

Vulnerability of
Internet Service Providers
Under Canadian Copyright Law

MARK A. HOPKINSON

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The views expressed in this paper are those of the author and do not necessarily reflect industry policy, government policy, or the views of the University of Ottawa, the University of Victoria or any other entity.

Mark A. Hopkinson is a second year law student at the University of Victoria, and a visiting special student at the University of Ottawa for the fall 1999 term.

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Abstract

This paper examines the implications of a recent Copyright Board decision for the liability of Internet Service Providers (ISPs) under Canadian copyright law. There are a number of different rights that exist within copyright, and each right is separate and distinct. In the context of musical works, the Board's October 1999 decision concluded that ISPs, in their role as Internet intermediaries, do not infringe the communication copyright. To reach this conclusion, the Board relied on an express provision in the *Copyright Act* that exempts common carriers from communication liability. This paper suggests that application of the Board's reasoning may result in ISP liability for the infringement of other rights granted within copyright, where no analogous exemption exists. The most notable copyright for which no similar common carrier exemption exists is the reproduction right. In light of the Board's decision, this paper seeks to address the copyright liability of ISPs under Canadian law.

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*“... the protection of copyright and neighbouring rights is essential
to the development of electronic transactions”*

- Proposed European Directive on Electronic Commerce¹

Introduction

Copyright is not a single right, but rather a collection of rights. Copyright consists of exclusive economic rights² for works³ (including reproduction, publication, communication, performance and translation), neighbouring rights⁴ (such as those belonging to performers, producers and broadcasters), and moral rights⁵ (to protect the integrity of works). Each right within copyright can be considered separate and distinct.⁶ It is important when considering the copyright liability of Internet service providers (ISPs), to carefully examine each potentially applicable right within copyright and the rules associated with said right. This paper seeks to address the copyright liability of ISPs under the current Canadian law.

Infringement

(a) Direct Infringement

In order for copyright liability to arise, there must be a valid cause of action under s. 27 of the *Act*. Direct infringement is described in the *Act* as

27.(1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this *Act* only the owner of the copyright has the right to do.⁷

Liability in respect of direct infringement is strict; there is no knowledge requirement to create liability when an exclusive right of the copyright owner is infringed.

(b) Secondary Infringement

The criteria for secondary infringement is shown below.

27.(2) It is an infringement of copyright for any person to

- (a) sell or rent out,
- (b) distribute to such an extent as to affect prejudicially the owner of the copyright,
- (c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,
- (d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or

(e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),
a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows would infringe copyright if it had been made in Canada by the person who made it.⁸

With secondary infringement, there is a knowledge requirement before liability arises. When examining ISP liability under each right within copyright, it is important to keep in mind that with secondary infringement provisions may be involved where actual or constructive knowledge exists.

Tariff 22 Decision

In 1995, the Society of Composers, Authors and Music Publishers of Canada (SOCAN)⁹ submitted to the Copyright Board a proposed Tariff No. 22 for the "Transmission of musical works to subscribers via a telecommunications service not covered under tariff nos. 16 or 17".¹⁰ The approval of the Board is required in accordance with s. 67.1(2) of the *Copyright Act*.

The Copyright Board's decision¹¹ for the proposed Tariff 22 was released on Wednesday October 27, 1999. The Tariff 22 decision has been the first major Canadian legal statement in regards to copyright liability on the Internet.¹² While the decision focussed on copyright liability for the communication of musical works (or sound recordings), the decision contains implications and analogies for the application of Canadian law to other copyrights and works on the Internet.

SOCAN has applied for judicial review of the Tariff 22 decision and, as a result, the Federal Court of Canada, Appeal Division will rule on these matters in the future.¹³

Canadian Legal Regime

The divergent interpretations of Canadian copyright law and their applicability to Internet service providers can be broadly summarised into three categories.

(1) ISPs as full actors

- *Arguably SOCAN's best case scenario*
- The ISP (as an entity) authorizes all copyright infringements that occur on the ISP's equipment
- The ISP commits the infringing acts that take place using their equipment

(2) ISPs as limited actors

- *Arguably the approach taken by the Copyright Board in the Tariff 22 decision*
- ISPs do not authorize copyright infringing acts simply by acting as intermediaries
 - It is the content provider who authorizes copyright infringements
- ISPs are liable for direct acts of copyright infringement unless a specific exemption exists in the *Copyright Act* to remove ISP liability
 - Paragraph 2.4(1)(b) can remove ISP liability under the communication right

(3) ISPs as non-actors

- *Arguably an ISP's best case scenario*
- ISPs do not authorize or commit any acts of copyright infringement that occur on their equipment.
- The content provider and not the ISP commit and authorize the infringements that take place on an ISP server, when the ISP acts merely as a conduit.
- Some ISPs may rely in part on s. 36 of the *Telecommunications Act*¹⁴ to remove content-based liability.

The main focus of this paper will be the second interpretation as enumerated above. The conclusions in the Tariff 22 decision and the possible implications drawn from the Copyright Board's approach will provide the foundation for discussing ISPs as limited actors. This reasoning will be followed by shorter discussions regarding the first and third interpretations as listed above, namely ISPs as full actors and ISPs as non-actors.

ISPs as Limited Actors – the Tariff 22 Decision

A. Communication to the Public by Telecommunication (of a Work) s. 3(1)(f)

The communication right, appearing in paragraph (f), is one of the s. 3(1) exclusive economic rights for works set out in the *Copyright Act*.

S. 3.(1) For the purposes of this *Act*, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

...
(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
...
and to authorize any such acts.¹⁵

Although one logical manner to discuss copyright liability would begin by addressing the s. 3(1) exclusive rights in the order in which they appear in the *Act*, the discussion in this paper will begin by discussing the communication right. This approach was adopted to allow the Tariff 22 decision, and their conclusions regarding communication, to form the foundation for discussion.

A.1. Authorization of Communication

The Tariff 22 decision concludes that it is the content provider that authorizes Internet communications¹⁶ and not the Internet Presence Provider (IPP) or the Internet Access Provider (IAP). (IPPs and IAPs are ISPs.) “Even knowledge by an ISP that its facilities may be employed for infringing purposes does not make the ISP liable for authorizing the infringement if it does not purport to grant to the person committing the infringement a license or permission to infringe.”¹⁷ Under this decision, the ISP is not seen to authorize communication to the public by telecommunication.

This is not an absolute exemption from liability under authorization of communication for ISPs. In the event that an ISP provides content or if the ISP acts a moderator of a newsgroup and allows an infringing message to reach the newsgroup, the ISP could be seen as authorizing the communication.¹⁸

The Tariff 22 decision suggests that knowledge of a copyright infringing communication could put the ISP in a position to authorize the communication.¹⁹ Authorization of a communication without the consent of the copyright owner is a strict liability infringement. By definition, lack of knowledge is not a defence for the right to authorize communication, but the Board’s interpretation is such that an ISP likely does not commit the infringement without knowledge.

...authorization occurs only when a person exerts a degree of control over the activities of “the grantee” sufficient for the person to be said to purport to have the authority to grant to another person the right to use the work in a manner that comes within the exclusive rights of the copyright owner. The likelihood of such an occurrence increases with the extent to which the commercial interest of the parties are linked to the protected use and the actual or imputed knowledge of the probability of a protected use.²⁰

Thus, particularly when the ISP has a commercial interest involved, gaining knowledge of an infringement yet failing to take preventative steps could put the ISP in a position where the authorization of communication occurs.

A.2. Actual Communication

A.2.a. "Internet Intermediary"

The Tariff 22 decision concludes that “Internet intermediaries” can avail themselves of the s. 2.4(1)(b) exception to the communication right for common carriers.²¹

2.4(1)(b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public;²²

“Internet intermediaries” include “the ISP of the person who makes the work available, persons whose servers acts as a cache or mirror, the recipient’s ISP and those who operate routers used in the transmission.”²³ Thus, when acting in the capacity of an “Internet intermediary”, an Internet service provider will not be seen to infringe the communication right.

The decision further clarifies the use of “means” in s. 2.4(1)(b):

“Means” has a broader meaning than “facilities”. The “means” that are necessary to effect an Internet transmission and to which paragraph 2.4(1)(b) refers are not limited to routers and other hardware. They include all software connection equipment, connectivity services, hosting and other facilities and services without which such communications would not occur.²⁴

The Copyright Board concludes on this point:

In the end, each transmission must be looked at individually to determine whether in that case, an intermediary merely acts as 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 musical work communicates it.²⁵

Under Tariff 22, in their role as an “Internet intermediary”, ISPs will not be liable for communicating a work over the Internet. Now we must look at their liability when they are not acting merely as a conduit.

Why the Tariff 22 Decision Suggests that ISPs are Limited Actors

The assertion that the Copyright Board’s decision is an example of ISPs as limited actors as opposed to ISPs as non-actors is potentially contentious. To be clear, the Copyright Board was only considering the attribution of liability for the communication of musical works and not for reproduction or other rights. As the Copyright Board found ISPs not to be actors for the communication right or authorization of communication, it is the only the Board’s reasoning that suggests the interpretation of ISPs as limited actors. If the Copyright Board considered the ISPs not to be actors in the direct act of communication, they would not need to rely on s. 2(4)(1)(b) of the *Act* as a basis to conclude that ISPs do not communicate the work. The implication of invoking s. 2(4)(1)(b) is that without this express exception to the communication right, ISPs would be actors directly infringing this right. Therefore with this reasoning, express exceptions to other rights such as reproduction will be necessary to find ISPs not to be actors.

A.2.b. Actions Outside the Scope of Paragraph 2.4(1)(b)

Many ISPs conduct certain activities outside the scope of an "Internet intermediary". Under the copyright framework, each activity and not the status of the actor must be examined. To understand some ISP activities that the Copyright Board excludes from the application of s. 2.4(1)(b), we should refer to the following statements of the Tariff 22 decision.

...where an ISP posts content, associates itself with others to offer content, creates embedded links or moderates a newsgroup... these entities are no longer acting as intermediaries; their liability will be assessed according to the general rules dealing with copyright liability. The same will hold true where an ISP 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.²⁶

Clearly many ISPs do post some content - whether it be simply to advertise or administer their services or in some other manner. Some ISPs moderate newsgroups. These activities raise potential liability issues for ISPs.

Does adding advertising to cached material meet the standard of "modifying the contents" of cached material? For example, the Internet presence provider GeoCities²⁷ provides 15 megabytes of free web server space to host web pages for its members. As a means to gain financial compensation for the hosting of web services, GeoCities adds an embedded advertisement to the display of a free web page each time the page is accessed. In practical terms, this amounts to the Internet presence provider modifying the HTML code that was stored on their web servers by subscribers. Under the Tariff 22 decision, it appears that this modification of the stored material would result in removing the ISP from acting as an Internet intermediary.

One major issue that wasn't clearly addressed in the Tariff 22 decision was the issue of ISP knowledge and any practice of notice and take down. This topic is discussed later in this paper under the heading "ISP Options to Reduce Liability".

B. Reproduction Right (s. 3(1))

The reproduction right, appears in s. 3(1) exclusive economic rights for works set out in the *Copyright Act*.

S. 3.(1) For the purposes of this *Act*, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever... and to authorize any such acts.²⁸

As "there is no practical distinction between acts which could infringe the reproduction right and those acts which could infringe the rights created by Section 3(1)(d)",²⁹ this paper will discuss only the reproduction right. The relevant section of the *Act* is:

S. 3.(1)(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed, ... and to authorize any such acts.³⁰

The Tariff 22 decision recognises that reproductions occur during an Internet communication. The Copyright Board states;

Internet transmissions remain communications within the meaning of the *Act* even though they also involve, or result in, one or more transitory or permanent reproductions. A single activity may give rise to liability under more than one head of subsection 3(1) of the *Act*. Thus, a facsimile transmission results in a communication even though it involves a reproduction.³¹

As it was not relevant to SOCAN's proposed tariff, the decision does not complete an in depth legal analysis of the reproduction right in application to Internet communications. It would be incorrect to construe exemptions from the communication right discussed in the Tariff 22 decision, most notably the paragraph 2.4(1)(b) common carrier exception, to apply to the reproduction right.

The Copyright Board will have to deal with the application of the reproduction right to Internet communications in the future when they examine Tariff No. 1,³² proposed by the Société du droit des auteurs, compositeurs et éditeurs au Canada (SODRAC)³³. The subject matter for Tariff No. 1 is "Reproducing of musical works in a network exploitation".³⁴

Reproductions are created on ISP equipment during Internet communications that can fall within the literal reading of s. 3(1). On this point, case law in the United States has concluded that a RAM copy of a computer program is a reproduction under U.S. copyright law.³⁵ The Copyright Board's decision appears to be in line with the U.S. decision. The big issue is whether reproductions on ISP equipment amount to reproductions *by* the ISP as an entity. Which person or entity is performing the acts of reproduction and of authorization of reproduction for the reproductions that occur on ISP equipment? It is on this point that the interpretations of ISPs as limited actors and ISPs as non-actors differ. Without an express exemption, considering ISPs as limited actors would find the ISP to be an actor in the act of reproduction.

B.1. Posted With Permission of the Copyright Owner

B.1.a. Implied License and its limits.

The copyright owner would likely be seen to authorize reproduction on ISPs and on the computers of end users if the original posting of the material was with the permission of the copyright owner. This is known as an "implied license" to browse the material. Commentators such as Hayes³⁶ in 1997 suggest that an implied license for reproductions is necessary to view material available online where the material is posted by, or with the permission of, the copyright owner. The only way that material posted online can be viewed is through the technical processes of being reproduced in ISPs and the RAM and/or cache of the end user.³⁷ As mentioned above, this implied license for reproduction would be limited to only the copies that are an integral part of the browsing process (Internet communication).

Downloading (outside of RAM and caching), printing, or reproducing other than for the purposes of facilitating an Internet communication may not be seen as being covered in the implied license.³⁸ It is also possible that the selection of format for material posted online may extend to different implied licenses. For example, posting a file in PDF (Adobe Acrobat Portable Document File) format along side the same information in HTML (HyperText Mark-up Language) format may suggest an implied license is extended to print a copy of the PDF version.

B.1.b. Revoking the Implied License & Deep Linking

Can an implied license be expressly revoked? Some commentators propose that the very nature of an implied license be such that it can be expressly revoked.³⁹ Other commentators feel strongly that material posted with the permission of the copyright owner and is publicly accessible automatically has an implied license. This theory suggests that the only way such an implied license can be revoked is if the material is removed from a publicly accessible website. For example placing the material into a restricted area where it is password protected.

This question has not been expressly settled in either Canada or the United States. Questions revolve around what lengths must be taken to revoke the implied license. “Deep linking” is the practice of linking to a page deep within another website. This can be contrasted with sending users to the main page of the second site where the site owners could exhibit some control over how users travel through the site and what advertising they see. Would posting a policy somewhere on a website that forbidding deep linking be sufficient to revoke the implied license for browsing? This would be problematic if someone could freely access parts of the website without being aware of the existing policy.

A Canadian Example

Ottawa resident Jean-Pierre Bazinet, the owner of the Movie-List.com website, received a series of letters from lawyers representing Universal Pictures alleging infringement of Universal’s copyright.⁴⁰ In their first letter, Universal Pictures required that Bazinet remove all Universal pictures, trademarks and movie clips from his website. Bazinet complied with these demands and responded to their letter acknowledging his compliance. The response he received in Universal’s second letter, demanded that he remove all deep links to Universal websites and other websites that contained Universal’s material. In the series of letters to Bazinet, the demands of Universal’s lawyers progressed from requiring removal of

copyright infringing material, to the removal of links to infringing material, to finally the removal of links to authorized material which was publicly accessible on the Internet.⁴¹ With each letter, the claim to copyright infringement was becoming weaker, until in the last situation, they were requiring Bazinet to remove all deep links to authorized Universal websites.

The letter from Universal's lawyer on July 9, 1999 was the first one to raise a copyright complaint for deep linking. That letter stated that Bazinet was

not permitted to link to other sites that contain our copyrighted material without our authorization. Not only is this activity another violation of our intellectual property rights, it also violates your Internet service provider's terms of service. Accordingly, you must remove all images from our films as well as links to other sites that have our trailers.⁴²

Bazinet wrote responses to Universal and Bazinet's Canadian ISP, SimpleNet, declaring that the only links to sites containing Universal Pictures' copyright material that he provided were to legitimate websites where the material was posted with the authorization of the copyright holder. This statement did not satisfy either Universal or the Canadian ISP. SimpleNet wrote him an email on July 21, 1999 stating:

Universal HAS contacted us at this time. The situation is now that you must abide WHATEVER Universal insists upon. If not, we will have no choice but to suspend your site. We are bound to do so legally. Please comply with them IMMEDIATELY. Thank you for your cooperation in this matter.

Sincerely,
SimpleNet Abuse Review⁴³

With the threat of legal action from Universal Pictures for deep linking and the threat of having his website suspended, Bazinet removed all links to legitimate sites containing copyright protected property of Universal Pictures. Bazinet asked his ISP to provide him with a copy of the legal documents that Universal sent them but SimpleNet refused. The ISP said that "this matter is between you and them, our only involvement would/could be to suspend and reactivate your account based on your cooperation with them."⁴⁴

Is this treatment justified? Is a Canadian ISP legally required to suspend a subscriber's account when they receive a complaint alleging copyright infringement? Does deep linking qualify as copyright infringement in Canada?

There is no case law in Canada regarding deep linking. The Tariff 22 decision does not make a distinction between deep linking and other forms of linking (with the exception of embedded links). “The person that merely supplies a link which must be activated by the user does not [authorize the communication of the work].”⁴⁵ If this broad statement is interpreted to include deep linking, it suggests that the Board would not consider a deep link to be an authorization of communication.

The Tariff 22 linking statement also leaves unclear the liability for Canadian copyright infringement in situations where the hypertext link opens the new page in a one section of the screen but the new page is framed by web pages from the first site. In these “framing” situations, the web page address (also called uniform resource locator – URL) still identifies the first site, and not the linked page.

American Deep-Linking

The American situation is not a great help in the deep linking situation. There have been a number of lawsuits filed alleging copyright infringement through deep linking, but all have been settled out of court.

In 1997, Ticketmaster filed a lawsuit against Microsoft for linking directly to Ticketmaster’s ticket sales pages rather than its home page or “front door”. The companies settled out of court in February of 1999.⁴⁶ One could view the settlement as an admission of Microsoft’s guilt because the terms strictly prohibit Microsoft deep-linking to Ticketmaster’s website.⁴⁷ This could be evidence of an emerging trend in this area since legal complaints over deep-linking have reportedly led to a series of out-of-court settlements in which defendants have agreed to link only to a site’s top page.⁴⁸

More recently, eBay has objected to deep linking by AuctionWatch.⁴⁹ Although eBay has raised the issue of copyright violation (claiming copyright in prices⁵⁰), it appears that the argument is really based on misappropriation. They are most concerned about AuctionWatch unfairly profiting from eBay’s hard work.⁵¹

Jeffery Kuester, suggests that “where the line should be drawn between the right to link and the right to protect one’s intellectual property is for the courts to decide.”⁵² The balance may be different “when a link points not to an integral page on the foreign site, but to just one of the resources composing that page, such as a graphic or an audio/video clip.”⁵³ This statement corresponds with the Canadian Tariff 22

decision's conclusion that "a person that creates an embedded hyperlink to a work authorizes its communication."⁵⁴ As yet, the American courts have not had the opportunity to make a decision on deep linking.

B.2. Express License

CANCOPY announced on 20 March 1999, that they would grant licenses for digital reproductions of works.⁵⁵ Traditionally, CANCOPY licenses photocopies of copyright protected works. Where the ISP or the content provider has been granted an express license for the activities which the ISP performs in relation to copyright protected work, the ISP will not be liable for copyright infringement.

B.3. Posted Without Permission of the Copyright Owner (Pirate Copy)

Only the copyright owner has the authority to grant a license to someone else to allow them to make use of any of the exclusive rights granted through the copyright (with the exceptions of authorized collective societies and remuneration rights). In the event that a copyright protected work is made available online without the permission of the copyright owner, then a license (implied or otherwise) for reproductions by ISPs or the end user cannot exist.⁵⁶

If an ISP is deemed to be the entity that commits the reproductions on their equipment, the ISPs would be liable for the infringement of the reproduction right for works posted without the permission of the copyright owner.

B.4. Authorization of Reproduction

A logical extension of the Copyright Board's Tariff 22 decision, in which they allocated the authorization of communication to the content provider, is that the content provider would also authorize the reproduction. Under this line of reasoning, ISPs when acting in their role as Internet intermediaries, would not be liable for the infringement of authorization of reproduction. As discussed under authorization of communication, where the ISP has imputed or actual knowledge and acquires financial gain from the infringement, they may be seen to authorize the reproduction. This line of reasoning will hold true for the authorization of the other rights discussed below.

C. Other Rights

C.1. Publication

The definition of the publication of works found in s. 2.2 of the *Act* expressly excludes communication to the public by telecommunication of works.⁵⁷ This is in compliance with the Berne Convention definition of telecommunication.⁵⁸ This indicates that the publication of works may not occur on the Internet, and thus ISPs would not be overly concerned with liability under the publication right.

The Tariff 22 decision goes to great lengths to distinguish between the act of communication to the public by telecommunication and the authorization of communication. The decision states that it is the authorization and not the communication itself that covers the right of making available material online. An argument exists that this distinction by the Copyright Board could be extended to the interpretation of publication. The definition of publication explicitly excludes the act of communication, but may not exclude the making available online. Thus, the act of making something available online, and the authorization of communication on the Internet could result meeting the requirements for publication.

While the Berne convention excludes communication by wire from the definition of publication, it could be narrowly construed to not cover making available online or communication “to the public”. This interpretation may be more consistent with common notions about the ability to publish material online.

This comment is supported by a recommendation by the (US) Commission on Physical Sciences, Mathematics, and Applications in their 1999 publication *The Digital Dilemma: Intellectual Property in the Information Age*.⁵⁹ In that publication,

Conclusion: The information infrastructure blurs the distinction between publication and private distribution.

Recommendation: The concept of “publication” should be reevaluated and clarified (or reconceptualized) by the various stakeholder groups in response to the fundamental changes caused by the information infrastructure. The public policy implications of a new concept of publication should also be determined.⁶⁰

If we look at the definition of publication in the Gage Canadian Dictionary, we see that publication is defined as “the act of making known; the fact or state of being made known.”⁶¹ Considering this common understanding of publication

does take place on the Internet, why shouldn't our *Copyright Act* and the Berne Convention reflect this? Perhaps the interpretation described above can be used to allow publication to take place on the Internet. If this approach is adopted, then ISPs could find themselves in a position to face potential copyright liability for the publication right. In such a situation, a similar analysis to the infringement of the reproduction right would ensue.

The same basic interpretation can be extended to the publication of sound recordings in s.18 and s.2.2(b).

C.2. Performance (s. 3(1), s. 2.3)

The Tariff 22⁶² decision relies on a legislative amendment from 1994⁶³ to state that a communication to the public by telecommunication will not be seen as a performance. The *Copyright Act* now reads:

2.3 A person who communicates a work or other subject-matter to the public by telecommunication does not by that act alone perform it in public, nor by that act alone is deemed to authorize its performance in public.⁶⁴

However, Mark Hayes in his 1997 report draws attention to the words “*by that act alone*”. He suggests that if “a further step is taken at the end of the communication, such as the showing of the work to a large gathering of unrelated people, this could constitute both a communication to the public and a performance in public.”⁶⁵ Hayes bases this interpretation on the decision of the Supreme Court of Canada in *TéléMétropole Inc. v. Michel Bishop*.⁶⁶

In the situations where the Internet is deemed to also constitute a performance in public, an ISP that acts as an intermediary may not be seen to be sufficiently involved to be authorising or performing the work. Thus copyright liability under the performance right may not be a large concern for Canadian ISPs.

C.3. Neighbouring Rights

The Neighbouring Rights Collective of Canada (NRCC) filed a proposed tariff with the Copyright Board of Canada on March 31, 1998. A potential source of confusion in this paper, the proposed NRCC tariff bears the same number as the SOCAN tariff previously mentioned, namely, Tariff No. 22.⁶⁷ The Copyright Board of Canada has yet to address these issues. The analysis for neighbouring rights (such as those belonging to performers, producers and broadcasters) will be much the same as for the

exclusive economic rights discussed above. The ISPs actions will be evaluated as either an actor or non-actor to determine if the ISP will be subject to any remuneration rights or infringement actions.

D. Moral Rights

Moral rights, including the right to protect the integrity of works and the right to be associated with the work as its author,⁶⁸ cannot be bought, sold or assigned.⁶⁹ They reside with the author, or the author's heirs,⁷⁰ and not with any other person to whom part of the copyright has been assigned or licensed⁷¹. The term of protection for moral rights in Canada is the same as for the economic rights protection⁷² – currently life of the author plus 50 years.⁷³

Moral rights could raise potential liability problems when a copyright protected work is modified or altered by a person other than the author and is distributed on the Internet. While the distribution of modified works may involve ISPs, the actual modification of the works would likely not occur on ISP equipment. As a result, the potential for ISP liability in cases of moral rights violations may be limited to secondary infringements.⁷⁴

E. Secondary Infringements

As set out in the Introduction, copyright liability can arise through indirect actions that fall under secondary infringement in s. 27(2). Knowledge is a requirement for secondary infringements. Effective procedures for notice and take down or other means to ensure that copyright infringements do not take place with the knowledge of the ISP may effectively reduce ISP liability for secondary infringements. Industry standards such as the CAIP Code of Conduct⁷⁵ can be seen as a positive step in this direction.

ISPs as Full Actors

As SOCAN continues to submit, this interpretation would see ISPs as potentially liable for all actions of infringement that occur on their servers. Under this assertion, *prima facie* ISPs will be liable for all infringements that occur using the ISP's equipment. Liability for direct infringements would only be removed by express exemptions in the *Copyright Act*.

ISPs as Non - Actors

In this theory, while it is acknowledged that copyright infringements do take place on ISP equipment, it is not the ISP that is deemed to be the entity committing the infringements. This view focuses on who is the person that controls the copyright infringement.

To reiterate a phrase previously quote from the Tariff 22 decision, “even knowledge by an ISP that its facilities may be employed for infringing purposes does not make the ISP liable for authorizing the infringement if it does not purport to grant to the person committing the infringement a licence or permission to infringe.”⁷⁶ When considering ISPs as non-actors, this statement could be extended to cover all copyright infringements instead of limiting it to authorization.

In support of this position for interpreting Canadian law, Mark Hayes wrote:

Many copyright infringements may be committed on the Internet using physical equipment owned by others. By way of example, while the copy of a work could be made on the server of a BBS and retained there, it is the user posting the work on the BBS which actually makes the copy using the BBS’s equipment. In these circumstances, it is relatively clear that it is the user which is infringing and not the passive equipment operator unless the operator starts being involved in the infringing acts to the point that it “authorizes” the act. The case law in Canada holds invariably that where equipment is used by a third party to infringe copyright, the owner of the equipment does not infringe so long as such owner has no control over the manner in which the primary infringer uses the equipment.⁷⁷

When the ISP’s actions are limited to an automated process for the reproduction and communication of material for use on the Internet, the infringing acts can occur without any knowledge or action taken by any person employed by the ISP. It could be said that it is the content provider, and not the ISP, that is committing the infringing acts which make use of the ISP’s equipment.

In the American *Religious Tech v. Netcom* case, the court reasoned that where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of numerous parties whose role in the infringement is limited to setting up and operating a system necessary for the operation of the Internet.⁷⁸ Instead of relying on direct infringement, the American court looked at possible contributory liability, which included a knowledge requirement.

Extending this interpretation to the Canadian situation, a similar approach would mean that when the ISP has knowledge about a copyright infringement, it could be found to be liable under the secondary infringement provisions. The ISP would not be liable for direct acts of infringements.

S. 36 of the *Telecommunications Act*

Another possible route to find the ISPs not to be responsible for direct copyright infringing acts is found in s. 36 of the *Telecommunications Act*.

S. 36 Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications by it for the public.⁷⁹

To determine if this section applies to ISPs, it is important to understand a number of issues. First, the Commission is defined in the *Telecommunications Act* as the Canadian Radio-television and Telecommunications Commission (CRTC).⁸⁰ The CRTC released a decision in the summer of 1999 that they would not regulate the Internet (at this time).⁸¹ This forbearance could be considered a form of regulation, as is supported by s. 34 of the *Telecommunications Act*.⁸²

Secondly we must determine if an ISP qualifies as a Canadian carrier. A “Canadian carrier” is defined in the *Act* as meaning “a telecommunications common carrier that is subject to the legislative authority of Parliament.”⁸³ A “telecommunications common carrier” is defined as meaning “a person who owns or operates a transmission facility used by that person or another person to provide telecommunications services to the public for compensation”.⁸⁴ Whether or not an ISP complies with these definitions is further open to some interpretation and consultation in regards to other related definitions in the *Telecommunications Act*.

The Copyright Board’s decision to apply s. 2.4(1)(b) of the *Copyright Act* to Internet service providers adds some support to the theory that ISPs qualify as Canadian carriers.

S. 2.4(1) For the purposes of communication to the public by telecommunication,
(b) a person whose only act in respect of the communication of a work or other subject matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public⁸⁵

This wording combined with the Copyright Board’s decision that it applies to ISPs, suggests that ISPs are telecommunications common carriers.

The *Telecommunications Act* does not apply in respect of broadcasting by a broadcasting undertaking.⁸⁶ Broadcasting and broadcasting undertakings involve the transmission of programs, which requires that the program does not consist predominantly of alphanumeric text.⁸⁷ “For greater certainty, [the *Broadcasting Act*] does not apply to any telecommunications common carrier, as defined in the *Telecommunications Act*, when acting solely in that capacity.”⁸⁸ In the CRTC’s decision to forbear regulation of the Internet, they state that the Internet “currently consists predominantly of alphanumeric text and is therefore excluded from the definition of ‘program’. This type of content, therefore falls outside the scope of the *Broadcasting Act*.”⁸⁹ This is further supports the suggestion that *Telecommunications Act* and s. 36 could apply.

This issue is discussed in paragraphs 53 and 55 of the CRTC decision. Three relevant statements from the decision are:

"...'exempt transmission apparatus' such as routers, servers, and software."⁹⁰

"...the Commission wishes to clarify that it does not agree with parties suggesting that the Commission's objective is that all ISPs, providers of local exchange services or other service providers must own or operate transmission facilities and so become 'facilities-based' carriers."⁹¹

"...the Commission... recognises that not all service providers will invest in the transmission facilities that qualify them as 'telecommunications common carriers' under the *Telecommunications Act*."⁹²

The Tariff 22 decision indicates that some ISPs do qualify as "telecommunications common carriers" but many do not. This suggests that large ISPs that own 'transmission facilities' will be able to claim exemption from s. 36 of the *Telecommunications Act* while smaller ISPs without 'transmission facilities' cannot. If this interpretation is adopted, it may result in considerably different levels of liability for large and small Canadian ISPs, putting smaller ISPs at a comparable disadvantage.

This being said, there is a strong argument for why Section 36 of the *Telecommunications Act* does not apply to ISPs. This argument is such that s. 36 should not be read as an exemption, but rather as a prohibition against Canadian carriers controlling the content of telecommunications. Entities that are not Canadian carriers are not subject to this restriction.

This means that ISPs that are Canadian carriers cannot interfere with the content of a telecommunication without CRTC approval. An Internet transmission is, of course, a telecommunication as defined by the *Telecommunications Act*.

This covers services such as Telus' "PlaNET Telus" and "MyBC" portals since they are operated by a Canadian Carrier (Telus Alberta and Telus BC respectively). The CRTC held a proceeding, started by Telecom Public Notice CRTC 98-39 and culminating in Telecom Decision 99-4,⁹³ which decided in paragraph six:

The Commission hereby grants approval under section 36 of the Act to involvement by any Canadian carrier in the content of that carrier's own Internet Service, whether such services are tariffed or forborne.⁹⁴

It appears that all Canadian carriers have CRTC permission to "involvement" in the content of their own Internet service. The prohibition of section 36 never did apply to ISPs that were not Canadian carriers. The rules are thus the same for all ISPs, whether they are Canadian Carriers or not.

Although s. 36 of the *Telecommunications Act* likely does not apply, the theory of ISPs as non-actors would only create copyright liability for ISPs under secondary infringements when knowledge exists.

Jurisdiction of Canadian Copyright Law

The Copyright Board in the Tariff 22 decision interprets Canadian copyright law such that communications are deemed to occur in Canada only when the location of the web server is within Canada's boundaries.

Communications occur at the site of the server from which the work is transmitted, without regard to the origin of the request or the location of the original Web site. Therefore, to occur in Canada, a communication must originate from a server located in Canada on which content has been posted.⁹⁵

The Copyright Board's conclusion regarding the criteria for a communication to occur in Canada is in contrast to the opinion expressed by Hayes in 1997. In his report, Hayes stated:

On balance, in view of both the wording of Section 3(1)(f) and the limited case law on this issue, the better view seems to be that a communication to the public by telecommunication takes place in Canada when such a communication is received in Canada. This means that persons who are located outside of Canada may be liable for

copyright infringement in Canada if they initiate an infringing transmission which is received in Canada, but persons in Canada who communicate solely to recipients outside of Canada will not be communicating to the public by telecommunication within the meaning of the *Copyright Act*.⁹⁶

As suggested by University of Ottawa law Professor Michael Geist in his monthly column to the *Globe & Mail*, “the problem with the board’s approach is that it could lead to a race to the bottom in Internet law, where firms relocate to the location with the least restrictive regulatory framework.”⁹⁷

The Copyright Board’s interpretation limits the applicability of Canadian copyright law to communications involving a Canadian web server, but in contrast the Hayes interpretation could lead to the application of Canadian copyright law to Internet communications involving Internet presence providers in other parts of the world. If courts adopt the Hayes interpretation, the potential copyright liability for Canadian ISPs under Canadian law could be reduced to exclude all copyright infringements involving the ISP that are not received in Canada.

As this issue is addressed in grounds (c) and (d) of SOCAN’s appeal of the Tariff 22 decision,⁹⁸ the Federal Court of Appeal may resolve this issue in the future.

It is possible that a “communication originating in Canada that is received elsewhere may constitute an infringement of the communication right in that other country.”⁹⁹ As it is outside the scope of this paper, this paper refrains from a detailed discussion of laws from other jurisdictions that are potentially applicable to Canadian ISPs.

ISP Options to Reduce Liability

A. Notice and Take Down

There are a number of concerns for ISPs regarding their liability under Canadian copyright law for notice and take down. The concerns are enumerated below.

- a) What constitutes valid notice?
- b) How should ISPs know when a complaint / notice is valid and when it is not?
- c) What liability exists if the ISP takes something down that the content provider had a lawful right to post?
- d) What liability exists if the ISP does not take something down once they have received some form of notice?
- e) How quickly must the ISP act?

Lacking a clear interpretation of Canadian copyright law as it applies to the liability of ISPs for notice and take down, ISPs potentially face a double-edged sword. In their nightmare scenario, ISPs would be liable if they take down non-infringing material in response to a bogus complaint, and yet would be liable for not removing infringing work when a complaint is valid.

The *Digital Millennium Copyright Act* (DMCA)¹⁰⁰ in the United States has provided very clear direction to the process of Notice and take down which removes liability from ISPs for removing content upon receiving a complaint. To help solve the problem of erroneous notifications, the DMCA has made it an offence for anyone to falsely allege illegality of material posted on the web.

In Canada, the Canadian Association of Internet Providers (CAIP)¹⁰¹ has created a voluntary Code of Conduct¹⁰² that includes provisions related to notice and take down¹⁰³. It is unclear whether adhering to this developing industry standard would place ISPs at a higher or lower risk of Canadian copyright liability.

In Australia, the proposed *Copyright Amendment (Digital Agenda) Bill 1999* includes the clause “whether the person complied with any relevant industry codes of practice”¹⁰⁴ as a factor to consider in determining whether a person has authorized copyright infringement. Perhaps complying with industry codes could be a factor to consider in Canada. However, ISPs in Canada are still faced with the problem that direct infringements of the communication and reproduction rights involve strict liability. Knowledge or compliance with industry codes is not a defence for strict liability infringement.

In the United States, the New York Supreme Court found a computer bulletin board system (BBS) liable for messages posted by users because the BBS held itself out to the public as controlling the content of its bulletin boards.¹⁰⁵

The Canadian case *BeaverHome.com v. Nexx Online*¹⁰⁶ may be relevant to the Canadian notice and take down situation. It is not a copyright case.

In *BeaverHome.com*, notice was given to an ISP in the form of a number of complaints regarding spam e-mails (mass unsolicited commercial emails) which were being sent by one of the ISP’s clients in January 1999. The ISP informed the client in February that their actions were in contravention of the codes of "netiquette", a clause in the ISP-subscriber contract. The client then stopped sending the e-mails (200,000 per day) using

the Canadian ISP but instead went through an ISP in California. The Canadian ISP continued to receive complaints, and in April 1999 decided to terminate their service with this client, denying access to their web page which was the product being advertised in their mass unsolicited commercial emails.

In a normal notice and take down situation, the objectionable content resides on a web page stored on the ISP's server, and the ISP takes down or denies access to the material upon receiving notification of the illegal material. *Nexx Online* was a spam case. It could be argued that spam is entirely different than copyright infringement on the Internet and so this case may only provide mild persuasion to support the notice and take down procedures in Canada.

There are no clear guidelines in the *Copyright Act* or in Canadian case law to indicate what constitutes appropriate notice. The increase in potential direct copyright liability that comes with increased knowledge of an infringement suggests that ISPs would be justified when removing material they believe to be copyright infringements upon receiving notice.

B. Knowledge and Take Down

Here is a brief discussion of ISP liability concerns regarding ISP knowledge of copyright infringements taking place on their server.

The CAIP voluntary Code of Conduct¹⁰⁷ includes principle 5, which states that "CAIP members will not knowingly host illegal content." This suggests that Canadian ISPs are willing to work with law enforcement agencies and take some form of action when they gain knowledge of an infringement. From a policy perspective, this is a positive step to reduce copyright infringement on the Internet. If ISPs refrain from holding themselves out as controlling the content, but instead limit themselves to reactive remedies including notice and take down, they should be able to avoid the voluntary legal assumption of liability for content as in the American Prodigy case¹⁰⁸.

The authority of an ISP to take action based solely on their knowledge (without receiving a complaint) is discussed in the case *R. v. Weir*¹⁰⁹. The *Weir* case can be seen as persuasive but not binding for copyright infringement situations.

In *R. v. Weir*,¹¹⁰ an ISP takes action based solely on their knowledge, without notice of a complaint. This case deals with child pornographic material as an attachment in email. The reason why this case could be seen as applicable to the ISP copyright liability

discussion is that it provides some support for an ISP taking action based on their knowledge and without the benefit of receiving any notice.

In this case, during a routine repair of their client's email box, an employee of the ISP noticed names of attachments that indicated the material would include child pornographic photographs. The ISP notified the police and provided the police with the material upon request. The defendant in the case, Weir, raised Charter challenges (ss. 7, 8, 24(1), 24(2)), including invasion of privacy. The judge upheld the ISP's actions as reasonable and subsequently allowed the evidence.

A different balance may exist between privacy rights and child pornographic material compared with the balance of privacy rights and copyright infringement. For this reason, the *R. v. Weir* case is only persuasive but not binding in regards to an ISP taking action based solely on knowledge without receiving notice of a copyright infringement.

The Tariff 22 decision suggests that the likelihood of direct liability for the authorization of copyright increases with the extent to which the ISP has actual or imputed knowledge. This increase in potential liability with knowledge indicates that an ISP could be justified when choosing to take some action based on their knowledge of a copyright infringement.

Conclusion

There still exists considerable uncertainty in the interpretation of Canadian copyright law regarding the direct liability of Internet service providers. In light of the Tariff 22 decision as well as the divergent interpretations of ISPs as full, limited or non-actors, it would be premature to declare that ISPs have no risk of direct liability for copyright infringements when acting as a mere conduit of information. Of particular concern to Canadian ISPs would be the potential for direct liability under the reproduction right when material is posted online without permission of the copyright owner.

The potential for secondary infringement liability when an ISP gains knowledge of a copyright infringement suggests that it would be prudent for the ISP to develop an effective policy to reduce this risk. Adhering to notice and take down policies developed as industry standards (such as through CAIP) could considerably limit an ISP's liability for secondary infringement. However, if an ISP's policy crosses the line from reactive to proactive, including assertions to *control* or *eliminate* all copyright infringements that occur on their system, they could risk losing their status as a mere conduit or "Internet intermediary" and thus increase their liability for direct infringements. Perhaps a website

disclaimer and provisions in their terms of service to subscribers explicitly disclaiming *control* over content could help reduce the ISPs liability for direct copyright infringement.

The future decision of the Federal Court of Appeal regarding Tariff 22 and the communication to the public by telecommunication, may provide guidance regarding the favoured interpretation of direct copyright liability for ISPs under Canadian law.

Endnotes

¹ A4-0248/99 Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market (As amended by Parliament) (COM(98)0586 – C4-0020/99 – 98/0325(COD)) at Recital 22c.

² *Copyright Act*, R.S.C. 1985, c. C-42, Amended by R.S.C. 1985, c. 10 (1st Supp.); c. 1(3rd Supp.); c. 41 (3rd Supp.); c. 10 (4th Supp.); S.C. 1988, c. 65; 1990, c. 37; 1992, c. 1; 1993, c. 15; c. 23; c. 44; 1994, c. 47; 1995, c. 1; 1997, c. 24; c. 36, s.3 [hereinafter *Act*].
<<http://canada.justice.gc.ca/FTP/EN/Laws/Chap/C/C-42.txt>> (visited Dec 9, 1999)

³ See *Act* at s. 5 for a description of works in which copyright may subsist. See also *Act* at s. 2 for definitions of “every original literary, dramatic, musical and artistic work”, “literary work”, “dramatic work”, “musical work”, and “artistic work”.

⁴ *Act*, ss.15, 17 - 19, 21, 26.

⁵ *Ibid.*, ss. 14.1, 14.2.

⁶ As per McLachlin, J. in *Bishop v. Stevens*, [1990] 2 S.C.R. 467.

⁷ *Act*, s. 27(1).

⁸ *Ibid.*, s. 27(2).

⁹ “Society of Composers, Authors and Music Publishers of Canada” - the only performing rights society in Canada. SOCAN’s role is to license the users of music performing rights in return for copyright fees.
<<http://www.socan.ca>> (visited Dec. 9, 1999)

¹⁰ The proposed tariff was published in the *Canada Gazette* on September 30, 1995, October 19, 1996 and October 18, 1997. Most recently, a 1998 reference can be found in the *Supplement to the Canada Gazette, Part I*, “Copyright Board: Statement of Proposed Royalties to be Collected by SOCAN for the Public Performance or the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works for the Year 1999”, June 13, 1998, at 26-27.
<<http://canada.gc.ca/gazette/part1/current/g1-13224.pdf>> (visited Dec. 9, 1999)

¹¹ Copyright Board of Canada. Phase I – Legal Issues, Board File: Public Performance of Musical Works 1996, 1997, 1998, 27 October 1999 [hereinafter “Tariff 22 Decision”].
<<http://www.droit.umontreal.ca/doc/cbccda/1999cda1027.pdf>> (visited Dec. 9, 1999)

¹² The Copyright Board is a tribunal. There has been no Canadian statement on this topic in the legislative process or in the court system. The Tariff 22 decision has been appealed by SOCAN on 25 November 1999. This means that the Federal Court of Appeal will rule on these matters in the future.

¹³ SOCAN’s “Application for judicial review of the decision of the Copyright Board dated 27 October 1999 in Phase I - Legal Issues, Board File: Public Performance of Musical Works”, filed at the Federal Court of Appeal on 25 November 1999. SOCAN’s grounds for appeal included:

The Board erred in law or as to its jurisdiction, took into account irrelevant matters, or failed to take into account relevant matters:

a) In holding that a musical work is not communicated to the public by telecommunication within the meaning of section 3(1)(f) of the *Copyright Act* (hereinafter “communication” or “communicated”) when the work is made available by storing it on a host server where it can be accessed by members of the public.

b) In holding that, with respect to most Internet transmissions, only the person who posts a musical work communicates the work.

c) In holding that, to occur in Canada (that is, to give rise to liability under section 3(1)(f) of the *Copyright Act*), the communication must originate from a server in Canada on which the musical work has been posted; so that a transmission of a musical work from an Internet server located outside of Canada to a subscriber of an Internet Service Provider (“ISP”) in Canada does not result in a communication in Canada.

d) In failing to hold that, if no communication occurs in Canada when a musical work originates from a server outside Canada, the transmission to the subscriber in Canada is nevertheless a performance in public of the musical work effected or authorized by the recipient subscriber’s ISP. In holding that a communication triggered by an embedded hyperlink occurs at the site to which the link leads.

e) In holding that when a transmission of a musical work involves a cache, the communication occurs at the location of the server from which the cache originally obtained the information.

f) In failing to hold that, with respect to Internet transmissions of musical works, the ISP who provides access to a subscriber and from whose router the musical work is transmitted to the subscriber communicates the work or authorizes the communication.

g) In holding that a person who only supplies on its website a hyperlink to be activated by the user does not communicate or authorize the communication of a musical work transmitted or that will be transmitted when the hyperlink is activated.

h) In misinterpreting the exemption in section 2.4(1)(b) of the *Copyright Act* to include within its scope Internet intermediaries generally, including the ISP of the person who posts the work or makes it available, persons who operate or who act as a cache or mirror, the recipient’s ISP and those who operate routers in the transmission chain.

i) In failing to decide whether an entity that posts a musical work on a server located outside Canada with the intention to communicate the work specifically to recipients in Canada communicates the work in Canada.

j) In failing to hold that the transmission of the musical work by the recipient’s ISP is a distribution to such an extent as to affect prejudicially the owner of the copyright under section 27(2)(b) of the *Copyright Act*.

¹⁴ *Telecommunications Act*, R.S.C.1985m c. T-3.4 (amended R.S.1993, c. 38), s. 36.

“Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public.”
<<http://canada.justice.gc.ca/FTP/EN/Laws/Chap/T/T-3.4.txt>> (visited Dec. 9, 1999)

¹⁵ *Act*, s. 3.(1).

¹⁶ Tariff 22 Decision, at 26, point 6, also at 43 - 47.

¹⁷ *Ibid.*, p. 47.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, at p. 46.

²⁰ *Ibid.*

²¹ *Ibid.*, at 26 & 38.

²² *Act*, s. 2.4(1)(b).

²³ Tariff 22 Decision, at 38.

²⁴ *Ibid.*, at 39.

²⁵ *Ibid.*, at 40.

²⁶ *Ibid.*, at 41.

²⁷ GeoCities <<http://www.geocities.com>> is now owned by Yahoo! <<http://www.yahoo.com>>

²⁸ *Act*, s. 3.(1).

²⁹ Mark Hayes, Copyright Chapter in “The Cyberspace is Not a No Law Land” Internet Content-Related Liability Study, Industry Canada, 1997, at 212.

<<http://strategis.ic.gc.ca/SSI/it/1603118e.pdf>> (PDF format, visited Dec. 9, 1999)

<<http://strategis.ic.gc.ca/SSG/it03117e.html>> (HTML format, visited Dec. 9, 1999)

³⁰ *Act*, s. 3.(1)(d).

³¹ Tariff 22 Decision, at 28. The Copyright Board relies upon the decision of the Supreme Court of Canada in *Bishop*, *supra* note 6.

³² “Statement of Proposed Royalties to be Collected by SODRAC for the Reproduction, in Canada, of Musical Works in the Exploitation of an Electronic Network for the Years 1999 and 2000.” Supplement of the Canada Gazette, Part I, June 13, 1998, at 11-14 [hereinafter “Statement of Proposed Royalties”].

<<http://canada.gc.ca/gazette/part1/current/g1-13224.pdf>> (visited Dec. 9, 1999)

³³ Société du droit des auteurs, compositeurs et éditeurs au Canada (SODRAC). <<http://www.sodrac.com>> (visited Dec. 9, 1999)

³⁴ “Statement of Proposed Royalties”, *supra* note 32.

³⁵ See: *MAI Systems Corp. v. Peak Computer* (9th Cir. 1993).

³⁶ Hayes, *supra* note 29.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ For an American example, refer to – Larry Lessig, David Post and Eugene Volokh, “Lesson 7 - Copyright 6: A Copyright Owner's Conduct May *Sometimes* Create an "Implied License" that Lets Others Copy.” 1999. They state “Implied licenses can always be EXPRESSLY REVOKED, just by saying so in a way that potential copiers will see.”

<<http://www.ssrn.com/update/lcn/cyberspace/lessons/copyr06.html>> (visited December 6, 1999)

⁴⁰ The Bazinet correspondence [hereinafter “Movie-List.com”] can be viewed online at <<http://www.movie-list.com/universal.html>> (visited Dec. 9, 1999)

⁴¹ *Ibid.*

⁴² See the second letter from Universal Picture’s Litigation Counsel Carolyn A. Hampton, *ibid.*

⁴³ See SimpleNet’s letter of July 21, 1999, *ibid.*

⁴⁴ See SimpleNet’s letter of July 23, 1999, *ibid.*

⁴⁵ Tariff 22 Decision, at 27, point 9.

⁴⁶ Scott Rosenberg, “Don’t Link or I’ll Sue!”, Salon Magazine, August 12, 1999. <http://www.salonmagazine.com/tech/col/rose/1999/08/12/deep_links/> (visited Dec. 9, 1999)

⁴⁷ Echo Station: Exploring Star Wars Beyond The Daily News. “The 500 Pound Wookiee” Page 3. Online at <http://www.echostation.com/features/lfl_wookiee3.htm> (visited Dec 2, 1999)

⁴⁸ See “August 13 – Don’t link or I’ll sue!”, Overlawyered.com, August 1999 [hereinafter “Overlawyered.com”]. <<http://overlawyered.com/archives/99aug1.html>> (visited Dec. 2, 1999) and see also Cisneros, Oscar S. “Universal: Don’t Link to Us”, Wired News, July 27, 1999. <<http://www.wired.com/news/news/politics/story/20948.html>> (visited Dec. 2, 1999)

⁴⁹ Janet Kornblum, EBay attacks ‘deep linking’, USA TODAY, 6 October 1999. <<http://www.usatoday.com/life/cyber/tech/ctg348.htm>> (visited Dec. 9, 1999)

⁵⁰ EBay is claiming to have copyright on the bidding prices, feedback, and other transaction-related information. See Wired News Report, 11.Oct.1999. <<http://www.wired.com/news/business/0,1367,31850,00.html>> (visited Nov. 16, 1999)

⁵¹ Kornblum, *supra* note 49.

⁵² Cisneros, *supra* note 48.

⁵³ “Overlawyered.com”, *supra* note 48.

⁵⁴ Tariff 22 Decision, at 27, point 9.

⁵⁵ The CANCOPY Media release is available at <<http://www.cancopy.com/whatsnew/digital3.pdf>> (visited 27 Nov 1999).

⁵⁶ Hayes, *supra* note 29 (PDF version) at 286.

⁵⁷ Act, s. 2.2 (1).

2.2 (1) For the purposes of this Act, “publication” means

- (a) in relation to works,
 - (i) making copies of a work available to the public,
 - (ii) the construction of an architectural work, and
 - (iii) the incorporation of an artistic work into an architectural work, and
- (b) in relation to sound recordings, making copies of a sound recording available to the public
- (c) the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording, or
- (d) the exhibition in public of an artistic work.

⁵⁸ *Berne Convention for the Protection of Literary and Artistic Works*, last amended on October 2, 1979. Article 3 (3) “... the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.”

⁵⁹ Commission on Physical Sciences, Mathematics, and Applications. *Digital Dilemma: Intellectual Property in the Information Age*. November 1999, at ES-5. <<http://www.nap.edu/books/0309064996/html/>> (visited Dec. 9, 1999)

⁶⁰ *Ibid.*

⁶¹ Gage Canadian Dictionary, Toronto: Gage Educational Publishing Company, 1983, at 908.

⁶² Tariff 22 Decision, at 29 & 34. At 34, “on January 1, 1994, a provision came into force that made it clear that the person who communicates a work does not perform it.” The provision was originally s. 3.4, until 1997 when it was moved to s. 2.3.

⁶³ *Act*, s. 2.3.

2.3 A person who communicates a work or other subject-matter to the public by telecommunication does not by that act alone perform it in public, nor by that act alone is deemed to authorize its performance in public.

⁶⁴ *Ibid.*

⁶⁵ Hayes, *supra* note 43 at 213.

⁶⁶ *TéléMétropole Inc. v. Michel Bishop*, [1990] 2 S.C.R. 467.

⁶⁷ Tariff No. 22 “Transmission of sound recordings embodying musical works and performers’ performances of such works to subscribers via a telecommunications service not covered under tariff nos. 16 or 17”, Supplement of the Canada Gazette, Part I, June 13, 1998, p.11-14.
<<http://canada.gc.ca/gazette/part1/current/g1-13224.pdf>> (visited December 5, 1999)

⁶⁸ *Act*, s. 14.1(1).

⁶⁹ *Ibid.*, s. 14.1(2).

⁷⁰ *Ibid.*, s. 14.2(2).

⁷¹ *Ibid.*, ss. 14.1(2) & 14.1(3).

⁷² *Ibid.*, s. 14.2(1).

⁷³ *Ibid.*, s. 6.

⁷⁴ *Ibid.*, s. 27.(2).

⁷⁵ CAIP Code of Conduct. <<http://www.caip.ca/caipcode.html>> (visited Nov. 25, 1999)

⁷⁶ Tariff 22 Decision, at 47.

⁷⁷ Hayes, *supra* at 18-19.

⁷⁸ *Religious Tech. Center. v. Netcom Online Communication. Services*, 907 F. Supp. 1361 (N.D. Cal. 1995), November 21, 1995.

⁷⁹ *Telecommunications Act*, *supra* note 14, s. 36.

⁸⁰ *Ibid.*, s. 2.(1).

⁸¹ CRTC Final Report: New Media, 17 May 1999. Telecom Public Notice CRTC 99-14 Broadcasting Public Notice, CRTC 1999-84 . “CRTC decision.”
<<http://www.globetechnology.com/crtc/report/broadcast.html>> (HTML format) and also at
<http://www.crtc.gc.ca/ENG/BCASTING/NOTICE/1999/P9984_0.txt> (TXT format, Part 1)
<http://www.crtc.gc.ca/ENG/BCASTING/NOTICE/1999/P9984_1.txt> (TXT format, Part 2)

⁸² *Telecommunications Act*, *supra* note 14, s. 34. It reads:

Forbearance by Commission

34. (1) The Commission may make a determination to refrain, in whole or in part and conditionally or unconditionally, from the exercise of any power or the performance of any duty under sections 24, 25, 27, 29 and 31 in relation to a telecommunications service or class of services provided by a Canadian carrier, where the Commission finds as a question of fact that to refrain would be consistent with the Canadian telecommunications policy objectives.

⁸³ *Ibid.*, s. 2.(1).

⁸⁴ *Ibid.*

⁸⁵ *Act*, s. 2.4(1)(b).

⁸⁶ *Telecommunications Act*, s. 4.

⁸⁷ *Broadcasting Act*, s. 2(1).

⁸⁸ *Ibid.*, s. 4(4).

⁸⁹ CRTC New Media Decision, (17 May 1999), at para. 35.

⁹⁰ *Ibid.*, at para 53.

⁹¹ *Ibid.*, at para 55.

⁹² *Ibid.*

⁹³ CRTC Telecom Public Notice CRTC 98-39 and Telecom Decision 99-4
<<http://www.crtc.gc.ca/INTERNET/1999/8045/02/d99-04.htm>> (valid Dec. 9, 1999)

⁹⁴ *Ibid.*

⁹⁵ Tariff 22 Decision, at 27.

⁹⁶ Hayes, *supra* note 29 at 241.

⁹⁷ Geist, Michael. CYBERLAW: *Vital ruling misses boat on offshore servers*. The Globe and Mail, Report on Business Section, 18 November 1999, at T2.
<<http://www.globetechnology.com/archive/gam/News/19991118/TWGEIS.html>> (visited Dec. 9, 1999)

⁹⁸ SOCAN's application for judicial review, *supra* note 13, points (c) & (d).

⁹⁹ Tariff 22 Decision, *supra* note 11, at 61.

¹⁰⁰ 1998 *Digital Millennium Copyright Act*. <<http://www.lcweb.loc.gov/copyright/legislation/hr2281.pdf>> (visited Dec. 6, 1999)

¹⁰¹ Canadian Association of Internet Providers (CAIP). <<http://www.caip.ca>>

¹⁰² CAIP Code of Conduct. *supra* note 75.

¹⁰³ *Ibid.*, at principles 5, 6 & 7.

¹⁰⁴ *Copyright Amendment (Digital Agenda) Bill 1999*, First Reading, September 1999, p. 10. <<http://www.aph.gov.au/parlinfo/billsnet/99173.pdf>> (visited Nov. 25, 1999)

¹⁰⁵ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, LEXIS 229, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) In the courts reasoning, it held that computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates. It is PRODIGY's own policies, technology, and staffing decision which have altered the scenario and mandated the finding that it is a publisher, and thus liable for the content of posted messages. <<http://www.jmls.edu/cyber/cases/stratton.html>> (visited Dec. 2, 1999)

¹⁰⁶ *1267623 Ontario Inc. et al. v. Nexx Online, Inc.* 45 O.R. (3d) 40. (Ontario Superior Ct. of Justice, 1999)

¹⁰⁷ CAIP Code of Conduct, *supra* note 75.

¹⁰⁸ *Stratton. v. Prodigy*, *supra* note 105.

¹⁰⁹ *R. v. Weir*, [1998] A.J. No. 155. (Alberta Ct. of Q.B.)

¹¹⁰ *Ibid.*