective in painting a doomsday picture to justify protectionism for the incumbents. To instill fear, they argued that (1) there are no effective technological restrictions that could ensure that the Internet retransmission is limited to a specific territory,<sup>70</sup> and (2) U.S. and Canadian programmers would no longer

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<sup>67</sup> *Id.* at ¶¶ 24-26.

<sup>68</sup> *Id.* at ¶¶ 28-34.

<sup>69</sup> *Id.* at ¶ 36.

<sup>70</sup> *Id.* at ¶ 37.

license their works to Canadian broadcasters for fear they would lose control over their content.<sup>71</sup> They then argued that this would harm viewers in two ways: (1) popular programming would migrate to pay and subscription services where viewers would have to pay for access,<sup>72</sup> and (2) Canadian content would suffer because with declining audience share and advertising revenues, broadcasters would no longer be able to pay for or produce Canadian programming.<sup>73</sup>

Opponents also noted that Internet retransmission would disrupt the current pattern of separate release windows for different markets. Producers currently use these release windows to maximize revenues through price discrimination.<sup>74</sup> Others noted that Internet retransmitters would compete with conventional retransmitters, but without any of the same obligations to prevent signal duplication, carry all local broadcast stations, and contribute to the production of Canadian programming.<sup>75</sup> Of course, none of these conditions are imposed on Internet retransmitters because they are exempt from all Broadcasting Act regulations. However, the CRTC could certainly impose the same requirements on Internet distributors as it does on conventional distributors.

The Commission concluded that Internet retransmission has the potential to advance the goals of the Broadcasting Act by making programming available to more viewers in more places, as well as fostering technological innovation.<sup>76</sup> However, the Commission also concluded that at present, there was not adequate technology to ensure that Internet retransmissions are restricted to a specific geographic region, and that this would have a

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<sup>71</sup> *Id.* at ¶¶ 38-39.

<sup>72</sup> *Id.* at ¶¶ 39-40.

<sup>73</sup> *Id.* at ¶¶ 38, 41.

<sup>74</sup> *Id.* at ¶ 45.

<sup>75</sup> *Id.* at ¶¶ 50-51.

<sup>76</sup> *Id.* at ¶¶ 65-66.

“serious negative effect on Canadian television producers and broadcasters and on the Canadian broadcasting system as a whole.”<sup>77</sup> However, the CRTC noted that the recent change to the compulsory license requirements prevent Internet retransmitters from using the new media exemption as a loophole to retransmit broadcast signals. Therefore, the Commission concluded, it is not necessary to amend the 1999 exemption order or impose specific requirements on Internet retransmitters at this point in time.<sup>78</sup>

Thus, as the law now stands, new media broadcasters (including those who want to retransmit over-the-air broadcast signals) are exempt from all broadcast regulations. However, Internet retransmitters covered under the exemption are ineligible for the Copyright Act’s compulsory license, requiring them to negotiate directly with broadcast stations and copyright owners.

## **Conclusion**

Canada’s Broadcasting Act and Copyright Act were both designed to promote technological neutrality. Unlike the United States, where the FCC’s authority is limited based on the technology utilized, Canada’s CRTC has authority over all program “broadcasters.” With the emergence of streaming audio and video on the Internet, the CRTC was forced to decide how to regulate Internet “webcasters.” It chose to exempt this specific class of broadcasters from regulation in order to foster the new technology’s development. This was the first retreat from a technology-neutral framework.

Soon afterwards, Internet retransmitters iCraveTV and JumpTV took advantage of the CRTC exemption and the technology-neutral language of the Copyright Act’s

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<sup>77</sup> *Id.* at ¶ 68.

<sup>78</sup> *Id.* at ¶¶ 77-79.

compulsory license to begin retransmitting broadcast signals on the Internet. The threat to current territory-based licensing practices led copyright owners and broadcasters to sue and ultimately to force Parliament to change the terms of the compulsory license. This was yet another retreat from the goal of technological neutrality in information and communication policy.

The scare tactics used by the dominant incumbent industry players are striking in their similarity to previous successful lobbying campaigns. Broadcasters and content producers argued that without government protection from competition, they would be unable to continue providing effective service to the public. In fact, the Canadian Association of Broadcasters suggested that without access to highly profitable American programming, they would no longer be able to “honour their respective commitments to the Canadian broadcasting system.”<sup>79</sup> This threat should be quite familiar to students of U.S. telecommunications regulation. AT&T argued that competition from other telephone carriers would make it impossible to sustain universal service policies. Broadcasters argued that competition from cable companies would make it impossible to fulfill their public interest requirements. Today, those same broadcasters argue that ownership restrictions must be lifted so that they can earn enough profits to fulfill those same obligations. Thus we see a typical pattern of incumbent industries arguing that their monopoly profits must be protected if they are to be expected to fulfill their public interest obligations under the law.

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<sup>79</sup> *Id.* at ¶ 38. The vague threat that Canadian broadcasters could no longer honor their obligations was made more concrete with the help of the U.S. National Association of Broadcasters. Explaining how internet retransmissions would destroy local exclusivity and reduce advertising revenues for local broadcast stations, the NAB “described how this could have a cumulative impact, affecting both producers and audiences, as local stations found themselves forced to reduce their spending on local news and information, community service and outreach programs.” *Id.* at ¶ 41.

This tactic is not surprising since these thinly veiled threats to discontinue serving the public often persuade regulators and politicians.

One of the newer elements to arise out of this controversy is the use of broadcasting policy as a justification to change copyright policy. Domestic copyright policy has long been subject to international pressure.<sup>80</sup> Yet in this instance, we see changes made in copyright policy due to the international threats to broadcast policy. A nation's broadcast policy, much like its copyright law, is firmly connected to both economic goals and cultural goals. In this situation, we see how the international nature of the Internet poses a threat to domestic broadcasting, which in turn leads to changes in copyright law.

The supposed power of the Internet to upset communication policy becomes a justification for increased protection for the established culture industries (including both content producers and distributors). Ironically, these same industries typically champion free market competition as the best way to achieve policy goals when it serves their purposes, and then cite the threat of competition when it gets too near. For now, the incumbent industries have staved off the threat, and it appears regulators will regulate each technology separately for the foreseeable future.

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<sup>80</sup> See Matt Jackson, *Harmony or Discord? The Pressure Toward Conformity in International Copyright*, 43 *IDEA J. L. and Tech.* 607 (2003).