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PRESENT TENSE:
WHAT iCraveTV AND JumpTV TELL US ABOUT THE FUTURE OF COPYRIGHT

Marc-André Pigeon
Economics Division

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Sometime in 2003, Canadians should get their first look at the government's long-awaited "Phase III" changes to the *Copyright Act*. It is not yet clear whether these changes will occur all at once, as they have in the past, or in piecemeal fashion. The changes are intended to bring the *Copyright Act* into the "digital age," in much the same way as the *Digital Millennium Copyright Act* (DMCA) did for the United States.(1) The Department of Canadian Heritage and Industry Canada have identified 12 issues that will likely be addressed in Phase III.(2) Half of these are tied to digital issues, two examples of which are: Should Canada make it illegal to develop software to "crack" digital copyright protections? How do we determine the extent to which Internet service providers should be held liable for the transmission and storage of copyright material over their services?(3)

The Phase III changes were also supposed to address the legality of retransmissions of television signals over the Internet, an issue that first gained media attention in 1999 because of a small Canadian firm called iCraveTV that tried, ultimately unsuccessfully, to launch an Internet television business. With the Internet retransmission issue demanding a more timely response than some of the other Phase III issues, the government introduced

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(1) The government has followed a three-phase process of updating Canada's copyright legislation. Phase I consisted of 1987's Bill C-60, which represented the first major overhaul of the *Copyright Act* since it was introduced in 1921. Phase II consisted of Bill C-32, which was passed in 1997.

(2) The 12 issues are spelled out in a document by Canadian Heritage and Industry Canada available on-line at: http://strategis.ic.gc.ca/SSG/rp01101e.html. Note that the consultation phase of Phase III revisions began in the summer of 2001 and ended in October 2001. A report on how well the existing *Copyright Act* is coping with the challenges of the digital age is expected in September 2002, as required by the Phase II revisions to the *Copyright Act*.

(3) The DMCA made it illegal to create and develop "code cracking" software. This section of the law is currently being put to the test in U.S. courts, where a Russian company has been accused of "selling and conspiring to sell a program that lets people who use Adobe Systems' eBook Reader copy and print digital books, transfer them to other computers and have them read aloud by the computer. The Moscow-based software company faces $2.25 million in fines if convicted of breaking the law, enacted in 2000 to bar the creation or distribution of technology that can be used to circumvent copyright protections." See: http://news.com.com/2100-1001-824877.html for details.

Bill C-48 in mid-December 2001, which ostensibly cleared the air by technically at least allowing Internet retransmission to take place but only under potentially onerous conditions that will be spelled out in regulations that were promised for the spring of 2002.(4)

This paper argues that iCraveTV's experience (and later, that of Jump TV) sheds light on four key "policy pivots" or tensions that will shape the government's copyright reforms:

1. Tension between new technology innovators and rights holders. This usually translates into lawsuits and aggressive lobbying. Although often ineffective in stamping out the offending behaviour, lawsuits nevertheless provide important precedents and legal opinions that may affect Phase III policy. They also buy time for content creators and older technologies to adapt to the new environment.
2. Tension between sovereignty and globalization. Many argue the Internet is ill-suited for regulation and consequently poses a threat to sovereignty and rights holders' ability to charge for the use of their products in different countries. The balance of power may now be changing, and states may soon be able to enforce digital "boundaries" in a way that was once believed impossible.
3. Tension between industrial policy objectives – namely, the development of Canadian expertise in leading-edge technology – and the needs of rights holders to protect their interests.
4. Tension between the need for economic incentives versus the need for a vibrant public domain.

A CLOSER LOOK AT INTERNET TELEVISION: THE CASE OF iCraveTV AND JumpTV

iCraveTV was launched in the fall of 1999. The company's business model was simple: it took television signals from the airwaves with an antenna located atop a building in Toronto, turned them into a digital format, rebroadcast them over the Internet, and sold banner advertising around a small "television" on the user's computer screen and throughout the web

(4) Bill C-48 was passed by the House of Commons Heritage Committee in June 2002 with a new so-called "carve out" clause that excludes Internet firms from the compulsory licensing scheme available to cable companies for the rebroadcasting of television signals. As of this writing (August 2002), the Bill was still awaiting approval from the Senate.

site. iCraveTV offered 17 channels in all, including most of the major Canadian (CBC, CTV, Global and City-TV) and U.S. stations (NBC, ABC, PBS and WB). To get to the actual television screen, users first had to pass through various verification and "clickwrap agreements" ostensibly designed to stop non-Canadian users from tuning in to its services, even though Canadian law does not, at this time, require retransmissions to stay in Canada.(5)

iCraveTV's arrival on the retransmission scene tapped into a pervasive fear amongst rights holders that the Internet undermines their ability to earn a living from their output by, for example, charging others for the right to use their products in different countries. To illustrate the power and pervasiveness of fear, consider that the Olympics are still not broadcast on the Internet because the International Olympic Committee (IOC) worries this would undermine its ability to sell broadcasting rights on a country-by-country basis. Within weeks of iCraveTV going to air, large rights holders lobby groups (including the Canadian Association of Broadcasters, Twentieth Century Fox, and Disney Enterprises) were threatening – and, in some cases, taking – legal action against the company. In February 2000, U.S. broadcasters obtained an injunction against iCraveTV. Later that month, iCraveTV took itself off the "air" after reaching an agreement with broadcasters and rights holders in Canada and the United States, leaving unresolved the question of whether its actions were legal *in Canada*.

iCraveTV's retreat did not deter Montréal-based JumpTV from moving into the Internet television business. In the summer of 2001, JumpTV asked the Copyright Board to set royalty tariffs for Internet retransmissions for 2001-2003. Despite opposition from rights holders, hearings were scheduled for December 2001. Unlike iCraveTV, JumpTV promised it would stay off the air until its Copyright Board hearings were finished. JumpTV also said it had technology that would ensure its rebroadcasts were available only in Canada, something no amount of clickwrap agreements could realistically do. In the end, however, JumpTV backed out of the hearings after it became clear the government planned to introduce legislation (i.e., Bill C-48) to address the Internet retransmission issue.

JumpTV's appearance on the scene so shortly after iCraveTV's demise suggests the Internet rebroadcasting question was far from settled both legally and technologically, as

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(5) Clickwraps are legally enforceable contracts whereby the terms of the contract are accepted by clicking the "I Agree" button. According to Michael A. Geist ("iCraveTV and the New Rules of Internet Broadcasting," *University of Arkansas at Little Rock Law Review*, Fall 2000, footnote 14), "parallels are often drawn to the software industry and their shrinkwrap contracting practices, in which the terms of the software license are only available to the purchaser after they purchase and open the product."

might have been surmised by what happened with a U.S. company called Napster, which allowed users to exchange copyrighted music free of charge in a file format known as MP3. At the same time that the U.S. recording industry was launching (ultimately successful) lawsuits against Napster, competing or similar services were springing up all over the Internet. These include, for example, programs like Gnutella, KaZaA and Freenet, which "distributed search and file sharing capability, bypassing a central server entirely, so that there would be no intermediary to sue and no records of who had transferred what files to subpoena."(6)

> … [A]ttempting to stop companies such as iCraveTV or Napster is much like playing the "whack a mole" game. For every iCraveTV that is stopped, two or three new versions will quickly appear. It becomes a never-ending fight resulting in wasted energy and legal bills.(7)

KEY LEGAL QUESTIONS

iCraveTV was launched shortly after the Canadian Radio-Television and Telecommunications Commission (CRTC) wrapped up a series of hearings on how it should deal with "new media" not explicitly under its mandate. The CRTC adopted a laissez faire approach designed to encourage the growth of the Internet as a new medium, rather than the regulatory approach many had expected. The CRTC's decision was seen as part of the country's broader effort to be a leader in the burgeoning field of high technology.

> … The CRTC heeded the barrage of submissions from media organizations imploring it to refrain from establishing new regulations. At that time they adopted a forward-looking approach that recognized both the futility of traditional regulatory approaches and the benefits of providing new media companies with the regulatory space to develop unhindered.(8)

As the Department of Canadian Heritage and Industry Canada put it, "the promotion of technological innovation in the media which connect Canadians to one another is an important element of Canadian public policy." iCraveTV interpreted these hearings – and the CRTC ruling (an "exemption order") that granted Internet firms a special exemption from the

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(6) Jessica Litman, *Digital Copyright*, Prometheus Books, Amherst, New York, 2001, p. 167.

(7) Geist (2000), p. 6.

(8) *Ibid.*, p. 1.

normal process that requires retransmitters to acquire a licence and pay broadcast royalties – as a "green light," that its efforts amounted to a clear-cut case of "innovation in the media which connect Canadians to one another."

> iCraveTV claimed to have the benefit of the Exemption for new media broadcasting undertakings, which *unconditionally* [emphasis added] exempts undertakings which 'provide broadcasting services delivered and accessed over the Internet' from the requirements to hold a broadcasting licence and conform with regulations made under Part II of the Broadcasting Act.(9)

University of Ottawa professor Michael Geist, who was hired by iCraveTV to provide an opinion on the legality of its retransmissions, argued the exemption order rendered iCraveTV's retransmissions legal under the *Broadcasting Act*.(10) As for the *Copyright Act*, the retransmission right is spelled out in Section 31, which says a retransmission is not an infringement of copyright 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.

Geist believed iCraveTV was on "safe ground" legally. First, it was clearly retransmitting a local signal, satisfying subsection (a). The CRTC's exemption order seemed to satisfy subsection (b). However, in Geist's words, subsection (c) was "the most challenging" because it could be satisfied only if iCraveTV retransmitted its signal in its entirety and simultaneously, something that would be difficult – if not impossible – to ensure, given the relative ease with which copies of broadcasts can be made, possibly undermining the potential

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(9) Department of Canadian Heritage and Industry Canada, "Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission Licence to the Internet," 2001, p. 5 of 18 in the Internet document, available at: http://strategis.ic.gc.ca/ssg/rp00008e.html.

(10) According to the Department of Canadian Heritage and Industry Canada (*ibid.*, p. 11), the *Broadcasting Act* also requires that retransmitters "provide efficient delivery of programming at affordable rates, *using the most effective technologies available at reasonable cost*" [emphasis added].

market for the product and surely violating the "simultaneous" retransmission provision.(11) Subsection (d) requires payment of all relevant royalties. Because there was no royalty structure for Internet retransmissions, iCraveTV could not technically be in violation. Although iCraveTV did eventually ask the Copyright Board to set Internet retransmission tariffs, there is some question as to whether the law as it stands would have forced it to pay anything at all.

Subsection (d) is also of interest because it is of a relatively recent vintage, a product of Phase I revisions to the *Copyright Act* and an enshrinement of the "technological neutrality" principle adopted by the government (i.e., all technologies or forms of communication are treated equally under the law) in 1989. Prior to that year, cable retransmitters did not have to pay any kind of royalties whatsoever to rights holders or the original broadcasters. A 1954 decision by the Exchequer Court of Canada drafted the law in technology-specific terms, noting that the so-called communication right (essentially a copyright over the broadcasting of one's efforts) applied only to "Hertzian waves," i.e., over-the-air transmissions.

SOME HISTORICAL AND ECONOMIC CONSIDERATIONS

Copyright means more than just the right to control reproductions (i.e., copy + right). As suggested by the French "droit d'auteur," copyright also includes the "moral rights of the author, which view literary and artistic works as extensions of the author's personality."(12) The moral rights of the author – which in Canada at least cannot be transferred but can be waived – can be dissected into three components, namely:

- the right to be known as the author of the work;
- protections against unauthorized alterations or mutilations of the work; and
- the right to withhold publication.

Copyright rules and the concept of intellectual property are relatively new, coinciding with the spread of capitalism and, not coincidentally, technological changes. In 1709,

(11) iCraveTV also removed closed captioning from its retransmission. Opponents also used this point to argue the company was in violation of the *Copyright Act*.

(12) Julio H. Cole, "Controversy: Would the Absence of Copyright Laws Significantly Affect the Quality and Quantity of Literary Output?" *Journal of Markets & Morality*, Vol. 4, No. 1, 2001, p. 113.

England passed the Statute of Anne, also known as "An Act for the Encouragement of Learning," after the invention of the printing press by Gutenberg in the fifteenth century ushered in a world where it was suddenly possible to make almost unlimited copies of documents quickly and cheaply, potentially without the author's knowledge, often without any remuneration to the author. According to U.S. legal scholar Stewart Sterk,[13] the Statute's preamble

> deplored the growing tendency of printers and booksellers to reprint books 'without the Consent of the Authors or Proprietors … to their very great Detriment, and too often to the Ruin of them and their Families.' … not only were these printers and booksellers usurping revenues from more deserving authors, but copyright legislation also was needed 'for the encouragement of learned men to compose and write useful books.'

Based on this preamble and the nature of the word itself, it would seem that copyright law has always been about protecting the creator's financial interests. U.S. legal scholar Jessica Litman argues, however, that copyright laws have long sought a balance between two broadly defined competing interests, namely, the author's right to derive some income from his/her work versus society's interest in having these works widely disseminated and available in the commons. Overly strong copyright law could limit the dispersion of an author's ideas, to the detriment of those who could not afford to pay for the service but who may be able to put the ideas to good use, and hence benefit society as a whole. Overly weak copyright law, on the other hand, could lead to inadequate supply of socially necessary knowledge: too few chemistry textbooks, too few instructional manuals, too few plays and concertos. To some extent, however, the tension between these competing aims was lessened by the very technology that fostered the debate in the first place: printing presses were and are relatively easily regulated and, with the possible exception of sheet music, there were no readily available means of copying the "sounds" of music until well into the twentieth century. The technology, in other words, came bundled with its own physical constraints, its own copyright police. Copyright enforcement was, compared to the modern situation, *relatively* easy.

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(13) See Stewart E. Sterk, "Rhetoric and Reality in Copyright Law," *Michigan Law Review*, 1996, pp. 1197-1249.

FOUR KEY POLICY PIVOTS

Four areas of tension that will likely shape Phase III changes can be distilled from this overview. First, rights holders as well as representatives of the older technologies fear that the Internet threatens their ability to earn a livelihood and have turned to lawsuits to protect their interests. This kind of response is not new.(14) Broadcasters and rights holders, for example, opposed the technologically specific "Hertzian wave" rule that essentially subsidized the cable industry for more than 30 years. In the case of iCraveTV, the response was lawsuits. In the case of JumpTV, rights holders tried to block the Copyright Board hearings altogether. These tactics may serve a purpose beyond the obvious effort to stop the offending activity or technology.(15) For older industries and copyright holders, such tactics may also buy them time to better understand and exploit the new technology or push for the legal protections they feel are necessary to work in the digital era.(16) It is well known that new communication technology rarely completely eliminates the old; rather, the new tends to complement the old.(17)

Second, the debate around iCraveTV and JumpTV exposed a larger tension between sovereignty and globalization. Rights holders wanted to shut down iCraveTV because it threatened their ability to sell their output in different markets, according to different copyright rules. Unlike cable and, to a lesser extent, satellite broadcasts, a program streamed on the Internet can, with some ease, be copied and distributed at no cost around the world. Why would anyone pay for a television show or put up with advertising when they can get it cost- and advertising-free from their local neighbourhood pirate?

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(14) For example, Litman (*supra*, note 6, pp. 38-39, p. 47) shows how composers, sheet music publishers and musicians in the early 1900s attempted to limit or block the spread of player pianos and "talking machines." These two infant industries were initially excluded altogether from negotiations that led to the passage of the 1909 *Copyright Act* in the United States. As she goes on to note, "the infant industries found the 1909 act ambiguous and its application to their activities uncertain until the courts issued an authoritative ruling."

(15) Generally, existing interests will at least initially have deeper pockets than the representatives of the new technologies and can therefore have some success in slowing their growth through legal means.

(16) Many radio stations (and increasingly, broadcasters) already stream their signals over the Internet. This practice, according to the Copyright Policy Branch of the Department of Canadian Heritage and the Intellectual Property Policy Directorate of Industry Canada, does not "apparently" constitute a retransmission for the purposes of the compulsory licensing scheme. There is clearly some ambiguity as to whether broadcasters (radio and television) should themselves be paying royalty fees for their Internet activities. A similar debate has emerged with newspapers that publish articles both in print format and on the Internet.

(17) For example, it was widely believed that the advent of television sounded the death knell of radio. History has shown that this did not take place.

Internet retransmitters, on the other hand, wanted to be treated the same way as cable and satellite retransmitters (the so-called "technologically neutral" view), arguing it is unfair to expect them to perfectly control what happens to their rebroadcasts once they are in the hands of consumers. Moreover, as the Department of Canadian Heritage and Industry Canada note, there has always been appreciable signal "bleeding" with satellites and conventional over-the-air television signals. Internet retransmitters further argue it is becoming increasingly feasible to restrict access to a defined border area, as suggested by JumpTV's belief that its technology would placate U.S. media firms. Two major initiatives led by the private sector are working at creating "universal" identification for Internet users, and several Internet gambling sites already have technology that can identify and block users from countries that object to the practice.(18) Microsoft has programmed its Windows XP operating system to "support digital rights management ("DRM") schemes that will allow the movie studios and record companies to protect their digital content by encrypting it and attaching usage rules." As well, manufacturers are increasingly being convinced to embed copyright technology into their digital devices.(19) Governments could also create their own digital identifications that would tell a JumpTV-like service whether a given user was Canadian or not. "With a simple way to verify citizenship, a simple way to verify that servers are discriminating on the basis of citizenship, and a federal commitment to support such local discrimination, we could easily imagine an architecture that enables local regulation of Internet behaviour."(20)

Third, industrial policy objectives will compete with the interests of rights holders in Phase III changes to the *Copyright Act*. Recall that the CRTC issued its exemption order for Internet activities because its policy goal was to help Canada become a world leader in the development of Internet-based technologies. This ruling paved the way for iCraveTV to go to the air – a move that threatened rights holders. Media reports following Bill C-48 suggest there is some policy conflict between the two departments charged with regulating broadcasting and telecom undertakings, namely the Department of Canadian Heritage, which generally wants to

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(18) See Steven Bonisteel, "Universal Net ID Consortium Says Momentum Growing." See also "Rise of Internet 'Borders' Prompts Fears for Web's Future," by Arianna Enjung Cha, *The Washington Post*, 4 January 2002, p. E01.

(19) See Chris Sprigman, "Lockware: The Promise and Peril of Hollywood's Intellectual Property Strategy for the Digital Age," *FindLaw*, available on-line at: http://writ.news.findlaw.com/commentary/20020103_sprigman.html.

(20) Lawrence Lessig, *Code and Other Laws of Cyberspace*, New York, Basic Books, 1999, pp. 56-57.

protect or enhance rights holders, and Industry Canada, which has traditionally been charged with furthering Canada's industrial-policy goals.(21) This may explain why most of the real "policy-making" in Bill C-48 was, at least until the Internet carve-out amendment from June 2002, left to the regulations.

Fourth, the Internet retransmission issue reveals the tension between rights holders' moral and economic rights versus society's right to also have information freely available in the public domain. The most strident arguments against iCraveTV and JumpTV evoked an economic argument that says that without strong copyright laws there would be little or no incentive for artists to create any further works. In the words of Michael McCabe, formerly of the Canadian Association of Broadcasters, "If copyrights are devalued by cheaters and takers, nobody will have any incentive to create, and everyone will be worse off." Jack Valenti, president and chief executive officer of the Motion Picture Association of America, hit on the same theme with his remarks at a meeting of the House of Representatives' Committee on Commerce Subcommittee on Telecommunications, Trade and Consumer Protection. He said that government officials should "hugely care" about companies like iCraveTV because "creative works do not spring from a void. … It is the summation of massive infusion of risk capital that must be, for the most part, recouped else works dry up."(22)

CONCLUSION

These four tensions or policy pivots are not an exhaustive list of the broad policy themes that will underpin Phase III changes. There are other key policy pivots that may shape Phase III revisions to the *Copyright Act*, including, for example, the nationals treatment rule, which says a country must treat foreign copyright holders the same way it treats domestic copyright holders, as well as the balance-of-payment implications of extending copyright protection. As noted at the outset, these four themes are merely meant to be suggestive and contextual to the 12 (now 11, with Bill C-48) issues outlined by the Department of Heritage Canada and Industry Canada, including the retransmission issue examined in some detail here.

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(21) See, for example, "Copps Aims to Maim Web "Pirates"; New Legislation Will Bring Copyright to the Internet," *The Toronto Star*, 12 December 2001, p. 2.

(22) See "Video on the Internet: iCraveTV.com and Other Recent Developments in Webcasting," Hearings before the Subcommittee on Telecommunications, Trade and Consumer Protection of the Committee on Commerce, House of Representatives, from 16 February 2000. See the Selected References section of this paper for Internet link.

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