

The Canadian Rights Market Under Siege

The “end of times” or merely another link in the evolutionary chain?

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Introduction

Even a casual observer of the Canadian communications industry could not have missed the considerable tremors caused by the introduction and rapid adoption of the online streaming television and movie service Netflix. Netflix did not invent streaming video, but it did manage to amass a substantial catalogue of programming and deliver it to the masses with a user-friendly interface at a reasonable price. Its popularity is undeniable.

As with any disruptive technology, online streaming video services (or “over-the-top” or “OTT” services as they are commonly known) have generated considerable debate among consumers, policy makers, and industry stakeholders. There have been calls for more regulation of OTT services, calls for less regulation of traditional broadcasting undertakings, complaints that Netflix’s Canadian catalogue is smaller than the U.S. catalogue, and concerns about the impact of OTT services on Canadian broadcasters who have regulatory obligations designed to offer and promote Canadian content.

The focus of this paper is on the perceived threat that foreign online video services represent to a distinct Canadian rights market. It will look at

¹ The views and opinions expressed are those of the authors and do not necessarily reflect the views and opinions of Fasken Martineau or its clients.

regulatory, legal and commercial responses designed to protect a Canadian rights market and consider how these responses compare to measures taken to deal with earlier threats.

What do we mean by a “Canadian rights market”?²

Copyright lies at the heart of the orderly commercial functioning of the broadcast industry. Upon creation, a film or television program is protected by copyright laws which require a broadcaster to obtain the consent of the copyright owner to broadcast the film or program. Broadcasting is a form of public performance and public performance is one of the exclusive rights granted to copyright owners in section 3 of the *Copyright Act*. The granting of copyright licenses from creator to distributor to programming undertaking to distribution undertaking creates a “value chain” where each player is able to monetize its investment in the programming. Copyright law has developed to prevent unauthorized uses of programming and to protect this value chain.

Copyright is a purely statutory regime, which means it is also territorial in nature. The Canadian *Copyright Act*, which is enacted and amended by Parliament, can only grant rights with respect to Canada. However, communications technologies don’t necessarily respect national boundaries and this creates challenges for domestic copyright enforcement and broadcasting policy.

The Supreme Court recognized that the inherently borderless nature of the internet is a direct challenge to a statutory system of rights that is, at its core, territorial. In *SOCAN v. CAIP*, the Court found that a public performance that originates in one jurisdiction and is received in another

² Peter Miller describes the current state of the Canadian program rights market in great detail in his 2014 paper prepared for the CRTC. See “The State of the Canadian Program Rights Market: 2014”, June 26, 2014, online: <https://www.friends.ca/files/PDF/fcb.2014-190.appendix2.pdf>.

jurisdiction can be both “here and there”.³ As Binnie J., writing for the majority observed:

... An internet communication that crosses one or more national boundaries “occurs” in more than one country, at a minimum the country of transmission and the country of reception. ... To the extent the [Copyright] Board held that a communication that does not originate in Canada does not occur in Canada, I disagree with its decision.

At the end of the transmission, the end user has a musical work in his or her possession that was not there before. The work has necessarily been communicated, irrespective of its point of origin. If the communication is by virtue of the internet, there has been a “telecommunication”. To hold otherwise would not only fly in the face of the ordinary use of language but would have serious consequences in other areas of law relevant to the internet, including Canada’s ability to deal with criminal and civil liability for objectionable communications entering the country from abroad.⁴

To deal with the multijurisdictional nature of internet communications, the Supreme Court held that liability for copyright infringement can be determined based on the application of the well-established “real and substantial connection test” that is used in tort law to determine a court’s jurisdiction to hear a matter that might arise from acts occurring in different countries.⁵ In determining whether there is a real and substantial connection between an internet transmission and Canada, such that Canadian copyright legislation would apply, the Supreme Court said relevant factors to be considered include the location of the content provider, the location of the host server, the location of the intermediaries and the location of the end user. “Weight to be given to any particular factor will vary with the circumstances and the nature of the dispute.”⁶ The Court

³ *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 SCR 427 (“SOCAN v. CAIP”) at paras. 1-2

⁴ *SOCAN v. CAIP* at paras. 44-45.

⁵ *SOCAN v. CAIP* at para. 60.

⁶ *SOCAN v. CAIP* at para. 61.

referred to earlier cases where it had found sufficient connection for Canadian courts to take jurisdiction where Canada is the country of transmission,⁷ or the country of reception.⁸ The Supreme Court found that this approach is consistent with international copyright practice where protection to rights holders is guaranteed through a system of treaties administered by the World Intellectual Property Organization (WIPO), an agency of the United Nations.

However, having found that the ability of Canadian Courts to exercise jurisdiction in respect of transmissions that originate both here and elsewhere is consistent with general legal principles and national and international practices, the Supreme Court then somewhat unhelpfully cautioned that just because jurisdiction *could* be exercised, doesn't mean it *will* be exercised:

This conclusion does not, of course, imply imposition of automatic copyright liability on foreign content providers whose music is telecommunicated to a Canadian end user. Whether or not a real and substantial connection exists will turn on the facts of a particular transmission. It is unnecessary to say more on this point because the Canadian copyright liability of foreign content providers is not an issue that arises for determination in this appeal, although, as stated, the Board itself intimated that where a foreign transmission is aimed at Canada, copyright liability might attach.

This conclusion also raises the spectre of imposition of copyright duties on a single telecommunication in both the State of transmission and the State of reception, but as with other fields of overlapping liability (taxation for example), the answer lies in the making of international or bilateral agreements, not in national courts straining to find some jurisdictional infirmity in either State.⁹

So the question remains, what legal protection and remedies are available to Canadian rights holders to protect their investments against competing

⁷ *Libman v. The Queen* [1985] 2 S.C.R. 178.

⁸ *Canada (Human Rights Commission) v. Canadian Liberty Net* [1998] 1 S.C.R. 626.

⁹ *SOCAN v. CAIP* at paras. 77-78.

transmissions from foreign jurisdictions, particularly where the non-Canadian transmission has been licensed in the jurisdiction of origin but not in Canada?

As we will discuss, the internet is not the first technology to raise these questions.

Plus ca change, plus c'est la meme chose?¹⁰

While the internet best exemplifies the threat posed on a Canadian rights market by international transmissions, it is hardly the first such threat to emerge. Indeed, given that Canada shares a 9,000 km border with the United States (one of the most prodigious producers of audiovisual content on the planet), and 75 per cent of Canadians live within 160 kilometers of that border, it should not come as a surprise that Canada's program rights market was under assault before it even existed.

The first Canadian television broadcast stations began operating in Montreal on September 6, 1952 and two days later in Toronto. However, by this time there were already 146,000 television sets in Canada, or about one for every 10 Canadian citizens. And what were these 146,000 television sets tuned to before the first Canadian signals were available? U.S. television stations, of course. By the end of 1949, three years before the CBC started operating in Montreal and Toronto, there were already more than 90 television transmitters operating in the U.S., and by 1951 there were almost 9 million television sets in the U.S..¹¹ In 1952, viewers in Toronto could already receive the off-air signal of WBEN-TV out of Buffalo, which had been operating since 1948 serving the Western New York (and southern Ontario) market.

¹⁰ Jean-Baptiste Alphonse Karr, *Les Guepes*, 1849 and Rush, *Circumstances*, 1978.

¹¹ K. Easton, *Building an Industry: A History of Cable Television and its Development in Canada*, (Nova Scotia: Pottersfield Press, 2000) at page 43.

Like the internet, over-the-air signals don't respect national boundaries, so the Buffalo television station's signal spilled over into Canada's largest English-language market without any concern for the Canadian rights to the programming being carried. However, unlike the internet, terrestrial television signals have a finite geographical contour. This means that while Canadians living directly across Lake Ontario from Buffalo could enjoy "The Clue" and "Meet the Millers" on WBEN-TV, anyone living more than a couple of hundred kilometers away was out of luck.

What if we used a really, really big antenna?

The problem of limited range was solved by the development of Community Antenna Television (CATV) systems, the precursor to the modern cable television system. The early Canadian CATV systems, developed as trials in southwestern Ontario the mid- to late 1950s involved centrally located large mast antennas that could more reliably capture out-of-market U.S. and Canadian television signals. These signals would then be distributed to the CATV system's customers using coaxial cable strung from house to house.¹²

The introduction and popularity of CATV systems in Canada led to the widespread retransmission of distant U.S. signals, which was the first threat to the Canadian rights market for television programming that would be addressed with a legal response. From its introduction in the mid-1950s, cable television existed outside the regulated broadcast system until the early 1970s. In response to the introduction of the *Broadcasting Act* in 1968, the CRTC announced initiatives to bring cable television into the regulatory fold when it issued *Canadian Broadcasting "A Single System": Policy Statement on Cable Television* ("Cable Policy Statement") in the summer of 1971.

¹² Easton at pages 70-83.

In the Cable Policy Statement, the CRTC recognized that cable television had the potential to greatly expand the variety of programming available to Canadians, but was also concerned that, left unregulated, it represented a direct threat to the viability of Canadian over-the-air television stations and their ability to fulfill a cultural role. The CRTC decided that neither the unfettered growth of cable television, nor its undue restriction was an acceptable outcome. Instead it opted for a middle course to integrate cable television into the broadcasting system in a way that would avoid disruption and permit the developments of all aspects of the broadcast system.¹³

It was clear, however, that the potential threat to the Canadian broadcast rights market was one of the primary motivations, if not *the* primary motivation, behind the initiative to regulate cable television:

The danger to the Canadian broadcasting system is real and immediate. ... The Commission has indicated in previous policy announcements how unlimited penetration by United States stations on a wholesale south to north basis would completely destroy the licensing logic of the Canadian broadcasting system as established by the *Broadcasting Act*. If a solution is not found to integrate cable into the overall system, the impact, by fracturing the economic basis of the private broadcasters, would also disrupt the Canadian cultural, educational and information imperatives of both the public and private sectors of the Canadian broadcasting system.¹⁴

The threat from cable that the Commission identified was the effect of retransmitting up to eight distant signals, many of which would carry some of the same programming that had been licensed by the local Canadian over-the-air television station serving that local market. Obviously, a Canadian viewer being able to watch “All in the Family” on the signal of a distant CBS affiliate rather than on the local Canadian signal diminishes the value of the Canadian rights to the program. The CRTC found that the retransmission on distant signals of programming also available on local broadcast stations

¹³ Cable Policy Statement at page 5-6.

¹⁴ Cable Policy Statement (quoting the CRTC’s discussion paper) at page 6.

did not provide any additional choice to viewers while at the same time harming the economic interests of the local broadcasters.¹⁵

As a response, the CRTC adopted a “program duplication policy”, which we know today as simultaneous substitution. Under this policy, where the same program is carried on both a distant signal and a local signal simultaneously, a terrestrial or satellite broadcasting distribution undertaking (“BDU”) is required to delete the signal of the distant station and replace it with the signal of the local station for the duration of the program.¹⁶ As a result, the local signal is available on two different channel positions and the distant signal is not available anywhere on the dial. Despite the fact that simultaneous substitution was a measure directly intended to protect a distinct Canadian programming rights market, it has been at times controversial with the public. Most notably, some Canadian television viewers complain every year that they are not able to watch the marquee Super Bowl commercials that are shown during the American broadcast of the NFL championship game. In response to viewer reactions, the CRTC has decided to make an exception to the simultaneous substitution policy specifically for the Super Bowl starting with the 2017 broadcast, although the Federal Court of Appeal has agreed to hear an appeal of this change in policy brought by Bell Media, the owner of CTV which holds the Canadian broadcast rights to the Super Bowl.

If it’s a Death Star, shouldn’t it have lasers?

After distant signals and cable retransmission, the next technological advancement to pose a threat to the Canadian rights market was the introduction of, and widespread access to, U.S.-based direct-to-home (DTH) satellite services, the most notable being DirectTV and DISH Network.

¹⁵ Cable Policy Statement at page 26.

¹⁶ See section 38 of the *Broadcasting Distribution Regulations* SOR/97-55, Dec. 8, 1997 as amended.

Although ExpressVu (now Bell TV) and Star Choice (now Shaw Direct), two Canadian DTH systems, were licensed in 1996 and launched in 1997, there continued to be a significant number of Canadians who received satellite signals from the U.S. providers. According to a 2003 study of the Canadian broadcast industry by the House of Commons Standing Committee on Canadian Heritage,¹⁷ there were at that time between 500,000 and 700,000 Canadian households receiving unauthorized U.S. satellite services costing the Canadian system approximately \$300 million a year.¹⁸

U.S. satellite signals, like U.S. broadcast television signals, spill over the Canada-U.S. border without regard to domestic laws or regulations. Unlike television signals which have a limited geographical range, however, U.S. satellite signals are widely available to most of the Canadian population. Therefore these signals could be accessed by almost any Canadian with the technological means. In order to prevent the unauthorized access of their signals, DTH operators encrypt the signal so that the programming cannot be accessed unless the end user possesses the corresponding technology (a set-top box with an embedded decoder card) necessary to decrypt the signals and access the television programming. As the U.S. satellite providers DirectTV and DISH Network are not authorized to provide service in Canada, the means to decrypt these U.S. signals are not supposed to be provided to Canadians.

There were two distinguishable methods by which Canadians accessed unauthorized U.S. satellite services: the so-called “grey market” and “black market”. The black market referred to the practice of people using illegal, counterfeit decoder cards and set-top boxes to circumvent the encryption

¹⁷ *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting*, Standing Committee on Canadian Heritage, Clifford Lincoln, Chair, June 2003 (“Lincoln Report”), online: <http://www.parl.gc.ca/content/hoc/Committee/372/HERI/Reports/RP1032284/herirp02/herirp02-e.pdf>.

¹⁸ *Ibid.* at 509, 511.

technology without subscribing to the satellite service. It was commonly referred to as “signal theft”. The grey market referred to the practice of Canadians who would use a U.S. credit card or U.S. postal address to pose as a resident of the United States and subscribe to the U.S. satellite service. Both of these methods were subject to legal proceedings in Canada that were aimed at dealers who either sold the counterfeit equipment in the case of the black market or assisted in providing U.S. mailing addresses and securing the decoding and receiving equipment in the case of the grey market.

The proceedings were brought pursuant to the following provisions of the *Radiocommunication Act*,¹⁹ which prohibited certain activities related to the unauthorized decryption of satellite signals:

9. (1) No person shall

(c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;

...

10. (1) Every person who

...

(b) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9,

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

¹⁹ R.S.C. 1985, c-R-2.

...

(2.1) Every person who contravenes paragraph 9(1)(c) or (d) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

Section 18 of the *Radiocommunication Act* permits a person who holds an interest in the content of a subscription programming signal or holds a broadcasting licence from the CRTC and who has suffered losses as the result of conduct that is contrary to sections 9 or 10 to sue for damages from the person who has engaged in the prohibited conduct, and, to obtain injunctive relief.

Attempts to sue grey and black market service providers met with mixed success, however, as a split developed among Canadian courts as to the proper interpretation of section 9 of the *Radiocommunication Act*. One line of cases held that the phrase “lawful distributor of the signal or feed” in para. 9(1)(c) meant that the provision only applied to the unauthorized decryption of Canadian satellite signals, since the U.S. satellite providers were not authorized to provide service in Canada and were not, therefore, “lawful distributors”. The contrary line of cases held that 9(1)(c) applied to unauthorized decryption of any satellite signal, regardless of whether it was Canadian or not.

This split among the Courts as to the proper interpretation of para. 9(1)(c) was finally resolved by the Supreme Court in *Bell ExpressVu v. Rex*.²⁰

Canadian DTH operator Bell ExpressVu, as a licensed Canadian BDU, commenced proceedings in the Supreme Court of British Columbia against Richard Rex, who provided grey market satellite services under the name of

²⁰ *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 [*Bell ExpressVu v. Rex*].

Can-Am Satellites. The B.C.S.C. took the narrow view of the scope of para. 9(1)(c) and held that the provision only applied to the lawful distributors in Canada and did not apply to the “paid subscription by Canadians to signals from distributors outside Canada.”²¹ In coming to this decision Brenner J. was concerned with the prospect that Canadians could be found liable for a theft offence despite having paid for the subscription services they are receiving.²²

The majority of the British Columbia Court of Appeal dismissed Bell’s appeal of the B.C.S.C. decision.²³ Writing for the majority, Finch J.A. noted that given the contradictory interpretations in the case law, the provision must be said to be ambiguous and that because of the possibility of penal consequences the narrower interpretation adopted by the B.C.S.C must prevail.²⁴ Writing in dissent, Huddart J.A. disagreed with the majority’s narrow approach to statutory interpretation which she said ignored the broader policy scheme being “the maintenance of a distinctively Canadian broadcasting industry in a large country with a small population within the transmission footprint of arguably the most culturally assertive country in the world with a population ten times larger.”²⁵

The Supreme Court allowed the appeal of the B.C.C.A. decision and did so primarily on the basis of established principles of statutory interpretation by considering the provision in its grammatical and ordinary sense and concluded that para. 9(1)(c) prohibits the “the decoding in Canada of any encrypted subscription programming signal, regardless of the signal’s origin,

²¹ [1999] B.C.J. No. 3092 (QL) (B.C.S.C.) at para. 20.

²² *Ibid* at 18-19.

²³ (2000), 79 B.C.L.R. (3d) 250.

²⁴ *Ibid.* at para. 35.

²⁵ *Ibid* at para. 49.

unless authorization is received from the person holding the necessary lawful rights under Canadian law.”²⁶

Writing for a unanimous Court, Iacobucci J. then went on to consider the broader policy context that includes not only the *Radiocommunication Act*, but also the *Broadcasting Act* and the *Copyright Act*. In particular the Court recognized that the interrelated statutory regimes are bound up with the policy objective of protecting Canada’s program rights market:

There is another contextual factor that, while not in any way determinative, is confirmatory of the interpretation of s. 9(1)(c) as an absolute prohibition with a limited exception. As I have noted above, the concept of “lawful right” in the definition of “lawful distributor” incorporates contractual and copyright issues. According to the evidence in the present record, the commercial agreements between the appellant and its various programme suppliers require the appellant to respect the rights that these suppliers are granted by the persons holding the copyright in the programming content. The rights so acquired by the programme suppliers permit the programmes to be broadcast in specific locations, being all or part of Canada. As such, the appellant would have no lawful right to authorize decoding of its programming signals in an area not included in its geographically limited contractual right to exhibit the programming.

In this way, the person holding the copyright in the programming can conclude separate licensing deals in different regions, or in different countries (e.g., Canada and the U.S.). Indeed, these arrangements appear typical of the industry: in the present appeal, the U.S. DTH broadcaster DIRECTV has advocated the same interpretation of s. 9(1)(c) as the appellant, in part because of the potential liability it faces towards both U.S. copyright holders and Canadian licencees due to the fact that its programming signals spill across the border and are being decoded in Canada.²⁷

The Supreme Court explicitly recognized that the concept of a “lawful distributor” of programming in Canada requires some consideration of Canadian copyright and the distinct Canadian program rights market. As a

²⁶ *Bell ExpressVu v. Rex* (SCC) at para. 43.

²⁷ *Ibid.* at paras. 50-51.

result, the fact that a Canadian had made a grey market payment to a U.S. satellite service was irrelevant in determining whether or not the distribution of the programming was “lawful” or not, since the U.S. programming services distributed by the U.S. satellite services don’t have the right to distribute in Canada programming the rights to which are held by a Canadian programming undertaking.

The Supreme Court decision interpreting para. 9(1)(c) of the *Radiocommunication Act* as prohibiting any decryption of U.S. satellite services did not immediately put an end to the satellite legal skirmishes, however. The Respondents to the Supreme Court appeal had raised the constitutional question of whether the provision infringed freedom of expression contrary to the *Charter of Rights and Freedoms*, but the Supreme Court declined to answer the constitutional question citing the lack of an evidentiary record.²⁸ In declining to decide the Charter question, the Court recognized that the question could still be raised in subsequent litigation, which is, in fact, exactly what happened. Mr. Rex continued to supply customers with the means to access grey market U.S. satellite services prompting another round of litigation. In 2012, the British Columbia Court of Appeal found that the provisions of the *Radiocommunication Act* do not infringe the Charter’s guarantee of freedom of expression.²⁹

What is almost as interesting is the public reaction to the Supreme Court’s decision in *Bell ExpressVu v. Rex*. This reaction foreshadows the public reaction years later when Netflix began to take steps to prevent Canadians from accessing the U.S. service with its larger catalogue of movies and television programs. While most people seemed to accept that black market satellite access is a form of theft that should be subject to criminal and civil sanctions, there were some commentators who believed that Canadians had

²⁸ Ibid., paras. 56-67.

²⁹ *Dish Network LLC v. Rex*, 2012 BCCA 161 (CanLII).

“a right” to access U.S. satellite services if they paid the applicable subscription fees. A typical example of this view could be found in the editorial written by Matthew Fraser and published in the National Post on April 29, 2002.

Mr. Fraser said that Canada’s attempts to crack down on grey market satellite services put Canada in the same company as North Korea and “assorted neo-medieval Islamic theocracies” in preventing access to foreign satellite services:

Canada’s satellite TV saga provides a textbook case study of how, in the closed Ottawa world of regulation-protected broadcasters, whenever commercial stakes clash with cherished principles, economic interests invariably win.

While Mr. Fraser recognized that the Canadian program rights market was at the heart of the policy to prevent U.S. services from being broadcast into Canada, he dismissed the copyright rationale as a sham excuse used to protect vested interests:

DirecTV first attempted to operate legally in Canada in the early 1990s, but got sandbagged by the Canadian Radio-television and Telecommunications Commission. DirecTV later partnered with Power Corp. of Canada, but Power DirecTV also met CRTC resistance.

Why? Because DirecTV carried a number of banned U.S. channels, such as MTV and Home Box Office. The CRTC banned HBO because it had authorized a Canadian-based channel, The Movie Network, as a monopoly middleman for HBO product. TMN, coincidentally, was owned by Astral Media Inc., whose president, André Bureau, happened to be a former CRTC chairman.

The CRTC's rationale for its HBO ban is that TMN owns Canadian "territorial rights" for HBO programs. DirecTV – which like all satellite systems is transborder – is allegedly violating those rights by beaming HBO to its Canadian subscribers. But what if HBO and Hollywood studios simply stopped selling product to TMN, or sold non-exclusive rights? There would be no Canadian commercial rights to violate.

But the CRTC, unable to counter that argument, falls back on a "cultural" rationale for TMN's monopoly: TMN kicks back cross-subsidies for Canadian content – monopoly rents that, in theory, cannot be extracted from U.S.-based DirecTV. Yet that rationale, too, is without foundation: Hollywood studios invest more in movie production in Canada than the CRTC will ever extract from Astral Media.

Canadian cable barons, meanwhile, have discreetly supported the CRTC's anti-DirecTV posture because DirecTV poses a more powerful "death star" threat than ExpressVu and Star Choice. But the cable industry's position contains one telling nuance: If DirecTV is allowed into Canada, they will also demand the right to carry HBO, Showtime and other banned American channels. Goodbye, TMN. Goodbye, CRTC.

To Mr. Fraser and those who agreed with him, a distinct Canadian program rights market is not a legal structure to be protected; rather, it is a problem that needs to be eliminated (and with it, apparently, all forms of broadcast regulation in Canada).

While there are undoubtedly still some Canadians who access grey and black market U.S. satellite services, it seems obvious that the threat has been substantially resolved through a combination of legal enforcement against dealers; technological measures to disable counterfeit decryption devices; and a far more competitive range of programming choices available from legitimate Canadian cable and satellite BDUs that makes unlawful alternatives less appealing. Furthermore, for those Canadians interested in accessing popular television programs and movies without regard to the legality of the means, satellite technology has been almost entirely eclipsed by the internet.

The *other* “Crave”

Before we look at the threat posed to the Canadian program rights market by internet services such as Netflix, it is interesting to recall that the first full-on assault on television program rights launched over the internet was not initiated by U.S. services being made available in Canada; rather it was

a small Canadian upstart called iCraveTV (not to be confused with Bell Media's legitimate video streaming service CraveTV) that fired the shot heard around the world (or at least in Hollywood and New York).

In late 1999, William Craig started a website called iCraveTV that streamed seventeen U.S. and Canadian conventional television signals over the internet.³⁰ Mr. Craig made no attempt to license the use of the programming available from his website, relying instead on the provision of the Canadian *Copyright Act* that permits BDUs to retransmit programming in over-the-air television signals without requiring the consent of the program rights owner or the broadcaster. One of the conditions is that a BDU has to pay royalties to rights owners for programming retransmitted on distant (out-of-market) signals. iCraveTV did not require a broadcasting licence because the CRTC had decided in 1999 to exempt from regulation new media undertakings that engage in broadcasting over the internet.³¹

Since the statutory licence provided by section 31 of the *Copyright Act* would only apply to retransmissions within Canada, iCraveTV required users to read a 3,000-word disclaimer stating that users could only access the site from a computer located in Canada. To verify the location, users were asked to input a Canadian area code.³² Canadian and U.S. program producers, broadcasters and sport leagues pointed to the ineffectiveness of iCraveTV's primitive "geo-gating", which resulted in easy access to the programming by users in the United States (and presumably anywhere else in the world). Litigation in the United States and subsequent settlement negotiations resulted in iCraveTV ceasing operations in early 2000.³³

³⁰ S. Handa, *Copyright Law in Canada* (Toronto: Butterworths Canada, 2002) at 332.

³¹ Public Notice CRTC 1999-197, *Exemption Order for New Media Broadcasting Undertaking*, December 17, 1999 ["New Media Exemption Order" or "Digital Media Exemption Order" or DMEO"]. The DMEO has been updated from time to time and remains in effect.

³² D. Hawalwshka, *iCraveTV Controversy*, MacLean's Magazine, January 10, 2000.

³³ Handa at 332.

In response to iCraveTV, and a second potential Canadian internet retransmitter called JumpTV, the Federal Government rushed through amendments to section 31 of the *Copyright Act* to explicitly exempt from the scope of the statutory retransmission licence undertakings operating pursuant to the New Media Exemption Order.³⁴ The end of internet retransmission in Canada, however, was just the beginning of the internet's challenge to the Canadian rights market.

The current issues: deja view

Many younger Canadians, having missed the earlier controversies described above, are learning about the mechanisms of the Canadian program rights market for the first time.

These mechanisms have recently entered the public eye (again) as a result of the internet's inherently borderless nature. Canadians browsing the web are frequently frustrated when they encounter videos that will not play due to their "geographic location" or the videos' "copyright restrictions", or they bemoan the fact that they pay similar prices for paid streaming services as subscribers in the U.S. do, but have access to smaller content libraries.

Many do not appear to understand that the programming is not just being arbitrarily withheld, but that the unavailability results from the interplay of a complex set of legal, economic and social factors, as well as simple questions of popularity.

As has always been the case, content owners geographically divide and license their rights because different programs will be more or less in demand in different territories. Each territory provides a different set of potential bidders for the streaming rights in a given program: international streaming services, domestic streaming services, and conventional BDUs.

³⁴ *An Act to amend the Copyright Act*, S.C. 2002, c. 26.

For example, the owner of the streaming rights in “Parks and Recreation” may sell Netflix a licence for the right to stream it in the U.S., and sell shomi the exclusive right to stream it in Canada. If Netflix were to offer streaming for “Parks and Recreation” to viewers in Canada, it would breach its contract with the owner, and it would also be infringing shomi's exclusive right to stream the show to Canadian viewers.

Human nature being what it is, the practice of using technological workarounds to access streaming content from other countries, instead of through its legal Canadian source, is now common.³⁵ The false U.S. locations that these viewers use are the contemporary equivalent of the false U.S. addresses Canadians used to access grey market satellite services.

One great library of content?

It is often proposed that, to prevent this from happening, international streaming services should simply acquire global rights in all of their programming so that they can offer a single content library worldwide.

Netflix has been very vocal about its own desire to acquire or maintain global rights in the programming it offers. Of course, to do so is not as simple as it sounds.

First, although most of its own original programming is available globally, there is no guarantee that Netflix will be able to acquire the global rights to the programming it has licensed.³⁶ There will inevitably be competition for

³⁵ “Canadians outraged as Netflix cracks down on VPNs”, The Globe and Mail, April 20, 2016, online: <http://www.theglobeandmail.com/technology/netflix-serious-about-crackdown-on-vpns-used-to-avoid-geo-blocking/article29700273/>. The article states that “roughly 30 per cent of Canada’s almost four million Netflix subscribers [...] are believed to be using so-called unblocking services”.

³⁶ “Netflix says it will do more to stop customers from bypassing country restrictions”, The Verge, January 14, 2016, online: <http://www.theverge.com/2016/1/14/10767982/netflix-blocking-proxies-vpn-country-restrictions>.

the remaining territorial rights in those programs and the territorial rights market could be maintained as a matter of economics alone.

Second, even when Netflix is distributing the programming it has produced itself, it must consider regional economics, sensitivities and preferences. Aside from the question of which territories' viewers enjoy "Death in Paradise" the most, international distribution raises more serious questions, such as censorship. This was highlighted in January 2016 after Netflix announced its expansion to more than 130 new countries. Netflix was asked whether its own program "Orange is the New Black", which contains explicit depictions of same-sex sexual activity, would air uncensored in all of the new markets.³⁷ A Netflix representative left the answer somewhat unclear, saying that "Netflix will continue to make market-specific decisions based on the preferences of [its] members."³⁸ As of April 8, 2016, censorship authorities in both Indonesia and Kenya had raised complaints about Netflix's content.³⁹ The question arises: if Netflix's library were to be truly global, would this require it to alter its programming choices to make them compliant with all regions' tastes, requirements and even censors?

Third, even if Netflix were to offer an identical library of programming everywhere in the world, it would still compete with other streaming services and conventional BDUs. From the viewer's perspective, although this would change the specific set of offerings from each competing service,

³⁷ "Netflix goes global - but will it censor lesbian sex from Orange is the New Black?", Gay Star News, January 7, 2016, online: <http://www.gaystarnews.com/article/netflix-goes-global-but-will-it-cut-lesbian-sex-from-orange-is-the-new-black/#gs.5sU22ss>

³⁸ "Netflix goes global - but will it censor lesbian sex from Orange is the New Black?", Gay Star News, January 7, 2016, online: <http://www.gaystarnews.com/article/netflix-goes-global-but-will-it-cut-lesbian-sex-from-orange-is-the-new-black/#gs.5sU22ss>; see also "Netflix won't commit to leaving its content uncensored around the world", The Verge, January 6, 2016, online: <http://www.theverge.com/2016/1/6/10724616/netflix-ces-2016-uncensored-original-global-content>.

³⁹ "Here's How Netflix Inc. Can Take on Censors Around the World", The Motley Fool, April 8, 2016, online: <http://www.fool.com/investing/general/2016/01/22/heres-how-netflix-inc-can-take-on-censors-around-t.aspx>

each territory's market would remain fragmented because competing services with their own exclusive rights would still exist. The end result would be that many consumers would still end up needing to subscribe to a patchwork of services in order to receive all the programs they want. How would this improve things?

Oh, you mean this gate key⁴⁰

Much has been made of the problem of leaky geo-gates. These are technological tools meant to restrict access to content to particular geographic areas, which some viewers bypass through various technological means. Regardless of whether program rights will be licensed on a global basis in the future, what can Canadian program right holders do now to protect their rights?

Amendments to the *Copyright Act* that were made in 2012 provide rights holders with a variety of legal tools for protecting the territorial rights they have purchased. Chief among them are the provisions prohibiting the circumvention of technological protection measures (TPMs) that control access to content. These provisions are worded quite broadly, and it is reasonable to believe that streaming services' geo-gates would be considered access-control TPMs under the definition in section 41 of the *Copyright Act*:

41. [...] technological protection measure means any effective technology, device or component that, in the ordinary course of its operation,

(a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner [...].

There are civil prohibitions on circumventing access-control TPMs, and on offering or providing circumvention services, or means of circumvention, to the public:

⁴⁰ *The Princess Bride*, 1987.

41.1 (1) No person shall

(a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition technological protection measure in section 41;

(b) offer services to the public or provide services if

(i) the services are offered or provided primarily for the purposes of circumventing a technological protection measure,

(ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a technological protection measure, or

(iii) the person markets those services as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market those services as being for those purposes; or

(c) manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component if

(i) the technology, device or component is designed or produced primarily for the purposes of circumventing a technological protection measure,

(ii) the uses or purposes of the technology, device or component are not commercially significant other than when it is used for the purposes of circumventing a technological protection measure, or

(iii) the person markets the technology, device or component as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market the technology, device or component as being for those purposes.

Thus, these prohibitions could apply to individuals who bypass geo-gates to stream programming from foreign services, and to people who provide or market services for, or by means of, bypassing geo-gates. The particular technological means employed to circumvent the TPMs do not appear to be relevant. They have not yet been judicially considered in the context of cross-border streaming, so it is difficult to know how a court would conduct its analysis, but the various prohibitions appear to cast a broad net.

The civil consequences for contravening these prohibitions are the same as those for infringing copyright—i.e., damages⁴¹—except that individuals who circumvent TPMs for their own private purposes cannot have statutory damages ordered against them.⁴²

Further, where TPMs are circumvented knowingly and for commercial purposes, subsection 42(3.1) of the *Copyright Act* also prescribes criminal penalties:

42 Circumvention of technological protection measure

(3.1) Every person, except a person who is acting on behalf of a library, archive or museum or an educational institution, is guilty of an offence who knowingly and for commercial purposes contravenes section 41.1 and is liable

(a) on conviction on indictment, to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding six months or to both.

Again, these provisions are quite new, relatively speaking, and have not yet been judicially considered.

Of course, the first actions being taken have been practical as opposed to legal. For example, Netflix has indicated that it is now taking measures to prevent foreign access of its various content libraries.⁴³ PayPal has also begun to cut off its own payment processing services to border-hopping services such as UnoTelly.⁴⁴

⁴¹ *Copyright Act*, subs. 41.1(2) and (4).

⁴² *Copyright Act*, subs. 41.1(3).

⁴³ “Netflix cracks down on proxy services used to access foreign content”, CBC News, January 14, 2016, online: <http://www.cbc.ca/news/technology/netflix-proxy-services-crackdown-1.3404169>.

⁴⁴ See, e.g., “PayPal cuts off payments to UnoTelly Netflix-unblocking service”, CBC News, February 5, 2016, online: <http://www.cbc.ca/news/technology/unotelly-paypal-1.3435740>.

Where there is a sea (or the internet) there are pirates

“Traditional” program piracy, whether through unauthorized downloading via a method such as BitTorrent or through unauthorized streaming services such as Popcorn Time, is still a concern for rights holders. There appears to be a growing recognition among Canadians that this is morally undesirable. However, as Netflix has begun blocking foreign viewers from accessing its U.S. library, returning to piracy has become a knee-jerk threat.⁴⁵

The provisions of the *Copyright Act* with the most obvious potential application to services facilitating piracy are the rule against enabling copyright infringement in subsection 27(2.3), and the exclusive right to communicate a program to the public by telecommunication described in paragraph 3(1)(f).

Rights holders could consider using those provisions in civil proceedings against TPM circumvention services, as well.

There is also the “notice and notice” system in sections 41.25-41.27 of the *Copyright Act*, pursuant to which a rights owner may send a notice of claimed infringement to an alleged infringer’s ISP, the web host of the allegedly infringing material, or to a search engine.⁴⁶ The recipient of the notice is required to forward it to the alleged infringer (or inform the claimant why the notice could not be forwarded) and retain records that would identify the alleged infringer for a limited period of time.⁴⁷ This system would facilitate court action against alleged infringers. For practical

⁴⁵ See “Netflix enrages Canada by actually following through on VPN crackdown plans”, CBC News, April 19, 2016, online: <http://www.cbc.ca/news/trending/netflix-officially-kills-vpn-access-canadians-very-mad-1.3543299>; the subheading of the article itself is “Virtual private networks hit a major roadblock. So... back to torrenting?”. This threat is particularly interesting because bypassing geo-gates to access foreign content is arguably, itself, already piracy.

⁴⁶ *Copyright Act*, paras. 41.25(1)(a)-(c).

⁴⁷ *Copyright Act*, subs. 41.26(1).

reasons, it seems more applicable to situations where there is “traditional” piracy as opposed to the bypassing of geo-gates.

Here be dragons: The future of Canadian rights in an OTT world

As noted, over the past few months, we have seen Netflix begin to take active measures to stop cross-border streaming, which echoes the actions taken in the past to stop cross-border access to satellite services and unauthorized streaming.

Regardless though, even if grey-market Netflix ceases to threaten the Canadian program rights market, white-market Netflix (i.e. the Canadian version), and OTT services in general, are major competitive threats to conventional broadcasters and distributors. Netflix runs a legal, authorized service in Canada, which is currently exempt from most CRTC regulatory requirements and obligations pursuant to the DMEO, and as a global company, Netflix is acquiring sufficient financial power to simply purchase Canadian streaming rights.

It isn't only Netflix that is emerging as an OTT competitor. OTT services, Canadian *and* foreign, are increasingly a core source of programming for many Canadian viewers—not “over the top”, but alongside, conventional BDU services. For viewers, access to programming is increasingly being achieved through a patchwork of OTT and conventional services. Rogers' recent announcement that it will offer an OTT sports pack may signal that conventional BDUs are moving toward this model.

The CRTC justification for enacting and maintaining the DMEO is that regulating OTT services will not “contribute in a meaningful manner to the implementation of the broadcasting policy”⁴⁸ since these services do not significantly compete with conventional services. But have we passed the

⁴⁸ Subsection 9(4) of the *Broadcasting Act*, which establishes the conditions under which the CRTC must exempt certain undertakings.

tipping point where any attempts to distinguish between online and traditional services for the purposes of regulation is arbitrary and unjustified? If players in the exempt system, particularly foreign exempt services, are beginning to rival the regulated system for viewer attention, subscription revenue and programming rights, should the CRTC respond? If so, how? How much longer can the DMEO be maintained, if its premise has been eroded?

It is questionable whether, under the current legislation, the CRTC even has the tools at its disposal to respond to the changing landscape. Foreign OTT services can't be issued broadcasting licences because of the Canadian ownership requirements, and it is unrealistic to expect that the CRTC will attempt to shut down Netflix's Canadian operations. Is continuing exemption, even if the exemption rests on shaky ground, the only option?

The threat posed by OTT services to the Canadian program rights market is different from the threats that have gone before in one very important aspect: OTT services are operating within the regulatory tent in Canada despite having no significant regulatory requirements or obligations. The barbarians are no longer at the gate; they have moved in and taken up residence. If foreign OTT services can acquire, without restriction, Canadian program rights as part of their global licensing deals, and can freely operate in Canada without any of the Canadian ownership or Canadian content obligations imposed on traditional broadcasters, have we finally given up on protecting and promoting a distinctly Canadian rights market?

In response to the launch of Canadian OTT services shomi and CraveTV, both of which are affiliated with licensed broadcasting undertakings,⁴⁹ the Commission issued an exemption order that applies to "hybrid video-on-

⁴⁹ CraveTV is owned by Bell Media and shomi is a partnership between Rogers and Shaw.

demand” services.⁵⁰ These hybrid video-on-demand services will have the same flexibility as services operating under the DMEO and can be offered both over a traditional BDU network and online. Like Netflix, they will not be required to meet the regulatory obligations related to financial contributions to, and “shelf space” for, Canadian programming that are imposed on traditional VOD services.⁵¹ They can hold exclusive rights to programming, but only if they are offered on the internet to all Canadians without the need for a subscription to a specific broadcasting distribution undertaking, mobile service, or retail internet access service. These measure are intended to help these new HVOD services “compete on an equal footing in an on-demand environment”.⁵²

However, exempt hybrid video-on-demand services are still required to be owned by Canadians and it seems doubtful that any Canadian HVOD service will be a position to compete with Netflix for global programming rights if that is how Canadian streaming rights will be licensed in the future. Furthermore, it appears as if the CRTC’s response to the OTT threat is to the lower the regulatory standard. One then has to wonder, as on-demand streaming becomes more prevalent, what is to the become of the regulatory model?

And if our regulatory system doesn’t really have an answer to the threat posed to the Canadian rights market by OTT services, has the regulatory system outlived its usefulness?

Was Matthew Fraser right?

⁵⁰ Broadcasting Order CRTC 2015-356, *Terms and conditions of the exemption order for video-on-demand undertakings*, Appendix 1 to Broadcasting Regulatory Policy CRTC 2015-355, August 6, 2015 (“HVOD Policy”).

⁵¹ HVOD Policy at para. 6.

⁵² *Ibid.*