Canadian Copyright Law in Cyberspace: An Examination of the Copyright Act in the Context of the Internet

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Canadian Copyright Law in Cyberspace: An examination of the Copyright Act in the context of the Internet

Jeremy F. deBeer

1. INTRODUCTION

The Information Superhighway has dramatically altered the landscape of intellectual property. Although intellectual property law, and

The Information Superhighway, or the Internet, consists of various interconnected networks linking several million dissimilar computers on a global scale. There is no single organization that controls the Internet, nor is there any centralized point from which anyone may monitor its content. The Internet can be used as a tool for personal messaging, education, research, entertainment, and e-commerce. See Canada, Information Highway Advisory Council (IHAC), Preparing Canada for a Digital World: Final Report of the Information Highway Advisory Council (Ottawa: Industry Canada, 1997) at 20 [hereinafter IHAC Report: Preparing Canada].

For an excellent technical introduction to the Internet, see the evidence presented to the Copyright Board in PICTAN Statement of Rights, Public Performance of Musical Works, 1996, 1997, 1998 (Tariff 22, Internet) (80) (1999), 1 C.P.R. (4th) 417 at 430-431 [hereinafter Tariff 22 (Declar)]. Common methods of communication on the Internet include: (1) electronic mail (email), which allows point to point messages to be sent between users, (2) newsgroups, such as USENET, which are distributed message databases that present open discussions and exchanges on particular topics, (3) Internet Relay Chat (IRC), which allows multiple users to type messages to each other in real time, (4) Telnet, which allows users to access computers that are physically located elsewhere, (5) the Teletext Protocol, which enables users to send, receive, or work with files from another computer, and (6) the World Wide Web (WWW), which is a user-friendly graphical interface. See generally Shaham Shayesteh, "High Speed Chase: On the Information Superhighway: the Evolution of Criminal Liability for Internet Piracy" (1999) 33:1 Loyola of Los Angeles L. Rev. 183 at 186-91. Of the above communication methods, the WWW is the most familiar to the general public. It is based on Hypertext Markup Language (HTML), which can contain text, images, sound, animation, or video. HTML documents are known as Web sites and can be accessed with widely available software, such as Microsoft's Internet Explorer and Netscape's Navigator. Although technically distinct, the terms Internet, Net, Information Superhighway, Information Highway, World Wide Web, WWW, and Web are used synonymously throughout this paper.

The Internet originated in 1969 as a project of the U.S. government, ARPNET, which was designed to facilitate communication in the event of a nuclear catastrophe. In the U.S., the interconnected network of computers is officially

copyright law in particular, has frequently had to adapt to technological innovations, the Internet presents its most significant challenge in recent history. The primary commodities on the Internet are information and other intangibles—in other words, intellectual property. This, combined with the fact that copyright in Canada is protected solely under the Copyright Act, makes it imperative that the copyright regime be evaluated frequently to ensure its smooth and consistent application to new media, such as the Internet. Since the introduction of the first Copyright Act in 1924, Parliament has responded to technological and social change with a series of amendments to the original legislation. The purpose of this discussion is to determine


The Internet has now solidified a position as an influential technological innovation with its widespread use. The number of Internet users is growing exponentially and is expected to reach 320 million by 2001 and 720 million by 2006. North America is predicted to remain the leading region in the world for Internet use until at least 2005. West Europe is growing faster however, and will rank second by the same year. The Asia-Pacific region is growing the fastest, and is expected to have 170 million users in 2005. See PR Newswire, “North America is the Leading Region for Internet Users According to the Computer Industry Almanac” PR Newswire (17 August 1999); online: LEXIS (News, PR NEWSWIRE).


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R.S.C. 1985, c. C-42. An updated version of the Copyright Act can be found online: Department of Justice Canada <http://www.canada.justice.gc.ca/PDF/Name/ChapC-42-ActEn.pdf>. Section 63 provides that “Every person is entitled to copyright or any similar right in any literary, dramatic, musical or artistic work otherwise than under and in accordance with this Act.”

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See J. Melziner, “New Copyright Act Leaves some work undone” Law Times (15 September 1997) 10, 17. In 1988, amendments created exhibition rights for artistic works, improvements in moral rights, a new Copyright Board, protection for computer programs, additional criminal sanctions, and eliminated compulsory licenses for recordings of musical works. After the Canada-United States Free Trade Agreement in 1989, further changes ensured that cable and satellite companies paid royalties for retransmissions. The 1993 amendments included graphic and acoustic representations as musical works and ensured that broadcasters, TV, and

whether further changes Canada.

In response to the latest camps have emerged the largely sufficient to protect Internet. The opposing view to afford owners of intellec
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“New copyright law awaits reg altered the Copyright Act wi additional rights for performa the Copyright Board and record tapes, video cassettes, compact c. Notably, it failed to address the Internet.

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notes: Since the birth of copyright medium of expression or fear and concern that it d that the new candidate it required separate legal about photography, radio photocopying, and varic instance, the copyright is the new medium of expression omitted.

For an illustration of this in Copyright Subcommittee, f of the Report of the SaCo Council Secretariat, 1994) ibid.


Laz are based on print. He argues: ‘It has been stretch does always show, and now’s complexity’; The Electronic W University of Chicago Press, 21
whether further changes might be necessary or appropriate in Canada.

In response to the latest technological phenomena, two scholarly camps have emerged. The first group believes that current laws are largely sufficient to protect both users and creators of works on the Internet. The opposing view is that some degree of reform is necessary to afford owners of intellectual property adequate protection. The tension between the rights of copyright holders to receive protection for their works, on one hand, and the public's interest in the free use of copyright system operators were liable for royalties. The North American Free Trade Agreement Act, S.C. 1993, c. 44, came into force in 1994 and introduced legal rights for sound recordings and computer programs, and increased protection against the importation of pirated works. Most recently, as M. Bourrie discussed in "New Copyright laws await regulations," Law Times (19 January 1990) 13, Bill C-35 altered the Copyright Act with stiffened neighbouring rights, giving owners additional rights for performance of their works. It also strengthened the power of the Copyright Board and introduced a "liberalized levy" on anyone buying blank tapes, videocassettes, compact disks, or anything else capable of holding a recording. Notably, it failed to address the complex issues that have arisen as a result of the Internet.


There are many scholars and practitioners who feel that copyright law in general is sufficiently flexible to accommodate technological change. For example, in the context of U.S. law, professor Arthur Miller of the Harvard Law School, supra note 2, notes:

Since the birth of copyright, every age has seen the emergence of a new medium of expression or technology that has led people to express the fear and concern that it defines the boundaries of effective legislation in a way that is not consistent with the protection it was designed to provide. These apprehensions were voiced about photography, motion pictures, sound recordings, radio, television, phonograph, and various modes of telecommunication. In each instance, the copyright system has managed over time to accommodate the new medium of expression in the existing framework.

For an illustration of this belief in a Canadian context, see generally Canada, Copyright SubCommittee, Copyright and the Information Highway, Preliminary Report of the Copyright SubCommittee (Ottawa: Information Highway Advisory Council Secretariat, 1994) [Debriefing SubCommittee Report].

8. According to J.P. Barlow, "Intellectual property cannot be patched, retrofitted, or expanded to contain digital expressions." The Economy of Ideas: A Framework for Rethinking Copyright and Information Law in the Digital Age (Wired (March 1994) online: Wired: http://www.wired.com/wired/issue/w30/11/f11-170.html) (last accessed: 22 June 2000). R. Landham also believes that current U.S. copyright laws are based on print. He argues that "[C]opyright law was invented when print was invented... It has been stretched to protect images and sounds but the stretching has always shown, and now-electronic text breaks the intellectual fabric down completely." The Eleventh Word: Democracy, Technology, and the Arts (Chicago: University of Chicago Press, 1993) at 11.
dissemination of information, on the other, underlies this debate. The fact that the development of the Internet presents an unprecedented opportunity to share information between users inevitably affects the rights of copyright owners since the threat of infringement is also increased. To ease the tension among rights holders, copyright law must balance the interests of society and owners of copyrights. Essentially, enhanced public welfare through the creation of new works and the dissemination of those works in cyberspace can be achieved only by affording enough protection to ensure adequate incentives for creators to develop intellectual property on the Internet. However, copyright laws must not be so broad as to suppress the positive effects of technological progress.

My goals in writing this paper are twofold. First, I intend to provide the reader with an overview of the applicability of the current Copyright Act to the Internet. Second, I wish to emphasize that, although the Internet presents significant problems for the entire copyright regime and many complex issues that cannot be resolved without lengthy consideration and debate, we should not be deterred from examining potential legislative solutions in the interim. To that end, I begin by assessing the adequacy of the Act’s existing categories of works. Infringing activities by three broad interest groups are: (1) end users who provide services to make information available on the Internet; (2) Internet service providers; and (3) Internet access providers. This article seeks to determine the law applicable to each of these activities.

For an introduction to this tension between rights holders, see generally D. Vayv, *Intellectual Property Law: Copyright, Patents, Trademarks* (Concords: Irwin Law, 1997) at 9, 16. Further discussion of this and other theoretical issues concerning intellectual property can be found in W.J. Gordon & K.L. Port, eds., *Symposium on Intellectual Property Law Theory* (1993) 68 Chic.-Kent L. Rev. 583. Anyone with the most minimal familiarity with computers can see the Web to use, view, send, receive, or copy information. This is why the Information Highway has grown at such exponential rates. See S. Bernstein, *surfing the Internet: Canadian Internet Policy and the Future of Intellectual Property* (1996) 16 Mead’s L.J. 377 at 382.

Piracy activities are controlled in the physical world because of significant obstacles to distribution. For example, pirates must deal with smuggling product across borders, safety warehousing goods, and finding purchasers of bootlegged products. Digital piracy eliminates these problems because a single digital copy can be uploaded onto the Internet and thousands of perfect, identical copies can be distributed instantly. See S.E. Hapner, *New Protections for Internet Service Providers: An Analysis of The Online Copyright Infringement Liability Litigation Acts* (1999) 23:2 Seton Hall Leg. J. 359 at 364. These concerns have been raised that publishers and creators are reluctant to put their works on the Internet due to fear of infringement and piracy. See R. Rice, "Publishers pull their digits out" Financial Times (20 March 1995) 13.

There have been concerns that the full potential of the Internet cannot be realized if the legal protections afforded to works in the physical environment are not extended to cyberspace. Creators and other owners of intellectual property will not be willing to place their works at risk unless adequate systems are in place to permit them to set and enforce the terms and conditions under which their works are made available. Furthermore, the public, who generates a market for the Internet, may be reluctant to use its content unless the integrity of works on the Internet is guaranteed, and the works are available under equitable and reasonable terms. NIP White Paper, supra note 1 at 10-11.

13 This group typically includes ISPs. ISP provide the backbone for their subscribers, usually via an Internet Protocol (IP) address. They also supply and operate a connection to the Internet, make remainder of the Internet, albeit information. These companies, or Internet access providers (IA), may provide their service. If the subscribers are an end user, but when that “sender becomes a content peer” in the Tariff 21 Decision, supra. Federal Court of Appeal decision.

14 The Board did not find it necessary to examine multiple rates for various types of connection to the Internet, as provided by others. It is not the user, but when that “sender becomes a content peer” in the Tariff 21 Decision, supra Federal Court of Appeal decision.
of works. Infringing activities are then examined in the context of three broad interest groups classified by their activities on the Internet. These are: (1) end users who receive or use information, (2) content providers who make information available to users, 13 and (3) Online Service Providers (OSP) 14 who establish the communication link to the Internet. 15 When analyzing OSP liability, I will survey the American approach and discuss its application in a Canadian context. 16 In addition, throughout the paper I will examine the most recent

This group typically includes Web site creators who post material on the Internet. OSPs provide the backbone infrastructure of the Internet by offering connections to their subscribers, usually in exchange for a fee. OSPs provide subscribers with an Internet Protocol (IP) address that identifies their computer by a set of integers. They also supply and operate equipment and software to allow the subscriber to connect to the Internet, make arrangements with other OSPs to connect to the remainder of the Internet, and operate the routers and other equipment to forward information. These companies are also known as Internet service providers (ISP) or Internet access providers (IAP). See generally, Tariff 22 Decision, supra note 1.

It is important to examine these groups independently since each may play multiple roles for various transmissions on the Internet. An entity may provide a connection to the Internet, post its own content, or be an end user of content provided by others. Ibid. Similarly, if a person receives and views an email, they are an end user, but when that person forwards the message to another user, the sender becomes a content provider.

In the Tariff 22 Decision, supra note 1:443, the Copyright Board relied mostly on Federal Court of Appeal decisions relating to television and cable transmissions. The Board did not find it necessary to rely on evidence relating to the American and European situations and suggested that European precedents would have been of little use since legislation does not deal expressly with the Internet and jurisprudence appears to be non-existent. Furthermore, there are important distinctions between American and Canadian copyright law in areas such as distribution rights and contributory infringement. The U.S. now also has detailed statutory provisions that address the liability of OSPs.

However, it is important to ignore the approaches of other jurisdictions, particularly given the international dimensions of the Internet. Although important distinctions exist, there are enough similarities that a general survey of alternatives can nonetheless be quite useful. Because Internet litigation in Canada is in its infancy, "we generally look at what is going on in the U.S. and extrapolate from there to make a decision about what's going on here." D. Wyrulik quoted in C. Kerndt, "U.S. is forging new law in cybersecurity" Law Times (20 July 1998). 10

The goals of the copyright regime in the U.S. are somewhat different than those of the Canadian Copyright Act. According to the Copyright SubCommittee, an explicit goal of U.S. copyright law is "to promote the progress of science and useful arts", whereas the Canadian Act strives more to achieve "the recognition of the property of authors in their creations and the recognition of works as an extension of the personality of their authors". SubCommittee Report, supra note 7 at 26. However, this does not alter the fact that, at least in part, one of the important functions of copyright law in Canada is to promote social progress through the dissemination of information, and the Internet is an ideal mechanism through which to achieve this end. See generally IABC Report: Preparing Canada, supra note 1.
Canadian jurisprudence relating to copyright on the Internet. Although the breadth of topics that could be addressed and depth of potential discussion are as boundless as the Internet itself, I will limit this paper to those issues mentioned above. Finally, this paper concludes that the Copyright Act needs to be amended to accord with the realities of the Internet age. To displace the perception that cyberspace is a lawless domain, and to establish clear guidelines regarding copyright on the Internet, legislators must provide some much-needed certainty in this relatively new environment. Although massive revision of the copyright regime may not be feasible in the short term, manageable evolutionary legislative changes to the Copyright Act should be implemented immediately.

III. CATEGORIES OF WORKS

A. DIGITIZATION

To receive copyright protection in Canada, a work must fall within one of the established categories under s. 5(1) of the Copyright Act. These categories are typically broadly defined and include original literary, dramatic, musical, and artistic works. There is some question whether a digitized work, either originally created in or transformed into digital form, falls within one of these categories. A report of the Copyright Subcommittee (hereinafter “the Subcommittee”) of the Information Highway Advisory Council (IHAC) indicates that the existing definitions in the Copyright Act are sufficient to protect the digitization of works. Since copyright works are afforded protection “in any material form whatever,” the Subcommittee rejected the idea that digitization is thereby entitled to sui generis protection and adopted in a draft the existing view that digitized works are protected under s. 5 of the Copyright Act, subject to the limitations provided therein. Thus, the Copyright Act would be applied to digitized works, and the question of infringement would be determined on a case-by-case basis.

17. Specifically, where applicable, I will summarize and comment on the effects of the Copyright Board’s decision on Tariff 22. This decision, rendered on October 22, 1999, was the first of a two-part analysis of SOCAN’s proposal to charge royalties for the public performance of precommunication to the public of copyrighted material, particularly dramatic, musical works. Phase I of the decision focused on legal questions surrounding copyright on the Internet and determined which activities, if any, trigger liability under the Copyright Act. Phase II will deal with the policy issues raised by Tariff 22, including the most appropriate tariff structure.

18. Within that discussion, issue pertaining to the most appropriate target for a tariff, and whether blanket licensing is the best form of licence in the relevant market will be debated. See Tariff 22 Decision, supra note 1 at 429.

19. For example, peripheral issues that arise on the Information Highway, such as moral rights and crown copyright, although important, are not discussed in detail. Enforcement of copyright on the Information Highway is also an important issue. The development of monitoring systems is a necessary component of any plan of action to resolve the problems this paper will discuss. However, an analysis of such systems is beyond the scope of this review of the Copyright Act.

20. Copyright Act, supra note 4, s. 5(1).

21. Sub-committee Report, supra note 7 at 7. The digitization of a work does not create a new work, rather, it constitutes the expression of copyright subject matter in a different form (ibid.).

22. Sub-committee Report, supra note 4 at 3.


24. See D.J. Lundy, “Revising the Copyright Act: Marshall J. of Compur & Inf. Copyright Act, supra note 4, s. 3.
rejected the idea that digitization creates a completely new work and is therefore entitled to sui generis protection. This position was also embraced and adopted in a final report of the IHRAC.

It seems the existing Copyright Act recognizes that a work created on the Internet is entitled to copyright protection. Although an explicit definition in the Copyright Act may make it clearer that digital works are protected under s. 5(1), such a specific expression may, in fact, be limiting. It is possible that any new definition Parliament may draft would not embrace future innovations. For this reason, the Subcommittee's flexible approach, recognizing the existing categories of works as all encompassing, is preferred.

III. THE EXPLOITATION OF WORKS ON THE INTERNET

A. END USERS

1. Browsing

Browsing is among the most common activities on the Internet. Necessarily, browsing involves downloading, even if only temporarily, information into a computer's random access memory (RAM). Courts in the United States have been clear in holding that this act constitutes copying under U.S. law, yet there are sources that suggest otherwise.

Canada's Copyright Act grants the copyright owner "the sole right to... reproduce the work", and since efforts to avoid liability for

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22. SubCommittee Report, supra note 7 at 7.
24. This would be true, even if the work is itself an infringement of copyright. The fact that a digital work infringes copyright does not prevent the work from becoming the subject of its own copyright if it meets the requirement of the Copyright Act. The owner of copyright of the original work has recourse against the producer of the digital work. Yet likewise, the owner of copyright in the digital work may also pursue subsequent infringers. Throughout this paper, it is important to distinguish competing parties, each of whom may have their own copyrights.
27. See MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993). Under U.S. copyright law, a copy is created on a computer system when it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." See U.S. Copyright Act, 17 U.S.C. s. 102(a) (1976).
29. Copyright Act, supra note 4, ss. 3(1).
infringement on technicalities will likely not succeed. Anyone who broods over the Internet probably infringes copyright in that digital work. Although most commenters suggest Canada can be expected to follow the American precedent, this issue has not been settled. The BHAC Report: Connection Community Content advocates amending the Copyright Act to clarify what constitutes browsing and which works are publicly available. Exactly how Canadian law should deal with browsing depends largely on the goals of copyright legislation. If copyright owners are to be adequately protected, they must have the right to control all forms of reproduction, including browsing. However, owner's rights must be balanced against public interests and, therefore, subject to some reasonable limitations harmed by browsing and misuse, or distribute their work ignore the fact that browsing merely a denial of factum an alternative. Rather, works protected if copyright law infringement and expressly appreciate circumstances. It would be struck by limiting

2. Fair Dealing
Browsing on the Internet in traditional works in a book is no infringement because an exclusive right given to a on the Internet presents a use, albeit ephemeral, reproduction copyright. Nevertheless, it held liable for such a trivial almost inevitably be within use. If users' intentions an defence to infringement in C. The Copyright Act already copyright infringement in Canadian legislation provision.

30 It is conceivable that a user (or similarly, a content provider or access provider) could break up a work and copy an infinite number of non-substantial portions separately. It could then be open to argue that each part is not an infringement, since it is not a substantially reproduction. See M. Hayes, "Internet Copyright Infringement in Canada," online: Strategies: http://strategies.ip.ca/SRC/h/06/05/05/05.html (last accessed: 15 March 2000). Recently, the Copyright Board appeared to partially close this loophole. They rejected the argument that a work is not communicated, for the purposes of telecommunication, because it is broken into packets of data and reassembled. All of the packets required to communicate the work are transmitted from the server on which the work is located, to the end user, regardless of the order in which they are received. They also held that there is a copy of a work on a hard drive even if the relevant data is stored in separate sectors located throughout the hard drive. Furthermore, it does not matter that what is transmitted over the Internet is not the work itself, but instructions that allow the end user to reconstruct the work. See the Tariff 22 Decision, supra note 1 at 447.

31 The potential liability that flows if the digital work itself infringes another copyright will be discussed in Part III.B.1, below.

32 See e.g. Hayes, supra note 30, especially at n. 76 where he states, "While it is by no means completely close, it is expected that Canadian courts would follow the lead of the American and U.K. courts and hold that loading of a copyright image into RAM is in fact a reproduction." In addition, the Subcommittee, Subcommittee Report, supra note 7 at 13, concluded that the "act of accessing a work constitutes a reproduction." Supra note 23 at 115.

33 If the law were to hold browsers liable for infringement, this would involve a significant policy shift, especially with respect to U.S. law, from favoring information users to favouring copyright owners: Hayes, supra note 26 at 2. And, as R. Nimmer suggests, such a shift should occur only through a direct choice, not as the implication of technological developments: Information Law, (1996) para 4.08[I] at 4-30 as cited in Hayes, supra note 26 at 2. Since the goals of Canadian law are already slanted toward protecting authors (see generally Subcommittee Report, supra note 7; BHAC Report: Preparing Canada, supra note 1; BHAC Report: Connection Community Content, supra note 23), the shift would not be as dramatic. Nonetheless, it could have a considerable impact on Internet users, making virtually every activity on the Internet an infringement of copyright.

34 For example, if certain actions Copyright Act, supra note 4, and research or study (ibid., s 29B.1 (ibid., s. 29.2)) as well as libraries, i
likely not succeed, 30 anyone who simply infringes a copyright in that fact, that each part is not an infringement, that users often follow "links" not knowing exactly what information they are accessing. 36 See generally Copyright Act, supra note 4. 37 Traditional browsing, in a bookstore for example, cause no immediate threat of reproduction by examination. Conversely, this is not the case on the Internet—it is very easy to permanently copy a work onto a computer. See Pollock, supra note 3.

35 Browsing a work simply for the purpose of determining whether one likes it could leave users unwittingly liable for copyright infringement. See RIAA Report: Copyright Community White Paper, supra note 12 at 11-15. Note that, because of the use of cryptic or ambiguous file names, users often follow "links" not knowing exactly what information they are accessing.

36 See generally Copyright Act, supra note 4.

37 Traditional browsing, in a bookstore for example, cause no immediate threat of reproduction by examination. Conversely, this is not the case on the Internet—it is very easy to permanently copy a work onto a computer. See Pollock, supra note 3.

38 Hayes, supra note 26 at 2. See also Religious Technology Center v. NetCom On-Line Communication Services, Inc., 50 F. Supp. 2d 1378, n. 25 (N.D. Cal. 1995). However, as will be discussed below, Canadian law provide for much narrower exceptions.

39 For example, if certain actions are undertaken without notice of infringement, see Copyright Act, supra note 4, s. 29.3), fair dealing is allowed for the purpose of research or study (ibid., s. 29), criticism or review (ibid., s. 29.1), or news reporting (ibid., s. 29.2). There are also specific exceptions for educational institutions (ibid., s. 29.4-30.3) as well as libraries, archives, and museums (ibid., s. 30.1-30.3).

40 Contrast this with the U.S. approach, where copyright exceptions are allowed under the doctrine of "fair use": U.S. Copyright Act, supra note 27, s. 107. The U.S. legislation gives the courts discretion to determine which activities should be
Practically, this means that if fair dealing is to be an effective means of avoiding liability flowing from browsing on the Internet, legislators must take action. It is insufficient to simply recognize the need for further review. Since existing provisions in the Copyright Act are of limited application, the Act must be amended.41

Moreover, legislative changes must be flexible. If an exceedingly specific provision is incorporated into the Act, there is a risk that it will become outdated with technological progress. In that event, the Legislature would again need to re-evaluate the Copyright Act. Because of the slow pace of legislative action compared to technological progress, a flexible approach, similar to that of the U.S.,42 is better suited to adapt to modern circumstances. It is inadvisable to force judges to manipulate narrow provisions to accommodate technological innovations. By including a general defence to infringement that addresses the Internet, judges will be able to equitably balance the rights of society against the rights of owners.

If nothing is done to alter the existing Copyright Act, users may be subjected to unwarranted liability. That is, holding those who simply browse copyrighted works on the Internet liable for infringement is neither justifiable nor practicable. In effect, their infringing activity yields them few substantive economic benefits and causes only permisssible and which should not. The factors that a court may consider include: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect on the use of the potential market. Ibid. See also Campbell v. 'Astral-Rose Music, Inc., 510 U.S. 576 (1994). 41 The Copyright Sub-Committee concludes that further review of this area may be required. However, their recommendation is lacking in that they seem to need to amend the current Copyright Act. Although “fair dealing” is consistent with the value of Canada attaches to creative minds”, it is questionable whether the law is “sufficiently supple to allow for equitable decisions with respect to the use of works on the Information Highway”. Sub-Committee Report, supra note 7 at 26. Given that it is extremely likely that browsing conludes infringement, judges will invariably be forced to address this issue. When that time comes, it is necessary that the Copyright Act contain criteria that can be considered within the specific context of the Internet.

42 The IEAC Report: Connection: Content: Context, supra note 20, at 36, recommends that specific criteria and guidelines as to the scope of the fair dealing exception be provided, including explicit recognition that it applies to electronic copies. However, the report is not clear on whether the recommendation is for a specific, exhaustive definition that includes electronic copies within the existing sections or a new, general, and flexible section that can be applied to future innovations.

43 We must always remember that, given the distinct goals of U.S. copyright law, identical provisions cannot simply be transplanted into Canadian legislation. Whereas the broad exception of “fair use” is consistent with user rights, dissemination, and social progress, the narrower exception of “fair dealing” tends to protect authors and owners of copyrights. In drafting a provision to apply to the Internet, we must be careful not to go so far as to dramatically shift this fundamental policy choice. To be consistent with the goals of Canadian copyright law, it should be made clear that Internet user rights are subject to the reasonable expectations of authors.

As discussed above, it is inexcusable that within those circumstances where copyright owners should be at that browsing is an infringement. Furthermore, it is important to what ought to be acknowledged. Ideally, a Web page is viewed goes beyond this to actually mean that is, where there is some be U.S. Copyright Act, supra note 2.

46 Of course, OSP may still be c content providers. OSP includes Kim Thompson, vice-president Industry Association (CRIA) at competition technique called Gomp, that makes it easy to by “Copyright pirates are swarmed”. Virtually any song ever recorded is located all over the world and is available i equipped with the required N availability. The widespread NTO 47 triggered SOCA NTs attempt to recently deal with by the surf 424, 436.
significant economic harm to content providers. In addition, end users often lack the resources to make prosecution worthwhile. Of course, those end users that do receive economic benefits from copyright infringement ought not to be able to exploit any potential exemptions.44 As under U.S. law,45 the purpose and character of the use should be a primary consideration. With revision, fair dealing exceptions in Canada can relieve innocuous users from liability. Furthermore, insulating end users with a flexible doctrine of fair dealing would reduce the need to explore the ensuing contributory liability of ISPs for users’ infringement. If the end user has a legitimate defence, an OSP need not worry about any consequent liability.46 Although policy makers may wish to further consider all alternatives and their respective implications, action is necessary to adequately protect copyright owners in the meantime.

B. CONTENT PROVIDERS

1. Posting

Whereas users may be liable to content providers for copyright infringement, Web site creators may also find themselves liable if they post copyrighted works on the Internet without authorization. Perhaps the most recently publicized example of this activity involves the widespread availability of songs in MP3 format,47 although nearly

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44 As discussed above, it is imprudent to simply ignore the fact that a reproduction has occurred, since there may be situations where liability is justified. For example, in those circumstances where browsing does create economic benefit on a user, copyright owners should be able to control use of their works. We cannot deny that browsing is an infringement, albeit subject to a defence of fair dealing. Furthermore, it is important to define what is meant by browsing when discussing what ought to be actionable. In a technical sense, the term denotes the process whereby a Web page is viewed on a computer monitor. It is only where the user goes beyond this to actually make use of the material that liability should follow; that is, where there is some benefit conferred on the user.

45 U.S. Copyright Act, supra note 27, § 107.

46 Of course, OSPs may still be contributory liable for the infringing activities of content providers. OSP liability is discussed in detail in Part III.C.3, below.

47 Ken Thompson, vice-president and general counsel to the Canadian Recording Industry Association (CRIA) says, “[H]undreds of thousands of Web [sites] use a compression technique called MP3 [standing for Motion Picture Experts Group] ... that makes it easy to obtain massive amounts of data” quoted in L. Payoff, “Copyright pirates are swarming the Internet” Law Times (18 January 1999) 15. Virtually any song ever recorded is available in this format from a variety of Web sites located all over the world. Software programs, such as Real Audio and Windows Media Player, enable users to play music downloaded from anywhere in the world and are available free of charge. In fact, most Web browsers come equipped with the required software and an index of sites that make such files available. The widespread availability of copyrighted music on the Internet triggered SOCAN’s attempt to impose royalty fees on Internet activity, which was recently dealt with by the Copyright Board. See Tariff 22 Decision, supra note 1 at 424, 436.
every unauthorized posting of text, data, pictures, graphics, sound clips, songs, video, text, audio, or multimedia on the Internet could have copyright implications. Clearly, posting copyrighted works without permission infringes copyright as it reproduces ‘a work in any material form’. 46 Because Canadian copyright law allows separate owners to hold different rights, 47 the following discussion explores whether it may implicate other rights as well. 50

a. Communication to the Public

Most importantly, in the context of the Internet, a copyright owner has the exclusive right to communicate the work to the public by telecommunication. 51 This right raises two important issues: 1) do telecommunication include digital transmissions over such a medium, and 2) what is the meaning of the phrase “to the public”? First, the definition of telecommunication in the Copyright Act covers a wide variety of communication methods and is sufficient to include existing technologies. 52 Although some of the existing methods of connecting to the Internet 53 are listed within this section, technologies

48 Copyright Act, supra note 4, s. 34(1). As discussed in Part II.A above, the digitization of a work is a reproduction in any material form.
49 Copyright Act, supra, s. 34(2).
50 As suggested by Haynes, supra note 30, a creator of a musical work might assign performance and telecommunication rights and mechanical (recording) rights to separate collectives. The music publisher may own the rights to the written representation of the notes and words contained in the work, while a record company or producer owns a separate copyright in the recorded performances.
51 Notably, the Supreme Court of Canada has decided that a single activity may infringe more than one of the rights granted under s. 3(1) of the Copyright Act. See Bishop v. Stewart, [1990] 2 S.C.R. 467, 72 D.L.R. (4th) 97.
52 Copyright Act, supra note 4, s. 34(1).
53 “Telecommunication” means any transmission of signs, signals, writing, images, sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic systems.” - ibid., s. 2. Note the use of the word “means” rather than “includes” in s. 2 of the Copyright Act. Haynes, supra note 30, believes that “[i]t is clear that the intention of the Copyright Act is to encompass every form of electromagnetic or wireless communication within this definition”. A recent amendment to the Copyright Act adds indirect support for this argument. In Canadian Cable Television Assn. v. Canada (Copyright Board) (1991), 34 C.P.R. (3d) 521 (F.C.T.D.), 542 (R.S.C. 1985, c. C-41) [hereinafter CCC] the Federal Court of Canada held that changing the description of the right from “radio communication” to “telecommunication” eliminated the distinction between transmission by radio waves and transmission by guided signals by means of wire or cable. See “Television, supra note 10 at 463. Most recently, the Copyright Board concluded in Tariff 25 Oceana, supra note 1 at 444, that “[p]ackets of information transmitted on the Internet [are] the definition of [a telecommunication]”. This decision seems to have quedited debate over this issue for the moment.
54 For example, what about work within the definition of telecommunication to provide to employees used technology specific terms.
55 In particular, when a computer or a cable network allows the user to access public information, such as news or entertainment, it is considered to be providing the public with the information. As mentioned above, the right to communicate a work to the public is a constitutional right of the public and cannot be limited by any law. In this context, the Telecommunications Act provides the general framework for the regulation of telecommunication services in Canada. The act contains provisions that require service providers to ensure that their networks are not used for illegal activities, such as the distribution of pirated content or the facilitation of unauthorized access to copyrighted works.
56 See CRTC, supra note 52, and Canada (Government of Canada) (1993) CCC, the report referred to in 50 and held that CRTC must consider Federal Court decided that s 5 of the Copyright Act in individual p 57 also Chappell & Co. Ltd. v. Rex (S.C.) where sixteen had not been assembled within an electronic public place. 58 Note that the Australian Act 6 with permission to use the new technology’s may involve a more qualified Performing Rights Association Ltd. (Red. C., Midland) [1990] F.C.T.D. appeal to the 57 CRTC on this issue. 59 For example, where a copyright owner has not been compensated for the unauthorized use of their work, they may have the right to take legal action against the infringer.
60 A copyright owner can sue for damages, injunctions, or both. Additionally, in some cases, a copyright owner may be entitled to recover the costs of enforcing their rights.
61 This does not necessarily mean that the copyright owner must file a lawsuit. It may be possible to negotiate a settlement or to enter into a licensing agreement with the infringer.
62 In some cases, the copyright owner may also have the right to seek an injunction to prevent further infringement.
63 The Copyright Act in Canada offers protection for both authors and producers of works. Authors have the right to control the use and reproduction of their works, while producers have the right to control the distribution and display of their works.
may emerge that could escape this definition. Given the incredible pace of technological innovation, it would be more appropriate to engage a non-specific definition that sets out a variety of telecommunication methods as illustrations.

Although the Tariff 22 Decision has recently clarified many of the ambiguities surrounding the phrase "to the public", these words deserve some consideration. Formally, the only judicial interpretations that could provide guidance in this area were of the phrase "in public". However, the Federal Court of Appeal has since ruled that "to the public" is broader than "in public". Thus, at the very least, a communication is "to the public" every time it would be "in public" in similar circumstances. In effect, if the public or a segment of the public is intended to receive a communication, then there can be

54 For example, what about wireless telecommunication? Possibly, they are included within the definition of telecommunication. However, if Parliament intended this provision to apply to uniformed developments, arguably they would not have used technology specific terms.

55 To determine when a communication was "in public", the courts applied a "character of the audience" test. See Canadian Admiral Corp. v. Rofffinsen, Inc., [1954] Ex. C.R. 382, 20 C.P.R. 75. A large number of private performances could not become public performances solely because of their numbers. The character of the individual audiences remained exactly the same; each was private and domestic, and therefore not "in public": ibid. at 382.

56 See CCTA, supra note 32, and in its companion case, CTV Television Network Ltd. v. Canada (Copyright Board) (1963), 99 D.L.R. (4th) 216, 46 C.P.R. (3d) 343 (F.C.A.). In CCTA, the Court refused to follow the Canadian Admial decision, supra note 55, and held that CCTA's members were performing musical works in public. The Federal Court decided that a communication intended to be received by members of the public in individual private settings is a communications to the public. See also Chappef & Co. Ltd. v. Associated Radio Co. of Australia Ltd., [1925] V.L.R. 350 (S.C.) where Causon J. stated at 362, "A performance, in our judgment, is no less public because the listeners are unable to communicate with one another or are not assembled within an enclosure or gathered together in some public hall or other public place."

Note that the Australian Federal Court, after reviewing the older cases dealing with performances "in public", indicated in obiter that the phrase "to the public", "may involve a more restrictive meaning than the phrase 'in public':" Ausmow1in v. Performing Rights Association Ltd. v. Telstra Corporation Ltd., [1994] R.C.C. 299 at 314 (Fed. Ct. Gen. Div.)). This conflicts with obiter statements of the Federal Court of Appeal in the CCTA and CTV cases. See Haynes, supra note 30.

57 Ambiguity exists when a Web site is not freely available to the public, but can be accessed only by "members". As Pollock, supra note 3, explains, "if the site is only set up for a number of the owner's friends and access is strictly regulated then there may be an argument that the site is not available "to the public at large." Contrast this with sites where works are available to anyone willing to pay the membership fee. Section 2(4)(a) (formerly section 36(1)(a), repealed, 1997, c. 24, s. 3) of the Copyright Act, supra note 4, indicates that people who occupy dwelling units in the same building are permitted to public communications to them are "to the public". Pollock, supra note 3, has made an analogy between this and a Web site set up for an exclusive group of people.
a communication to the public. A point-to-point email is probably not a communication to the public, whereas posting a copyrighted work on a Web site likely is a communication to the public.

Most commonly, a work is not transmitted to the public simultaneously, but is available "on demand." Regardless of the fact that all members of the public may receive the transmission at their own convenience, the Subcommittee is of the view that the Copyright Act must be interpreted to include such communications. In fact, a variety of interpretations exists to the same effect. The Copyright Board independently reaches "a communication may be made to members of the public at

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larger than a family and in a group consisting of a small close ties that has not i receiving such expensive Canada, North American Free

1992) at 17-22.

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board independently reached a similar conclusion and decided that "a communication may be to the public when it is made to individual members of the public at different times, whether chosen by them...or by the person responsible for sending the work." 63 The telecommunication takes place not at the time it is made available, but at the time when any member of the public uses a browser to access the work from the source computer, whether or not the work is viewed immediately or not.64

Even if a work is transmitted only once, it is still communicated to the public if it is made available on a site accessible to a segment of the public.65 In addition, the person who posts a work communicates it to the public, regardless of the fact that a system may be programmed to operate automatically once certain actions are taken by persons other than the content provider.66

Ultimately, although judicial interpretation has provided some guidance regarding telecommunication to the public, legislative amendment is nonetheless advisable to establish a complete and coherent framework with respect to this right. The Copyright board's decision does not give us the type of authoritative statement that is larger than a family and its immediate circle of acquaintances or is not a group comprising a limited number of individuals having similarly close ties that has not been formed for the principal purpose of receiving such performances and communications of works.

Canada, North American Free Trade Agreement (NATPA) intended to be the object of, and is linked or performance of works, at the same time or different times avoided that such an aggregation is

[Note: The text appears to be cut off or incomplete in this snippet. Additional context or clarification might be required to properly understand the full content of the document.]
required to provide certainty to this area of the law. I wish to emphasize that the Tariff 22 Decision is a statement from an administrative tribunal only and does not carry the same authority as it would have had it been from a court. Until there has been judicial consideration by a higher-level court, questions will remain as to the true state of the law in Canada. Since those who operate on the Internet cannot wait while judges and policy makers reflect on possible interpretations of telecommunication to the public in the context of the Information Highway, immediate legislative action should be taken.

b. Publication

Section 3(1) of the Copyright Act also grants an owner the right to publish a work. An exhaustive definition of "publication" in the Act indicates that it means, in part, making a work available to the public. It seems clear that posting a work on the Internet makes copies available to the public, but whether that is, in fact, publication depends on how the posting is characterized. If posting that work is considered a reproduction of the work, then it is virtually inescapable that the posting is a publication. However, s. 2(1)(c) of the Copyright Act indicates that communication to the public by telecommunication is not publication. Therefore, if the posting is considered a communication to the public by telecommunication, rather than a reproduction, there has been no publication for the purposes of the Act. Since the same Act can easily be considered either a reproduction or a communication, these discrepant results seem illogical and difficult to justify. Unfortunately, this issue has yet to be litigated in Canada and, therefore, legislative action is essential to clarify the law.

c. Public Performance

It is also prudent to address the right to perform a work in public in the context of the Internet. Since one performs a work when one causes it to be heard or seen, and a work may be performed by

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66 Copyright Act, supra note 4, s. 2.2(1)(a)(i).
67 Ibid., s. 2.2(1)(c).
68 Tirex is a case in Ontario, which was recently allowed to proceed as a class action, that may clarify some of the issues surrounding publication on the Internet. See Robertson v. Thomson Corp. (1999), 172 D.L.R. (4th) 171 (Ont. Ct. Gen. Div.). In addition to other issues, a court could consider the applicability of publishing agreements to electronic media. The plaintiff alleged that she had given authorizations to publish a book review to print format only, and when it became available on a Web site operated by the defendant, sued for copyright infringement.

69 Copyright Act, supra note 4, s. 3(1). The term "perform" applies to all acts of works. See Vignola v. Canadian Performing Right Society Ltd., [1943] S.C.R. 348 at 353, 3 D.L.R. 369.
70 Canadian Adinative, supra note 55 at 40A.
71 A musical work is performed with musical instruments, or by mechanized means.
72 Burshtein, supra note 10 at 438.
73 See supra note 63 and concomitantly.
74 However, the right to perform "retransmitting" which is descended from
75 supra note 4, s. 2.3.
76 Tariff 22 Decision, supra note 1 at 4.
77 supra note 4, s. 3(1B). Screened work produced by a process and videocassettes, videotapes, holograms included, since they were not covered in the Adoption Act, supra note 55 at 395-96. Videotape is produced by a process of "retransmission Rights of Dominion Broadcast (3) Ltd. 97 (Can. Bd.), aff'd (1990), 44 C.R. for judicial review dismissed (1991) to the Supreme Court refused (1992) the act now refer to any work upon which to photographs. See 1.
mechanical methods of reproduction, it would seem that performance in public might include transmissions on the Internet. However, it may be that performance implies a requirement of immediacy, unlike a telecommunication. If this were so, then simply posting material on the Internet would not constitute a performance.

It is interesting that the Copyright Act declares that "a person who communicates a work... to the public by telecommunication does not by that act alone perform it in public". In this provision, the use of the words "by that act alone" can be used to further support the notion that the content providers may infringe more than just one right by posting works on the Internet. Nevertheless, it would appear that posting works on the Internet is a telecommunication and not a performance. In fact, in the Tariff 22 Decision, the Copyright Board relied in part on s. 2.3 of the Copyright Act and refused to find that transmission on the Internet was a performance in public rather than a telecommunication. However, they did not say that such a transmission could not be both, and made no mention of the words "by that act alone". Given that posting works on the Internet could be a public performance, amendments to the Copyright Act are required to clarify this situation.

d. Making Other Contrivances

The Copyright Act also gives the copyright owner the exclusive right to make any record, perform, play, cinematograph film, or other contrivance with which it can mechanically perform or deliver the work. A reproduction of certain types of works on the Internet could constitute a performance of cinematograph films. Alternatively, posting a musical work is performed when it is audibly reproduced by the voice, by musical instruments, or by mechanical methods of reproduction. See Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd., [1939] 4 D.L.R. 353 (F.C.).

71 A musical work is performed when it is audibly reproduced by the voice, by musical instruments, or by mechanical methods of reproduction. See Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp. Ltd., [1939] 4 D.L.R. 353 (F.C.).
work on the Internet could be determined to be making an "other con- 
trivance". The question is whether a digital file falls within the 
meaning of this section. "Mechanically performed" includes performance 
through a machine such as a computer; thus, a digital file is 
technically a means by which a work may be performed. However, 
courts have considered the word "make" only in the context of a 
record and have yet to consider whether posting a work on the 
Internet could be making a contrivance. Legislators would be wise 
to clarify this ambiguity.

e. Public Exhibition

In addition, posting may implicate the right to present an artistic 
work at a public exhibition. This right could be infringed on the 
Internet if a content provider displays works in a virtual "museum". 
However, the Canadian Copyright Act limits this right to artistic 
works. Since public exhibition could play an important role on the 
Internet, further protection should be given to owners of copyright 
in all types of works by making clear that posting a work is a public 
exhibition.

f. Distribution

Unlike U.S. copyright law, the Canadian Copyright Act does not 
establish a distribution right. However, where anyone distributes a

*"Intellectual Property Litigation in Canada Before and After NAFTA" (1995) 11 C.I.P.R. 339 at 345: Arguably, video clips or photographs posted on the Internet act were expressed by such a process and are therefore specifically included within this provision.

76 See Warner Bros.-Seven Arts Ltd. v. CFSM-TV Ltd. (1971), 65 C.P.R. 215 at 241-42 (Ex. Ct.).

77 A person who finds material into disks and imprints the disks with grooves and tracks so that the work may be mechanically performed, makes a record. See Camp Co. Ltd. v. Alcan Crest Music Inc. (1980) 1 S.C.R. 357 at 378, 187 D.L.R. (3d) 649.

78 Copyright Act, supra note 4, s. 3(1)(g).

79 Copyright Act, supra note 4, s. 3(1)(g).

80 Contrast this with the law in the U.S: where the right to display includes literary, 
musical, and dramatic works, pantomimes and choreographic works, and pictorial, 
graphic, and sculptural works. See U.S. Copyright Act, supra note 27, s. 102-103. 

81 The NFL White Paper, supra note 1 at 72, takes the position that broadcasting through 
copies of works on the Internet is a public display of at least a portion of the 
broadcast work.

82 SubCommittee Report, supra note 7 at 11. See also Pollock, supra note 3.

83 In the U.S. Copyright Act, supra note 27, the right of display is interwoven with 
the right to perform, a work publicly. If Canadian legislators were to extend the right of 
public exhibition of all types of works, the substance of a new proposal might closely parallel s. 101 of the American Act. Such a right could then be easily applied to the Internet to protect copyright owners. In fact, infringement of this 
right under the U.S. Copyright Act has served as the basis for liability in a number of 
cases. See e.g. Playboy Enterprises, Inc. v. Furio, 839 F. Supp. 1552 (M.D. Fla. 
1993).

84 See U.S. Copyright Act, supra note 27, s. 106(3).

85 Copyright Act, supra note 4, s. 27(2)(h).

86 In the context of the information High, a computer is a remix and does means and maner by which citizens can. C.P.R. (3d) 152 (N.S. C.A.).

87 See Pollock, supra note 4, at 84-85.

88 See Copyright Act, supra note 4, s. 3(1).

89 The transmission of broadcast-style signals from a computer is known as radio or TV signal or constitutes a distribution. See, e.g., Multimarine-Cf. last accessed: 18 March 2000.

90 Using software that is freely available on the Web, anyone can, for example,乳腺 broadcasts. Canadian Web sites that include iCrafeTV.com <http://www.

copy of a work, sound recording, fix or communication signal to the |r | they infringe copyright. Although defined in the Act, it seems that the | content provider is distributing copyright case law has affirmed this.

Originally, this provision was intended or distribute unauthorised - a content provider does not technics by making the work available, the make copies—an infringement of copyright seems fairly clear, and a Canadian provision to electronic media, no is necessary to protect the interest to cause less harm to clarity the Internet.

2. Webcasting

Webcasting is a district activity. multimedia to an end user. It is a
transmit live simultaneous audio and computer. Unlike radio, it is essentially surrounded the convergence of broadcast law on the Internet. Major media
The right to present an artistic right could be infringed on the plays would be a virtual "museum". In Act limits this right to artistic could play an important role on the could be given to owners of copyright that posting a work in a public

Canadian Copyright Act does not wherever, anyone distributes a

Canada before and After NAFTA* (1995) 11

distribution or photographs posted on the Internet and we therefore specifically included within

SW TV Ltd. (1971), 65 C.P.R. 215 at 241-42


where the right to display includes literary, fine and choreographic works, and pictorial. See Copyright Act, supra note 27, ss. 101-102.

It takes the position that broadcasting through public display of at least a portion of the public

1. See also Pollock, supra note 3. The right of display is interwoven with the

maintain legislators were to extend the right 46. The substance of a new provision might

An Act. Such a right could then be easily right owners. In fact, infringement of this

served as the basis for liability in a number


106(3).

| Copyright Act, supra note 4, s. 27(2)(b). Also, s. 42(1)(e) makes this a criminal offense. These provisions apply to those who deal with infringing copies of works, whether or not they have made the copies themselves. Before liability is imposed, there is a requirement that the distributor know or should have known that the work infringes copyright. Ibid., ss. 27(2), 42(5).

In the context of the Information Highway, one can distribute copies by accessing a computer from a remote site and downloading programs or by controlling the means and manner by which others can access copies. See R. v. M (J.P.) (1996), 67 C.P.R. (3d) 152 (N.S. C.A.).

See Vavere, supra note 9 at 84-86.

See Copyright Act, supra note 4, s. 3(1).

The transmission of broadcast-style signals through the Internet to be viewed or listened to from a computer is known as Webcasting. This can be retransmissions of radio or TV signals or the content of audiovisual content created solely for Internet distribution; see online: Multimediator <http://www.multimediator.com/immg/craven/> (last accessed: 18 March 2000).

Using software that is freely available on the Internet, such as RealPlayer or Window's Media Player, users can, for example, listen to live radio and watch concerts or new broadcasts. Canadian Web sites that have delivered or are delivering this technology include iCraveTV.com <http://www.icravetv.com/> and CBC Live Audio <http://www.cbc.ca/Audio.html>. Popular U.S. sites include Yahoo Broadcast <http://www.br.wildcard.com/> and NetRadio <http://www.netradio.com/>. and Real Networks <http://www.reallnetworks.com/>.
their apprehensions about the implications of emerging technologies have now manifested into their worst nightmare.91

For example, iCraveTV.com Inc. recently began showing television programs from 17 stations in Canada and the United States on its Web site.92 However, the company's activities were quickly curtailed after several powerful U.S. media giants93 were successful in obtaining an injunction from a Pennsylvania judge.94 It is interesting that, of the many Web sites that offer similar content, only iCraveTV.com has been subject to such strict scrutiny.95

Difficulty arises because this type of activity does not fit neatly into any of the existing rights granted to copyright owners in Canada. In fact, the confusion is a result of an unhappy mixture of copyright, broadcasting, and CRTC regulations. It seems that, under CRTC rules, companies may retransmit public TV signals on the Web if the signals are not changed.96 Act, a broadcaster is given copyright broadcasts. It would appear that IC of the broadcasters whose signals reading of this provision seems intercept and retransmit broadband infringe copyright.97 Furthermore and states that retransmission requires.98 In part, as a result of the Canadian Association of Broadcasters changes to the Copyright Act.99 revised to explicitly exclude online retransmitter.100

The growth of Webcasters (interest) is issues, particularly for IC was iCraveTV.com simply operating a licence?101 If so, what is the role of activities on the Internet?102 It should be treated any different? What about Webcast operators w.

91 Although the video feed from (CraveTV)com is not perfect broadcast quality, this company is certainly not an innocuous Internet upstart. Its founder and CEO, William Craig, has worked as an executive for a cable company ( Rogers Communications Inc.), broadcasters (including Fox), and as a broadcast policy analyst (for the CRTC). See M Stinson & S Craig, "CraveTV makes waves" The Globe & Mail (21 January 2000) B9.


94 Presumably, because it is impossible to stop the flow of such information across national borders, the Web site discontinued Webcasting entirely. The operators of iCraveTV.com have since agreed to permanently stop transmitting signals in exchange for the withdrawal of lawsuits against them. See M. Evans, "iCraveTV waves white flag in Web rebroadcasting battle" The Globe & Mail (29 February 2000) B1, B6. Although both interesting and important, jurisdictional matters are beyond the scope of this paper.

95 However, sites such as broadrant.com negotiate rights in advance to broadcast content; see Stinson & Craig, supra note 91. Conversely, iCraveTV.com did not negotiate payments with the people who own the rights to the programming that they were retransmitting: see MultiMediator, supra note 89.
if the signals are not changed. 96 Yet, under s. 2(1) of the Copyright Act, a broadcaster is given copyright in the communication signals it broadcasts. It would appear that iCraveTV.com infringed the copyrights of the broadcasters whose signals they intercepted. However, a close reading of this provision seems to indicate that companies that intercept and retransmit broadcast signals on the Internet may not infringe copyright. 97 Furthermore, s. 32 of the Act provides a defence and states that retransmission is not an infringement in certain situations. 98 In part, as a response to the activities of iCraveTV.com, the Canadian Association of Broadcasters is now actively seeking changes to the Copyright Act. Specifically, they wish to see s. 31 revised to explicitly exclude online media entities from the definition of retransmitter. 99

The growth of Webcasters on the Internet has raised many interesting issues, particularly for traditional broadcasters. For example, was iCraveTV.com simply operating as a broadcaster without a licence?100 If so, what is the role of regulatory bodies101 in relation to activities on the Internet?102 Is there any reason that Webcasters should be treated any differently than traditional broadcasters? What about Webcam operators who show live video feeds—are they...

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96 Multimediator. Ibid.
97 Section 21 of the Copyright Act, supra note 4, grants a copyright owner the right to do the following in relation to a communication signal: (a) fix it, (b) reproduce any fixation of it, (c) authorize another broadcaster to retransmit it to the public simultaneously, and (d) perform it in a place open to the public on payment of an entrance fee. Arguably, Webcasting does not reproduce a fixation of a broadcast signal. Theoretically, (d) could be stretched to encompass certain Internet transactions; however, this provision was not drafted with the Internet in mind and is subject to a variety of interpretations.
98 Ibid. Section 31(2) states that it is not an infringement of copyright to communicate to the public by means of a communication undertaking a retransmission of a local or distant signal, (b) the retransmission is lawful under the Broadcasting Act, (c) the signal is retransmitted simultaneously and in its entirety, and (d) the retransmitter has complied with the Copyright Act. Arguably, to industry insiders, this appears to be the defence of iCraveTV.com. See S. Cugis, “Canadians to join iCraveTV attack: Broadcasters to follow U.S. competitors’ assault within 10 days on web site that retransmits TV channels” The Globe & Mail (21 January 2000).
100 For a discussion on whether the Internet is “broadcasting” or within the scope of the CRT regulation, see Hayes, “Canada, Cultural Sovereignty and the Internet” (1996) 14 Cyber-Lawyer 13.
101 Such as the CRT in Canada and the FCC in the U.S.
102 This issue has been brought to the forefront of debate about copyright on the Internet by the Terra 22 Division, supra note 1. Of the most obvious questions is: if SOCAN is entitled to charge royalties for use on a new distribution media that has previously been outside its realm, should the CRT be responsible for regulating broadcasting on the Web?
broadcasters. The discussion here is meant only to introduce these issues, as they are too complex to fully explore in this paper. Nonetheless, they should be addressed in the near future, if not to establish new laws then at least to clarify existing ones.

Unfortunately, Ottawa has said for now, it will not pass new regulations for the Internet. When the government does decide to take action, it is questionable whether it is even in the domain of copyright law to remedy this situation. It would appear that existing laws might be partially suited to address content providers' liability for Webcasting under the right of telecommunication to the public. However, extensive clarification is necessary before this provision can be stretched to properly apply to the complex issue of Webcasting. In its present incarnation, the Copyright Act gives us little guidance and is ill suited to provide us with sufficient answers. Nevertheless, the fact that we cannot immediately resolve all of the problems surrounding Webcasting does not mean legislators should remain idle. Although a complete and permanent solution may not be readily available, we must not refrain from exploring interim alternatives. If the above recommendations for content provider liability are implemented, at least some certainty can be achieved.

C. ACCESS PROVIDERS

1. The Issue
Tracking and stopping infringing activity on the Internet is extremely difficult. As mentioned, end users often lack the resources necessary to make infringement suits worthwhile for copyright owners, and it is questionable whether users are actually the most appropriate subjects of copyright liability. Although many of those who post material without authorization ought to be held liable for infringement, they may also be too unscrupulous to justify legal action against them. In addition, the global nature of the Internet means that content providers, as well as users, are often outside of Canadian jurisdiction and are therefore difficult to prosecute. For these reasons, copyright owners are eager to pursue identifiable, "deep-pocket" defendants. Since, inevitably, service providers facilitate all communications on the Internet and represent an identifiable link between content providers and end users, they are ideal targets for liability. Furthermore, some would argue that OSPs are in the best position to bear the risk of liability as they can most easily pass costs on to their customers. Thus, it is unfair copyright liability on the Internet.

Copyright owners submit that those who provide copyright infringing material without authorization may provide access to infringing material. They have often provided the bare link to a site, and that is all. Consequently, the operators of the Internet as a whole are not directly responsible for the infringing content. However, those who simply provide access to infringing content without authorization are responsible for the infringing material. They are responsible for the infringing content. They are also responsible for infringing content. They are responsible for infringing content.

2. Common Carrier Exemption

Those who simply facilitate Internet use may be able to escape liability. The U.S. Supreme Court in Gado Broadcasting Co. v. Lampf, Inc. indicated that legitimate use, their matters of infringement simply because of the fact that the operators of the Internet may possess the ability to provide users with access to infringing content. However, the operators of the Internet may not be considered "authors" under the Copyright Act, supra note 109. It is therefore not possible for the operators of the Internet to be held liable for copyright infringement.

* Footnotes *

103 Multimedia, supra note 89.
104 Mr. Personal, supra note 91. Also, as Papoff reported, supra note 47, the director of the public policy directorate of the federal Department of Industry, Daniel Boulet, has said that there is no date for the department's next legislative initiative in the copyright area.
105 See discussion in Part III.B.1.a. above.
106 Direct infringement is where the act of infringement is performed by the operator of a communications network as a result of the operator of a communications network as a result of the operator's acts.
107 Contributory and secondary liability refers to the situation where the operator of a communications network is not a direct infringer of copyright but engages in acts that contribute to copyright infringement.
108 Marco Landolf, lawyer and an article by a Canadian law firm, supra note 107.
109 Most telephone companies have a similar policy that limits their liability to the extent of the services provided.
110 This is the typical format for a bill of such companies include Annex 111 106 U.S. 417 (1984).
112 See also CRS Reps. (id. \-642 (H.L.).
customers. Thus, it is unsurprising that much of the debate over copyright liability on the Internet is focused in this area.

Copyright owners submit that, in addition to Web site creators who post copyrighted material, access providers should be liable for copyright infringement. Whereas those who personally post content without authorization may directly infringe copyright, online service providers (OSPs) who provide access to copyrighted works are potentially liable for contributory infringement. However, among those who simply provide access to content on the Internet, there are varying degrees of control over that content. Often, as Margo Langford explains, "[there is no commonality] among OSPs. "Some only provide the bare link aspect; others provide content creation; some have e-mail; some don't offer newsgroups." Many providers only establish a connection to the Internet and have no association whatsoever with its content. Others operate their own networks, allowing members to browse and share information amongst each other. Often, the operators of such services will also provide access to the Internet. As will be discussed below, these distinctions may be crucial in assessing liability.

2. Common Carrier Exceptions

Those who simply facilitate the transmission of works over the Internet may be able to escape liability for copyright infringement. The U.S. Supreme Court decision in Sony Corp. v. Universal City Studios, Inc. indicated that, because video cassette recorders have legitimate uses, their manufacturer was not liable for contributory infringement simply because people might use them to infringe copyright. By analogy, this reasoning may be applied to OSPs who do nothing but provide a connection to Internet content, much of which could be non-infringing material.

106 Direct infringement is where the defendant has copied the whole or a substantial part of the work, or done any other act that only the copyright owner is given the right to do.

107 Contributory or secondary infringement occurs where the defendant has authorized another person to infringe an owner's copyright in a work. If a service provider does not actually do any of the things listed as exclusive rights of the copyright owner (see Copyright Act, supra note 6, § 3(1)), they may still be liable for contributory infringement.

108 Margo Langford, lawyer and staff of the Canadian Association of Internet Providers (CAIP), quoted in Papert, supra note 47.

109 Most telephone companies that provide "dial-up" service fit this description.

110 This is the typical format for a Bulletin Board Service (BBS). Other illustrations of such companies include America On-Line (AOL) and CompuServe.


Furthermore, the Subcommittee suggests that s. 2.4(1)(b) of the Copyright Act explicitly exempts common carriers from copyright liability where their only act is to provide the means of telecommunication necessary for another person to communicate the work. The Copyright Board commented extensively on this provision in the Tariff 22 Decision. They held that providing means includes providing “all software connection equipment, connectivity services, hosting and other facilities and services without which such communication of the work would not occur”. Ultimately, each transmission must be looked at individually to determine whether it is a conduit for communications by other persons, or whether it is acting as something more. Generally speaking, however, it is safe to conclude that with respect to most transmissions, only the person who posts a...work communicates it. However, both the Subcommittee and the Copyright Board overlooked an important detail of this provision. In fact, it declares only that a common carrier does not communicate a work to the public. Thus, the section merely exempts such an entity from liability for direct infringement of the right to communicate a work to the public. It does not insulate them from responsibility for contributory infringement of any other rights. For example, s. 2.4(1)(b) does not address the rights of reproduction, publication, public performance, or exhibition in public. The exception is further limited by the fact that it will not apply where an OSP acts in any capacity other than as a mere connector.

3. Direct Liability of OSPs

There are situations where a service provider may directly infringe copyright. An OSP will often establish a "mirror" site on its own server that reproduces the original site. Similarly, a provider must make sure that users and minimize network load. They held that providing means includes providing “all software connection equipment, connectivity services, hosting and other facilities and services without which such communication of the work would not occur”. Ultimately, each transmission must be looked at individually to determine whether it is a conduit for communications by other persons, or whether it is acting as something more. Generally speaking, however, it is safe to conclude that with respect to most transmissions, only the person who posts a...work communicates it. However, both the Subcommittee and the Copyright Board overlooked an important detail of this provision. In fact, it declares only that a common carrier does not communicate a work to the public. Thus, the section merely exempts such an entity from liability for direct infringement of the right to communicate a work to the public. It does not insulate them from responsibility for contributory infringement of any other rights. For example, s. 2.4(1)(b) does not address the rights of reproduction, publication, public performance, or exhibition in public. The exception is further limited by the fact that it will not apply where an OSP acts in any capacity other than as a mere connector.
server\textsuperscript{118} that reproduces the contents of a Web site to "mirror" the original site.\textsuperscript{119} Similarly, an OSP will frequently "cache" heavily accessed pages to shorten the access time that is experienced by their users and minimize network logjams.\textsuperscript{120} In these situations, the service provider ceases to be a mere conduit and may be liable for direct infringement of copyright.

Arguably, it is in the interests of all stakeholders, including copyright owners, to promote the efficiency of Internet transactions by encouraging practices that speed access times. Therefore, it may be appropriate that OSPs be exempted from liability for caching. Furthermore, perhaps because the infringements are of a merely technical nature, OSPs should not be held liable. In this respect, the Copyright Board stated:

\begin{quote}
\textit{An Internet intermediary is not precluded from relying on paragraph 2.4(1)(b) [of the Copyright Act] simply because it provides services that are ancillary to providing the means of communication or because it performs certain steps or procedures [such as caching] to improve performance.}\textsuperscript{121}
\end{quote}

Similarly, U.S. courts have held that temporary copies made as part of the implementation of a discussion group system were incidental and did not directly infringe copyright.\textsuperscript{122} However, we must be aware that there are arguments that suggest OSPs should be held liable no matter how technical in nature the infringement is.\textsuperscript{123}

Note that an OSP will still be liable where it "creates a cache for reasons other [than] improving system performance, modifies the contents of the cached material or interferes with any means of obtaining information as to the number of 'hits' or 'accesses' to the cached material."\textsuperscript{124} Thus, service providers cannot escape liability if service provider may directly infringe by establishing a "mirror" site on its own... Find on a remote server... 123 OSPs do receive a direct benefit from such activity. Most obviously, if OSPs can provide faster and more efficient access, they can more easily attract and retain customers and charge higher rates to those customers. There are also significant policy issues associated with any potential exceptions. For example, are there safeguards that would ensure that cached copies would not be publicly available? See Hayes, supra note 30 at n. 93. Furthermore, if end users are to be held liable for technical copyright infringements committed by browsing, as discussed in Part III.A., why should OSPs not be subject to the same strict scrutiny? In this respect, perhaps it is necessary to re-evaluate fair dealing provisions in the context of OSPs as well.

\textsuperscript{118} Such a server is known as a "proxy server".

\textsuperscript{119} A host computer closer to end users facilitates quicker access for customers.

\textsuperscript{120} See Hayes, supra note 30. "Caching" involves reproducing elements of a web page found on a remote server and storing these elements on an immediate server - audit.

\textsuperscript{121} Tariff 22 Decision, supra note 1 at 452.

\textsuperscript{122} See NetCam, supra note 38 at 1372-73.

\textsuperscript{123} OSPs do receive a direct benefit from such activity. Most obviously, if OSPs can provide faster and more efficient access, they can more easily attract and retain customers and charge higher rates to those customers. There are also significant policy issues associated with any potential exceptions. For example, are there safeguards that would ensure that cached copies would not be publicly available? See Hayes, supra note 30 at n. 93. Furthermore, if end users are to be held liable for technical copyright infringements committed by browsing, as discussed in Part III.A., why should OSPs not be subject to the same strict scrutiny? In this respect, perhaps it is necessary to re-evaluate fair dealing provisions in the context of OSPs as well.

\textsuperscript{124} Tariff 22 Decision, supra note 1 at 453.
they post their own content, associate with others to offer content, or moderate a newsgroup.125

4. The Duty of OSPs
Service providers could be held absolutely liable for all copyright infringements committed by themselves and their customers. Alternatively, copyright laws could allow OSPs to completely escape responsibility under the common carrier exemption. The IHAC recommended a compromise between these two positions. They suggested that service providers126 be able to escape liability if: 1) they did not have actual or constructive knowledge that the material infringed copyright, and 2) they acted reasonably to limit potential abuses.127 In the Tariff 22 Decision, the Copyright Board expressly concluded that a service provider will be held liable for authorizing a communication to the public by telecommunication, thereby infringing copyright, only if it sanctions more than the mere use of its facilities.128 The extent to which an OSP sanctions more than mere use "will require an analysis of whether, in the particular circumstances, one party is granting or purporting to grant to another party the right to communicate the work."129 Importantly, an OSP is entitled to presume that its facilities will be lawfully used.130

A close examination of both the IHAC's recommendation and the Copyright Board's decision reveals that their scope could, in fact, be quite limited. With respect to the IHAC's recommendations, it is still unclear what steps are considered reasonable. Are OSPs protected if they give notice of potential copyright violations on the Internet?131 Alternatively, is there a positive duty to police the Internet to locate and remove or block infringing material?132 In addition, the cumulative

125 Ibid.
126 Actually, the recommendations expressly mentions only bulletin board owners and operators. Nevertheless, the intention of the report appears to be to establish a similar exemption for all ISPs and service providers.
127 IHAC Report: Connection Community Content, supra note 23 at 120.
128 Tariff 22 Decision, supra note 1 at 458.
129 Ibid.
130 Ibid.
131 Ibid.
132 If we, in our efforts to combat copyright infringement, in fact OSPs escape liability by performing the meaningless task of giving a warning? Perhaps, if notice is given, an OSP could argue that they do not purport to grant another party the right to communicate the work, as is sufficient according to the Tariff 22 Decision, supra note 1. Nevertheless, they might still be subject to liability for infringement of other rights.
133 In that case, given the vastness of the Internet, is such a requirement feasible? Do OSPs have the authority to block content, especially given the international dimensions of the information Superhighway? Could service providers be barred from interfering with Internet content as a matter of law, since to hold otherwise would chill free speech? See generally Netcom, supra note 38, for a discussion of rather than alternative rather use of the word "and," further Although the intention of OSPs and establish a potent recommendations will likely be more closely followed.
134 Like s. 2,4(1)(b) of the C only to authorization in the by telecommunication. It infringement of a wide "wars" Copyright Board did not that presume its facilities will be claim that they have no interest in which their subscribers or service provider realize that Internet probably infringes. Board was also not clear or would have an OSP liability substantial to overlook. Altho it is prudent to look closely.

5. Service Provider Liability
Several jurisdictions, including implemented legislation to a dilemmas surrounding OSP differences between Canada policy, it is nonetheless and neighbors to the south. The survey of U.S. policy reports, liability and considers their t In 1995, the Clinton, Intellectual Property release Paper.137 This paper recognizes free speech in the context of the First Amendment and Copyright Card, Arts & Entertainment L.J. 133 IHAC Report: Connection Community Content 134 See Part IV. C. Above 135 Supra note 1 at 458. Instead of 136 Court in de Vries v. Relate 137 Presumably, if an OSP did not be difficult to assert that OSP communicate the Internet any infringement.

137 Supra note 1.
rather than alternative nature of the requirements, indicated by the use of the word "and", further limits the availability of this exemption. Although the intention of the IHRAC was to limit the liability of OSPs and establish a potential defence to infringement, they recommend their recommendations will likely not achieve that goal, unless "reasonable steps" are more clearly defined.

Like § 2.4.3(b) of the Copyright Act, the Tariff 22 Decision refers only to authorization in the context of communication to the public by telecommunications. It fails to address potential liability for infringement of a wide variety of other rights. Furthermore, the Copyright Board did not elaborate on its statement that an OSP can presume its facilities will be used lawfully. Can OSPs legitimately claim that they have no constructive knowledge of infringing activities in which their subscribers or content providers engage? Should not a service provider realize that at least some of the content on the Internet probably infringes somebody's copyright? The Copyright Board was also not clear on the effect that notice of infringement would have on OSP liability. In sum, these inadequacies are too substantial to overlook. Although we have been given some guidance, it is prudent to look elsewhere for additional or alternative solutions.

5. Service Provider Liability in the United States

Several jurisdictions, including the United States, have proposed or implemented legislation to attempt to clarify the law and resolve the dilemmas surrounding OSP liability. Although there are significant differences between Canada and the U.S. in both copyright law and policy, it is nonetheless judicious to examine the approach of our neighbours to the south. The following discussion contains a selective survey of U.S. policy reports, case law, and legislation regarding OSP liability and considers its application in a Canadian context.

In 1995, the Clinton Administration's Working Group on Intellectual Property released its report, known as the NII White Paper. This paper recognized that it was appropriate to hold service


I HRAC Report: Connection Community Content, supra note 23 at 126.

See Part III C.2, above.


Presumably, if an OSP did not respond to notice of infringing activities, it would be difficult to assert that they did not thereby purport to grant authority to communicate the material to the public, making the OSP liable for contributory infringement.

Supra note 1.
 providers liable for copyright infringement and supported maintaining existing liability standards. Their overall conclusions were justified by noting that current liability standards protect the interests of copyright owners. Since they are for-profit businesses, OSFs should be accountable to some extent, and to hold otherwise would be unfair to other types of distributors. Furthermore, according to the Working Group, limiting liability would discourage the development of alternative anti-infringing technological devices and practices such as insurance, indemnification, and collective licensing agreements. The Working Group did make it clear that an OSF should be able to reduce or escape liability if they investigate and act when informed of potential infringements. Generally, the Working Group’s report introduces many important policy issues and recognizes the importance of balancing the interests of various stakeholders. It would be imprudent of Canadian legislators to completely ignore their recommendations.

A number of U.S. cases that have considered copyright liability on the Net may provide further guidance in this area. In Playboy Enterprises, Inc. v. Frena, the Court held that Frena, a bulletin board service (BBS) operator, was liable for copyright infringement. In this case, BBS members uploaded and downloaded copyrighted photographs and hence, as the Court found, were reproducing the work. Unfortunately, no actual copies—a direct infringer address the difficult issue although Frena claimed to be notified of its presence. In Sega Enterprises Ltd. v. Toinininen the court found that Sega’s video game company guilty of contributory infringement. Time games were uploaded knowingly allowed its site substantially participated in. Religious Technology Corporation Services Inc. could have been in area. In a trial won to a, the Federal Court decided that Netcom might be liable for its service provider is not exposed to legitimate notice of the subscriber’s access. The lawsuit. Notably, they weak recommendation by the IHRM knowledge of and action. Fortunately, the case was settled before the Court could answer the availability. A

138 Ibid. at 117, 122.
139 Ibid. at 122. An infringer can either put to work an unauthorized use or authorize another to do so. That is, they may be directly, contributory, or vicariously liable for infringement, depending on the extent of their involvement in the infringement. See Sony, supra note 111.
140 NII White Paper, supra note 1 at 114. The Working Group asserts that providers are the most appropriate party to hold liable because they have a contractual relationship with their subscribers. Finding OSFs liable for infringement is a clear policy decision, and allowing OSFs to escape liability would set a dangerous precedent (Ibid. at 122) by weakening the underlying principles of copyright law (Ibid. in VVS).
141 Ibid. at 117.
142 Ibid. at 122. Potential liability for copyright infringement is an operating cost that other types of distribution businesses have been forced to incur. Arguments for treating OSFs differently than traditional distributors are not compelling. Ibid. at 116.
143 Ibid. at 123. Note, however, that the IHRM did not express similar concerns and felt that it was possible to limit OSP liability with proper licensing, collectives, and public education. See IHRM Report: Connection Community Content, supra note 23 at 119-20.
144 NII White Paper, supra note 1 at 116-17.
145 NII White Paper, supra note 1. This report is beyond the scope of this paper. My intention here is to provide an overview and alert readers to the existence and tone of the NII White Paper.
146 Much of the case law in this area deals with BBS operators. Since the role of an OSF is often similar to that of a BBS operator, these cases form the basis for determining OSP liability.
right infringement and supported by standards. Their overall conclusions support the current liability standards protect the s.440 since they are for-profit businesses, to some extent, and to hold otherwise types of distributors. Furthermore, they argue limited liability would discourage anti-infringing technological devices software, indemnification, and collective working. Group did make it clear that avoid or escape liability if they investigate potential infringements. Generally, the reduces many important policy issues of balancing the interests of various important of Canadian legislator to understand.

At have considered copyright liability on their guidance in this. In Playboy, Court held that Frena, a bulletin board liable for copyright infringement. In Playboy and downloaded copyrighted the Court found, were reproducing the

Set forth a work to an unauthorized use or authorize it by directly, contributory, or vicariously liable on the extent of their involvement in the on 111.

114. The Working Group asserts that providers to hold liable because they have a contractual floor that are liable for infringement in a clear way to escape liability would set a dangerous using the wrongdoing principles of copyright law.

Copyright infringement is an operating cost that states have been forced to source. Arguments for additional distributors are not compelling: Ibid. at

Ibid. The IHAC did not express similar concerns and

IP liability as punitive licensing collectors and

Connect Community Content, supra note 23 at 16-17.

east. the entire report is beyond the scope of this to provide an overview and alert readers in the

Paper. A table with BBS operators. Since the role of an

BBS operator, these cases form the basis for

work. Unfortunately, because at least one of the parties made actual copies—a direct infringement—the Court did not have to address the difficult issue of contributory infringement. Notably, although Frena claimed he removed the infringing material once notified of its presence, he was not absolved of liability. In Sega Enterprises Ltd. v. Maphia, the Court granted a preliminary injunction preventing a BBS operator from posting programs extracted from Sega video game cartridges. The Court found the defendant guilty of contributory infringement because there was a copy each time the games were uploaded or downloaded. The defendant knowingly allowed its site to be used for infringing activities and substantially participated in the direct infringer's conduct.

Religious Technology Center v. Netcom On-Line Communications Services Inc. could have been one of the most significant cases in this area. In a ruling seen as a partial victory for service providers, the U.S. Federal Court decided that Netcom could not be held liable for direct or vicarious infringement. However, because of the failure to remove infringing material once notified, the Court held that Netcom might be liable for contributory infringement. Although a service provider is not expected to act on a mere allegation, at some point, legitimate notice does obligate a service provider to cut off the subscriber's access. Therefore, the Court refused to dismiss the lawsuit. Notably, they would have applied a standard similar to that recommended by the IHAC, determining liability based on the knowledge of and actions toward the infringing material.

Unfortunately, the case was settled before trial and the terms of the settlement were not made public. Similarly, The Frank Music Corp. v. CompuServe Inc. was settled before the Court could answer important questions. CompuServe was sued over the availability of infringing musical instrument digital
interface (MIID)\textsuperscript{156} files in one of its forums. Because the service provides neither owned nor operated the music forum,\textsuperscript{157} and the operator warranted to them that the material did not infringe copyright, CompuServe claimed they were not liable. However, the Court did not evaluate this claim as the defendant agreed to pay $568,000 to the copyright owners in exchange for licences for the future use of copyrighted material.\textsuperscript{158} This settlement is expected to serve as a basis for the collective licensing of music on the Internet,\textsuperscript{159} although the overall role of collectives remains unclear.\textsuperscript{160}

\textsuperscript{156} As Bunnell explains, supra note 10 at 420, this interface allows patch, rhythm, and other musical information to be recorded into a computer's memory. It is then stored permanently on the magnetic media used in computers so it may be recalled and played back at a later time.

\textsuperscript{157} In fact, it was operated as one of thousands of such forums carried by the service provider: Frank Music, supra note 155.

\textsuperscript{158} Columbia Sires Copyrights Infringement Lawsuit Filed by Frank Music based on subscribers' uploading and downloading of "Unchained Melody" and other songs" (December 1991): Entertainment Law Report online: LEXIS (News, ENTERTAINMENT LAW REPORTER).

\textsuperscript{159} Bunnell, supra note 10 at 466. Licensing collectives can be a valuable and productive tool to track infringement and enforce copyright. ASCAP and BMI, the U.S. equivalents of SOCAP, have recently chosen to grant licences to Web sites that post copyrighted content. In Canada, Cape believes that Web sites and users are the most appropriate targets of SOCAP's tariffs. See C. Krombholz, "Cyber music produces watershed copyright ruling" Law Times (30 July 1998) 18. However, they ignore the fact that often, users and content providers are not easily identifiable, lack the financial means necessary to make a lawsuit worthwhile, and operate from other countries. Thus, arguably, content providers are not the ideal subjects of tariffs.

\textsuperscript{160} Collectives work well to connect a large number of creators and a small number of users. For instance, it is convenient for a large number of musical artists to negotiate with a relatively small number of radio stations through a collective. Similarly, the opposite is also true. That is, a collective may be the most appropriate way for a small number of literary publishers, for example, to deal with a large number of users. However, on the Internet, collectives could, in fact, be barriers to communication. In this context, we are dealing with indefinite number of both users and creators. Thus, collectives may end up being like a kiosk in a garden hose, stifling the free flow of information between parties. Of course, perhaps collectives can serve a useful role for copyright owners by tracking use of and protecting their copyrights. At the same time though, collectives may inhibit many small-scale operations on the Internet by refusing to negotiate independent agreements. Arguably, collectives better serve larger entities and harm smaller ones. This note is merely to alert the reader to the complex and intertwined issues surrounding the role of collectives on the Internet. For a more detailed discussion of the role of licensing collectives in the context of copyright on the Internet, see K. Hill, "CS— A Collective Solution for Copyright Management in the Digital Age" (1997-98) 76 Copyright World 18; M.B. Rutten, "The ASCAP Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement" (1998) 36 Boston College L. Rev. 1061; A. Kaba, "Proposal for a Worldwide Internet Collecting Society—Mark Twice and Samboth Johnston Licenses" (1998) 45:5 J. Copyright Soc. USA 329.

Since there has been [issue], these cases are now President signed the Digital October 28, 1998. Section 20 Copyright Act and established Title 163 based on the part.

To quality for limited, if other things: (1) not know or notifying material on its own infringing and financial losses. As a result, no financial as to prevent infringement. Web site as available to receive. And, where an OSF acts from monetary damages in storage of infringing materials stored on their system at the time, the loss is excused from liability if the user lose no direct benefit from it on notification.\textsuperscript{171} In ad

\textsuperscript{161} However, the case law analyzed unresolved pp. See Halpern, supra note 154.

\textsuperscript{162} Digital Millennium Copyright (1998), 2977-2986 (October 31).

\textsuperscript{163} Section 512 addresses the liability to faculty and students [temporarily copies of infringing material for the purposes of providing connections (off-line) to infringing material for greater search engines, that provide material (s) 312(b). This material ceased to prevail on OSF systems (s) 312R.

\textsuperscript{164} See generally Halpern, supra 162 the Digital Millennium Copyright Act (1998) 36.

\textsuperscript{165} U.S. Copyright Act, supra note 169.

\textsuperscript{166} Ibid., s. 312(c)(3)(B).

\textsuperscript{167} Ibid., s. 312(c)(3)(A).

\textsuperscript{168} Ibid., s. 312(c)(3).

\textsuperscript{169} Ibid., supra note 167.

\textsuperscript{170} Halpern, supra note 11 at 300.

\textsuperscript{171} Ibid. at 394-95.
Since there has been legislation implemented to address this issue, these cases are now of less importance. In fact, the U.S. President signed the Digital Millennium Copyright Act (DMCA) on October 28, 1998. Section 203 of the DMCA added s. 512 to the U.S. Copyright Act and established provisions that limit liability for certain entities based on the particular infringing conduct. To qualify for limited liability, a service provider must, among other things: (1) not know or have reason to know of the presence of infringing material on its system, (2) act "expeditiously" to remove infringing materials or block access to them, (3) not benefit financially from the presence of infringing material, (4) adopt, implement, and notify subscribers of its policy to terminate accounts for repeated infringement, and (5) designate an area of its Web site at which copyright owners may notify it of infringing activities. In effect, while an OSP acts only as a passive conduit, it is "excused from monetary damages due to the 'intermediary and transitory' storage of infringing material." If OSPs have infringing material stored on their system at the request of an Internet user, they will be excused from liability if they have no knowledge of infringement, gain no direct benefit from the presence of the material, and remove it on notification. In addition, where educational or nonprofit

161 However, the case law assists in interpreting legislation and helps to fill the unaddressed gaps. See Halpern, supra note 11 at 365-66.


163 Section 512 addresses the liability of: (1) universals that provide Internet service to faculty and students (supra note 27, s. 512(c)), (2) OSPs whose systems make temporary copies of infringing materials in the course of transmitting, hosting, or providing content (supra, s. 512(a)), (3) OSPs that merely copy and store infringing material for greater efficiency (ibid., s. 512(b)), and (4) services, such as search engines, that merely reindex users to Web sites containing infringing material (ibid., s. 512(d)). Most importantly, this section clarifies OSP liability for infringing conduct caused by third parties whose materials were issued or offered on an OSP system (ibid., s. 512(c)).


165 U.L. Copyright Act, supra note 27, s. 512(a)(1)(B).

166 Id., s. 512(c)(1)(A)(ii).

167 Id., s. 512(c)(1)(B).

168 Id., s. 512(c)(1)(A).

169 Halpern, supra note 11 at 390 [footnotes omitted].

170 Ibid. at 394-96.
entities provide Internet access, students and faculty are treated as separate from the provider.\textsuperscript{172}

This legislation tackles many of the issues surrounding OSP liability for copyright infringement. In fact, provisions in the DMCA directly address many of the RIAA's concerns and subsequent recommendations for action in Canada.\textsuperscript{173} In particular, it answers the RIAA's call for a limited defence for innocent service providers with much more certainty than does the \textit{Tariff 22 Decision}.\textsuperscript{174} Furthermore, it promotes the RIAA's goals of public education regarding copyright on the Internet by requiring OSPs to post notice of their policies.\textsuperscript{175} Importantly, it expressly allows copyright owners to have recourse against identifiable defendants by reaffirming that OSPs may be liable for infringement.

Courts in the United States have already begun to use the DMCA to address some of the copyright concerns on the Internet. For instance, it seems that the DMCA is capable of bridging the gap between content providers and service providers and extrapolating the boundaries of actionable conduct in cyberspace. Napster Inc., a controversial song-swapping service that allows users to connect to a hub of central computer servers and share millions of sound recordings free of charge, recently tried to take advantage of the "safe harbour" provisions of the DMCA. However, a California Court ruled against the internet company in a suit brought against them by the Reeceding Industry of America (RIA).\textsuperscript{176} In a similar case, MP3.com Inc, a revolutionary business that has created havoc in the music industry by offering free songs online, was found guilty of violating record company copyrights by a U.S. federal judge.\textsuperscript{177} Although not entirely based on the DMCA, this case provides another illustration of the U.S. approach to online copyright infringement. Only time will tell whether or not these cases reflect a trend toward favoring the rights of copyright owners on the Internet. Certainly, like the DMCA, they are a reflection of the belief that the Internet is not a lawless domain where chaos reigns.

Unfortunately the DMCA questions raised by the Inter- not only, it does not define it in the online environment, implemented in Canada, the The debate over OSP liability is very likely should bear the responsibility liable used to be sufficient. In a context where traditional may argue that seeking to because of their relatively pa liability, it is possible that o many rights. Yet, we cannot offer effective recourse for or boundless nature of the are needed not only to resolve policy of protecting copyright free distribution of information. Although further clarifications are required to do to avoid it ought to give effect to the guidelines concerning OSP's rights of creators and Internet complete strategic policy it necessitates much investigation academicians, businesses, the art groups. Nevertheless, that I substantial consideration immediate and concrete not. Immediate legislative act the progress of knowledge of copyright owners, those who need clear, fair, and predict we ought to look to legislate, for criticism of the DMCA, and of the Digital Millennium Copyright Act: Reaching Out of Reach: A Solution in Search of a Problem. In fact, many commentators, such as Ken Thompson, express Canada.
domain where chaos reigns and rules do not apply—an example Canadian lawmakers would be wise to follow.

Unfortunately the DMCA does not answer all of the copyright questions raised by the Internet; in fact, it is far from perfect. Most notably, it does not define what is actionable copyright infringement in the online environment. Thus, even if similar legislation is implemented in Canada, that alone will not be sufficient.

The debate over OSP liability raises interesting theoretical and policy considerations. Traditional copyright law would suggest that liability ought to be focused on content providers. Since they are the parties who most likely directly infringe copyright, arguably, they should bear the responsibility. In fact, holding the direct infringer liable used to be sufficient. However, the Internet has provided a new context where traditional principles no longer neatly apply. Some may argue that seeking to impose liability on OSPs is unjustified because of their relatively passive role. Granted, with widespread OSP liability, it is possible that copyright owners would be afforded too many rights. Yet, we cannot ignore that the new paradigm does not offer effective recourse for copyright owners because of the anonymity and borderless nature of the Internet. Therefore, changes to the Act are needed not only to resolve ambiguities, but also to reconsider the policy of protecting copyright owners at the expense of inhibiting the free distribution of information.

Although further clarification of exactly what service providers are required to do to avoid liability is necessary, Canadian legislation ought to give effect to the intentions of the IHAC and create concrete guidelines concerning OSP liability, thereby mindfully balancing the rights of creators and Internet users. Of course, formulating a complete strategic policy regarding service provider liability will necessitate much investigation, analysis, and debate among lawmakers, academics, businesses, the general public, and a host of other interest groups. Nevertheless, that there are many issues that will require substantial consideration should not prevent us from exploring immediate and concrete measures in the interim.

Immediate legislative action is recommended since, to promote the progress of knowledge on the Internet and to adequately protect copyright owners, those who operate on the Information Highway need clear, fair, and predictable guidelines. Therefore, I submit that we ought to look to legislation like the DMCA and adopt similar...
provisions into the Canadian Copyright Act. For example, by requiring service providers to create a forum where owners can report unauthorized use of their works,181 reasonably effective, albeit incremental, progress can be made toward at least recognizing and perhaps protecting copyrights on the Internet.

IV. CONCLUSION
The Internet presents both opportunities and challenges to the copyright industry and its users. The public now has virtually unlimited access to an abundance of works of every type, never before available. Creators and owners of intellectual property can use the Internet to reach audiences that were previously inaccessible. However, its boundless nature can also be a trap for the unwary, as pirates will copy and disseminate copyrighted works effortlessly and instantaneously. Thus, it is imperative that intellectual property owners be granted the same protections in cyberspace that copyright legislation was intended to provide in the physical world.

Some would suggest that the evolution of the Internet will bring about the demise of copyright law; that legislative revision can never resolve the copyright problems on the Information Highway; and that making amendments to the Copyright Act is like rearranging the deck chairs on a sinking ship.182 Given the international, anonymous, and diffuse dimensions of the Internet, it is true that tracking and enforcing copyrights are an owner's largest concern. Although Canada's role in global copyright issues on the Internet may not be instrumental, we can set an international example for others to follow. With a quick and effective response, Canada can become a leader in the Internet industry. Ultimately, before this can be achieved, re-evaluation of copyright laws is necessary to adjust them to a new mode of communication and extrapolate the parameters of Internet transactions. Copyright owners and Internet users alike must be afforded a degree of certainty to operate effectively on the Information Superhighway. To that end, I have attempted to illustrate the ways in which Canada's Copyright Act applies to recent developments on the Internet.

This examination has discovered that the Copyright Act is ill suited to address many complex issues. Furthermore, judicial interpretation has not adequately supplemented this legislation. There are very few Canadian cases that deal with copyright on the Internet and what few exist are not comprehensive enough. Although some of the Act's provisions can be manipulated to incorporate the Internet, such manoeuvring is imprudent and inadvisable. For the sake of clarity, the Copyright Act must be adapted specific enough to accommodate so rigid as to necessitate frequent maintaining the appropriate adaptability will be an arduous task.

Certainly, adjusting the law to future technological realities will of the entire copyright regime, developing at such an incredible pace and change copyright law. This point has been made evident in this paper. Although information about the most recent reached the stage where I am co

183 Unfortunately, I am deferring pin the publisher, despite the need to the much anticipated courtroom s on July 26, 2000, just as this paper went to press, the RIAA was granted a preliminary injunction against Napster, a popular peer-to-peer file-sharing service, preventing it from continuing its activities. It is premature to conclude that this is a victory for the music industry, but it is a significant step forward in the fight against copyright infringement on the Internet.

184 See U.S. Copyright Act, supra note 27, s. 512(c)(2).
185 Barlow, supra note 8.
the Copyright Act must be amended to include provisions that are specific enough to accommodate technological innovations, yet not so rigid as to necessitate frequent revision. Admittedly, achieving and maintaining the appropriate balance between predictability and adaptability will be an arduous task.

Certainly, adjusting the law to perfectly conform to existing and future technological realities will require a massive review and revision of the entire copyright regime. Because the Information Highway is developing at such an incredible pace, new issues will continue to emerge and challenge copyright laws, no matter how flexible they become. This point has become increasingly evident to me while composing this paper. Although I am constantly learning of additional information about the most recent developments in this area, I have reached the stage where I am compelled to coalesce my discoveries.

Unfortunately, I am deferring pressure to submit a final version of this paper to the publisher, despite the need to address significant developments. For example, the quick anticipated courtroom showdown between Napster and the RIAA began on July 26, 2000, just as this paper was being sent to the printer. In a quick and clear decision, the RIAA was granted an injunction, effectively ordering Napster to stop the infringing activities or shut down its Web site. Unfortunately, written reasons are not expected to be available for several weeks. However, the Court emphatically rejected all of Napster's defenses and delivered harsh words to lawyers and executives at the unregarded Internet company who were rebuked for "creating a monster." Notably, the 9th U.S. Circuit Court of Appeals stayed the order until the expedited appeal can be heard early this fall. Although the Napster decision was only with respect to an injunction, it sends a strong message that whereas many believe that copyright law cannot continue to withstand unremitting technological assaults, courts are poised to enforce traditional rules. In fact, it is likely that the watershed statements from the U.S. District Court will influence the behaviour of Internet operators in all sectors of the economy, including many ISPs, who have been eagerly awaiting legal guidelines.

It is tempting to conclude that if a court is already in the process of considering these issues, there is no need for further review by the Legislature. However, on careful analysis, it becomes clear this is not the case. Rather, it emphasizes the urgency with which this matter ought to be approached. The fact that this uncertain area of law is being litigated right now in the U.S. should serve to alert us to the challenges that the Canadian copyright regime faces, not in the future, but at the present moment. When the same comes for Canadian courts to answer similar questions, and that time is surely fast approaching, it is imperative that there be consciously formulated guidelines to direct them. Those guidelines must be created by the Canadian Legislature, not U.S. courts.

The ongoing legal saga that has surrounded Napster and similar services will continue to unfold in the near future. The fact that, undoubtedly, there will have been new developments by the time you are reading this note epitomizes the dynamic nature of these issues. Although I will be following the legal battles with considerable interest, respectfully, I cannot describe and comment on them fully in this paper. I will be forced to save my thoughts for another time. My only hope is that my conclusions here today will not be rendered obsolete before they can be properly considered.
Undoubtedly, the Legislature faces a similar challenge. Nevertheless, lawmakers cannot remain idle while technology advances. The evolutionary changes that have been discussed throughout this paper can provide immediate and effective guidelines for Internet transactions while policy makers pursue their alternatives. In sum, that there will always be questions that remain unanswered cannot deter us from at least attempting to resolve existing concerns.