

iCraveTV and the New Rules of Internet Broadcasting

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In the period of time since a governor from Arkansas moved into the White House, the world has gone wired. The revolutionizing impact of the Internet on virtually every aspect of commerce and communication is by now well recognized. Nowhere have the changes been more dramatic than in the media industry, where the convergence of “old” and “new” media has occurred faster than virtually anyone envisioned. Barons of old media now trip over each other to demonstrate that they “get the Net” by aligning themselves with newly established dot-coms that are short on profits but long on potential.

The transformative effects of the Internet have left the law with some significant question marks. In an age when new businesses and business models appear daily and where six weeks of Internet time is the equivalent of a year in real space, the legal community must ask itself whether the old rules can be effectively applied to this new medium.

The Canadian legal community became one of the first to consider these issues when the Canadian Radio-Television and Telecommunications Commission (“CRTC”), the country’s lead regulator on broadcast and telecommunications matters, launched its new media hearings in the summer of 1998. Still months away from the mergers that would change an industry, the CRTC recognized that changes were afoot and that an examination of its role in this new media era was needed.

Although the Canadian legal and media communities expressed concern that the CRTC would use the hearings to establish new regulations to “regulate the Internet,” the final report yielded the opposite approach. In fact, the CRTC heeded the barrage of submissions from media organizations imploring it to refrain from establishing new regulations. At that time they adopted a forward looking approach that recognized both the futility of traditional regulatory approaches and the benefits of providing new media companies with the regulatory space to develop unhindered.

In the wake of the CRTC decision, the stage was set for Canadian media companies to blossom under a regulatory framework that placed their development at the top of the policy priority list. Into this framework leapt Bill Craig, an “old media” executive, who in the fall of 1999 launched iCraveTV, an online Webcaster. He began to provide Internet users with the opportunity to watch television in real-time directly on their personal computers.

In doing so, Craig created a firestorm of protest from broadcasters and content creators across North America. Those parties, who only months earlier had vehemently opposed Internet regulation, now watched in horror as an unregulated Internet hatched new business models that caught many of them by surprise. The reaction in both the U.S. and Canada was swift – legal actions demanded an immediate cessation of all unauthorized Webcasts on both sides of the border with massive damage claims sought for alleged infringement.

The legal strategy worked. Old media may envy the stock market valuations of new media, but it still possesses the significant financial clout that a new media startup simply cannot hope to match. On February 28, 2000, approximately one month after it put a temporary stop to its Webcasting activities under judicial order from a federal court in Pittsburgh, iCraveTV announced that it had reached a settlement with the broadcasters and content creators on both sides of the border, agreeing to permanently stop its unauthorized Webcasting activities.

Today, several months since the legal wrangling, it is worthwhile to examine the iCrave dispute in greater detail. Where does Canadian law stand on iCrave's activities? What are the jurisdictional implications of the iCrave dispute? Does the dispute foretell the future of broadcast? This article briefly addresses each of these issues, concluding that not only did iCrave's Webcasts comply with Canadian law but that in hindsight it will be seen as pioneer rather than a pirate.

iCraveTV and Canadian Law

To fully appreciate the application of Canadian law to iCraveTV, an understanding of precisely what iCraveTV was doing is required. Although to the end user it appeared as if the company was simply grabbing television signals off a cable broadcast and inserting commercials around its Webcast, the situation was significantly

more complex.

At the time of its debut in November 1999, iCraveTV provided users with the capability to watch 15 channels directly on their personal computer. Included were all major Canadian broadcasters (CBC, CTV, Global, City-TV) and a number of U.S. broadcasters (NBC, ABC, PBS, WB). The broadcasts were picked up through antennae located atop a north Toronto building. The signal was tuned into a retransmission signal, digitized, and then streamed onto the Internet. The end user accessed the iCraveTV signal by using their personal computer, a piece of software called the Real Player, and a fast connection to the Internet. The Real Player is a popular, freely available software application that allows for streaming audio and video on the Internet. The iCraveTV Web site indicated that users were required to connect to the Internet at minimum speeds of 56k, presumably to ensure reasonable transmission quality.

Access was conditioned upon passing through three stages of verifications and clickwrap agreements. Since iCraveTV recognized that its activities were legal in Canada but potentially illegal elsewhere, it took several steps to ensure that only persons located in Canada could access the service. The first step required the potential user to enter their local area code. If the area code was not a Canadian area code, the user was denied access to the service. This approach was viewed, with some justification, as rather gimmicky since iCraveTV's own Toronto area code was posted on the site.

The second step required the user to enter into a clickwrap agreement in which the user would confirm that they were located in Canada. The user was confronted with two icons -- an "I'm in Canada" icon and a "Not in Canada" icon. Assuming the user clicked on the "In Canada" icon, the user was then presented with another clickwrap agreement. This agreement contained a complete terms of use agreement including another confirmation that the user was located in Canada. The user was required to scroll to the bottom of the agreement and click on the "I Agree" icon.

The iCraveTV signal was featured on a two-inch screen (approximately) on the user's computer monitor. Below the signal was a small advertisement inserted by iCraveTV. The advertising signal constituted a separate stream and did not alter the original broadcast signal.

Notwithstanding the best efforts of broadcasters and content creators to label iCraveTV an intellectual property thief, the reality in Canada, however, was never that clear cut. Viewed through the prism of U.S. law, and in particular the Digital Millennium Copyright Act (DMCA), it is not surprising to find that most U.S. experts quickly agreed with the broadcasters' assessment. The DMCA establishes a series of stringent copyright protections, and its application to iCraveTV left little doubt in the minds of the broadcasting community that iCraveTV's webcasts were violations of U.S. law.

The application of Canadian law to iCraveTV raised the prospect of applying two

separate laws – the Broadcasting Act and the Copyright Act. The two laws functioned interdependently, as compliance with the retransmission provisions found in the CA is contingent upon compliance with the BA.

Applicability of the *Broadcasting Act*

The BA has long been viewed as Canada's most important broadcast policy instrument. Section 3 of the BA enumerates over 20 pillars of Canadian broadcast policy with a stipulation that the legislation be interpreted with that policy in mind. The policies outlined in Section 3 focus on protecting and promoting Canadian culture through Canadian ownership of the broadcast system and the promotion of Canadian programming.

3. (1) It is hereby declared as the broadcasting policy for Canada that
 - (a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;
 - (b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;
 - (c) English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements;
 - (d) the Canadian broadcasting 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,
 - (iii) through its programming and the employment opportunities arising

- out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and
- (iv) be readily adaptable to scientific and technological change;
 - (e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;
 - (f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;
 - (g) the programming originated by broadcasting undertakings should be of high standard;
 - (h) all persons who are licensed to carry on broadcasting undertakings have a responsibility for the programs they broadcast;
 - (i) the programming provided by the Canadian broadcasting system should
 - (i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,
 - (ii) be drawn from local, regional, national and international sources,
 - (iii) include educational and community programs,
 - (iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and
 - (v) include a significant contribution from the Canadian independent production sector;
 - (j) educational programming, particularly where provided through the facilities of an independent educational authority, is an integral part of the Canadian broadcasting system;
 - (k) a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available;
 - (l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;
 - (m) the programming provided by the Corporation should
 - (i) be predominantly and distinctively Canadian,
 - (ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,
 - (iii) actively contribute to the flow and exchange of cultural expression,

- (iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,
 - (v) strive to be of equivalent quality in English and in French,
 - (vi) contribute to shared national consciousness and identity,
 - (vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and
 - (viii) reflect the multicultural and multiracial nature of Canada;
- (n) where any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m);
- (o) programming that reflects the aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose;
- (p) programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose;
- (q) without limiting any obligation of a broadcasting undertaking to provide the programming contemplated by paragraph (i), alternative television programming services in English and in French should be provided where necessary to ensure that the full range of programming contemplated by that paragraph is made available through the Canadian broadcasting system;
- (r) the programming provided by alternative television programming services should
- (i) be innovative and be complementary to the programming provided for mass audiences,
 - (ii) cater to tastes and interests not adequately provided for by the programming provided for mass audiences, and include programming devoted to culture and the arts,
 - (iii) reflect Canada's regions and multicultural nature,
 - (iv) as far as possible, be acquired rather than produced by those services, and
 - (v) be made available throughout Canada by the most cost-efficient means;
- (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,
- (i) contribute significantly to the creation and presentation of Canadian programming, and
 - (ii) be responsive to the evolving demands of the public; and

(t) distribution undertakings

- (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
- (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,
- (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and
- (iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.

(2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

The integral nature of the BA's policy section is reflected by the fact that the CRTC is required in Section 9(4) to exempt regulation of those broadcast undertakings where regulation would not contribute in a material manner to the broadcast policy found in Section 3.

As noted above, in July 1998, the CRTC launched an extensive study into the regulation of new media which was defined in a recent exemption order as follows:

"New media broadcasting undertakings provide broadcasting services delivered and accessed over the Internet, in accordance with the interpretation of "broadcasting" set out in Broadcasting Public Notice CRTC 1999-84 / Telecom Public Notice CRTC 99-14, Report on New Media, 17 May 1999."

The study sought to address the following issues:

In what ways, and to what extent, do new media affect, or are they likely to affect, the broadcasting and telecommunications undertakings now regulated by the Commission?

In what ways, and to what extent, are some or any of the new media either broadcasting or telecommunications services?

To the extent that any of the new media are broadcasting or telecommunications, to what extent should the Commission regulate and supervise them pursuant to the Broadcasting Act and the Telecommunications Act?
Do the new media raise any other broad policy issues of national interest?

Following months of hearings and submissions, during which time the Commission had heard from hundreds of interested parties, the CRTC released its New Media Report in May 1999 clarified the breadth of the definitions of "program" and "broadcasting" as defined in section 2 of the BA. Those definitions are as follows:

"broadcasting" means 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;

"program" means 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;

In reviewing current Internet activity and the definition of broadcasting, the CRTC held that the majority of services currently available on the Internet consist predominantly of alphanumeric text, and therefore, do not fall within the scope of the BA and are outside the Commission's jurisdiction. Moreover, new media services where the potential for user customization is significant (*i.e.* end-users have an individual/one-on-one experience and create their own uniquely tailored content) were also deemed not to be transmission of programs for reception by the public, and therefore outside the scope of the BA.

The report concluded as well that some new media services do fall under the BA's definitions of "program" and "broadcasting." Included is Internet content that consists

only of audio, video, a combination of audio and video, or visual images including still images that do not consist predominantly of alphanumeric text. The Commission noted 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, technology 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."

Notwithstanding the application of the BA to certain forms of Internet broadcasting, the CRTC concluded that, for new media which falls under the definition of "broadcasting," regulation "will not contribute in a material manner to the implementation of the policy objectives set out in section 3(1) of the Act." Accordingly, pursuant to s.9(4) of the BA, an exemption order was proposed in respect of all new media undertakings that are providing broadcasting services over the Internet, in whole or in part, in Canada. As it realized that it did not contribute to achieving the objectives of the Act, the CRTC recognized that any attempt to regulate new media broadcasting might put Canadian industry at a competitive disadvantage in the global marketplace and force business to less regulated markets.

That exemption order, passed in final form on December 17, 1999, provides as follows:

The Commission is satisfied that compliance with Part II of the Broadcasting Act (the Act) and applicable regulations made thereunder by the class of broadcasting undertakings

described below will not contribute in a material manner to the implementation of the broadcasting policy set out in subsection 3(1) of the Act.

Therefore, pursuant to subsection 9(4) of the Act, the Commission exempts persons who carry on, in whole or in part in Canada, broadcasting undertakings of the class consisting of new media broadcasting undertakings, from any or all of the requirements of Part II of the Act or of a regulation thereunder. New media broadcasting undertakings provide broadcasting services delivered and accessed over the Internet, in accordance with the interpretation of "broadcasting" set out in Broadcasting Public Notice CRTC 1999-84 / Telecom Public Notice CRTC 99-14, Report on New Media, 17 May 1999.

Based on the foregoing, a strong argument can be made that the iCraveTV activities qualified for the CRTC exemption and thus were exempt from BA regulation. Although it is possible that the CRTC will revisit its position sometime in the future, it has rejected reviewing the exemption order any earlier than five years from its effective date. In fact, the CRTC noted that an earlier review could create regulatory uncertainty. It affirmed its expectation that the exemption of these services will enable continued growth and development of the new media industries in Canada, and will contribute to achieving the broadcasting policy objectives, including access to these services by Canadians.

Applicability of the Copyright Act

The retransmission of broadcast signals is also governed in Canada by Section 31 of the CA. In particular, Section 31 (2) provides as follows:

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

the communication is a retransmission of a local or distant signal;
the retransmission is lawful under the *Broadcasting Act*;
the signal is transmitted simultaneously and in its entirety, except as otherwise required or permitted by or under the laws of Canada; and
in the case of retransmission of a distant signal, the re-transmitter has paid any royalties,

and complied with any terms and conditions, fixed under this Act.

Legislative and Judicial History Behind s. 31(2)

In assessing the application of s. 31(2), insight can be drawn from a historical analysis of the copyright disputes that arose in the infancy of the cable industry. These disputes between local television broadcasters and cable companies revolved around the issue of whether copyright liability could be triggered by the retransmission of over-the-air local broadcast signals.

In Canada the question of copyright protection of television broadcasts was first addressed in *Canadian Admiral Ltd. v. Rediffusion*. In this instance of retransmission of a live broadcast, the courts afforded little in the way of copyright protection, a holding that was to become indicative of Canada's future policy position on this issue.

After the emergence of cable broadcasting in the late 1960s, the CRTC considered its impact on Canadian broadcast policy on a number of occasions. In 1969, the Commission issued a statement recognizing the growing importance of cable television. It argued that cable facilitated and encouraged local programming, recognizing that it should complement, rather than compete, with programming available to the community through television. It also recognized the need to license all systems and to evaluate their relation with television.

In July 1971, the CRTC released its *Policy Statement on Cable Television: Canadian Broadcasting – “A Single System.”* In that statement, it took note of the importance of copyright, but argued:

“...the concept of copyright is somewhat limited in the context of television-cable relationship and in some respects it might be detrimental to look solely to copyright as a systematic solution to the problem of achieving equity between these two segments of the broadcasting system.

The Commission believes that it is imperative that the broadcasters and the cable television operators develop a method that will correct the inequity that has developed in the system. However, if no solution is forthcoming, the Commission will take necessary steps to achieve this goal.”

Accordingly, rather than using copyright to bar retransmission by the cable companies, the CRTC approach to the issue of cable retransmission focused on balancing the benefits to Canadian broadcasting policy on the one hand with the need for fair compensation on the other. The Commission navigated through this balance by advocating an industry-led solution based on a negotiated compensation settlement.

The Supreme Court weighed in on the issue of retransmission several years later in *Capital Cities Communications Inc. v. CRTC*. At issue was the jurisdictional reach of the CRTC and the right of cable companies to alter retransmitted programming by inserting their own commercial messages, a practice the CRTC approved in its 1971 report. On the matter of jurisdiction, Chief Justice Laskin ruled that:

"I am therefore in no doubt that federal legislative authority extends to the regulation of the reception of television signals emanating from a source outside of Canada and to the regulation of the transmission of such signals within Canada. Those signals carry the programmes which are ultimately viewed on home television sets; and it would be incongruous, indeed, to admit federal legislative jurisdiction to the extent conceded but to deny the continuation of regulatory authority because the signals are intercepted and sent on to ultimate viewers through a different technology. Programme content regulation is inseparable from regulating the undertaking through which programmes are received and

sent on as part of the total enterprise."

With regard to the alteration of retransmitted programming, the Court overturned the CRTC policy, ruling that such activity was not permissible since it did not allow the broadcasting station to retain the commercial value of its programs. Implicit in the decision, however, was the understanding that unaltered retransmission was permissible and not a violation of copyright.

In March 1983, the CRTC again resisted the use of copyright to bar retransmission by emphasizing the need for a negotiated settlement. In its Decision 83-126, the Commission stated:

"The Commission recognizes that in certain circumstances at the local exhibition phase, various problems may arise related to the issue of potential copyright infringement and the associated issue of 'broadcaster consent'. The Commission expects the parties involved to take steps to make such contractual or other arrangements as may be necessary in such circumstances."

The issue of redistribution of foreign signals without payment was largely resolved through the enactment of section 2006 by the Canada –United States Free Trade Implementation Act in 1988, which led to the introduction of s.28.01 of the CA, now s. 31. Section 2006 mandated that each country's copyright law include a right to remuneration for retransmission subject to certain conditions. Given the absence of any prohibition against retransmission, the agreement between Canada and the United States does appear to accept the premise that retransmission is permissible where it meets the standards now contained in s. 31 (2) of the CA.

The Canadian courts had the opportunity to consider the new section in *FWS Joint Sports Claimants v. Canada (Copyright Board)* , a 1991 Federal Court of Appeal decision. That case stemmed from a challenge to the new royalty scheme by a group of royalty collectives, including professional sports leagues and various cable and broadcaster associations. The Federal Court of Appeal upheld the royalty scheme, noting that:

"This was its first consideration of the amendments to the Copyright Act, R.S.C. 1985, c. C-42, which were enacted pursuant to the Canada-United States Free Trade Agreement Implementation Act (S.C. 1988, c. 65). Prior to the passage of this legislation, there were no royalties payable by those who retransmitted these distant signals, which lacuna in the law was filled by the new legislation."

As reflected by the case law and the legislation, in order to harness associated dynamic efficiencies, Canada has to date taken a minimalist approach to the regulation of copyright and retransmission of broadcast signals through cable transmissions. Given Canada's minimalist approach to the regulation of e-commerce and the information highway, it appears likely that this approach will continue with respect to retransmission of broadcast signals through the Internet.

Application of s. 31(2) to iCraveTV's Activities

In order to qualify for the retransmission exemption found in s.31(2) of the CA, a re-transmitter must meet all four provisions contained in the section.

Subsection (a) requires the communication to be a retransmission of a local or distant signal. As described above, iCraveTV captured local and distant signals via

antennae, tuned the signal into a retransmission signal, digitized it, and then streamed it onto the Internet. This process would qualify under the subsection since the provision speaks only to the origin of the retransmitted signal.

Subsection (b) mandates that the retransmission is lawful under the BA. As discussed in detail above, the CRTC's recent exemption order for new media companies exempts Internet audio and video broadcasts of the nature of iCraveTV, thus rendering the activity lawful under the BA.

Subsection (c) provides that the signal must be retransmitted simultaneously and in its entirety, except as otherwise required or permitted by or under Canadian law. This provision is particularly important as it precludes the deletion of advertising material or time shifting to allow for receipt of programming from different time zones.

This provision was the most challenging for iCraveTV. On the assumption that iCraveTV was retransmitting simultaneously and in its entirety, they complied with the provision. iCraveTV's opponents seized on the conversion of the broadcast signal into a digital signal and the omission of the closed-captioning signal to argue that the iCraveTV approach did not meet the requirements of the statute.

Subsection (d) establishes the royalty payment scheme described above. Upon payment of the prescribed fees and royalties, these provisions create a statutory right to

publicly retransmit a broadcast signal. At the present time, there are no fixed royalties for Internet retransmissions. Since the provision only requires payment of applicable royalties, iCraveTV was in compliance with this provision as well.

Interestingly, iCraveTV recognized the need to establish a royalty scheme for Internet retransmission as a means to legitimize its activities and to modernize the current framework. The company applied to the Canadian Copyright Board to commence proceedings into the establishment of such a royalty. The possibility of proceedings was actually opposed by the broadcasters and content creators who demanded that the royalty application be withdrawn as part of the eventual settlement.

The Implications of the iCraveTV Case

Although the iCraveTV case raises several interesting issues, I would like to briefly focus on only two of them -- the heightened tensions between technology and the law as well as the jurisdictional implications of the case.

Technology and the Law

The iCraveTV case is actually one of a series of disputes that have emerged over the past year as a result of the growing use of the Internet to deliver broadcast and

multimedia content. Similar actions have been launched by the Motion Pictures Association of America (MPAA) against the creators of a software hack program that allows DVDs to be copied and played on Linux operating systems as well as by the Recording Industry Association of America (RIAA) against Napster (for a program that facilitates swapping MP3 files), against the makers of the Diamond Rio (for a playback system for MP3s), and against MP3.com (for its Beam-It service that allows for legally purchased CD's to be listened to directly via the Internet). These actions illustrate the growing divide between traditional methods of content delivery and new media opportunities. Sandwiched in between is a legal system that is ill-equipped to deal effectively with these brewing controversies.

In my view, traditional broadcasters and content creators would be well advised to alter their strategy in the face of new technologies as their battle is a losing one. First, attempting to stop companies such as iCraveTV or Napster is much like playing the "whack a mole" game. For every iCraveTV that is stopped, two or three new versions will quickly appear. It becomes a never-ending fight resulting in wasted energy and legal bills.

Second, specific legal responses to new technologies are typically either inappropriate or ultimately apt to fail. For example, weeks following the iCraveTV settlement, the Canadian Association of Broadcasters announced its intention to pursue a statutory amendment to the CA that would specifically identify Internet retransmission as

a violation of the law. This position, which smacks of hypocrisy given the same association's earlier argument that iCraveTV was already violating the law, typifies the knee-jerk legislative reaction of the traditional media industry.

Even where new laws are passed, they hardly provide traditional media with the protections they crave. For example, Napster's legal counsel is relying upon safe harbor provisions for Internet service providers found in the DMCA to argue that its service actually complies with the new statute which was expressly designed to provide increased copyright protections in the Internet age. Should Napster succeed, the case will be yet another instance (iCraveTV being one) of traditional media facing the hard reality of laws or regulatory policies which do not necessarily provide the protective cover they seek.

Rather than turning to legislative change, traditional media would do well to consider the reasons new media services are emerging and respond to marketplace demands with their own offerings. In the case of iCraveTV, the popularity of the service illustrates the growing demand for multimedia content delivered via the Internet. It has exemplified that perhaps it is time for traditional broadcasters to embrace the new medium by establishing their own online broadcasting services. In the case of Napster and the emergence of MP3s, the popularity may stem from consumer frustration with overpriced CDs that cannot be effectively sampled prior to purchase. New modes of delivery might result in increased customer satisfaction and a decrease in digital music piracy.

Jurisdictional Implications

Lurking behind virtually every Internet law issue is the question of jurisdiction, just as in the iCraveTV dispute where competing but equally legitimate regulatory frameworks yield vastly different results. In a networked environment that knows no borders, the ability to apply a single law is virtually impossible.

The willingness of a U.S. court to apply jurisdiction in the iCraveTV matter illustrates the limitations of the passive versus active test that has emerged in Internet jurisdiction cases. Rather than treating the Internet as a single entity, the passive versus active test recognizes that a spectrum of activities occur online and that each must be individually examined. The legal response ought to differ with the specific nature of each activity.

At one end of the spectrum are “passive” Web sites that are largely informational in nature. These sites feature minimal interactivity by functioning much like an electronic brochure. In the interest of fairness and the facilitation of e-commerce, courts have agreed to take a hands-off approach to such sites. This approach recognizes that site owners cannot reasonably foresee facing a legal action in a far-off jurisdiction based simply on the availability of information.

At the other end of the spectrum are those sites that are fully e-commerce enabled. These sites, which feature significant interactivity by functioning as the online equivalent of a real space enterprise, are characterized as “active” sites. Courts have repeatedly asserted their authority over such sites, arguing that site owners are aware of the risk of facing legal actions in multiple jurisdictions since they are doing business globally via the Internet.

The passive versus active test, while potentially useful for clearly passive or obviously active sites, is of limited value in the assessment of sites that provide more than simple information but less than full blown e-commerce. These sites present courts with a tough balancing act. Moreover, it is important to note that the passive versus active test does not remain static. A site characterized as active two years ago could today be considered passive, since the level of interactivity found on the world’s leading e-commerce sites continues to increase dramatically.

The iCraveTV case also highlights another shortcoming in the current test. Although clearly an active site in Canada, how should the iCrave site have been characterized by a U.S. court? Since U.S. based users were required to pass through three stages designed to limit the site to a Canadian audience, including fraudulently entering into two clickwrap agreements, it is arguable that the "active" site was actually passive for U.S. purposes and therefore outside U.S. jurisdiction.

Had the U.S. court ruled in such a manner, it would have provided much impetus to reconsider current approaches to Internet jurisdictional issues. For example, a growing reliance on intermediaries, such as Internet service providers, might prove attractive in the absence of an effective method of exerting adjudicatory muscle over offshore sites. Alternatively, a movement toward a "targeted" approach to jurisdiction, which involves an analysis to determine which jurisdiction a site is targeting based on its disclaimers, its site language, its currency and other variables, may be a more appropriate and effective method of addressing the Internet jurisdictional question. This latter approach has been adopted by securities regulators worldwide who recognize that active versus passive distinctions are relatively meaningless for their purposes.

Conclusions

iCraveTV achieved what most dot-coms desperately desire -- front page headlines and worldwide awareness. Although it is no longer in the business of webcasting, new versions of iCraveTV will likely appear on the Internet horizon in short order. Try as they might, traditional media will be unable to stop the next Iamcrazyabouttv.com or Ilovetv.com. In the battle of technology and the law, the law must adapt to new technologies by learning to work with new developments rather than directly oppose such developments. To paraphrase John Gillmore, Internet technologies treat legal impediments as road blocks and simply route around them.

