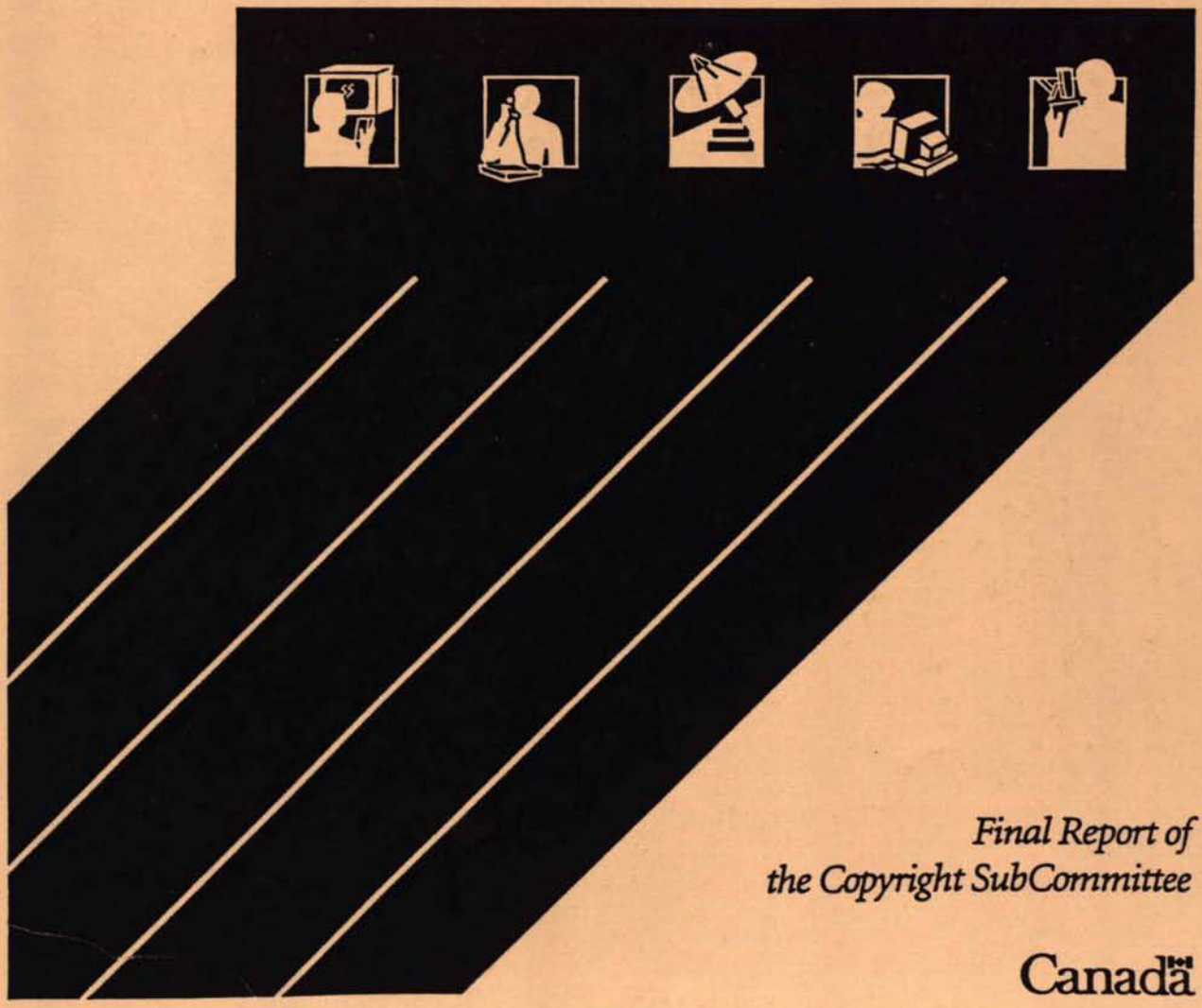
Information Highway Advisory Council

Copyright and the Information Highway

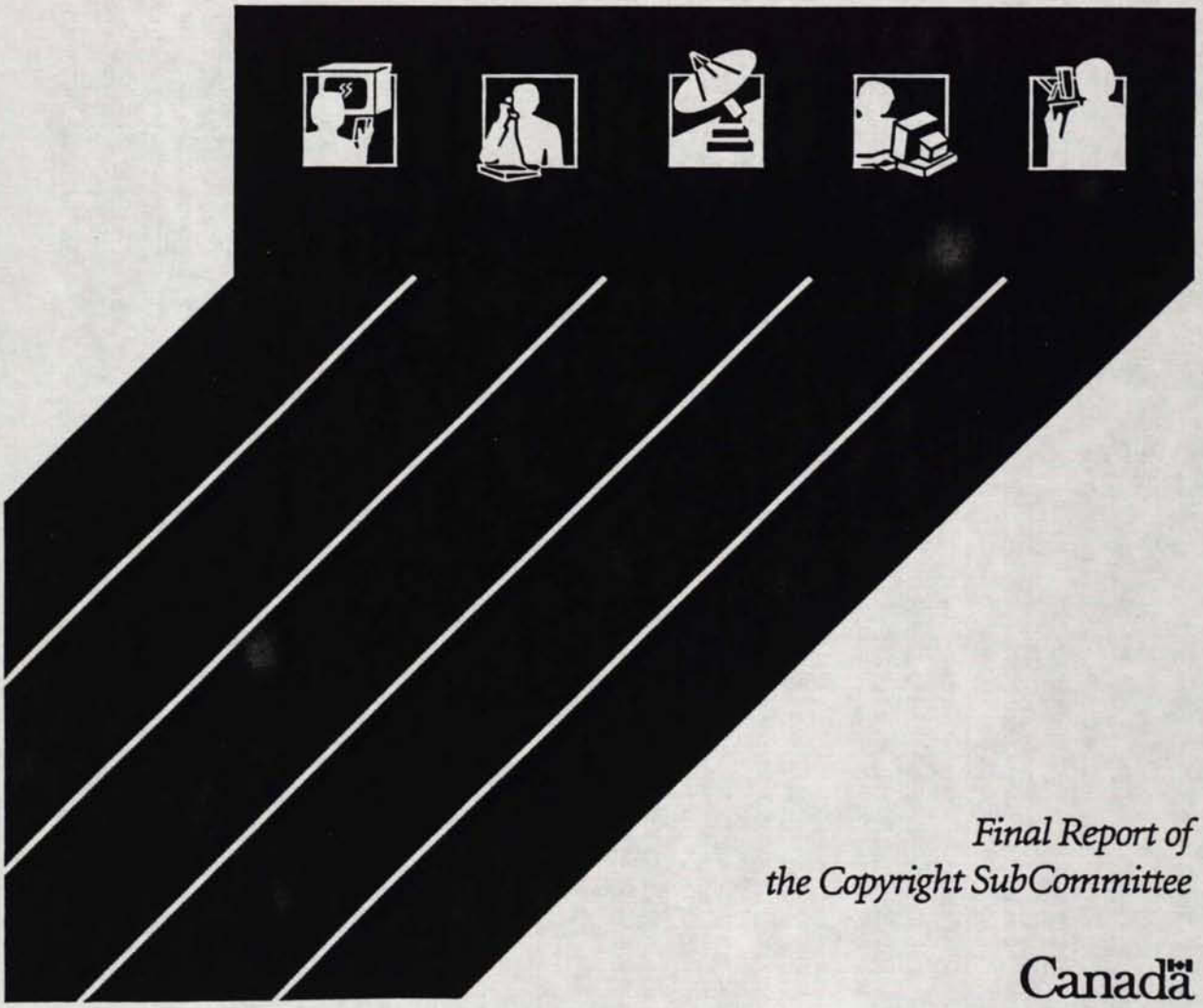


Final Report of
the Copyright SubCommittee

Canada

Information Highway Advisory Council

Copyright and the Information Highway



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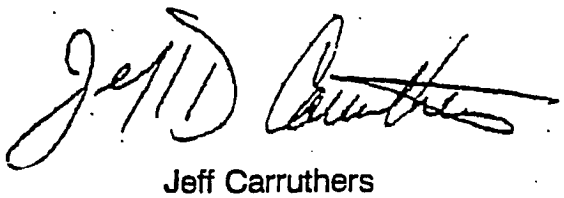
PREFACE

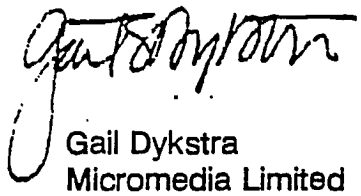
Copyright has typically been the preoccupation of creators and a select group of industry players, government officials and academics. As the world information society opens up with the advent of digital technologies, new issues arise and, as a consequence, we find the number of stakeholders included in the circle of the debate grows increasingly larger. As we move ahead to implement a strategy to build a network of networks, a truly Canadian Information Highway, the debate on the many complex issues surrounding copyright in the digital universe will no doubt continue to be boisterous and widespread.

The Copyright SubCommittee encourages ongoing discussion of these important issues. The intent of this Report is to help focus that discussion by identifying specific copyright issues and offering analysis and recommendations.

Claude Brunet
Martineau Walker
(Chair)

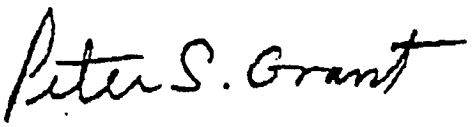


Jeff Carruthers
Globe Information Services



Gail Dykstra
Micromedia Limited

Michael Eisen
Morris Rose and Ledgett



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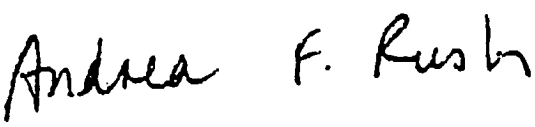
McCarthy Tétrault



Andrea Rush
Gowling Strathy & Henderson

March, 1995

ACKNOWLEDGEMENTS

The Copyright SubCommittee could not have tabled this Report within the timeframe allocated to it without the important work and continuing logistic support of the Advisory Council's secretariat, Canadian Heritage and Industry Canada.

In particular, the SubCommittee is extremely grateful to Alison Taylor who took on the difficult task of organizing the SubCommittee's work and of committing to paper the deliberations and conclusions contained in this Report. Our thanks are also extended to Claude Lafontaine, Brenda Dunbar and Pierre Leduc who made important contributions to the SubCommittee's deliberations.

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CHAPTER 1

INTRODUCTION

The Advisory Council on the Information Highway (IHAC) was formed in March, 1994, by the Minister of Industry, the Honourable John Manley. Chaired by David Johnston, the Council has approximately a one-year mandate to study the issues and make recommendations to government on a strategy to build a Canadian Information Highway. The Council established five working groups: Competitiveness and Job Creation; R&D Applications and Market Development; Access and Social Impact; Learning and Training; and Canadian Content and Culture.

In recognition of the important and complex role of copyright on the Information Highway, the Working Group on Canadian Content and Culture established the Copyright SubCommittee in August, 1994. The mandate of the SubCommittee is to identify the specific issues and make recommendations on the role of copyright in the context of the Information Highway. The members of the SubCommittee were chosen for their particular expertise in copyright from both legal and business perspectives. It is also important to note that the selection criteria for membership was not based on ensuring representation of industry groups but instead, focused on ensuring that a balance was struck between legal and non-legal and that the perspective of both creators and users was taken into account. In reaching its conclusions on the various copyright issues, it became clear to SubCommittee members that this approach proved highly successful as unanimous agreement was achieved on the majority of issues.

The Final Report of the Copyright SubCommittee represents the SubCommittee's examination and analysis of the implications of the new technologies on copyright.

Mandate and Terms of Reference of the SubCommittee

The scope and terms of reference of the SubCommittee were broadly defined. The mandate of the SubCommittee is: "To make recommendations on the ways in which copyright can be used to enhance the Information Highway to the benefit of Canadians."

In defining its terms of reference, therefore, the SubCommittee chose to interpret copyright as meaning more than an examination of legal issues in light of the *Copyright Act*. Policy and administrative issues and current industry practices were also included within the ambit of the SubCommittee's terms of reference. Accordingly, the SubCommittee examined copyright issues from three perspectives: 1) Legal; 2) Policy and 3) Administration.

It was also agreed that for the purposes of examining the impact of new technologies on copyright, any protected work or use of such a work in a digital format that is electronically communicated should be examined in light of the *Copyright Act*.

It is important to note that the SubCommittee does not intend to re-examine the measures being contemplated as part of the Phase II copyright revision process. For example, the SubCommittee considers that the current debate as to whether or not to introduce a right in the broadcast signal is a Phase II issue. Although the SubCommittee does not wish to revisit issues being dealt with in Phase II, it nevertheless recognizes that there may be some overlap.

Given comments made in the submissions received in reaction to the SubCommittee's preliminary report, the SubCommittee wishes to state that it considers the conduct of a review of copyright principles to be outside the scope of its mandate. Further, the SubCommittee is aware of other, more appropriate, forums in which the underlying philosophy of copyright can be discussed.

It should also be noted that the SubCommittee confined itself to copyright, that is, the protection of literary, dramatic, musical and artistic works, and does not examine patent and trademark matters. This approach is consistent with the focus in the Industry Canada booklet and the SubCommittee is in agreement that copyright raises the major new issues requiring attention.

In formulating its recommendations, SubCommittee members agreed that a balance should be struck between the needs of creators and users. On the one hand, creators are concerned about the unauthorized use, reproduction and alteration of their works in a digital medium and feel there are currently no effective means by which to ensure fair remuneration and adequate protection of their rights. On the other hand, users should have reasonable access to new products and services in order to ensure that a viable and healthy commercial marketplace continues to exist.

Issues

Copyright has played a critical role in the development of healthy indigenous cultural industries. Since the *Copyright Act* came into force in 1924, copyright has functioned as an essential economic lever for Canadian creators and, as well, has been instrumental to the realization of Canadian cultural sovereignty and Canadian identity.

The new technologies, including digitization and interactivity, have provoked a wide public debate as to how copyright should be enforced on the Information Highway. While many have recognized the need to clarify the rules of the road for copyright, precisely what those rules should be has not been clear. The potential for piracy or unauthorized use and reproduction of copyright protected works and its consequent economic repercussions are of key concern to creators and producers. On the other hand, the importance of streamlining the procedures for rights clearance and a full understanding of the nature and extent of copyright liability are critical for users, service providers and distributors of protected works on the Information Highway.

The SubCommittee drew on a number of sources to develop a comprehensive list of issues. As a starting point, the SubCommittee referred to the Industry Canada discussion paper `The Canadian Information Highway: Building Canada`s Information and Communications Infrastructure` (April, 1994). A key objective of the publication was to raise, in very broad terms, the issues that government and industry players must address in order to adapt to the new technologies and build a `network of networks` into a truly Canadian Information Highway. Copyright was identified as a critical issue affecting the development of new products and services for Canada`s information highway. The list of issues identified by the SubCommittee take into account all the questions raised in the Industry Canada discussion paper.

In addition, the SubCommittee referred to a wide variety of reports and studies, including for example, the NGL Nordicity Study on New Media and Copyright, the U.S. Green Paper on Intellectual Property and the National Information Infrastructure (the "Lehman" Report) and the Report of the Japanese Institute on Intellectual Property. [1] Finally, the SubCommittee members themselves identified issues as a result of informal discussions with various industry groups. The resultant list of issues (Appendix A) is, in the view of the SubCommittee, comprehensive and represents the concerns of both users and creators, industry and government.

Broadly speaking, the questions that have been raised in a wide variety of forums have included: How will existing rights apply to the creation, transmission and use of works in a digital environment? How will the moral rights of creators be protected? Who should be made liable for copyright infringement? How can we track the use and reproduction of protected works for the purposes of enforcement? And how can the process of clearing rights, particularly for multimedia works, be streamlined?

Over the course of its deliberations, it became evident to the SubCommittee that many of the issues presenting the greatest difficulty were not, as some might expect, legal or policy related, but administrative or technical in nature. That is, the enforcement of copyright and the clearance of rights, from a practical perspective, are viewed by the industry as important problems that must be addressed if a truly Canadian Information Highway and the creation of new Canadian products and services in a digital medium are to be realized.

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1 See, for example:

"New Media and Copyright", NGL Nordicity Ltd., Study produced for Industry Canada, April, 1994.

U.S. NII Green Paper, "Intellectual Property and the National Information Infrastructure", Preliminary Report of the Working Group on Intellectual Property Rights, July, 1994.

"Exposure '94: A Proposal of a New Rule on Intellectual Property for Multimedia", Japanese Institute for Intellectual Property, February, 1994.

Proceedings of the WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighbouring Rights, Harvard University, March 31-April 2, 1993.

Equally important is the need to educate both users and creators on the role of copyright on the Information Highway. Accordingly, the SubCommittee recommends, that the federal government, in partnership with industry and creator and user communities, consider launching a public education campaign to better inform both creators and users on the application of copyright on the Information Highway.

Overall, the SubCommittee concluded that the current *Copyright Act* provides sufficient protection for new and existing works, including multimedia works, that are created or distributed in a digital medium. The SubCommittee also concludes that, for the most part, the current copyright legislative and policy framework is sufficiently flexible to provide the means of effectively enforcing copyright on the Information Highway and, at the same time, providing users with reasonable access to protected works.

The Copyright SubCommittee had four months within which to formulate its recommendations and was requested to report back to the Working Group on Canadian Content and Culture and the Advisory Council with its preliminary findings in December, 1994. There followed a public consultation process during which interested parties, including industry groups and members of the other Advisory Council working groups, were given the opportunity to make their views known on the draft Report in the form of written submissions. The SubCommittee received a total of 55 written submissions from a broad range of interested parties representing both users and creators (see list of submissions in Appendix C). The members of the SubCommittee wish to thank all parties for their comments and note that the majority of submissions expressed generally strong support for the SubCommittee's conclusions and recommendations.

The final version of the Report, which takes into account comments made as part of the public consultation process, is herewith submitted to the Advisory Council on the Information Highway.

CHAPTER 2

GENERAL RECOMMENDATIONS

* Action on copyright reform is critical and the federal government should move to accelerate the introduction of Phase II amendments to the *Copyright Act*. Any amendments should be technology-neutral in order to take into account future technologies.

  Where Phase II includes issues that have an important impact on the Information Highway, such issues should be studied in light of the recommendations made by the Copyright SubCommittee and the Advisory Council as a whole.

* The federal government should review its role as a user of information as well as a holder of intellectual property rights with a view to establishing itself as a model for copyright use.

* Government should take a greater leadership role as an educator of industry and of the creator and user communities on the critical importance of copyright to the Canadian economy, to job creation and to cultural sovereignty.

* A permanent mechanism should be established to ensure that the *Copyright Act* is under regular review and revision in order to adjust to a rapidly changing environment. One such mechanism could be a Parliamentary Standing Committee with a specific mandate to be responsible for copyright matters.

* Canada's future copyright reforms should take into account international developments and trends in respect of new technologies and the Information Highway.

CHAPTER 3

CATEGORIES OF WORKS

ISSUE 1

Are there categories of works that are communicated electronically that are not subject to the current Copyright Act and which may not be made accessible on the Information Highway due to a lack of protection?

DISCUSSION

The Information Highway and new digital technologies have made possible new applications and new types of works. Among the foreseeable impacts on copyright is the ability to generate perfect copies of protected works on a massive scale and the possibility of altering the materials in ways which had not been contemplated by the original author. The issue of alteration or derogation of a work and the consequent implications for moral rights are dealt with separately in this Report.

While the rules of navigating on the highway are not yet fully understood, the producers of certain new digitized works have begun to consider *sui generis*[2] protection as separate legal protection, for all works in a digital form. This view may in part be a result of the belief that the digitization of works is in effect creating a new category of protected work.

The SubCommittee is of the view that the digitization of works does not in itself constitute the creation of new works falling outside the ambit of the *Copyright Act* but constitutes the expression of copyright subject-matter in a different format. Given that the *Copyright Act* protects original works "whatever may be the mode or form of their expression", the SubCommittee is not persuaded that a *sui generis* right for works in a digital format is necessary. The majority of the submissions of interested parties, whether representatives of users or creators, agreed with all the recommendations of the SubCommittee in regard to categories of works.

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2 As referenced in the NGL Nordicity Study, 'sui generis' is defined in the Oxford dictionary as "of its own kind, unique". In this context, the idea is the creation of a separate statute to embody copyright in a particular type of work, in this case, multimedia works.

RECOMMENDATION

- The SubCommittee is unaware of any new categories of works which would not fit within the existing definitions of `literary`, `artistic`, `dramatic`, `musical` work as currently contained in the *Copyright Act* and as these works are understood under the laws of other countries in which the Berne Convention is applied.

ISSUE 2

Are multimedia works adequately covered by the definition of 'work of compilation'? If multimedia works must be defined separately in the Copyright Act, how should they be defined?

DISCUSSION

In many jurisdictions, consideration is being given to creating and defining a new category of work, called `multimedia` works. The NGL Study on New Media and Copyright, produced for the Department of Industry, reviewed a number of options, including introducing a 'sui generis' right for multimedia works.

The concept of a multimedia work is not new. Films incorporate moving images with sound; published works incorporate photographs with text. These works embody different works, or portions of works, often created in different mediums, in a single new medium. Therefore, the fact that multimedia works can be embodied in a digital format is not an issue. Similarly, the interactive nature of a multimedia work is not, in itself, sufficient to warrant consideration as a new category of work. Although the interactive feature of the multimedia work, as a component of that work, would be protected as computer software, it would not by itself define the nature of the work as a whole.

For the purposes of copyright protection, multimedia works can be considered to be compilations. The fact that multimedia works are expressed in a digital format is not relevant since the definition of compilation is silent on this and is therefore technology-neutral. However, there is a need for increased and widespread understanding of the use of "compilation" to cover multimedia works by creators.

The majority of responses either agreed with the position taken by the SubCommittee or did not comment on this issue.

RECOMMENDATIONS

- The SubCommittee is of the view that existing copyright legislation rather than *'sui generis'* legislation should continue to be the source of protection for multimedia works.

- The definition of "compilation" contained in the *Copyright Act* is sufficient to embrace multimedia works.

ISSUE 3

Should works be defined separately or, for the purposes of being technology-neutral, should separate categories of works be eliminated? And if so, should this be done only in respect of digitized works on the Information Highway?

DISCUSSION

The SubCommittee sees no reason to eliminate the separate categories of works for the purpose of being technology-neutral. The rights as currently described in the *Copyright Act* are not meant to be expressly applied to any particular technological medium and provide sufficient flexibility for works in a digital environment.

RECOMMENDATION

- The SubCommittee is of the view that the current categories of works contained in the *Copyright Act* sufficiently identify works produced and used in a digital environment and should not be amended or eliminated.

CHAPTER 4

USE OF WORKS

ISSUE

When do existing rights apply? Does the nature of copyright protection have to be changed to address the use of works on the Information Highway?

ECONOMIC RIGHTS

(a) Reproduction

A copyright owner has the exclusive right to "produce or reproduce the work or any substantial part thereof in any material form whatever" [s. 3(1)]. Therefore, a work would be subject to the reproduction right where it is electronically reproduced. A fixed copy is considered to be reproduced when it is downloaded from a BBS to a hard drive, disk or any other storage device. Further, it is the SubCommittee's view that accessing a work constitutes a reproduction. (A fuller discussion of this issue can be found on page 13).

(b) Communication to the Public by Telecommunication

A copyright owner has the exclusive right "in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication" [as qualified by the retransmission regime established in s. 28(1)]. The right to communicate to the public encompasses transmissions of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic systems. In plain language, it covers the transmission of a work via cable, radio, satellite and telephone wires where such a transmission is made to the public.

An issue of interest is the extent to which the phrase "to the public" embraces communications to subscribers on the Information Highway. Point-to-point e-mail between two individuals, even where it includes a copyright work, is not a communication of that work to the public, or a performance of the work in public. However, the downloading of a protected work contained in the e-mail transmission is subject to the right of reproduction.

If a work is placed on a computer "bulletin board", so that it is communicated to any member of the public that wants to dial in and read the work, then, in the view of the SubCommittee, the exclusive right of the copyright owner of the work to communicate the work to the public would be infringed if this is done without permission.

Some parties suggested that the meaning of 'to the public' should be clearly defined in the Act. The SubCommittee is of the view that the phrase "to the public" must be interpreted to include transmissions such as those described above, even though each member of the public may receive the transmission at different times and at their own convenience. The case law to date has not expressly addressed this issue, however, and any narrowing of this concept by judicial interpretation should be addressed in suitable amendments to the *Copyright Act.*

(c) Performances in Public

The public performance right refers to performances of a work or any substantial portion of a work in public. [s. 3(1)] A performance is defined as "any acoustic representation of a work or any visual representation of a dramatic work, including a representation made by means of any mechanical instrument, radio receiving set or television receiving set." [s.2] In this context, the Federal Court of Appeal has held recently that cable operators in transmitting works to subscribers in their private residences are nonetheless performing such works "in public".

(d) Publication of a Work

Generally, the publication right refers to making copies of a work available to the public for the first time, but does not include the performance in public of a literary, dramatic, or musical work, the delivery of a public lecture, the communication of a work to the public by telecommunication, or the exhibition in public of any artistic work. [s. 3(1) and s. 4(1)] Again, 'to the public' is not defined in the *Copyright Act.*

It is the view of the SubCommittee that electronic transmissions resulting in the making of copies available to the public constitute a publication.

(e) Public Exhibition

A copyright owner has the exclusive right "to present at a public exhibition, for the purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan." [s. 3(1)(g)] This right is much more limited than the U.S. display right which includes the right to publicly display literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic or sculptural works.

The SubCommittee is of the view that the public exhibition right could play an important role on the Information Highway and that it may become necessary to revisit the scope of this right in the future as it may serve as the public display right found in U.S. law.

(f) Rental Right

On January 1, 1994, in compliance with NAFTA, Canada introduced a commercial rental right for computer programs and sound recordings. There is no rental right in the case of audiovisual works, including movies.

It is important to note that, in the SubCommittee's view, having regard to current technological capabilities, the activity of 'rental', that is of renting a copy of a work, is not yet possible on the Information Highway. Rental is the transfer of a particular copy from person A to person B. This does not occur on the Information Highway. The transmission of a work results, rather, in the making of an additional copy of a work by person B. In other words, accessing a work constitutes a reproduction and not the rental of an original copy.

However, the ease of digitization and the increased avenues for distribution will put more copies of works in the hands of more users, thereby increasing the possibility of unauthorized commercial rental activity outside the scope of the Information Highway proper. It is for the reason noted above that the SubCommittee does not view it as relevant to extend the rental right to other works, including multimedia works, in the context of works that are transmitted on the Information Highway.

Currently, infringement of the rental right gives rise to civil remedies. The SubCommittee originally recommended that criminal sanctions should apply. Upon review, it has been concluded that this may not be an Information Highway issue per se. Consideration should still be given to tightening the statutory language to clarify that the rental right cannot be circumvented by transactions such as 'restocking fee' shams which are in effect commercial rental activities. As a number of submissions indicated, statutory damages will become increasingly important as technology develops. Accordingly, the provisions for statutory damages based on the U.S. model originally recommended should be added to the civil remedies available to copyright owners generally and not confined to infringing rental activity.

g) Importation

The SubCommittee received submissions requesting that importation be clarified so as to include importation by electronic means. In the view of the SubCommittee, electronic importation is not possible, as a practical matter, since the transmission of a work from point A to point B constitutes the making of an additional copy with the original or a different copy of the work remaining at point A.

RECOMMENDATIONS

Communication to the Public by Telecommunication:

- The SubCommittee is of the view that the right embraces the communication to the public of material regardless of whether that material is made available on an 'on-demand' basis. If further consideration establishes that this is not clear, the *Copyright Act* should be amended to provide clearly that a communication offered to the public by means of telecommunication is subject to the authorization of the copyright owner, even where such communication is made on-demand to separate users.

Rental Right:

- The statutory language of the *Copyright Act* should be tightened to impede or prohibit hidden and unauthorized acts of commercial rental in the case of computer programs and sound recordings.

Copyright Protection Generally:

- There should be introduced provisions for statutory damages based on the U.S. model.

ISSUE

Should 'browsing' be permitted as a use of works in the Information Highway?

DISCUSSION

The Information Highway promises easier and broader access and reproduction of books, artwork, music, films, videos, live and recorded music and other works. Creators are concerned that despite the potential for easier access, their royalty share will stagnate. Users, in contrast, are concerned that each time they access a work, in whole or in substantial part, for the purposes of determining whether they would like to use it, they will be infringing copyright. Specifically at issue here is the right of reproduction. Users are concerned that 'browsing' through a database may constitute a reproduction and entail costs that would not normally be associated with perusing reference works in a traditional library.

Within the current copyright framework, the issue is whether browsing entails the making of a copy and/or the communication of the work to the public. The SubCommittee is of the view that browsing on the Information Highway entails the making of a copy; in order to browse, the work must be accessed. It is the SubCommittee's view that any act of accessing a work constitutes a reproduction, even if it is a temporary or ephemeral fixation. As such, browsing a work or a substantial portion of a work is subject to the right of reproduction.

Those responding to the SubCommittee had widely divergent views of the definition of 'browsing'. Some parties included as 'browsing' the ability to freely sample any database and extract information, as long as the data was not downloaded to a hard drive or printed. Others felt that viewing video or multimedia productions constituted 'browsing'. However, the creator community and information industry consistently stated that browsing constitutes an act of reproduction and is subject to the reproduction right.

In their response to the SubCommittee's draft report, some parties expressed the concern that if browsing is considered a reproduction, it would unnecessarily fetter users' ability to access and use works on the Information Highway. The SubCommittee is of the view that the limitation to users' ability to access works is not, in the context of browsing, a major issue. Copyright owners are able to authorize, in advance, the reproduction of their works in a digital environment and negotiate fees accordingly. It should be left to the copyright owner to decide whether and when browsing should be permitted and what, if any, economic value should be attached to the act of browsing.

Other parties accepted that browsing constituted a reproduction of a work but argued that the fair dealing defence should be applicable or required specific criteria. The SubCommittee reviewed the application of the fair dealing defence and whether, if it was

found to be relevant, provision should be made to clarify the jurisprudential criteria for fair dealing for works on the Information Highway.

The SubCommittee has concluded that the fair dealing defence will not, in most cases, be useful. For the most part, the copyright owner will have authorized the reproduction of a work transmitted electronically, including for the purpose of browsing. For those limited cases in which a work is placed on the Information Highway without authorization for browsing, the fair dealing defence may very well be available to the user. But the SubCommittee is not convinced that such rare instances warrants a change in the fair dealing provisions in the Act. A more detailed discussion of fair dealing can be found in Chapter 9.

RECOMMENDATION

- The act of browsing a work in a digital environment should be considered an act of reproduction.

ISSUE

What is the copyright liability with respect to carriage of protected works?

DISCUSSION

Section 3.1(3) of the *Copyright Act* explicitly exempts common carriers (e.g. telcos) from copyright liability where they function solely as a common carrier: "...a person whose only act in respect of the communication of a work to the public consists of providing the means of telecommunication necessary for another person to so communicate the work does not communicate that work to the public."

At issue is whether service providers, that is those that distribute the work to the public, are liable for the unauthorized communication of the work to the public.Although no case law currently exists in Canada that relates directly to this issue, the U.S. courts have rendered a number of decisions in respect of determining liability of a service provider for the unauthorized use of a protected work. In Playboy Enterprises Inc. v. Frena, subscribers of a bulletin board service (BBS) in Florida uploaded photographs which originally appeared in Playboy Magazine. Numerous other subscribers to the service subsequently downloaded the photographs. Playboy sued the operator of the bulletin board system alleging copyright infringement. In its decision, the U.S. court held that the bulletin board system infringed the magazine's copyright in the photographs by distributing the works. Given the particular facts of that case, the court held the operator of the bulletin board liable even though the operator claimed no knowledge of the fact that the photos had been so distributed. The ruling further determined that the bulletin board operators had infringed the copyright owners' exclusive right to distribute the work to the public. Further, the courts considered and rejected the BBS operator's claim to use the 'fair use defence'.

Some parties requested that the definition of common carrier in the *Copyright Act* should be revisited with a view to determining whether and when it should apply to service providers, such as BBS operators, operating on the Information Highway. The SubCommittee recognized and debated the many points of view on this issue. There were those parties who strongly advocated that the common carrier exemption should apply to service providers and there were other parties who argued that, regardless of the nature of the service, there should be copyright liability for the content carried.

The SubCommittee considers that electronic bulletin board operators are liable for copyright infringement since they are not common carriers. However, a defence mechanism should be provided for those instances where it can truly be demonstrated that the copyright has been knowingly infringed.

RECOMMENDATION

- Liability on owners and operators of electronic bulletin board systems (BBS), since they are not common carriers, should be imposed. However, a defence mechanism should be provided for those instances where it can be demonstrated that they did not have actual or constructive knowledge of the infringing or offensive material and where they have acted reasonably to limit potential abuses.

CHAPTER 5

MORAL RIGHTS

ISSUE 1

Given the ease of manipulation of works in a digital environment, what is the impact on moral rights, particularly the right of integrity? Should the right of integrity be made subject to a waiver?

DISCUSSION

Once in a digital format, literary, dramatic, musical and artistic works can be easily manipulated or altered. For example, consider a photograph wherein each individual element can be re-coloured, removed, displaced or distorted without any visible trace that the photograph has been changed. In many cases, it is precisely the potential to alter, reproduce or otherwise review a work that makes the digital world so attractive.

Will these activities be curtailed or unnecessarily limited by an excessive enforcement of the moral right of integrity? If so, should moral rights of creators be abolished? Conversely, will authors refrain from authorizing the reproduction of their works in a digital format for fear of allowing them to be so easily modified?

Right of Integrity

The right of integrity is found in S. 14.1(1) of the *Copyright Act.* According to s.28.2, it is considered infringed only if the work is,

> *to the prejudice of the honour or reputation of the author,*
> *a) distorted, mutilated or otherwise modified; or*
> *b) used in association with a product, a service, cause or institution.*

The prejudice to the author's honour or reputation is deemed to have occurred where a painting, sculpture or an engraving has been modified without permission.

However, there is no automatic infringement of the right if the location of the work, the physical means by which it is exposed or the physical structure which contains it have been altered. Similarly, restoration in good faith does not, of itself, constitute an infringement of the right.

The right of integrity is attached to the honour and reputation of the author. To remedy an alleged infringement, the author must therefore show that his reputation has suffered from the modification. This is akin to an action in defamation. It would appear

difficult to justify that a defamation of the author could be permissible where it occurred by electronic means, when it would not be so justified if the defamation occurred through conventional means. Creators have enjoyed the moral right of integrity since the enactment of the original *Copyright Act*, but court actions of infringement of the right have been extremely rare.

It would therefore appear that the perceived danger to the liberal use of digital technology is not well founded. At the same time, it would appear unwarranted to remove this 'check and balance' that has provided creators with a sense of security for many years.

There remains, however, the difficulty of the presumption of prejudice where the work involved is a painting, sculpture or engraving. The debate that led to the introduction of the particular provisions to govern moral rights in these works centred upon the mutilation of originals of paintings, sculptures and signed, original lithographs. The perceived problem at that time, was the need to ensure that the history of art be preserved. The amendment, which was adopted in 1988, failed to retain the distinction. However, insofar as the original intent should be preserved, it seems excessive to allow a creator to prevent any modification, including modifications that are not prejudicial to his reputation, of a copy of an artistic work which happens to be a painting, a sculpture or engraving. The right of reproduction appears to be sufficient to protect the interests of authors in this respect.

Waiver of Moral Rights

Moral rights cannot be assigned, but their exercise can be waived in advance by the author. A number of submissions received by the SubCommittee recognized that authors have decried that possibility and are still extremely sensitive to the issue. The debate is ongoing as part of the Phase II copyright revision process. The issue, therefore, is one that should properly be addressed in the context of Phase II rather than in the context of recommendations to the Information Highway Advisory Council.

RECOMMENDATIONS

The SubCommittee recommends that:

- The moral right of integrity should be maintained;
- The presumption of prejudice should be brought back to its original intention, namely where modification is that of an original;

ISSUE 2

Can the moral rights of the author be adequately enforced on the Information Highway?

DISCUSSION

Because of the interactive nature of the digital medium, it will be extremely difficult for an author to be aware of modifications to a work that could be prejudicial to that author's honour or reputation. Those who make their works available will be at risk both in respect of their reputation and in respect of their economic interests. The SubCommittee acknowledges the concern expressed by some parties that, in a digital environment, it may be difficult to ensure the original of a work can be identified.

The problem is one that is rooted in technology rather than in law. To assume that it will be impossible to monitor the use of works on the Information Highway is incorrect; where there is an interest in using new technologies, a way of using it that is in the interests of most parties will likely be found. Encryption and other technical solutions for preserving the original of a work are becoming easier to use and more widely available to authors of a work in digital form. In any event, removing or altering the legal framework because technological development may prevent the enforcement of rights in practice, is pushing the issue in the wrong direction. Maintaining the system of rights that enables creators to control the use of their works should help ensure that a manageable system of enforcement will be developed. The history of copyright has shown that copyright owners have been able in the past to devise systems that allow them to benefit from the use of their works, either by way of sampling, blanket licenses or full-fledged monitoring, while allowing users to make full use of those works.

RECOMMENDATION

- The legal framework governing copyright should ensure, rather than curtail, the development of systems to monitor the uses of copyright on the Information Highway.

ISSUE 3

Are there categories of works that should be covered by moral rights but exempt from economic rights?

DISCUSSION

Some have argued that certain works should be made freely and widely available to the public but which, because of their particular nature, should at the same time be preserved from modification. Examples of such works are laws, regulations and judicial decisions, official statistics and health and safety information. The public interest would appear to lie both in the free availability of such works and in their remaining intact with their sources clearly identifiable. If one were to agree with this approach, the public interest would be best served by a regime of moral rights rather than a regime of economic rights.

This issue is already before us in the current technological environment but is exacerbated by the prospect of a global information society. In the end, it may be less of a copyright issue but rather one of responsibility for the use of unauthorized modifications of such works. The penalties currently provided in this regard in the *Act* may well be sufficient deterrents to the unauthorized tampering of works.

Moreover, the availability of modified versions of such works of public interest as those works mentioned above does not prevent that a 'true original' be maintained for verification purposes. It is in this light that, in the following chapter dealing with Crown copyright, the SubCommittee addresses more fully the issue of public domain for certain governmental works.

RECOMMENDATION

The SubCommittee recommends:

- The possibility of affording certain works a regime of protection limited only to moral rights should not be considered.

CHAPTER 6

CROWN COPYRIGHT

ISSUE

Should the Crown continue to claim copyright ownership for works disseminated on the Information Highway or should works of the Crown be put in the public domain?

DISCUSSION

The use of, and access to, government information will increasingly become an issue as the Information Highway is developed. Placing public information, such as basic health and welfare information, statistics and legal documents, in the public domain should be an essential principle. In this regard, the SubCommittee is of the view that universal, equitable and affordable access to public information should be technology-neutral and should be unaffected by the storage medium. In this broader context, the government should adopt a more flexible approach that recognizes its accountability in respect of the dissemination of government information and provide the public with basic information it requires to make decisions about health, welfare and business. Further, policy regarding access to government holdings should apply equally to all information, regardless of the medium in which it exists.

Currently, federal crown copyright policy requires prior permission to reproduce documents. This policy, however, is not uniformly applied. As a policy, it can be altered without public consultation. The SubCommittee also recognizes that if Crown copyright were more strictly enforced, it would create an unnecessarily cumbersome and costly administrative process.

Ensuring universal and easy access to public information on the Information Highway does not, in the SubCommittee's view, require the abolishment of Crown copyright. A more flexible approach to public information and the recognition of the principles of accountability and affordable access can be balanced with recognition of the right of government to create information products for which revenue should be received. The copyright of the Crown in right of Canada should be retained while concurrently the federal government should make a greater effort to place more government information in the public domain which requires neither prior permission nor payment. Crown copyright should be retained in order to ensure that where necessary to justify costs, the government retains the ability to generate revenues.

In 1991, Treasury Board established a policy for use of intellectual property created through contractual relationships. Under the 1991 IP, the presumption is that the contractor should keep the intellectual property, subject to certain exceptions. The intent of the policy is to give the contractor the opportunity to properly commercialize the technology or product. The SubCommittee agrees with the concerns expressed in some of the submissions that this policy is not uniformly applied and strongly recommends that the federal government take steps to reinforce the application of the policy. The review of the IP Policy planned for 1995 should take into account the concerns raised by many interested parties to this Report as the review of this Treasury Board policy will have an impact on the use and commercialization of Canadian technology on the Information Highway.

Canada's Information Highway should be used to improve the public's access to government information and serve as a conduit for Canadian citizens' use of government information sources to create an information-based economy. The SubCommittee is pleased to note the near unanimous support for the recommendations on Crown copyright. Further, the SubCommittee notes the suggestion made by some parties to clarify the difference between Crown copyright and Crown prerogative. It should be noted that the discussion embraces both.

Many of the written submissions suggested that the discussion and recommendations governing Crown copyright include works of the Crowns in right of the Provinces. The SubCommittee is not recommending the outright abolition of Crown copyright. On the other hand, it is unclear that federal jurisdiction over copyrights would include the determination of the administrative policies of the Provincial Crowns in respect of their own copyrights. The SubCommittee is therefore of the view that it would be beyond its mandate to make any specific recommendations in this regard but expresses the hope that Provincial Crowns will take this opportunity to re-evaluate their policies.

Furthermore, it should be made clear that where Crown copyright is asserted for generating revenue, licensing should be based on the principles of non-exclusivity and the Crown should recover no more than the marginal costs incurred in the reproduction of the information or data (except information or works produced by Crown agencies or corporations such as the CBC or the National Film Board).

RECOMMENDATIONS

- Crown Copyright should be maintained;
- The Crown in Right of Canada should, as a rule, place federal government information and data in the public domain;

CROWN COPYRIGHT CONT'D

- Where Crown copyright is asserted for generating revenue, licensing should be based on the principles of non-exclusivity and the recovery of no more than the marginal costs incurred in the reproduction of the information or data (except information or works produced by Crown agencies or corporations such as the CBC or the National Film Board).

CHAPTER 7

DISTRIBUTION RIGHT

ISSUE

Are there any new rights that should be introduced with respect to the Information Highway? For example, should there be an electronic distribution right to cover the transmission of digital works?

DISCUSSION

The Canadian *Copyright Act* does not contain an electronic distribution right as such apart from the more limited right "to communicate to the public by telecommunication" which is discussed earlier. The *Act* does give the copyright owner a right of first publication (making copies of a work available to the public) but that right is limited to the first publication of the work. Further distributions of works are not within the control of the copyright owner, once the first publication of the work has been authorized.

This is somewhat qualified by the fact that distributions of unauthorized copies of a work may be prevented in that such distributions constitute an 'indirect infringement' of copyright.

On the other hand, as noted above, the U.S. *Copyright Act* contains a right of distribution which is "exhausted" once the first distribution has occurred (known as the 'first sale doctrine'), other than in regard to importation. In the U.S. NII Green Paper on Intellectual Property, it is recommended that the distribution right be amended to include distribution by electronic means. This is required because, unlike the Canadian Act, the U.S. law does not contain a right of communication to the public by telecommunication. In the U.S., much discussion has centred on that proposal with the result that the debate has trickled northward into Canada.

The Canadian right "to communicate to the public by telecommunication" is such that the electronic transmission of works to the public are clearly within the domain of the copyright owner. Therefore, there is no need for Canada to amend its Act to introduce a distribution right in order to cover the electronic transmission of works.

RECOMMENDATION

- An electronic distribution right should not be introduced in the *Copyright Act*.

CHAPTER 8

OWNERSHIP

ISSUE

Should the U.S. principle of "first sale" apply? If so, in what circumstances?

DISCUSSION

The issue is imported from the U.S. where the copyright law includes a 'distribution right'. If copyright in Canada were to include a distribution right, the copyright owner could theoretically prohibit any transmission of a work, including a redistribution of those copies of a work which the owner had previously authorized to be in circulation. For example, a copyright owner could prohibit the re-selling of a book by a consumer who had lawfully acquired that book. In the context of the Information Highway, it is feared that works made available would not circulate as freely as the technology permits if the rightful owner of a copy of a work cannot make that copy available to other users.

In order to prevent such a situation, the U.S. developed what is known as the 'first sale' doctrine which holds that the distribution right is 'exhausted' with its first use. It must be clearly understood that the 'first sale doctrine' does not apply to acts of reproduction or importation. The 'first sale doctrine' is merely a necessary adjunct to a right of distribution. If that right is not contained in Canadian law, there is no need to consider introduction of the 'first sale doctrine'.

RECOMMENDATION

- As an electronic distribution right is not recommended, it is further recommended that the first sale doctrine not be introduced as it is merely a necessary adjunct to the right of distribution.

CHAPTER 9

FAIR DEALING

ISSUE

Since the U.S. is examining its 'fair use' provisions, should Canada also review the scope of its 'fair dealing' provision and its relevancy to digital works?

DISCUSSION

a) Fair Dealing

The *Copyright Act* contains a number of exceptions to the exclusive rights of copyright owners. When an act with respect to a work falls within one of these exceptions, there is no copyright infringement, even though the act itself had not been authorised by the copyright owner.

Fair dealing is not an exception to the rights of copyright owners. It is designed to be a valid defence for users in cases where an infringement has occurred. The usefulness of the fair dealing defence is that it can be raised in any situation of infringement. It is a window on equity in what would otherwise be a mere black and white situation. It can only serve its purpose if it remains vague enough to be invoked in a variety of unforeseen situations. Clarity is the domain of exemptions; vagueness is the domain of this equitable defence.

Fair dealing is most often discussed in respect of an infringement of the right to reproduce, although it is designed to be invoked in respect of the infringement of any of the copyright owner's exclusive rights.

To understand the mechanics of the fair dealing defence, an example may be useful on the basis of an infringement of the right to reproduce.

The copyright owner has the exclusive right to reproduce his work (i.e. the totality of the work) or 'a substantial part thereof'. The copyright owner has no right to control the reproduction of a non-substantial part of his work. Thus, quotations are allowed under the *Copyright Act* not by virtue of an exemption, nor by virtue of fair dealing, but because the copyright owner does not have the right to prevent the reproduction of a non-substantial part of a work.

Where, without authorization, a substantial part of a work has been reproduced, there is a situation of infringement. This is where the fair dealing defence comes into play.

The defence will prevail where the infringing reproduction is proven to have been a "fair dealing" for certain purposes.

The test is three-fold and is generally the subject of much confusion. Firstly, the infringement must have been a 'fair dealing'. Secondly, the fair dealing must have been for specific, listed, purposes. Thirdly, where the infringement occurred for the purposes of criticism, review or newspaper summary, the source and the author's name if given in the source must be given in the criticism, review or newspaper summary.

There is a general confusion that a dealing with a work is fair if it is done for the purposes listed in the Act. Such is not the law. The dealing must first be fair and then, and only then, must be for the purposes listed in the Act.

What, then, is a 'fair' dealing with a work?

Canadian decisions on this point are rare but Canadian courts appear to have decided that one could not deal fairly with an unpublished work. They have also decided, in at least one instance, that the reproduction of the totality of a work was not a fair dealing, irrespective of the purposes of the reproduction. Thus, the defence is presently available where the work reproduced had previously been published, and where the work was not taken in its entirety.

The purposes for which the work was used must be:

- private study
- research
- criticism
- review
- newspaper summary

b) Fair use

In the U.S. fair use is also a defence to copyright infringement rather than a specific exception to the rights of copyright owners. But, given the jury process in the U.S., the U.S. Act gives criteria to be used by the courts in determining whether the use was fair. These criteria are given in a non-exhaustive list. They are:

1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2) the nature of the copyrighted work;
3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4) the effect of the use upon the potential market for or value of the copyrighted work.

The U.S. law specifies that "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors".

The purposes for which fair use may be invoked in the U.S. are:

- criticism;
- comment;
- news reporting;
- teaching (including multiple copies for classroom use);
- scholarship; and
- research.

Apart from its fair use provision, the U.S. law contains numerous exceptions to copyright protection, notably for education, libraries and archives. Canadian interests asking for the same exceptions generally refer to these exceptions as "fair use", which only adds to the confusion.

In the end, it appears that the differences between the Canadian concept of 'fair dealing' and the U.S. concept of 'fair use' are the following:

1) it is possible to use an unpublished work fairly in the U.S.;

2) teaching and scholarship are purposes for which one can invoke the fair use defence in the US (but the use must still first be fair);

3) the U.S. courts have received specific guidance on how to determine that a use was fair.

c) Fair dealing on the Information Highway

On the Information Highway, it is safe to assume that much of the fair dealing defences would arise with respect to private study or research. Those are purposes already recognised under the Canadian Act. It is unclear what additional protection Canadian users would derive from the addition of 'scholarship' as a valid purpose for invoking the fair dealing defence, given that there is probably not much distinction between 'scholarship' on the one hand and 'private study' or 'research' on the other hand.

There remains the question of whether «teaching» should be a purpose that would qualify for the fair dealing defence to come into play. In all probability, the Information Highway will become a tool used increasingly in teaching. On the other hand, pressing demands have been repeated for an outright exemption from copyright protection by the

educational lobby and such exemptions are under consideration as part of Phase II of copyright revision. Indeed, for clarity's sake, it is probably more efficient to provide for specific exemptions for the benefit of educational institutions rather than to leave it to the courts to determine the applicability of fair dealing defences in those cases.

With respect to the guidelines provided to the courts by the U.S. law to help them determine whether a use was fair, there is no saying that Canadian courts, left to their own thinking, would not develop similar and additional criteria. In any event, Canadian courts do not appear to have created situations that need to be corrected by amending the *Copyright Act* in this respect. Given that the US law itself leaves room for judicial creativity, there seems to be little pressing need at this time to give directions to Canadian courts in their appreciation of what constitutes a fair dealing.

Finally, there is no possibility of dealing fairly in Canada with an unpublished work whereas it is possible to use such works fairly in the U.S. It must here be recalled that the U.S. law is founded on the principle that copyright is a tool 'to promote the progress of science and useful arts'. According to that principle, the goal of copyright in the U.S. is to be an incentive for the disclosure and publication of works.

The Canadian Act is based on very different principles: the recognition of the property of authors in their creation and the recognition of works as an extension of the personality of their authors. In Canada, moral rights of authors are clearly recognised and Canadian society respects the principle that an individual must be allowed to decide when his creation will be made public. Canada has traditionally shown more respect for unpublished works than have the U.S. That being said, as mentioned earlier, it is the SubCommittee's view that making copies of a work available by electronic means constitutes a publication.

The question remains as to whether the fair dealing provisions should apply and whether criteria should be introduced to provide guidance to the courts with respect to the use of works on the Information Highway. The SubCommittee observed a high level of dissonance among submissions representing both users and creators regarding the current state of the fair dealing provisions in the Act. Submissions from creators' groups have generally argued that, given the ease of reproduction of works on the Information Highway, fair dealing should be excluded as a possible defence in order to restore some balance of control for copyright owners. Submissions from users requested greater clarity in the application of the fair dealing provision and argued that there should be criteria such as are currently found in the U.S. law. It should be noted, however, that the U.S. criteria for 'fair use' are used to aid a jury in reaching a decision. In Canada, such cases are not put
before a jury. The SubCommittee therefore sees no need to include the criteria as found in the U.S. law given the current technologies. However, perhaps the time will come to give Canadian courts some guidance by including a non-exhaustive list of criteria in the

Copyright Act to give users and creators a clearer notion of what is fair dealing in the context of the Information Highway.

To conclude, there appears to be no need presently to import into the Canadian fair dealing concept elements as contained in the U.S. fair use provisions. Further, the SubCommittee sees no need to review the fair dealing provisions given the current technology. The Canadian fair dealing provision is consistent with the value that Canada attaches to creative minds and appears sufficiently supple to allow for equitable decisions with respect to the use of works on the Information Highway.

RECOMMENDATIONS

- Based on the current state of technology, the SubCommittee is of the view that the fair dealing provisions are capable of offering sufficient protection to users of copyright material on the Information Highway and these provisions should not be modified.

- However, given the growing concern regarding the future of technology, the government should review the situation on a regular basis to ensure that the fair dealing provisions are appropriate in the context of the Information Highway.

CHAPTER 10

ADMINISTRATION

ENFORCEMENT

ISSUE

Creators of works in a digital medium are concerned about the unauthorized use of their works on the Information Highway and feel that there are currently no effective means by which to ensure fair remuneration.

What mechanisms (legislative, policy, technological) could be introduced to address the problem? How can the use of works be tracked for the purposes of remuneration?

DISCUSSION

Many creators are concerned that once a work is distributed in a digital format, its value and possibly its integrity will be decreased. From an economic perspective, creators fear that works stored and distributed in a digital format will be widely pirated, resulting in economic loss to the copyright owner. These concerns stem from the ease of duplication of digital works and the ease with which various protection schemes can be sidestepped.

Interestingly, the concerns regarding protecting the commercial value of information mirror those faced during the previous decade with computer software. From both the practical and policy perspectives, there are lessons to be learned from the experiences in computer software as well as with the taped duplication of music and videos, and the pirating of satellite programming.

Technology

Encryption: Currently, satellite broadcasters use encryption technologies to scramble signals to counter pirating. The technology works best in a point-to-point transmission and, if applied to a point-to-multipoint system, would require a complex two-key system and could involve significant administrative costs.

Fingerprinting: This technology involves incorporating identifiers for the unique differences between original copies. Police use this technique for tracking sensitive documents. In computer software, each copy incorporates a unique ID that must be known and accessed to activate the software. Although it has proven to be the most effective means of enforcement in the computer software world, it would have limited applications on the Information Highway.

ENFORCEMENT CONT'D

Tagging: Tagging is the incorporation of a copyright notice or other message into the protected work to make it obvious that an illegal copy has been made and distributed. Examples include name and registration number inserted into a software program and notices inserted in televised movies or other programming fare. On the Information Highway, tagging could involve a copyright notice scattered throughout the content. This approach may do little to dissuade unauthorized use or reproduction of works unless the fear of detection (as a result of legislative or administrative controls) is sufficiently strong.

Conversion/Anti-Copying: This involves the transformation of a digital work into an intermediary form so that the raw information or content cannot be edited or altered. The technology may impede unauthorized reproduction since the quality of the work diminishes with each successive copy.

Cheaper is Better: The concept is to make it less expensive to purchase the original work than to make a copy of the work. The approach requires high volume sales and would not be suitable for works that do not attract a wide audience.

Policy

Deregulation/Laissez-faire approach: There is a growing trend toward market deregulation in the provision of products and services within the communications environment. The approach would continue this trend and allow the market to determine the quality and range of products and services to be offered. A serious disadvantage of the approach is the lack of controls for the promotion of Canadian content and the danger of dividing consumers into 'haves and have-nots'. The approach may also have a significant negative impact on smaller Canadian companies.

Non-legislative Government Intervention: Government could use its diplomatic and policy muscle to get the industry players and its international trading partners to crack down on copyright violation. The approach requires a commercial rather than a cultural focus which has not been the Canadian approach to date but given the current fiscal restraints, could be a cost-effective approach in combination with other measures.

Codes and Standards: An industry-wide code or standard could be adopted to govern copyright. This is a traditional approach which is slow to adapt to technological change and the danger of adopting the lowest common denominator to ensure adoption by all parties is always prevalent.

Education: Building on the heightened public awareness about the issues surrounding the pirating of computer software, the approach may be one of the most effective means by which government could pursue a non-legislative agenda for enforcement of copyright on the Information Highway. The approach would require the joint effort of government, industry players, the cultural industries and copyright collectives.

Legislation

Civil Sanctions: Civil sanctions leaves copyright enforcement to an action for copyright infringement. To be effective in the new digital world, the application of civil sanctions requires technologies to track the distribution of copies and identify the copyright owner of the work.

Criminal Sanctions: Tougher penalties, including financial penalties, could be introduced for illegal copyright activities. Again, to be effective, it would require technologies to track copies and identify the copyright owner of the work.

Of all the techniques tried in respect of copyright enforcement for computer software programming, three appear to have been successful: 1) Criminal sanctions, supported by a combination of private and public sector prosecutions; 2) Identify new ways to present information without releasing the underlying digital information, such as encryption; and 3) public education respecting illegal copyright activities and the resultant penalties.

The majority of submissions strongly agreed with the SubCommittee's recommendations regarding enforcement issues. A number of submissions cautioned that there may be occasions where a practice such as tampering or bypassing an encryption or copyguard may be done for a legitimate purpose (e.g. computer software development) and should not be caught by a provision which would make such a practice a criminal offence. Several submissions suggested that such practices, if made a criminal offence, should also attract civil liability.

RECOMMENDATIONS

- The federal government should assist in the development and standardization of user-acceptable ways to track use of protected works;

- The federal government should assist in the development and use of 'identifiers' to be included in the distribution of protected works in a digital format to make it easier to trace copyright ownership and unauthorized use of protected materials;

ENFORCEMENT CONT'D

- The federal government should take an active role, in partnership with industry, creator groups and the user community, in a public education campaign to better inform both users and creators about the use of copyright.

- The federal government should consider the full range of policy instruments at its disposal to ensure effective copyright protection in order to support the creation of new Canadian works.

- Tampering or bypassing, for the purposes of infringement, of any kind of encryption or copyguard should be made a criminal offense under the *Copyright Act*.

ISSUE

Can the enforcement of rights impede or prevent reasonable access by users to protected works on the Information Highway? Will copyright become an unreasonable burden? If so, in what circumstances?

DISCUSSION

The question implies that the principle of 'reasonable access' may at times be more important than the rights of copyright owners. Unfortunately, one of the consequences of attempts to protect intellectual property rights, including copyright, is the increasingly complicated level of access for users, even if they are willing to pay, and access to otherwise free works. Examples abound.

There is, for example, the requirement to use passwords to log onto a Local Area Network (LAN) or onto an information database. As well, satellite programming is, for the most part, encrypted, including the basic network signals and even PBS. On the other hand, the choice and the quality of both signal and programming has improved as the competition among a wide array of program providers and broadcasters has increased.

If the experience with the computer software industry is any indication, the Information Highway may go through an initial trial stage in which various methods to protect copyright will be awkward or expensive. Eventually, the process of enforcing rights should become more streamlined, prices will be lowered, competition will increase and the copyright owner and user will settle on more efficient ways of protecting and using protected materials.

To suggest that copyright will become an 'unreasonable' burden implies that there is no alternative way of obtaining or generating information or of distributing information in a way that is acceptable to both creators and consumers. The Information Highway promises to make information more accessible, not less.

However, special attention should be paid to institutions which might possess unique or critical information for public consumption. One such example is the government's Crown copyright in legislation and regulations, judicial and quasi-judicial orders and economic information. If the government were to use its role as public custodian to limit who has access to the information, it could be seen as imposing an unreasonable burden on the public who is governed by that legislation or who has a right to the information. (see Chapter 6: Crown Copyright)

ISSUE

What are the administrative alternatives for the clearance of rights for the use of works on the Information Highway, particularly in respect of multimedia works?

DISCUSSION

There are two problems in respect of the clearance of rights. Creators of multimedia works and other composite works have difficulty in identifying individual copyright owners in specific works or portion of works and frequently the transactional cost of clearing rights appears to be prohibitive. Secondly, many creators are reluctant or are refusing outright to grant permission to reproduce the work in a digital medium out of concern for the eventual unauthorized use or modification of the work.

There is growing pressure on existing copyright collectives to become more concerned about the clearance of rights for use of works in a digital medium without unfortunately much evidence of progress. Many of the collectives do not have the sophisticated systems or expertise which may be required to handle the so-called 'electronic rights' and electronic transactions. There are also rights holders who have chosen not to participate in collectives, thereby compounding the difficulty of clearing rights.

One option may be to establish a **voluntary rights identification centre** where all rights holders could register their works, describe the nature of the available rights and provide a contract for licensing arrangements. Multimedia developers wishing to obtain the rights for a particular work or portion of a work would have a centralized system for locating a copyright holder and negotiating the appropriate rights clearances. Such a centre need not be restricted to clearing rights for use on the Information Highway. To be truly effective, any such system would need to include <u>all</u> rights applicable to the Information Highway.

An alternative is a **compulsory licensing scheme** wherein certain rights are limited in scope. This approach would be viewed as a form of 'exception' and would require that a particular public interest must override the rights of the copyright owner. A good example of compulsory licensing is the generic drug legislation that was amended by the federal government several years ago to require a copyright owner to allow other companies to make generic copies at predetermined royalty rates. In this case, the overriding public interest was the desire to control drug costs. However, it should be noted that this situation has changed, and since 1992, there is no compulsory licensing for generic drug products. Accordingly, the SubCommittee does not suggest that a compulsory licensing scheme should be considered in the commercial marketplace since there does not appear to be the requisite public interest test at this time.

A third option would be establish an electronic or 'virtual' marketplace for clearance of rights and, ultimately, for arranging commercial licensing agreements. The marketplace forum could be as simple as an Internet service or as complex as a commercial database.

Systems devised to track the use of works on the Information Highway, such as a 'tagging' scheme, could also be helpful for streamlining rights clearances. In this respect, any such system would benefit both creators and users.

The SubCommittee is pleased to note that the majority of submissions supported the discussion and recommendations concerning rights clearance. A few submissions supported the creation of a copyright/intellectual property management system which would embody a royalty collective, monitoring system and technical advisory group. Several submissions raised user concerns including the need to be involved in the design of any system and the need for privacy of information.

The role of government should be to encourage but not to engage in the operation of systems to streamline rights clearance for users. The industry itself should be responsible for deciding on the best approach to the clearance of rights for the Information Highway. However, as noted earlier, special legislative provisions to combat misrepresentation or fraud in the operation of these systems might be appropriate to encourage the development of such systems.

RECOMMENDATIONS

- Government should encourage industry, creator and user communities, in the creation of administrative systems to streamline the clearance of rights for use of works in a digital medium.

- Compulsory licensing should not be considered in the commercial marketplace.

CHAPTER 11

PUBLIC EDUCATION

ISSUE

Educating Canadians about copyright is essential for the development of Canada's Information Highway. How can users and creators be better informed about the application of copyright in a digital world?

DISCUSSION

Canadians need to know more about all aspects of copyright. Copyright must be better understood as an integral component of the creative process and as a natural extension of responsible research and use of particular forms of expression. Individuals, whether in educational settings, business environments or at home with personal computers, must take responsibility for their use of copyright protected sources of information and other works. In addition, creators of digital works should take steps to better inform themselves about the copyright process and the rights and responsibilities of copyright owners.

The federal government can lead by example by implementing model copyright user practices in all departments. By respecting the rights of others and ensuring that use of protected works is properly compensated, the federal government can set the standard for users in both private and public sectors. As a copyright holder itself, the federal government can show others how to exercise copyright in a responsible and reasonable manner by actively participating in copyright monitoring/reporting programs. Digital identification methods to encode and ensure the integrity of government works should become a routine part of the dissemination of government holdings in a digital environment.

The federal government should consider a public education campaign to make available basic information on all aspects of copyright, including legislation, regulations and procedures, and rights clearance, in a variety of formats for users and creators. The federal government can support and strengthen efforts to make copyright part of the educational and cultural industries. Copyright must become a concept that is understood and practised rather than an inconvenience or expense to be ignored.

Copyright is both an economic and a cultural issue and both perspectives should be recognized in any public education initiatives. As a business issue, copyright stimulates demand for digital products and increases employment in the creative and

cultural industries. A practical model for the dissemination of information on copyright will help
both creators and users treat copyright with the same level of importance as they would a change in tax laws or developing a new source of supply for a manufacturing process. Copyright monitoring and compliance on the Information Highway should become one of the essential 'costs of doing business'.

Copyright's importance to Canada's cultural resources should also be recognized and reflected by ensuring that users and creators respect the rights of others as well as understanding how to exercise their own rights as creators of content for the Information Highway.

All interested parties that commented on this issue expressed strong support for the SubCommittee's recommendations with respect to public education.

RECOMMENDATIONS

- Users and creators must assume greater responsibility for informing themselves on copyright and the application of various rights in a digital world.

- The federal government should lead by example as both a model 'user' and 'creator'.

- The federal government should take an active role, in partnership with industry, and with creator and user communities, in a public education campaign to better inform both users and creators about the use of copyright.

CHAPTER 12

BROADCASTING POLICY AND REGULATION

The following chapters dealing with broadcasting policy and regulation and with international issues, while including material that is broader than merely copyright, were considered by the SubCommittee as important to review because of their implications for copyright.

ISSUE 1

What are the implications of CRTC's Telecom Decision 94-19 and the Video-on-Demand (VOD) exemption order for broadcasting-type regulation of services? Do these decisions impact on national treatment obligations in respect of copyright?

DISCUSSION

Telecom Decision CRTC 94-19, issued by the CRTC on Sept.16, 1994, opens a wide door to the provision by telephone companies of *non-broadcast* information and entertainment services to the home, including those in which it may have involvement or control over content. However, the decision establishes the following safeguards:

- In regard to any services that qualify as "broadcasting" (whether or not exempted from regulation), the telephone companies can act only in a common carrier role, e.g. provide the transmission platform. If they wish to take on any wider role in respect to broadcast services, they must apply for and obtain broadcasting licences or qualify under the relevant exemption criteria established by the CRTC under the *Broadcasting Act*. Moreover, their telecommunications tariffs are to be amended to impose a requirement for such licensing or exemption qualification on any broadcast service providers using their facilities.

- The Commission has left the issue of whether or under what terms telephone companies would qualify for broadcasting licences to be dealt with by specific proceedings under the *Broadcasting Act*.

- The Commission has specifically noted that its regulatory framework "must provide appropriate competitive and consumer safeguards in connection with telephone company construction of broadband facilities." Any investment in such facilities must be "economically justified and appropriately recovered." In particular, the Commission has stated that it will not permit the telephone companies to recover any investment in broadband to the home through increases in basic local telephone rates charged to the general body of subscribers unless the business case for such investment has been established.

- Apart from broadcast services, the telephone companies are given relatively free range to become involved with information services in the so-called "unclaimed territory". The Commission has stated that it will not be opposed in principle to the involvement of carriers in content, and are not required to set up separate companies to do so. (But in fact, separate affiliates would be necessary in most cases if broadcast services were involved, because of other legal requirements) The entry of the telephone companies into the content side of such information services is subject to CRTC cross-subsidy and access safeguards, as well as an "imputation test" to address anti-competitive pricing, to deal with the problems of vertical integration.

By its terms, the decision does not sanction the entry of the telephone companies into broadcasting services, to which the CRTC has given a fairly wide interpretation (e.g. VOD qualifies as broadcasting). The entry of the telcos in these areas is left to be determined in separate proceedings under the *Broadcasting Act*, where a myriad of issues involving cultural policy will need to be addressed. (Some of these will no doubt be addressed in general terms in the upcoming CRTC information highway proceeding). Apart from their role as common carriers, which again can be read fairly narrowly, the only area open to the telephone companies in the broadcasting field at present is an involvement in experimental video-on-demand trials. But even this exemption has been drafted so as not to overlap with the near VOD services offered through cable by the licensed pay-per-view services, and to involve the licensed pay-per-view services in the provision of feature films to the telco trials.

Telecom Decision 94-19 leaves the question of telco involvement in broadband investment as a matter to be determined in the future. The CRTC has since issued a letter decision rolling all cable concerns about telco broadband investment into the "split rate base" proceeding which is about to be initiated. The business case for such investment was not made in the *Review of Regulatory Framework* proceeding, and Telecom Decision 94-19 makes it clear that such a business case will need to be made by the telcos before any investment will be allowed to be recovered.

The acknowledgement in Telecom Decision 94-19 that when broadcasting services are offered using telco facilities the providers must adhere to *Broadcasting Act* policy requirements is an important point. It means that there will be a number of proceedings initiated by the telcos (or by joint ventures involving the telcos) for new broadcast licences or exemption orders. But since it will be the *Broadcasting Act* that governs these proceedings, not the *Telecommunications Act*, the Commission will need to take into account any submissions arguing that such new services should not be licensed if they prejudice the quality, accessibility or Canadian content contribution of existing licensed services, a policy preoccupation under the *Broadcasting Act* but not under the *Telecommunications Act*.

Implications for National Treatment for Copyright

Telecom Decision 94-19 leaves in place the crucial concept under the *Broadcasting Act* that service providers in the broadcasting sphere must be licensed or regulated by the CRTC, that such providers may be confined to nationals, and that the terms or conditions of broadcasting services should discriminate in favour of Canadian programs and Canadian creators of those programs.

The "national treatment" provision in the provisions of the Agreement Establishing the World Trade Organization relating to intellectual property (the TRIPPS agreement) (Article 3.1) stipulates that Canada must accord to the nationals of other parties treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions provided in certain treaties, and subject to an exception for performers, phonogram producers and broadcasters for rights not provided under TRIPPS. The term "protection" is defined in a note to "include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights."

The equivalent national treatment provision in NAFTA (Article 1703) reads "with regard to the protection and enforcement of all intellectual property rights." In regard to copyright, Article 1705.3 goes on to require that each Party provide that

> "(a) any person acquiring or holding economic rights may freely and separately transfer such rights by contract for purposes of their exploitation and enjoyment by the transferee, and
>
> (b) any person acquiring or holding such economic rights by virtue of a contract...shall be able to exercise those rights in its own name and enjoy fully the benefits derived from those rights."

The intellectual property provisions in NAFTA (Chapter 17) is subject, however, to the cultural industries exception imported into NAFTA by Article 2106 thereof. Article 2107 of NAFTA defines "cultural industries" to include "the production, distribution, sale or exhibition of film or video recordings...[and] audio or video music recordings" as well as "radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services."

Insofar as the TRIPPS chapter in the WTO Agreement is concerned, nothing in Canada's broadcasting regulatory framework would appear to breach Article 3.1. While the effect of our broadcast regulatory environment is indirectly to benefit Canadian creators by requiring our broadcasters to stimulate indigenous production and exhibition, nothing in the *Broadcasting Act* leads to discrimination in regard to the protection or

enforcement of copyright. Although the CRTC has frequently set up regulatory structures that have new rights and obligations attached to them (e.g. the Eligible List, Canadian content eligibility criteria, etc.), it has never sought to exempt anyone from paying any appropriate copyright fees and has noted on numerous occasions that it expects every licensee to adhere to any copyright requirements.

Insofar as NAFTA is concerned, some have suggested that there may be an argument under Article 1705.3.(a) that the Canadian broadcasting system limits the ability of foreign copyright owners to freely transfer the right to communicate a work to the public (a Berne Convention right) to anyone, since only licensed broadcasters are allowed to carry out this service, and they are limited by quotas as to how much foreign programming they can broadcast. This suggestion is subject to rebuttal. But in any event, Article 1705 is subject to the cultural industries exception, which ensures that Canada's protection and assistance measures in the broadcasting field would be unaffected.

It is also important to note that in respect of certain new rights, Canada is not subject to a strict national treatment obligation but may be able to apply the principle of "material reciprocity", as has been done in a number of other countries. In addition, some countries that have introduced a blank tape levy to redress the harm caused by music and video home taping have set aside a cultural/social fund derived from the proceeds to the exclusive benefit of nationals. Depending on the statutory regime, these approaches are not necessarily in conflict with the applicable national treatment obligations under the existing copyright conventions.

To conclude, Telecom Decision CRTC 94-19 attempts to work within the broadcasting regulatory framework, not around it. That framework is not inconsistent with Canada's international copyright obligations, including the national treatment requirements of the WTO agreement and NAFTA. A recommendation in this area is not necessary.

ISSUE 2

What is the impact, if any, of copyright on broadcasting regulation and the cultural policy objectives of the Broadcasting Act?

DISCUSSION

See discussion under Issue 1 of Chapter 12 above.

The obligations of broadcasters or cable television operators to comply with any requirements of copyright law are not affected by CRTC regulations or licence conditions. As noted above, the CRTC has never sought to exempt anyone from paying any appropriate copyright fees and has noted on numerous occasions that it expects every licensee to adhere to any copyright requirements.

One of the exclusive rights under copyright in subsection 3(1) of the *Copyright Act* is the right to communicate a work to the public by telecommunication. While this right does not apply in regard to persons (e.g. telephone companies in certain situations) "whose only act in respect of the communication of a work to the public consists of providing the means of telecommunication necessary for another person to so communicate the work", it does apply to that other person who utilizes telco, satellite or cable facilities to communicate the work to the public. Thus the *Copyright Act* does not discriminate between the use of cable or telco facilities.

The creation of new neighbouring rights, if such rights required significant new payments from broadcasters or distribution undertakings to rights holders, could have an impact on the financial ability of such licensees to make other contributions to the Canadian broadcasting system. However, the importance of introducing neighbouring rights for creators cannot be underestimated and this factor would need to be weighed carefully against the additional revenue that such rights would generate for Canadian creators.

RECOMMENDATION

- Canada should bear in mind the need to ensure that future national treatment obligations in copyright not impact unduly on the cultural objectives contained in the *Broadcasting Act*.

CHAPTER 13

INTERNATIONAL

ISSUE 1

In what ways should Canada harmonize its copyright regime in relation to international developments in respect of the Information Highway?

DISCUSSION

International developments are still at a very preliminary stage as the U.S., Japan and other countries wrestle with possible updates to their copyright legislation in light of information highway developments. In the absence of a clear international consensus on these measures, it is premature for Canada to consider "harmonization" as an end in itself. In fact, solutions that Canada could come up with could end up being a model for other countries to consider.

RECOMMENDATION

- Canada should stay abreast of international developments in regard to copyright and the Information Highway but there is no need for immediate action toward harmonization.

ISSUE 2

Under NAFTA, what new services on the Information Highway would be defined as enhanced telecommunication services (as opposed to broadcasting)? What are the implications for national treatment obligations for copyright?

DISCUSSION

Some types of video-on-demand and multimedia communications service content may be classified as broadcasting "programs", and some types of video-on-demand service providers may be classified as "broadcasting undertakings" within the meaning of the *Broadcasting Act*. Unless an exemption is granted, such a classification could lead to CRTC regulation of the relevant video-on-demand or multimedia services in a manner that supports Canadian services and service providers, and consequently discriminates against non-Canadian services and service providers.

However, both the FTA and NAFTA prohibit such discriminatory treatment insofar as it relates to "enhanced telecommunications services" or "computer services". This raises the question, therefore, whether various multimedia service providers using the information highway will be classified as "broadcasting undertakings" or "enhanced service" providers, or both.

In the FTA, the definition of an "enhanced service" is left to the regulator having jurisdiction. Unlike the FTA, NAFTA provides its own definition of enhanced services. The definition, which is found in Chapter 13 (Article 1310), provides that:

> enhanced or value-added services means those telecommunications services employing computer processing applications that:
> (a) act on the format, content, code, protocol or similar aspects of a customer's transmitted information;
> (b) provide a customer with additional, different or restructured information; or
> (c) involve customer interaction with stored information;

Except to the extent that they can be viewed as "broadcasting" rather than "telecommunications services", many types of multimedia services would fit within the foregoing definition. To the extent that a service does fit within the definition, and subject to the exemption in Article 1301.2 described further below, NAFTA significantly limits the type and extent of government regulation, and particularly, limits discrimination against services provided by nationals of the other NAFTA countries. For example, while Article 1303 of NAFTA contemplates that a country may licence or require registration of enhanced services, it sets strict limits on the nature of such licensing or registration procedures. Specifically, it prohibits discrimination and requires a "transparent" licensing regime and expeditious processing of applications.

NAFTA also establishes rules designed to provide non-discriminatory access to and use of telecommunications networks, such as those operated by the telcos. These rules would benefit multimedia service providers, whether or not they are classified as enhanced service providers. A key provision of these rules, found in Article 1302, reads:

> **1302.1.** Each Party shall ensure that persons of another Party have access to and use of any public telecommunications transport network or service, including private leased circuits, offered in its territory or across its borders for the conduct of their business, on reasonable and non-discriminatory terms and conditions, including as set out in paragraphs 2 through 8.

The other paragraphs of Article 1302 ensure that nationals of other NAFTA signatories will have various rights of access to and use of public telecommunications networks, including the right to attach their own equipment to telecommunications networks, to interconnect their own private circuits, and to perform switching, signalling and processing functions.

While the right of service providers to access and use telecommunications networks clearly applies to the existing telcos' public networks, the cable networks and facilities (including telcos when they engage in cable distribution) are specifically excluded. Article 1301 provides that:

> **1301.3.** Nothing in this Chapter shall be construed to: ... (d) require a Party to compel any person engaged in the cable or broadcast distribution of radio or television programming to make available its cable or broadcast facilities as a public telecommunications transport network.

In addition to this specific exemption, Article 1301 contains a general exemption that applies to all of the telecommunications rules set out in Chapter 13 of NAFTA (including those applicable to enhanced services). The exemption reads as follows:

> **1301.2.** Except to ensure that persons operating broadcast stations and cable systems have continued access to and use of public telecommunications transport networks and services, this Chapter does not apply to any measure adopted or maintained by a party relating to cable or broadcast distribution of radio or television programming.

The intent of this exemption is to exclude broadcasting and cable television regulation from the market opening rules generally applicable to telecommunications services.

The foregoing is of course subject to the cultural industries exemption. Application of that exemption to multimedia services will depend largely on the classification of a particular multimedia service; however, the exemption is worded very broadly. This underlines the importance of the "cultural industries exemption" in NAFTA.

The WTO Agreement signed at Marrakesh came into force on January 1, 1995, and will establish important new principles for international trade, particularly in regard to the services sector. One of the key areas of dispute between the United States on the one hand, and Canada and the European Community on the other, was the continuance of provisions for the protection and assistance of indigenous audiovisual services. Despite

formidable pressure from the U.S. in the negotiations, however, neither Canada nor the European Community lost the ability to maintain or expand measures to support their audiovisual industries.

Unlike NAFTA, the WTO Agreement does not have an explicit exemption for cultural industries. In the General Agreement on Trade in Services (GATS) included in the WTO Agreement, however, national treatment is only applied to services included in a particular country's schedule. Neither Europe nor Canada have included audiovisual or broadcasting services in their country-specific schedules. Canada and the European Communities have included certain enhanced or value-added telecom services in their schedules, but unlike NAFTA there is no definition for such services in the GATS or in the Telecommunications Annex thereto. In Canada's case, it provided a list of "enhanced or value-added [telecommunications] services" which included "on-line information and database retrieval". However, Canada scrupulously avoided committing to national treatment on audiovisual services, which Uruguay Round documents define to include "network services necessary for the transmission of television signals, independently of the type of technology (network) employed." The list does not include any reference to audio-visual or broadcasting services, which have separate CPC classifications.

A key question will be the treatment of multimedia services that combine conventional text-based information services with audio-visual material. As soon as these services include the attributes of audiovisual programs intended for display on devices designed for the display of television signals, they are likely to be categorized as audio-visual services and not within the telecommunications services heading noted above.

In examining questions of interpretation, it will be important for a country to have a consistent domestic legislative framework. If Canada defines a multimedia service on the information highway as essentially falling within the classification "on-line information and database retrieval", and not as a television program, then national treatment obligation would appear to apply, by virtue of the provisions of Article 5.4 of the Telecommunications Annex, which reads in part:

> "Each Party shall ensure that service suppliers of other Parties may use public telecommunications transport networks and services for the movement of information within and across borders, including... for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Party."

If, on the other hand, information stored in machine-readable form can be said to constitute a television program, then it will fall outside the national treatment provision. In particular, that provision is subject to the limitation expressed in Article 2.2 that it "shall not apply to measures affecting the cable or broadcast distribution of radio or television programming."

Conclusion

The WTO Agreement obligates Canada to provide national treatment to "on-line information and database retrieval" enhanced or value-added telecommunications services. However, it does not fetter Canada's ability to classify Video-on-Demand or multimedia programming with significant audio-visual components on the Information Highway as "broadcasting", even though offered through the facilities of telecommunications carriers. In that case, national treatment obligations would not apply. On the other hand, if such services were classified by Canada as enhanced telecommunications services, it is likely that Canada would find itself obligated to offer non-discriminatory access to its telecommunications carrier system to non-Canadian providers of such services.

In analysing which multimedia programs would or should fall under the definition of "broadcasting" in the *Broadcasting Act*, the SubCommittee recognized that the definition would need to embrace works such as feature films and music, both of which are mainstays of radio and television schedules, even when these works are digitized, put on a file server, and made available to the public over telephone lines on an on-demand basis. Given the current definition of broadcasting, the SubCommittee also supports the exclusion of predominantly text-based multimedia works from the *Broadcasting Act.*

Between these two extremes, lies a difficult middle ground. Briefs submitted to the SubCommittee took one of two positions. Those supporting a broad definition of broadcasting urged the importance of the cultural policy objectives of the *Broadcasting Act* as support for Canadian multimedia products, and noted that the CRTC exemption power in subsection 9(4) could and should be used on a flexible basis to exclude those services where a cultural imperative does not apply.

Those supporting a narrow definition of broadcasting expressed concern that broadcast disciplines were not appropriate for the multimedia industry, would impede rather than encourage investment, and that the CRTC exemption power was not sufficient to ensure that such services were not unduly fettered.

The SubCommittee did not reach a consensus on the appropriate statutory treatment of the middle ground and notes that these issues are the subject of debate in the CRTC public hearings on the information highway.

RECOMMENDATIONS

- Canada should ensure that the definition of "broadcasting" in the *Broadcasting Act* continues to apply to films, music, radio and television programs and other similar audiovisual programming services offered to the public on the information highway. Conversely, primarily text-based multimedia services should not be included in the definition.

- In regard to whether multimedia services on the information highway that fall between these two extremes should be categorized as "broadcasting" and/or exempted from regulation, the federal government should take into account the concerns raised by all parties to the information highway debate in this regard.

- To the extent that audiovisual programming services are included in the definition of broadcasting, national treatment obligations will not apply to service providers in Canada, except in regard to the protection or enforcement of copyright in such programs.

ISSUE 3

Neighbouring Rights: Are there any international implications in respect of implementing such a regime in a digital environment?

DISCUSSION

The United States in particular has tended to confine the introduction of new rights (e.g. the blank tape levy in the 1992 Audio Home Recording Act; and the potential performing right in sound recordings) to digital media or digital transmission, leaving analog forms to be unrecognized.

Other countries have applied new rights to both analog and digital media. It is left to Canada to decide which way to approach such new rights. The result may affect the extent to which reciprocal or national treatment is required under our international treaties. This in turn will have an impact on the balance of payments applicable for particular uses. It may be in Canada's interest to seek to restrict international recognition to those countries who provide material reciprocity in terms of royalties payable to Canadian creators.

RECOMMENDATION

- That Canada bear in mind the international implications in implementing neighbouring rights in a digital environment.

APPENDIX A

COPYRIGHT SUBCOMMITTEE

LIST OF ISSUES

PREAMBLE

The Copyright Committee agreed that the fundamental questions to be posed in respect of copyright and the Information Highway are as follows: 1) What are the barriers encountered by creators in making protected works available in a digital environment? 2) What are the barriers to users in accessing such works on the Information Highway? The issues to be addressed can be divided into three categories: Legislative, Policy, Administrative (Enforcement and Clearance).

The following specific issues have been identified by the Copyright Committee.

CATEGORIES OF WORKS

Are there categories of works that are communicated electronically that are not subject to the current *Copyright Act* and which will not be accessible on the Information Highway due to a lack of protection?

Should works be defined separately or, for the purposes of being technology-neutral, should separate categories of works be eliminated? And if so, should this be done only in respect of digitized works on the Information Highway?

Are multimedia works adequately covered by the definition of 'work of compilation'? If multimedia works must be defined separately in the *Copyright Act,* how should they be defined?

OWNERSHIP

Who owns what rights? Who controls them? (e.g. multimedia works, Crown copyright) Should the Crown continue to claim copyright ownership for works disseminated on the Information Highway?

Should the U.S. principle of 'first sale' apply?

MORAL RIGHTS

Can the moral rights of the author/creator be enforced on the Information Highway? If so, how?

Given the ease of manipulation of works in a digital environment, what is the impact on the right of integrity? Should it be made subject to a waiver?

Are there categories of works that should be covered by moral rights but exempt from economic rights?

USE OF WORKS

Does the nature of copyright protection have to be changed to address the use of works on the Information Highway? Are there any barriers that prevent or impede reasonable access to and use of protected works? Are there categories of works that will not be part of the Information Highway due to an excessive level of protection?

Are there any activities or uses of works on the Information Highway that are not covered?

When should a use of a work be subject to copyright and when does use require a payment for services only?

How do existing rights apply? For example, does the electronic dissemination of a work to a user constitute a publication? When is a work electronically reproduced? When is it communicated to the public by telecommunication? When is it performed in public?

What activities, if any, would be subject to the rental right? Should the rental right be subject to criminal enforcement?

If introduced, should the scope of the broadcast signal right be broader than the Rome Convention minima? If so, how?

Are there any new rights that should be introduced with respect to the Information Highway? For example, should there be an electronic distribution right to cover the transmission of digital works?

EXCEPTIONS

How should exceptions to copyright liability in terms of the Information Highway be addressed?

Since the U.S. is evaluating its 'fair use' provisions, should Canada also examine the notion of 'fair dealing' and its relevancy to digital works?

Should 'browsing' be permitted in the context of use of works on the Information Highway? When would it be considered a Public Display? What forms of browsing should be allowed? What could be covered by the fair dealing provisions?

ADMINISTRATION

Enforcement:

Creators of works in a digital medium are concerned about the use, reproduction and manipulation of their works on the Information Highway and feel that there are currently no effective means by which to ensure remuneration. What mechanisms (technological, policy, legislative) could be introduced to resolve the problem?

Are particular civil or criminal remedies needed (e.g. statutory damages) for the use of works in a digital environment? If so, what would be the scope of the remedies?

How can the use of works be tracked for the purposes of remuneration? How can the use of a portion of a work be defined for the purposes of compensation? Or should this constitute fair dealing?

Can the enforcement of rights impede or prevent reasonable access by users to protected works on the Information Highway? Will copyright become an unreasonable burden? If so, in what circumstances?

Clearance of Rights:

What are the administrative alternatives for the clearance of rights for use of works on the Information Highway, particularly in respect of multimedia works? (e.g. collectives, copyright clearance centre with a voluntary registration system, compulsory license, contractual arrangements)

Should infringement apply only in the case of works that have some form of prevention mechanism (e.g. as is currently the case of encrypted satellite signals)?

Regulation:

What are the implications of CRTC's Telecom Decision 94-19 and the VOD exemption order for broadcasting-type regulation of services? Do these decisions impact on national treatment obligations in respect of copyright?

INTERNATIONAL

How should Canadian copyright be defined in relation to other models being developed in other countries? (e.g. U.S., Europe, Japan)

Harmonization of rights internationally: In what ways should Canada harmonize its copyright regime in relation to international developments in respect of the Information Highway? How will fair dealing be handled? How should neighbouring rights be handled? How should importation issues be addressed?

In examining how the *Copyright Act* should be revised to meet the needs of creators and users on the Information Highway, what considerations should Canada give to the foreign balance of payments in respect of royalties?

NAFTA: What new services on the Information Highway would be defined as enhanced telecommunication services (as opposed to broadcasting)? What are the implications for national treatment obligations for copyright?

PUBLIC EDUCATION:

How can users and creators be better informed on copyright liability and protection for the use of works on the Information Highway?

Is there a role the government can play in influencing the direction and nature of digital works available on the Information Highway?

APPENDIX B

RECOMMENDATIONS - COPYRIGHT SUBCOMMITTEE

CATEGORIES OF WORKS

- The SubCommittee is unaware of any new categories of works which would not fit within the existing definitions of `literary`, `artistic`, `dramatic`, `musical` work as currently contained in the *Copyright Act* and as these works are understood under the laws of other countries in which the Berne Copyright Convention is applied.

- The SubCommittee is of the view that existing copyright legislation rather than *'sui generis'* legislation should continue to be the source of protection for multimedia works.

- The definition of "compilation" contained in the *Copyright Act* is sufficient to embrace multimedia works.

- The current categories of works contained in the *Copyright Act* sufficiently identify works produced and used in a digital environment and should not be amended or eliminated.

USE OF WORKS

Communication to the Public by Telecommunication:

- The SubCommittee is of the view that the right embraces the communication to the public of material regardless of whether that material is made available on an 'on-demand' basis. If further consideration establishes that this is not clear, the *Copyright Act* should be amended to provide clearly that a communication offered to the public by means of telecommunication is subject to the authorization of the copyright owner, even where such communication is made on-demand to separate individual users.

Rental Right:

- The statutory language of the *Copyright Act* should be tightened to impede or prohibit hidden and unauthorized acts of commercial rental in the case of computer programs and sound recordings.

Copyright Protection Generally:

- There should be introduced provisions for statutory damages based on the U.S. model.

Browsing:

- The act of browsing a work in a digital environment should be considered an act of reproduction.

Liability:

- Liability on owners and operators of electronic bulletin board systems (BBS), since they are not common carriers, should be imposed. However, a defence mechanism should be provided for those instances where it can be demonstrated that they did not have actual or constructive knowledge of the infringing or offensive material and where they have acted reasonably to limit potential abuses.

MORAL RIGHTS

- The moral right of integrity should be maintained;
- The presumption of prejudice should be brought back to its original intention, namely where modification is that of an original;
- The legal framework governing copyright should ensure, rather than curtail, the development of systems to monitor the uses of copyright on the Information Highway.
- The possibility of affording certain works a regime of protection limited only to moral rights should not be considered.

CROWN COPYRIGHT

- Crown Copyright should be maintained.
- The Crown in Right of Canada should, as a rule, place federal government information and data in the public domain.
- Where Crown copyright is asserted for generating revenue, licensing should be based on the principles of non-exclusivity and the recovery of no more than the marginal costs incurred in the reproduction of the information or data (except information or works produced by Crown agencies or corporations such as the CBC or the National Film Board).

DISTRIBUTION RIGHT

- An electronic distribution right should not be introduced in the *Copyright Act*.

OWNERSHIP

- As an electronic distribution right is not recommended, it is further recommended that the 'first sale doctrine' not be introduced as it is merely a necessary adjunct to the right of distribution.

FAIR DEALING

- Based on the current state of technology, the SubCommittee is of the view that the fair dealing provisions are capable of offering sufficient protection to users of copyright material on the Information Highway and these provisions should not be modified.

- However, given the growing concern regarding the future of technology, the federal government should review the situation on a regular basis to ensure that the fair dealing provisions are appropriate in the context of the Information Highway.

ADMINISTRATION

Enforcement:

- The federal government should assist in the development and standardization of user-acceptable ways to track use of protected works.

- The federal government should assist in the development and use of 'identifiers' to be included in the distribution of protected works in a digital format to make it easier to trace copyright ownership and unauthorized use of protected materials.

- The federal government should take an active role, in partnership with industry and the creator and user communities, in a public education campaign to better inform users and creators about the use of copyright.

- The federal government should consider the full range of policy instruments at its disposal to ensure effective copyright protection in order to support the creation of new Canadian works.

- Tampering or bypassing, for the purposes of infringement, of any kind of encryption or copyguards should be made a criminal offense under the *Copyright Act*.

Rights Clearance:

- The federal government should encourage the industry and creator and user communities in the creation of administrative systems to streamline the clearance of rights for use of works in a digital medium.

- Compulsory licensing should not be considered in the commercial marketplace.

PUBLIC EDUCATION

- Users and creators must assume greater responsibility for informing themselves on copyright and the application of various rights in a digital world.

- The federal government should lead by example as both a model 'user' and 'creator'.

- The federal government should take an active role, in partnership with industry and with the creator and user communities in a public education campaign to better inform both users and creators about the use of copyright.

BROADCASTING POLICY/INTERNATIONAL

- Canada should bear in mind the need to ensure that future national treatment obligations in copyright not impact unduly on the cultural objectives contained in the *Broadcasting Act*.

- Canada should stay abreast of international developments in regard to copyright and the Information Highway but there is no need for immediate action toward harmonization.

- Canada should ensure that the definition of "broadcasting" in the *Broadcasting Act* continues to apply to films, music, radio and television programs and other similar audiovisual programming services offered to the public on the Information Highway. Conversely, primarily text-based services should not be included in the definition.

- In regard to whether multimedia services on the Information Highway that fall between these two extremes should be categorized as "broadcasting" and/or exempted from regulation, the federal government should take into account the concerns raised by all parties to the information highway debate in this regard.

- To the extent that audiovisual programming services are included in the definition of broadcasting, national treatment obligations will not apply to service providers in Canada, except in regard to the protection or enforcement of copyright in such programs.

- Canada should bear in mind the international implications in implementing neighbouring rights in a digital environment.

APPENDIX C

LIST OF SUBMISSIONS

Keith Acheson
ADISQ
Alliance of Canadian Cinema Television and Radio Artists
Archives of Ontario
Association for Media Literacy
Association for Media and Technology in Education in Canada
Association nationale des éditeurs de livres
Association of Canadian Archivists
Association of Media Educators of Quebec
Association of Universities and Colleges of Canada
Christopher Broadbent
CANCOPY
Canadian Alliance Against Software Theft
Canadian Association for Interoperable Systems
Canadian Association of Broadcasters
Canadian Association of Media Education Organizations
Canadian Association of Photographers and
Illustrators in Communications
Canadian Bar Association
Canadian Book Publishers' Council
Canadian Business Telecommunications Alliance
Canadian Cable Television Association
Canadian Conference of the Arts
Canadian Copyright Institute
Canadian Film and Television Production Association
Canadian Independent Record Production Association
Canadian Motion Picture Distributors Association
Canadian Music Publishers' Association
Canadian Recording Industry Association
Coalition des créateurs et des titulaires de droits d'auteur
Coalition for Public Information
Cogeco
Committee of Major Law Publishers
Cyphertech Systems Inc.
Government of Saskatchewan
IHAC Working Group on Learning and Training
Information Industry Association
Information Technology Association of Canada
National Archives of Canada
National Film Board
National Library of Canada
North York Board of Education
Pacific Music Industry Association

Periodical Writers' Association of Canada
Society of Composers, Authors and Music Publishers of Canada
Société des auteurs, recherchistes, documentalists et compositeurs
Special Libraries Association-Toronto Chapter
Southam Inc.
Stentor Telecom Policy Inc.
Martin Tomlinson
Writers' Guild of Canada
Writers' Union of Canada