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# THE REGULATION OF NEW MEDIA BROADCASTING IN CANADA POST-ICRAVETV.COM

by DANISTAN SAVERIMUTHU†

## I. INTRODUCTION

Recent events involving iCraveTV.com have brought the topic of new media broadcasting, specifically Internet broadcasting, into prominence both in the area of intellectual property law specifically, and in public discussion more generally. While the court of public opinion has characterized the situation of iCraveTV.com as a battle of the big Corp.s-versus-the little guy—a battle that the big Corp.s have won for now, the superior and federal courts of Canada may soon be asked to resolve this broadcasting war. This paper will offer an advance look at the relevant issues such a decision is likely to address, based upon the current state of Canadian, American and international copyright law. A review of Canadian copyright law is necessary to assess whether new media broadcasters such as iCraveTV.com are correct in their contention that their activities are legally permissible in Canada. In addition to examining the exclusive rights of authors, an analysis will be conducted on the exceptions provided by Canadian copyright legislation. Whether or not Canadian law does permit new media broadcasting, the possibility that other jurisdictions may not have an equally favorable regime necessitates an analysis of how liability for extraterritorial copyright infringement can be mitigated. As well, the situation in the United States will be scrutinized due to the inevitable effects of a Canadian new-media broadcasting undertaking on American viewers and broadcasters. Finally, some words are offered on the direction that the regulation of new media broadcasting should take will complete the overall analysis.

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A. ROLE OF THE CANADIAN RADIO-TELEVISION AND  
TELECOMMUNICATIONS COMMISSION

The Canadian Radio-television and Telecommunications Commission (CRTC) conducted public hearings into the possible regulation of new media broadcasting beginning on July 31, 1998. After an in-depth review of both the *Broadcasting Act* and the *Telecommunications Act*, it announced on May 17, 1999, that it would not regulate the Internet. The review concentrated on analyzing the following issues:

1. How do the new media affect the regulation of the traditional broadcasting undertakings of radio, television and cable?

2. Do any of the new media constitute services already defined by the *Broadcasting Act* and *Telecommunications Act*, and if so, how should they be regulated?

3. Do the new media raise any other broad policy issues of national interest?<sup>1</sup>

In announcing its decision, the CRTC highlighted the fact that new media on the Internet was already achieving the goals of the *Broadcasting Act* and was successful without regulation. It also felt that regulation might jeopardize Canadian competitiveness in this area as compared to other countries.<sup>2</sup> On December 17, 1999, it announced a moratorium on regulation of new media broadcasting for five years, effectively exempting new media broadcasters on the Internet.<sup>3</sup> Interestingly, the exemption order was not made applicable to traditional broadcasters already subject to the *Broadcasting Act* who carry on new media broadcasting activities.

B. FACTS: RECENT EXPERIENCE OF ICRAVE.TV.COM

ICraveTV.com began intercepting American and Canadian television signals and streaming them over the Internet on November 30, 1999. It gained quick popularity and notoriety, as well as extensive media coverage. Predictably, broadcasters in both Canada and the United States were disturbed by the availability of their programming for free on the Internet. On January 20, 2000, an application for a temporary

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1. *MISC<Canada Won't Regulate Net; Australia Might ¶ 3* <<http://scout18.cs.wisc.edu/NH/99-05/99-050-19/0015.html>> (accessed Sept. 21, 2001); see generally *Can. Radio-television & Telecomm. Commun.* <<http://www.crtc.gc.ca/eng/welcome.htm>> (accessed Sept. 21, 2001).

2. *Can. Radio-television and Telecomm. Commn.*, News Release, *CRTC Won't Regulate the Internet ¶ 2* (May 17, 1999) [hereinafter *CRTC News Release 17 May 1999*] (on file with the John Marshall Journal of Computer & Information Law).

3. *Can. Radio-television and Telecomm. Commn.*, Pub. Notice, *CRTC 1999-197, Exemption Order for New Media Broadcasting Undertakings ¶ 4* <<http://www.crtc.gc.ca/archive/Notices/1999/PB99-197.htm>> (accessed Dec. 17, 1999).

injunction was filed in U.S. Federal Court by a coalition of major U.S. television network broadcasters and studios.<sup>4</sup> The National Football League and the National Basketball Association filed a similar complaint the same day. The U.S. court granted a temporary restraining order on January 28, 2000.<sup>5</sup> The Canadian Association of Broadcasters, along with a coalition of Canadian television network broadcasters filed an application for an injunction with the Ontario Superior Court on January 31, 2000.<sup>6</sup> On February 8, 2000, the U.S. Court issued a 90-day injunction on iCraveTV.com and released its reasons.<sup>7</sup>

Faced with the prospect of protracted litigation on both sides of the border, iCraveTV.com came to a settlement with both the U.S. plaintiffs as well as the Canadian Association of Broadcasters on February 28, 2000.<sup>8</sup> The Canadian settlement came well in advance of any decision by the Ontario Superior Court. Since this time, the iCraveTV.com Web site has ceased broadcasting over the Internet. As of this writing, iCraveTV.com was negotiating license agreements with various content providers in an effort to resume operations on its site. It was also working on geographical screening technology to prevent non-Canadians from accessing the site.

## II. CANADIAN COPYRIGHT LAW

The issue of whether new-media broadcasting undertakings are caught by Canadian copyright law is clearly a complex issue. Organizations conducting operations similar to that carried on by iCraveTV.com will face a number of legal hurdles that must be overcome in order to escape liability for copyright infringement.

The main contention on the part of traditional broadcasters is that unauthorized new media broadcasting violates the exclusive rights held by authors and copyright holders in artistic or dramatic works under section 3 of the *Copyright Act*,<sup>9</sup> more specifically section 3(1)(f) which includes the sole right "in the case of any literary, dramatic, musical or

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4. *Twentieth Cent. Fox Film Co. v. iCraveTV*, 2000 U.S. Dist. LEXIS 1091 (W. D. Pa. Jan. 21, 2000) (Verified Compl.) [hereinafter *U.S. Compl.*].

5. *Twentieth Cent. Fox Film Co. v. iCraveTV*, 2000 U.S. Dist. LEXIS 1013 (W. D. Pa. Jan. 28, 2000) [hereinafter Order of Ct.].

6. Can. Assn. of Broad., *Canadian Broadcasters File Lawsuit Seeking Injunction Against iCraveTV.com* ¶ 1 <[http://www.cab-acr.ca/english/newsroom/00/nr\\_jan3100.html](http://www.cab-acr.ca/english/newsroom/00/nr_jan3100.html)> (accessed Jan. 31, 2000).

7. See *Twentieth Cent. Fox Film Co.*, 2000 U.S. Dist. LEXIS 1013 (granting an injunction against the parent company of iCraveTV.com).

8. iCraveTV.com, Press Release, *Statement Regarding Settlements from iCraveTV President, Bill Craig* ¶ 1 <<http://www.icravetv.com/press/releases/2000-02-28.html>> (Feb. 28, 2000); see generally USA Today, Tech Report, News, *Ruling Stops iCraveTV Transmissions* <<http://www.usatoday.com/life/cyber/tech/cth310.htm>> (June 7, 2000).

9. *Copyright Act*, R.S.C. 1985, c. C-42, § 3(1)(f) (Jan. 2001) (Can.).

artistic work, to communicate the work to the public by telecommunication.” This section embodies the legislative enactment of Canada’s obligations under Article 11 of the *Berne Convention for the Protection of Literary and Artistic Works*.<sup>10</sup> While the *Berne Convention* does allow for deference to national legislation; on the whole, it represents the minimum enforceable standards for international copyright protection in literary and artistic works. Article 11 outlines the exclusive rights of authors and is provided for under the Canadian *Copyright Act* under section 3(1).

Article 11<sup>bis</sup> of the *Berne Convention* provides authors with exclusive rights to authorize broadcasting of their work. 11<sup>bis</sup>(1)(ii) makes specific mention of communications to the public by wire or by rebroadcasting. The key, however, seems to rest in 11<sup>bis</sup>(2) which leaves the exercise of these rights and the conditions under which they may be exercised in the hands of national legislation. We will now examine the applicable provisions of the Canadian *Copyright Act*.

#### A. HOLDER OF COPYRIGHT

The first question that must be answered is, who holds the copyright to works such as those broadcast by iCraveTV.com. Generally, studios produce the programming that is broadcast by television networks. This programming is in turn licensed to broadcasters, who themselves claim copyrights in the scheduling of this programming on a level similar to that which gives copyright to compilations of individual works.<sup>11</sup> However, the Federal Court of Appeal in 1991 confirmed a determination by the Copyright Board that the programming schedule, called the broadcast day does not constitute a compilation enjoying separate copyright protection

[T]here is nothing to be copyrighted in addition to the actual shows being broadcast, which have already been copyrighted by their owners. It is not a new work. There is no editing or creative input added to the shows themselves. The written compilation may be a collection of literary or dramatic works, but that does not make the broadcast day a liter-

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10. See *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1986, Can. T.S. 1948 No. 22, 828 U.N.T.S. 221 (revised most recently by *Paris Act Relating to the Berne Convention*, July 24, 1971 as amended on Sept. 28, 1979, Can. T.S. 1998 No. 18) [hereinafter *Berne Convention*].

11. 17 U.S.C. § 101 (2000). Copyright exists for a compilation of works through the selection and arrangement of the works, thus giving it an element of originality independent of the individual works. *Id.* This aspect of copyright became formalized with the implementation of the *North American Free Trade Agreement* in 1994. *Id.* The definition of a “compilation” is “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” *Id.* The term compilation includes collective works. *Id.*

ary or dramatic work itself.<sup>12</sup>

While the definition of compilation includes “a work resulting from the selection or arrangement of data,”<sup>13</sup> it appears clear that broadcasters retain copyright only insofar as they license or are assigned a copyright or where they create the actual programming broadcast, such as in the case of news or sports telecasts. In all other circumstances, the authors of the work are the sole holders of copyright.

While production studios and network broadcasters possess arguments in favor of their exclusive rights under the *Copyright Act*, cable companies do not hold such rights. Indeed, the cable industry began in a manner strikingly similar to that of iCraveTV.com. First emerging over thirty years ago, these companies captured the airborne signals of various networks and rebroadcast them via cable to their subscribers. For most of this period the cable companies were not obliged to compensate the networks for this rebroadcast. This changed, however, with the advent of the *Canada-United States Free Trade Agreement* that established a series of licenses and tariffs payable to the holders of the various copyrighted works, most significantly American studios and broadcasters.<sup>14</sup>

Having established the exclusive rights under Canadian copyright law that can be enjoyed by studios and broadcasters, we must next examine whether the activities of an entity such as iCraveTV.com constitute a violation of section 3(1)(f) of the *Copyright Act*. To make such a determination, an initial analysis of two issues is necessary: Has there been a communication to the public and, if so, has it been achieved by telecommunication.

#### B. WHAT CONSTITUTES A COMMUNICATION TO THE PUBLIC?

In assessing whether the activities of iCraveTV.com constitute a communication to the public, the analysis in *Canadian Admiral Corp., Ltd. v. Rediffusion, Inc.*<sup>15</sup> as well as *Canadian Cable Television Association v. Copyright Board (Canada)*<sup>16</sup> are helpful. Both cases dealt with the issue of communicating a work by determining whether the work was performed and subsequently whether it was performed in public. In the latter case, the court dealt with the communication of musical works

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12. *FWS Joint Sports Claimants v. Can. (Copy. Bd.)*, [1992] 1 F.C. 487, 490.

13. *Canadian Copyright Act*, R.S.C. 1985, c. C-42, § 2 (Jan. 2001) (Can.) (defining compilations to be a work resulting from the selection or arrangement of data).

14. See Can. Copy. Bd., *Annual Rep. 1989-1990* [1990] C.B.D. No. 5 (establishing licensing and tariffs for copyrighted works); see Copy. Bd. Can., *Retransmission Royalties: Statements of Royalties to Be Paid for the Retransmission of Distant Radio and Television Signals in 1990 and 1991*, *Copyright Act*, § 70.63 [1990] C.B.D. No. 3 (Oct. 2, 1990).

15. See *Can. Admir. Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382.

16. See *Can. Cable Television Assn. v. Can. Copy. Bd.* [1993] 2 F.C. 138 [hereinafter CCTA].

to cable subscribers. It was contended by the Canadian Cable Television Association ("CCTA") that because electrical signals were used to communicate in the performance, no acoustic or sound waves were transmitted. Letourneau J.A. stated, "I do not think this whole case ought to depend on whether it is this kind or that kind of waves which are transmitted to the subscribers."<sup>17</sup> He continued, "[f]urthermore, the definition of 'performance' covers 'any' acoustic representation."<sup>18</sup> This determination was consistent with the finding of the Supreme Court in *Composers, Authors and Publishers Assn. of Canada Ltd. v. CTV Television Network Ltd.*<sup>19</sup> as well as the Exchequer Court in *Canadian Admiral*.

*Canadian Admiral* offers the accepted approach for determining whether a work is performed "in public." Cameron J. applies the "character of the audience" test.<sup>20</sup> In *Canadian Admiral*,<sup>21</sup> a cable company (Rediffusion) communicated the transmission of an over-the-air sports broadcast, which it intercepted using an antenna, to its subscribers via cable. The majority of subscribers were individual households. In applying his test to the facts of the case, Cameron J. determined that: ". . .there [was] no evidence whatever except that they were seen by the defendant's subscribers, presumably only the householders. The character of the audience was therefore a purely domestic one and the performance in each case was not a performance in public."<sup>22</sup> This decision was distinguished in *CCTA* where Letourneau J. stated, "[w]ith respect, I prefer and adopt the contrary views expressed by English, Indian and Australian authorities. . . . They are consistent with our Act."<sup>23</sup> He continued, "They are consistent with the plain and usual meaning of the words 'in public,' that is to say openly, without concealment and to the knowledge of all."<sup>24</sup>

Faced with these two conflicting decisions, a determination in the case of iCraveTV.com is especially important. Given the global and ever-expanding reach of the Internet, it is most likely that the holding in *CCTA* would win the day. This conclusion is especially compelling in light of the fact that *CCTA* is a relatively recent case that dealt with non-broadcast services, that is, specialty channels, which are not openly available over the air, but exclusively through cable and satellite ser-

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17. *Id.* at 150.

18. *Id.* at 151.

19. *Composers, Authors, and Publishers Assn. of Can. v. CTV Tele. Network* [1968] S.C.R. 676.

20. *See Can. Admir. Corp.*, [1954] Ex. C.R. 382.

21. *Id.*

22. *Id.* at 408.

23. *CCTA*, [1993] 2 F.C. at 153.

24. *Id.*

vices. If even these constitute a performance in public, presumably new media broadcasting would also fall under this regime. This conclusion has been confirmed by a recent decision of the Copyright Board.<sup>25</sup>

### C. EXCEPTIONS TO THE COPYRIGHT ACT

Having undertaken a review of the positive law regarding performances in public according to the terms of the *Copyright Act* and concluding that new media broadcasting likely constitutes a performance in public, a further examination of any saving provisions or exceptions must be conducted. In this case, section 2.3 of the *Copyright Act* is relevant. It provides that: “. . . 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>26</sup> Clearly the relevant part of this provision is the phrase “by that act alone.” The scope of the provision is limited by the word “telecommunication” which the *Copyright Act* defines at section 2 as, “any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.” This would include broadcast via radio, television, cable as well as the Internet. Given that the exception offered by section 2.3 has not been elaborated by the legislature, by the Copyright Board or the courts, there is little substantive pronouncement on its scope or application. A plain and true meaning of this provision would seem to indicate a legislative enshrinement of the holding in *Canadian Admiral*, indirectly negating the effect of CCTA; such a possibility has been put forward by other specialists in the field.<sup>27</sup> This has the effect of offering new media broadcasters a potential reprieve from infringement liability under section 3(1)(f) of the *Copyright Act*.

Section 2.4 of the *Copyright Act* is another clause that demands assessment with regard to potential exemptions or exceptions from section 3(1)(f). Specifically, subsection (1)(b) which states:

2.4(1) For the purposes of communication to the public by telecommunication,

(b) A person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to

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25. Judges M. Hetu, A. Burns & A.E. Fenus, *SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* [1999] 1 C.P.R. 4<sup>th</sup> 417 [hereinafter *Tariff 22*].

26. *Canadian Copyright Act*, R.S.C. 1985, c. C-42, § 2 (Jan. 2001) (Can.).

27. Sheldon Burshtein, *Surfing the Internet: Copyright Issues in Canada*, 13 Santa Clara Computer & High Tech. L.J. 385, 411-12 (May 1997).



the public[.]<sup>28</sup>

This provision is the Canadian equivalent of the American “common carrier”<sup>29</sup> exception that removes liability from entities whose sole role is providing communications infrastructure such as the cabling that makes up a telephone network. This provision is particularly important in the context of the Internet which relies upon a virtually untraceable global network of fiber optic cable, copper wire, coaxial cable, routers, and servers that transport billions of packets of data on a daily basis. Internet Service Providers (“ISPs”) and large communications services such as Bell Canada Enterprises might rely upon this provision to avoid liability for copyright infringement carried out by others such as ISP subscribers. In *Tariff 22*, the Copyright Board held that organizations such as ISPs and companies providing communications infrastructure do benefit from section 2.4(1)(b) if,

its role in respect of any given transmission is limited to providing the means necessary to allow data initiated by other persons to be transmitted over the Internet, and as long as the ancillary services it provides fall short of involving the act of communicating the work or authorizing its communication.<sup>30</sup>

The Board included entities such as the ISP of the person who makes the work available, the recipient’s ISP, as well as operators of mirror or cache servers and routers as qualifying intermediaries for the purposes of section 2.4(1)(b).<sup>31</sup> While this conclusion is convincing, it remains to be seen whether it is sufficient to save new media broadcasting activities from potential infringement liability. Again, the Copyright Board in *Tariff 22* offers direction toward a possible test for assessing who might claim protection under section 2.4(1)(b): “In the end, each transmission must be looked at individually to determine whether in that case, an intermediary merely acts as a conduit for communications by other persons, or whether it is acting as something more.”<sup>32</sup> Do the acts of new-media broadcasting undertakings such as iCraveTV.com qualify as “a conduit for communications by other persons?”. When seen in the context of other accepted intermediaries who have generally passive roles such as Internet Service Providers, it appears unlikely. The critical point here seems to be content and its posting on the Internet.

The Copyright Board describes in *Tariff 22* how the use of ISP equipment might enable the transmission of work posted independently by one of its subscribers. Such a situation would not entail infringement liability for the ISP due to section 2.4(1)(b). However, liability may be

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28. *Canadian Copyright Act*, R.S.C. 1985, c. C-42, § 2.4(1) (Jan. 2001) (Can.).

29. *See Id.*

30. *Tariff 22*, *supra* n. 25, at 491.

31. *Id.* at 488.

32. *Id.* at 494.

incurred if the ISP were itself to post the infringing content or was involved in a business relationship with the subscriber beyond the independent provision of services.

The active streaming process usually employed by new media broadcasting activities, while amounting to a transmission of content, is not limited to a passive role but rather entails positive action. The process requires interception of a broadcast signal, its digitization, and its subsequent availability and transmission over the Internet. Presumably, all of these activities are carried out by the new media broadcaster, either internally or as a service contracted to a third party. Even this contractual relationship carries with it a high degree of coordination and collaboration that does not amount to an independent relationship as contemplated by the *Copyright Act* or the Board in *Tariff 22*. Thus, while ISPs for receivers of new media broadcasting avoid potential liability under section 2.4(1)(b), new media broadcasters themselves would not.

#### D. BROADCASTING AND RETRANSMISSION

An additional area of the *Copyright Act* with important implications for the legality of new media broadcasting is the section on broadcasting. The *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement"),<sup>33</sup> to which Canada is a party, sets out protection for broadcasting organizations in Article 14(3).<sup>34</sup> This provision gives broadcasters the right to authorize and to prohibit rebroadcasting via wireless means as well as communications to the public of their broadcasts. Paragraph 6 of this same article allows members (i.e. parties to the agreement) to set "conditions, limitations, exceptions and reservations" to the extent permitted by the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*.<sup>35</sup> This *Convention*, to which Canada has recently acceded, generally defers to national legislation, however, it makes special mention at Article 15(2) that a contracting state may limit the rights of broadcasters in order to offer a similar scope of copyright protection as provided to authors of literary and artistic works. Section 21 of the Canadian *Copyright Act* appears to give effect to the *TRIPs Agreement* as well as the *Rome Convention* by giving broadcasters copyright in the

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33. See generally *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 33 I.L.M. 1197 <<http://www.jus.uio.no/lm/wta.1994/ia1c.html#to2984>> (accessed Apr. 15, 1994) [hereinafter *TRIPs Agreement*] (stating the final act embodying the results of the Uruguay Round of multilateral trade negotiations and agreement establishing the World Trade Organization).

34. *Id.*

35. *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, art. 15(2), 496 U.N.T.S. 43 (Oct. 26, 1961) [hereinafter *Rome Convention*]. The United States is not a party to this treaty. *Id.*

communication signals that they broadcast and accompanying sole rights. One of these rights, enumerated under subsection (1)(c) is the sole right “to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast[.]”<sup>36</sup> At the same time, section 31(2) of the *Copyright Act* seems to offer a contrary position by providing:

- (2) 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*;
  - (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>37</sup>

A closer examination of the two sections reveals that both may offer implicit authorization for new media broadcasting activities in Canada.

Section 21(1)(c) refers specifically to one broadcaster’s right to authorize *another broadcaster* to retransmit its communication signal to the public simultaneously with its broadcast. The relevant question then becomes whether or not new media broadcasters such as iCraveTV.com qualify as broadcasters for the purposes of the *Copyright Act*.

Section 2 of the *Act* defines broadcaster as:

a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission[.]<sup>38</sup>

If the primary activity of new media broadcasters in relation to communication signals is retransmission, a characterization that on its face seems an accurate description, then it does not constitute a broadcaster for the purposes of the *Act* and section 21(1)(c) would not apply. No liability for infringement otherwise applicable would be incurred. Notwithstanding a finding that retransmission is the primary activity of new media broadcasters, an examination of the definition of “broadcasting undertaking” would reveal that the recent decision of the CRTC not to regulate the Internet and new-media broadcasting activities has the effect of disqualifying these activities as broadcasting undertakings. According to section 30.9(7) of the *Copyright Act*, operators of such an

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36. *Canadian Copyright Act*, R.S.C. 1985, c. C-42, § 21(1)c (Jan. 2001) (Can.).

37. *Id.* § 31(2).

38. *Id.* § 2.

undertaking must hold a broadcasting license from the CRTC. This latter finding is restricted, however, by the pronouncements by the CRTC that new media broadcasting does qualify as broadcasting under the *Broadcasting Act*,<sup>39</sup> though it chooses not to regulate it.<sup>40</sup> It will be interesting to see how the Copyright Board or the courts deal with this consequence of the CRTC decision. A plain and literal interpretation of section 21(1)(c), however, seems to allow new media broadcasters to retransmit broadcast communication signals without incurring liability under the *Copyright Act*.

The provisions of section 31(2) regarding the retransmission of local signals, which allow cable companies to rebroadcast signals in return for paying a tariff, also appear to permit new media broadcasters to operate in a similar fashion, although the Copyright Board has set no tariff to be paid. In order to avoid potential infringement of copyright, new media broadcasters must fulfill all four criteria set out in section 31(2). As described above, this includes the requirement that the communication be a retransmission of a local or distant signal.<sup>41</sup> According to the *Local Signal and Distant Signal Regulations*,<sup>42</sup> whatever is not a local signal qualifies as a distant signal.<sup>43</sup> The only limitation on what new media broadcasters cannot retransmit, therefore, are specialty channels available exclusively on cable systems or satellite, i.e. those not "transmitted for free reception by the public by a terrestrial radio or terrestrial television station."<sup>44</sup>

The second criterion that must be met to enjoy the benefits of section 31(2) is that the retransmission be lawful under the *Broadcasting Act*.<sup>45</sup> Presumably, if Canadian networks are broadcasting the transmission, it adheres to the provisions of the *Broadcasting Act* with regard to Canadian programming and content. Thus, for example, if a new media broadcaster were to rebroadcast only certain programming selections that caused it to no longer meet the Canadian programming requirements, such as broadcasting American programming exclusively, then it would lose the benefit of section 31(2).

The third criterion of section 31(2) is related to the aforementioned scenario, since it requires that the signal be retransmitted simultaneously and in its entirety.<sup>46</sup> A rebroadcast at a later date or time would contravene this provision. There is also the prospect that given the

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39. *Broadcasting Act*, S.C. 1991, B-9.01, ch. 11 (Can.).

40. *CRTC News Release 17 May 1999*, *supra* n. 2, at ¶ 13.

41. *Canadian Copyright Act*, R.S.C. 1985, C-42, § 31(2)a (Jan. 2001) (Can.).

42. *See Local Signal and Distant Signal Reg.*, S.O.R./89-254 (Apr. 2000) (Can.).

43. *Id.* § 3(b).

44. *Canadian Copyright Act*, R.S.C. 1985, c. C-42, § 31(1) (Jan. 2001) (Can.).

45. *Id.* § 31(2)(b).

46. *Id.* § 31(2)(c).

streaming technology employed by new media broadcasters, a viewer might save the content and replay it later, raising the possibility that the new media broadcaster might be found guilty of authorizing infringement of copyright. More detrimental, the prospect of having this saved content rebroadcast over the Internet again rather than being re-viewed privately might entail liability for new media broadcasters. The first situation is mitigated by the decision in *CBS Songs v. Amstrad Consumer Electronics Plc.*<sup>47</sup> The House of Lords found in that case that the production of a recording device that allowed copyrighted materials to be recorded did not amount to authorization of infringement.<sup>48</sup> Indeed, the court made specific mention of how live broadcasts might be recorded for “private purposes” and that this did not amount to authorizing infringement.<sup>49</sup>

The final criterion allowing for the retransmission of a broadcast states that in the case of retransmitting a distant signal, a royalty must be paid and all terms and conditions of the *Copyright Act* complied with.<sup>50</sup> Since these channels are retransmitted across Canada, all would qualify as distant signals according to the regulations.<sup>51</sup> The practical effect of this provision is that new media broadcasters would have to pay royalties for all channels they retransmit. Such a scenario is obviously dependent on a royalty scheme already being in place, presumably under the administration of the Copyright Board.

Fulfillment of the conditions set out in section 31(2) is within the capacity of new media broadcasters, thus allowing them to avoid any potential liability from copyright infringement, but contingent, however, on payment of an appropriate tariff, which would be determined by the Copyright Board. Indeed, the *Berne Convention* provides that in the case of a rebroadcast, “equitable remuneration . . . in the absence of agreement, shall be fixed by competent authority.”<sup>52</sup> It is noteworthy that iCraveTV.com had submitted a request to the Board for an examination of Internet delivery of television signals. As part of the settlement reached between iCraveTV.com and the Canadian Association of Broadcasters, however, iCraveTV had to withdraw this request. Even in the event that the Board proceeded with the matter, iCraveTV would only be permitted to intervene in the context of a review of the Board’s decision, and then only relating to the quantum and structure of a tariff or with regard to the factual evidence placed before the Board relating to

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47. [1988] 1 A.C. 1013 (H.L.) [hereinafter *Amstrad*].

48. *Id.* at 1013.

49. *Id.*

50. *Canadian Copyright Act*, R.S.C. 1985, c. C-42, § 31(2)(d) (Jan. 2001) (Can.); see *Retransmission Royalties Criteria Regulations*, SOR/91-690 (Jan. 2001) (Can.).

51. *Canadian Copyright Act*, R.S.C. 1985, c. C-42, § 31(2)(d) (Jan. 2001) (Can.).

52. *Berne Convention*, art. 11<sup>bis</sup>(2) Sept. 9, 1886, Can. T.S. 1948.

iCraveTV's activities.<sup>53</sup> As a result of the potential legal impact of section 31(2) being interpreted in favor of new media broadcasting, the Canadian Association of Broadcasters is pursuing amendments to this section that would exclude online media entities from the definition of retransmitter.<sup>54</sup>

#### E. RETRANSMISSION OF MUSICAL WORKS THE FINDING IN *TARIFF 22*

The recent decision of the Copyright Board in *Tariff 22* includes pertinent commentary regarding the retransmission of broadcast signals over the Internet.<sup>55</sup> It does not concern the television programming itself, but rather the musical works that may or may not be included in that programming. The Board begins with a citation of the finding in *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* ("SOCAM") where the court held that the transmission of a musical work in a broadcast signal constitutes a separate communication.<sup>56</sup> The Board used this decision as the basis for its conclusion that the retransmission of such broadcasts over the Internet would also contain a separate communication of a musical work, whose performance would mandate that a royalty be paid.<sup>57</sup> There is an issue of whether SOCAN may already be adequately compensated for the use of the musical work, but the Board leaves this issue unresolved, preferring to deal with it in the second phase of their decision on *Tariff 22*, related to the quantum and structure of the proposed tariff.<sup>58</sup> Still, this finding will have an effect on new media broadcasters notwithstanding a review of the decision by the courts. If the respective organizations make an application to the Copyright Board to that effect, it would extend the obligation to pay a tariff to collective societies such as SOCAN as well as regular broadcasters.

#### F. MORAL RIGHTS

Another consideration that might invite liability for copyright infringement is that of moral rights. As established in the *Berne Convention*<sup>59</sup> under article 6<sup>bis</sup> and implemented in the *Copyright Act* under section 14.1,<sup>60</sup> moral rights are vested in the author and cannot be as-

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53. *Can. Broad. Corp. v. TVRadioNow Corp.*, Settle. Agreement ¶ 5 (Feb. 28, 2000) (on file with author).

54. Ian Jack, *Broadcasters Want Copyright Act Changed* ¶ 9 <<http://www.nationalpost.com/financialpost.asp?f=000329/244822>> (accessed Mar. 29, 2000).

55. *Tariff 22*, *supra* n. 25, at 515-16.

56. 58 C.P.R. 3d 190 (1994) [hereinafter *CAB*].

57. *Tariff 22*, *supra* n. 25, at 515-16.

58. *Id.* at 515.

59. See *Berne Convention*, *supra* n. 10.

60. *Canadian Copyright Act* R.S.C. 1985, c. C-42, § 14.1 (Jan. 2001) (Can.).

signed although they may be waived in whole or in part.<sup>61</sup>

Moral rights, insofar as they are set out in the *Copyright Act*,<sup>62</sup> relate to the author's right to maintain the integrity of the work and to be associated with it. Moral rights might impose liability on iCraveTV.com. More specifically, moral rights may impose liability with the removal of the Vertical Blank Interval ("VBI"), the removal of closed captioning information, and the addition of online advertising to the side frames of the iCraveTV.com broadcast picture.

The VBI is the portion of a broadcast signal that allows the beam creating the picture on a television screen to move from the bottom to the top of the screen. During this fraction of time no picture is shown and the VBI is essentially empty. New applications are being devised for the VBI, but one that currently exists is the transmission of closed captioning information.

The streaming process employed by iCraveTV.com does not utilize the VBI and in fact removes it from the retransmitted broadcast. The important question is whether broadcasters might claim an infringement of the moral rights of their broadcast signal on the grounds that the signal integrity was compromised. Further, there is real data in the form of closed captioning information that is effectively removed along with the VBI. The submission of the plaintiffs in the American complaint against iCraveTV.com states that these create unauthorized derivative works.<sup>63</sup> The merits of this contention will be discussed below. As to whether this constitutes infringement of the moral rights of the author, section 28.2 of the *Copyright Act* regarding the right of integrity offers guidance. Section 28.2 provides that the "honor or reputation of the author" must be prejudiced through distortion, mutilation, or other modification, or when used in association with a product, cause, service or institution.<sup>64</sup> There are several reasons to believe that such a claim by broadcasters would not be successful.

First, the VBI is not meant to be viewed by recipients of the broadcast signal in the first place. Thus, its removal cannot be noticeably detected, with the exception of those who make use of the closed captioning information contained therein. Further, the VBI has a specific utilitarian purpose; thus it is difficult to demonstrate a substantial degree of originality that would attract copyright and by extension, moral rights protection.

These justifications might be mitigated, however, if a more elaborate use of the VBI is made, the removal of which would have noticeable ef-

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61. *Id.* § 14.1(2).

62. *Id.* § 14.1.

63. *U.S. Compl.*, *supra* n. 4, at ¶ 42.

64. *Canadian Copyright Act* R.S.C. 1985, c. C-42, § 28.2(1)a-b (Jan. 2001) (Can.).

fects. A potential example of this in the United States is the use of the VBI in the operation of the V-chip, a device used to block programming that may be unsuitable for children. The utilitarian argument can still be made, particularly since in the case of new media broadcasting no V-chip would be available to make use of the VBI-embedded signal; however, the effect of removing the signal would be more noticeable.

The addition of advertising to a retransmitted broadcast signal, as was done by iCraveTV.com and would likely be employed by other new media broadcasters, may also attract potential infringement of the moral rights of broadcasters. In this case, the association of the broadcast signal with advertising, which has been independently procured by the new media broadcaster, could qualify as a violation as set out in section 28.2(1)(b).<sup>65</sup>

A scenario can be envisioned where the new media broadcaster places advertising for what turns out to be a disreputable company. Whether the original broadcaster would suffer a possible diminution of reputation cannot realistically be answered. Still, one can envision the original broadcaster making a claim that its "honor or reputation has been prejudiced"<sup>66</sup> by the activities of the new media broadcaster. The extent to which this can be successfully proven will ultimately be decided by the particular facts that give rise to the claim. There is also the possibility that the integrated advertisements might modify the original broadcast to the extent contemplated by section 14.1 and section 28.2(1)(a). This level of modification might constitute infringement in a similar fashion to the association infringement. Again, however, the possibility of it being successfully litigated by broadcasters will depend on the particular circumstances of the situation.

#### G. SECONDARY INFRINGEMENT

A particular contention of Canadian broadcasters in their battle against new media broadcasters such as iCraveTV.com is that their activities amount to secondary infringement. This assertion is supported by the broadcasters' claims that the availability of their broadcasts over the Internet detrimentally affects their ability to secure licenses for foreign programming, particularly content produced in the United States.<sup>67</sup> Further, the broadcasters contend that the market for foreign broadcast rights in Canadian programming is equally threatened.<sup>68</sup> Moreover, unfair competition is created for advertising revenue and the opportunity to

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65. *Id.* § 28.2.

66. *Id.*

67. *Can. Broad. Corp. v. TVRadioNow Corp.*, (Jan. 31, 2000) (application for writ of cert.) (Can.) (on file with the John Marshall Journal of Computer & Information Law).

68. *Id.*



exploit their own new media broadcasting opportunities is limited. These grounds may possibly be justified under section 27(2) of the *Copyright Act*<sup>69</sup> concerning secondary infringement. Specifically, subsection (b) makes the distribution of a copy of a work or communication signal, to such an extent as to prejudicially affect the copyright owner, an infringement of copyright.<sup>70</sup> In order for the broadcasters' claim to be successful, they would have to prove that a copy of the work was made and show evidence of the prejudice experienced as a result of iCraveTV.com's activities.

The concept of reproductions and copies in the context of the technology employed by the Internet might make this first point a difficult one to make. By the very virtue of the Internet, copies of works are made for the purposes of caching, mirroring, and routing, all necessary for the efficient operation of the network infrastructure. That such incidental copying would constitute infringement for an activity that is otherwise permissible, the retransmission of a broadcast signal, would produce a resulting inconsistency with the *Copyright Act*. Infringement should not be solely dependent upon the technology employed in communicating a work, where one method would be permissible and another would not.

Further arguments by television broadcasters that the markets for Canadian and foreign programming licenses would be jeopardized have substantial merit. Clearly, foreign programmers would be reluctant to license to Canadian broadcasters, if these same programs would thereby be made available around the world through the Internet. Similarly, the availability of Canadian programming content on a universal basis would offer no incentive for foreign broadcasters to purchase Canadian content. These arguments might be abated, however, if geographic screening technology permitted the Internet retransmissions to be viewed solely in Canada. iCraveTV.com is currently working on this kind of technology, dubbed "iWall."<sup>71</sup> Such a development coupled with a consistent interpretation of section 27(2) of the *Copyright Act* would preclude the liability of new media broadcasters for secondary infringement.

### III. EFFECTIVE RESTRICTION OF NON-CANADIAN VIEWERS

The ubiquitous nature of the Internet makes new media broadcasting a difficult activity to regulate as evidenced by the decision of the CRTC, but it also presents difficulties for new media broadcasters themselves in terms of carrying out what would otherwise be a legal broad-

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69. *Canadian Copyright Act* R.S.C. 1985, c. C-42, § 27.2 (Jan. 2001) (Can.).

70. *Id.* § 27.2(b).

71. Cowboyz.com, *The iWall VPN (Virtual Private Network)* ¶ 3 <[http://www.internetw.all.com/iwall\\_vpn.html](http://www.internetw.all.com/iwall_vpn.html)> (accessed Feb. 3, 2001).

casting undertaking. A case in point was the mass mobilization of litigation launched against iCraveTV.com by U.S. broadcasters, led by the Motion Picture Association of America ("MPAA").<sup>72</sup> While American copyright law varies in specific but important ways from Canadian law as will be discussed below, the fact remains that new media broadcasting is permissible under Canadian law but the case is more difficult to make under U.S. law. However, by virtue of article 5(2) of the *Berne Convention*, "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."<sup>73</sup> As well, there exists at American law precedent that gives American courts jurisdiction over public performances that occur in the United States despite the fact that the allegedly infringing acts take place outside American territory.<sup>74</sup> This fact, coupled with the arguments by Canadian broadcasters regarding the negative effect of new media broadcasting on foreign programming rights make a strong case for new media broadcasters to find ways of limiting the reach of their content to jurisdictions where their activities are permissible. As previously noted, iCraveTV.com is already working on technology to establish these limits.

When U.S. broadcasters filed their complaint in the U.S. District Court for the Western District of Pennsylvania, iCraveTV.com claimed as one of the main tenets of its defense that its operations were legal in Canada and were only meant to be viewed in Canada. They offered as evidence the fact that viewers of their site were obliged to register, and part of this process, involved attesting to the fact that they were Canadian residents. Viewers were asked to input a Canadian area code, an example of which, as stated by the American broadcasters, was available on iCraveTV.com's site itself. Further, viewers who subsequently revisit the site were able to bypass this geographical screening through the use of a cookie.<sup>75</sup> Chief Judge Ziegler, in granting an injunction against iCraveTV.com, adopted the findings of fact and conclusions of law made by the plaintiffs.<sup>76</sup> In so doing, he agreed that while iCraveTV.com claims to have not intended its site to be viewed by U.S. browsers, intention is irrelevant in the context of copyright infringement

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72. See generally *U.S. Compl.*, *supra* n. 4.

73. See generally *Berne Convention*, *supra* n. 10.

74. *L.A. News Serv. v. Conus Commun. Corp.*, 969 F. Supp. 579, 583 (C.D. Cal. 1997).

75. A "cookie" is a file kept either on the originating server or the viewer's computer which records information used by the server. Thus, in this case, the iCraveTV.com server was able to ascertain that individuals had already registered and thus could be given immediate access to the site.

76. *Twentieth Cent. Fox Film Corp. v. iCraveTV.com* 2000 U.S. Dist. LEXIS 11670, Findings of Fact and Conclusions of Law ¶ 19 (W. D. Pa. Feb. 8, 2000) (declaring plaintiffs' proposed findings of fact and conclusions of law with respect to issuance of preliminary injunction) (on file with the John Marshall Journal of Computer & Information Law).

as a strict liability tort.<sup>77</sup> Further, as described earlier, the court found that a public performance took place in the United States, despite the fact that the transmission originated from Canada, giving American courts jurisdiction over the alleged infringement.<sup>78</sup>

Clearly, the system initially put in place by iCraveTV.com to prevent unauthorized, i.e. non-Canadian, users from viewing the content, was ineffective. The use of a cookie to facilitate subsequent visits to the site also undermined the effectiveness of any security system. The American broadcasters stated in their initial complaint that they had requested iCraveTV.com to implement an "effective restriction of their service to Canadian residents."<sup>79</sup> Presumably, if such a restriction had been put in place, it might have mollified the broadcasters and avoided their use of legal injunctive recourse. In order to carry out new media broadcasting activities in Canada, however, the issue must be about what constitutes an effective restriction from a legal standpoint rather than relying upon the varying opinion of foreign broadcasters.

The major difficulty with this situation is that copyright is generally a creature of statute. Thus, infringement is more often than not a matter of strict liability where the only exceptions and defenses available are those provided by statute or at common law.<sup>80</sup> Further complicating matters is the fact that it is the foreign rather than Canadian jurisdiction that dictates the standard of compliance. Given these realities, this topic will be covered in only a general form with some particular attention paid to the United States, the signals of which iCraveTV.com did intercept and retransmit, and the jurisdiction with the second largest amount of viewers to the site after Canada.

#### A. DEFENSES TO STRICT LIABILITY

Beginning from the assumption that copyright law is a creature of statute where absolute liability is incurred for acts of infringement, an examination of general defenses and exceptions must be made. It is well established that at common law even strict liability offenses may be defended on the basis of honest belief or due diligence. It is this latter defense of due diligence which offers the most promise for Canadian new media broadcasters whose activities have global reach.

While it is evident that the requirements put in place by iCraveTV.com were ineffective, what does qualify as an effective restriction? Does the fact that iCraveTV.com displayed advertisements for

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77. *Id.*

78. *Id.*

79. *U.S. Compl.*, *supra* n. 4, at ¶ 10.

80. See *Ford Motor v. Summit Motor Prod.*, 930 F.2d 277, 299 (3d. Cir. 1991) (giving an American example).

American companies demonstrate an intent to broadcast to the United States? Does the engagement of an international sales manager similarly constitute an acknowledgement of carrying out activities outside Canada?<sup>81</sup> The reasonable answer in these cases is a negative one. Despite engaging in international advertising activities, it is the actual viewing of the new-media broadcasting activities and the location of the viewers that will be legally determinative.

The next question must be whether effective restriction capabilities exist that would allow for a Canadian new media broadcaster to carry on activities solely in Canada. A discussion of available technology would not be helpful at this point simply due to the fact that technology is constantly evolving both in its ability to restrict and its ability to bypass such restrictions. Rather, what is most relevant is a discussion of the legal criteria that must be met in order to fulfill the due diligence requirement for new media broadcasters. These criteria can then be used to evaluate whether the technology chosen to restrict viewing to only approved jurisdictions is in compliance or not.

#### B. CRITERIA ESTABLISHING DUE DILIGENCE

First, it must be acknowledged that no technology on the Internet, as it presently exists, will prevent *all* viewers outside of Canada from gaining access to new media broadcasting activities such as iCraveTV.com. Interpretation of a strict liability statute for copyright infringement that ignores this basic reality would have a chilling effect on the development of digital intellectual property as well as other important emerging areas such as electronic commerce. One of the advantageous features of the Internet during its creation was its ability to reroute information around blockades and gaps in the system. This has the unfortunate effect of making the Internet never 100 percent secure for any given application. Once this fact has been accepted, a much more responsive and practical legal regime can be constructed.

Second, a brief review of the screening mechanism employed by iCraveTV.com should be conducted. The cookie feature that allowed users to bypass the registration system is a feature that would necessarily have to be removed. The relatively easy access that cookies or similar technologies offer, while beneficial to legitimate Canadian users, also offer non-Canadians an additional opportunity to circumvent geographic restrictions put in place. Likewise, the idea of consistently requiring verification of Canadian residence for subsequent visits to the site exhibits a relatively high degree of diligence on the part of a new media broadcaster in implementing a geographic restriction process. The standard offered by iCraveTV.com, that is, requiring input of a Canadian area code, is

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81. *U.S. Compl.*, *supra* n. 4, at ¶ 12.

visibly insufficient in verifying Canadian residents. The added fact that such a code was available on the site itself for anyone to see would certainly amount to liability; such laxity borders on negligence on the part of iCraveTV and would likely constitute contributory copyright infringement in the United States. What is required instead is a means of verification independent of a browser's input; essentially, technology that provides the means to authenticate the geographic origin of a browser, whether it is through a reverse DNS look-up,<sup>82</sup> a top-level domain search, or analogous means. The key is to obtain verification of the geographic origin of the viewer with a reasonable level of reliability. The reasonable standard in this case must be shaped by examining the screening technology commercially available to new media broadcasters and evaluating the relative ease with which such technology can be manipulated or subverted by third parties. While information such as a postal code, phone number, or address may be solicited as part of the registration process, what is more important is to obtain independent information that can confirm that viewers of the site are indeed browsing from a terminal located in Canada. The final form of the process will also depend on privacy considerations that are beyond the scope of this paper.

The final criterion necessary in establishing due diligence on the part of a Canadian new-media broadcasting activity is periodic monitoring and evaluation. This entails a review of the user statistics of the site to ensure that non-Canadians are not able to access the site in substantial and unreasonable numbers. Again, while it is not possible to prevent such access on an absolute basis, statistics that reveal that a substantial number of non-Canadian users are gaining access must trigger a response from new media broadcasters to implement new measures to maintain geographic limitation. It is difficult to assess what constitutes substantial and unreasonable numbers. However, given the type of restriction system that must be put in place, one would expect that only dedicated persons such as hackers with both the knowledge and inclination to attempt to bypass would be able to do so.

New media broadcasters cannot and should not be held liable because of the illegal activities of others. In the United States, Congress passed the *Communications Decency Act*,<sup>83</sup> which effectively immunized ISPs from tort liability incurred from their subscribers' postings. The basis for granting this immunity was because "[i]t would be impossible for service providers to screen each of their millions of postings for possi-

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82. "Reverse DNS look-up" is a means employed by both Netscape and Microsoft to verify that only North American residents may download special 128-bit encryption Internet browsers by "tracing" the location of the user prior to program download.

83. 47 U.S.C. §230 (1996).

ble problems.”<sup>84</sup> Despite the fact that the *Communications Decency Act* was found to be unconstitutional on privacy grounds, the reasoning of Congress regarding the liability of ISPs remains sound and should be applied to new media broadcasters.<sup>85</sup> iCraveTV.com should not be held responsible for copyright infringement due to the small number of viewers who intentionally bypass security measures. Having acted with due diligence in implementing an effective restriction system, new media broadcasters should be protected from strict liability for copyright infringement.

#### IV. COMPARISON WITH AMERICAN COPYRIGHT LAW

The copyright regime in the United States offers protections similar to those in Canada; however, the details of American legislation as well as the jurisprudence create specific differences between the laws of the two countries. With the introduction of the *Canada-U.S. Free Trade Agreement* in 1989<sup>86</sup> and the *North American Free Trade Agreement*<sup>87</sup> five years later, there has been a greater degree of harmonization in the area of intellectual property law.

Analysis of U.S. copyright law is important for Canadian new media broadcasters due to the proximity of the United States, the large amount of American programming that is broadcast by traditional Canadian network broadcasters, and the fact that Americans make up the largest number of Internet users worldwide.<sup>88</sup> Finally, as evidenced by the recent experience of iCraveTV.com, American studios and broadcasters hold significant intellectual property rights in popular broadcasts and are willing to exercise those rights to their fullest extent. Avoiding the litigious ire of American broadcasters is key to remaining viable as a new media broadcaster. The case of iCraveTV.com demonstrated that without effective restrictions to U.S. viewers, American courts could establish sufficient jurisdiction in order to grant an injunction. As this matter has been dealt with above, it will not be revisited here except to say that the analysis is equally applicable in the United States.

The basis for American copyright law is set in the United States Constitution which states that “Congress shall have Power. . .to promote the Progress of Science and useful Arts, by securing for limited Times to

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84. *Zeran v. Amer. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

85. *Id.*

86. See generally *Canada-U.S. Free Trade Agreement* <<http://wehner.tamu.edu/mgmt.www/NAFTA/fta/index.htm>> (accessed Feb. 3, 2001).

87. See generally *The Tech, North American Trade Agreement* <<http://www.tech.mit.edu/Bulletins/Nafta/>> (accessed Feb. 2, 2001).

88. Tech. in Educ., *Technology in Education Web Site Attracts Visitors from Around the Globe* ¶ 1 <<http://www.technology-in-education.co.uk/articles/news/article.htm>> (accessed Jan. 30, 2001).

Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>89</sup>

The detailed provisions governing copyright are provided under the U.S. *Copyright Act*.<sup>90</sup> Section 101 provides definitions for the various subsequent copyright provisions<sup>91</sup> and is similar to section 2 of the Canadian *Copyright Act*, while the U.S. *Copyright Act* section 102 enumerates what constitutes the subject matter of copyright and lists particular works of authorship that enjoy copyright protection.<sup>92</sup> Section 106 of the U.S. *Copyright Act* is the American equivalent to section 3(1) in the Canadian *Copyright Act* and sets out the exclusive rights of authors and copyright holders, among them the exclusive right to perform the work publicly.<sup>93</sup> It also gives a specific right “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”<sup>94</sup>

#### A. RIGHT OF REPRODUCTION

The first exclusive right of authors under section 106 is the right to reproduce the copyrighted work.<sup>95</sup> In the case of new media broadcasting, a reproduction of the work is only made insofar as the technology utilized by the Internet requires it. The retransmission of broadcast signals is meant to allow viewers to view the broadcast simultaneously with its signal transmission, as opposed to creating a permanent copy that can be viewed on demand. April Major stated that any temporary copying created in the course of an Internet transmission is incidental to the technology involved.<sup>96</sup> Citing *Baker v. Selden*,<sup>97</sup> she reiterates the well-established principle that “copyright law does not protect processes themselves.”<sup>98</sup> Such an interpretation is convincing. Thus, it is reasonable to conclude that new media broadcasting activities would not infringe the exclusive reproduction right of authors under the U.S. *Copyright Act*.

#### B. RIGHT TO PREPARE DERIVATIVE WORKS

Included in the exclusive rights of an author under section 106 is the

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89. U.S. Const. Art. I, § 8, cl. 8.

90. 17 U.S.C. § 101.

91. *Id.*

92. *Id.* § 102.

93. *Id.* § 106(4).

94. 17 U.S.C. § 106(6) (2000).

95. *Id.* § 106(1).

96. April Major, *Copyright Law and the Electronic Frontier of the Web*, 24 Rutgers Computer & Tech. L.J. 75, 94 (1998).

97. 101 U.S. 99, 103 (1880).

98. Major, *supra* n. 96, at 94.

right “to prepare derivative works based upon the copyrighted work.”<sup>99</sup> This is an important provision in the context of new media broadcasting, since it usually involves the transmission of a digitized version of a broadcast signal. Under this provision, liability will be incurred if it is found that the digitizing process performed by new media broadcasters creates a derivative work based upon the original broadcast signal.<sup>100</sup> Major states that “[a]s a rule, digitized works themselves are usually derivative works of preexisting works.”<sup>101</sup> American and Canadian broadcasters have consistently stated that their own new media undertakings are compromised by the actions of independent new media broadcasters like iCraveTV.com. Presumably, section 106(2) was designed to prevent exactly such a situation from occurring.<sup>102</sup> From an economic rights perspective, copyright law is meant to provide the original author with the opportunity to exploit his intellectual property for commercial purposes and thus offer protection commensurate with achieving this goal. Although not mentioned in the judgment granting a preliminary injunction against iCraveTV.com,<sup>103</sup> it seems evident that new media broadcasting of the sort carried on by iCraveTV.com does constitute copyright infringement under section 106(2).

### C. RIGHT TO DISTRIBUTE WORKS

Part of the bundle of rights enjoyed by authors and recognized by section 106 of the U.S. *Copyright Act* is the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending[.]”<sup>104</sup> The interpretation of this provision requires considerable attention to the nature of the Internet and should be made in a manner consistent with the reading of other provisions in the U.S. *Copyright Act*.

While some might assert that the copies made in the course of a work being transmitted over the Internet constitute copying for the purpose of section 106(3), there is reasonable evidence to counter this argument. As previously discussed, copies created incidental to the proper functioning of the Internet would likely not attract liability in and of themselves.<sup>105</sup> Alternatively, one can examine the provision further and note the requirement of “sale or other transfer of ownership” in order to constitute infringement. New-media broadcasting activities if they choose to adopt a system similar to the one implemented by

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99. 17 U.S.C. § 106(2) (2001).

100. *Id.* § 106(3).

101. *Major, supra* n. 96, at 102.

102. 17 U.S.C. § 106(2).

103. *See generally Twentieth Cent. Fox Film Corp.*, 2000 U.S. Dist. LEXIS 11670.

104. 17 U.S.C. § 106(3).

105. *See supra* pt. III(A) (discussing the right of reproduction).



iCraveTV.com, would offer access to broadcasts for free, gaining revenue from online advertising instead. The notion of transfer of ownership does not seem to include any action that takes place in the course of a typical new-media broadcasting activity.

The *National Information Infrastructure Copyright Protection Act of 1995*<sup>106</sup> proposed to amend section 106(3) to replace “or by rental, lease, or lending” with “by rental, lease, or lending, *or by transmission.*”<sup>107</sup> This proposed amendment was based upon a report of the National Information Infrastructure Task Force.<sup>108</sup> Appointed by President Clinton, its mandate was to develop policies on telecommunications and information that would promote development of a national information infrastructure.<sup>109</sup> If such an amendment was made to section 106(3), courts may choose to give<sup>110</sup> a broader interpretation to transfer of ownership in the case of digital transmissions such as those made in the course of a new-media broadcasting activity. To date, however, the proposed amendment has not been incorporated into the U.S. *Copyright Act*.<sup>111</sup> Accordingly, section 106(3) as it presently exists<sup>112</sup> would not be infringed by Canadian new-media broadcasting activities.

#### D. RIGHT TO PUBLIC PERFORMANCE

The litigation brought against iCraveTV.com by American broadcasters and studios resulted in a temporary injunction barring iCraveTV from broadcasting.<sup>113</sup> Although the parties eventually settled the matter, a settlement that essentially made the temporary court order permanent, the U.S. trial judge did release reasons for his 90-day injunction of February 8, 2000.<sup>114</sup> While they amounted to the adoption of the plaintiff's finding of fact and conclusions of law, they are notable insofar as they pertain to the right of an author to perform his work publicly.

Section 106 contains three subsections that deal with the right to publicly perform and publicly display one's copyrighted work or to authorize such actions.<sup>115</sup> Subsection (4) regarding performance applies to “literary, musical, dramatic, and choreographic works, pantomimes, and

106. Sen. Res. 1284, 104th Cong. (1995); H.R. Res. 2441, 104th Cong. (1995).

107. *Id.* [emphasis added].

108. See generally United States, Info. Infrastructure Task Force, *The Report of the Working Group on Intellectual Property Rights* <<http://www.uspto.gov/web/offices/com/doc/ipnii/>> (Sept. 1995) [hereinafter *White Paper*].

109. *Id.*

110. 17 U.S.C. § 106(3) (2000).

111. *Id.* § 101.

112. *Id.* § 106(3).

113. *Twentieth Cent. Fox Film Corp. v. iCraveTV*, 2000 U.S. Dist. LEXIS 11670 (2000).

114. See generally *id.*

115. 17 U.S.C. § 106(4)-(6).

motion pictures and other audiovisual works.”<sup>116</sup> The right of display is restricted to literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work under subsection (5).<sup>117</sup> Finally, the public performance of sound recordings transmitted by digital audio enables protection under subsection (6).<sup>118</sup> Public performance or display is defined as:

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>119</sup>

While there is no definition of the “public,” the words “any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered”<sup>120</sup> offers a general guideline. As outlined earlier, the trial judge found that the activities of iCraveTV.com constituted the public performance of the American broadcasters’ copyrighted work, thus violating section 106 by infringing upon their copyright.<sup>121</sup>

Whether material transmitted over the Internet amounts to a public performance in the United States is a question of little debate. Several authors have concluded that it constitutes a public performance,<sup>122</sup> and American case law has held similarly.<sup>123</sup> Although in many cases, only individual users are viewing the posted content, the number individual users is usually of such that it amounts to a performance in public. As previously noted, the trial judge rejected the contention that the transmissions originated in Canada and, as claimed by iCraveTV.com, were not meant to be viewed by American Internet users.<sup>124</sup> The possibility of a geographic confinement system that would restrict the new-media broadcast site to Canadians and save Canadian new media broadcasters

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116. *Id.* § 106(4).

117. *Id.* § 106(5).

118. 17 U.S.C. § 106(6) (2000).

119. *Id.* § 101.

120. *Id.*

121. *See generally Twentieth Cent. Fox Film Corp.*, 2000 U.S. Dist. LEXIS 11670.

122. *See generally* D.L. Hayes, *The Coming Tidal Wave of Copyright Issues on the Internet* <[http://www.fenwick.com/pub/tidal\\_wave.htm](http://www.fenwick.com/pub/tidal_wave.htm)> (accessed Mar. 21, 2000); Major, *supra* n. 96, at 97.

123. *Playboy Enter. v. Frena*, 839 F. Supp. 1552, 1557 (M.D. Fla. 1993).

124. *See generally Twentieth Cent. Fox Film Corp.*, 2000 U.S. Dist. LEXIS 11670.

from liability was not dealt with.<sup>125</sup>

Specific mention must be made of the protection offered to the public performance of sound recordings by section 106(6) of the U.S. *Copyright Act*. This provision, adopted in 1997,<sup>126</sup> adds to the five basic rights that make up the protection afforded to authors. It was meant to address the omission of sound recordings from section 106(4). Section 106(6) provides protection for digital audio transmissions only, reflecting the fact that section 114 of the U.S. *Copyright Act* already governs the "scope of exclusive rights in sound recordings." Despite the fact that section 106 is often referred to as the bundle of exclusive rights of authors, these rights do not operate in a joint manner. Rather, each offers a separate protection and is interpreted independently. This is all to say that the explicit mention of a digital audio transmission does not necessarily leave digital transmissions of a non-audio nature outside the ambit of section 106. Subsection (6) was meant to close a gap in subsection not to create a new one. Furthermore, any new media broadcasts containing sound recordings would presumably be subject to section 106(6). Absent such a scenario, the activities would still be caught by section 106(4).

#### E. REBROADCASTING AND SECONDARY TRANSMISSIONS

Consideration of the American provisions on rebroadcasting, or secondary transmissions as they are defined in the U.S. *Copyright Act*, are conspicuously absent from the decision in *IcraveTV.com*. However, the judge cited a case<sup>127</sup> that, upon remand, *obiter dicta* that seems to lend credence to an exception for new media broadcasting under the provisions of secondary transmissions, as is the case in Canada.

It is useful at this point to provide an overview of the rebroadcasting provisions found in section 111 in the U.S. *Copyright Act*.<sup>128</sup> Subsection (a) contains five clauses that set out in what circumstances rebroadcasting will not constitute copyright infringement. The first applies to lodging establishments that retransmit signals to individual rooms without the use of cable. The second applies to specific exceptions set out in section 110(2) that relate to educational uses. The fourth applies to satellite retransmitters and the fifth applies to non-commercial uses such as government or non-profit organizations. The clause which new media broadcasters are interested in is the third, which states:

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125. See *supra* pt. II (identifying the issue of implementing a security system which prevents non-Canadians from accessing and using the services offered).

126. 17 U.S.C. § 106(6) (stating an amendment made by the *Digital Performance Right in Sound Recordings Act of 1995*); see Sen. Res. 227, 104<sup>th</sup> Cong. (1995).

127. See generally *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998).

128. 17 U.S.C. § 111.

- (a) The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if –
- (3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: Provided, that the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions[.]<sup>129</sup>

A primary transmission is defined as, “[A] transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.”<sup>130</sup> A secondary transmission is defined as “the further transmitting of a primary transmission simultaneously with the primary transmission[.]”<sup>131</sup> Subsection 3 outlines a number of criteria that allow for carriers to retransmit a signal containing a copyrighted work without incurring liability for infringement.<sup>132</sup> Each will be examined in turn.

The first criterion is that the carriers have no control over the content or selection of the primary transmission.<sup>133</sup> Taking the process utilized by iCraveTV.com as a reasonable example of a typical new-media broadcasting activity,<sup>134</sup> it is clear that the carrier in this context has no control over the primary transmission.<sup>135</sup> The signal is captured by an antenna in its entirety and prepared for broadcast over the Internet. The fact that the VBI is subsequently removed during streaming is a question applicable to the secondary transmission, not the primary transmission. The second part of this criterion mandates that the carrier have no control over the selection of the primary transmission. Is a new media broadcaster in choosing which stations it will offer making a selection as to the primary transmission? A recent decision by a New York district court suggests that it does not.<sup>136</sup>

The remanded case of *Infinity Broadcasting Corp. v. Kirkwood*<sup>137</sup> in-

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129. *Id.* § 111(a)(3).

130. 17 U.S.C. § 111(f) (2000).

131. *Id.*

132. *Id.* § 111(a)(3).

133. *Id.*

134. See generally *Twentieth Fox Film Corp.*, 2000 U.S. Dist. LEXIS 11670 (2000).

135. 17 U.S.C. § 111(a)(3).

136. *Infinity Broad. Corp. v. Kirkwood*, 63 F. Supp. 2d 420, 423 (S.D.N.Y. 1999).

137. *Id.*

volved the rebroadcasting of primary transmissions of radio signals via a telephone service. The initial case was decided in favor of *Kirkwood*,<sup>138</sup> but was appealed to the U.S. Court of Appeals for the Second Circuit where the decision was overturned and the case remanded.<sup>139</sup> In the remanded action, the court cited section 111(a)(3) as protecting *Kirkwood* from infringement liability.<sup>140</sup>

The service offered by *Kirkwood* while different from a new media broadcast, still bears striking similarities in its processes, particularly with regards to capturing various signals for rebroadcast.<sup>141</sup> In applying the criteria set out in 111(a)(3), the District Court discussed at length whether or not *Kirkwood*'s service selected the signals it rebroadcast. Its ultimate determination was that the actions of *Kirkwood* did not disqualify him from meeting this criterion in section 111.<sup>142</sup> This finding is based on the fact that *Kirkwood*'s service picks up and rebroadcasts all the radio signals available in the area, and the actual selection of a particular signal is left up to the individual accessing the service.<sup>143</sup> *iCraveTV.com*, by intercepting all available television signals in its area of operation Canadian and American, makes no selection as to which signals it offers. Much like the service offered by *Kirkwood*, it leaves this decision up to the individual user of the site.

The decision in *Kirkwood* is also significant in its interpretation of the term carrier.<sup>144</sup> Finding that found retransmission of over-the-air signals via microwaves to be permissible under the U.S. *Copyright Act*,<sup>145</sup> the court in *Kirkwood* on remand stated, "[T]he exemption is not limited to the technology that existed at the time Congress passed the Act."<sup>146</sup> It found the service provided by *Kirkwood* fell within the intention of Congress to adapt the terms of the U.S. *Copyright Act* to evolving technology and deemed it to be a carrier for the purposes of section 111.<sup>147</sup> New media broadcasters may be able to argue that they qualify as carriers using a similar justification.

The second criterion of section 111(a)(3) stipulates that the carrier should have no control over the recipients of the secondary transmission.<sup>148</sup> On its face, it would appear that new media broadcasters would

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138. *Infinity Broad. Corp.*, 965 F. Supp. at 561.

139. *Infinity Broad. Corp.*, 150 F.3d at 112.

140. *Infinity Broad. Corp.*, 63 F. Supp. 2d at 423.

141. *See generally id.*

142. *Id.* at 426.

143. *Id.* at 421.

144. *Id.* at 425.

145. *E. Microwave v. Doubleday Sports*, 691 F.2d 125, 126 (2d. Cir. 1982).

146. *Infinity Broad. Corp.*, 63 F. Supp. 2d at 422.

147. *Id.* at 425.

148. 17 U.S.C. § 111(a)(3).

be in full compliance with this second criterion as the availability of their service technically is as widespread as the Internet itself. The implementation of a geographic restriction system might be construed as undue control by a court, although such a system would be removed if new media broadcasting were found to be legal in the United States. A court would likely not use this paradoxical situation as justification for a failure in its analysis of compliance with section 111(a)(3).

The third criterion is a fairly specific one that details that a carrier's activities must consist solely of providing wires, cables, or other communications channels.<sup>149</sup> A new media broadcaster wishing to meet this criterion would clearly be looking to qualify under "other communication channels" since they do not solely provide wire or cables. One possibility might rest in construing the digitizing and streaming process as a communications channel. Again, the decision in *Kirkwood* on remand offers guidance.<sup>150</sup> The court adopted the broader passive-agent standard rather than the telephone-company standard for assessing compliance with the third criterion.<sup>151</sup> The court documented the history of the cable industry, and the Supreme Court's decision, which found cable operators were passive actors akin to viewers rather than active ones who would be responsible for communicating a public performance.<sup>152</sup> The court then cited the actions of Congress and its implementation of a statutory licensing scheme to the effect "commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted materials' should pay royalties to the creators of the programming[.]"<sup>153</sup> Given the clear intention of Congress, the court in *Kirkwood* on remand held that *Kirkwood* did not comply with the third criteria of section 111(a)(3) and, therefore, could not escape liability for infringement of copyright under section 106.<sup>154</sup> The court specifically mentioned Internet broadcasting as one area that would benefit from a converse ruling. Given this pace of technological change and accompanying opportunities for commercial exploitation, such a ruling may lurk in the not-too-distant future. Indeed, the court stated that additional cases are necessary to prescribe the scope of the meaning of carrier in the U.S. *Copyright Act*.<sup>155</sup> Given the experience of the cable industry, it would seem that if the legislature is to ever speak on this issue, it will be at the behest of a ruling similar to the one delivered by the U.S. Supreme Court during cable's infancy. Until then, given the findings in *Kirkwood* on

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149. 17 U.S.C. § 111(a)(3) (2000).

150. See generally *Kirkwood*, 965 F. Supp. 553.

151. *Id.* at 425.

152. *Id.*

153. *Id.* at 426.

154. *Id.*

155. *Id.*

remand as well as the conclusions of law contained in iCraveTV.com's injunctive order, new media broadcasters will be unable to rely upon the secondary transmission exemptions to escape liability for copyright infringement.

#### F. THE "COMMON CARRIER" DEFENSE

There is a substantial amount of American jurisprudence regarding the liability of various parties, specifically ISPs and Bulletin Board System ("BBS") operators for copyright infringement whose review is useful here.

The most well-known case is that of *Religious Technology Center v. Netcom On-Line Communication Services*.<sup>156</sup> The court held that the ISP, Netcom, was not liable for the copyright infringement committed by a BBS using the ISP for its access to the Internet. The fact that the ISP had no knowledge of the infringement and the infringing copies made on its servers were made as a function of the automatic systems of the ISP were important factors in making this determination. The court distinguished the earlier case *MAI Systems Corp. v. Peak Computer, Inc.*,<sup>157</sup> which established liability for temporary copies of a work stored in the Random Access Memory ("RAM") of a computer. In making the distinction in *Netcom*, the court stated, "unlike *MAI*, the mere fact that Netcom's system incidentally makes temporary copies of plaintiffs' works does not mean that Netcom has caused the copying. The court believes that Netcom's act of designing or implementing a system that automatically and uniformly creates temporary copies of all data sent through it is not unlike that of the owner of a copying machine who lets the public make copies with it."<sup>158</sup> Netcom established that some degree of volition was necessary when incidental copies of a work are made. This holding was followed in *Sega Enterprises Ltd. v. MAPHIA*<sup>159</sup> where a BBS operator knowingly stored unauthorized copies of video games created by Sega. While no liability was incurred for direct infringement, the operator did sustain contributory liability. This elevated level of volition did constitute infringement, but not of the direct nature.<sup>160</sup> Finally, the case of *Playboy Enterprises v. Frena*,<sup>161</sup> which was decided prior to the *Netcom* and *Sega* cases, dealt with the uploading and downloading of photographs on a BBS. The court found that copyrighted photographs of Playboy Enterprises that were uploaded and subsequently displayed

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156. 907 F. Supp. 1361, 1382 (N.D. Cal. 1995).

157. 991 F.2d 511, 519 (9th Cir. 1993).

158. *Netcom*, 907 F. Supp. at 1369.

159. 948 F. Supp. 923, 936 (N.D. Cal. 1996).

160. *Id.*

161. 839 F. Supp. at 1554.

publicly were in violation of the exclusive rights under section 106 of the U.S. *Copyright Act*.<sup>162</sup> The BBS operator was found to be liable for direct infringement;<sup>163</sup> however, critics suggest that the court's finding may have a limited scope, particularly in light of the decisions in *Netcom* and *Sega*. The BBS was devoted to photographs of an adult subject matter, thus the court may have inferred a more direct participation on the part of Frena, which constituted liability.<sup>164</sup>

The jurisprudence that makes up the common carrier defense seems to indicate that a degree of volition is necessary in order to attract liability for direct infringement of copyright. The question of whether a new media broadcaster in the transmission of broadcast signals acts with such a degree of volition has not been expressly decided. The answer is inextricably linked to whether a new media broadcaster can be defined as a carrier for the purposes of retransmission, but is not necessarily dependent upon it.

#### G. APPLICABILITY OF INTERNATIONAL TREATIES

With the advent of the *North American Free Trade Agreement*,<sup>165</sup> there has been significant harmonizing of trade-related legislation between Canada, the United States and Mexico, including copyright law. However, differences still exist between Canada and the United States with regard to the applicability of international treaties dealing with copyright. While both countries are party to the *Berne Convention*, *Universal Copyright Convention*<sup>166</sup> and the *TRIPs Agreement*,<sup>167</sup> the *Rome Convention*,<sup>168</sup> which Canada ratified in 1998, has not been signed by the United States. Although this treaty which establishes minimum rights for broadcasting organizations defers to domestic legislation, its inapplicability in the United States should be noted.

The United States recently passed the *Digital Millennium Copyright Act*<sup>169</sup> which, among other things, amended the U.S. *Copyright Act* to bring its domestic law in line with the international obligations under-

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162. *Id.* at 1559.

163. *Id.*

164. *Hayes*, *supra* n. 122, § II(A)4.

165. *See generally* *NAFTA*, *supra* nn. 86 and 87.

166. *See Berne Conv., Universal Copyright Convention* (Sept. 6, 1952), Can. T.S. 1962 No. 13 (available at <<http://www.tufts.edu/departments/fletcher/multi/texts/UNTS13444.txt>>).

167. *TRIPs Agreement*, 33 I.L.M. 1197 (Apr. 15, 1994) (available at <<http://www.jus.uio.no/lm/wta/1994/iia1c.html#to2984>>).

168. *See Rome Conv.*, 496 U.N.T.S. 43.

169. *See* Pub. L. No. 105-304, 112 Stat. 2860 (1998) (available in LEXIS at 105 P.L. 304).



taken through its accession to the *W.I.P.O. Copyright Treaty*<sup>170</sup> as well as the *W.I.P.O. Performances and Phonograms Treaty*.<sup>171</sup> While neither treaty has yet come into force, the United States has acceded to both, while Canada is only a signatory. Both instruments reflect the development of national copyright law but establish higher minimum standards than the *Berne Convention*. The *W.I.P.O. Copyright Treaty* establishes an internationally recognized right of authors to communicate their work to the public under Article 8.<sup>172</sup> The *Agreed Statement* concerning this article allows for a common carrier exception and also allows for the application of Article 11<sup>bis</sup>(2) of the *Berne Convention*. The *W.I.P.O. Performances and Phonograms Treaty*<sup>173</sup> offers authors exclusive rights in recording and distribution of their work, irrespective of the medium. An express provision is made for digital works as well as remuneration of authors for works broadcast or communicated to the public. The status of these two treaties is uncertain at this time since they have not enjoyed widespread ratification. In the case of the new media broadcaster, it is important to note the various legislative developments in the United States, Canada, and internationally. Globally, the United States and Canada continue to fall under the basic *Berne Convention* regime, with each following similar trends in the development of international copyright law.

#### H. CONTRIBUTORY INFRINGEMENT

One of the major differences between American and Canadian copyright law is the existence of liability for contributory infringement of copyright in U.S. copyright law. American broadcasters claimed in their complaint against that iCraveTV.com, the iCraveTV.com was liable for contributory infringement of copyright by making a digital copy of its signal available on the Internet.<sup>174</sup> The court agreed with the broadcasters assertions and found that the activities of iCraveTV.com did fall under this type of liability. The reasoning included the fact that third parties would themselves infringe the broadcasters' copyright by further transmitting, and thus publicly performing, the programming streamed by iCraveTV.com.

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170. See *World Intellectual Property Organization Copyright Treaty*, (Dec. 20, 1996) 36 I.L.M. 67 [hereinafter "*WIPO Copyright Treaty*"] (adopting through the W.I.P.O. Diplomatic Conference on Certain Copyright and Neighboring Rights Questions).

171. See *World Intellectual Property Organization Copyright Treaty*, (Dec. 20, 1996) 36 I.L.M. 78 [hereinafter "*WIPO Performances & Phonograms Treaty*"] (adopting through the W.I.P.O. Diplomatic Conference on Certain Copyright and Neighboring Rights Questions).

172. See generally *WIPO Copyright Treaty*, *supra*. n. 170.

173. See generally *id.*

174. *U.S. Compl.*, 2000 U.S. Dist. LEXIS 1091 at ¶ 58.

The two issues that must be examined in any case of alleged liability for contributory copyright infringement are the level of knowledge regarding the existence of copyright and the level of participation of the allegedly liable party in the infringing activity. *Netcom* also dealt with the issue of contributory infringement of an ISP, concentrating on the knowledge requirement.<sup>175</sup> The court in *Netcom* held that mere allegations by a potential plaintiff are insufficient and are subject to verification by the ISP, if possible.<sup>176</sup> Any obvious indicators such as copyright notices on various works would be sufficient evidence that the necessary knowledge existed. As to the level of participation, this goes to volition as well as any positive actions taken that might be construed as participating in an act of copyright infringement. *iCraveTV.com*, in its submissions to the court, did not deny that it had copied the works of the broadcasters. It is evident that these works did contain copyright notices, thus *iCraveTV.com* did possess the required level of knowledge for contributory infringement. As to its level of participation, the process of capturing the broadcast signal, digitizing and then subsequently streaming it, appear to be positive acts that meet the participation requirement of contributory infringement. Barring an exception to infringement under section 111, new media broadcasters whose activities reach into the United States would likely be found liable of contributory copyright infringement.

## V. CONCLUDING REMARKS

The issue of moral rights was not discussed here since its provisions are generally similar to those in Canada and the same considerations apply.<sup>177</sup> Overall, the current state of American copyright law does not permit new media broadcasting from operating unless licensing agreements can be negotiated between traditional broadcasters and new media broadcasters. Canadian operations such as *iCraveTV.com* would only be able to operate within a relative margin of safety if their activities were limited to Canadian residents. While the American legal framework is not rigid to the point that new media broadcasters have no hope of operating legally in the United States, the jurisprudence, as evidenced in the *Kirkwood* decision after remand, is reluctant to grant such an expansive right to new media broadcasters without a simultaneous or preceding legislative initiative to that effect. When the cable industry first began, the U.S. Supreme Court did take this bold step, which was later followed by a legislative response in keeping with the purpose of

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175. *Netcom*, 907 F. Supp. at 1374-75.

176. *Id.*

177. *See supra* pt. II(f) (providing for further information on moral rights).

copyright law in the United States.<sup>178</sup> To date no case has reached the Supreme Court, instead being limited to federal district and circuit court decisions. The similarities between the cable industry and new media broadcasting are compelling. There remains sufficient ambit for a court to construe the word carrier in section 111(a)(3) widely enough to encompass a new media broadcaster.

The final note on the American situation is a reference to the terms of the settlement reached between U.S. broadcasters, studios, and iCraveTV.com.<sup>179</sup> Clause 6(1)(b) states that if a Canadian federal court or provincial superior court determines that the activities of iCraveTV.com are permissible and do not require the consent of the network broadcasters and that the activities are "strictly limited" to Canada, then iCraveTV may resume operations. Thus, a scenario can be envisioned where the friendlier copyright environment in Canada would find new-media broadcasting activities permissible provided an effective security system is implemented to limit the transmissions from entering the United States. This would be permissible under the terms of the agreement. Again, the determination of what constitutes "strictly limited" is open to interpretation, although the criteria set out in this paper offer a useful guide.

There is ample reason to believe that a bright future exists for new media broadcasting in Canada. A detailed analysis of Canadian copyright provisions, concentrating on the section governing retransmission, points to a current situation where new media broadcasters can legally carry on broadcasting activities without fearing infringement of copyright. Canadian broadcasters are aware of this situation and, as previously stated, hope to remove the benefits enjoyed by new media broadcasters under the retransmission provisions by lobbying for an amendment to that effect.<sup>180</sup>

The recent decision by the Copyright Board in *Tariff 22* may signal a more concrete acceptance of new media broadcasting in Canada. The possibility of instituting a compulsory license regime may be the best way to ensure that the technology offered by the Internet can be utilized while at the same time maintaining a level of consistency between various broadcast license regimes.

One of the interesting features of the decision in *Tariff 22* is the finding by the Board that its jurisdiction extended only to computer servers based in Canada. Thus, the capacity to generate royalties for new-media broadcasting activities would also be limited to sites hosted on servers

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178. U.S. Const. Art. I, § 8, cl. 8.

179. See generally *ICRAVE Press Releases: Agreement* <[http://www.mpa.org/Press/iCrave\\_Agreement.htm](http://www.mpa.org/Press/iCrave_Agreement.htm)> (accessed Feb. 22, 2000).

180. Jack, *supra* n. 54, at ¶ 2.

located in Canada. Would it be possible to intercept signals in Canada and stream the signal from a server located outside the country? The requirement of capturing over-the-air signals might prevent such a scenario, but this part of the decision has been the subject of some criticism.<sup>181</sup> Additionally, the likely necessity to maintain some form of permanent presence would also likely be sufficient for the Copyright Board to extend its jurisdiction. Still, the discussion of royalties from Internet communications in *Tariff 22* puts Canada in the lead with regards to new media broadcasting.

A legal, predictable and certain regulatory regime offers a safer business environment in which new media broadcasting can develop. The Canadian example will undoubtedly offer guidance in this area. As various communication methods converge, it will be incumbent upon jurisdictions around the world to foster the concurrent advancements in technology in the context of an adaptive legal and regulatory framework.

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181. Michael Geist, *Vital Ruling Misses Boat on Offshore Servers* ¶ 16 <<http://www.globetechnology.com/archive/gam/News/19991118/TWGEIS.html>> (Nov. 18, 1999).

