

Intellectual Property Issues Associated with Video Streaming:
An Analysis of iCraveTV
[Revised Version]

Marsha Ann Tate
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Dr. Parsons
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Introduction

Article 1, Section 8 of the United States Constitution states “The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Today, this 200+ year old edict remains the foundation for American patent and copyright law.

The attention garnered by intellectual property rights in Western societies through the years is based upon economic, legal and ethical principles. The economic basis for copyright rests on the viewpoint that artists, inventors, and writers must expend considerable sums of time, energy and money in order to bring their ideas to fruition. In return for their efforts, the government grants these individuals exclusive control of their creations for set terms. This period of exclusive control is intended to allow these individuals time to recoup the expenditures placed into creating the work. At the expiration of the term, the work then enters the *public domain*, where it may be freely used without permission from the original copyright owner. The limited duration of exclusive control and ultimate "public ownership" of a work are the government's attempt to balance the economic interests of copyright owners with the societal need to promote access to information.

During the initial development of copyright laws in the 17th & 18th centuries, the printed word served as a primary form of intellectual property. Consequently, until the early 20th century, intellectual property laws were devoted exclusively to print-based issues and therefore targeted those who made unauthorized copies of works by hand or

printing press. Moreover, distribution of "pirated" works was accomplished via the postal system or personal contacts.

Nonetheless, limitations inherent in earlier reproduction and distribution technologies somewhat impeded broad and rapid circulation of copied materials. However, beginning in the late 19th century and continuing to the present day, unparalleled advances in communication and duplication technologies have essentially abolished these earlier limitations. As a result, individuals with only minimal resources can create almost exact duplicates of art, film, literature or music with extraordinary ease. In addition, these same technological advances also allow alteration of original works into a virtually limitless array of derivative works, often without permission of the copyright owners. Moreover, the resulting duplicates or derivations can be distributed to other individuals throughout the world almost instantaneously via the Internet.

"Streaming"

Internet sites offering music, film, and television broadcasts using *streaming* technologies have recently received an enormous amount of attention from government authorities and intellectual property owners. *Streaming* allows compressed prerecorded audio or video files to be sent over the Internet to a user's computer. Streaming can also be used to send live broadcast feeds by converting video signals into a compressed digital signal. The signal is then transmitted from a specialized multicasting capable (i.e., able to send the same file to multiple users simultaneously) Web server. Unlike traditional multimedia downloading techniques, streaming allows users to hear or view files without waiting until a file has been completely downloaded to their local computer. As a result, streaming helps alleviate inadequate connection speed or insufficient computer capacity

problems that often plague multimedia downloading. However, fast Internet connections and sufficient computer power to decompress the data in real time remain critical factors for the streaming process. Nonetheless, continued improvements in telecommunications infrastructure and computer technologies are rapidly eroding these barriers. Moreover, special plug-ins or programs called players that are required to decompress streamed file data are also now frequently pre-bundled with Web browsers such as Netscape Navigator.

Why is streaming causing such a kerfuffle? Well, largely because streaming involves intellectual property rights, money and traditional mass media corporations trying to adapt to a digital society. Recent cases involving the dissemination of music and other creative works over the Internet forces a reconsideration of commonly held views about control and ownership of information, individual freedom, and ethics. In addition, in an international setting, viewpoints about these issues may differ based upon factors such as nationality and culture.

Legislators, jurists and "intellectual property" owners are faced with the daunting task of addressing a myriad of new intellectual property issues associated with streaming and other revolutionary technological advances. Pirating or other misappropriation of intellectual property can translate into significant losses to legitimate owners of the property and ultimately to the economy as a whole. Therefore, intellectual property protection garners considerable domestic and foreign policy attention in the U.S. and other developed countries.

Questions to be Addressed by the Case Study

This paper will explore iCraveTV, a recent highly publicized intellectual property case involving video streaming. Following a brief overview of U.S. and international copyright law, the parties and intellectual property issues involved in the iCraveTV case will be examined from a political economic perspective. Specifically, the paper will address the following questions:

- What was iCraveTV?
- What specific intellectual property issues have been raised by the iCraveTV case and how do they differ from earlier cases?
 - Have there been any earlier legal precedents that address issues similar to those raised by iCraveTV?
- Why is the iCraveTV case deemed so important by the television broadcasters and film producers?
 - What are the potential consequences to traditional media companies and society at large if iCraveTV and similar sites are allowed to continue offering their services?
- What (if any) ethical issues does the iCraveTV case raise?
 - What ethical arguments are offered in support of and in opposition to iCraveTV?

Definition and Scope of Copyright

According to the U.S. Copyright Office, copyright

... protects original works of authorship, including literary, dramatic, musical, and artistic works such as poetry, novels, movies, songs, computer software and

architecture. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed (U.S. Copyright Office, September 14, 1999).

Copyright protection begins the moment a work is created by an *author*. For copyright purposes, an author is defined as "the creator of the original expression in a work" and is automatically deemed the copyright owner unless ownership has been transferred to another party such as a publisher. An exception to this rule occurs with "works made for hire" in which a work is created by an employee within the scope of employment. In these situations, the employer is considered to be the author of the work and therefore the copyright owner.

For works created after January 1, 1978 copyright protection is afforded for the life of the author plus an additional 70 years. In the case of joint authorship, protection is granted for 70 years after the last surviving author's death. Works for hire are protected 95 years from the year of first publication or 120 years from the year of creation whichever occurs first. In addition, for pre-1978 works the terms of protection differ based upon various factors.

Copyright Ownership

Copyright ownership is often treated ethically and legally in a somewhat similar fashion to rights afforded owners of "real property" such as land or personal possessions. As a result, copyrights can be sold or otherwise transferred to other parties by the original owner and also can be contested.

Copyright ownership encompasses a bundle of five rights: 1) the right of reproduction (i.e., make copies of a work) 2) the right to prepare derivative works (i.e.,

create adaptations or other works based upon the original work) 3) the right to distribute a work 4) the right to perform a work publicly (e.g., stage a play) and 5) the right to display a work publicly.

Fair Use

The exclusive rights granted to copyright owners are limited somewhat by the Fair Use Doctrine that allows particular uses of a work without requiring prior permission of the copyright owner. Limited portions of a work including quotes may be used for commentary, criticism, news reporting, and scholarly reports. Four factors must be weighed together in order to determine whether a use is a *fair use*: 1) the purpose and character of the use 2) the nature of the copyrighted work 3) the amount and substantiality of the portion used and 4) The effect of the use on the potential market for the copyrighted work. However, no legal rules define exactly what number of words, musical notes or other parts of a work constitute a violation. As a result, fair use judgments must be made on a case by case basis.

Impact of Intellectual Property on the U.S. Economy

According to a 1999 report by the International Intellectual Property Alliance, U.S. copyright industries accounted for 4.3% or \$348.4 billion of the U.S. Gross Domestic Product (GDP) in 1997. In addition, foreign exports and sales of U.S. copyright industries totaled \$66.85 billion in 1997, "more than all major industry sectors including agriculture, automobiles and auto parts and the aircraft industry (*New study reveals copyright industries are engine driving the U.S. economy*, 1999). In terms of employment, the cultural industries provide jobs for 3.8 million U.S. workers or 2.9% of total U.S. employment.

Copyright in an International Setting

As the above statistics indicate, intellectual property is vitally important to America's economic well being in both domestic and export markets. Therefore, protection of this valuable commodity is of prime governmental concern not only at home but within the global marketplace as well.

Currently, no "international copyright" affords worldwide protection for a work. Instead, copyright protection rests on the laws of each individual country. However, two major international copyright conventions, the Berne Union for the Protection of Literary and Artistic Property (Berne Convention) and the Universal Copyright Convention (UCC) help ease the problems associated with copyright protection in a global setting. In addition, the United States is also a party to a number of other international and bilateral copyright agreements. Generally, these agreements grant the same protection to U.S. copyright owners in the signatory countries under their laws as afforded to their own citizens and the U.S. reciprocates. Nonetheless, there are some nations that confer little or no protection to any foreign works.

The United States Trade Representative's (USTR) annual Special 301 report serves as an important governmental monitoring mechanism of U.S. intellectual property interests globally. As required by the United States Trade Act of 1974, the Special 301 report identifies nations failing to adequately protect and enforce intellectual property rights. Based on the type and extent of the deficiencies found, listed countries are placed in one of the three following categories: *priority foreign country*, *priority watch* or *watch*.

Priority foreign countries have been identified as committing or permitting the most "onerous and egregious acts, policies and practices" that have impact or even

threaten to adversely impact U.S. intellectual property interests. Once a nation is placed in the category, the USTR makes a determination whether to further investigate the deficiencies. Countries failing to address the concerns raised by the U.S. prior to completion of the investigation are liable to imposition of bilateral trade sanctions.

Countries categorized as *priority watch* are those that have regulatory or enforcement problems including failure to enact or enforce intellectual property legislation. Unlike the previous categories, *watch countries* usually have strong intellectual property protections but nonetheless have taken a stance or action considered inimical to U.S. intellectual property interests. Although the *priority watch* and *watch* categories cover less egregious offenses, nations failing into any of the categories will be subjected to U.S. diplomatic pressure to rectify identified problems.

Intellectual Property from a Political-Economic Perspective

The political-economic theory of communication focuses on the interconnections between institutional structures and practices. The capitalist class (e.g., large media conglomerates) dominate society via their ownership and control of the means of communication. Moreover, their communicative strength not only buttresses the ideological power of the class but also translates into influence upon the political system. Consequently, government policies regarding communications tend to emphasize capitalist property interests over the right of access to communication channels (Bettig, 1996).

Political economists have expressed concern that recent initiatives designed to address various issues related to copyright and new technologies are contrary to the

original spirit of copyright protection by favoring capital class interests to the detriment of the society at large. These efforts include strengthening existing laws regarding copyright infringement as well as passing new laws such as *The Digital Millennium Copyright Act of 1998* that specifically address newer technologies such as webcasting.

Another recent example, the Sony Bono Copyright Extension Act of 1998 extends protection of copyrighted works for an additional 20 years before they enter the public domain. The legislation, frequently referred to by critics as the *Mickey Mouse bill*, was heavily promoted by the Walt Disney Corporation since *Steamboat Willie*, the film debut of Mickey Mouse as well as other works featuring valuable Disney characters would have otherwise soon entered the public domain under the existing copyright terms.

However, not only cartoon characters but all other copyrighted works are affected by the new legislation. Artists, scholars, writers and society as a whole is forced to wait several generations before a work reaches the public domain. Moreover, critics also point out that this extension really only benefits a small group of copyright owners who possess properties such as cartoon characters that have a lasting economic value

Several other related criticisms of current copyright policy also relate to the control wielded by large media and publishing conglomerates over information via their copyright ownership. One criticism focuses on the common practice of authors ceding all copyright ownership rights to a publisher or other corporate entity. In exchange for the rights, the corporation will copy, distribute, and promote the author's work. However, in many instances, the original author will only ultimately receive a fraction of the total income derived from the work while the corporation reaps the lions share of the profits.

Alternatively, an author could retain copyright ownership (if the work is not a

work for hire) and self-publish it. However, an individual will rarely be able to match the distribution, publicity and other means at the disposal of large corporations and consequently, the work is more likely to languish in obscurity.

A related criticism of the current form of copyright law posits that large corporations are using copyright ownership to seize and control culture. Professor Ronald Bettig offers this viewpoint in *Copyrighting Culture: The Political Economy of Intellectual Property*. Bettig argues that corporations not only own and control the means of communication but also own and control the content through copyright. This arrangement provides a wealth producing mechanism for corporations as well as a way to expand market power. This monopolistic nature of copyright when coupled with the oligopolistic nature of the corporate copyright owners creates vexing problems for society. These include "high barriers to entry in the 'marketplace of ideas' and a narrow and limited range of informational and cultural works" (Bettig, 1996, p. 2).

Jon M. Garon expresses a similar viewpoint, asserting that large corporations have altered the constitutional framework by changing the goals of copyright protection from their original intention of encouraging creation and dissemination of works to "ownership and remuneration". Garon states:

The net result of this change has been to misdirect the current regulatory schemes in a manner that undermines the original social objectives of intellectual property jurisprudence and to limit access to content and public debate. Ironically, the closure of the marketplace of ideas comes at a time when technology affords the greatest public access to the marketplace of ideas in history (Garon, 1999, p. 498). One manifestation of these authors concerns can be found in the high prices

charged to individuals in order to access protected works. Consequently, those who lack the economic where-with-all to pay for access are consequently denied the information.

There are a large number of other arguments both decrying and supporting various aspects of copyright and other intellectual property components. However, the selected arguments above demonstrate the diversity of interests and viewpoints inherent in modern copyright discussions.

Methodology

U.S. and Canadian statutes and regulations, journal articles, and significant prior U.S. federal court rulings were utilized to ascertain the current "official" view (if one exists) regarding copyright issues associated with television programming and the Internet. In addition, U.S. and Canadian magazine and newspaper articles about iCraveTV were examined to identify the specific issues and parties involved in the controversy. Arguments offered in favor of or in opposition to the disputed issues in the case were also noted. Thereafter, the issues identified in the case were examined from a political economic standpoint.

iCraveTV

iCraveTV provides a prime example of the ideological and legal complexities intrinsic to the 21st century intellectual property arena. iCraveTV, the brainchild of William Craig, a former executive of Fox Sports Pittsburgh was a Web site offered by Craig's TVRadioNow Corporation headquartered in a Toronto suburb. In November 1999, the six-employee company began pulling broadcast signals from 17 American and Canadian network and cable channels and turned them into streaming video. The video was then offered live via the www.iCravetv.com Web site where the programs appeared

in a small window on the viewer's computer screen. All programs were shown without alteration of the content. iCraveTV's profits were derived from selling advertising displayed on the iCraveTV site. However, iCraveTV failed to get permission (and consequently pay for) the programming offered on its website.

William Craig's contention was that iCraveTV was legal under existing Canadian law. According to the Canadian statutes, retransmission of Canadian broadcast signals within Canada appeared to be permissible if they remained unaltered and royalties were submitted to broadcasters for their use. iCraveTV's method for restricting access to Canadian users consisted of requiring entry of a Canadian area code in order to view broadcasts. However, according to court papers, of the 800,000 visitors to the iCraveTV site in December 1999, the majority were American (Maney, February 8, 2000). Craig later acknowledged that security deficiencies at the site allowed Americans to access U.S. broadcasts for which he did not pay royalties.

The steps taken by U.S. and Canadian companies to cease iCraveTV Webcasts were so assertive that the *Toronto Star* labeled the efforts "The largest legal attack ever on an Internet company". In addition, Motion Picture Association of America's Jack Valenti riled "It's one of the largest and most brazen thefts of intellectual property ever committed in the United States" (Maney, 2/8/2000).

The Parties & Issues in the iCraveTV Case

Although at first glance iCraveTV may seem like a small-scale venture, it created alarm among film, sports and television powerhouses. The possible broader implications posed by the iCraveTV case triggered the intense reactions from large media companies and other copyright owners. These implications included threats to the traditional

concepts of local television and cable franchise rights. Moreover, iCraveTV was a threat to the current practice of selling rights to sporting and other events on a country by country basis. Christopher Stern addresses these possible implications in a February 29, 2000 *Variety* article discussing iCraveTV stating:

Movie studios and sports leagues haul in billions of dollars in revenue by selling copyrighted material on a market-by-market basis. If a viewer in, say, Los Angeles, can suddenly watch *Friends* on the Internet, its value to the outlet plummets. And the inability to offer exclusive deals for syndicated material would rock the foundations of the television programming business (Stern, February 29, 2000).

U.S. and Canadian media companies as well as sports associations initiated court actions to cease iCraveTV's Web casts. In the United States, a joint lawsuit was filed by the National Basketball Association (NBA) and the National Football League (NFL). A second Motion Picture Association of America (MPAA)-backed suit was also filed on behalf of ten U.S. media companies: Columbia Pictures Industries, Columbia Pictures Television, Columbia TriStar Television, Disney, MGM, Orion Pictures, Paramount, Twentieth Century Fox, Universal City Studios, Time Warner Entertainment, ABC, CBS, and Fox Broadcasting (Bonisteel, February 29, 2000). In Canada, a lawsuit was filed by the Canadian Association of Broadcasters on behalf of CBC, GlobalTV, and TVOntario among others.

The U.S. plaintiffs accused iCraveTV of copyright and trademark infringement as well as unfair competition (Molloy, February 28, 2000). Specifically, the suits alleged that iCraveTV was pirating television broadcasts, that according to U.S. copyright law,

were illegal to retransmit to U.S. residents without paying royalties (Morton, March 2, 2000). Moreover, they claimed that the "area code" gatekeeping mechanism to limit access to Canadian users was virtually worthless since Canadian area codes were readily available in phone books and elsewhere.

On January 28, 2000 iCraveTV ceased Webcasting following the issuance of a temporary restraining order by a U.S. federal court in Pittsburgh. On February 8, 2000 the same court issued a preliminary injunction that prohibited iCraveTV from broadcasting signals into the U.S. for 90 days. Also, the company was given until May 8, 2000 to prove to the court that it could effectively restrict access to Canadians only. However, since iCraveTV lacked the required access control, it was essentially put out of business by the court decree.

The iCraveTV Settlement Agreement

In late February 2000, iCraveTV reached settlements with all U.S. and Canadian plaintiffs. Under the terms of the settlements, iCraveTV agreed to cease transmitting all Canadian and U.S. broadcasting. However, iCraveTV would be allowed to resume transmissions provided it negotiates royalty agreements with Canadian and U.S. broadcasters in addition to implementing an effective "gate keeping" mechanism to bar non-Canadian access. Commenting upon the settlement, Jack Valenti stated "We remain committed to using every resource at our disposal to defend our intellectual property" (Morton, February 29, 2000). Craig interpreted the agreement somewhat differently, stating "Given the virtually infinite resources of those rights holders, a dot-com startup like iCraveTV was simply unable to continue with protracted multifront litigation" (Craig quoted in Evans, February 29, 2000).

Application of Political Economic Theory to iCraveTV

From a political-economic standpoint, iCraveTV and related sites offering streamed content pose a threat to the capitalist class over control of media flows and intellectual property not to mention the profits derived from them. In response, the "capitalists" (i.e., the media companies) wielded their superior economic and political power to suppress the "threat" using the U.S. and Canadian judicial systems. Moreover, if the case not been settled, the American government would likely have placed considerable pressure on its Canadian counterpart (including being added to the USTR's "Special 301" report) to enjoin iCraveTV's activities. In lieu of allowing individuals virtually unfettered access to information and entertainment, the copyright owners in this case instead sought more stringent forms of restrictions to free access. As a result, society at large is deprived of a technologically viable television viewing option predominantly based upon control and economic considerations of the copyright holders.

iCraveTV, and in a broader sense, all new Internet technologies threaten the traditional oligopolistic structure whereby media companies could largely dictate how, where and when their property will be used. Traditionally, the introduction of new technologies such as the VCR which transfer some modicum of control from intellectual property owners to users have resulted in attempts by the owners to halt the production and distribution of the technologies. However, as Professor Bettig points out in his book, although technological breakthroughs may originate outside the "core", they will ultimately become integrated into the core. Recent mergers between Internet-based and traditional media companies strongly suggest that the "capitalist" class is aggressively working to integrate new technologies such as streaming into the existing core. Large

media companies such as Disney and Time Warner are not opposed to new technologies. Rather, they simply want to dictate the terms and conditions of their use in order to maximize their market and profits.

One possible solution to cases such as iCraveTV may be the implementation of compulsory licensing for retransmission of television broadcasts over the Web. A compulsory licensing scheme would allow individuals to use copyright materials without permission for Internet distribution (with certain limitations including keeping “works” intact). However, the Webcaster would be obliged to pay royalties to the copyright owners for use of their property. A form of this of arrangement appears to be what Craig was referring to in Canadian law although compulsory licensing is also currently used in the United States for cable programming. Compulsory licensing would not only help encourage access to intellectual property, it would also insure owners are adequately compensated for use of their property.

Conclusion

There is also a valid related fear that media companies are becoming so frightened of losing control of their property that actions to deter piracy, in the form of encryption or various “copy proofing” techniques will prove so restrictive that access to materials will be denied even if the usage falls under the penumbra of fair use. It must be remembered that America's Founding Fathers meant to balance owner's rights with those of the society as a whole. To date, the difficult task of balancing the rights of intellectual property owners with the need of a democratic society to have access to information remains largely unresolved. Moreover, new technologies such as video streaming add new complexities to an already byzantine situation. Nonetheless, it is imperative for a

democratic society to strive to maintain the balance regardless how naturally precarious it may be.

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Web Sites of Selected Groups Actively Involved in Intellectual Property Issues

Motion Picture Association of America
<http://www.mpaa.org>

This politically influential and powerful association represents the U.S. motion picture, home video and television industries. It plays a critical role in many intellectual property disputes both at home and abroad.

International Intellectual Property Alliance (IIPA)
<http://iipa.com>

IIPA is a coalition of associations that represent U.S. copyright-based industries. Members include the Association of American Publishers (AAP), AFMA, the Business Software Alliance (BSA), the Interactive Digital Software Association (IDSA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA) and the Recording Industry of America (RIAA).