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A New Technology Question of Olympic Proportions: Should NBC's License to Broadcast the Games Include Internet Broadcasting Rights?

Brandi Barnes Kellis

A NEW TECHNOLOGY QUESTION OF OLYMPIC PROPORTIONS: SHOULD NBC'S LICENSE TO BROADCAST THE GAMES INCLUDE INTERNET BROADCASTING RIGHTS?

"Video killed the radio star . . ."[1]

I. BACKGROUND

The 2000 Summer Olympics could have been an impressive showcase, not only of human athletic ability but of human ingenuity. The Sydney Games were the first Olympics to occur during the cyber-age.[2] The rapid advancement of communications technology would have allowed computer users to see photos, enjoy real-time video and listen to live audio of the Games over the Internet.[3] Due to its capacity to deliver information to users almost simultaneously, the Internet had become an increasingly popular way to reach news and information.[4] An indifference to physical location and a multitude of offerings meant the Internet had the potential to make the 2000 Olympics the world's virtual stage.

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[1] THE BUGGLES, *Video Killed the Radio Star*, *on* THE AGE OF PLASTIC (Island 1979).

[2] Mike Snider, *Security Team Monitoring Web to Guard IOC's Video Ban*, USA TODAY, Sept. 15, 2000, at 3F.

[3] *See* Bernhard Warner, *IOC May Let Dot-Coms Cover Games in . . . 2002*, THESTANDARD.COM (Aug. 18, 2000) ("The Net . . . is a hybrid of print and broadcast, because sites can incorporate real-time coverage, moving pictures and sound."), *at* http://www.thestandard.com/article/0,1902,17807,00.html (on file with the Journal of Intellectual Property Law).

[4] *See* Jennifer M. Driscoll, *It's a Small World After All: Conflict of Laws and Copyright Infringement on the Information Superhighway*, 20 U. PA. J. INT'L ECON. L. 939, 940 (1999) ("[T]he Internet may stand to displace television and books as the entertainment medium of choice.").

The Internet and the Olympics seemed to be a match made in heaven. The 2000 Games were "held in a time zone that is between nine and [seventeen] hours ahead of peak viewing time in sports' two largest television markets, Europe and the U.S.,"[5] giving "the [I]nternet a fantastic opportunity to provide sound and moving pictures to Olympic viewers hungry for live action. And because the Olympics is a multi-sports event, the [I]nternet is ideal for producing coverage of everything from shooting to handball. . . ."[6] Additionally, Internet users were expected to number 705 million in 1999.[7] As well, there had been a corresponding rise in Internet advertising expenditures, which had increased by more than 112% from 1997 to 1998, reaching more than $1.92 billion and far surpassing sales of outdoor ads.[8]

Despite the Internet's potential and its capabilities for ad revenues, not only was it *not* used to show Olympic events to the world as they happened, but a comprehensive ban was placed on any and all attempts to post video of the Games to the Internet.[9] Why was this available technology spurned at what could have been its most triumphant moment? The answer lies in one very lucrative contract.

A. THE CONTRACT BETWEEN NBC AND THE IOC

Broadcasters around the world currently have contracts worth millions of dollars locking up television rights to the Olympic Games through 2008.[10] Like other organizers of international sporting events, the IOC normally grants television rights to broadcasters for a given territory, usually per country, on an exclusive basis.[11] The National Broadcasting Company

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[5] Patrick Harverson, *See No Action, Hear No Action, Click No Action: Olympics on the Internet*, FIN. TIMES (LONDON), Aug. 4, 2000, at 15.

[6] *Id.*; *See also* Wendy Grossman, *Olympics Misses the Net: American TV Network NBC is Not Broadcasting the Sydney Olympics*, DAILY TELEGRAPH (LONDON), Sept. 21, 2000, at 9 ("[T]he Internet, more than any other medium, is ideal for catering to niche interests.").

[7] Julia Alpert Gladstone, *Survey of the Law in Cyberspace: Introduction*, 55 BUS. LAW. 407, 407 (1999).

[8] Linda Pickering & Mauricio F. Paez, *Music on the Internet: How to Minimize Liability Risks While Benefitting from the Use of Music on the Internet*, 55 BUS. LAW. 409, 409 (1999).

[9] *Can NBC Ban Internet Broadcast Rights to the Sydney Olympics?*, BUS. WIRE, Sept. 5, 2000, LEXIS, News Library, News Group File.

[10] *Id.*

[11] *See* Eur. Comm'n Decision 403/93, 1993 O.J. (L 179) 23, 27 ("Television rights are normally held by the organizer of a sports event, who is able to control the access to the premises where the event is staged.").

(NBC) paid $705 million for the right to broadcast the Sydney Games to the United States, compared to $615 million paid by all the other broadcasters combined.[12] The network paid a total of $3.5 billion for the exclusive rights to broadcast the Olympics to the United States through 2008.[13] The contracts obviously include television, but do they also include Internet broadcasting, or "Webcasting," which had become increasingly commercially viable since the signing of 1995 agreements.[14]

The question arises repeatedly with the birth of each new medium: how are existing contracts affected? Internet broadcasting is a medium by which video and audio are "streamed" to a personal computer so that the user may view and hear a broadcast without actually downloading a permanent copy onto his hard drive.[15] Internet usage and technology have increased swiftly in the medium's short history.[16] When NBC purchased its television rights in 1995, Web surfers worldwide only totaled 15 million.[17] Now there are more than 70 million surfers in the United States alone.[18] "[T]he IOC has found itself caught in a time warp. When the sponsorship and broadcasting rights contracts were signed . . . the [I]nternet was not the phenomenon it is now, and the sports websites were nowhere near as developed."[19] With Internet technology, video broadcasting is now possible, even if only for short video clips,[20] and that technology continues to advance rapidly.

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[12] Grossman, *supra* note 6, at 9.

[13] Andrew J. Glass, *Planning on Viewing the Olympics on the Web? Stop looking!*, VENTURA COUNTY STAR, Sept. 11, 2000, at B6.

[14] "The proliferation of technology and the Internet has made it possible to 'broadcast' events live on the Web, creating new competition for traditional television outlets." *Can NBC Ban Internet Broadcast Rights to the Sydney Olympics?*, *supra* note 9.

[15] Pickering, *supra* note 8, at 409.

[16] The Internet got its start with a U.S. military project called "ARPANET" (Advanced Research Projects Agency Network) which connected four computers in 1969. Research and higher education institutions had gotten in on the project by 1972, when a total of 37 computers could communicate with each other. Now, of course, the Internet is available to computer users everywhere through Internet service providers. Jeffrey G. Raphelson, *Old Laws, New Laws, and New Technology: A Summary of Some Laws Affecting Use of the Internet*, 77 MICH. B.J. 1202 (1998).

[17] Snider, *supra* note 2, at 3F.

[18] *Id.*

[19] Grossman, *supra* note 6, at 9; *see also* Harverson, *supra* note 5, at 15 ("The problem is all the Olympic deals were signed when the [I]nternet was in its infancy . . .").

[20] *See* Miguel Helft, *Quokka Goes for the Gold*, THESTANDARD.COM (Aug. 14, 2000) ("[T]here is no technical reason why, for instance, a Web site could not show video of short events such as the high jump or the 100-meter dash . . ."), *at* http://www.thestandard.com/article/display/0,1151,17604,00.html (on file with the Journal of Intellectual Property Law).

"This new form of competition begs the question as to whether or not television rights holders also own the rights to Internet coverage."[21] One issue is how online media groups can compete with the exclusive broadcasting rights NBC purchased for the 1996 through 2008 Games that may include the exclusive rights to broadcast over the Internet.[22] Meanwhile, formal separation of rights to broadcast over television and those to broadcast over the Web could give the International Olympic Committee millions of extra dollars in revenue for the Games. The novelty of Internet broadcasting, not to mention the vast amounts of money on the table, meant NBC took control of the Internet rights to the 2000 Summer Games by default.[23] The IOC has since taken firm hold of Internet rights to future Olympics and plans not to let them go for quite a long time.[24]

B. THE CURRENT SETTING

During a December 2000 meeting between top IOC officials, traditional broadcasters and Internet executives in Lausanne, Switzerland, the parties discussed the possibility of bringing the Games on-line, but they did not produce any good news for the Internet community.[25] The IOC announced that it will postpone bestowing Internet rights to the Games on current contract holders or anyone else until current broadcasting contracts expire. In short, "the IOC has decided to hold its Internet rights hostage"[26] until the 2010 Winter Games.[27]

The problem with this approach is that if the Internet explosion continues at its current pace, the IOC's new anti-Internet policy could effectively cripple NBC and its fellow licensees by the time the 2008 Games

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[21] *Can NBC Ban Internet Broadcast Rights to the Sydney Olympics?*, *supra* note 9.

[22] John Dorschner, *Olympics Won't Fizzle for Fans Who Use Internet*, THE MIAMI HERALD (Sept. 12, 2000), *at* http://www.herald.com (on file with the Journal of Intellectual Property Law).

[23] *Can NBC Ban Internet Broadcast Rights to the Sydney Olympics?*, *supra* note 9; *see also* Harverson, *supra* note 5 ("[I]n the absence of any specific online agreements, some broadcasters simply will not allow any [I]nternet coverage (of the 2000 Olympic Games) . . .").

[24] "The International Olympic Committee flatly ruled out the use of streaming video on Web sites through the 2008 Summer Games, which conveniently covers the length of its $3.5 billion contract with NBC." Milton Kent, *Net Games*, BALTIMORE SUN, Dec. 8, 2000, at 2D.

[25] Bernhard Warner & Rick Perera, *Olympic Committee Won't Let the Webcasts Begin*, THE STANDARD.COM (Dec. 5, 2000), *at* http://www.thestandard.com/article/display/0,1151,20603,00.html (on file with the Journal of Intellectual Property Law).

[26] *Id.*

[27] *Id.*

come around. As the Internet becomes more and more equipped to support longer and longer streams of video, showing the Games to millions of fans via the World Wide Web could become an attractive additional means of revenue for broadcasters with contracts to disseminate the Games.

Hoping to sell off Internet rights to media outlets in different parts of the world just as it has been doing with television, the IOC refuses to budge until Internet broadcasters are able to restrict their Webcasts to certain geographic areas.[28] But what if Internet video streaming technology develops without the accompanying technology to confine it to a specific region of the world? In such a situation, NBC might want to take advantage of the former kind of technology without worrying about the lack of the latter kind. The purpose of this Note is to suggest an equitable solution to the possible dispute between NBC and the IOC over whether Internet rights are included in NBC's existing broadcast contract.

Although the IOC now heads an Olympic movement consisting of more than 200 countries,[29] Internet broadcasting rights are an issue only in the most technologically advanced nations.[30] This past Olympics, the time difference between Australia and most of those countries heightened the importance of the issue.[31] NBC's Web site, NBColympics.com, was the only one with the rights to post streaming video of the events,[32] but NBC held the short video clips it played there until after they had aired on NBC television—at least fifteen hours after the event actually took place in Sydney.[33]

NBC insisted that online video coverage of the Sydney Olympics be minimized in order to maintain U.S. television audiences and safeguard the

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[28] *Id.*

[29] *International Olympic Committee*, THE STANDARD.COM (last visited Sept. 3, 2000), *at* http://www. thestandard.com/companies/display/0,2063, 56429,00.html (link to Hoover's Company Capsule) (on file with the Journal of Intellectual Property Law).

[30] For the most part, those nations are in North America and Western Europe.

[31] International Olympic organizers have a history of failing to appreciate what live broadcasting could mean to the Games. The first live television feed occurred at the 1956 Winter Games in Cortina D'Ampezzo, Italy. "On that occasion, Olympic honcho Avery Brundage sniffed: 'We . . . have done well without TV for 60 years and will do so certainly for the next 60 years, too.' " Glass, *supra* note 13.

By now, after such a profitable experience with television, Olympic officials should certainly realize what a cash cow the Internet has the potential to become.

[32] Alissa MacMillan, *Internet Olympiad: Results from Down Under are Instantly Available Online*, N.Y. DAILY NEWS, Sept. 17, 2000, at 8.

[33] Adam Creed, *Australian Radio Station Forced Offline During Olympics*, NEWSBYTES, Sept. 19, 2000, LEXIS, Nexis Library, News Group File.

highly-profitable advertising deals the network received from its huge investment in Olympic television rights.[34] The IOC capitulated.[35] In order to protect the value of the television rights it sold to NBC, the IOC hired firms in Paris and the United Kingdom to patrol the Internet for unauthorized video clips during the 2000 Olympics.[36]

Meanwhile, companies that run sports-related web sites without an accompanying traditional media outlet—like a television network—did not even receive press passes to the Games.[37] NBC chose not to exercise its commandeered right to use its own web site to show the games this time, and insisted that the IOC instead police cyberspace to make sure no one else broadcasted the Games over the Internet either.[38] However, by 2008, NBC may see real possibilities of high Internet advertising revenues and want to broadcast portions of the Games on NBColympics.com. Internet video streaming could conceivably allow for a television-like format of Olympic events and commercials alike within the next seven years. What if the network decides to fight to expand its Olympic video broadcast coverage to the Web?

C. THE ISSUE

For the IOC, the heart of this potential dispute is whether the Internet is really a new medium or simply an advertising sponsorship category—as it has been considered on a local level until now.[39] NBC was not the only one who thought the Internet was part of the rights it paid for. IBM, the official Olympic sponsor in the Information Technology category since the IOC

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[34] *Id.*

[35] *See Opportunity of 'Olympic' Proportions Foregone by Live Internet Coverage Ban*, PR NEWSWIRE, Sept. 7, 2000, LEXIS, Nexis Library, News Group File ("The IOC ban [gave] NBC Sports the exclusive right to broadcast Olympic events in their entirety and [prevented] any radio play-by-play, taped video highlights, and live video from being broadcast on the Internet.").

[36] Mike Snider, *Security Team Monitoring Web to Guard IOC's Video Ban*, USA TODAY, Sept. 15, 2000, at 3F.

[37] *See* Glass, *supra* note 13; *see also* Bernhard Warner, *Banned from the Olympics*, THE STANDARD.COM (Aug. 4, 2000) (reporting that Sydney was the third time in a row that dot-com journalists were shut out of the Olympics), *at* http://www.thestandard.com/article/0,1902,17665,00.html (on file with the Journal of Intellectual Property Law).

[38] Glass, *supra* note 13.

[39] Diane Anderson, *Big Blue Bids the Olympics Adieu*, THE STANDARD.COM (Aug. 28, 2000), *at* http://www.thestandard.com/article/0,1902,17971,00.html (on file with the Journal of Intellectual Property Law).

began its sponsorship program in 1984, also claimed Internet sponsorship by virtue of the fact that it was responsible for the official Olympic Web sites for the 1996, 1998 and 2000 Games.[40] "But the IOC maintains that Net rights have never been up for bid for any games. And regardless of whether it is called a medium or category, the IOC now wants to control the Internet."[41] IBM walked away from its sponsorship after 1998 contract renegotiations stalemated over the Internet rights issue.[42] Though the IOC has not offered Internet exclusivity to anyone for the Salt Lake City Winter Games, in August 2000 NBC signed a deal with the local organizing committee to produce the official Web site for the 2002 Games.[43]

The question is not whether the Internet will become an integral part of the Olympics, but how.[44] The IOC, established in 1894, generates its revenue by selling broadcast rights to the Olympic Games, as well as the rights to the familiar five-ringed Olympic symbol.[45] This nongovernmental, not-for-profit association has become big business and has shown that it knows how to get the most money for what it has to offer.

> In recent years, with increased competition for the [broadcasting] rights, organizers have become more and more aware of the value of their rights and prices have increased considerably. . . . The fee for the [S]ummer Olympics rose from US $90 million for the Barcelona Olympics in 1992 to $250 million for the Atlanta Games in 1996.[46]

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[40] *Id.* at 2 (reporting that since the IOC refused to let it have Internet control as to the Games, IBM pulled out of the Olympics altogether after Sydney).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Jonathan Weber, *The Olympics Need the Net*, THE STANDARD.COM (Aug. 14, 2000), *at* http://www.thestandard.com/article/0,1902,17606,00.htm (on file with the Journal of Intellectual Property Law).

[45] *International Olympic Committee, supra* note 29.

[46] Eur. Comm'n Decision 403/93, *supra* note 11. The IOC has not always seen things this way. *See* Glass, *supra* note 13 (stating that the British Broad. Corp. was the first to institute the idea of paying for media rights to the Olympic Games when it paid British organizers $3,000 in 1948. The check was never cashed).

D. SYNOPSIS

The IOC wants to sit on Internet rights to broadcast the Olympic Games until the 2008 expiration of the contracts held by broadcasters around the world.[47] NBC has already made clear its belief that the Internet is included in the broadcasting rights it paid for in a contract executed in 1995 to run through 2008.[48] Even though NBC did not take advantage of the Web during the 2000 Games, the network could well be interested in using it within the next seven years. What might the outcome be if NBC sued the IOC in a U.S. court, claiming that Internet broadcasting rights were included in its contract? This Note proposes the rule that if a new medium changes consumer behavior to create a new market and the contract is ambiguous, then the new medium is outside the language of the contract. Applying this rule, a court should rule in favor of the IOC.

II. THE LANGUAGE OF A CONTRACT

Contracts are the vehicles by which the rights to develop and commercialize information assets are granted. In any contract dispute, courts will first look to the words that make up the written agreement to determine whether the contract is ambiguous.[49] Courts usually enforce the common-law, objective meaning of contract terms at the time the agreement was made.[50] However, this is not possible when those terms are ambiguous. Whether a contract is ambiguous or not is a question of law.[51] Courts determine ambiguity by looking at the terms of the contract only.[52] A term is ambiguous when a reasonably intelligent person, who is cognizant of the

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[47] Kent, *supra* note 24.

[48] Dorschner, *supra* note 22.

[49] *See, e.g.*, Rooney v. Columbia Pictures Indus., 538 F. Supp. 211 (S.D.N.Y. 1982) (holding that the contract involved was in fact unambiguous).

[50] E. ALLAN FARNSWORTH, CONTRACTS § 7.9, at 458-60 (3d ed. 1999).

[51] Walk-in Med. Ctrs., Inc. v. Breuer Capital Corp., 818 F.2d 260, 263 (2d Cir. 1987); Philadelphia Orchestra Ass'n. v. Walt Disney Co., 821 F. Supp. 341, 345, 27 U.S.P.Q.2d (BNA) 1107, 1109 (E.D. Pa. 1993).

[52] Curry Road, Ltd. v. K Mart Corp., 893 F.2d 509, 511 (2d Cir. 1990).

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).

industry customs, practices, usages and terminology could find that the term has more than one meaning.[53]

Courts will attempt to gauge the parties' intentions; however, those participating in the contract may not have even considered the possible impact of an unknown or undeveloped medium on their agreement.[54] Therefore, it is fruitless in many cases involving new technology for courts to spend much time searching for "intentions" that in reality are not there.[55]

Parties may demonstrate that they did contemplate and bargain for the rights to future mediums by using certain words or phrases in the contract. Courts will interpret words such as "all" or "complete and entire" as indicating that the parties intended to convey a broad grant of rights.[56] Courts use this kind of language as evidence of the parties' intentions at the time of the agreement. In the absence of such wording, courts must find some way—in keeping with the notion of fairness—to apportion the rights in question among the parties in a suit.

This Note will address the avenue U.S. courts should take in contract disputes caused by an arising technology when courts find that the contract in question is indeed ambiguous. Most contracts are ambiguous in one way or another;[57] therefore, there is a good chance that a court faced with the NBC/IOC agreement would find one or more of its terms to be unclear.

One rule of contract interpretation is that if the language can be subject to two different meanings, a court will choose the one that favors the public interest.[58] In the hypothetical NBC/IOC case, NBC would have a strong argument that granting Internet broadcast rights to the network during its current contract term would best serve the public interest. Especially if video streaming technology continues to improve at its current pace, the IOC's effective ban on Olympic Webcasts will deprive Internet users of information that is of great social value. Furthermore, Internet Olympic broadcasts would make that information more readily available to a larger

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[53] Walk-in Med. Ctrs., 818 F.2d at 263.

[54] "In many disputes arising out of contemporary business transactions, however, the parties gave little or no thought to the impact of their words on the case that later arose." FARNSWORTH, *supra* note 50, § 7.9, at 465.

[55] 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.10[B], at 10-89 (2000).

[56] Brown v. Twentieth Century Fox Film Corp., 799 F. Supp. 166, 171-72, 26 U.S.P.Q.2d (BNA) 1626, 1630 (D.D.C. 1992).

[57] *See* 1 FARNSWORTH, *supra* note 50, § 7.8, at 454 (stating that most contracts are subject to interpretation).

[58] *Id.* § 7.11, at 474.

number of Americans. While television is employed by most viewers only at night,[59] the Internet is available to many Americans via personal computers (PCs) throughout the day.

III. THE ONLY DIRECT PRECEDENT

Only one case of record tackles the exact issue this Note addresses: whether a license to record and broadcast an event using one medium includes a license to record and broadcast that same event over another, newer medium that was not yet commercially viable when the license was granted. That case, *Norman v. Century Athletic Club, Inc.*,[60] was decided by the Maryland Court of Appeals in 1949.

In 1943, when the parties in *Norman* signed their contract, radio was king and television was not much more than an experiment.[61] Under the agreement, the owners of "the Coliseum," a sports arena in Baltimore, renewed a license to the building's lessees (the plaintiffs) allowing the lessees to broadcast the Monday night boxing matches the plaintiffs held there.[62] Although the contract simply granted "the privilege of broadcasting the boxing bouts" without specifying radio,[63] the Maryland Court of Appeals held that the license was indeed for radio and did not include transmission via television.

The 1943 contract in *Norman* ran from 1946 to 1951, and by 1946 the plaintiff had the capacity to televise its boxing matches.[64] However, the defendant owner of the venue refused to allow the bouts to be televised without payment of additional compensation. That court found the words of the contract to be unambiguous.[65] Focusing on the popular meaning of the word "broadcast," the *Norman* court held: "In April, 1941 or April, 1943—or now—the only ordinary meaning of 'the privilege of broadcasting

[59] "Primetime" viewing hours are generally considered to be between 8 p.m. and 11 p.m.
[60] 69 A.2d 466 (Md. 1949).
[61] *See* FCC Mimeograph No. 57,820, *quoted in Norman*, 69 A.2d at 468 (" 'As of January 1, 1942, there were 9 commercial television stations and 23 experimental television stations licensed [in the United States].' "); *see also* Ettore v. Philco Television Broad. Corp., 229 F.2d 481, 483 n.3, 108 U.S.P.Q. (BNA) 187, 188 n.3 (3d Cir. 1956) ("[T]he first commercial television license was granted . . . in New York City. The construction permit and license were issued on June 17, 1941.").
[62] *Norman*, 69 A.2d at 466-67.
[63] *Id.* at 467.
[64] *Id.* at 467-68.
[65] *Id.* at 469.

the boxing bouts' that has any commercial application at all has reference to radio and not to television."[66] The court even looked to various dictionaries from prior time periods and found no entry for "broadcast" which referred to transmission by television.[67] Largely because of an inability to define "broadcast," the court rejected the plaintiff's contention and the lower court's apparent reasoning that radio and television simply represented "two means to one end."[68]

The situation in *Norman* is strikingly similar to the issue surrounding NBC's broadcasting license. Therefore, a United States court's holding and rationale should turn out in a similar fashion to *Norman*. Internet broadcasting was in development in 1995 when NBC signed its agreement with the IOC, but, like television at the time of *Norman*, it was not yet ready for commercial use. Further, the popular meaning of 'broadcast' in 1995 certainly did not encompass transmission via the Internet, though it may now among techno-savvy people. Moreover, as in the context of radio versus television, it can hardly be said that television and the Internet "differ only in details."[69]

Though the *Norman* court found that contract to be unambiguous, a U.S. court ruling in an NBC/IOC dispute would be well advised to follow this Maryland precedent and allow for separation of television and Internet broadcasting rights. The same arguments which formed the basis for the *Norman* holding apply with equal force to the question at hand. The court should find that Internet rights were not conferred to NBC in its current license to broadcast the Olympic Games.

IV. AN ANALOGY TO NEW USES FOR COPYRIGHTED WORK

While Internet broadcasting capabilities are too new to have yet been litigated, analogies can easily be drawn between this technological advancement and others that have surfaced in the past in the arena of copyright law. In the context of copyright licenses, a similar dispute to the one imagined

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[66] *Id.* at 468-69.

[67] *Id.* at 468.

[68] *Norman*, 69 A.2d at 469. In dicta, the court said that even if the contract language was ambiguous, "it would not necessarily follow that because the parties bargained for the actuality of radio rights, they also intended to bargain for the unknown possibilities of commercially non-existing television rights." *Id.*

[69] *Id.*

here between NBC and the IOC "inevitably arises whenever a new use for a certain [copyrighted] work is developed or invented subsequent to the execution of the license agreement."[70] The arrival of a new medium capable of exploiting a copyrighted work touches off a new round of legal battles over whether existing contracts include the "new use" of the work. If the work is employed for some use other than that which was intended in the contract, the copyright owner is deprived of his right to compensation for the new use of the work.[71]

Under this scenario, copyright licensees argue that the agreement's definition of a medium actually contains the new use for the copyrighted work. However, licensors argue that the new use could not have been contemplated by the agreement in question. The court is the appropriate body to supply terms to dictate which party has a right to the new use. Therefore, courts look to principles of contract and copyright law, always starting with the threshold question as to whether or not the contract language is ambiguous.[72]

The IOC is much like a copyright licensor. While it does not create anything protected by copyright law, this fact does not mean the IOC cannot control access to information. To the contrary, the IOC, as the Olympic Games producer, has the power to contract with media outlets (licensees) to allow them to broadcast the events and activities that make up the Games in exchange for consideration because the IOC has a property interest like a copyright in the events it produces.

The United States Supreme Court in *Zacchini v. Scripps-Howard Broad. Co.*[73] recognized that entertainment producers have a protection right for the economic value of their creation.[74] Just like the human cannonball act in that case, the Olympic Games are "the product of [the IOC's] own talents and energy, the end result of much time, effort, and expense. Much of [the Games'] economic value lies in the 'right of exclusive control over the publicity given to [their] performance.' "[75] Just as with copyright laws, the

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[70] Joanne Benoit Nakos, Comment, *An Analysis of the Effect of New Technology on the Rights Conveyed by Copyright License Agreements*, 25 CUMB. L. REV. 433, 434 (1995).

[71] Ettore v. Philco Television Broad. Corp., 221 F.2d 481, 487 (3d Cir. 1956).

[72] FARNSWORTH, *supra* note 50, at 452-53. *See also* the discussion of contract ambiguity in Section II of this Note.

[73] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 205 U.S.P.Q. (BNA) 741 (1977).

[74] *Id.*

[75] *Id.* at 575.

absolute protection afforded producers like the IOC serves as an economic incentive for them to make the investment required to generate something of interest to the public.[76]

V. SURVEY OF COPYRIGHT 'NEW USE' CASES—DIVERGENT HOLDINGS

No matter what safeguards copyright licensors and licensees include in their contracts, no matter what language they use in their written agreements, case history demonstrates parties cannot be sure what will happen if they take their contract to court. Judicial responses to disputes concerning new media over the years have produced a confusing array of outcomes.

The earliest "new use" cases involved whether a license for the dramatic rights to produce a play included the rights to produce a motion picture. The Supreme Court in *Manners v. Morosco*[77] held that motion picture rights were not included in the dramatic license agreement for "Peg O' My Heart."[78] Movie rights were not mentioned, even though the new medium was known to the contracting parties at the time the document was executed. The language granted "the sole and exclusive license and liberty to produce, perform and represent" the play.[79] Likewise, the federal court for the Southern District of New York found no motion picture rights in the dramatization rights to "Ben Hur" when motion picture technology was not known at the time of the 1899 contract.[80]

Next came the advent of "talkies," affecting contracts that licensed copyright use when only silent films were known commercially. The Second Circuit, in *L.C. Page & Co. v. Fox Film Corp.*,[81] found that "moving picture rights" included audio. The court reasoned that the new use must be made a part of the contract, because excluding it would practically extinguish the current use and render the contract worthless.[82] By contrast, the New York Court of Appeals in *Kirke La Shelle Co. v. Paul Armstrong Co.*[83] held

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[76] *Id.* at 576.
[77] 252 U.S. 317 (1920).
[78] *Id.*
[79] *Id.* at 325.
[80] Harper Bros. v. Klaw, 232 F. 609 (S.D.N.Y. 1916).
[81] 83 F.2d 196, 29 U.S.P.Q. (BNA) 386 (2d Cir. 1936).
[82] *Id.* at 199.
[83] 188 N.E. 163 (N.Y. 1933).

that "talkie" rights could not have been within the contemplation of the parties and hence were not within the contract. The New York court did make concessions, though. Recognizing that talkies would wipe out the market for silent pictures, the court demanded that the parties split the proceeds for the sale of the talkie rights.[84]

Another controversy arose in the middle of the twentieth century when television became commercially viable. Did a contract granting motion picture rights entitle the licensee to televise the copyrighted work? While the Third Circuit said "no" in 1956 in *Ettore v. Philco Television Broadcasting Corp.*,[85] the Second Circuit said "yes" twelve years later in *Bartsch v. Metro-Goldwyn-Mayer, Inc.*[86] Both contracts at issue were signed in the 1930s. However, the plaintiff in *Bartsch* was an established player in the entertainment business who the court found should have foreseen the use of television and mentioned it in his contract.[87] On the other hand, the plaintiff in *Ettore* was a boxer whom the court found had no knowledge of television.[88]

The 1980s and 1990s saw a string of new use cases brought about by the invention of the video cassette recorder. Licensees claimed that their motion picture and/or television rights included the right to distribute the copyrighted work on home video. In 1983, the U.S. District Court for the District of New Jersey agreed holding that when Platinum Record Co. sold Lucasfilm the right to use four songs on the soundtrack to the film "American Graffiti," the 1973 grant included the right to distribute the movie on video discs and cassettes.[89] Five years later, the Ninth Circuit went the exact opposite direction in *Cohen v. Paramount Pictures Corp.*[90] The Ninth Circuit held that video rights were not included where the plaintiff had granted Paramount the right to use his song in a film called "Medium Cool" in 1969.[91] Both courts found that video technology was unknown when the copyright licenses were executed.

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[84] *Id.* at 168.

[85] Ettore v. Philco Television Broad. Corp., 221 F.2d 481, 481 (3d Cir. 1956).

[86] Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 157 U.S.P.Q. (BNA) 65 (2d Cir. 1968).

[87] *Id.*

[88] *Ettore*, 229 F.2d at 481.

[89] Platinum Record Co., Inc. v. Lucasfilm, Ltd., 566 F. Supp. 226 (D.N.J. 1983).

[90] 845 F.2d 851, 6 U.S.P.Q.2d (BNA) 1723, *amended by* 7 U.S.P.Q.2d (BNA) 1570 (9th Cir. 1988).

[91] 845 F.2d at 855.

The First Circuit and New York's Appellate Division followed *Cohen*'s lead in the early 1990s in *Rey v. Lafferty*[92] and *Tele-Pac, Inc. v. Grainger*,[93] respectively. Both found video use to be excluded from the television contracts. As in *Cohen*, the court in *Rey* accepted the lower court's questionable finding that video technology was unknown to the parties in 1979. By contrast, the *Tele-Pac* court held that the 1964 contract at issue was limited by the definition of broadcasting, even though people in the entertainment industry were familiar with video.

In a recent case, the authors of a book entitled "Evidence of Love" claimed that they did not give up home video rights when they granted "exclusive worldwide motion picture and television rights" for the film based on the novel.[94] In that case the Fifth Circuit followed *Bartsch*, saying that because video technology was well known when the contract was signed in 1988, video rights were included even though they were not mentioned.[95]

VI. ANALYSIS OF NEW USE CASES

Though the copyright new use cases provide little guidance as to how a court might rule in a case involving Internet broadcasting, they do offer a look at the array of factors courts consider and different solutions courts create when determining whether a new technology is included in a contract. What, generally, do the courts look for in making that determination? The answer, and the outcomes, vary widely.

A. THE DEFINITION GAME

The meaning a court gives a particular word or phrase in the contract is critical in many of the new use cases. The hypothetical case between NBC and the IOC would probably center around the definition of the term "broadcasting" and whether that word should encompass broadcasting via the World Wide Web.[96] However, this method of deciding a contract

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[92] 990 F.2d 1379, 26 U.S.P.Q.2d (BNA) 1339 (1st Cir. 1993).

[93] 570 N.Y.S.2d 521, 6 U.S.P.Q.2d (BNA) 1726 (N.Y. App. Div. 1991).

[94] Bloom v. Hearst Entm't, Inc., 33 F.3d 518, 521, 32 U.S.P.Q.2d (BNA) 1332, 1334 (5th Cir. 1994).

[95] *Id.* at 525.

[96] Does Internet video and audio streaming constitute "broadcasting"? The Australian government took up this issue in the summer of 2000, even going so far as to consider its own ban of "TV-style" audio

dispute wrought by the development of a new technology is superficial and does not lead to predictable outcomes. A study of several new use cases prominently exhibits the fact that courts can easily manipulate definitions, ignore certain contract language, and even reject clearly written contractual conditions in order to support their desired outcomes.

1. Meaning of Words in the Contract. Words, like statistics, can say just about anything one wishes to make them say. Courts in the new use cases have been known to stretch and shrink the reasonable meaning of words on several occasions, often while rejecting precedent.

The *Norman* court consulted several dictionaries in holding that the contract granting the right to broadcast boxing bouts in the defendants' arena did not include television.[97] The court found no definition of the word "broadcast" that referred to television transmission.[98] That court did not stop at dictionary entries, however. It also alleged that the "present popular meaning" of "broadcast" was "identified with radio" because television did not yet "disseminate[ ] information to the four corners of the earth."[99]

As in *Norman*, the court in *Tele-Pac, Inc.* found the new technology in question excluded after scrutinizing the meaning of "broadcasting by television" and insisting that the term be construed according to its ordinary meaning, which the court said implies transmission from some point outside the home.[100] Thus, the phrase was held not to include home video transmission from VCR to television set.[101]

In 1983, the court in *Platinum Record Co.* tackled the meaning of "exhibition" in a television rights license.[102] That court concluded that the

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and video streaming to the Internet as unlicensed broadcasting in breach of Australian law. The proposed ban would have affected streaming that might be in competition with mainstream television services. David Frith, *Australian Government Considering Video Streaming Ban*, NEWSBYTES.COM, June 20, 2000, LEXIS, News Library, News Group File.

On July 21, though, the country's minister of federal communications, Richard Alston, said Internet audio and video streaming should not be regarded as a broadcasting service under the legislature's digital television legislation. This determination was made after government officials reviewed the status of such côntent currently available on the Internet. Denis Peters, *Internet Industry Buoyed by Streaming Decision*, AAP NEWSFEED, July 21, 2000.

[97] Norman v. Century Athletic Club, Inc., 69 A.2d 466, 468 (Md. 1949).

[98] *Id.*

[99] *See id.* (quoting *Norman v. City of Las Vegas*, 177 P.2d 442, 450 (Nev. 1947)).

[100] Tele-Pac, Inc. v. Grainger, 570 N.Y.S.2d 521, 523 (N.Y. App. Div. 1991).

[101] *Id.*

[102] Platinum Record Co. v. Lucas Film, Ltd., 566 F. Supp. 236, 227-28 (D.N.J. 1983).

term encompassed the use of video cassette recorders (VCRs), and accordingly held that home video was included in the agreement because exhibition by video was equivalent to exhibition by television transmission.[103] Almost five years later, however, the Ninth Circuit in *Cohen* rejected that exact same notion and held that video was not included in an agreement granting the right to "exhibition . . . by means of television."[104]

2. *Are the Technologies the Same?* The plaintiff lessee in *Norman* claimed that the existing use and the new one (radio and television, respectively) "differ only in details," because they "operate on the same scientific principle" and represent two means to the same end.[105] That court rejected these contentions.[106] Similarly, the *Ettore* court stressed the scientific differences in projecting a film and sending signals for telecast.[107] That court found that television was not included in a grant of motion picture rights.[108]

Unlike these cases, the Second Circuit in *Bartsch* found the new technology (television) to be included in the grant of " 'the motion picture rights throughout the world,' " despite its holding that television was indeed a completely different medium than film.[109] More often than not, however, courts that acknowledge the difference between the new medium and the existing one also find that the new technology is not included in the contract.[110]

B. SOPHISTICATION OF THE PARTIES

An important factor to many courts deciding new use cases is the relative sophistication of the contracting parties. This may explain the divergent holdings in *Ettore* and *Bartsch*. The *Ettore* court put much weight on the fact that the plaintiff was "unsophisticated"—a prize fighter who negotiated the original motion picture agreement with little or no legal assistance.[111] On

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[103] *Id.*

[104] Cohen v. Paramount Pictures Corp., 845 F.2d 851, 853 (9th Cir. 1988).

[105] 69 A.2d at 469.

[106] *Id.*

[107] Ettore v. Philco Television Broad. Corp., 221 F.2d 481, 488 (3d Cir. 1956).

[108] *Id.*

[109] Bartsch v. Metro-Goldwin-Mayer, Inc., 391 F.2d 150 (2d Cir. 1969).

[110] The courts in *Cohen*, *Tele-Pac, Inc.*, and *Rey*—all decided after *Bartsch*—found home video to be outside television contracts after recognizing that the two mediums are different.

[111] *See Bartsch*, 391 F.2d at 154 n.2 (stating that Ettore, "was not an experienced businessman but a prize fighter, and the Court relied heavily on his lack of sophistication in determining whether it was fair

the other hand, the court found the plaintiff in *Bartsch* to be an experienced businessman, savvy to the ways of the entertainment industry.[112] He should have known, said the court, not to have assigned such a broad grant as that of "the motion picture rights throughout the world" if he did not intend the contract to include television rights.[113]

A corollary to sophistication of the parties is whether the new technology at issue was known at the time of the contract. The Third Circuit, in *Ettore*, found that as late as 1940 the effect of television on society was "nil"[114] and therefore unknown. Contrast this with *Bartsch*'s affirmation of a lower court holding that "[d]uring 1930 the future possibilities of television were recognized by knowledgeable people in the entertainment and motion picture industries."[115]

Another instance in which an unsophisticated plaintiff may have been protected by a court can be seen in the *Rey* case.[116] There, the court accepted a lower court finding that video technology probably did not exist when Margret Rey, the elderly Canadian author of the popular "Curious George" children's book series, signed a television agreement in January 1979.[117] In fact, early model VCRs were already in some homes by that time.

C. SPECIFIC CLAUSES IN THE CONTRACT

When courts look at the language of a contract, they usually determine if the parties included phrases calculated to protect them in the event of a contract dispute. These phrases include 'reservation of rights clauses,' which are designed to protect any interest the grantor wishes to retain in the work he controls. On the other side of the coin are 'future technologies clauses,' wording designed to guarantee that any future use that comes up to affect the license vests in the grantee. Both of these clauses are placed in a grant of rights as a safeguard against just the sort of litigation in which NBC and the IOC might find themselves engaged. The new use cases, though, show that sometimes this method is an effective way to protect one's rights, and

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to charge him with knowledge of the new medium.") (citing *Ettore*, 229 F.2d at 491 n.14).

[112] *Id.*

[113] *Bartsch*, 391 F.2d at 153.

[114] 229 F.2d at 491 n.14.

[115] *Bartsch*, 391 F.2d at 154.

[116] Rey v. Lafferty, 990 F.2d 1379, 1379; 26 U.S.P.Q.2d (BNA) 1339 (1st Cir. 1993).

[117] *Id.* at 1387.

sometimes it does not matter whether protective clauses are included in a contract or not.

1. Reservation of Rights Clauses. A typical reservation of rights clause (RRC) sets aside "all rights and uses in and to the work in issue except those herein granted." That type of clause aided the grantor in *Cohen*.[118] There, music licensor Cohen included a paragraph in his 1969 contract with Paramount Pictures that reserved to the grantor "all rights and uses in and to said musical composition, except those herein granted to the Licensee."[119] That court heeded the RRC and held that while Cohen had granted the right to television exhibition, he had reserved the right of distribution by video.

Most courts will construe reservation of rights clauses in favor of licensors, but what if the IOC failed to include one in its broadcasting agreement with NBC? The new use cases demonstrate that these clauses, while helpful, are not imperative for a grantor to hold on to new technology rights that arise during the life of a contract. Courts have inferred limitations regarding new technology in ambiguous contracts without the help of an RRC, even when the technology existed at the time of contracting.

For example, the court in *Tele-Pac* held that a grant of the rights to show twenty-six black and white movies on television did not include video rights to those films.[120] The *Tele-Pac* court refused to distinguish *Cohen*, even though *Tele-Pac* did not explicitly reserve all rights not granted. Instead the court held that "[t]he right to 'distribute films for broadcasting by television or any other similar device' is, by its own terms, sufficiently limited so that no express reservation of rights is required."[121] This was so even when video possibilities were well known to those in the entertainment business. Because the *Tele-Pac* court used a narrow definition of 'broadcasting,' whether the parties knew of the new technology when the 1964 agreement was signed proved to be irrelevant.[122]

The *Rey* and *Ettore* courts inferred an RRC for those plaintiffs.[123] The First Circuit in *Rey* held that although the agreement granting television rights "contains no 'specific limiting language,' *compare Cohen*, (citation omitted) we believe such limitation is reasonably inferable from the situation

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[118] 845 F.2d at 853.
[119] *Id.*
[120] 570 N.Y.S.2d at 521.
[121] *Id.* at 524.
[122] *Id.* at 525; *see also* the discussion of the courts' use of definitions in Section VI.A of this Note.
[123] *Rey*, 990 F.2d at 1379; *Ettore*, 229 F.2d at 481.

of the parties and the 'general tenor of the section' in which the 'television viewing' rights were granted."[124] The Third Circuit in *Ettore* used general notions of fairness to support its decision to "treat the absence of the new or unknown media, television in the instant case, as about the equivalent of a reservation against the use of the work product of the artist or performer by a known medium."[125]

In stark contrast to those courts that have inferred an RRC where one did not actually exist, the Second Circuit has chosen to override express reservation clauses in order to find a new technology included in a contract. Both *Bartsch* and *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*[126] are illustrative.

Licensor Bartsch included a clause in his 1930 movie rights contract with Warner Brothers that stated, "The rights which the Purchaser obtains from the Owner in . . . [the musical play] 'Maytime' are specifically limited to those granted herein. All other rights now in existence or which may hereafter come into existence shall always be reserved to the Owner and for his sole benefit."[127] But the Second Circuit chose to ignore Bartsch's explicit attempt to grant only motion picture rights and looked only to the assignment itself.[128] Contrary to *Cohen* and *Tele-Pac*, the *Bartsch* court focused on the fact that television's potential was known in the entertainment business, and Bartsch was a man experienced in that business. Because of this, even an unequivocal reservation of rights was not enough for Bartsch to win the day. The court insisted the contract contain an almost scientific description of the term motion picture for Bartsch to exclude television from his grant.[129]

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[124] 990 F.2d at 1390.

[125] 229 F.2d at 491. It is interesting to note that *Ettore* was decided without the appellate court or the lower court ever reading the contract at all. *Id.* at 490 n.13.

[126] 145 F.3d 481, 486, 46 U.S.P.Q.2d (BNA) 1577, 1580 (2d Cir. 1998).

[127] *Bartsch*, 391 F.2d at 152.

[128] *Id.* at 153 ("[D]efendant's rights do not turn on the language we have been discussing [including the reservation of rights clause] but rather on the broad grant, in the assignments to and from Bartsch, of 'the motion picture rights throughout the world'. . ."); *see also Bloom*, 33 F.3d at 524 (finding that authors of a book did not retain home video rights, notwithstanding the general reservations clause contained in contract for sale of motion picture and television rights).

[129] *Id.* at 155 ("[I]f Bartsch or his assignors had desired to limit 'exhibition' of the motion picture to the conventional method where light is carried from a projector to a screen directly beheld by the viewer, they could have said so.").

In 1998, the Second Circuit reaffirmed its *Bartsch* holding by once again overriding an RRC.[130] In that case, composer Igor Stravinsky in 1939 had granted Disney the right to use his music in a motion picture. A reservation clause was in the contract providing that "the licensor reserves to himself all rights and uses in and to the said musical composition not herein specifically granted . . . ."[131] The court nonetheless held that the license allowed Disney to sell videocassettes of "Fantasia" without further compensation. As it did in *Bartsch*, the court looked to policy considerations and extrinsic evidence but refused to regard any contract language but the assignment itself, saying:

> The reservation clause stands for no more than the truism that Stravinsky retained whatever he had not granted. It contributes nothing to the definition of the boundaries of the license . . . . [I]f the broad terms of the license are more reasonably read to include the particular future technology in question, then the licensee may rely on that language.[132]

Thus, another Second Circuit grantor lost rights he tried to retain in the contract because he put words of limitation in an RRC instead of directly into the assignment itself.[133]

In *Bloom v. Hurst Entertainment*, the Fifth Circuit held a general RRC to be defeated because of other, more specific terms, in the same contractual paragraph.[134] That RRC not only reserved all rights not expressly granted but also specifically reserved the publication, live stage and radio rights by name.[135] The court applied the rule of *ejusdem generis* to limit the rights actually reserved to those specifically mentioned.[136] Because video rights were not enumerated, they were not reserved. The *Bloom* court reasoned that "having chosen not to specifically reserve the video rights in their

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[130] *Boosey & Hawkes Music Publishers, Ltd.*, 145 F.3d at 481.

[131] *Id.* at 484.

[132] *Id.* at 488.

[133] *Id.* at 487 ("Thus, we conclude that the burden fell on Stravinsky, if he wished to exclude new markets arising from subsequently developed motion picture technology, to insert such language of limitation in the license. . . .").

[134] 33 F.3d at 524 n.1.

[135] *Id.* at 521.

[136] *Id.* at 524.

reservation clause, [Bloom] cannot prosper by this boilerplate, catch-all clause."[137]

It is important to reiterate that Rey and Ettore were not businesspeople experienced in media rights contracting. A reservation of rights clause may have been inferred for this reason. Because both NBC and the IOC are equally sophisticated in business dealings, and because it goes against the general sense of fairness mentioned in *Ettore* for a court to ignore an explicit RRC in a contract, the *Cohen* and *Tele-Pac* cases are the most educational for our purposes. These courts held the new technology at issue to be outside the contract at hand because that technology was fundamentally different from the one in the agreement. A court deciding a dispute between NBC and the IOC should follow this commonsense approach.

2. *Future Technologies Clauses.* Unlike reservation of rights clauses, future technologies clauses (FTCs) are included to protect the licensee. A typical FTC states that the grant shall be applicable to "all media now known or hereafter made known." A successful FTC can be seen in *Platinum Record Co. v. Lucasfilm, Ltd.*, where the agreement gave defendant Lucasfilm the right "to exhibit, exploit, market and perform ['American Graffitti'] perpetually throughout the world 'by any means or methods now or hereafter known.' "[138] In a brief opinion the court found that the broad license clearly included video distribution whether the plaintiff knew about the new technology or not.[139] *Platinum*, however, is something of an anomaly among similar new use cases. Like RRCs, the existence of an FTC is not controlling in many new use cases.

In *Tele-Pac, Inc. v. Grainger*, Tele-Pac's grant gave up "the license to distribute the [subject motion pictures] . . . for broadcasting by television or any other similar device now known or hereafter to be made known."[140] Even so, video was held to be excluded from the television broadcasting license. The *Tele-Pac* court ignored the FTC, choosing instead to focus on the meaning of the term 'broadcast.'[141] According to the court, television

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[137] *Id.*

[138] Platinum Record Co. v. Lucasfilm, Ltd., 566 F. Supp. 226 (D. N.J. 1983).

[139] *Id.* at 227-28.

[140] *Tele-Pac*, 570 N.Y.S.2d at 522.

[141] *See also* the discussion of the courts' use of definitions in Section VI.A and that of the reservation of rights clause in Section VI.C.*1* of this Note (explaining the approaches in thorough detail).

and video were so dissimilar as to preclude the possibility of the latter being under a contract for the former,[142] despite the existence of the FTC.

One case clearly exemplifies the proposition that an FTC does not guarantee a licensee the right to a new use. In *Subafilms, Ltd. v. MGM-Pathe Communications Co.*,[143] the Ninth Circuit held that the video rights to the 1968 Beatles' animated film "Yellow Submarine" stayed with the licensor even though the contract included a very comprehensive FTC. Subafilms and the Hearst Corp. had entered into a joint venture to produce the movie. The two signed financing and distribution agreements with Metro-Goldwyn-Mayer and United Artists in 1967. The FTC in those contracts granted "all so-called 'theatrical' rights in the Picture," as well as the right to "perform the Picture and prints and trailers thereof by television and by any other technological, mechanical or electronic means, method or device now known or hereafter conceived or created."[144] Despite this strong language, the court in *Subafilms* allowed extrinsic evidence as to the intent of the parties to trump the FTC.[145] According to the court, MGM-UA had motion picture and television rights, but it did not have video rights.[146] Unlike the FTC in *Tele-Pac*—which was ignored for language inside the agreement—this seemingly impenetrable FTC failed when the court looked beyond the four corners of the contract.[147]

Even if the NBC/IOC broadcasting license includes a broad future technologies clause, the analogous new use cases show clearly that this is no guarantee that NBC would prevail. If a court hearing this hypothetical case followed the Ninth Circuit and looked to outside evidence, the existence of an FTC might not mean much at all. Likewise, if the court focused on the similarity of the new technology to the one that was originally bargained for, any FTC included in the NBC/IOC contract might fail.

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[142] *Tele-Pac*, 570 N.Y.S.2d at 525.

[143] Subafilms, Ltd. v. MGM-Pathe Communications Co., Nos. 91-56248, 91-56379, 91-56269, 1993 U.S. App. LEXIS 4068 (9th Cir. Feb. 17, 1993) (unpublished table decision), *rev'd en banc*, 24 F.3d 1088 (9th Cir. 1994).

[144] *Id.* at *4.

[145] *Id.*

[146] *Id.*

[147] *Id.*

D. SUGGESTED APPROACHES TO NEW TECHNOLOGY CASES

In cases where there is neither a reservation of rights clause nor a future technologies clause to interpret, copyright scholar Melville Nimmer suggests two approaches for courts, absent a showing of intent.[148] The first, a "strict approach," favors the grantor. Here, the contract is read narrowly as giving the licensee only such rights in a given medium that fall within the "unambiguous core meaning" of a contract term. In other words, any rights not expressly granted are reserved.[149] *Cohen* represents the leading case taking Professor Nimmer's "strict approach" to determine whether a new technology is included in an existing grant of rights. Other cases that follow this line include *Tele-Pac* and *Rey*.

According to Nimmer, "The other alternative, and the one that it is believed is to be preferred, is to hold that the licensee may properly pursue any uses that may reasonably be said to fall within the medium as described in the license. This would include uses within the ambiguous penumbra . . . ."[150] The main champion of this approach is *Bartsch*. *Bartsch* and its progeny place the burden of contractual clarity upon the grantor. One of the pillars on which this "preferred approach" rests is the idea that the grantor must reserve the rights he wishes to retain.[151] This means the grantor must specify exactly what does not fall within the broad meaning given to the assignment. If he fails, they will be included in the assignment. Professor Nimmer's approaches are mentioned in the opinions of several new use cases, and are sometimes used as support for a court's holding.[152]

VII. PROPOSED SOLUTION

Bartsch followed Nimmer's so-called "preferred approach" holding that television was included in a 1930 assignment of motion picture rights, even though it would be eleven years before the FCC would grant the first

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[148] 3 NIMMER, *supra* note 55, § 10.10[B] at 10-89.

[149] *Id.*

[150] *Id.* at 10-90.

[151] *See* Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 (2d Cir. 1968) (holding that a grant of "motion picture rights" was broad enough to include television).

[152] *See, e.g.*, Bourne v. Walt Disney Co., 68 F.3d 621, 36 U.S.P.Q.2d (BNA) 1449 (2d Cir. 1995) (holding that the term "motion picture" was broad enough to include distribution of movies on video).

commercial television license.[153] The rule from *Bartsch*, as set out in *Bloom*, states:

> When a broad grant of rights is made in a contract, and a new use can be construed to fall within that grant, and that use was foreseeable at the time the grant was made, then the burden shall be on the grantor to reserve the right to the new, but foreseeable, use.[154]

The *Bartsch* rule does not produce predictable holdings on which drafters can rely when writing media licenses, and it should be rejected. This Note proposes that instead of trying to define words and figure out whether or not a new technology was foreseeable, courts should look to economic realities when a contract granting a license is ambiguous.

When a new technology affects an existing contract, the stakes can be quite high. A contract exists between NBC and the IOC to broadcast the Olympic Games. When the contract was made in 1995, the only lucrative way to show the Olympic Games to American viewers was to televise the events and charge TV advertisers for commercial time. However, by 2008 the Internet could be a viable medium, technologically and financially, for broadcasting the Games. NBC, like Paramount Pictures in the *Cohen* case, alleges that it needs no further license to take advantage of a new means of exploiting its broadcasting rights. The real question is not whether the parties saw Internet broadcasting coming down the pike in 1995, but who will get the windfall that the Internet will surely bring. Will NBC get more than it bargained for—the right to broadcast (or keep someone else from broadcasting) over cyberspace even though at the time it did not expect to when it paid the IOC in 1995? Or will the IOC be allowed to sell the right to use this technology in conjunction with the Games to the highest bidder?

The perpetual problem with all new technology cases is that there was no actual intent of the parties as to that new technology when the agreement was made.[155] *Bartsch* attempts to superficially impose intent as to which media the parties may or may not have contemplated. It is up to the court to determine whether a new technology was foreseeable at the time the grant

[153] Ettore v. Philco Television Broad. Corp., 229 F.2d 481, 483 n.3 (3d Cir. 1956).
[154] Bloom v. Hearst Entm't, Inc., 33 F.3d 518, 525, 32 U.S.P.Q.2d (BNA) 1332, 1337 (5th Cir. 1994).
[155] *Id.* at 525.

was made.[156] The cases surveyed in this Note demonstrate questionable holdings as to when a new medium can be said to be developed enough to be deemed "foreseeable" at the time of a contract. For instance, the *Rey* court was willing to go along with the notion that video technology was unknown in late 1979,[157] but "American Graffiti," the subject of the *Platinum Record Co. v. Lucasfilm, Ltd.* case, was released on video cassette in 1980.[158] (It was not the first movie ever released on video.) The courts seem to disagree on whether to judge the existence of a new technology by a subjective or an objective standard. Others hold that such existence is immaterial.[159]

Another dilemma is with determining whether or not the contract is actually the "broad grant of rights" required for *Bartsch* to be applicable.[160] What kinds of technology do words like "exhibit," "transmission," and, important for our hypothetical case, "broadcasting" encompass? This question has sent many a court running for its dictionaries, only to rely on vague notions of "popular meaning."[161] A corollary problem is *when* the contract term being scrutinized meant what a court says it means? For example, the court in *Philadelphia Orchestra Ass'n v. Walt Disney Co.*[162] held that "[t]he common usage of the phrase 'feature film' does not necessarily imply a presentation in a theatre outside of the home."[163] This is certainly true today, and it was probably true when the case was decided in 1983. It is quite a stretch, however, to say it was true when the agreement was signed for the Philadelphia Orchestra to perform most of the musical score for "FANTASIA" in 1939.

Bartsch allows individual judges too much discretion. Without any objective guidelines to follow, it is only natural for judges to apply their personal viewpoints as to the use of a new technology. This means that whether a judge will find that "a new use can be construed to fall within [a] grant" is anyone's guess.

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[156] 3 NIMMER, *supra* note 55, at 10-89.
[157] Rey v. Lafferty, 990 F.2d 1379, 1387, 26 U.S.P.Q.2d (BNA) 1339, 1345 (1st Cir. 1993).
[158] 566 F. Supp. 226, 227 (D.N.J. 1983).
[159] Tele-Pac, Inc. v. Grainger, 570 N.Y.S.2d 521, 523 (N.Y. App. Div. 1991).
[160] *Bloom*, 33 F.3d at 525.
[161] *See, e.g.*, *Norman*, 69 A.2d at 468 (alleging that the popular meaning of broadcast meant radio).
[162] 821 F. Supp. 341, 27 U.S.P.Q.2d (BNA) 1107 (E.D. Pa. 1993).
[163] *Id.* at 345.

Moreover, the *Bartsch* rule demands that "the burden shall be on the grantor to reserve the right to the new, but foreseeable, use." Courts that insist on a specific, rather than general, reservation of rights clause set up contract drafters in an unending catch-22. Suppose a licensor does as *Bartsch* demands, enumerating all contemplated technologies that are not to be included in a grant. Who is to say that a court like the Fifth Circuit in *Bloom* will not find against the grantor because he failed to list some new technology that was in fact unknown at the time of contracting?

Courts should abandon the contrived ways of supporting their verdicts licensed by *Bartsch*. They should instead look to whether or not the new technology at issue brings about a change in consumer behavior, creating a new economic market. If it does, the new medium should be outside the confines of the contract. Conversely, if the new technology simply enhances or extends an already-existing technology, it would be included in the license granted. "Technological advances must continually be evaluated and their relation to legal rules determined so that antiquated rules are not misapplied in modern settings. . . . Yet, if the substance of a transaction has not changed, new technology does not require a new legal rule merely because of its novelty."[164]

Plugging some of the historical new use cases into this economic market model, "talkies" would automatically be included in the rights to silent films, as moviegoers continued to visit theaters to see the results of a contract granting motion picture rights. Conversely, television rights would not be included in an assignment of film rights. Television created an entirely different way for audiences to experience the product of the contract, and with that came a totally separate market for advertisers to exploit.[165]

Likewise, home video would be outside contracts granting motion picture and/or television rights. The availability of video changed consumer behavior with respect to both pre-existing mediums, since it afforded viewers much more control over what they see and when they see it. No longer must people go to the theater to enjoy a movie, nor are they forced to wait until a television network decides to televise it. Similarly, video gives viewers the power to tape a television program and watch it at some time

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[164] Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827, 838 (1998).

[165] Alex Alben, *Future Technology Clauses and Future Technologies Legal Roadblocks to New Media Uses Along the Information Super Highway*, ENT. L. REP., Vol. 15, No. 12 (May 1994).

later, fast-forwarding through the commercials.[166] Additionally, video movies are available for consumers to purchase and keep, unlike the movies shown at a theater. The sale and rental of videotapes[167] and discs create a completely different market, as well as another new venue for advertisers to reach audiences.

Under this regime, a court would not have to bend and stretch the definitions of contractual terms—nor decide whether subjective or objective foreseeability could have affected the agreement—to reach an equitable decision. As with the current situation, reservation of rights clauses and future technology clauses can be incorporated into licensing contracts. However, if the new technology at issue does in fact create a new economic market, these clauses would not be considered in a dispute over whether that technology is included. This is fair because if a licensee considered the new technology as part of the bargain at the time of contracting but did not tell the licensor, he was not dealing in good faith. Hence, he does not deserve the windfall that including the new use in his license provides. What is more probable is that the licensee did not expect his bargain to include the rights to the new technology, even if it was perhaps foreseeable to certain people.

Applying the proposed economic market regime to our hypothetical lawsuit between NBC and the IOC, broadcasting over the Internet creates a new economic market. Much like the advent of television, Internet availability has changed—and will almost certainly continue to change—consumer behavior. As with home video, Internet broadcasting offers the same type of moving pictures accompanied by sound that theaters and television offer. However, computers give people even greater control over what they see and hear than does video. The Internet also offers yet another brand new canvas on which advertisers can paint. Under the proposed system, the IOC would win, and Internet rights would not be included in NBC's television broadcasting license.

VIII. CONCLUSION

The Internet has developed rapidly in the last few years. Video streaming technology has made it possible to broadcast short Olympic events over the

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[166] Cohen v. Paramount Pictures Corp., 845 F.2d 851, 853-54 (9th Cir. 1988).

[167] This includes even blank videotapes on which viewers can record television programs or illegally copy movies.

World Wide Web, and the possibility of television-like viewing over the Internet in the next few years is not a far-fetched notion.[168] NBC may well decide that it wants to take advantage of the Internet to show parts of the Games as they happen and try to persuade a U.S. court to force the IOC to allow the network to do so under its current broadcasting contract.

It is this author's opinion that NBC video Webcasts of the Games would be much more in the American public's best interest than no Internet video of the Games at all. However, the only direct precedent to this hypothetical case, *Norman v. Century Athletic Club*,[169] held that a radio broadcasting license does not include television.[170] Therefore, under *Norman*, Internet broadcasting rights are probably not included in NBC's right to televise the Olympic Games through 2008. The analogous copyright cases do not offer much in the way of guidance, as they employ a multitude of factors in different ways to reach diverse outcomes.

For a clearly reasoned outcome and a precedent that can easily be followed in future cases, the best way for a court to decide a potential suit between NBC and the IOC over Internet broadcasting rights—if the court finds that the contract language is ambiguous—would be to base its holding on economic realities. Since Internet broadcasting drastically changes consumer behavior and thereby creates a new economic market, a court hearing this hypothetical case should hold that Internet broadcasting rights are not part of the broadcasting rights NBC purchased in 1995.

BRANDI BARNES KELLIS

[168] This author does not address what should happen to these kinds of contracts if within the next seven years the Internet actually were to completely replace television. That scenario seems most analogous to the silent movie/"talkie" cases in which the new technology was held to be included in the contract because it worked to render the existing contract virtually worthless.

[169] 69 A.2d 466 (Md. 1949).

[170] *Id.* at 471.