

# **iCraveTV.com: Pioneer of the Digital 'Wild West' or Twenty-First Century Pirate?**



**By: Corey D. Steinberg**



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At the tail end of the Twentieth Century North America's television broadcasters were given a rude awakening to the reality of the upcoming Digital Millennium. Amid virtually no fanfare, and certainly no publicity, iCraveTV.com was born on November 30, 1999. iCraveTV.com was a World Wide Website created with the sole raison d'être of providing Internet users with the means of accessing television directly via their computers. This revolutionary idea and pioneering spirit, however, were met by cease-and-desist orders, threats of litigation, and accusations of various types of malfeasance including several forms of intellectual property law infringement.

## **(I) What was iCraveTV.com?**

iCraveTV.com is difficult to sum up in a simple definition that merely delineates the function the service performed. It is many different things to different parties. One's description of it depends on one's individual circumstances and personal interest in the website.

### ***(a) The Evolution of Television***

Viewed from the perspective of the Internet user this website was simply a means of accessing television via the World Wide Web. This service was merely the next stage in the evolution of television. The convergence of various media is becoming commonplace in the modern broadcasting-telecommunications world and iCraveTV.com was perceived by many to be nothing more spectacular or outrageous than the most obvious next step in this trend.

"Bill Gates is spending a lot of money bringing the Internet to the family television," said Bill Craig, president of the company

that operates iCraveTV.com. 'We're spending a lot less to bring television to the Internet.'<sup>1</sup>

The justifications for bringing television online are essentially two. First, representatives of iCraveTV.com extol the convenience of this convergence of media. Second, they assert the inevitability of this meritorious evolution of television viewing, into a more 'personal experience.'

William Craig explains:

"The Internet is a very personal experience -- the P in PC stands for personal. When you sit down at a computer, it is just you and the Internet. When you sit down at the family television, it is a shared experience. ... Is an 18-year-old girl going to sit there, while Mom and Dad are watching TV, and write E-mails? No. But will she go to her room and watch *Kids in the Hall* while she writes E-mail? It is a sounder concept."<sup>2</sup>

This entity, however, could be and has been described in other, often derogatory, ways.

### **(b) Experiment in Canadian Intellectual Property Law**

iCraveTV.com could be described as a callous experiment in Canadian intellectual property law. This website is experimental in that it provided a service that intuitively appears to be illegal. According to Canadian copyright and broadcast law, however, the service provided by the site may be legitimate.

"Basically, the rebuttal is based on a simple claim: the Net is just like cable. Canadian law allows cable companies to retransmit broadcast signals without asking permission or paying licensing fees, so long as they don't alter the signal in any way.

<sup>1</sup> T. Cohen, "'real time' TV on Web under fire" *Associated Press* (7 December 1999) <http://www.sjmercury.com/svtech/news/breaking/ap/docs/11638271.htm>.

<sup>2</sup> S. Craig, "The end of TV as we know it" *globetechnology.com* (17 December 1999) <http://www.globetechnology.com/>.

iCraveTV.com streams TV signals live and unaltered, says Craig, and it too is exempt."<sup>3</sup>

### **(c) Twenty-First Century Pirates**

Some have called the site a brazen attempt at theft via copyright piracy.<sup>4</sup> This line of thinking spawned the broadcast industry's pejorative term for the website, 'iStealTV.'<sup>5</sup>

There is little doubt that the service offered by this website is a form of intellectual property theft in the United States. No exemption for local rebroadcasts exists under the American Copyright Act, as in the Canadian equivalent.

Duke University Law School Professor David Lange explains:

"If nothing but American law were involved, it would be hard to see in what way [Craig] was not violating copyright law ... The problem is, he says he has a Canadian license. If so, the question is: At what point does a fairly clear violation become offset by a license from Canada?"<sup>6</sup>

As much of the most economically valuable content available on iCraveTV.com was American in origin it is of little surprise that most of those publicly speaking out regarding the service espouse the belief that the site was undeniably stealing broadcast material.

"Ten major motion picture studios and three broadcasting companies say the company - and its putative president and chief executive officer, William R. Craig - are shameless cyberthiefs and have slammed iCraveTV and others with a lawsuit for copyright and trademark infringement, dilution, unfair competition, and civil conspiracy (*Twentieth Century Fox Film Corp. v. iCraveTV, W.D. Pa.*, No. 00121, filed 1/20/00)."<sup>7</sup>

<sup>3</sup> C. Bicknell, "They Crave Suits v. IcraveTV" *Wired News* (16 December 1999) <http://www.wired.com/news/business/0,1367,33093,00.html>.

<sup>4</sup> D. Standeford, "U.S. Studios, TV Stations Charge iCraveTV with 'Brazen' Cyberpiracy" *American Lawyer Media's IP Law Weekly* (28 January 2000) <http://www.almdc.com/>.

<sup>5</sup> S. Craig, "The end of TV as we know it" *globetechnology.com* (17 December 1999) <http://www.globetechnology.com/>.

<sup>6</sup> D. Standeford, "U.S. Studios, TV Stations Charge iCraveTV with 'Brazen' Cyberpiracy" *American Lawyer Media's IP Law Weekly* (28 January 2000) <http://www.almdc.com/>.

<sup>7</sup> Id.

Motion Picture Association of America President and Chief Executive Officer Jack Valenti belittles any credence given to the Canadian exemption from copyright infringement:

"Craig is a pioneer 'like a burglar busting into a bank that's never had a burglary before,' Valenti said. And as for possible defenses to the lawsuit, Valenti said, 'The only rebuttal he can make is something written in some indecipherable language. He can't do it in English.'"<sup>8</sup>

## **(II) What did iCraveTV.com do?**

It has been established thus far that iCraveTV.com provided television over the World Wide Web. It has been stated that this act resulted in numerous accusations of malfeasance. It has also been suggested that this website's activities may be completely legitimate in Canada.

These assertions require expounding. Moreover, they tend to give rise to further questions. These questions are those such as, *'How did iCraveTV.com provide television online?'* or *'Why would this act be illegal?'*. Conversely perhaps one might ask *'How could this service possibly be legal in Canada?'* and, assuming that this is the case within Canada, *'Does the Internet not reach all jurisdictions in the world making Canadian law merely a small facet of the legal regime pertaining to iCraveTV.com?'*

An examination of the legal issues surrounding iCraveTV.com will answer these queries.

### **(a) What means were used by iCraveTV.com to provide its service?**

The technology used by iCraveTV.com to acquire its broadcast signals was hardly revolutionary. The company merely commissioned the erection of huge antennae in

strategic locations to intercept signals as they are broadcast from their points of origin. These antennae were erected near the company's home office in Ontario fairly close to the Ontario-New York State border.<sup>9</sup> Via these means, it is possible to catch signals from both Ontario and New York State.

In this way iCraveTV.com successfully intercepted 17 different broadcast signals.

"The company relays signals from 17 channels that are currently available off the airwaves over its home base of Toronto. Those channels represent most of Canada's broadcast television networks - including the publicly funded Canadian Broadcasting Corporation - as well as such US-based services as NBC, CBS, ABC, Fox, and PBS."<sup>10</sup>

Once captured, these signals were 'digitised' by a computer and 'compressed'. These compressed versions of the original broadcasts were then small enough that they could be feasibly 'streamed' over the Internet.

Counsel for one group of plaintiffs who sought a legal remedy against iCraveTV.com summed up this process neatly:

"iCraveTV intercepts copyrighted television signals, digitizes and compresses them, and then transmits or 'streams,' the programming over the Internet to viewers who receive it on their computers, surrounded by advertising sold by iCraveTV. The sounds and images of the copyrighted television programming are thereby made available to viewers who access the iCraveTV.com web site."<sup>11</sup>

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<sup>8</sup> Id.

<sup>9</sup> The company did, however, have plans to erect broadcast towers in the West, as well, to take advantage of the two different time zones with their corresponding broadcast schedules.

"We're actively planning it. We've done all the research, we've got a site location. That's what we plan to do next," said William Craig, founder and president of iCraveTV.com. "It's been our plan all along to pick up a Western time zone. Picking up four or five CTV stations doesn't make sense unless it's in different time zones." (B. Shecter, "Rebel web broadcaster expands to the West" *Financial Post* (16 December 1999)).

<sup>10</sup> S. Bonisteel, " iCraveTV.com Has Cross-border Webcasting Plan" *Newsbytes News Network* (5 January 2000) <http://www.newsbytes.com/>.

<sup>11</sup> *National Football League v. iCraveTV* (W. D. Pa., No. 00120, filed 20 January 2000) at para. 38.

**(b) How did an Internet user view the signals once received?**

Internet users were able to view the signals in a format that roughly resembled television through the use of software called Realplayer. This software is available free of charge online at the RealNetworks.com website at <http://www.realnetworks.com/>.

Complaints abounded, however, over the quality of this reception. The picture quality was hardly comparable to that of even the most primitive of television sets. The Realplayer image tended to be jumpy, unclear, and inconsistent.

Craig Bicknell explains some of the complaints made by broadcasters:

"Broadcasters mock Craig's claim that the Net, with its clunky streaming video, offers unaltered programming. 'If you thought [Denver Broncos quarterback] Brian Griese looked slow on TV last Monday, you should have seen him on the Net,' said NFL spokesman Brian McCarthy. 'Obviously this is not the quality that NFL fans expect.'"<sup>12</sup>

This problem may be exacerbated depending on the user's individual connection to the Internet. A 'dial-up connection' via a standard modem resulted in the lowest possible quality of picture when watching television via iCraveTV.com. This was a result of the 'bottleneck' that occurred when the user attempted to receive such massive amounts of data through a connection that, at best, could receive information at 56 kilobytes per second. This bottleneck resulted in delays between the last bits of information received and the next bits.<sup>13</sup> This manifested in a picture that is disjointed or periodically paused due to 'net congestion'.

<sup>12</sup> C. Bicknell, "They Crave Suits v. iCraveTV" *Wired News* (16 December 1999) <http://www.wired.com/news/business/0,1367,33093,00.html>.

<sup>13</sup>In order to grasp this concept, imagine a large crowd of people leaving a room simultaneously through a single door. As the crowd reaches the doorway, some force their way through, while others step aside and allow people to pass. This creates a situation wherein a number of people may pass through smoothly for a few seconds, followed by a lull when no one passes through, followed by a group passing through continuously for a few seconds, followed by another lull and so on. The people are analogous to the large amount of data sent by iCraveTV.com and the doorway is like a 56kbps modem. Just as certain people will

'High-speed connections,' such as cable, ADSL, ISDN, T1, or T3 connections to the Internet, with speeds as high as 100 times or greater than that of standard modems, were able to rectify this problem to a degree. Even with such modern connections, however, picture-quality still did not even closely resemble that of an inexpensive television set with a standard television-cable connection.

### **(3) What could be illegal about iCraveTV.com?**

iCraveTV.com has been accused of various legal transgressions. Accusations came via cease-and-desist orders. Accusations were also made publicly in the media. Eventually these accusations crystallised in the form of two civil actions being launched in Pennsylvania (later followed up by two more), and one in Canada.

In order to determine all the possible transgressions of law that may have been made by iCraveTV.com, all one must do is examine the complaints that initiated these proceedings.

#### ***(a) Canadian Association of Broadcasters v. iCraveTV.com***

The Canadian lawsuit was somewhat of a superfluous gesture as it was initiated after the American courts had already addressed the situation. The Canadian plaintiffs, the Canadian Association of Broadcasters, were twenty-four hours too late to request that the court enjoin iCraveTV.com from doing anything, as the site had ceased operating the day before. The plaintiffs were merely threatening immediate action in the event that

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pass through the doorway, but will then wait to leave the area until the rest of their group also passes through, some data will be received by the modem but will not be able to be represented on the computer monitor until joined by further data. This appears as jumps or even full pauses in the video being displayed.

iCraveTV.com did not continue to comply with the temporary injunction already awarded in Pennsylvania.

"The Canadian broadcasters say iCraveTV had violated their copyrights by showing their content online without permission. The group is asking for \$75 million in damages and another \$1.1 million a day if iCraveTV goes back online."<sup>14</sup>

The Canadian case was based solely on copyright infringement.<sup>15</sup>

**(b) *National Football League v. iCraveTV.com; Twentieth Century Fox v. iCraveTV.com***

In contrast to the Canadian case, which arose 'a moment too late,' the American actions were initiated 'not a moment too soon.' These cases were launched in earnest attempts to shut down iCraveTV.com in time for the pending Super Bowl airing the following day. The plaintiffs in one of the cases who held a proprietary interest in the football game were anxious to meet this deadline, as the Super Bowl is one of the world's most economically valuable broadcast events, in terms of its licensing and advertising revenues.

The complaints filed in these cases accused iCraveTV.com of a vast array of improprieties. The equitable remedy sought (and obtained) was an immediate, temporary injunction enjoining the website from operating pending litigation.

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<sup>14</sup> J. Borland "New lawsuit targets Net's iCraveTV" *CNET News.com* (31 January 2000) <http://news.cnet.com/news/0-1004-200-1538429.html?tag=st.ne.1002..>

<sup>15</sup> According to Peter Grant, the lawyer from McCarthy Tetrault who represents the Canadian Association of Broadcasters, the suit would have been for both copyright and trademark infringement, but by limiting the suit to copyright infringement it was possible to move the case through the courts more quickly.

"We are not precluded from bringing trademark action in the future,' Mr. Grant said. However, he said that by pursuing solely copyright damages it allowed the plaintiffs to expedite their case through the court system." (J. Borland "New lawsuit targets Net's iCraveTV" *CNET News.com* (31 January 2000) <http://news.cnet.com/news/0-1004-200-1538429.html?tag=st.ne.1002..>)

One of the Pennsylvania cases was launched by the National Football League, National Basketball Association, and NBA Properties Inc. ("Sports Leagues"). The other case was launched by Twentieth Century Fox, Disney, Columbia Tristar Television, Columbia Pictures Television, Columbia Pictures Industries, M.G.M., Orion, Paramount, Universal, Time Warner, A.B.C, C.B.S., and Fox ("TV-Movie Group"). Collectively, the two cases accused iCraveTV.com of unfair competition, civil conspiracy, interference with the performance of a contract, false designation of the origin of services, registered trademark dilution, direct copyright infringement, and contributory copyright infringement.

This approach used for seeking an injunction is known among legal practitioners as 'the scattergun approach' to litigation. It is evident that the Pennsylvania lawyers were hastily accusing iCraveTV.com of every possible act of malfeasance remotely applicable to the website. It is not particularly necessary, therefore, to examine all of these accusations in detail, as some are tangential to as well as contingent upon the determination of the core issues. This does not, however, preclude any or all of them from potentially being valid accusations at law.

***(c) Charges Brought Against TVRadioNow and iCraveTV.com***

Let us briefly address and dispel with the relatively tangential charges first.

**(i) Unfair Competition and Civil Conspiracy with the Intent to Unfairly Compete**

The charges of unfair competition and civil conspiracy are related and can be addressed together. According to the TV-Movie Group, by operating iCraveTV.com, the company TVRadioNow "engaged in unfair competition under the common law of the

Commonwealth of Pennsylvania and other states to the detriment of plaintiffs in violation of the law."<sup>16</sup> As well, it was alleged that each of the individual defendants, "intentionally and willfully entered into an agreement in combination and conspiracy with the intent to unfairly compete with the plaintiffs."<sup>17</sup>

These accusations are not a matter of policy analysis. Such charges turn on their facts. These accusations at common law are intentional torts. A court, therefore, must determine factually whether or not these particular executives actually sought to compete unfairly in the broadcast industry to sustain a charge of unfair competition. Further, in order to prove a case of civil conspiracy, a court would have to determine if these defendants actually collaborated together with the intent to compete unfairly.

Lord Simon L.C. explains:

"The question to be answered, in determining whether a combination to do an act which damages others is actionable ... is not 'did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action,' but 'what is the real reason why the combiners did it?' Or, as Lord Cave puts it, 'what is the real purpose of the combination?' The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realize or should realize will follow, but what is in truth the object in the minds of the combiners when they acted as they did."<sup>18</sup>

In order to answer this question one would require evidence pertaining to the actions and intent of the defendants when they devised and implemented iCraveTV.com. As well, these questions would be difficult to decide without first determining whether or not any of the other charges against the defendants were valid. If the defendants were in compliance with the law in all other respects it would be difficult to accuse them of unfair

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<sup>16</sup> *Twentieth Century Fox Film Corp v. iCraveTV* (W. D. Pa., No. 00121, filed 20 January 2000) at para. 79.

<sup>17</sup> *Id* at para. 83.

competition in the absence of any evidence of other, specific actions also taken to that effect. Moreover, if they are not guilty of unfair competition, it logically follows that the defendants could not be guilty of conspiring to compete unfairly.

As the answers to these issues are matters of fact rather than policy, which require evidence specific to the in-house dealings of TVRadioNow, they are outside the ambit of this paper. Moreover, as the determination of the validity of other charges laid would likely have a direct bearing on the unfair competition charges, it would be prudent to leave these unfair competition issues and move on to the other charges against iCraveTV.com.

(ii) Interference with the Performance of a Contract

The charge of interference with the performance of a contract made against TVRadioNow by the Sports Leagues is also an intentional tort. The Sports Leagues maintain that:

"By transmitting programming that the Sports Leagues have exclusively licensed to others, and by framing competing advertising material adjacent to that programming, iCraveTV has made the Sports Leagues' performance of their contracts more burdensome and has interfered with the benefits that their telecast licensees bargained for when they contracted for exclusive telecast rights of the Sports Leagues' game telecasts."<sup>19</sup>

This tort, like those of unfair competition and civil conspiracy, depends on the determination of other accusations made against TVRadioNow. If the service provided by iCraveTV.com and all actions by TVRadioNow were within legal bounds, any weight that this charge of tortious conduct may have is thereby negated.

Gale J. explains:

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<sup>18</sup> *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* [1942] A.C. 435 at 444-5.

"(I)f a person without lawful justification knowingly and intentionally procures the breach of a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong. That wrong does not rest upon the fact that the intervenor has acted in order to harm his victim, for a bad motive does not *per se* convert an otherwise lawful act into an unlawful one, but rather because there has been an unlawful invasion of legal relations existing between others."<sup>20</sup>

The Sports Leagues are accusing TVRadioNow of making it more difficult for them to fulfil their obligations under exclusive contracts made with other parties by virtue of an illegal act. This, like the torts already discussed, is an issue that turns on the determination of other charges laid against the company. If iCraveTV.com's existence is inherently illegal, then the Sports Leagues might have a case for this tort. If, however, the service provided by TVRadioNow's site is legal, then the Sports Leagues do not likely have any such meritorious claim.

If iCraveTV.com was operating within the law, then the mere fact that its existence harms the Sports Leagues does not qualify it as an intentional tort, even if TVRadioNow had anticipated this result. "(T)he fact that the intervenor (*TVRadioNow*) has acted in order to harm his victim (*Sports Leagues*), for a bad motive does not *per se* convert an otherwise lawful act into an unlawful one."<sup>21</sup>

If iCraveTV.com's existence is found to be within the law, this impugned 'tortious conduct' could be more accurately characterised in terms of laissez-faire business competition.<sup>22</sup> As the status of iCraveTV.com within intellectual property law is at issue, and this tort turns on the website's legal status, a discussion of this tort, like unfair

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<sup>19</sup> *National Football League v. iCraveTV* (W. D. Pa., No. 00120, filed 20 January 2000) at para. 64.

<sup>20</sup> *Posluns v. Toronto Stock Exchange* [1964] 2 O.R. 547, 46 D.L.R. (2d) 210 (H.C.) at 261.

<sup>21</sup> *Id.*

<sup>22</sup> Characterised in this manner the actions of TVRadio Now, rather than being deemed tortious by an American court, should be applauded as upholding one of the truest of American traditions.

competition and civil conspiracy, is also outside the ambit of this paper. It would be far more productive to move straight to the intellectual property issues themselves.

(iii) False Designation of the Origin of Services and Registered Trademark Dilution

(A) False Designation of the Origin of a Service

False designation of the origin of a service is a charge of 'confusion' under the American equivalent of the Canadian Trade-Marks Act.<sup>23</sup> The American act is found at Section 43(a) of the Lanham Act and is commonly called the Lanham Trademark Act.<sup>24</sup> TVRadioNow was charged under the Lanham Trademark Act at §1125(a)(1)(A).

This subsection of the American statute reads:

"1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person

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shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."<sup>25</sup>

This legislation aims at preserving the goodwill generated by a company with or without a registered trademark. It is roughly equivalent to a Canadian common law

<sup>23</sup> *Trade-Marks Act*, R.S.C. 1985, c. T-13.

<sup>24</sup> *Lanham Trademark Act*, 15 U.S.C. §§ 1114-27.

<sup>25</sup> *Lanham Trademark Act*, 15 U.S.C. § 1125(a)(1)(A).

action in 'passing off.'<sup>26</sup> Both the Canadian common law action and the American codified version seek the same objects. They both aim to protect the goodwill of a company from misrepresentations made by third parties.

Prof. David Vaver of Osgoode Hall Law School explains the Canadian passing off action:

"Passing off aims primarily to prevent the disruption of economic relations by misrepresentations. So proof is required of

- a reputation or goodwill acquired by the plaintiff in its business name, mark, or other trading symbol
- a misrepresentation by the defendant causing deception or confusion between the two enterprises
- actual or likely damage to the plaintiff; and
- no reason of public policy to withhold a remedy."<sup>27</sup>

The charge laid under the American law essentially accuses iCraveTV.com of attempting to give the impression that the material, which it provided over the Internet, was attributable to or endorsed by the telecasters who initially broadcasted this material for television reception.

The TV-Movie Group's complaint to the court described this infringement of the Lanham Act:

"Through the acts described above and the false and misleading representations made by iCraveTV and presented at the iCraveTV.com site, defendants are conveying the false and misleading representation that plaintiffs as well as the legitimate telecasters of plaintiffs' programming (such as the Network Plaintiffs and the Buffalo television stations), endorse the iCraveTV site."<sup>28</sup>

The complaint went on to say:

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<sup>26</sup> It is relevant to consider the Canadian law in this regard, as well as the American law, due to comments made by Peter Grant, counsel for the Canadian Association of Broadcasters, that an action in trademark infringement could be brought in the future. The Canadian suit that was actually launched focused only on copyright infringement, but this was an effect of expedience rather than any lack of merit to a claim for trademark infringement. (see fn. 15)

<sup>27</sup> D. Vaver, *Intellectual Property Law* (Irwin Law, 1997) at 178.

<sup>28</sup> *Twentieth Century Fox Film Corp v. iCraveTV* (W. D. Pa., No. 00121, filed 20 January 2000) at para. 62.

"In addition, defendants are falsely representing that iCraveTV owns the material that is 'streamed' on the iCraveTV.com Internet site, including plaintiffs' programming when iCraveTV in fact has no such ownership interest or other rights in such materials."<sup>29</sup>

The TV-Movie group is concerned that the misrepresentation that they endorse iCraveTV.com is likely to deceive Internet users. The effect of this deceit would be to diminish the goodwill built up by these companies over their years of operation.

This is a reasonable concern. Due to the poor quality video a user receives when viewing iCraveTV.com, members of the TV-Radio Group have a legitimate concern that viewers will attribute this low quality product to them. An association with such an aesthetically substandard video service could certainly affect public perception of the companies comprising the TV-Movie Group. A drop in public confidence of this nature could result in detrimental economic ramifications for the companies.

False assertions insinuated by the iCraveTV.com website exacerbate this concern.

The TV-Movie Group's complaint to the court explains:

"Plaintiffs own or control rights under both federal law (the Lanham Act) and under state law in many trademarks. ... Defendants are unlawfully using these trademarks on their site and thereby improperly conveying the impression that the iCraveTV.com site is sponsored by, affiliated with, or otherwise authorized by plaintiffs."<sup>30</sup>

These are the claims upon which the TV-Movie Group alleges an infringement of §1125 of the Lanham Trademark Act. It should be noted that American courts have interpreted this legislation broadly. Joyner J. of the same court that heard the iCraveTV.com complaints definitively made this point:

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<sup>29</sup> Id. at para. 63.

<sup>30</sup> Id. at para. 52.

"This section is traditionally construed broadly, so as to protect the remedial nature of the Act."<sup>31</sup>

Due to the similarity this legislation bears to a Canadian passing off action, let us consider Vaver's criteria for such an action, outlined above, as they apply to the facts alleged by the TV-Movie Group in this case. As the American legislation is to be "construed broadly" by the courts, it is reasonable to presume that an action that could meet Vaver's criteria for a Canadian common law action would also meet this "broad" American standard.

The first criterion is that the plaintiff companies must have attained a reasonable degree of goodwill. This hardly seems to be at issue when discussing the largest television and movie companies in the world. Undoubtedly, such entities possess a great deal of goodwill in the public marketplace. Many years of and vast amounts of money expended on advertising and production by these companies have ensured this.

The second criterion seems to be, *prima facie*, met as well. If the complaint made to the court is accurate; the iCraveTV.com website certainly seems to be making a 'misrepresentation' to the public giving the false insinuation that the TV-Movie Group endorses it. This is reasonably likely to cause 'deception' or 'confusion' in the minds of viewers, thereby meeting the second of Vaver's criteria.

The third criterion also seems likely to be met. This criterion requires the actual or likely event of damage to the plaintiff. The TV-Movie Group's collective reputation is at risk. If Internet users believe that the low quality image displayed on their computer screen is attributable to the complainants, the TV-Movie Group's collective reputation for professional quality is likely to be damaged. This satisfies the third of Vaver's criteria.

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<sup>31</sup> *Barmasters Bartending School, Inc. v. Authentic Bartending School, Inc.* 931 F.Supp. 377 at 384 (E. D.

The fourth criterion, objections to a remedy based on public policy, does not seem to pose a problem either. There appear to be no obvious reasons why enjoining TVRadioNow from continuing its operation of iCraveTV.com should be contrary to public policy. There are neither any obvious risks to public safety nor any grave issues of irreparable harm or injustice that could occur as a result of enjoining iCraveTV.com from operating.

According to Vaver's criteria for passing off, therefore, iCraveTV.com appears to be infringing Canadian intellectual property law. A passing off action would be meritorious and likely successful if it was brought in Canada. As S.1125(a)(1)(A) of the Lanham Trademark Act is essentially an American codification of this Canadian common law action, and due to the 'broad construal' given to this legislation in the American courts, the success of a proceeding under this section *prima facie*, also appears likely.

(B) Registered Trademark Infringement and Dilution

Apart from the charge made under the Lanham Act for the 'false designation of the origin of the service' provided by iCraveTV.com, TVRadioNow was also charged with a state-codified offence at trademark law. This second allegation focuses specifically on the dilution of registered trademarks. This state law has no 'natural name,' but is codified as 54 Pa. C.S.A. § 1124.

The relevant provision of this statute reads:

"The owner of a mark which is famous in this Commonwealth shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use of a mark or trade name

if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark."<sup>32</sup>

This legislation has a rough equivalent in the Canadian Trade-marks Act<sup>33</sup> in Sections 20(1) and 22(1) combined, which read:

**"20. (1) Infringement.** - The right of the owner of a registered trade-mark to its exclusive use shall be deemed to be infringed by a person not entitled to its use under this Act who sells, distributes or advertises wares or services in association with a confusing trade-mark or trade-name."<sup>34</sup>

**"22. (1) Depreciation of goodwill.** - No person shall use a trade-mark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto."<sup>35</sup>

The Canadian legislation is somewhat broader than the Pennsylvania law insofar as the remedies it makes available to a plaintiff. A greater number of options for relief, such as damages, are available under the Canadian act. Under the Pennsylvania law, a plaintiff is limited to an equitable remedy in the form of an injunction. The delineation of the infringement, however, is essentially the same under both laws.

Both laws seek to avoid the 'dilution' of a registered trademark through the actions of 'free-riders' that trade on the goodwill of others. An interpretation of a trademark dilution claim in Pennsylvania, in the case of *Hershey Foods*, explains that while the defendant's mark does not confuse consumers as to the source of the goods, it leads consumers to believe that the plaintiff's mark now identifies two different sources of goods. This potential association by consumers dilutes the mark's ability to identify the plaintiff's goods alone.<sup>36</sup>

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<sup>32</sup> 54 Pa. C.S.A. § 1124.

<sup>33</sup> See fn. 26.

<sup>34</sup> *Trade-Marks Act*, R.S.C. 1985, c. T-13, S. 20(1).

<sup>35</sup> *Id.* S. 22(1).

<sup>36</sup> *Hershey Foods Corp. v. Mars, Inc.*, 998 F.Supp. 500 (M.D.Pa.1998).

Vaver explains that this is essentially the same interpretation given to the Canadian act:

"A mark may be used non-confusingly, but in a way that may tarnish its image or reduce its drawing power. Suppose ROLEX is marked on condoms; or a sign is put up beside a ROLEX watch display: 'Buy GRUNGE watches: cheaper but as good as ROLEX'; or an insect repellent is advertised under the slogan, 'Where there's life, there's bugs,' to spoof the Budweiser slogan 'Where there's life there's Bud.' In none of these cases is confusion likely. Nobody would likely think the Rolex Watch Co. had started making condoms, nor that there was a trade association between it and GRUNGE, nor that Budweiser had moved into the insect repellent business. Still trade-mark owners would like to stop such uses. The value of their mark often depends on the affective associations built around it by advertising. Why should others free ride on or diminish this value? This idea is reflected in section 22(1) of the Act."<sup>37</sup>

In order to prove dilution of a trademark under 54 Pa. C.S.A. § 1124, it is necessary for the plaintiff to prove three factors which are outlined in *Hershey Foods*<sup>38</sup>:

- (i) that its mark is famous (as opposed to merely being a valid trademark)
- (ii) that the defendant began using a mark in commerce after the plaintiff's mark became famous
- (iii) that the defendant's use causes dilution by lessening the capacity of the plaintiff's mark to identify and distinguish goods or services

A possible fourth criterion or at least an influential piece of evidence, found in some other Pennsylvania decisions is the intent of the defendant.

- (iv) It is "relevant" to a judgment for dilution under the Pennsylvania statute if the plaintiff can prove "predatory intent" on the part of the defendant.<sup>39</sup>

This standard in some respects is higher than that in Canada, where the predatory intent of the impugned infringer is not particularly at issue, although its weight would still be considered, especially if an award of damages were made. The Canadian

<sup>37</sup> D. Vaver, *Intellectual Property Law* (Irwin Law, 1997) at 216.

<sup>38</sup> *Hershey Foods Corp. v. Mars, Inc.*, 998 F.Supp. 500 (M.D.Pa.1998).

interpretation of dilution, however, does insist that only "uses in the technical trademark sense" can dilute a trademark.<sup>40</sup> This means that the mark may be used with impunity for competitive advertising purposes or for the purpose of parody.

Neither of these exceptions is relevant to iCraveTV.com, as the trademarks were used in the technical sense. This is the case as they were used "at point of sale or change of possession of the goods."<sup>41</sup> It may be difficult to say, geographically, exactly where the goods changed possession. This occurred, either at the point when the data left the iCraveTV.com server, or when the Internet user received them. Wherever this occurred, however, the trademarks were used simultaneously with this change of possession.

As the Canadian exceptions are irrelevant for the case against TVRadioNow, it is reasonable to compare the facts of this case to the criteria outlined in the Pennsylvania case law for a successful claim in dilution.

The first criterion seems easily met by the plaintiffs. There is little question that marks such as that of Twentieth Century Fox or Disney are "famous" in any jurisdiction in the Western world. As mentioned earlier, the astronomical amounts of money spent by these companies on production and advertising have ensured this beyond a rational doubt.

The second criterion is also easily met. It would be an easy case to prove that the trademarks belonging to the constituents of the TV-Movie Group were famous long before November of 1999. All of the companies comprising this group have been in business for many years.

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<sup>39</sup> *Guardian Life Ins. Co. of America v. American Guardian Life Assur. Co.*, 943 F.Supp. 509 (E.D. Pa. 1996); *A & H Sportswear Co., Inc. v. Victoria's Secret Stores, Inc.*, 926 F.Supp. 1233 (E.D. Pa. 1996), *aff'd* 166 F. 3d 191, 49 U.S.P.Q. 2d 1493.

<sup>40</sup> *Clairol International Corp. v. Thomas Supply and Equipment Co.* [1968] 2 Ex. C.R.

<sup>41</sup> D. Vaver, *Intellectual Property Law* (Irwin Law, 1997) at 216.

The third criterion may not be as obviously satisfied, but in all likelihood this case would meet the standard. This is the question of whether or not the use made by iCraveTV.com of the plaintiffs' trademarks would likely diminish the capacity of the mark to distinguish goods created by the plaintiffs. This would likely be answered in the affirmative, because an Internet user logging on to iCraveTV.com who sees these trademarks, could reasonably mistake the service provided by the website as originating with the holders of those trademarks. This conclusion, of course, would be erroneous and indicates the potential for these trademarks to lose their definitive association with products originating with the plaintiffs.

The fourth criterion, which is influential but not necessary for a successful action for dilution in Pennsylvania, is the intent of the defendant. This question is whether or not the intent of those who chose to use the registered trademarks of the plaintiffs on iCraveTV.com's website was predatory. The answer to this question, similar to the questions raised pursuant to a charge of civil conspiracy discussed earlier, could only be determined by an examination of evidence after an investigation into the in-house dealings of TVRadioNow. For this reason it is not possible to address this question at this time.

Given what is known about this case, however, it does seem that an action in dilution is valid and likely meritorious at law. At least, there certainly seem to be grounds for a *prima facie* case for dilution. This would be likely in either Pennsylvania or Canada.

(iv) Direct and Contributory Copyright Infringement

Up to this point, this paper has examined accusations of various types of tortfeasance and various types of trademark infringement. After a brief examination of each of these it has been determined that all of these types of malfeasance are reasonably attributable to TVRadioNow and its operation iCraveTV.com. All of this is accurate, however, none of the above accounts for the actual reason that ten motion picture studios, three American broadcast companies, two sports leagues, and the Canadian Association of Broadcasters rushed to their respective legal counsel to pursue actions in court.

The real reason that all of these parties were determined to put an end to the operation of iCraveTV.com was to end the ongoing commission of a crime that is as old as the concept of private property. This crime is pure and simple theft, in this case theft via copyright infringement.

This is the one charge that is common to all three lawsuits<sup>42</sup> on both sides of the border. It was mentioned earlier that the lawyers acting for the plaintiffs in the American suits were using 'the scattergun approach to litigation'. It was also mentioned that this was not an illegitimate course to pursue, as all of the charges laid are reasonably attributable to TVRadioNow. These ideas are not inconsistent.

The reason this is a scattergun approach is that all of these accusations 'shot' at the defendants really sought to remedy only one of the charges. Most of the allegations would not have been brought in and of themselves. They were all brought with the object of ending the ongoing theft of valuable broadcast material through the infringement of the copyrights held by the plaintiffs in those works.

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<sup>42</sup> There were actually 5 lawsuits as the Sports Leagues and TV-Movie Group each went back into court after their initial victories to seek a permanent injunction enjoining the operation of iCraveTV.com. These injunctions were granted.

It makes no difference from a policy perspective whether or not the charge is for direct or contributory copyright infringement; therefore these charges may be addressed together. This is so, because if one of these charges is found to lack legal merit, then neither will be meritorious at law.

The difference between these two types of copyright infringement is simple. Direct infringement refers to the act of stealing, distributing, or making available a copyrighted work oneself. In this case, TVRadioNow was accused of the "willful and unauthorized reproduction, distribution, public performance, and public display of copyrighted works, and the unauthorized creation of derivative works."<sup>43</sup>

Contributory infringement occurs when one makes it possible for another to infringe a copyright. In this case it was claimed that the defendants "knowingly and materially contribute(d) (*ed.*) to the unauthorized reproduction, distribution, public performance, and public display of copyrighted works, and the unauthorized creation of derivative works."<sup>44</sup>

In this case the real issue of interest is whether or not any infringement actually occurred at all. If any infringement occurred, it is almost certain that both direct and contributory infringement occurred. As well, if either of these types of infringement did not occur, then it is almost certain that neither of them occurred.

#### (A) Copyright Legislation

The defendants are charged under § 106 and § 501 of the American Copyright Act. The relevant provisions read:

**"§ 106. Exclusive rights in copyrighted works.**

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<sup>43</sup> *National Football League v. iCraveTV* (W. D. Pa., No. 00120, filed 20 January 2000) at para. 55.

<sup>44</sup> *Id.* at 59.

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

\* \* \*

(2) to prepare derivative works based upon the copyrighted work;

\* \* \*

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of 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, to display the copyrighted work publicly."<sup>45</sup>

**"§ 501. Infringement of copyright.**

(a) Anyone who violates any of the exclusive rights of the copyright owner ... is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled ... to institute an action for any infringement of that particular right committed while he or she is the owner of it. ... The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the

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<sup>45</sup> *Copyright Act*, 17 U.S.C. § 106.

cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs."<sup>46</sup>

In the Canadian action, TVRadioNow was charged under Section 21 of the Canadian Copyright Act. The relevant provisions of that legislation read:

**"21. (1) Copyright in communication signals.** - Subject to subsection (2), a broadcaster has a copyright in the communication signals that it broadcasts, consisting of the sole right to do the following in relation to the communication signal or any substantial part thereof:

\* \* \*

(d) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast"<sup>47</sup>

An examination of these pieces of legislation would lead one to wonder what could possibly be at issue in this case. It appears to be clearly delineated in both the American and Canadian acts that iCraveTV.com was operating outside of copyright law.

§ 106 of the American Copyright Act expressly gives the copyright holder the exclusive right to license other parties to "perform" or "display" the copyrighted work in public. § 501 of the American act forbids the "simultaneous retransmission" of a broadcast signal without authorization by the copyright holder. Section 21 of the Canadian Copyright Act gives the copyright holder of a broadcast signal the 'exclusive right to authorize the simultaneous rebroadcast of its signal. This leads one to logically wonder: *How could iCraveTV.com possibly be operating within the law?*

(B) What possible defense could iCraveTV.com have to charges of copyright infringement?

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<sup>46</sup>Id. §501.

<sup>47</sup> *Copyright Act*, R.S.C. 1985, c. C-42, S. 21.

On what possible basis, then, could the President of iCraveTV.com, William Craig, consistently be maintaining, as he has said on many occasions, "Under Canadian law, this can be clearly done"?<sup>48</sup>

Why would Craig's counsel agree that the actions of iCraveTV.com are legal?

"Our client is frankly confused by the tone and content of your letter,' reads a letter from Mark Hayes, an attorney from Davies, Ward, & Beck, a Toronto law firm retained by iCraveTV.com. 'As a retransmitter of over-the-air broadcast signals, our client has an absolute exemption from any liability of copyright infringement. Your client is well aware of these provisions of the Canadian Copyright Act.'"<sup>49</sup>

There are experts who agree:

"While most legal experts believe iCraveTV has overstepped legal bounds, some said the site may have some legal wiggle room. Canadian law allows cable companies to retransmit broadcast signals without paying licensing fees, so long as they don't alter the signal in any way. The same rules may apply to the Web."<sup>50</sup>

Prof. Hudson Janisch of the University of Toronto Faculty of Law explains that all that is required for the legal retransmission of a local signal is the payment of royalties, rather than the acquisition of a license for use of the copyrighted material:

"The Copyright Act now requires the payment of royalties to program originators for any rebroadcast. ... As long as iCraveTV.com makes those payments, they are in compliance of the law."<sup>51</sup>

<sup>48</sup> J. Borland, "iCraveTV.com exec discusses his start-up's short life" *CNET News* (29 February 2000) <http://news.cnet.com/category/0-1004-200-1560999.html>.

<sup>49</sup> C. Bicknell, "They Crave Suits v. iCraveTV" *Wired News* (16 December 1999) <http://www.wired.com/news/business/0,1367,33093,00.html>.

<sup>50</sup> C. Bicknell, "TV Site in Big Web Tangle" *Wired News* (6 December, 1999) <http://www.wired.com/news/digiwood/0,1412,32914,00.html>.

<sup>51</sup> L. Surtees, "Broadcasters warn iCraveTV.com of legal action if signals are used" *globetechnology.com* (4 December 1999) <http://www.globetechnology.com/>.

The reason that Craig has a point legally is due to an exemption in the Canadian Copyright Act originally inserted to foster the growth of a fledgling cable industry. The exemption is found at Section 31(2) of the Act.

This provision reads:

- "(2) **Retransmission of local signals.** - 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 the Act<sup>52</sup>

*Does iCraveTV.com meet this exemption?* Let us consider this:

Subsection (a) requires that the communication must be a retransmission of a local or a distant signal. It would appear that this is *likely* what iCraveTV.com is doing. They are picking up local signals on antennae, and retransmitting them.

There are those who would dispute this, however. Counsel for the Canadian Copyright Tribunal comments:

"Mario Bouchard, general counsel of the Tribunal, says IcraveTV 'has a very good case to be made that they are a retransmitter.' But it's far from clear-cut: As in the U.S., Internet broadcasting firms are so new that Canadian authorities have not figured out whether they should be classified as 'retransmitters' – and, therefore, whether they should be protected under Canadian copyright laws."<sup>53</sup>

<sup>52</sup> *Copyright Act*, R.S.C. 1985, c. C-42, S. 31(2).

<sup>53</sup> B. Warner, "NFL Tackles Pesky Canadian Site" *The Standard* (15 December 1999) <http://www.thestandard.net/article/display/0,1151,8207,00.html>

The issue over the definition of a retransmitter is thus a point of contention. Intuitively, one would think that the iCraveTV.com would meet this definition, but this is hardly obvious and is an issue that must be worked out in law.

Subsection (b) requires that the retransmission be legal under the Broadcasting Act.<sup>54</sup> This, as it turns out, is not a problem for iCraveTV.com as yet another exemption works in the website's favour.

Canada's communications regulator, the Canadian Radio-television and Telecommunications Commission (CRTC) has exempted the Internet from regulation under the Broadcasting Act. This policy was announced by the CRTC in May of 1999.

"For those undertakings that offer new media services that do fall under the definition of broadcasting, the Commission has concluded that regulation is not necessary to achieve the objectives of the Broadcasting Act. It will issue by 30 June 1999, a proposed exemption order<sup>55</sup> without terms or conditions in respect of all undertakings that are providing broadcasting services over the Internet, in whole or in part, in Canada. Accordingly, the Commission will not regulate new media activities on the Internet under the Broadcasting Act."<sup>56</sup>

It would seem, based on this statement by the CRTC, that iCraveTV.com is outside the ambit of the Broadcasting Act. Any actions taken by the website are, logically therefore, legal under the Broadcasting Act, as this act has no authority to outlaw such activities. One must wonder, however, if iCraveTV.com does not make a mockery of this statement by the CRTC by extending it to an extreme and absurd end.

In actual fact, the CRTC stands behind its decision not to regulate the Internet. The Commission endorses its own policy, even when faced with the anomalous result

<sup>54</sup> *Broadcasting Act*, R.S.C. 1991, c.11 B-9.01.

<sup>55</sup> NOTE: To the knowledge of the author, as of the date of writing this paper, this exemption order is still yet to be issued by the CRTC.

<sup>56</sup> Canadian Radio-television and Telecommunications Commission, "The Report on New Media" Ottawa, ON (17 May 1999).

that manifests when that policy is combined with copyright law to culminate in the advent of iCraveTV.com:

"This is the type of service we envisaged on the Internet when we examined new media,' a spokeswoman for the Canadian Radio-television and Telecommunications Commission said yesterday. Under CRTC rules, companies may retransmit public TV signals on the Web - provided the signals are not changed. 'We have no concerns at this point,' the CRTC spokeswoman said."<sup>57</sup>

It appears, then, that iCraveTV.com meets subsection (b) by being legal under (i.e. outside of the regulatory ambit of) the Broadcasting Act.

Let us consider subsection (c) of the exemption under Section 31. This is a question of whether or not iCraveTV.com retransmits broadcast signals simultaneously with the original and in their entirety. This has been a serious point of contention in this case. It was mentioned earlier that those opposed to the operation of iCraveTV.com complained of the low quality transmission the site provided:

"Broadcasters mock Craig's claim that the Net, with its clunky streaming video, offers unaltered programming. 'If you thought [Denver Broncos quarterback] Brian Griese looked slow on TV last Monday, you should have seen him on the Net,' said NFL spokesman Brian McCarthy. ... When the television image is shrunk down to the size of a postcard and wrapped with ad banners, is that unaltered? It is not, say the broadcasters."<sup>58</sup>

One might argue that this is merely a technological flaw. Perhaps iCraveTV.com should not be held at fault for the limits of current technology.

University of Toronto Law Professor Hudson Janisch agrees:

"While there is room to argue whether iCraveTV precisely meets these requirements (for example, there may be a split-second delay caused in modulating the over-the-air broadcast signal into

<sup>57</sup> T. Hamilton and L. Surtees, "Major broadcasters upset at upstart Webcaster" *globetechnology.com* (3 December 1999) <http://www.globetechnology.com/>.

<sup>58</sup> C. Bicknell, "They Crave Suits v. IcraveTV" *Wired News* (16 December 1999) <http://www.wired.com/news/business/0,1367,33093,00.html>.

a digital format for retransmission over the Internet), these technical requirements should not be interpreted in a restrictive way to defeat the overall expansive purpose of Section 31. The act clearly intends to allow for retransmission on a technologically neutral basis."<sup>59</sup>

Actually, however, charges of altered signals run deeper than the superficial aesthetic appeal of the picture received by the user. There are significant economic ramifications derived from the fact that iCraveTV.com sells advertising space. It is this 'framing' of advertisements around the video displayed on the website that has raised the ire of the site's opponents.

"He is not to alter our signal,' said Greg Schmidt, vice president and general counsel for LIN Broadcasting, which owns NBC affiliate WIVB Buffalo. 'I don't see how degrading our picture down to a postcard at three frames a second and framing it with his ads is not altering the content. If we sold an ad to Budweiser they would not be thrilled to have a Miller ad wrapped around it,' said Schmidt."<sup>60</sup>

It appears then, that it is certainly questionable whether or not iCraveTV.com does transmit unaltered signals.

The final requirement under the exemption, the requirement under subsection (d) that a retransmitter must pay "royalties" would not appear to be a problem for TVRadioNow. William Craig has always maintained an intention to pay royalties through the usual Canadian mechanism for doing so, the Canadian Copyright Tribunal.

"Craig claims that the NFL will be paid through the tribunal. 'That's the law and that's our intent,' he says."<sup>61</sup>

<sup>59</sup> H. Janisch, "iCraveTV: pirate or pathfinder?" *globetechnology.com* (1 February 2000) [www.globetechnology.com](http://www.globetechnology.com).

<sup>60</sup> J. Flint, "Site threatened by NFL, TV stations" *Wall Street Journal Interactive Edition* (10 December 1999) <http://interactive.wsj.com/home.html>.

<sup>61</sup> B. Warner, "NFL Tackles Pesky Canadian Site" *The Standard* (15 December 1999) <http://www.thestandard.net/article/display/0,1151,8207,00.html>.

In fact, it has continuously been the copyright holders who have resisted payment from iCraveTV.com. This resistance resulted from a knee-jerk reaction to the subversive manner in which Craig started iCraveTV.com. Copyright holders resented the fact that their permission had never been solicited before the site came online.

Glenn O'Farrell, national vice-president of legal and regulatory affairs for Global Television comments:

"I find it disingenuous that he is offering payment now. You don't just take something and then say 'I had every intention of paying for it.'"<sup>62</sup>

If Craig is telling the truth, it does appear that iCraveTV.com does have every intention of satisfying any payment requirements under the usual Canadian system, royalties calculated by the Canadian Copyright Tribunal. One can only assume that, given the opportunity, iCraveTV.com would, in fact pay these royalties.

(C) Jurisdiction: The Internet touches more than just Canada

There is one more issue related to the Canadian exemption from liability in copyright infringement. The fact is, if iCraveTV.com streams material on the Internet, that material is able to reach any computer logged in to the World Wide Web anywhere in the world. For this reason, an exemption under Canadian copyright law may not hold a great deal of weight.

This is apparent when one considers the fact that a judge in Pennsylvania did not hesitate to enjoin iCraveTV.com from operating. Judge Ziegler had little concern for any exemption under Canadian law for copyright infringement that affected the jurisdiction of his court.

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<sup>62</sup> S. Craig, "Broadcast signals subject of web war" *globetechnology.com* (11 December 1999) <http://www.globetechnology.com>.

There were, of course, security measures taken by iCraveTV.com to ensure that only Canadians could access the site. This has always been the defense made by William Craig to allegations that a Canadian exemption is worthless in light of the universal nature of the Internet. These measures required a user of the website to input a Canadian area code into a field on the iCraveTV.com home page in order to gain access to the broadcast material available therein. This 'proof of being within Canada' would then give the user security clearance to use the site.

"Mr. Craig says that although his site is on the World Wide Web, only Canadians are suppose to use it. To download a broadcast, a user has to enter his or her area code."<sup>63</sup>

Broadcasters and other opponents of iCraveTV.com feel that these security measures were entirely superficial and wholly inadequate. The TV-Movie Group expresses its dissatisfaction:

"iCraveTV's supposed screening process requires a person who wishes to view the programming 'streamed' on the iCraveTV.com site simply to take a moment (1) to type in a Canadian area code, such as '416' (which is listed on the site itself), and (2) to click on two buttons stating that the viewer is in Canada and agrees to comply with certain terms. . . . Any Internet user in Pennsylvania, or anywhere else in the United States, can thus easily access defendant's infringing public performances of plaintiffs' copyrighted works."<sup>64</sup>

Berkman Professor of Law at Harvard, Lawrence Lessig, disagrees with the TV-Movie Group. He feels that security measures on the Internet must be judged according to a low standard. He is inherently opposed to anyone who attempts to exercise "perfect control" over the free flow of information in cyberspace:

"No doubt 'thieves' should be punished and content should not be 'stolen.' But 'theft' is defined relative to the law and the First Amendment, not to an ideal of perfect control. And when the law

<sup>63</sup> Id.

<sup>64</sup> *Twentieth Century Fox Film Corp v. iCraveTV* (W. D. Pa., No. 00121, filed 20 January 2000) at para. 45.

grants a right to speech, that right is ordinarily defended even if control over that speech is not perfect. But according to the MPAA, until iCraveTV can 'guarantee' that no hacker can crack its security system, iCraveTV should be enjoined from giving Canadians access to desktop TV. The principle is extraordinary. Does a movie theater lose the right to show R-rated movies if local moralists can produce a ticket sold to a 15-year-old?"<sup>65</sup>

*Is Professor Lessig correct? Should the standard for limiting the flow of information on the Internet to one jurisdiction be as low as the mere requirement of inputting an area code into a field on a website in order to gain access, when such an area code is supplied on the home page of that very site?*

Perhaps such a low standard is appropriate, due to the Internet's traditional history of fostering the freedom of movement of information throughout the world. Perhaps, however, the TV-Movie Group is correct in that if a website purports to be using a security system, then that system should be effective.

#### **(4) What is the present status of iCraveTV.com?**

As the situation stands to date, iCraveTV.com is offline. It has been enjoined by a permanent injunction (a follow up to the initial temporary injunction) by the court of the Eastern District of Pennsylvania. This injunction, however, is up for review by the court in approximately one month from the writing of this paper.

In Canada, iCraveTV.com has signed a settlement with the Canadian Association of Broadcasters in which the website agrees to remain offline. This agreement, however, stipulates that when copyright law pertaining to this area is clarified in Canada, this will be grounds for renegotiation of the agreement.

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<sup>65</sup> L. Lessig, "Cyberspace Prosecutor" *The Standard* (18 February 2000) <http://www.thestandard.com/article/display/0,1151,10885,00.html>.

"If a court in Canada makes a final determination ... or legislative change makes clear or confirms, that the transmission or other dissemination of broadcast signals on, over or through the Internet without the consent of the affected broadcasters and owners of copyright in the Works contained in such signals is not an infringement of copyright in Canada, or that such transmission or other dissemination may be licensed in Canada from all owners of copyright in such broadcast signals and the Works they contain without the consent of such copyright owners, the iCraveTV Parties or any of them may move before the Ontario Superior Court of Justice, upon notice to the Broadcasters, to vary the terms of the Judgment in the Application to carry on such transmission or dissemination in compliance with the terms of such final determination or legislative change."<sup>66</sup>

In the mean time, iCraveTV.com is working on improving its security measures. These efforts are meant to allay the concerns of those that disagree with Lawrence Lessig and that insist that websites like iCraveTV.com implement an effective security system barring the use of the site from those outside the site's legal jurisdiction. The company has commissioned a team to devise a security system called the 'i-Wall'.

The invention and implementation of the i-Wall is also likely to benefit iCraveTV.com when the issue of the site's resumption of operation is reviewed by the court of the Eastern District of Pennsylvania. As security on iCraveTV.com was a great point of contention in the Pennsylvania suits, the website is attempting to rectify this for the upcoming review by that court.

Further, Craig plans to use the new security system devised by iCraveTV.com as a marketable commodity in itself. He plans to patent this software and offer it to other websites for a variety of applications.

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<sup>66</sup> *Settlement Agreement*, Canadian Broadcasting Corporation / Société Radio-Canada, CHUM Ltd, CTV Television Inc., ONTV Ltd. & Rogers Broadcasting Ltd. and TVRadioNow Corp., William R. Craig, William R. Craig Consulting, Kirby J. Cambell, George Simons, Ian McCallum & John Trickey (28 February 2000) at para. 6.

"He said the 'i-wall' is a way to limit access to Web sites by country, something he has named iCAN, for Country Area Network. 'I have had a team of six people working on this for about seven weeks, and we've been spending lots of money on it, and we've figured it out,' Mr. Craig claimed. 'It's elegant, it's simple, it's persuasive, and it's secret, because we're documenting it now so that we can file it for patent purposes.'"<sup>67</sup>

As well as his plans for 'i-Wall' Craig has plans to revamp iCraveTV.com and turn it into a supplier of specifically 'specialty' channels.

"Bill Craig, undaunted by his recent setback in the face of the combined might of the Canadian and U.S. broadcasting industries, now says he intends to offer specialty channels such as CNN and the Discovery Channel over the Internet. 'There is a silver lining in this dark cloud,' Mr. Craig said in an interview yesterday. 'I now have a terrific brand name and have carved out a better business plan than my original one.' By this summer, Mr. Craig said, he expects to have signed deals with U.S. and Canadian specialty channels that will offer country-specific subscription services, something he sees as the next inevitable step in the Internet evolution."<sup>68</sup>

As it stands, iCraveTV.com awaits review in an American court. As well, the site is under an agreement in Canada, only until such time that Canadian law can catch up to the website's 'cutting edge experiment with copyright'. While the website awaits a determination of its future it is evident that plans are being made for the site to return, improved by offering only specialty channels and more secure in its screening process and security measures. Presumably, the goal will be for the website to remain within legal boundaries.

"Representatives of U.S. broadcasters said the industry would not object to Mr. Craig offering speciality channels, as long as proper deals are struck. 'If he is attempting to be legitimate, then we wish him well,' said Rich Taylor, vice-president of MPAA."<sup>69</sup>

<sup>67</sup> J. Ingrassia, "I'll be back" *Electronic Media* 19:10 (6 March 2000) 2000 WL 8175803.

<sup>68</sup> P. Morton, "Undaunted By Media Giants" *Financial Post* (2 March 2000).

<sup>69</sup> Id.

There is little doubt that members of the broadcast industry would 'wish iCraveTV.com well' if the site stays within legal parameters. Presumably, this restriction on its activities would prevent the website from infringing copyrights through the theft of such material. Perhaps more importantly, a commitment to legitimate business dealings would prevent iCraveTV.com from invading the economically rich American broadcast market.

From a perspective of practicality, it would be advisable for the website to try to remain within the law. Those who resist change have shown a tireless determination to quell any attempts made by iCraveTV.com to step outside legal boundaries. These determined efforts indicate that any further attempts to do so will be met with severe resistance on many fronts and by many opponents. The broadcast industry and professional sports leagues up to this point have demonstrated this, and there is no reason to expect any reprieve from this policy of relentless resistance.

After the arduous battle up to this point, William Craig has shown fantastic perseverance and tenacity in his battle for iCraveTV.com. He has had to endure tort allegations, trademark infringement claims, and accusations of copyright infringement. There have been cease-and-desist orders, allegations in the public media, court proceedings, and injunctions. Regardless, Craig continues to persevere and plans to return with a new, improved, legitimate iCraveTV.com. William Craig and iCraveTV.com deserve to be applauded for displaying such a trailblazing spirit as well as for the invaluable contributions they will have eventually made to the settlement of new issues in intellectual property and broadcast law. For these reasons, and to echo the

words of Rich Taylor, this author would also like to 'wish iCraveTV.com well' and hopes to see the emergence of a new, improved, *legitimate* iCraveTV.com in the near future.

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