

Made in Canada:

A Unique Approach to Internet Service Provider Liability and Copyright Infringement

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Understanding networks not as metaphors, but as materialized and materializing media, is an important step towards diversifying and complexifying our understanding of power relationships in control society.¹

A. INTRODUCTION

In its recent proposed amendments to the *Copyright Act* (Bill C-60),² the Canadian government is finally addressing the long-standing and thorny issues surrounding the liability of Internet Service Providers (ISPs) for material circulating on the Internet that infringes copyrights. In general, and in keeping with most other Western jurisdictions, the legislation states that ISPs are not infringing copyright when they merely act as technical

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1 Eugene Thacker, "Foreward: Protocol Is as Protocol Does" (2004) in Alexander R. Galloway, *Protocol: How Control Exists After Decentralization* (Cambridge, MA: MIT Press, 2004) at xv <<http://mitpress.mit.edu/books/chapters/0262072475forw1.pdf>>.

2 Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005, online: <www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.pdf>.

conduits for the transmission of copyrighted material.³ But it's a lot more complicated than that, because the nature of the ISP is a lot more complicated than that. ISPs have variously been compared to postal systems, telephones, dramatic theatres, cable television systems, toll highways, truck rental agencies, and record shops.⁴ Yet, as Eugene Thacker points out above, such metaphors can work to obscure rather than elucidate the actual workings of the Internet and their power implications. The Internet as a medium of communication potentially subject to copyright regulation, and the ISP as one pivotal player in that process, need to be understood in their specificity if we are to evaluate the proposed legislation effectively.

In this analysis, I will first ask what are ISPs, how should we think about them, and why are they implicated in copyright disputes. I then evaluate three different approaches to ISP liability: total liability, total immunity, and limited liability. Total liability is an option that has not really been considered in Canada and is often associated with repressive regimes. A system of total immunity for ISPs, usually accompanied by a form of voluntary regulation, essentially describes the legal status quo as it exists in Canada until the legislation is passed. Finally, an approach of limited liability for ISPs is usually accompanied by a mandatory administrative regime for dealing with complaints by copyright owners. The legislation proposes a limited liability model for Canada, but its approach to the mandatory administrative regime for copyright complaints is what is striking.

Interestingly, while the rest of the Western world has adopted what has come to be known as a Notice and Takedown (NTD) system, Canada is taking an original approach, proposing instead, a Notice and Notice (NN) system. This is discussed in more detail below, but briefly, in the NTD approach, if a rights owner becomes aware of a copyright infringement on a particular computer system, it provides notice to the ISP which maintains that system. The ISP is then obliged to "take it down," namely remove that content or block access to it. In an NN system, on the other hand, the copyright owner provides notice of its allegation that copyrighted works are being circulated illegally on the ISP's system to the ISP. The ISP then forwards that notice to the alleged offender — its customer — who can either remove the content or face pursuit in the courts by the rights owner.

3 *Ibid.*, cl. 20.

4 These metaphors are drawn from the submissions received by ISPs, broadcasters, CRIA, and other similar stakeholder organizations throughout the consultation process conducted by Canadian Heritage and Industry Canada: <http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/h_rp01105e.html>.

I conclude by evaluating the merits of the NTD and NN systems, recommending the “made in Canada solution” proposed in Bill C-6o.

B. THE CHALLENGE OF THE INTERNET SERVICE PROVIDER

In general, ISPs are the companies like Bell Sympatico, Yahoo!, CompuServe, AOL, Telus, and others which provide access to the distributed network of the Internet under contract with their customers. There are two primary types of access: dial-up and broadband (or high speed). In a dial-up model, the customer’s modem dials a telephone number that an ISP has designated to receive calls to its modems. The devices communicate to establish a protocol connection over which information packets can move. Broadband functions in a very similar manner using different equipment with much greater efficiency.

There are basically two levels of ISP: those that provide the backbone access service and those that provide secondary access and other services. Backbone providers provide access through network points of access. These typically larger ISPs provide access and services to other usually smaller ISPs who are not backbone access providers. There are a wide range of shapes and sizes of ISPs with a 2002 study in Canada indicating that 44 percent were classed as small (namely with 1,266 subscribers on average), 40 percent were classed as medium (with 2,174 subscribers on average) and only 16 percent were large scale (with an average of 69,329 subscribers).⁵ In the past, differences between backbone access providers and secondary service and access providers led to a distinction being made between Internet Access Providers (those who provided the fundamental means of access only) and Internet Service Providers (those that provided other services such as webhosting, e-mail, and so on). This distinction, however, is increasingly untenable.

Craig McTaggart usefully breaks the operation of the Internet into four layers: the physical layer, the operational layer, the application layer, and the content layer.⁶ The physical layer he describes as the computer equipment and the communications networks over which the Internet oper-

5 POLLARA Inc., *Industry Framework for Internet Service Providers* (Industry Canada: Industry Framework Telecommunications Policy Branch, 2002), <www.caip.ca/issues/ISPReport.pdf> Table 2 at 11.

6 Craig McTaggart, “A Layered Approach to Internet Legal Analysis” (2003) McGill Law Journal 571, <www.journal.law.mcgill.ca/abs/vol48/4mctag.pdf>.

ates.⁷ The operational layer comprises the standards and protocols through which information is coded as well as the operational functions of ISPs that keep it all moving.⁸ The application layer is the software that enables the Internet content to be read at an individual computer — web browsers, instant messaging and e-mail programs, and server software.⁹ Finally, the content layer is the layer that the user sees and works with, namely the data that is available to us through the Internet, whether it is visual, textual, or auditory.¹⁰ In the early days of the Internet, ISPs were primarily implicated in the physical and operational layers, whereas currently, they are increasingly involved in both the applications and content layers. All ISPs (even backbone providers) offer services other than mere access, including website hosting, operating domain name resolution software, hosting e-mail applications, offering security services (against “spam” for example), and even producing content.

Charlotte Waelde and Lilian Edwards also recognize the diverse and changing nature of the ISP.¹¹ They suggest that early attempts to regulate ISPs focused, problematically, on the nature of the content and its authorship, whereas more recently issues are being framed in relation to the type of function being performed by the ISP.¹² This is, in large part, because a categorical definition of ISPs is impossible. There is an increasingly wide array of newer type of Internet intermediaries who host, store, and transmit information over the Internet and thus are ISPs, even though we would not traditionally think of them as such. These “other ISPs” include universities, search engines (also called locational tools) such as Google; weblogs or online diary websites; mailing list moderators; online commercial undertakings such as Amazon; aggregators or sites which provide links to a variety of informational sources (such as news headlines compilers); and libraries, among others. As well, the nature of the communications media has changed. Originally major telecommunications companies were the primary ISPs. Now communications actors like cable and mobile phone companies are also involved in service provision.

7 *Ibid.*, at 583.

8 *Ibid.*, at 584.

9 *Ibid.*, at 587.

10 *Ibid.*

11 Charlotte Waelde & Lilian Edwards, “Online Intermediaries and Liability for Copyright Infringement,” WIPO Seminar on Internet Intermediaries (WIPO: 2005), <www.wipo.int/meetings/2005/wipo_iis/en/presentations/doc/wipo_iis_05_ledwards_cwaelde.doc>.

12 *Ibid.*

These various changes and developments in the provision of Internet services explain some of the challenges that regulators have faced in dealing with the circulation of illegal content on the Internet.¹³ But it does not adequately explain why, in the moral and economic panics that have ensued around copyright and music file-sharing, in particular, the ISP finds itself at the centre of the legal disputes. For this we must understand the relationship between online communication and copyright.

As many have noted, the Internet poses an unprecedented set of challenges to the traditional workings of copyright. Digital technologies and communications networks enable the almost infinite replicability of works in any medium without loss of quality; virtually instantaneous communication of those copies, at an infinitesimal cost per unit, to millions of people around the world; and the circulation of these copies in relative anonymity by computer users. Add to this the difficulties in negotiating issues of national jurisdiction in the online world and the emergent culture of access and participation on the part of users (including an increasingly sophisticated awareness of, and in some instances disregard for, copyright law) and the situation is very complicated for rights owners. In this context, Andrew Bernstein and Rima Ramchandani correctly note that the ISP "... finds itself in a uniquely vulnerable [legal] position."¹⁴

The legal vulnerability recognized by Bernstein and Ramchandani is grounded in the nature of communication on the Internet. An Internet transmission is a complex process where a content provider uploads content onto a host server, a user requests some information, and the host server transmits that content. Upon receiving the request for information, the file is broken up into packets and transmitted from the host server to the recipient's server via one or more routers. Each packet has a "header" or destination address. Routers read only the header (not the content of the packet) in transmitting. Different packets or parts of the content may travel along different routing pathways. Upon arrival of all the packets, the recipient computer can reconstitute and open the file immediately or save it until later. While ISPs who provide hosting services generally do not have control or knowledge of the content of these sites, they do usu-

13 It is important to remember that liability issues for Internet content arise in the context of hate literature and speech, defamation, privacy, obscene content, and so on, and not merely in relation to copyrighted works.

14 Andrew Bernstein & Rima Ramchandani, "Don't Shoot the Messenger! A Discussion of ISP Liability" (2002) 1 Canadian Journal of Law and Technology 77, <www.torys.com/publications/pdf/ar2002-8t.pdf> at 77.

ally retain a master password that will allow them access to all material on their server.

As we can see, the Internet works as a large decentralized network of communication activities with many diverse players — a challenge for any regulator. And yet, as Joel R. Reidenberg recognizes:

[v]arious points in the network infrastructure serve as gateways that in effect recentralize access to the internet. These gateways might be access providers, hosting services or major switching hubs that are located within the jurisdiction of the interested state. The existence of these gateway points in an otherwise decentralized network entices states to focus efforts and find enforcement mechanisms that operate through the intermediaries at these points.¹⁵

The ISPs are these gateway intermediaries. So, as a result, the ISP has been identified by rights owners, collective societies, and governments as the most viable point in this ephemeral chain of digital communication at which to control the activities of users. The history of the regulation of ISPs with respect to copyright can generally be understood, then, as series of efforts by states and copyright owners to re-centralize control through the gateway of the ISP in order to manage content and user action in the online environment.

To this end, rights owners mobilize a set of general arguments for ISP liability based on the nature of Internet communication.¹⁶ Copyright owners make arguments of economic, legal, and administrative efficiency suggesting that the anonymity, individual, and impecunious nature of most Internet users means that they are difficult to locate, expensive to pursue, and not likely to be able to afford substantial judgments against them. They argue that as ISPs are profiting from all of the copyright infringing activity taking place on the Internet through increased business from customers, they should be required to share in the burden of copyright enforcement. Some copyright owners have gone further, to suggest that ISPs have actual or constructive knowledge of the infringing activity and should therefore be liable either for secondary infringement or authorizing primary infringement. They further argue that the viability of the film and music industries may well be at stake and that subjecting ISPs to

15 Joel R. Reidenberg, “States and Internet Enforcement” (2003–2004) UOLTJ 213, <[http://web5.uottawa.ca/techlaw/resc/UOLTJ_1.1&2.doc%2010\(Reidenberg\).pdf](http://web5.uottawa.ca/techlaw/resc/UOLTJ_1.1&2.doc%2010(Reidenberg).pdf)> at 223.

16 See above note 5.

greater risk of liability for copyright infringement will ensure their vigilance in making efforts to curb piracy.

ISPs counter with their own arguments based primarily on their limited knowledge of content as a result of the technological nature of the Internet. They argue that it is unfair and inappropriate to burden them with liability when they are not infringing copyright themselves. They suggest that the cost-sharing model proposed by copyright owners will have a number of detrimental impacts upon their own industry. It will slow down technological development and innovation and lead to increased costs to the consumer, possibly limiting access for some Canadians as a result. They remind us that the nature of Internet communication (routing packets identified only by header and not monitoring website content) is such that they have no knowledge of what is passing along their network at any given point and time. Further, they claim that the enormous quantity of material on the network makes any attempt to acquire such knowledge impractical to the point of impossibility. They argue that they are mere conduits for the communications of others and, parallel to telecommunications companies, should not be held accountable for the “content layer.”

These general arguments have been at the heart of the ongoing legislation and litigation as stakeholders around the world have struggled over the last decade to make sense of the role of the ISP in relation to copyright infringement. A number of different approaches to the “problem” of the ISP and copyright can be distilled from these efforts.

C. APPROACHES TO ISP LIABILITY

Waelde and Edwards suggest that global approaches to regulating ISPs can be divided into three broad categories: the “total liability” approach, the “self regulation/total immunity” approach; and the “limitation of liability/notify and takedown” approach.¹⁷

1) Total Liability

The total liability approach holds that ISPs would be liable in the same ways that primary content providers are for illegal material. This approach has been deployed in non-Western nations to deal with the dissemination of seditious, subversive, and political communication. It has tended to open

¹⁷ Above note 13 at 19–34.

possibilities for state censorship.¹⁸ It has not been one of the approaches considered in the Canadian context.

2) Total Immunity/Self-Regulation

The second approach Waelde and Edwards suggest — total immunity/self-regulation — operates on the assumption that if provided total immunity, ISPs will voluntarily take on a controlling role with respect to copyright infringement.¹⁹ There has been some case law and legislation in the U.S. suggesting this approach has not been satisfactory, particularly in instances where the ISP has refused to remove offending or illegal content.²⁰

In Canada, I suggest that in the absence of legislation, the combination of a recent Supreme Court of Canada decision; the Code of Conduct of the Canadian Association of Internet Providers (CAIP); and a voluntary arrangement arrived at between the Canadian Recording Industry Association (CRIA), CAIP, and the Canadian Cable Television Association (CCTA) has resulted in a form of unstable total immunity/self-regulation that has been working in Canada.

a) SOCAN

Recently, the Supreme Court of Canada had the opportunity to speak to ISP liability in its resolution of the nine-year dispute that had come to be known as the Tariff 22 case.²¹ The Society of Composers, Authors, and Publishers of Music in Canada (SOCAN), Canada's leading music collective, sought to have ISPs required to collect royalties for downloaded music. This possibility arose because in 1989, Parliament added section 3(1)(f) of the *Copyright Act* to provide copyright holders with the exclusive right to communicate a work to the public through telecommunication, thus recognizing satellite, Internet, and other related communications.²² Combined with this, an exemption was provided to anyone merely providing the means for telecommunication (the common carrier exemption).²³ With these new sections, collective societies wanted to receive royalties for In-

18 *Ibid.*, at 19.

19 *Ibid.*, at 19–22.

20 See discussion in Waelde & Edwards, above note 13 at 20–22.

21 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, 2004 SCC 45, <www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol2/html/2004scr2_0427.html>, [2002] 2 S.C.R. 427. [SOCAN cited to S.C.R.]

22 *Copyright Act*, R.S.C. 1985 c. C-42, <<http://laws.justice.gc.ca/en/C-42>>, s. 3(1)(f).

23 *Ibid.*, s. 2.4(1)(b).

ternet downloading and to have those royalties collected and owed by the ISPs. They targeted ISPs because that was the most viable way of collecting the fees.

The history of the case goes back to 1995, when SOCAN applied to the Copyright Board of Canada for the tariff. Four years of hearings followed and in 1999 the Copyright Board found ISPs did not have to collect the tariff.²⁴ The Board, for the first time in Canadian law, offered a detailed and nuanced understanding of the technological issues involved in ISP liability, one that continues to inform decision-making in the area. SOCAN appealed to the Federal Court of Canada and that court held in 2002 that while in general ISPs were protected from liability by the “common carrier exemption,” the ISPs might be required to pay some royalties on the grounds of their practices of caching content.²⁵

However, the caching element of the Federal Court’s decision was overturned, and the findings of the Copyright Board fully endorsed, by the 8 to 1 decision of the Supreme Court of Canada in *SOCAN*.²⁶ The court, as it had in two of its previous landmark copyright decisions,²⁷ began by asserting the need for balance in the interpretation of the *Copyright Act*, situating that position explicitly in relation to the Internet. Justice Binnie for the majority stated, “[t]he capacity of the Internet to disseminate ‘works of the arts and intellect’ is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of art and intellect in the first place.”²⁸

The Court provided clear endorsement of the protection offered to ISPs by the common carrier exemption suggesting that the legislation clearly defines ISPs as service providers, not content providers. Paralleling its en-

24 SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22 Internet) (Re), (1999), 1 C.P.R. (4th) 417, online: <www.cb-cda.gc.ca/decisions/m270101999-b.pdf>.

25 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. Of Internet Providers (C.A.)*, [2002] 4 F.C. 3, <www.canlii.org/ca/cas/fca/2002/2002fca166.html>, 2002 FCA 166, (2002), 215 D.L.R. (4th) 118 [SOCAN cited to D.L.R.].

26 Above note 22.

27 See *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, <www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html>, [2002] 2 S.C.R. 336 [*Théberge*] and *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, <www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0339.html>, [2004] 1 S.C.R. 339 [CCH].

28 Above note 26 at para. 40.

dorsement of fair dealing in *CCH*, the court held that intermediaries engaged in the communication of copyrighted content, such as ISPs, do not merely enjoy immunity from copyright infringement, but rather they are deemed not to have communicated the work to the public at all. “Section 2.4(1)(b) is not a loophole but an important element of the balance struck by the statutory copyright regime.”²⁹ As long as the ISP does not alter the content, it is not communicating work to the public for the purposes of copyright, as a matter of legislative policy. Thus the Supreme Court endorsed the view that ISPs cannot be found liable for content that violates copyright if they are acting as a mere technical conduit.

The issue of the caching of content became important and required the court to get further into the intricacies of Internet transmission. SOCAN had argued that in caching some of its content — namely, making a temporary copy on the ISP’s server so that the data could be transmitted more quickly — the ISPs had acted as more than mere conduits for the information. They argued that this constituted a reproduction for the purposes of the Act. The court held, consistent with its previous position, that “Parliament has decided that there is a public interest in encouraging intermediaries who make telecommunications possible to expand and improve their operations without the threat of copyright infringement. To impose copyright liability on intermediaries would obviously chill that expansion and development.”³⁰ The court found that the creation of a cache copy was a “serendipitous consequence of improvements in Internet technology” and was content-neutral.³¹ Thus, ISPs were empowered to use caching technology to improve service to their clients without concern as to liability.

Finally, the issue of authorization arose with SOCAN arguing that the ISPs knew very well that people were using their facilities for infringing purposes. The Court, following its recently-strengthened definition of authorization in *CCH*, held that “the knowledge that someone *might* be using neutral technology to violate copyright ... is not necessarily sufficient to constitute authorization.”³² If the ISP were notified of the offending content and refused to take steps to take it down, this might constitute authorization. The court concluded:

29 *Ibid.*, at para. 89.

30 *Ibid.*, at para. 114.

31 *Ibid.*, at para. 115.

32 *Ibid.*, at para. 127.

... by enacting s.2.4(1)(b) ... Parliament made a policy distinction between those who abuse the Internet to obtain “cheap music” and those who are part of the infrastructure of the Internet itself. It is clear that Parliament did not want copyright disputes between creators and users to be visited on the heads of the Internet intermediaries, whose continued expansion and development is considered vital to national economic growth.³³

Thus ISPs were clearly exempt from liability for acting as conduits and for caching. This protection is basically retained in the proposed legislation where Parliament apparently continues to “not want the copyright disputes between creators and users to be visited on the heads of Internet intermediaries.”

b) Industry Self-Regulation

The second element of the current Canadian situation for ISPs is found in the provisions of the CAIP Code of Conduct. The Code provides that CAIP members (which include a large majority of the major ISPs in Canada) will not knowingly host illegal content, that they will share information about such content to that end, that they will take reasonable efforts to investigate legitimate complaints about illegal content, and that prior to taking action on any such allegation, they will conduct an internal review, consult with legal authorities, and notify the content provider of the complaint, requesting a response.³⁴ There is no available data indicating the levels of compliance with specific provisions of the voluntary Code. However, as Waelde and Edwards’ model suggests, an uncertain legal framework does generate some self-regulation.³⁵ In Canada, this has gone ever further than in other jurisdictions, as we will see below.

c) Stakeholder Co-operation

The third element in the current Canadian regime is a unique system of stakeholder co-operation between rights owners and ISPs. In late 2000, CAIP, the Canadian Cable Television Association (CCTA), and the Canadian Recording Industry Association (CRIA) voluntarily put into place a “notice and notice” (NN) system to deal with online copyright infringement claims. CRIA, upon becoming aware of a copyright infringement affecting

33 *Ibid.*, at para. 131.

34 Canadian Association of Internet Providers, “Code of Conduct,” online: <www.cata.ca/caip/codeofconduct/CodeConduct.html>, provisions 5–7.

35 Above note 13 at 19–22.

one of its members, provides notice to the ISP in question by e-mail (if they are a member of CAIP or CCTA). The written notice clearly identifies the claimant and its interest, sets out the precise claim (including a description of the infringing material), and provides the location of the material. The ISP then provides a notice to the subscriber reminding them that it is against the ISP's policy to put their resources to illegal use, advising them of the information from CRIA, and encouraging them to contact CRIA to resolve the issue. The ISP then acknowledges the complaint and confirms to CRIA by return e-mail that the information contained in the complaint has been passed on to the subscriber. In the event that a subscriber does not remove the content in question, CRIA is at liberty to seek injunctive or monetary relief through the courts pursuant to the *Copyright Act*. This is essentially the regime that has been codified in section 40.1 of Bill C-60.³⁶ While described by CRIA President, Brian Robertson, as an "uneasy peace" in 2003,³⁷ the most recent reports from the participating parties were that approximately 80 percent of all complaints received by the ISPs were resolved through this system.³⁸

The existing Canadian system of substantial, if not total, immunity combined with self-regulation, while admirably effective to date, has several shortcomings. First, because it is not codified, there is a level of uncertainty about the exact nature of potential liability for activities not involving caching and mere transmission. Second, a voluntary system does not "catch" the activities of those parties not participating in the voluntary regime. Third, it is a regime that exists only with respect to music copyrights. To expand it would require multiple specific agreements between ISPs and rights owners in other areas of creation. For these reasons, some form of codified approach making mutual rights and responsibilities clear seems most appropriate.

3) Limited Liability/Complaints Regime

The third type of liability that Waelde and Edwards discuss — limited liability — is necessarily accompanied, they suggest, by a notice and take-

36 Above note 3 at cl. 29.

37 Robert Thompson & Mark Evans, "Telus Issues Copyright Warning to Downloaders" (2003) in *Financial Post*, 12 September 2003, FP1.

38 See testimony of Jay Thomson (CAIP) in the Committee Hearings for the Standing Committee on Canadian Heritage, 37th Parl., 3rd Session, Standing Committee on Canadian Heritage, Evidence, Thursday, 22 April 2004, <www.parl.gc.ca/infocomdoc/37/3/HERI/Meetings/Evidence/HERIEVo9-E.htm> at 32.

down system. This perspective suggests that ISPs should be protected from unlimited risk in their activities, but that this immunity should be balanced against other policy factors, such as protecting the owners of intellectual property rights.³⁹ This balance is achieved through a mechanism involving ISPs directly in the removal of online material allegedly infringing copyright. This is the approach they favour and the one in place in the United States and the European Community.

a) United States

In the United States, the 1998 *Digital Millennium Copyright Act* in Title II, “Online Copyright Infringement Liability Limitation Act,” limits the liability of an ISP when it is acting solely as a conduit for the transmission of digital information for its customers.⁴⁰ The legislation provides four “safe harbours” based on the typical activities of an ISP: transitory communication,⁴¹ system caching,⁴² storage of information on systems and networks at the directions of users (hosting),⁴³ and information location tools, such as search engines.⁴⁴

An ISP eligible for the activity of transitory communications is defined as: “an entity offering the transmission, routing, or providing connections for digital on-line communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material sent or received.”⁴⁵ For the other three activities (caching, storage, and location tools), a service provider is defined more broadly as: “a provider of on-line services or network access, or the operator of facilities therefore.”⁴⁶ To benefit from the caching and hosting exemptions, the ISP cannot have knowledge (actual or constructive) of the infringement. They cannot have received a financial benefit directly attributable to the infringing activity. Finally, they must have been unaware of the facts or circumstances from which the infringing activity is apparent, or upon gaining knowledge, have acted expeditiously to block access to, or remove the material.⁴⁷

39 Above note 13 at 22–34.

40 *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112, Stat. 2860 (1998), <www.access.gpo.gov/cgi?bin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ304.105>, s. 512 [DMCA].

41 *Ibid.*, s. 512(a)(1)–(5).

42 *Ibid.*, s. 512(b)(1) & (2).

43 *Ibid.*, s. 512(c)(1)–(3).

44 *Ibid.*, s. 512(d)(1)–(3).

45 *Ibid.*, s. 512(k)(1)(A).

46 *Ibid.*, s. 512(k)(1)(B).

47 *Ibid.*, 512(a), (b), & (d).

There is an elaborate “Notice and Takedown” system provided for within the legislation.⁴⁸ The ISP must have designated an agent to receive claims for notice of infringement with the U.S. Copyright Office. Upon learning about an alleged infringement, the copyright owner submits a notice to the ISP’s agent containing certain specified information. The ISP will be exempted from financial liability and third party claims if it acts quickly to take down the material. The ISP’s customer can respond to the notice by filing a counter-notification. The counter-notification must be sent to the complaining party, who then has a chance to respond. If it does not respond, then the ISP must reinstate the content and access.

Finally, in order to qualify for any of the four exemptions, the ISP must have adopted and implemented a policy of terminating accounts of subscribers who are multiple infringers (where appropriate) and must accommodate and not interfere with technological protection measures.⁴⁹ The exemption includes a bar on monetary relief and restricts injunctive relief. The exemption for caching, storage, and location tools protect ISPs from third party claims as well.⁵⁰ Notwithstanding the heavy nature of the NTD system, the ISP is under no positive obligation to monitor its content or seek out information about potential infringing activities on its network.⁵¹ It is also important to note that failing to qualify for any of the exemptions does not make the ISP liable for copyright infringement and does not detract from other defences it may have available to it. In short, the *DMCA* offers a complex, detailed, and heavy regime which privileges the removal of content by the ISP upon an allegation of copyright infringement.

b) The European Community

In the European community there are two directives that govern ISP liability for copyright infringement: the European Union’s *Electronic Commerce Directive* (the *ECD*)⁵² adopted in June 2000 and the *European Union*

48 *Ibid.*, 512(c) & (g).

49 *Ibid.*, s. 512(i).

50 *Ibid.*, s. 512 (a), (b), & (d).

51 *Ibid.*, s. 512(m).

52 EC, *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)* [2000] O.J.L. 178/1, online: EC <http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/1_178/1_17820000717en00010016.pdf>.

Copyright Directive, adopted in May 2001.⁵³ In Articles 12-15, the *ECD* recognizes the technical and passive nature of the intermediary functions of ISPs.⁵⁴ ISPs are defined more broadly than in the United States to include both ISPs and ISSPs or “information society services providers.”⁵⁵ When these entities act as conduits, cache, and host, there are a range of exemptions and limitations on their liability. When acting as a mere conduit, the ISP is completely absolved from liability provided that it does not initiate the transmission, select the receiver of the transmission, or modify the information contained in it.⁵⁶ There is complete liability for caching as well, provided that the information has not been modified, the cache is updated regularly, and the ISSP has not obtained actual knowledge of the disabling of the original source or a court order closing it down.⁵⁷

For hosting, the ISP is exempt from liability provided that it has no actual knowledge of illegal activity or information. It is exempt from damage claims if it has no actual knowledge and a lack of awareness of facts from which the illegal activity is apparent. The ISP must act expeditiously to remove or disable access to information upon obtaining knowledge of the copyright infringement.⁵⁸ The Directive also recognizes that there is no positive obligation on the ISP to monitor content or to seek out information on copyright infringement itself.⁵⁹ So in Europe as well, an NTD system is envisioned, although the specific mechanisms of its operation are left to member states.

D. THE “MADE IN CANADA” SOLUTION

As we can see, the limited liability/NTD system is certainly the dominant approach among Western states. Interestingly, it was also the approach most discussed by the Departments of Canadian Heritage and Industry earlier in the copyright reform process and eventually advocated by the Standing

53 EC, *Directive 2001/29/EC of the European Parliament and of the Council of May 2001 on the harmonization of certain aspects of copyright and related rights in the information society* [2001] O.J.L. 167/10, online: EC <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/1_167/1_16720010722en00100019.pdf>.

54 Above note 53 at 3.

55 *Ibid.*, art. 2(a) & (b) at 8-9.

56 *Ibid.*, art. 12 at 12.

57 *Ibid.*, art. 13 at 13.

58 *Ibid.*, art. 14 at 13.

59 *Ibid.*, art. 15 at 13.

Committee on Canadian Heritage.⁶⁰ In stark contrast to the focus on NTD, virtually no academic or political attention in Canada or in other jurisdictions has been given to the “made in Canada” solution to ISP liability: the NN approach. This is unfortunate. I suggest that the limited liability/NN system addresses a number of substantial concerns posed by an NTD system and offers a number of additional benefits. Below I review both approaches.

1) Limited Liability/Notice and Takedown

A limited liability/NTD system has a number of major shortcomings when one considers it in general and in the Canadian context. First, in practice it results in some substantial limitations to freedom of expression. Second, it is inconsistent with the broader Canadian approach to illegal content on the Internet. Third, it suffers from problems of proportionality. Fourth, it is ultimately ineffective in addressing current practices of file-sharing, and finally, it is unnecessary in light of the NN system.

An NTD system is essentially a pre- or non-judicial determination of copyright infringement. It places the burden for assessing whether or not there has been an actual copyright infringement on the ISP, which is then liable for the consequences of that decision. ISPs claim that they do not have the financial and legal resources, or adequate time with the requirements of expeditious action, to make sound decisions on copyright issues. Faced with what is essentially a determination of law, they opt for the less risky option: taking the content down. Thus, the content providers' expression is being limited; namely, removed from the Internet, simply on the basis of an allegation made by a copyrights holder.

Research confirms that the practical effect of the NTD burden is the removal of content without due consideration of the merits of the claim of infringement. In Europe, Oxford researchers found in 2004 that “the current regulatory settlement has created an environment in which the incentive to take down content from the Internet is higher than the potential costs of not taking it down.”⁶¹ In the United States, the Electronic Frontier

60 The 2004 Report of the Standing Committee on Canadian Heritage recommends an NTD regime. Canadian Heritage and Industry, *Interim Report on Copyright Reform* (Ottawa: Report of the Standing Committee on Canadian Heritage, 2004), <www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01-d.htm>, Recommendation 3 at 23.

61 Chris Ahlert, Chris Marsden, & Chester Yung, “How Liberty Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation” (1 May 2004), online: <<http://pcmlp.socleg.ox.ac.uk/text/liberty.pdf>>, at 12.

Foundation has been very active in publicizing the errors and problems with the takedown demands of complainants under the *DMCA*. Content that has been wrongfully removed includes uncopyrightable facts, public domain materials, material subject to the fair use exception, social criticism, and trademarked material. In addition, frequent instances of ISP harassment by copyright owners, improper identification of users, and administrative errors are also reported.⁶²

Faced with the knowledge that its complaint alone will likely result in the removal of content, the American Recording Industry Association, for example, has been very aggressive in laying complaints with ISPs. As Peter Yu effectively details, the use by the RIAA of automated web crawlers and other computer programs to search for and detect illegally traded songs has resulted in numerous errors.⁶³ For example in May 2003, the RIAA issued a takedown notice to Speakeasy, a broadband ISP. The form letter noted that “approximately 0 files” contained recordings copyrighted by RIAA artists such as Creed. The site in question was devoted to demonstrating the superior graphic capabilities of the Commodore Amiga computer and had no music files on it at all.⁶⁴ In the same month, a retired professor of astronomy, Peter Usher, was confused with Usher Raymond, the popular R&B artist. Once the computer program found a music file and the name Usher, a takedown notice was issued to the university hosting the professor’s site. The university was very close to shutting down the whole site (to the detriment of students writing final exams) when the error was discovered. It turned out the music file was a song by an *a cappella* group of university astronomers and astrophysicists about a gamma ray satellite they had developed.⁶⁵

Given the logistics of copyright owners tracking huge amounts of Internet communications, errors like this are inevitable. As long as the rights owner believes in good faith that a breach has occurred, the user has no recourse for the impact of the takedown of their website. The effect of this, Yu suggests, has been chilling on ISPs.⁶⁶ Even more troubling than

62 Electronic Frontier Foundation, “Unsafe Harbors: Abusive DMCA Subpoenas and Takedown Demands” (2003), online: <www.eff.org/IP/P2P/20030926_unsafe_harbors.php>.

63 Peter Yu, “P2P and the Future of Private Copying” (2004) 76 *University of Colorado Law Review* 653.

64 *Ibid.*, at 661.

65 *Ibid.*, at 661–662.

66 *Ibid.*, at 662. See also Scott Nesbitt, “Rescuing the Balance? An Assessment of Canada’s Proposal to Limit ISP Liability for Online Copyright Infringement” (2003) 2 *CJLT* 115, <http://cjlt.dal.ca/vol2_no2/pdfarticles/nesbitt.pdf>.

technological error on the part of copyright owners' detection programs, however, are instances where organizations have attempted to silence critique (such as the Mormon Church and Church of Scientology), where documents are part of the public domain, and where uncopyrightable facts that are inconvenient to a commercial enterprise are the subject of notice and takedown notices that are acted upon by ISPs.⁶⁷

Sonia K. Katyal critiques these activities by copyright owners as a new form of surveillance.⁶⁸ She defines "piracy surveillance" as, "... extrajudicial methods of copyright enforcement that detect, deter, and control acts of consumer infringement."⁶⁹ She goes on to detail the implications of this new form of surveillance. "Because these systems of copyright enforcement are largely unregulated and fall outside of state control, piracy surveillance measures are capable of an unprecedented scope of invasion and control over the expressive activities of ordinary citizens, particularly with respect to the protection of fair use, free speech, and due process."⁷⁰ She, too, documents the response of ISPs to the fear of liability for copyright infringement, including employers and universities banning the use of all file sharing software; refusing to permit MP3 files, regardless of whether or not they fall under fair use or are from the public domain; and providing all personal details about users immediately upon receiving the takedown notice.⁷¹ As Katyal correctly notes, "piracy surveillance eviscerates [the] balance between control and expression, leading to an escapable logic of vigilantism."⁷²

Courts in the United States have demonstrated a repeated reluctance to consider the issues involved in NTD as concerning competing rights between freedom of speech (as the right is formulated in the United States) and copyrights.⁷³ As a result, the balance between rights owners and users has been effectively and dramatically thrown off in favour of owners. Cer-

67 See discussion of these various examples in Sonia K. Katyal, "The New Surveillance" (2003) 54 *Case Western Res.* 297 at 345-46 & 369.

68 *Ibid.*

69 *Ibid.*, at 300.

70 *Ibid.*, at 301.

71 *Ibid.*, at 325. See also Eric Evans "From the Cluetrain to the Pantopticon: ISP Activity Characterization and Control of Internet Communications" (2004), 10 *Michigan Telecommunication Technology Law Review* 445.

72 *Ibid.*, at 361-62. For other scholars making similar arguments, see Hannibal Travis, "Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment" (2000) 15 *Berkeley Technology Law Journal* 777.

73 JuNelle Harris, "Beyond Fair Use: Expanding Copyright Misuse to Protect Digital Free Speech" (2004), 13 *Texas Intellectual Property Law Journal* 83.

tainly Canadian legislators should be very cautious about a system which, in practice, has resulted in such substantial and repeated limitations on freedom of expression.

A second shortcoming with implementing a limited liability/NTD system in Canada which requires ISPs, rather than courts, to make an initial interpretation of illegality is that it would be inconsistent with the broader policy direction in Canada. In 2001 and 2002, respectively, amendments were made to the Canadian *Criminal Code* providing for seizure of electronic hate propaganda⁷⁴ and child pornography.⁷⁵ In both of those instances, a judge, acting upon reasonable grounds, can order the “custodian of the computer system” (the ISP) to provide a copy of the offending material to the court, remove the material from the computer system, and provide the information necessary to identify the person who posted the material. After receiving that information, the judge will cause notice to be given to the person who made the posting(s) and that individual has the opportunity for a court hearing to determine the status of the material. If the material is found, on a balance of probabilities, to be either hate propaganda or child pornography, the court can order the ISP to delete it. If it is found not to fall within these provisions, then the material is returned to the ISP and any initial order about its removal is terminated. Thus in two situations where arguably the public interest in the speedy removal of potentially illegal material being circulated over the Internet is much greater, Parliament opted to place authority and responsibility for a determination of illegality in the hands of the courts. It seems then inconsistent on either a legal or policy basis to empower ISPs to make a determination of legality in a context where the harm being done is less severe.

A third concern with NTD is the potential lack of proportionality between the “offence” committed and the actions required of the ISP. ISPs are understandably very concerned about the impact of an NTD regime on their relationships with their clients. At best they are certainly going to be the subject of customers’ ire. At worst, they may be involved in third party litigation as a result of the improper takedown of their customer’s material. This is particularly the case given the need for expeditious action to remove material and because the response of “takedown” can be very drastic relative to the amount or nature of infringing content. For example, if a client has an entire website of content and there is one infringing image on it, the only possible technological response by the ISP is to block

74 *Criminal Code*, R.S.C. 1985, c. C-46, <<http://laws.justice.gc.ca/en/C-46/>>, s. 320.1.

75 *Ibid.*, s. 164.1.

access to, or remove, the website completely. The “takedown” is not limited to the offending content and is a remedy which risks being radically out of proportion with the offence (should there be one). Troublingly, CRIA even went so far as to advocate before the Standing Committee on Canadian Heritage for what Michael Geist aptly calls a “notice and terminate” approach;⁷⁶ namely, one where subscribers accused of infringing would have their accounts peremptorily terminated.⁷⁷ This radical lack of proportionality is one of the dangers inherent in focusing too exclusively on music file-sharing as the “problem” to be solved by any legislative response. Not all breaches of copyright are going to be websites devoted entirely to music file-sharing and indeed, currently few music file-sharing systems operate in this manner. Due process should not be completely evacuated at the behest of copyrights holders.

Ironically, one of the biggest shortcomings of the NTD approach is that it does not work to catch the currently dominant practices of music file-sharing. In a post-Napster environment, neither the content being swapped in P2P exchanges, nor any index of content, is located on the server of the ISP. Instead, the files are on the computers of individual users. Therefore, even with appropriate notice, there is no technological means for the ISP to takedown the content. This is only exacerbated with developments in file-sharing such as BitTorrent and Freenet.⁷⁸ The ISP’s only available action is to terminate the account of the subscriber; again, an extreme action, particularly on the basis of a mere allegation of copyright breach.

As equally damning as the fact that NTD does not catch the majority of copyright infringement that it is seeking to prevent is the argument that it is not necessary in the first place. It is not necessary because the Canadian music industry, the ISPs, and now the legislators have developed a unique approach to ISP liability that avoids many of the shortcomings of NTD while preserving its strengths.

76 Michael Geist, “A Blueprint for Better Copyright Law” *Toronto Star* (9 August 2004) <www.michaelgeist.ca/resc/html_bkup/august92004.html>.

77 Above note 61, at 28 & 36.

78 For a useful discussion of these P2P frameworks see Waelde & Edwards, above note 11 at 7–10.

2) Limited Liability/Notice and Notice

The limited liability/NN system proposed in the Canadian legislation recognizes that ISPs are the gateway intermediaries. They are the only actors in the chain of communication who have access to all the information necessary to link users to content. However, at the same time, it recognizes that ISPs are not primarily involved in the production of content, nor are they able to be aware of all content. Finally, this approach is further balanced by the recognition of users' rights to express themselves freely within the bounds of any limiting legislation, to be assumed not to engaged in illegal activity without evidence, and to have their privacy and identity protected. Limited liability/NN has among its greatest benefits the fact that it has been in successful operation for a number of years on a voluntary basis, as detailed earlier. Bill C-60 essentially codifies the CAIP-CCTA-CRIA arrangement for the benefit of all copyright owners, users, and ISPs. Below I will detail the legislative provisions of the "made in Canada" solution, discuss some of its merits, and identify some of the gaps not addressed in the legislation.

The limited liability of the ISP is addressed in the addition of section 31.1 to the *Copyright Act*. It exempts an ISP when "in providing services related to the operation of the Internet or other digital network, [it] provides any means for the telecommunication of a work ... through that network."⁷⁹ Activities related to caching are also expressly exempted.⁸⁰ The exemption is only available if the ISP does not modify the work in any way, implements any suitable protection measures of the content provider related to caching, and does not interfere with the collection of usage data. Hosting is exempted, but not when the ISP has actual knowledge of a legal decision pertaining to the infringement of copyright of the work in question.⁸¹

The NN regime is implemented in proposed sections 40.1–40.3. It provides that a copyright owner may send a notice claiming infringement to an ISP which transmits, hosts, or provides information location tools or search engines.⁸² The notice must be in writing and contain the claimant's name and address, identify the relevant work, state the claimant's interest in the copyright, specify the electronic location of the work, specify the infringement claimed, specify the date and time of infringement, and

79 Above note 2, at cl. 20.

80 *Ibid.*, (s. 31.1(2)).

81 *Ibid.*, (s. 31.1(4)).

82 *Ibid.*, cl. 29 (s. 40.1).

provide any other information required by regulation.⁸³ The ISP is then required to forward the notice electronically to the person identified by the electronic location provided in the notice. It must notify the claimant that the notice has been sent. Finally, it must also retain, for six months, the data necessary to identify the person and the substance of the claim.⁸⁴ If the ISP fails to act in accordance with these provisions, it can be fined a maximum of \$5,000 for not forwarding the notice and a maximum of \$10,000 for not retaining the information as prescribed.⁸⁵

The NN system has a number of advantages. First, it is principled in that it keeps the interpretation of copyright legislation and legal decision-making in the hands of the courts. The conflict thus remains between the copyright owner and the alleged infringer with the costs of any legal proceedings to be borne by those parties. As a result, Canada will not be vulnerable to the same litany of errors, abuses, and problems that have arisen as a result of the more draconian NTD system of the *DMCA*. Second, it is consistent with other Canadian legislation addressing the ways in which allegedly illegal content should be dealt with in the online environment. Third, it is a much more tempered response to an allegation of copyright breach to pass along the complaint to the alleged offender than to block access to an entire website. Fourth, it is not tied technologically to an outdated model of file-sharing. It is flexible enough to address current practices of file-sharing and presumably those yet to come. Reports from the participants in the voluntary system suggest, as noted previously, that up to 80 percent of complaints were being dealt with effectively by this approach.⁸⁶ Presumably with a codified and mandatory system, this success rate will improve.

Additionally, empirical research has compared the economic impacts of NTD versus NN. Economist Paul Chwelos conducted a study for Industry Canada in 2004 examining the respective economic impacts of three models of ISP liability: maintaining the status quo, implementing an NTD system, and implementing an NN system.⁸⁷ His analysis suggests that the legal and administrative costs of an NN system might be lower than for

83 *Ibid.*, (s. 40.1(2)).

84 *Ibid.*, (s. 40.2(1)).

85 *Ibid.*, (s. 40.2(3)).

86 Above note 39.

87 Paul Chwelos, "Assessing the Economic Impacts of Copyright Reform on Internet Service Providers" for Industry Canada <http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/vwapj/chwelos_final_e.pdf>.

the NTD approach, with corresponding positive implications for the international competitiveness of Canadian ISPs.⁸⁸ Innovation and development will be able to continue unabated. He also suggests Canada may emerge as something of a web-hosting haven relative to other jurisdictions.⁸⁹ He concludes by suggesting that “[o]n the whole, the Notice and Notice regime would provide a nearly identical business environment to the Notice and Takedown environment in the US, EU, and Australia.”⁹⁰

Despite its significant benefits, there are a few gaps and shortcomings in the present proposed legislation that merit mention. Under the voluntary NN system, when CRIA has attempted to pursue individuals, the ISPs have been reluctant to share the identity of their subscribers with CRIA, resulting in ongoing litigation on that issue.⁹¹ The proposed legislation will not resolve this. As well, the length of time the data connecting the user and his or her IP address is being retained — six months with a possible extension to a year — creates privacy concerns. Overall, however, the privacy rights of individual users are much better protected under the NN system. According to the Federal Court of Appeal in *BMG*, any copyright owner will have to show a *bona fide* claim in order to be able to obtain an order for the release of a subscriber’s name and such an order will only come after all of the various interests have been weighed on the particular facts of that case, including the privacy rights of the user.

In the proposed NN provisions there is also no penalty for a claimant who files a wrongful notice. There is provision made for a filing fee on the part of the claimant that could be activated should false or mischievous claims become an issue in the Canadian context. However, this has not yet been activated and, alone, may not be an adequate deterrent. The government may wish to consider in future adding a penalty for wrongful notices should this become a problem in the administration of the system.

Wrongful notice is more likely to be an issue with respect to search engines, given the specific provisions pertaining to them. Search engines are protected in proposed section 40.3 in that remedies against them are limited to injunctive relief only.⁹² In other words, they are not liable for damages if they infringe copyright by making or caching a reproduction of a work.

88 *Ibid.*, at 31.

89 *Ibid.*

90 *Ibid.*, at 32.

91 *BMG Canada Inc. v. John Doe*, 2005 FCA 193, <www.fca.-caf.gc.ca/bulletins/whatsnew/A-203-04.pdf>, [2005] F.C.J. No. 858 [*BMG*].

92 *Ibid.*, (s. 40.3).

This protection only applies if the copy is made automatically and for the purpose of providing information location tools. Further, the search engine cannot modify the copy; it must comply with any conditions requested by the content provider; it cannot prevent or interfere with usage data collection; and most significantly, it cannot have received notice of a claim under the Act's NN regime. What this does is basically create a mini-NTD system within the wider NN system, solely for search engines. It also prevents the search engine from receiving protection if it has altered the content in any way, a common practice. Finally, the absence of a clear definition of caching — whether it is merely a viewable cache or something more permanent done in the process of archiving for search indexing — creates uncertainty from the perspective of the search engine. It is unclear why search engines would be singled out for this altered approach, and in the absence of any kind of protection against wrongful claims, this may be opening the door to abuse by competitors within that industry as well as creating a climate of indeterminacy for the search engine.

E. CONCLUSION

The Canadian government has resisted the urge to merely follow in the footsteps of the American or European model of understanding ISP liability, and to good end. The extra time taken in our regulatory process has enabled the development of an industry-produced and practiced solution that is now being codified. It is coherent with the Supreme Court of Canada's interpretation of ISP liability issues, the current (and future) state of the Internet, users' rights, and owners' interests. It is important to note that the Notice and Notice regime can still lead to the removal, under judicial order, of material on the Internet that infringes upon the rights of copyright owners. This removal only takes place, however, after due consideration of the various interests involved in the dispute. The Supreme Court of Canada has called for a balancing of interests in the interpretation and implementation of copyrights in the information age.⁹³ The limited liability/notice and notice system proposed in Bill C-60 is an important and effective recognition of that balance. What remains to be seen is whether other jurisdictions learn from Canada's original and creative lead.

93 See dissent in *SOCAN* above note 21, and *BMG* above note 91.