

Canadians losing out with digital media

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Canadian Lawyer, December 2007

It seems odd that in our plugged-in, digital world, there are still restrictions on what Canadians can and can't view or purchase on the web. These virtual borders are slowly eroding, but IP experts say the issue is partly due to broadcasting and copyright regulations and partly due to dollars and cents.

The Internet should be making content more readily accessible to anyone, anywhere, but the reality is that Canadians often lose out when it comes to digital media, since agreements aren't always made with copyright holders to provide that content north of the border. That means we might be able to watch *Lost* on TV, but we can't download the latest episode onto our iPod.

Digital media is an area fraught with grey areas. Canadians can't access all of the content that's available in the United States, partly due to broadcasting and copyright regulations, partly due to dollars and cents.

"The internet was supposed to be the great equalizer as far as access to new technologies is concerned," says Elliott Simcoe, of Smart & Biggar/Fetherstonhaugh. "If you were in Zimbabwe or Thompson, Man., the internet was supposed to equalize your ability to access technology and content. It didn't really work out that way."

With traditional media such as radio and television, the Canadian Radio-television and Telecommunications Commission (CRTC) is concerned with protecting Canadian content. That means Canadians can't watch the cool U.S. commercials during the Super Bowl, or MTV Canada can't actually play any music videos (since MuchMusic has the licence for that type of programming).

"When we're talking about new media, the good news is that at least up until today the broadcast regulators have for the most part had a hands-off approach to internet and new media," he says. "That goes back to a 1999 report from the CRTC, at least as far as web casting is concerned."

Then there's copyright law, which is different in Canada than the U.S. With Apple iTunes, for example, Americans can type in their credit card number to get the latest episodes of *Lost* or *Desperate Housewives* on their iPod, but Canadians can't, even if they have video capabilities and are willing to pay for content.

"So with the exception of old episodes of *The Beachcombers*, there's not much to see," says Simcoe.

But it goes both ways — Aeroplan, for example, has set up its own music site, which is only available to Canadians.

We're seeing a trend toward the erosion of traditional borders through technology. A recent CRTC report says that as a result of the borderless nature of new technologies, exclusive program rights on a territorial basis are becoming more difficult to acquire and to protect, thereby threatening the integrity of the Canadian program rights market.

"A point may be reached with the internet and other unregulated platforms in which Canadian broadcasters could be completely bypassed," the report says.

We're already seeing a flood of bypassing, says Simcoe. Canadians will watch the U.S. commercials during the Super Bowl via satellite or streaming technology from the U.S. And the latest episode of *Lost* or *Desperate Housewives* shows up on YouTube hours after it aired on TV.

"The person who loaded up the TV show onto YouTube is making money and [Canadian network] CTV isn't making any money," he says. While there are take-down measures for copyrighted content, broadcasters have to keep on top of it 24 hours

a day. 'You can see that there's revenue loss here,' he says.

When the digital world started to become real for content providers, there was some hesitation on the part of U.S. studios in providing rights to digital platforms. "I'm not convinced it's Canadian copyright law," says Tracey Pearce, senior vice president of business and legal affairs with CTVglobemedia Inc. The concern, rather, was whether appropriate digital rights management technologies were in place, and what impact digital exploitation would have on the content.

Initially, U.S. studios wanted to manage how that was being handled. Then, as they started to get some experience with the platform, they became more comfortable rolling it out to third-party licensees, she says.

But limited access to content here is less a copyright issue, she added, and more of a straight-up business proposition — either you don't want to pay what they want you to pay, or you're not going to jump into acquiring rights to digital content when the industry has not yet been terribly successful in monetizing it.

"We're picking and choosing our properties now," says Pearce. We find the deals are still not as easy to get done as deals for more traditional platforms.' It comes down to getting everybody on the same page about what's a realistic licensing fee and how much a spot can be sold for over broadband.

"We're still experimenting with trying to find that sweet spot with the viewer," she says. "What we're going to do right now is learn about how people want to use it — let's try video-on-demand on cable, let's try broadband on ctv.ca, and see how people are accessing it."

The popular teen soap opera Gossip Girl, for example, has a younger viewing demographic and gets tons of hits on its broadband site. So for each show the network acquires, it has to decide which platforms make sense.

What has developed over the past few years are sophisticated geographic identification technologies that allow — with a high degree of accuracy — the operator of a web site to identify where an IP address is located, says Mark Hayes, a partner in the intellectual property group at Blake Cassels & Graydon LLP. So, while initially there was strong resistance by copyright owners to allow their material to be made available online, that has changed, particularly in the last couple of years.

Now we're seeing U.S. television shows and motion pictures being distributed over the Internet in a way that mimics the territorial methods offline. The development of these geographic identifier programs has been extremely important in unlocking the impasse that was there for a long time," he says. "And what we see in the music industry is that if you have an impasse in online licensing, that means you don't have robust online distribution, and the pirates will come in to fill the void."

The television and motion picture industries are trying their best to avoid that problem by staying ahead of the curve and allowing online licensing that mimics offline licensing, and there are now technological tools that allow for that. "That's why we're seeing movies and TV shows being made available at least in some form," he says.

But there are limited licensing deals in place that prohibit some distribution channels from distributing outside the market they're licensed in. So if a network has the exclusive licence to broadcast a certain TV show in the U.S., an online deal will generally be limited to the same territorial jurisdiction.

"Because this is all in its infancy, some of the shows will be available in the U.S. sooner because the licensees there have the money, have the resources, to be able to make them available sooner," says Hayes.

Clout also plays a role. If you're a major U.S. television network, you have the clout to negotiate electronic distribution rights with a studio producing a TV show. "You negotiate what the rights will be and there's a lot of money in it for everybody, so there's a real incentive to make a deal," Hayes says. When it comes to Canada, it's much more difficult for the networks here to convince them to go to that effort for such a small market.

"It's all one big grey area — the business models evolve, and the legal structures have to evolve to match the business models and technological capabilities, and that's a constant challenge."

This is what Industry Canada, which develops recommendations for legislative or regulatory changes under the Copyright Act, is attempting to do.

However, there are limits, because the distribution of content over the internet is really a matter of private contract, says Albert Cloutier, director of the Intellectual Property Policy Directorate at Industry Canada.

Copyright content in general can't enter the marketplace without the consent of the relevant rights holders.

"In terms of when things become available, from the copyright angle, it's really for the rights holders to decide, and market forces will play a role in terms of consumer demand," he says.

But Industry Canada wants to encourage the rollout of new services and is looking at reforms through the Copyright Act that are aimed at giving content providers and copyright owners the confidence and legal certainty they need to fully participate in a digital marketplace. This includes revamping some of the protections given to rights holders and coming up with measures to clarify the copyright responsibilities of internet service providers (ISPs).

One difference between Canada and the U.S. is ISP liability, says Brian Gray, a partner with Ogilvy Renault LLP. The Americans have a process called notice and takedown, which means if an ISP is notified of a copyright violation, it's immune if it follows the procedures of taking the offending material down. We don't have that in Canada.

In the U.S. there's litigation over YouTube, where YouTube is arguing that it's immune to liability as an ISP. The argument against that, however, is that YouTube is not an ISP — it's more like a broadcaster.

An issue that often comes up is whether something is a broadcast or a download (and is it a permanent download, a podcast, or a streaming simulcast). "They really are two separate rights," says Gray. "There's a broadcasting right and then there's a copying right."

While those issues have been settled for conventional broadcasters, the internet is a whole different ball game with new uses for content — everything from radio broadcasts over the internet to downloadable ringtones for cellphones.

But Canadians are losing out where the rights holder has fragmented the market, such that access to the content is restricted here more than it is in other countries, says Simcoe. "It's the Canadian rights market that has to adjust to the technological realities and that's more of an economic issue than a legal issue."