



# MEDIA LAW LETTER

## ISP Liability: Canada Proposes Copyright Reforms

By Andrew Bernstein and Tyson Dyck

Canada has no similar legislation to the *Digital Millennium Copyright Act* (the "DMCA"). Faced with uncertainties about copyright infringement and ISP liability, the Canadian federal government has begun reforming the *Copyright Act*. On June 22, 2001, it released its *Consultation Paper on Digital Copyright Issues* (the "Consultation Paper"). See Canada, Industry Canada and Canadian Heritage, *A Framework for Copyright Reform* (June 22, 2001), at: [http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/\\$FILE/digital.pdf](http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/digital.pdf/$FILE/digital.pdf).

In its section on the liability of network intermediaries, the Consultation Paper acknowledges that Canadian copyright law does not specifically deal with the role of ISPs. It therefore recommends a system similar to that set out in the DMCA.

### Background

The leading case on ISP liability in the copyright context, *Tariff 22*,<sup>1</sup> dealt predominantly with whether ISPs can be liable for communicating copyright-infringing works to the public (by letting them "flow" through their networks), copying the works (by caching them) or authorizing infringement and indirectly infringing copyright (by permitting users to use the Internet to infringe).

In *Tariff 22*, the Federal Court of Appeal found that the person who posts the work, and not the ISP, communicates it to the public. The Court also found that to authorize an infringement, the ISP must "have enough control over the infringer to prevent the infringement and behave in a way that would lead a reasonable person to conclude that [the ISP] had approved or countenanced infringement."

According to the Court, such a circumstance would be rare; it would require the ISP not only to approve the use of its equipment and transmission service for the infringing activity but also to purport to grant customers permission to infringe copyright.

On the other hand, the Court held that ISP caching constituted copying, a finding that attracted a dissent at the

Court of Appeal. An appeal is pending to the Supreme Court of Canada, and it will be interesting to see how the Court decides comes down on this controversial issue.

### Indirect Infringement Standards

The potential liability for indirect infringement remains less clear. The Canadian court in *Apple Computer, Inc. v. Mackintosh Computer Ltd.* (1986), 28 D.L.R. (4th) 178 (F.C.T.D.) at 225, suggested that once someone has actual or imputed knowledge that a particular work may be infringing copyright, he or she is obligated to ensure that it does not continue to do so.

This thinking parallels the notice and take-down provisions in the DMCA; however, its application in Canadian law is vague. The issue has not been considered in the context of ISP liability and leaves potential for liability.

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### Copyright Reforms Proposed

The Consultation Paper proposes a complaints-driven notice and take-down procedure that recognizes both the interests of copyright holders and the infeasibility of requiring ISPs to monitor all their online content. This proposed procedure would have the following features: an ISP would not be liable for the copyright infringements of third parties who use its facilities to disseminate copyrighted information to the public. Nor would an ISP be liable for reproducing copyrighted material for caching or website hosting.

An ISP could, however, be liable if it failed to block access to the infringing material after receiving proper notice from the copyright holder. *Id.* at 37. Proper notice would be written, would identify the copyright holder and would provide a clear description and location of the infringing material.

Finally, an ISP that acted in good faith to comply with this notice and take-down procedure would not be liable for the economic harm suffered by the copyright owner or by the infringer. Like that in the DMCA, this procedure

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would recognize ISPs' role as intermediaries but encourage them to fill this role responsibly.

### *Debate on Proposals Continues*

The Canadian debate on copyright reform continues today. ISPs have submitted their opinions to the House Standing Committee on Canadian Heritage. They agree with limiting ISP liability but propose a notice and notice, rather than a notice and take-down, process. Canadian Association of Internet Providers, *Re: 'Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act'—Review by the House of Commons Standing Committee on Canadian Heritage* (September 15, 2003), at <http://www.caip.ca/issueset.htm> (accessed April 22, 2004) at 5-6.

The Canadian Association of Internet Providers (CAIP), a collection of ISPs that provide about 80% of Internet connections in Canada, states that its ISP members will not knowingly host illegal content. If a copyright holder gives an ISP clear notice of an infringement, the ISP will then relay this notice to its customer and advise the Canadian Recording Industry Association (CRIA) that it has done so. ISPs will take down the infringing material only upon a court order if the notice and notice does not result in voluntary removal. *Id.* at 6-7.

The federal government is considering these proposals, and new legislation is likely to be introduced during 2005. Canada, Canadian Heritage and Industry Canada, "Supporting Culture and Innovation: Report on the Provisions and Operation of the *Copyright Act*" (October 2002), at <http://strategis.ic.gc.ca/pics/rp/section92eng.pdf> (accessed April 27, 2004) at 43.

In the federal government's March 24, 2004, *Status Report on Copyright Reform*, it considers two directions for this reform: first, to exempt ISPs from liability when they act as intermediaries, but to leave the possibility of civil sanctions if they do not help remove infringing material, perhaps using a notice and notice procedure; and second, to subject ISPs to liability for the infringing material on their facilities, which they could escape by meet-

ing certain conditions, such as responding to the requests of copyright holders to remove infringing material or to collect royalties.

Canada, Canadian Heritage and Industry Canada, *Status Report on Copyright Reform* (24 March 2004) at [http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/statusreport.pdf/\\$FILE/statusreport.pdf](http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/vwapj/statusreport.pdf/$FILE/statusreport.pdf) (accessed April 23, 2004) at 4-8.

In practice, these approaches might function similarly; in both cases, ISPs have some duty to respond to the requests of copyright holders. The difference lies in the initial presumption of liability. Whether ISPs will be prima facie liable for hosting infringing content will most likely depend on the Supreme Court's decision in *Tariff 22*. The federal government will also consider the systems established in other jurisdictions, including the United States.

Whatever direction it chooses, the federal government is likely to follow the Federal Court of Appeal's analytical framework in *Tariff 22*, and grant ISPs some type of protection from liability. The outstanding issues concern the process by which ISPs will enjoy this protection. The Canadian federal government has reacted more slowly to the issue of ISP liability than has the U.S. government, but in doing so, it seems to have gained from the American experience. It will undoubtedly incorporate that experience into new Canadian copyright legislation that will deal with the rights of copyright holders in a new digital environment.

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<sup>1</sup> *Re: SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet)* (1999), 1 C.P.R. (4th) 417 (C.B.D.), varied by *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers* (2002), 19 C.P.R. (4th) 289, 215 D.L.R. (5th) 188, [2002] F.C.J. No. 691 [hereinafter *Tariff 22*] and leave to appeal to S.C.C. granted in [2002] S.C.C.A. No. 289.

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