

CONSULTATION PAPER ON DIGITAL COPYRIGHT ISSUES

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LIST OF ACRONYMS

DMCA	Digital Millennium Copyright Act
ICT	Information and Communications Technologies
IHAC	Information Highway Advisory Council
IP	Intellectual Property
ISP	Internet Service Provider
NAFTA	North-American Free Trade Agreement
SDMI	Secure Digital Music Initiative
TRIPs	Trade-Related Aspects of Intellectual Property
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty

1. INTRODUCTION

Over the course of the last decade, revolutionary changes in technology have permitted the creation of a global network of networks, represented today largely by the Internet. This network is becoming an important means for disseminating and exchanging digitized information of all kinds. This information appears in the form of data, text, music, visual and audio-visual material, and computer software, among others. It may be provided synchronously in that the receiver perceives it virtually the moment it is sent, or asynchronously in that it is stored for the receiver's later retrieval. The information may be destined to one or a few people or subscribers, or may be made available to the world at large.

The purpose of this paper is to initiate consultation on a number of issues that arise at the intersection of the new digitally networked environment with the *Copyright Act*. It represents a first step in initiating discussion on a copyright framework that helps to promote dissemination on-line of new digital content, for and by Canadians.

The Opportunities of the Digitally Networked Environment

With the emergence of new and powerful digital information and communication technologies (ICTs), the means for sharing and exchanging, on a global scale, large quantities of information in various forms are available at a low and diminishing cost. ICTs, and especially the Internet, are thus presenting an important opportunity for more and more Canadians to make their presence felt, both in Canada and worldwide, whether it be in terms of culture, identity or commerce.

Through various initiatives that are part of its Connecting Canadians agenda, the government has already taken important steps to ensure that Canadians benefit from an Internet infrastructure that is second to none. However, a fundamental aim in supporting the development of such an infrastructure is to provide a platform for promoting a strong and visible Canadian presence around the globe. As described on the Connecting Canadians web site (<http://www.connect.gc.ca>), one of the government's key priorities, as part of this agenda, is to help Canada "become a world leader in supplying on-line content as well as exciting new software and applications. The Internet is an ideal place to tell the world about our country, our people and culture, our abilities and achievements, our history and hopes". To this end, the government has created a special fund to promote innovative industries such as multi-media. It is also working to ensure that its framework laws support this objective.

A Canadian Presence - Cultural Considerations

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The impacts of the digitally networked environment cannot be overestimated. As more people join this environment, and as capacity and distribution improve, the possibilities for interacting on the Internet increase accordingly, dramatically enhancing and enriching Canadian culture. Canadians are now able to communicate more easily with each other and with the world, expanding and enriching the opportunities for gaining the understanding and knowledge that culture represents. Creators of all kinds of cultural works have an unprecedented opportunity to share their works not only with more Canadians, but also with the world. The goal for the Departments of Canadian Heritage and Industry Canada (hereinafter referred to collectively as the departments), is to relate the departments' strategic objectives to the possibilities offered by this digital environment. Currently, the government's cultural policies are reflected in terms of *Connecting to the Canadian Experience: Diversity, Creativity and Choice*

(<http://www.pch.gc.ca/mindep/misc/experience/english.htm>). These cultural policies are designed to achieve a number of objectives: diverse and accessible Canadian choices; excellence in people; building capacity; and, connecting Canadians to each other and to the world. Only by continuing to ensure a sharing through communication can the cultural fabric of Canada be strengthened.

Electronic Commerce

The Internet is also rapidly emerging as an important medium for the sale and dissemination of many different kinds of goods and services, including copyrighted works. A large array of businesses advertise goods or services for sale over the Internet. Some now conclude payment and arrangements for delivery on-line. Where the item purchased is in an electronic format, such as a digital photograph, a study or a sound recording, delivery itself may be effected over the Internet with a few keystrokes and mouse clicks.

In 1999, Canadian private sector sales over the Internet amounted to approximately \$4.2 billion. The value of these sales rose to \$7.2 billion in 2000, up 73.4 percent from 1999 (*Survey of Electronic Commerce and Technology 2000*, Statistics Canada, <http://www.statcan.ca/Daily/English/010403/d010403a.htm>).

According to private sector estimates, this amount is expected to grow such that by 2004, Canadians will participate in approximately \$151.5 billion worth of commercial Internet-based transactions (IDC, 2000, <http://idc.com>). This growth is anticipated because Canada is well connected in comparison with other top industrialized nations; overall, Canada is second only to the United States. Currently, Canada has the most affordable Internet access in the world and ranks well in terms of connectedness indicators, such as infrastructure, access, usage levels and the right socio-economic enablers. The availability of interesting content on-line is an important factor for Canadian participation in the electronic commerce marketplace.

In *The Canadian Electronic Commerce Strategy* (<http://e-com.ic.gc.ca/english/60.html>), 1998, the government stated that “Canadian governments, in consultation with the private sector, must move quickly to clarify marketplace rules” and that “[w]ithout clear rules, the use and growth of electronic commerce will be stalled”. (p. 27) In this connection, special reference was made to intellectual property (IP) protection: “The protection of content, balanced with the needs of users, is vital to the growth of electronic commerce - these issues are being addressed in Canada within a global context . . .” (p. 30)

The Canadian E-Business Opportunities Roundtable is a private-sector led initiative formed in 1999 to develop a strategy for accelerating Canada's participation in the Internet economy. In its report of January 2000, *Fast Forward: Accelerating Canada's Leadership in the Internet Economy*, the Roundtable identified a number of opportunities for Canada to lead in the growth of electronic commerce. The Roundtable notes:

“As broadband capacity grows, the demand for animation and Web-based graphics will explode. Canada is well-positioned to be a leading multimedia supplier... Although this multimedia sector has served the Canadian market primarily, it can compete on skill and cost with design hotbeds in New York City, San Francisco and Los Angeles...”

The Roundtable released a further report, *Fast Forward 2.0: Taking Canada to the Next Level*, in February, 2001. The report may be accessed from the Web site of the Task Force on Electronic Commerce at <http://e-com.ic.gc.ca/english/index.html>.

Implications for Copyright Policy

Copyright subsists in many of the electronic products or services available on-line. Cultural and other industries, such as the software industry, consider copyright to be a key factor in generating the return needed to stimulate the creation and marketing of a wide range of new content. Several of the copyright sectors or “industries” have suggested that their willingness to embrace the Internet as a channel for disseminating their works or making them available ultimately depends on their ability to prevent or discourage unauthorized copying and distribution activities which are easily carried out in the digitally networked environment.¹

¹ By “copyright industries” the departments are attempting to identify for ease of reference the entities, institutions and individuals engaged in creative endeavours in Canada. The works resulting from such endeavours should not be understood as issuing from a particular “cultural industry”. The term is adopted without assimilating the creation of individual works to a single industrial model.

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The *Copyright Act* serves to recognize, promote and protect intellectual expression, as well as encourage and enable access to and dissemination of such expression. It achieves this by granting various rights and exceptions, including the right to reproduce works, the right to communicate works to the public by telecommunication, and the right to authorize such acts. *Prima facie*, the communication and reproduction of copyrighted works are among the most prevalent activities over networks. It follows that the *Copyright Act* already applies to such Internet transactions.

For their part, Internet Service Providers (ISPs) have suggested that their ability to provide on a competitive basis the services/platform needed for the wide range of content depends on how liability rules affect the cost of their business; cumbersome or complex rules put them at a competitive disadvantage when compared with ISPs in other jurisdictions.

Private Sector Role

A proactive response from the copyright sectors is essential for seizing the opportunities of the digitally networked environment and for meeting many of its challenges. Some of the challenges which have been created by technology may be adequately resolved by technology, through private arrangements with other Internet players, through educational activities in relation to copyright, or by adopting suitable business models.

Currently, the private sector is participating in a government-led initiative to streamline the clearance of digital rights in order to better foster recognition of and respect for copyright, as well as to promote a Canadian presence in a global, on-line world.

Government Rationale

The problem that confronts the policy maker in such a rapidly changing technological environment, is to determine when, whether and to what extent promoting content on-line for and by Canadians requires government intervention.

A number of copyright stakeholders have suggested that in order for Canada to be an important player in the emerging digital economy, current efforts need to be further bolstered by certain amendments to the *Copyright Act* to ensure that, on a practical level, the Act continues to be meaningful, clear and fair. Some rights holders have pointed to the 1996 World Intellectual Property Organization (WIPO) treaties, with their network-related provisions, as providing the basis for effectively responding to the digital challenges.

The departments are concerned that changes to the policy framework for copyright should not operate to hinder the development of the full potential of the Internet and other digital platforms.

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In this respect, it is noteworthy that each of the different copyright industries operates under its own uniquely-developed business models, which means that each has its own needs and requirements in the on-line world, not all of which relate to copyright. For example, the sound recording and film industries, with their large scale inventories and high development costs, have felt the need to devise strategies relating to the adoption of encryption technologies for disseminating or making works available on-line. The photographic industry, on the other hand, does not face the same business and artistic exigencies.

Accordingly, it may be that amendments made to the Act at this time could have the inadvertent effect of working against a Canadian presence if technologies develop along particular or unpredictable pathways. Despite the radical novelty of the Internet, the analysis reflected in this paper has proceeded on the basis that the *Copyright Act* has already developed into a flexible instrument that is capable of responding to many of the challenges of the digitally networked environment.

The departments have nonetheless concluded, partly through their interactions with interested parties, that it is now an opportune moment to initiate consultation with stakeholders on certain issues which must be addressed in a timely manner. The examination of these issues, among others, is necessary to fully realize the government's priority of promoting the dissemination of new and interesting content on-line, for and by Canadians. Specifically these issues are whether or not:

- the Act should be amended to allow a specific right for on-demand communication;
- legislative measures are needed to deter the circumvention of technological measures that are used by rights holders to protect their rights;
- legislative measures are needed to deter tampering with rights management information; and
- legislative measures are needed to address the liability of network intermediaries in relation to copyright protected materials over digital networks.

The departments are drawing attention to these particular issues at this time based on the following general premises and assumptions:

- The ICTs allow for rapid and essentially costless reproduction and communication of material, including copyright works, whether or not these have been authorized. From a copyright perspective, the ICTs, though they open the possibility to much larger international markets for copyright material, also facilitate infringing reproductions and communications of such materials.

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- Some rights holders consider that their ability to assert their copyright in relation to a work or other protected subject matter is considerably diminished in the Internet environment once the material is made available in that environment. In comparison with the analogue world, Internet-based infringers are potentially more numerous, more anonymous, and may operate from within jurisdictions that provide relatively little copyright protection.
- Some rights holders may be deterred from making their copyright material available on-line;
- Many rights holders wish to avail themselves of the potential benefits of digitizing their material and selling to the large markets now open to them via the Internet. They are using or are contemplating the use of technological means for protecting and identifying their material. Some rights holders are prepared to make material available now, while others would make their material available if they could control when and how their material would be disseminated, though some would prefer that their material not be made available at all. One possible response to this situation is suggested by certain provisions of the treaties concluded under the auspices of WIPO in 1996, including provisions for a "making available right", and measures in relation to technological protection and rights management information, which are discussed in greater detail, below.
- The cost of making copyright material available or having access to material is partly a function of the availability of the services of Internet intermediaries such as ISPs. Thus, a competitive ISP sector in Canada benefits both the rights holders and the users by ensuring a low cost platform for storing and transmitting content. Thus, it also promotes the government's objectives in relation to the dissemination of content for and by Canadians.
- In order for a competitive ISP sector to continue to thrive in Canada, the framework rules under which they operate should be clear, simple to adhere to, fair and take due account of the framework rules under which they operate in other jurisdictions.

In selecting or suggesting approaches for addressing these issues, the departments have been concerned with a number of fundamental and interrelated questions, such as:

- The *Copyright Act* has evolved over time to reflect a balance between the various categories of rights holders, intermediaries and users:
 - What are the appropriate balances in the digitally networked environment?
 - Does the environment created by the new ICTs upset these balances?
 - If so, does it do so in such a way as to impede the legitimate dissemination of content on-line?

- If so, what intervention, if any, is required to restore the balances?
- Do the challenges to copyright truly represent challenges to core copyright principles or are they primarily challenges to existing business and distribution models?
- Given that legislative intervention could potentially impede the emergence of new models of content creation and dissemination, and given the unpredictable manner and rate at which technology is evolving, when is legislative intervention an appropriate response?

In light of the foregoing questions, do the approaches suggested in this paper contribute to a copyright framework which promotes Canadian public policy objectives?

Though the paper addresses the issues raised above, it does not represent a definitive statement of the government's near-term legislative agenda for the *Copyright Act*; rather, it is intended to establish, through consultation, whether targeted amendments in the near term would help promote the development of an effective framework for the digitally networked environment and what the elements of such amendments might be. The result of the consultation process should also provide the government with a clear perspective on how these initiatives may promote and serve the interests of all Canadians operating in an on-line world.

The emphasis that Canada has laid on bringing the nation on-line now has opened a window of opportunity for Canadians to make their presence felt. The time is suitable for initiating broad-based discussions aimed at gaining a common understanding of the importance of the copyright framework in promoting the availability of interesting content on-line. Otherwise, the Canadian impact and the benefits for Canadians may be substantially reduced. Accordingly, the departments are interested in beginning to explore the parameters of a copyright framework that includes a reflection on digital issues.

2. CONTEXT

2.1 Early Domestic Initiatives

Within Canada, the federal government publicly addressed the need to further investigate the opportunities and challenges of the emerging digitally networked environment in December 1994, when the then Minister of Industry, the Honourable John Manley, announced the creation of the Information Highway Advisory Council (IHAC), a blue ribbon panel of public and private sector experts. IHAC, in turn, created a number of subcommittees and working groups, including a subcommittee on copyright, to examine particular issues more fully. IHAC recognized that

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copyright is a fundamental component of any policy and/or legislative framework that will guide the development of the information highway. IHAC released its final report in 1995 entitled *Connection, Community, Content: The Challenge of the Information Highway: Final Report of the Information Highway Advisory Council* (<http://strategis.ic.gc.ca/SSG/ih01070e.html>).

IHAC made a number of copyright recommendations. One of its most important conclusions was the recognition that the *Copyright Act* applies in the digital environment:

Some hold the view that all works created and stored in a digital medium should enjoy *sui generis* protection. The purpose of [recommendation 6.2]² is to give assurance that such action is neither required nor appropriate... The digitization of works, in itself, generally does not result in the creation of new works but constitutes the expression of copyright subject matter in a different format. (p. 113)

In its response to IHAC (presented in *Building the Information Society: Moving Canada into the 21st Century*, 1996, <http://strategis.ic.gc.ca/SSG/ih01103e.html>), the government promised that the “ministers of Industry and Canadian Heritage will work closely with stakeholders to resolve outstanding copyright issues related to the Information Highway and to reach a determination as to whether there is a need to revise the present Act further”. (p. 14)

In the same document, the government also promised that the ministers would create a Task Force that would address several key issues, including copyright, relating to the digitization of the federal government’s holdings.

In its final report of December 1997, (*Towards a Learning Nation: The Digital Contribution - Recommendations Proposed by the Federal Task Force on Digitization*, <http://www.nlc-bnc.ca/8/3/r3-407-e.html>), the Task Force recommended that the federal government adopt a policy and guidelines that would envisage a “single window” approach for streamlining rights licensing. The recommendations were all premised on the principle that the government act in a model fashion.

Further to the work of the Task Force, several federal departments and agencies are currently working to develop an easily accessible licensing framework for making the government’s holdings of information of all kinds, including art, artefacts and scientific works, available on-line in a digital format. In its final report, the Task Force proposed to the government a vision and role as a model

²Recommendation 6.2 provides:

“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.” (p.113)

user for accessing the wealth of information on-line: "...the provision of digital information provides new ways for government to meet its cultural, social and economic policy objectives. Not only does it increase access to and knowledge of the Canadian experience, but it also fosters opportunities for innovation, wealth and job creation in the Canadian content and multimedia industries."

This statement presents a helpful view of the potential of the digital platform for all Canadians.

At the same time, the government is carrying out regular consultations with stakeholders through a continuing series of roundtables and other discussion forums, including the Electronic Rights Licensing Roundtable. These meetings have created a constructive, cooperative environment in which to discuss various copyright-related issues.

It should also be noted that the government has already given effect to some of the recommendations propounded by IHAC. For example, as a result of changes brought about by *An Act to amend the Copyright Act*, S.C. 1997, c.C-24 (Bill C-32), the *Copyright Act* now provides for "statutory damages" for copyright infringement, in keeping with IHAC recommendation 6.3(c)³.

2.2 International Initiatives

The impact of digital technology has already begun to be addressed in the international copyright framework. At the same time, nations are involved in different international fora to discuss these issues globally.

Agreements, such as the North-American Free Trade Agreement (NAFTA) and the World Trade Organization's Agreement on the Trade-Related Aspects of Intellectual Property (WTO-TRIPS) are also important. These agreements were among the first regional and multilateral trade agreements, respectively, to formally acknowledge computer programs within the framework of copyright. For the purposes of copyright, computer programs are recognized as literary works.

However, these agreements were negotiated before a new generation of ICTs permeated the consumer market sufficiently so as to provide a reasonably efficient means of exchanging more than bare text and simple graphics. Even today, the time taken to transmit the very large files associated primarily with cinematographic works is relatively substantial, though it is diminishing rapidly.

³The recommendation for statutory damages is as follows:

"Rec. 6.3(c) Copyright Protection in General: Provisions should be introduced for statutory damages based on the United States model." (p. 114)

Accordingly, the agreements contain few provisions that deal explicitly with the digitally networked environment.

Copyright protection in a work may sometimes be thwarted by carrying out infringing activities outside the country of its origin. The international community has attempted to address this problem through a system of international treaties that essentially provide national treatment to the residents of member states. The internationalization of copyright in this manner has meant that Canadian rights holders can obtain recognition of their copyright in the jurisdictions with the most important marketplaces outside of Canada.

The need for some degree of internationalization of copyright is particularly acute in the digital network context. The Internet is largely unfettered by national boundaries and reaches most communities around the world serviced by telephony. Wireless distribution systems, such as satellite-based systems, are rapidly ensuring that works in digital formats are easily disseminated to the furthest reaches of the globe. While this fact increases the potential accessibility to and value of the work, it also exposes the work to potential infringements. The opportunities for redress are significantly impaired if any new protections proposed for Canadians domestically are not recognized abroad.

Nonetheless, in the late 1980s, WIPO began to examine, *inter alia*, some of the implications of the emerging ICTs on copyright. Its work was reflected in the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT), which were concluded in December 1996. While these treaties deal with many copyright and related rights issues, they contain special provisions that are specifically designed to address the challenges posed to copyright by the networked technologies. Canada participated throughout the preparatory work and played a leading role in the December 1996 Diplomatic Conference.

The United States implemented the two WIPO treaties through its *Digital Millennium Copyright Act* (DMCA), which was passed in 1998, and deposited its instruments of accession with WIPO in September 1999. Treaty implementation within the European Union (EU) is being coordinated through the EU Directive on Copyright and Related Rights in the Information Society (hereinafter, the "Copyright Directive"). The Copyright Directive was adopted by the EU's Council of Ministers on April 9, 2001. The Copyright Directive must be implemented by EU member states in their national laws within 18 months of its publication in the EU's *Official Journal*. The treaties will come into force once there are 30 accessions or ratifications. The list of countries which have joined the treaties may be viewed from the WIPO web site, (www.wipo.int).

2.3 WIPO Treaties - Revisited in the Domestic Context

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The WCT and WPPT were concluded shortly after the federal government had published its response to the IHAC recommendations. However, IHAC's mandate was extended to allow it to monitor the government's progress in implementing its recommendations. In IHAC's report card published in 1997, (*Preparing Canada for a Digital World: Final Report of the Information Highway Advisory Council*, 1997, p. 20, <http://strategis.ic.gc.ca/SSG/ih01650e.html>), it recommended that "[t]he Government of Canada should move quickly to respond to the World Intellectual Property Organization's 1996 Copyright and Performances and Phonograms Treaties".

Through this recommendation, IHAC recognized the valuable direction provided by the WCT and WPPT in establishing standards of copyright protection that would maintain the integrity and objectives of the copyright system in the digital network environment. As a first step toward adopting this recommendation, Canada became a signatory of the two treaties in December 1997. Signing the treaties demonstrated Canada's commitment to the principles they represent. However, absent ratification, Canada is not bound by the specific treaty obligations.

Ratification of the treaties is possible once Canada's copyright legislation complies with the treaties' provisions. In response to IHAC's report card, the departments commissioned two Canadian copyright experts (hereinafter the "expert consultants") from the private sector to provide their opinion as to the amendments needed to the *Copyright Act*, should Canada decide to ratify. Their reports were made available to the public on the Internet in July 1998, and served as the basis of consultation with stakeholders over the Summer of 1998

(<http://strategis.ic.gc.ca/SSG/ip01037e.html> and http://www.pch.gc.ca/culture/cult_ind/wcptpt_e.htm). The reports suggest that, although amendments would be required in order to comply with the new treaties, the Act already provides a framework for copyright protection that complies with the bulk of the treaties' provisions and which is up to date as compared with copyright legislation of many other countries.

While many stakeholders agreed with the amendments identified by the expert consultants and encouraged the government to proceed with treaty implementation and ratification, others sought more dialogue in order to have an opportunity to explore more fully the implications of such a step. For instance, several stakeholders were concerned that bare treaty implementation involved no consideration of the needs of institutions that use copyright materials consistent with other important public policy objectives (e.g., educational institutions, libraries, museums, archives, etc.). Others thought that the impact of existing and proposed rights on the potential copyright liability of Internet intermediaries, such as Internet Service Providers (ISPs), needed to be evaluated and clarified. Indeed, since that time, because of technological evolution and the fallout from legislative measures taken in other jurisdictions, some stakeholders have returned to the departments with new concerns about the impact of intervening too quickly.

2.4 Liability of Internet Service Providers (ISPs)

Internet intermediaries have expressed many concerns over their potential liability in relation to objectionable or illegal content circulating over their network facilities. Content may be objectionable or illegal for many reasons. For example, it may incite hatred against particular segments of society, be defamatory, or its particular uses may infringe trade-marks or copyright.

As an important step in grappling with the liability issue, the departments commissioned a study that examined the potential liability faced by Internet intermediaries with respect to illegal or objectionable content. The study, published in March 1997, also specifically considered the application of the *Trade-marks Act* and the *Copyright Act* to the intermediaries. (*The Cyberspace is not a "No Law Land": A Study of the Issues of Liability for Content Circulating on the Internet* at <http://strategis.ic.gc.ca/SSG/sf03117e.html>).

An important further development has since shed some light on the liability issues raised in the copyright context. On October 27, 1999, the Copyright Board released its decision that it would proceed with the certification of proposed *Tariff 22* (the so-called Internet tariff). In 1995, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) had filed a proposed tariff (*Tariff 22*) whereby ISPs were asked to pay royalties for the communication of the musical works in SOCAN's repertoire over digital networks such as the Internet. In its decision of October, 1999, the Board asserted its jurisdiction to certify such a tariff. The decision is currently under review by the Federal Court of Appeal. For more information, visit the Copyright Board's web site (<http://www.cb-cda.gc.ca/indexe.html>).

3. PROMOTING THE DISSEMINATION OF NEW DIGITAL CONTENT FOR AND BY CANADIANS - CORE PRINCIPLES

The government's efforts in building a knowledge-based society and economy is focussed partly on fostering the capacity to generate and disseminate the creative endeavours of Canadians. This content is what provides much of the value in such an undertaking. More particularly, the guiding objective supporting the analysis and proposals set forth in this document is to promote the Connecting Canadians agenda by creating a copyright framework that encourages the dissemination of new digital content on-line for and by Canadians. A copyright framework that achieves this objective will help to enrich the cultural lives of Canadians and boost the value of Canada's participation in the networked economy by increasing the diversity of content from which to choose, and most importantly, by increasing the range of content produced by the creative sectors of the Canadian community.

However, the principal objective may only be fully realized by acknowledging and giving effect to a set of core principles:

- **The framework rules must promote Canadian values.**

The government is committed to establishing a framework that will facilitate the use of the digital environment for Canadians to communicate with each other and with the world. In so doing, the values that define our society should continue to be upheld.

- **The framework rules should be clear and allow easy, transparent access and use.**

The need to respond to ever-changing technologies over the last century has added to the detail and complexity of copyright regimes around the world, including Canada's *Copyright Act*. Nonetheless, stakeholders have informed us that a source of some infringement lies in misunderstandings or differences in opinion about the scope of certain rights and exceptions. By the same token, rules that are unclear may have a chilling effect on legitimate uses of works that are nonetheless permitted under copyright law. Our objective is to dispel confusion for all Canadians about the boundaries of legitimate uses of works on-line.

- **The proposals should promote a vibrant and competitive electronic commerce in Canada.**

Another important factor relates to policy choices on issues that are being addressed for the first time. Canada's copyright policy is an important tool for promoting the competitiveness of Canadian businesses doing business electronically and should especially promote those industries that represent Canada's greatest opportunities. Any policy the government pursues should foster the conditions that will put Canadian players on a competitive footing with their counterparts abroad. In this respect, the departments acknowledge that in addition to the copyright sectors themselves, Canada's Internet intermediary sector is particularly affected by our policy choices.

Becoming a competitive player in the digital economy implies a need to ensure that the copyright framework is aligned to the global realities in a timely, ongoing fashion. The corollary is that the policy proposal is not exhaustive in relation to all questions related to the digital network environment; by attempting to address everything at once, Canada might lose an important opportunity.

- **The framework needs to be cast in a global context.**

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Other countries have developed or are developing domestic policy responses to the digitally networked environment. Not all of these are similar, nor are they all built on identical foundations. Canada's *Copyright Act* has taken its current shape in response to particular challenges and pressures, some of which are unique to Canada.

The Internet is largely unfettered by national boundaries and reaches most communities around the world serviced by telephony. Wireless distribution systems such as satellite-based systems are rapidly ensuring that works in digital formats are easily disseminated to the furthest reaches of the globe. While this fact increases the potential value of the work, it also exposes the work to infringements effected outside the country of its origin.

The international community has attempted to address this problem through a system of international treaties. For the most part, this treaty system provides for national treatment to the residents of member states. The internationalization of copyright in this manner has benefited Canadian rights holders by ensuring the recognition of their copyrights in the most important marketplaces outside of Canada.

However, a single regime for copyright protection worldwide may not be a practical objective. The challenge for the departments is to develop copyright policies that are consistent with and promote international standards of protection, but that continue to validate Canadian priorities, choices and values.

The provisions of the WCT and WPPT specifically directed to the challenges of the digital network environment appear to reflect principles that have support internationally; they may well come to represent the international norm. At the same time, the treaties allow for considerable flexibility with respect to implementation.

Certain stakeholders have expressed strong concern that the failure to ratify the treaties would greatly limit the utility of implementing new protections aimed at the digitally networked environment. The departments acknowledge the concern and recognize the importance of obtaining the widest possible recognition for Canadians of any new protections.

Ultimately the most difficult issues for governments worldwide in terms of a global electronic commerce framework may prove to be issues surrounding conflict of laws. That is, in the event of a dispute involving players of different nationalities, which nation's courts have jurisdiction over the dispute, whose copyright rules should apply, and how will plaintiffs enforce decisions reaching beyond the territorial jurisdiction of the court deciding the issue? A common understanding on conflict rules can only be achieved through an international dialogue. The full importance of this question is only now being recognized internationally and work has been initiated by WIPO to

consider the implications for IP protection. Canada will be a participant as this process moves forward.

- **The framework should be technologically neutral, to the extent possible.**

Technological evolution over the past decade has resulted in an explosive growth in the rate at which information can be sent over digital networks. At the time of writing, telephone lines may still be the primary conduits for this information, but their predominance may be in the process of being displaced by coaxial cable and other higher bandwidth conduits, such as fibre optic cables or even wireless systems based on microwave and satellite technologies. These developments illustrate how innovation in ICTs has rapidly changed the character and quality of the material and services available over the network environment. They also illustrate the importance of passing legislation that establishes technologically neutral principles rather than reactive legislation that responds to particular technological challenges.

4. PROPOSALS

4.1 Making Available

Some rights holders have argued for the right to determine whether, and under what circumstances, their works are made available over networks such as the Internet. This section explores issues related to the introduction of a “making available right” in the *Copyright Act*.

Background

The advent of ICTs and their many applications is posing serious new challenges to copyright policy in Canada and around the world. The representation of works in binary format as 1's and 0's has given rise to the possibility of easily making copies with no loss in quality from the original. Networks such as the Internet permit each network user to make works easily available to a worldwide audience. Conversely, each user may have access to a phenomenal number of works on-line from the comfort of their own home. In this way, ICTs create new ways of truly connecting Canadians with each other and the world, as well as creating new opportunities for rights holders to reach many more users.

By the same token, however, ICTs also represent a potential threat because they facilitate the large scale reproduction and dissemination of works without the rights holder's consent. Some rights holders are concerned that once their works, performances or sound recordings are available over the Internet, for example, by being uploaded onto an Internet web site, the opportunity for containing unauthorized dissemination is greatly impaired. Accordingly, they consider it essential

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that they have the right to authorize the appearance of their works or protected subject matter within the networked environment.

Currently, the Canadian *Copyright Act* allows authors and their assigns the right to determine when their works are first provided to the public, and then subsequently, the extent to which further copies of their works enter the marketplace. For works fixed in physical form, such as books and CDs, this control is achieved largely through the first publication and reproduction rights set out in s. 3 of the Act. For works that are not fixed in physical form (such as digital copies that are transmitted on-line), control is achieved through the reproduction right and the right to authorize communications.

The rights currently available to performers and sound recording makers in the *Copyright Act* have been the result of substantial amendments brought about by *An Act to amend the Copyright Act* (Bill C-32) which was passed in April 1997. Section 19 of the Act now confers on these rights holders a right of remuneration for the communication to the public and public performance of their protected subject matter. Section 18 of the Act confers on sound recording makers, first publication and reproduction rights similar to those of copyright owners. Performers have the right to:

- determine whether or not their performances can be fixed;
- reproduce any fixation made without their consent; and,
- reproduce any copies of an unauthorized fixation if the copies were made for a purpose beyond the scope of their authorization.

Performers also have the right to determine whether or not their live performances are communicated to the public by telecommunication. These rights are largely set out in s. 15 of the Act.

The specific notion of a "making available right" emerged during the ongoing negotiations leading to the conclusion of the WCT and WPPT in 1996. Prior to the negotiations, concerns were expressed that certain categories of works were not covered by the communication right contained in the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention) (<http://www.wipo.int/treaties/ip/berne/index.html>). For instance, the Berne Convention does not apply to the transmission by wire of literary works, including computer programs, as well as visual works.⁴

⁴ The notes on article 8 presented with the proposal of 1996 describe the situation well:

"... it has become evident that the relevant obligations need to be clarified and that the rights currently provided under the Berne Convention need to be supplemented by

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Another concern referred to “on-demand” communications. An on-demand service allows consumers to access and download works (text, music, pictures, video) from the service at the time and location they choose. During the negotiations, a consensus was reached as to the desirability of supplementing the existing provisions to address the perceived limitations of the Berne Convention and the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (the Rome Convention) (<http://www.wipo.int/treaties/ip/rome/index.html>).

As a result, the WCT extends the traditional exclusive right of authors to communicate to the public to all categories of works. Furthermore, the WCT explicitly provides that the right of communication to the public explicitly includes the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. The communication right is set out in article 8 of the WCT:

Article 8

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

The WPPT, on the other hand, creates for performers and producers of phonograms distinct exclusive rights of making available which are set out in articles 10 and 14 (respectively):

Article 10

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 14

extending the field of application of the right of communication to the public to cover all categories of works. . . . The right of communication does not presently extend to literary works, except in the case of recitations thereof. Literary works, including computer programs, are presently one of the main objects communicated over networks. Other affected categories of works are also not covered by the right of communication, significant examples being photographic works, works of pictorial art and graphic works”.

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Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

It is important to note that the formulation of the “making available” right in the particular terms used by the treaties does not mean that it must be characterized in the same terms in any national legislation.

Other Jurisdictions

Currently, in the US and Japan, authors, performers and sound recording makers have a making available right that is effectively provided, in some contexts, through other copyrights, e.g., through a transmission right. In Europe, the EU Copyright Directive requires Member states to amend their copyright legislation to provide the same. In Australia, an amendment to the *Copyright Act* (the *Copyright Amendment (Digital Agenda) Bill*) has been passed by the Australian Parliament. The amendment, which came into force in Spring 2001, introduced a new technology-neutral right to communicate literary, dramatic and musical works to the public, which would also explicitly encompass the making available of such works on-line.

4.1.1 Authors and Their Successors

In their 1998 reports, the expert consultants expressed the opinion that the *Copyright Act*’s communication right, with its attendant authorization right, is sufficiently broad to include a making available right for authors and their successors.

With regard to the interpretation of “to the public”, the departments note the IHAC Copyright Subcommittee’s view that the phrase “to the public” includes such services as computer “bulletin boards” where individual subscribers can dial in and download works for perusal at their convenience. However, the Subcommittee specified in its report, *Copyright and the Information Highway: Final Report of the Copyright Subcommittee* (<http://strategis.ic.gc.ca/SSG/ih01092e.html>), that the case law had not expressly addressed this issue and that “any narrowing of this concept by judicial interpretation should be addressed in suitable amendments to the *Copyright Act*.” (p. 11)

The departments share the expert consultants’ view that the Act provides for an on-demand communication right. In this respect, the Copyright Board, in its *Tariff 22* decision, concluded that an on-demand communication right is contained within the right to authorize the communication of a work to the public by telecommunication. The departments also agree with IHAC’s interpretation of “to the public”; given the absence of judicial interpretation narrowing the concept, we need not

amend the Act. Accordingly, the departments do not propose amending the Act in this respect at this time.

4.1.2 Performers and Sound Recording Makers

In contrast with the situation for authors, the Act does not provide performers and sound recording makers with the exclusive right to make a particular performance or recording of that performance available to the public on an on-demand basis. The expert consultants expressed the view that an amendment would be required if Canada were to provide a making available right for performers and sound recording makers that complies with articles 10 and 14 of the WPPT.

Because of the special challenges that the network environment poses for all rights holders, some stakeholders in the performance and sound recording sectors have encouraged the departments to develop an amendment to the Act that would explicitly include a making available right for their industries consistent with articles 10 and 14 of the WPPT. As noted above, they claim that a right in this respect would enable them to negotiate, along with authors and their assigns, for appropriate terms and conditions of use, and thus, to decide for themselves how best to derive benefits from their protected subject matter and to mitigate the potential for infringement.

Certain stakeholders would like the government to go further, arguing that a protection limited to preventing on-demand communications, such as making available on network sites, ignores the current and projected amount of real time streaming of music as well as other types of works over the Internet. These stakeholders encourage the government to transcend the minimal requirements of the WPPT by including such activities within the making available right.

On the other hand, the owners of copyright in the musical works have argued that before granting this right to performers and sound recording makers, the departments ought to explore how such a right would work in practice. Concerns have been raised that having three separate exclusive rights may unduly restrict the exploitation of recorded performances of works or their dissemination on the Internet. These stakeholders have expressed concern that a single rights owner could limit distribution even though the two other rights holders were eager to promote it.

Proposals

Given this backdrop, the departments propose to pursue a dialogue on the merits of introducing a making available right.

Such a proposal could consist of the following elements: Performers and sound recording makers would be provided with an exclusive right to authorize the on-demand communication or

performance to the public of a sound recording protected under the Act. For the purposes of this new provision, an “on-demand communication [or performance]” would be one in which the communication or performance of the particular recording could be initiated by the recipient at the time of his or her choosing such that the communication or performance of the recording would follow within the interval of time required for the transmission processes to be completed.

The proposal would be drafted to meet the requirements of the WPPT, but would not cover streaming activities as such, other than on-demand streaming. With respect to on-demand streaming, the departments note that the Act already provides a remuneration right to performers and sound recording makers in respect of the communication of their works in real time. In its *Tariff 22* decision, the Copyright Board acknowledged that Internet-based communication can be communication to the public by telecommunication.

1. How would a “making available” right affect the balances among the various copyright interests?
2. In which respects might such a right require limitations or be subject to exceptions?
3. In which respects do existing rights, e.g., the reproduction right, fail to provide a measure of control which is comparable to a distinct “making available” right?

4.2 Legal Protection of Technological Measures

Increasingly, a number of technologies are available that may be used to thwart the infringement of copyright materials on-line. Many rights holders have indicated that the adoption of such protective technologies (for example, encryption) are a key aspect of their plans for disseminating their works in the networked environment. The issue arises whether and under what circumstances copyright legislation ought to provide sanctions against persons who engage in activities related to the circumvention of these protective measures.

Background

In the digitally networked world, different technologies (referred to in this paper as technological measures) for retaining control over material available on-line may become increasingly prevalent. Such measures allow for varying degrees of control: access restrictions such as passwords, confirmation measures such as signatures and watermarks, to complete controls such as encryption. Some stakeholders consider technological measures as an important set of tools available to copyright owners for preventing unauthorized uses of their copyrighted materials and for securing

their continued ability to negotiate the terms and conditions under which such materials may be further disseminated.

Completely foolproof measures are unlikely to be technologically feasible. However, advances in technology will continue to increase their effectiveness. In this respect, the departments encourage the private sector to develop standards for such measures that will help to enable the emergence of the networked environment as a new marketplace for the copyright sectors. In time, the catalogue of technological measures available will likely range from those that protect copyrights by preventing unauthorized uses to complete access systems that integrate watermarking technologies and electronic rights management systems.

Concerns remain, however, that once a technological measure is defeated, control over the authorized dissemination and use of works in the networked environment is effectively lost. Given that even the strongest of technological measures will be vulnerable to circumvention, policy makers must consider whether to provide recourse against those who would defeat or assist in defeating such measures.

In proceeding with this analysis, the status of such measures is worth reviewing. Copyright law itself protects rights holders against unauthorized uses, while technological measures adopted by rights holders to ensure their rights serve to provide an additional layer of protection for works. Any proposed statutory provisions to protect technological measures would be in effect a third layer of protection, albeit one which relates not to works, *per se*, but to the technological measures in relation to works. In some jurisdictions, such legal provisions protecting technological protection measures extend beyond copyright to include restrictions on access and on the manufacture and distribution of circumvention devices. In other words, by providing legal recognition of the technological measures, the traditional boundaries of copyright law would be extended to include new layers of protection. There is concern that the *Copyright Act* may not be the proper instrument for protection measures that, *prima facie*, are extraneous to copyright principles.

International Developments

The 1996 WIPO treaties propose a model framework for the legislative recognition for such technological measures in article 11 of the WCT and article 18 of the WPPT, which provide respectively:

Article 11

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and

that restrict Acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 18

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict Acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Other Jurisdictions

Approaches taken or proposed in other jurisdictions have led to debate over how these articles should be implemented so as to provide a meaningful protection against piracy, but at the same time, remain consistent with the broader policies and objectives of their own copyright legislation. In general, the legislation adopted or in contemplation abroad has focussed on two types of activities: the act of circumventing a technological protection measure or the creation and/or traffic in devices (circumvention devices) that can be used to circumvent technological measures. With respect to the former, a distinction is sometimes drawn between acts that infringe copyright and acts that enable unauthorized access to protected material.

In the US, the *Digital Millennium Copyright Act* (DMCA) provisions which implement the above noted articles 11 and 18 target not only acts of circumventing technological protection measures for the purpose of gaining unauthorized access to works, but specifically prohibit (subject to certain exceptions) the manufacture and distribution of devices and the sale of services (circumvention services) that are used to circumvent such measures. The EU Directive contains a similar prohibition that targets both individual acts of circumvention, as well as the manufacture of and trade in devices primarily designed to circumvent protection measures.

In the debates surrounding the adoption of policies on anti-circumvention measures in both the EU and the US, policy makers needed to consider a number of issues with respect to the use of such technologies. For instance, the prohibition on circumvention devices and services could have the effect of overriding the traditional contours of copyright protection that emphasize a balance between the rights of creators and the interests of users. More particularly, the prohibition could have the effect of potentially blocking all types of access and use, whether or not they constitute an infringement of copyright. In describing this result, commentators have sometimes used the metaphor of the "locked drawer", whereby authorization to see or use the contents of the drawer must always be obtained from the owner of the key.

In Japan, the legislative choice has been to provide a very thorough and stringent regulatory framework against the circumvention of technological protection measures. Both devices (including a set of parts of a device that can be easily assembled) and programs having a principal function for the circumvention of technological protection measures used to protect copyright, are prohibited. Subject to special rules, an act of circumvention that makes a work vulnerable to being reproduced is proscribed.

In Australia, the *Copyright Amendment (Digital Agenda) Bill* does not proscribe the act of circumvention, but makes it illegal to manufacture or trade in devices that circumvent “effective technological measures”. It also makes it illegal to provide services for circumventing such measures. The definition of “effective technological measures” is fairly narrow, including only copy control mechanisms and mechanisms that provide access to a work through an access code or process.

The range of provisions adopted reflects the flexibility of the WIPO treaty requirements, but also suggests that there is no clear sense of what impact technological measures will have on copyright legislation. Although the US DMCA entered into force in 1998, the entry into force of prohibitions against unauthorized access to technologically-protected works was suspended for two years. This allowed the US Copyright Office to assess and address the potential impacts of the legislation in the context of a rule-making process. The DMCA also instituted regular three year reviews to provide an ongoing mechanism to measure impacts. The provisions are now in force along with exceptions developed through the rule-making process.

Proposals

Domestically, some copyright stakeholders have indicated that in the absence of a prohibition against the manufacture and traffic in circumvention devices, would-be infringers can legally access the means that enable infringement. With respect to the possibility of sanctioning acts of circumvention alone, these stakeholders have also expressed the concern that attempts to seek legal recourse on the basis of such acts are costly and may not always be effective in providing a strong deterrent to infringement in a globally interconnected world.

The departments acknowledge the concerns of these copyright stakeholders, but must consider these concerns within the framework of Canadian copyright law, where certain uses of works and limitations on copyright protection are recognized as serving legitimate and important public policy objectives. Such limitations are evidenced by the finite term of copyright protection, the fair dealing provisions and the exception provisions. These elements of our copyright law have been the outcome of extensive debate, consultation, jurisprudence and legal obligation, both domestically

and internationally. Any attempt to affect that balance may require a reconsideration of the current extent of the exceptions provisions.

The departments have considered the possibility of restricting or prohibiting the traffic in circumvention devices, while at the same time permitting devices that have, as their primary purpose, an activity that qualifies as legitimate, such as the enjoyment of an exception or access to material in the public domain. The difficulty is that devices which are suited to infringing uses are, by and large, equally suited to non-infringing uses. For example, a device used to circumvent a measure that prevents unauthorized copying will not distinguish between materials that continue to benefit from copyright protection from those that have fallen into the public domain.

Under these circumstances, the departments question whether it is possible to establish a legal framework which, on the one hand covers virtually all activities that undermine the use of technological measures, but at the same time continues to reflect the policy balance currently set out in the Act. Such a change in the *Copyright Act* could potentially result in a new right of access, the scope of which goes well beyond any existing right, and would represent a fundamental shift in Canadian copyright policy. It could serve to transform a measure designed for protection into a means of impeding legitimate uses. In essence, a change of this nature would be tantamount to bringing within the realm of copyright law, matters (e.g., restrictions on use) which may be more properly within the purview of contract law. Given the rate at which the technology underlying protection measures is changing, it is difficult, under present circumstances, to evaluate the public policy implications of such a step. Perhaps the role of technological changes warrants a careful study to examine what will be the dimensions of the intersection of anti-circumvention measures with the current Act.

The departments consider that the issues relating to anti-circumvention measures raised in this paper may serve as the departure point for a broader dialogue with all our copyright stakeholders on the appropriate contours of copyright in this environment. The departments are interested in developing approaches that will tangibly advance the government's public policy objectives and broader reflections on copyright, and are therefore eager to obtain stakeholder input.

The most basic form of prohibition would be to restrict specific acts. The Act would specifically prohibit the circumvention, for infringing purposes, of technological protection measures, where such measures have been adopted, *inter alia*, to restrict acts not permitted by the Act. In certain cases with commercial motivations, where the scale of the circumvention has consequences for the copyright sectors as a whole, there should be appropriate criminal sanctions. In taking this approach, the departments are in no way attempting to suggest to rights holders what kinds of technological protection measures they should be adopting.

At the other end of the spectrum, the most extensive form of prohibition would entail a prohibition on circumvention devices in addition to a prohibition on acts, as above. Thus, there could also be remedies against importing, selling, letting for hire, by way of trade offering or exposing for sale any device whose purpose is to circumvent any technological measure used to protect a right or rights conferred under the *Copyright Act*.

Further questions arise with respect to possible measures at this end of the spectrum. For example, to conserve the current contours of our copyright law, should rights holders be under a positive obligation to provide access to a person whose use falls within an exception to or limitation on copyright set out in the Act? This question touches on the issue of exemptions, which may require further analysis. The *Copyright Act* includes a private copying regime that could be significantly affected by restrictions that impede the ability to make copies of sound recordings for personal use.

1. Given the rapid evolution of technology and the limited information currently available regarding the impact of technological measures on control over and access to copyright protected material, what factors suggest legislative intervention at this time?
2. Technological devices can be used for both copyrighted and non-copyrighted material. Given this, what factors should be considered determinative in deciding whether circumvention and/or related activities (such as the manufacture or distribution of circumvention devices) ought to be dealt with in the context of the *Copyright Act*, as opposed to other legislation?
3. If the government were to adopt provisions relating to technological measures, in which respects should such provisions be subject to exceptions or other limitations?
4. Are there non-copyright issues, e.g. privacy, that need to be taken into account when addressing technological measures?

4.3 Legal Protection of Rights Management Information

On the Internet, copyright materials may be available from multiple sources - not all of which are necessarily authorized by rights holders - and for a variety of uses. The ability of rights holders to embed certain rights management information in their material can help them to assert their interest in the material and to monitor its movement. It can also serve to facilitate on-line licensing. However, the information is only useful to the extent that its integrity is maintained. In addition, it is important to bear in mind that the protection of rights management information could have

implications for personal privacy. This section discusses how the *Copyright Act* should apply against those who would tamper with or delete rights management information. It also explores what information should qualify for such protection.

Background

As a preliminary point, the departments note that the information discussed as “rights management information” relates to identifying information pertaining to the work, such as the title, the author or first owner and an identifying code. Such information may also function in relation to technological measures, as where a watermark serves to identify a work but may also be a requisite component for enabling the authorized use of a copyrighted work. The following discussion will develop the issues surrounding rights management information as a distinct area of concern. However, it is necessary to keep in mind potential questions on how rights management information overlap with those relating to technological measures.

Internationally, the copyright community has indicated that rights management information associated with works or sound recordings will become increasingly important, in an on-line environment. This information is part of the means used to verify the identity of a work and potentially the non infringing character of the works or recordings that are being made available for viewing, listening and downloading. It may also be a component of the systems for tracking certain information that is useful to rights holders, for example, for the purpose of distribution of royalties or clearance of rights. Thus, such information will allow rights holders to ascertain certain uses being made of these works and recordings. Rights management information may also allow users to confirm any moral rights that exist in the works.

Although in the future it may become difficult or unnecessary to distinguish between technological measures and rights management information, it is worthwhile to have a separate section on rights management information in order to discuss the considerations that are particular to it.

The expert consultants’ papers advised that the Canadian *Copyright Act* does not currently contain measures to protect the integrity of this information. The departments agree with this view and consider that rights owners should have effective remedies against such manipulation of their rights management information.

Some members of the copyright community have emphasized that legal deterrents are necessary to discourage tampering with such information in order to facilitate or conceal infringement. This community’s concern is reflected in article 12 of the WCT and article 19 of the WPPT:

Article 12

- (1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
 - (i) To remove or alter any electronic rights management information without authority;
 - (ii) To distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.
- (2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

Article 19

- (1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:
 - (i) To remove or alter any electronic rights management information without authority;
 - (ii) To distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.
- (2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

Other Jurisdictions

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The Australian *Copyright Amendment (Digital Agenda) Bill* has introduced such measures into Australian copyright law. The European Union's Copyright Directive, once implemented by its Member States, will achieve essentially the same result.

The US and Japan currently protect rights management information, but both jurisdictions have gone somewhat beyond the bare WIPO treaty requirements by including provisions that create sanctions for knowingly providing false rights management information. These jurisdictions also provide certain exemptions from liability. In the US, there is a general exemption for tampering for law enforcement, intelligence and other governmental activities. In Japan, there are exclusions from the prohibitions against alteration and removal (for instance, where certain recording or transmission technologies are involved), and where these acts are necessary to lawfully use the copyrighted material.

Proposals

The departments consider that article 12 of the WCT and article 19 of the WPPT could form the basis for a proposal to create new types of secondary infringement and new offences under the Act. These secondary infringements would consist of the removal or alteration of rights management information that impede the management of rights set out by law, and would include the distribution and communication to the public of works or copies of works when it is known that rights management information has been in some way altered or removed without authorization. In addition, the Act could also provide for a separate offence for removing or altering rights management information in order to enable or abet infringements of copyright and related rights.

At the same time, the departments ask whether the integrity of certain information ought to be protected, given that, over time, the information may cease to be accurate. Some commentators have noted that certain information currently included as "rights management information" in accordance with the definitions provided in the WCT and WPPT may change often during the lifetime of the copyright. In particular, the rights owner may often change, though the author will not, or in the case of a particular sound recording, the performer will not. Similarly, terms and conditions may not only change, but have uncertain legal validity in Canada. This may cause confusion among users and detract from a rights management regime rather than promote it.

As a further consideration, the departments note that in several cultural sectors, such as audio-visual works, there is a growing international consensus towards the adoption of a simple identifying code. Would the adoption, universally, of a single identifying code render protection of other types of information unnecessary?

Option A

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According to this option, "Rights Management Information" would be defined consistently with article 12(2) of the WCT and article 19(2) of the WPPT.

The fact that terms and conditions are protected does not, by itself, mean that those terms and conditions apply in Canada or are legally binding in Canada. Protecting such information should not be construed as confirming the legal validity in Canada of the terms and conditions of use which may be part thereof. Similarly, terms such as "author" or "owner of any right" would be defined according to their meaning in Canada.

Option B

Alternatively, rights management information in relation to a work would be defined to include information identifying the work, the author, the first owner of copyright in the work, and any numbers or codes that represent such information. The first owner of copyright is included in acknowledgement of the fact that many works (e.g., computer programs) are produced jointly by a number of authors who are employees of a business. In such instances, the name of the author may not usefully assist the copyright owner in identifying or asserting their interest in the work.

Similarly, rights management information in relation specifically to a sound recording would include information identifying the performer, the performance of the performer, the maker of the sound recording, the first owner of any right in the performance or sound recording, and any numbers or codes that represent such information.

1. What information should be protected under the *Copyright Act*? Given that information may cease to be accurate over time, should information relating to, for example, the owner of copyright and to terms and conditions of use be protected?
2. Certain terms and conditions may not be legally valid in Canada if they are contrary to public policy. In light of this, what limitations should there be on the protection of such information? Is a provision required that specifies that the protection of such information does not imply its legal validity in Canada?
3. Given the fact that some technologies serve a dual purpose, i.e., reflect rights management information and protect a work against infringement, how should provisions concerning rights management information take into account provisions regarding technological measures?
4. If the Act were amended to protect rights management information, does the fact that some technologies may be used both to set out rights management information and protect a work against infringement mean that duplicate or overlapping sanctions could result in some cases?
5. Are there non-copyright issues, e.g. privacy, that need to be taken into account when

4.4 Liability of Network Intermediaries, such as Internet Service Providers, in Relation to Copyright

Internet Service Providers (ISPs) play an integral role in enabling use of the Internet, whether the user is a sender of content or a recipient. To date, however, the *Copyright Act* has not specifically taken into account the role of the ISP. This section considers some of the issues with respect to the copyright liability of ISPs and explores the possibility of resolving them in a way that could also serve to curtail the circulation on-line of infringing content.

Background

Many Canadians are turning to network platforms such as the Internet to access various materials, including works protected by copyright. Correspondingly, the Canadian copyright sectors are seeking ways to exploit the potential of networks such as the Internet to disseminate their content.

The ISP plays an integral supporting role in enabling the dissemination and enjoyment of content produced by and for Canadians. One of the main functions of the ISP is to act as an intermediary to provide the network services that enable the connections between content providers and end users. This intermediary function can encompass various distinct types of activities. At a minimum, most provide their subscribers with access to the Internet, which includes the ability to transmit and receive information and to provide services such as e-mail. Many also provide space on their servers to their clients for use as Web sites, take measures (such as caching) to increase the efficiency of the network system, and provide or facilitate access to a wide range of content and consumer-oriented services.

The growth of a Canadian presence in the digitally networked environment will be aided by a viable and competitive Canadian ISP⁵ sector. The range of entities carrying out intermediary functions is extensive - ISPs in Canada are not only private commercial entities. Governments, educational institutions, libraries, archives, hospitals and other public institutions which, in fulfilment of their mandates, provide services to the public, may offer their employees, patrons and students services similar to those that are offered to the consuming public by their private sector counterparts. Technological change is making it feasible for private individuals to offer these services as well. A policy framework for ISPs must recognize the role played by all these entities, institutions and individuals.

However, the ISP community advises that given the sheer volume of material flowing through their facilities, ISPs do not currently have the ability to continually assess the legitimacy, from the standpoint of copyright, of client activities in relation to particular materials. Furthermore, the copyright status of the materials and the legal relationship between right holder and user (i.e., is the use authorized?) will often be unknown and unknowable to the network intermediary.

Some within the copyright sectors and the ISP community have also noted that the application of the *Copyright Act* to ISP activities is unclear in certain respects. This concern was acknowledged by IHAC in its 1995 report, *Connection, Community and Content*:

⁵ISP functions include many different kinds of services that link the content provider and the end user. However, the ISP activities that are of interest for the purposes of this paper are those that relate to enabling and facilitating access to and exchange of content on behalf of clients, i.e., where the ISP provides storage space, acts as a conduit for enabling access to information or takes measures to improve the efficiency of this service. The departments put aside for the present time consideration of those activities where the ISP is in some way involved in the selection of particular content, for example, the cataloguing of favourite Web sites within an organized taxonomy.

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The Council recognized that under the current law, service providers could be held liable for copyright infringement. Only common carriers that function solely in that capacity are exempt from copyright liability under the *Copyright Act*. However, it was felt, with the absence of any recourse to some form of defence mechanisms, copyright liability of Bulletin Board system operators could be too rigidly interpreted. (p. 120).

When IHAC prepared its 1995 report, the ISP sector was in the early stages of its development; to a greater degree than is the case today, content dissemination over networks was assisted through bulletin board services. IHAC's statement, though referring to bulletin board system operators, may be illustrative of the problem currently faced by ISPs in their intermediary capacity. In fact, with respect to potential copyright liability, bulletin board system operators often play a greater role vis-à-vis the particular content on their sites than do ISPs, such that the ISPs' intermediary activities seem to be contemplated by the statement.

Current copyright rules were not developed taking into account the emergence of the ISP sector and the departments agree that the application of these rules to ISPs may be uncertain in some instances.

Whether ISPs could be subject to a tariff of copyright royalties for the music communicated over their networks was an issue before the Copyright Board in the *Tariff 22* proceedings. The Board's decision on the legal issues raised in these proceedings specifically considers whether Internet intermediaries communicate musical works to the public by telecommunication when their subscribers upload such works onto the network sites they host. It also considers whether such communication occurs in the context of certain Internet-related activities such as linking, caching and mirroring.

In the opinion of the Copyright Board, it is the content providers (i.e., those who upload content onto network sites) who are liable to pay royalties under the Act, as it is they who communicate or authorize the communication of the works within the meaning of the Act. Providing services as an intermediary does not entail liability, as such activities are in many respects analogous to those of telephony's common carriers, and are specifically exempted pursuant to s.2.4(1)(b) of the Act. However, at the time of writing, it must be noted that the Board's decision is being reviewed by the Federal Court of Appeal such that the law in this respect has not been fully settled.

The *Tariff 22* decision deals specifically with the *Copyright Act*'s right of communication to the public by telecommunication in the context of musical works. As such, it does not eliminate the need to give further consideration to the liability issue, particularly in relation to the reproduction right.

In respect of reproduction, legal commentators have stated that in Canada, infringement of the reproduction right can give rise to strict liability; persons whose facilities are used to effect a reproduction may be liable regardless of whether or not there was an intent to infringe copyright. That said, the departments are not aware of case law that resolves the issue specifically with respect to ISPs.

However, with current technologies, reproductions of content of all kinds are an integral part of the networked environment. Reproductions may be found on Web sites, are made automatically through caching processes, and possibly in a transient fashion through the transmission process as well.

The departments understand that transmissions over digital networks such as the Internet operate basically through a process called "packet switching" to convey the information contained in any transmission between content providers and end users. An ISP would be unable to carry out one of its primary functions if it could not effect the reproductions of information that may be necessary to complete a communications activity. In addition, since these packets can be stored in various locations for varying amounts of time, this caching activity, while not essential to a particular act of communication, facilitates communications generally by increasing overall network efficiency.

In the departments' view, there are considerable difficulties in attempting to identify:

- which transmission processes result in the creation of a copy of a given work however transient, that amounts to a "reproduction" for the purposes of the *Copyright Act*;
- where those reproductions are made; and,
- whose server and storage facilities are involved, especially where such processes are largely automated.

The departments note that tariff proposals in relation to reproduction have been filed with the Copyright Board by the Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC) Inc. The tariff proposals (<http://www.cb-cda.gc.ca/proposed-e.html>) are based on "network exploitation" of reproductions of the recorded music in the SODRAC repertoire. Under these tariffs, ISPs would be required to pay royalties for all reproductions of the SODRAC repertoire that they or their customers may make on their facilities. The royalties would be payable on a per subscriber basis or on the basis of a percentage of gross revenues, whichever is greater. By paying royalties in accordance with the tariff, ISPs would be exempt from further liability in relation to the reproduction of SODRAC works. These tariffs would then be part of the means available to SODRAC to be compensated for certain unauthorized reproduction activities such as those enabled by widely used programs such as Napster and Gnutella.

The departments have considered the SODRAC approach in this paper in light of, among other things, the policies adopted for the time being by its major trading partners (summarized below), the international implications for Canada, and the varied business models which many of the copyright sectors are contemplating for conducting business on-line.

If certified, the SODRAC tariff creates an additional and distinct liability for ISPs which, because it does not embrace all copyright material circulating over the Internet, must necessarily co-exist with existing liability rules for works not covered by the tariff. This would create a situation that the departments believe would be unique to Canadian ISPs. For instance, they would likely be the only ISPs required to pay for the reproduction of material covered by the tariff, whereas foreign ISPs, which provide access to the same material, would not be under the same obligation. Further, faced with an allegation of copyright infringement, an ISP would have to take steps to determine whether or not the material at issue fell within the tariff repertoire. In these circumstances, it is open for discussion as to whether this approach to copyright liability represents an effective model that encourages the development of a Canadian ISP sector.

The departments acknowledge that over time, changes in the policy and technological environment may eventually compel the international copyright community to give this type of framework detailed consideration. In the meantime, however, the need remains to articulate a domestic policy that is cognisant of the interests of rights holders and of ISPs and of the global nature of the digitally networked environment.

Other Jurisdictions

Outside Canada, other jurisdictions have enacted legislation to promote certainty about their liability for ISPs in their intermediary role. The US, in its *Digital Millennium Copyright Act* of 1998, sets out detailed provisions that govern the liability of ISP specifically in relation to copyright infringement. The European Union, in its *Directive on Electronic Commerce* (adopted, but not yet formally implemented), has taken a "horizontal approach", addressing liability in relation to all digital activities, e.g., child pornography, hate literature, defamation, and including copyright-related activities, in order to promote consistency of liability across all the European jurisdictions.

While the US and EU approaches are different in certain respects, both are in essence variants of a notice and take-down system. Australia and Japan have also adopted similar positions to the US and the EU on intermediary liability.

Under a notice and take-down system, an intermediary is shielded from copyright liability unless, after having received notice of infringing material on its facilities, it fails to take requisite steps to

address the situation. Notice creates the impetus for the ISP to remove the offending material by exposing the ISP to the risk of a (greater) liability for failure to act on such a notice.

The US has included detailed notice and take-down provisions in its DMCA. The departments note that the DMCA only limits the liability of those ISPs who register with the US Copyright Office by designating an agent. In addition it also imposes three further threshold requirements: a policy to terminate accounts of habitual infringers, a notice to its subscribers of this policy, and a policy of not interfering with technical measures for identifying or protecting works. In addition, for caching and user storage, the ISP must also provide the name of an agent for receiving notices from rights holders.

The EU has not incorporated detailed notice and take-down measures into its Directive, but nonetheless requires ISPs to act “expeditiously” to remove infringing material from their subscriber sites once they become “aware” of the existence of such materials; the Directive does not specify the consequences of an ISP’s failure to act expeditiously.

Proposal

The departments note that agreements have already been concluded between certain rights holders and ISPs to deal with the presence of potentially infringing material on the ISPs’ network facilities. These contractual arrangements could be buttressed by voluntary codes of conduct adopted by ISPs that provide a further layer of clarity about the role and responsibilities of ISPs in the communication process. The departments take special note of the Canadian Association of Internet Providers’ (CAIP) Code of Conduct (<http://www.caip.ca/issueset.htm>) and commend CAIP members for their collaborative approach to dealing with illegal content on the Internet. In this respect, CAIP has advised that it is working to strengthen the effectiveness of the Code of Conduct through a *Fair Practices Initiative* that would provide guidance to CAIP members about how to put self-regulatory measures into practice on a day-to-day basis. At the time of writing, however, neither the Code nor the *Fair Practices Document* (<http://www.caip.ca/issueset.htm>) appear to contain provisions specifically addressing notice and take down with respect to material that infringes copyright. The departments therefore encourage CAIP to consult its membership on this issue, if it has not already done so.

The wide diversity of organizations and individuals who now qualify as rights holders or who provide services as ISPs means that direct collaboration and agreement may not always be feasible. Accordingly, a role remains for the government to establish copyright liability rules that are clear and fair.

In this regard, the departments are mindful of a number of considerations:

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- The evolution of a network-based economy is desirable and inevitable as a social, cultural and economic engine.
- Connectivity is fundamental to Government On-line, Electronic Commerce and e-democracy.
- Canadians should be encouraged to participate in this economy, both as consumers and as providers of services and content.
- Important measures of the success of this economy will be the amount of creative content available on-line and the use made of it.
- On a practical level, it is likely not feasible for ISPs to attempt to monitor such content. In this regard, consult *Regulation of the Internet - A Technological Perspective* (<http://strategis.ic.gc.ca/SSG/sf05082e.html>). Moreover, in the copyright context, the copyright status of a work or the legal relationship between the right holder and the user or the work will often be unknowable to the ISP.
- The persons who benefit from the content most directly are those who provide it and those who use it subsequently.

The departments raise the possibility of establishing a complaints-driven, notice and take-down process that appears to address important preoccupations of both rights holders and the ISP community. The process would be subject to any contractual arrangements entered into by ISPs with rights holders; in the absence of such contractual arrangements, a statutorily-specified process would apply.

The departments' proposal would contain the following elements:

First, there would be a limitation on liability for copyright infringement. An ISP would not be liable for copyright infringements when its facilities are used by a third party (including its clients) for disseminating copyright-protected material, whether this dissemination is understood as communication to the public (i.e., through a network transmission process) or reproduction (e.g., for purposes of caching or Web site hosting). Similarly, the ISP would not be liable for reproductions of copyrighted materials in the form of caches that facilitate the communications process where the original or initial communication is authorized.

Second, there would be a provision for notice and takedown. In the context of this approach, an ISP would not be liable for having infringing material on one or more of its sites unless it failed to

block access within a specified time of receiving “proper notice” from a rights holder or other interested party that such material was potentially infringing. In this respect, however, a cache which is created to facilitate the communication of legitimate material from an authorized site, would not, of itself, constitute an infringing reproduction. The proposal in respect of notice and takedown is limited to the intermediary function that relates to hosting and caching since purely transmission related activities would not be amenable to notice and takedown regimes.

The departments solicit comments as to whether proper notice should consist of the following or other elements:

- be in writing;
- provide clear identification of the claimant and his/her interest in the infringing material;
- set out the precise claim, including a description of the infringing material; and,
- set out the location of the infringing material.

Third, there would be limitations on the liability of ISPs for any economic harm resulting from compliance with the notice and take-down regime. That is, an ISP that acts in good faith to block access to a site specified in a “proper notice” is not liable for the harm suffered in consequence by its client or other third party. Further, the claimant must corroborate its claim in a timely fashion.

As noted previously, an increasing array of Internet players, ranging from commercial to non-commercial entities and individuals, purport to carry out intermediary functions. Accordingly, the exemption from liability would be restricted to ISPs that represent themselves to the world as providing intermediary services in an accountable, responsible manner. Thus, to benefit from the exemption, ISPs could be required to establish an identifier on the sites they host or their cache sites that would enable an interested party to communicate directly with them. This would help identify ISPs who qualify under the notice and take down provisions as well as identify a contact person for initiating requests about infringing material.

The departments acknowledge that concerns may be raised with an approach based on notice and takedown. First, the notice and takedown elements of the proposal are limited, for reasons suggested above, to caching and hosting such that no recourse would be available for the other types of reproduction that may be part of the communication processes in the networked environment. Second, unlike a tariff regime which provides for royalty payments to rights holders, a notice and takedown regime represents an overhead expense (i.e., the cost of monitoring and notification) that is not offset by compensation. In this regard, however, the notice and takedown framework preserves the legal ability of rights holders to assert control over the reproduction and communication of their works on-line. It reinforces this ability in practical terms by providing a quicker and less expensive mechanism than court proceedings for effecting the rapid removal of infringing content from the networked environment. Third, limiting the ISPs’ liability could have the

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effect of reducing or removing their incentive to participate in voluntary licensing-based initiatives for the on-line environment.

The departments ask stakeholders to comment on these elements, as well as to consider whether there are other elements that should be included in this proposal.

1. Do the current provisions of the *Copyright Act* already adequately address ISP concerns?
2. Some ISPs and rights holders have entered into agreements for dealing with infringing material. In what respects is this approach sufficient or insufficient?
3. What other intermediary functions that have not been discussed in this section, but that are nonetheless being carried out by ISPs, ought to be considered when developing a policy regarding ISP liability?
4. To the extent that a notice and take-down system is being contemplated, how would such a system affect the framework in Canada for the collective management of copyright? What alternative proposals should be considered? Under what conditions would a compulsory licensing system be appropriate?
5. To the extent that issues surrounding the scope and application of the reproduction right are being examined in relation to Internet-based communications, are there reasons why

5. CONCLUSION

The purpose of this paper is to initiate consultation on a number of issues that arise at the intersection of the new digitally networked environment with the *Copyright Act*; it serves as the backdrop for an initial discussion on the copyright aspects of a framework designed to promote the dissemination on-line of new digital content, for and by Canadians.

The foregoing proposals represent the current state of analysis on these issues. The departments would appreciate your comments on any aspect of this document. **We would ask that you provide a written response by September 15, 2001.**

Written comments may be sent by e-mail (WordPerfect, Microsoft Word or HTML formats) to:
copyright-droitdauteur@ic.gc.ca

Comments may also be sent by mail or fax to:

Comments - Government of Canada Copyright Reform
c/o Intellectual Property Policy Directorate
Industry Canada
235 Queen Street
5th Floor West
Ottawa, Ontario
K1A 0H5
fax: (613) 941-8151

Comments received, including the name of the person or organization making the submission, will be posted, in the official language in which they were submitted, on the Web site of the Intellectual Property Policy Directorate, Industry Canada, located at:
<http://strategis.ic.gc.ca/SSG/ip000001e.html> and the Web site of the Copyright Policy Branch, Canadian Heritage at: <http://www.canadianheritage.gc.ca>. If you do not wish for your submission to be so used, please expressly indicate so therein. Paper copies of the submission will be made available on request.

Comments on the submissions received should be provided in the same manner by October 5, 2001.

Consultation meetings could be held by the two departments later in the Fall and policy options would be developed, if necessary, by early 2002.

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Acceptable Use Policy

This consultation is intended to promote constructive debate. Submissions of an inflammatory nature such as personal or slanderous/libelous attacks, threatening messages or hate speech will be neither accepted nor displayed.

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