January 1997

Surfing the Internet: Copyright Issues in Canada

Sheldon Burshtein

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SURFING THE INTERNET: COPYRIGHT ISSUES IN CANADA*

Sheldon Burshtein†

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* Copyright © 1996 SHELDON BURShteIN, sb@BLAKES.ca.
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   Intellectual Property Group in the Toronto office. This article is an extract of an earlier paper
dealing with a variety of Canadian legal issues relating to the Internet, including trade-marks,
   patents, industrial designs, topography rights, personality rights, confidential information,
defamation, advertising, criminal issues as well as issues relating to bulletin board systems and
   broadcast regulation, presented at the 1996 McGill University Meredith Lectures on May 3-4,
   1996 in Montreal, Quebec. The text of this paper includes developments known to the author
   as of February 29, 1996. The author appreciates the helpful comments of his partner
   Christopher C. Hale on a draft of this paper. An earlier version of this paper was presented at
   the 1996 Telecom, Cable and Broadcasting Summit presented by Insight Information Inc. and

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    Canadian Bar Association Intellectual Property Section, the Licensing Executives Society, the
    International Trademark Association and other organizations.
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A key issue relating to the Internet is the control of content. For this reason, copyright law is important. This article summarizes considerations relating to the application of Canadian copyright law to the Internet. It includes a brief overview of Canadian copyright law, including a number of features which differ from the copyright law of the United States. The article also deals with each right comprised within copyright which has bearing on Internet applications. The article then discusses some examples of actual and alleged copyright infringements in connection with Internet content. Finally, the article discusses the copyright aspects of the Canadian government’s report on the information highway.

More than one commentator has referred to the “Information Highway” as the electronic equivalent of the Wild West, a lawless frontier. In Canada, it may be the Wild North. Canada is often the most important foreign jurisdiction to Americans in respect of copyright-protected materials. American-produced materials are often first distributed in Canada because of physical proximity and common culture and language. While the Canadian and the U.S. copyright systems are substantially similar, there are a few subtle but crucial differences, particularly in respect of copyright ownership and the rights of authors.

There is no Canadian legislation directed to the Internet or its use. This article considers the legal issues confronting users, providers and carriers of information on the Internet from the perspective of Canadian copyright law. Although the Internet knows no geographical boundaries, the discussion here will, of necessity, consider the Canadian legal landscape. However, because there are few Canadian judicial decisions on point, this article refers to United States caselaw.

and pending lawsuits to illustrate the developing body of law. This is not meant to be a detailed analysis of Canadian copyright law, but rather an overview of copyright in Canada, its applicability to the Internet, and some examples of issues and cases which have arisen to date.

The law of copyright has regularly had to accommodate new technologies and new media. The advent of cameras, phonographs, radios, televisions, photocopying, videotape recorders, computers, digitization, satellites and many other new technologies, has prompted unwavering challenges to copyright law. The Internet is yet one more new technology on this lengthy list. Just as each of the foregoing technologies raised specific questions in respect of copyright law, so too does the Internet. The ease of accessing, copying, modifying, distributing and performing literary, musical, artistic and dramatic works through the Internet presents intriguing issues relating to the violation of copyright. In order to understand the issues it is helpful to appreciate something about digitized technology and the process of accessing, copying, modifying, distributing and performing these works on the Internet.

I. INTERNET TECHNOLOGY

The Internet stores digitized representations of information into electronic signals, to make the representation amenable to recording electronically or on an optical medium. The storage of information, including text, still images, moving images and sound in a digital format is as revolutionary a development as the invention of the first printing press. Once in digital form, information is stored electronically or on an optical disk. This has revolutionized the medium in which data can be stored and the manner in which it can be transferred. For example, all of the white pages telephone directories for Canadian cities can be stored on a few compact disks and can be transferred over telephone wires. In digital form, content can be easily manipulated in many ways — by colorizing black and white movies, sampling music, editing text, retouching photographs and videos to remove or add subjects.

This trend of digitization is coupled with the development of the computer into a communications device. Through the rise of

3. Id.
ubiquitous computer networks, what was a stand-alone personal computer has become a gateway to access a vast array of other computers belonging to literally millions of individuals and businesses, all of them also hooked up to the Internet. Networks are not entirely new; telephone and cable television systems have existed for years. However, those types of networks are very different from the new computer networks. The telephone has been essentially single point to single point interactive communication; cable television has been single point to multi-point non-interactive communication. Computer networks are different because they are single point, and in some cases multi-point, to multi-point interactive communications.

These advances in digital technology and the rapid development of electronic networks and other communications technologies have dramatically increased the ease and speed with which a work can be reproduced, manipulated, distributed and performed. The establishment of high speed, high capacity information systems makes it possible for one individual, with a few key strokes, to deliver perfect copies of digitized works to millions of people; to upload, or send to the remote computer or network, a copy of the work to a bulletin board system (BBS), where millions can listen to or watch a performance; to download, or receive from the remote computer or network, a copy.

As a result of these new technologies, it is now virtually effortless to "cut and paste" an article or longer literary work provided by any publisher and distribute it to the entire Internet community in a matter of seconds. The same is true of software. Violations of copyright in literary works occur on the Internet thousands of times every day.

A. Musical Works

Computers can digitize music into files. No special computer equipment is necessary to copy a music file. A computer's operating system can copy a music file as readily as a text file. Similarly, no special equipment is required to copy music files from one computer to another or over telephone lines through networks to the computers of other network members. Several protocols are available for use to upload or download a file.

Music files often consist of two components. The first is a "sampling portion" that contains digital recordings of actual sounds.

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4. Id.

The second is a "specification portion" that describes the musical characteristics of the sound or sounds are to be given. These differ from program files in that they do not directly send instructions to the computer that acts upon them. Rather, they are data files. Special computer programs are needed to read the data in these files and translate the data to audible sounds. This output translation may be accomplished by a number of computers or through specialized sound boards or software. The interface between the digital data on a disk and audible music is referred to as the musical instrument digital interface, or "MIDI". This interface permits musical information, such as pitch and rhythm, to be recorded electronically in a computer's memory, stored permanently on the magnetic media used in computers, and later recalled to playback the musical work embodied in the MIDI recording. The musical input can take many forms. It can be as simple as connecting a compact disk or audio tape player into a jack on a sound enabled computer. Alternatively, it can involve the digital recording of electronic instruments such as synthesizers or can even involve the typing of notes and instruments on a computer screen.6

In many ways, computer music files are similar to other forms of sound recordings, whether records, tapes or compact disks. Although the nature of what is stored is quite different, what is stored is permanent, relatively portable and can result in humanly perceptible sound or music through the aid of a machine. The principal differences are the ease of verbatim reproduction, the ease of transmission and the fidelity of copies. For computers equipped with a modulator-demodulator, or modem, or sound input facilities, a digital reproduction of a sound recording requires only a few key strokes. When a computer file is downloaded from a BBS or remote information system, a conversion occurs. Most telephone lines carry analog signals, not digital data. Therefore, a modem must translate the computer's digital data into analog data for transmission. The receiving computer then takes the analog data and converts it back to digital data. All of this is imperceptible to the user, who simply tells the computer to transmit or receive the work.7

Although there is much unauthorized copying of musical works and subsequent distribution in the case of conventional media, there are several differences in the context of the Internet. A user may create a MIDI file, upload it to the network and transmit millions of copies without any investment in equipment or materials. More importantly,

6. Id.
7. Id. at 470.
an audio reproduction from a computer file is “identical to the original in every material respect,” whereas home-made duplications of audio tapes are of inferior quality.  

B. Pictorial Works

What has been said about musical works applies, with some exceptions, equally to pictorial works. They also reside in data files, called image files. One type of image or graphic file, a bit-mapped file, contains information on the color, intensity and position of tiny dots called “pixels,” on a computer screen. Pictorial works not created on a computer are digitized in one of two ways. First, a pictorial work such as a painting or a photograph may be scanned into a digital image file using a scanner which converts images from hard copy form to digital form. Second, digital cameras enable one to take a picture that is immediately stored in digital format and ready to be “dumped” to a computer’s hard drive. Programs that have the ability to display image files read in the data and paint the computer’s screen with the data read in from the image file. Like music files, image files come in various different formats. However, unlike music files, which may contain purely digital sounds or sampled acoustic sounds, image files are entirely of the pure digital reproduction type.  

C. Protection Technologies

The foregoing discussion makes clear the daunting challenge faced by Internet content providers to separate legitimate Internet copies that have been legitimately posted on, and reproduced from, the Internet from unauthorized copies transmitted by infringers. In order to deal with this problem, a number of technologies are in the course of development. By way of example, a few such technologies are briefly discussed.

One technique is encryption, particularly public key encryption.  

Traditional encryption systems, for example those used in banking, are based on secret key symmetric encryption, which uses a “symmetric” key. In such a system, there is one key that is used to both encrypt and decrypt the message. When a bank generates an secret encryption key for each electronic customer, it must distribute the key through secure

8. Id.
9. Id.
channels, such as by sending a physical exact copy of the secret key to a customer, while retaining a copy for itself. The use of the key in transactions binds the parties. If the key were to be compromised, the transactions would no longer be considered secure. In addition, the parties usually must know each other and exchange keys before a transaction can occur. Anonymity is difficult to achieve and the communications channels used to exchange keys must be independently secured to prevent fraud.11

Public key encryption is based on the use of an asymmetrical key. In a public key encryption system there are two keys—a private key and a public key. A user keeps his private key secret but gives out his public key openly so that others can use that public key to send back encrypted data that can only be decrypted by the user's private key. The public key that encrypts a message is different from the private key that decrypts it and cannot practically be derived from the private decryption key. The theoretical limits of public key asymmetrical encryption rest with the need to maintain the secrecy of one's private key, although the public key should be openly published.

In addition, parties need assurance that a published public key identified as belonging to someone in fact belongs to that person and has not been erroneously or fraudulently generated or changed. One method to accomplishing this is to use what are known as certification authorities to certify the authenticity of a public key as a match to the private key held by that party. Thus, when trust in the authenticity of the method exchange is required, there must be a mechanism to ensure the identity of the communicants. Regardless of the method used, the requirement of making public keys generally available and free from tampering is needed to complete the public key encryption system.

Encryption technology has developed to the point that at least one state, California, has a announced a “digital signature” statute to govern online transactions, defining legal requirements for digital signature.12

Encryption technology is perhaps the best technique to improve information security. However, the Canadian,13 and especially the U.S.,14 government still treat some encryption techniques as sensitive

13. The Clinton Administration recently modified the U.S. export laws regarding encryption. See 61 Fed. Reg. 68,572 (1996) (interim rule) (the interim rule amends the Export Administration Regulations (EAR) by exercising jurisdiction over, and imposing new combined national security and foreign policy controls on, certain encryption items that were
or secret. Therefore, the placement of encryption programs on the Internet, in some cases, may be considered to be a prohibited export which may result in prosecution under export control laws.

A second technique employed to authenticate digital works involves digital signatures. An “electronic signature” can be attached to a digitally represented work. Any work carrying such a signature is considered signed. Such a signature involves a unique sequence of digits that is computed on the basis of the work, the digital signature algorithm, and the key used in digital signature generation. The key is a private code known only to the signer that encrypts the signature so that it cannot be altered. A user who wishes to view the signature must be provided with a public key, which in this case is a code created by the original signer that will enable recipients to decrypt but not alter the signature. Once created, the signature is electronically linked to the work and can contain vital information about the work. If any change is made to the file or transmission that comprises the work, the information held in the copy’s signature will not match the specification. However, digital signatures are cumbersome for anything beyond relatively limited distributions and require content providers to create matching public and private keys for each work they disseminate. Raw distribution of the originator’s public key along with the work also adds to the expense of sending digital transmissions and also increases Internet traffic.15

A third technique enables copyright owners to embed digitized information into an audio or video file in much the way a watermark is embedded in paper. This steganography technique encodes this identifying information among the data that produces the text, sound or picture. Because the extra information is integral to the data, it cannot be removed, except by extremely sophisticated decryption methods designed to reveal and pluck out the identifying information from the surrounding data. This makes for a very secure fingerprint on each document. The steganographic information, which is invisible to the recipient of the file, has no effect on the quality of the playback for sound or video. The data can only be detected by software with the proper “lens” to view the identifying characteristic.16

The importance of these and other developing technologies cannot be overstated. As infringement enabling technologies become available to Internet users who download, alter, upload and transmit

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16. Id.
files, content providers will increasingly use these protective technologies to help control content.

D. Relevance of Copyright to Internet Content

Many have expressed the concern that the "full potential of the [Internet] will not be realized if the legal protection that extends to education, information and entertainment products and their use in the physical environment are not available when those works are disseminated through the Internet."17 It has been said that creators and other owners of intellectual property rights will not be willing to place their investments and properties at risk unless appropriate systems, both technical and legal, are in place to permit them to set and enforce the terms and conditions under which their works are made available for reproduction, distribution and performance through the Internet. Similarly, the public will not use the services and materials available on the Internet and generate the market necessary for its success unless a wide variety of works are available under equitable and reasonable terms and conditions, and the integrity of those works is assured. As the U.S. government's report on the Internet said, "All the computers, telephones, scanners, printers, switches, routers, wires, cables, networks and satellites in the world will not create a successful [Internet], if there is no content. What will drive the [Internet] is the content moving through it."18 Content is protected by copyright.

Unless the framework for legitimate commerce is preserved and adequate protection for copyright works is ensured, the Internet will not reach its full potential as a global marketplace. For this reason, the U.S. government Internet report said that copyright protection is not an obstacle in the way of success of the Internet; it is an essential component.19 Copyright motivates the creative activity of authors and thereby provides the public with the products of those creators. "By granting authors exclusive rights, the public receives the benefit of literary, artistic, musical and dramatic works that might not otherwise be created or disseminated. Effective copyright protection promotes a cybermarketplace of ideas, expression and products."20 To be fair, there are many who predict the demise of copyright in the digital age.

18. Id. at 7.
19. Id.
20. Id.
One writer has likened tinkering with copyright law to fit the digital age as rearranging the deck chairs on a sinking ship, arguing that it will not be possible to enforce rights where the medium enables instantaneous and infinite reproduction and distribution without cost or movement of tangible goods. Only time will tell.

II. BASICS OF COPYRIGHT LAW

In order to understand copyright issues in the context of the Internet, it is necessary to have a fundamental understanding of what copyright is, what works it covers, what rights it entails, how rights are acquired and how rights are violated. The following is a brief summary of Canadian copyright law.

A. What Copyright Is

Copyright provides the copyright owner the sole right to reproduce, in any material form, or perform the work protected by copyright or any substantial part thereof. Copyright is a purely statutory right. Copyright protects only the form of expression of a particular work, and not the ideas, thoughts, information or concepts set out in it. For example, copyright does not protect the “plot” of a book. However, in some cases, copyright may protect an abstraction of a work. Copyright may protect the “structure, sequence and organization” or the “look and feel” of a computer program.

Copyright subsists in every original literary, dramatic, musical and artistic work, provided certain conditions as to residence or citizenship of the author and place of publication are satisfied. Copyright automatically subsists in such a work upon its creation. The work must be in a material or fixed form capable of identification and having a more or less permanent character. However, neither publication nor legal formality is required. For a work to be “original,” it must not be copied from something else. Literary or artistic merit and inventive content are of no relevance, so long as some labour, skill,
time, ingenuity or mental effort is required in producing the work. Copyright may subsist in an adaption of an earlier work.

Canada is a member of both major international copyright conventions, the *Berne Convention* and the *Universal Copyright Convention* (UCC). As a result, the copyright of a Canadian author automatically subsists in those foreign countries belonging to one of the conventions and *vice versa*. Although registration of a claim to copyright is unnecessary for copyright to subsist, a registration procedure is provided by the *Copyright Act*, which permits the owner of copyright to obtain a certificate evidencing the existence of copyright in a work and the ownership thereof. The certificate creates no legal right but is merely evidence which can be used in court with respect to the issues of originality, authorship and ownership. The author or his or her assignee or other legal representatives may apply for registration of copyright.

**B. Works Protected by Copyright**

Works protectable by copyright are divided into five general categories: literary, dramatic, artistic and musical works, and records and other contrivances for recording sounds. A "work" includes the title of the work when the title is original and distinctive, but there is usually no copyright in the title itself.

Literary works include books, parts of volumes, pamphlets, tables, sheet music, maps, charts and plans separately published, computer programs and compilations of literary works. A compilation is a work resulting from the selection or arrangement of other works or parts thereof or a work resulting from the selection or arrangement of data. Generally, literary works cover all writings, including all printed matter such as menus and letters. A lecture is a literary work if it is reduced to writing before it is delivered. A lecture includes an address, a speech and a sermon. Dramatic works include pieces for dramatic recitation, choreography or mime, the scenic arrangement or acting form of which is reduced to material form, any cinematograph

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27. *Id.* § 54.
28. *Id.* § 2.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
and compilations of dramatic works. A "cinematograph" is a work expressed by a process analogous to cinematography.

Artistic works include paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, casts, models, works of artistic craftsmanship, architectural works, illustrations, sketches, engravings, etchings, lithographs, woodcuts, prints, works expressed by any process analogous to photography and plastic models relative to geography, topography, architecture or science, trade-mark logos and compilations of artistic works. Musical works include any work of music or musical composition, with or without words and compilations of musical works. Song lyrics are, however, classified as literary works. Contrivances include records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced. This category includes audio tapes, videotapes and compact discs.

C. Conditions for Copyright

An unpublished work enjoys copyright protection if it is a literary, dramatic, artistic or musical work, and if the author, at the date of making the work, is: (1) a Canadian citizen; (2) a British subject; (3) a resident of a Commonwealth country; (4) a citizen, subject or resident of a Berne Convention country; (5) a citizen, subject or resident of a UCC country; or (6) a citizen, subject or resident of a country that has agreed by treaty to treat Canadians on substantially the same basis as its own citizens in copyright matters (a "treaty country").

A published work generally enjoys copyright protection in that work if the work meets the foregoing criteria and if the work was first published in such a quantity as to satisfy the reasonable demands of the public, having regard to the nature of the work, in: (1) Canada; (2) a Commonwealth country; (3) a Berne Convention country; (4) a UCC country; or (5) a treaty country. Publication means making copies of

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34. Id.
35. Id.
36. Id. § 64(2).
37. Id. § 2.
38. Id.
39. Id. § 5(4).
40. See discussion infra Part III.E.
41. Copyright Act, R.S.C., ch. C-42, § 2 (1985) (Can.).
42. Id. §§ 5(1), 5(2), 5(2.1).
43. Id.
the work available to the public.\footnote{Id. § 4(1)(a).} Publication does not include the performance in public of a dramatic or musical work, the delivery of a lecture, the construction of an architectural work, the exhibition of an artistic work or, for these purposes, the issue of photographs and engravings of works of sculpture and architectural works.\footnote{Id. § 4(1).}

In the case of a cinematograph, copyright subsists if the maker is, at the date the cinematograph is made: (1) a corporation domiciled in a Berne Convention or UCC country; (2) an individual who is a Canadian; (3) an individual who is a British subject; (4) an individual who is a citizen, subject or resident of a Berne Convention country, a UCC country or other treaty country.\footnote{Id. §§ 5(1), 5(2), 5(2.1).}

\section{D. Term of Copyright}

Generally, copyright protection subsists in a work for the life of the author plus the next 50 years following the end of the calendar year of his death.\footnote{Id. § 6.} Copyright in a work of joint authorship subsists for 50 years from the end of the calendar year of the death of the last surviving author.\footnote{Id. § 9(1).} Copyright in a photograph subsists for 50 years from the end of the calendar year of the making of the original negative or other plate from which the photograph is directly or indirectly derived or the initial photograph, where there is no negative or other plate.\footnote{Id. § 10(1).} Copyright in a record, perforated roll and other contrivance for reproducing sound subsists for 50 years from the end of the calendar year of the making of the original plate from which the contrivance is directly or indirectly derived.\footnote{Id. § 11.} Copyright in a cinematograph or a compilation of cinematographs subsists for 50 years from the end of the calendar year of the first publication of the cinematograph or compilation. If publication does not occur during that period, copyright subsists for a further 50 years.\footnote{Id. § 11(1).} There are other rules governing the term of works in special cases, such as anonymous and pseudonymous works\footnote{Id. § 6.1, 6.2.} and posthumous works.\footnote{Id. § 7.}


E. Authorship and Ownership

The author is the person who creates the work. For example, the writer, not the subject, of a biography owns the copyright in the biography. Where a work is produced by the collaboration of two or more authors and the contribution of one author is not distinct from the contribution of the other author or authors, the work is a work of joint authorship.\textsuperscript{54} There are special rules for certain kinds of works. The author of a photograph is the owner of the negative or other plate, or the photograph if there is no plate, when it is made.\textsuperscript{55} In the case of a contrivance, the author is the person who makes the arrangements necessary for its making.\textsuperscript{56} Other than for photographs and sound recordings, corporate bodies cannot be authors. This raises questions in the case of works created primarily through the operation of machines and electronic devices. Canadian copyright law has no provisions to account for works generated with the aid of the computer.\textsuperscript{57}

A fundamental principle of copyright law is that the ownership of copyright must be distinguished from, and does not necessarily follow, ownership of the work itself. For example, the purchase of a book or painting does not give the purchaser any interest in the copyright in the book. In general, the first owner of copyright in a work is the author.\textsuperscript{58} Where the author of a work was employed by another person, and the work was made in the course of his employment, the employer is the first owner of the copyright in the absence of any agreement to the contrary.\textsuperscript{59} However, where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there is, in the absence of an agreement to the contrary, reserved to the author a right to restrain the publication of the work otherwise than as part of a newspaper, magazine or similar periodical.\textsuperscript{60}

The photographer or artist is the first owner of copyright in a photograph, engraving or portrait unless it was ordered by another and

\textsuperscript{54} Id. § 2.
\textsuperscript{55} Id. § 10.
\textsuperscript{56} Id. § 11.
\textsuperscript{57} Contrast the United Kingdom, where in the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken. Copyright, Design and Patents Act, ch. 48, § 3 (1988) (Eng.).
\textsuperscript{58} Id. § 13(1).
\textsuperscript{59} Id. § 13(3).
\textsuperscript{60} Id. § 13(2).
made for valuable consideration pursuant to that order. For instance, where a sitting fee is paid by a subject to the photographer for a portrait, the subject owns the copyright in the photographs taken. Where a work is prepared or published by or under the direction or control of the government or any government department, subject to any agreement with the author, the copyright in the work belongs to the government. This applies to the federal government, but it is unclear whether this applies to the provincial governments.

Except in the limited cases of photographs, portraits, and engravings made under order and works made in the course of employment, there is no provision in Canadian law which corresponds to the "work made for hire" doctrine in United States law. Therefore, unless an independent contractor of a work other than a photograph, portrait, or engraving ordered for valuable consideration transfers copyright in the work to the person who commissions that work, the independent contractor will own copyright in the work. Consider an example. A producer contracts with an independent production house for the preparation of an audio visual work. The production house contracts in writing to use the audio visual work as part of the CD ROM with a freelance screenplay writer. In the United States, if the production house specifically orders or commissions the work and enters into a written agreement with the freelancer stating that the work is to be considered a work made for hire, the production house is the author and first owner of copyright. In Canada, because there is no work made for hire doctrine, in the absence of an assignment from the freelancer to the production house, the freelancer will retain copyright. Unless the freelancer expressly assigns in writing copyright in the audio visual work to the production house, the production house will not have any copyright to assign to the CD-ROM producer.

F. Rights Comprised Within Copyright

Copyright comprises a bundle of rights. They include:

1. the production or reproduction of at least a substantial part of a work;
2. the performance in public of a work, including the delivery of a lecture.

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61. Id.
62. Id. § 12.
64. Copyright Act, R.S.C., ch. C-42, § 3(1) (1985) (Can.); see discussion infra Part III.A.
65. Id.
(3) the publication of at least a substantial part of an unpublished work;  
(4) the preparation, reproduction or publication of a translation of a work;  
(5) the conversion of a dramatic work into a novel or non-dramatic work;  
(6) the conversion of a non-dramatic work into a dramatic work by way of performance in public or otherwise;  
(7) the making of a record, perforated roll, cinematographic film, or other contrivance by means of which the work may be mechanically performed or delivered;  
(8) the reproduction, adaption and public presentation of a cinematograph;  
(9) the communication of a work by telecommunication;  
(10) the presentation at a public exhibition, for a purpose other than sale or hire, of an artistic work other than a map, chart or plan;  
(11) the rental of a computer program that can be reproduced in the ordinary course of its use, other than by reproduction during its execution in conjunction with a machine, device or computer;  
(12) the authorization of any of the foregoing; and  
(13) the reproduction, publication or rental of a record, perforated roll or other contrivance by means of which sounds may be mechanically reproduced.

G. How Copyright is Transferred

The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to territorial limitations, and either for the whole term of copyright or for any other
part thereof.77 Similarly, the owner may grant any interest in the right by license.78 However, no assignment or grant is valid unless it is in writing and signed by the owner.79 Therefore, merely contracting for the preparation of a work without an executed agreement that effects an assignment or license of copyright may result in the person who orders the work not having the rights that it needs.

As in the United States, there is a statutory right of reversion of copyright in Canada. A detailed discussion of the statutory reversion is beyond the scope of this article. Most simply, where the author of a work is the first owner of copyright, no assignment of the copyright and no grant of any interest therein, such as a license, made by the author, other than by will, is operative to vest in the assignee or licensee any rights with respect to the copyright in the work beyond the expiration of 25 years from the death of the author.80 Notwithstanding any agreement to the contrary, the reversionary interest in the copyright devolves on the death of the author to his or her legal representatives as part of the estate of the author.81 Any agreement entered into by the author as to the disposition of such reversionary interest is void.82 The right of reversion only applies where the author of a work is the first owner of copyright. Because the individual creator is, in the case of many works, the author and first owner, the right of reversion may often be relevant. The reversionary right does not apply to the assignment of copyright in a collective work or a license to publish a work or part of a work as part of a collective work.83 A "collective work" means an encyclopedia, dictionary, yearbook or similar work; a newspaper, review, magazine or similar periodical; or any work written in distinct parts by different authors or in which works or parts of works of different authors are incorporated.84 Whether or not the definition of a "collective work" extends to periodicals distributed in electronic format is unclear. Therefore, while the reversionary right may not extend to works such as newspaper articles created as part of a traditional newspaper publishing business, it may extend to recapture rights relating to on-line, disk and similar electronic applications of interest to publishers.

77. Id. § 13(4).
78. Id.
79. Id.
80. Id. § 14(1).
81. Id.
82. Id.
83. Id. § 14(2).
84. Id. § 2.
H. How Copyright is Violated

Copyright in a work is infringed by any person who, without the consent of the owner of the copyright, does anything that only the copyright owner has the right to do, namely the activities listed above. Certain acts which do not involve copying but commercial use of infringing copies also amount to infringement if there is the required knowledge on the part of the actor. Those acts are:

1. the sale or lease of any work which the seller or lessor knows infringes the copyright of another;
2. the distribution for the purposes of trade, or to such an extent as to affect prejudicially the owner of the copyright, of any work which the distributor knows infringes the copyright of another;
3. the exhibition in public by the way of trade of any work which the exhibitor knows infringes the copyright of another;
4. the importation of any work which the importer knows infringes the copyright of another;
5. the permission to use a theatre or other place of entertainment for private profit for the public performance of a work without the permission of the author, unless the grantor of the permission was not aware and had no reasonable grounds for suspecting the infringement.

I. Lawful Use

There are a number of activities that involve the reproduction or performance of a work protected by copyright, but are exempted from infringement of copyright. Those that may be relevant to Internet activities are:

1. any fair dealing with any work for the purposes of private study or research;
2. any fair dealing with any work for the purposes of criticism, review or newspaper summary, if the source and the author’s

85. Id. § 27(1).
86. Id. § 27(4)(a); see discussion infra Part III.L.
87. Id. § 27(4)(b); see discussion infra Part III.M.
88. Id. § 27(4)(c); see discussion infra Part III.N.
89. Id. § 27(4)(d); see discussion infra Part III.O.
90. Id. § 27(5).
91. Id. § 27(2).
92. Id. § 27(2)(a).
name, if given in the source, are mentioned;³³
(3) the making or publishing of paintings, drawings, engravings
or photographs of a work of sculpture or artistic
craftsmanship permanently situated in a public place or
building or the making or publishing of paintings, drawings,
engravings or photographs that are not in the nature of
architectural drawings or plans, of any architectural work;³⁴
(4) the publication of passages from copyright works in a
collection of material mainly composed of non-copyright
matter if the following criteria are met: (a) the collection
must be genuinely intended for use in schools; (b) this
intention is described in the title and in any advertisement
issued by the publisher; (c) the passage is not from a work
published for the use of schools; (d) the source of the
passage is acknowledged; and (e) the publisher does not
publish more than two passages by any one author within
five years.³⁵
(5) the publication in a newspaper of a report of a lecture
delivered in public unless such a report is prohibited by
conspicuous notices affixed during the lecture.³⁶
(6) the public performance of a musical work by a religious,
educational or charitable organization in furtherance of its
objects;³⁷
(7) the publication of a newspaper report of a political address
delivered at a public meeting;³⁸
(8) the making by a person who owns a copy of a computer
program, which copy is authorized by the owner of
copyright, of a single reproduction of the copy by adapting,
modifying or converting the computer program or translating
it into another computer language if the person proves that:
(a) the reproduction is essential for the compatibility of the
computer program with a particular computer; (b) the
reproduction is solely for the person's own use; and (c) the
reproduction is destroyed forthwith when the person ceases
to be the owner of the copy of the computer program;³⁹

93. Id. § 27(2)(a.1).
94. Id. § 27(2)(c).
95. Id. § 27(2)(d).
96. Id. § 27(2)(e).
97. Id. § 27(3).
98. Id. § 28.
99. Id. § 27(2)(l).
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(9) the making by a person who owns a copy of a computer program, which copy is authorized by the owner of the copyright, of a single reproduction for backup purposes of the copy or of a reproduction referred to in (8) if the person proves that the reproduction for backup purposes is destroyed forthwith when the person ceases to be the owner of the copy of the computer program.

One of the exceptions to infringement is worthy of separate mention, if only because the Canadian “fair dealing” exceptions are different than the United States concept of “fair use.” The Copyright Act provides that two types of fair dealing avoid infringement. The first is fair dealing with any work “for the purposes of private study or research.” The second is fair dealing with any work “for the purposes of criticism, review or newspaper summary,” if the source and the author’s name are mentioned. “Fair dealing” is not defined in the Copyright Act. Whether activity in respect of a work is “fair” is left to judicial interpretation upon the facts of each case. The courts have held that the factors which are relevant in determining the fairness of the dealings include: (1) the length of the excerpts which have been appropriated from the work; (2) the relative importance of the excerpts in relation to the critic’s or journalist’s own comments; (3) the use made of the work; and (4) the nature of the use, be it criticism, review or summary. Fair dealing is ultimately a matter of impression. For the defenses to apply, not only must the dealing be fair, but it must be for one of the purposes enumerated in the statutory provisions, namely for private study, research, criticism, review, or newspaper summary.

As mentioned, fair dealing must be distinguished from fair use. The latter expression, broader in scope, is defined in the United States Copyright Act. Even though the criteria as to what constitutes fairness set out in the United States legislation are appealing, it is only with great caution that they may be considered to determine whether an activity constitutes fair dealing in Canada.

100. Id. § 27(2)(m).
101. Id. § 27(2)(a).
102. Id. § 27(2)(a.1).
103. 17 U.S.C. § 107 (1988) (In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substitutability of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.)
J. Remedies for Infringement

Where copyright in any work has been infringed, the owner of the copyright is entitled to an injunction to stop further infringement, damages, or an accounting of profits, and the recovery of possession of all infringing copies and plates used therefor. If the infringing party was ignorant of the existence of the copyright work and had no reason to suspect the existence of copyright, an injunction is the only remedy available. Registration of copyright in the work is constructive notice of the existence of copyright. All infringing copies of any work, or of any substantial part thereof, in which copyright subsists, and all plates used or intended to be used for the production of such infringing copies, are deemed to be the property of the owner of the copyright.

Criminal sanctions may also be applicable. Infringers may be liable to fines of as much as one million dollars and imprisonment for as long as five years. Any person who knowingly: (1) makes an infringing work to sell or rent; (2) attempts to or actually sells or rents any infringing copy; (3) distributes copies for the purpose of trade; (4) publicly exhibits a copied work for trade purposes; or (5) imports an infringing copy for sale or rent in Canada, is guilty of an offence. Similarly, any person who knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, is guilty of an offense.

Any person who, without the written consent of the owner of the copyright or of his legal representative, knowingly performs or causes to be performed in public and for private profit the whole or any part of any dramatic or operatic work or musical composition in which copyright subsists in Canada, is guilty of an offense.

K. Moral Rights

Canadian copyright provides the author of a work moral rights:

105. Id. § 39.
106. Id.
107. Id. § 38.
108. Id. § 42-43.
109. Id. § 42(1).
110. Id. § 42(2).
111. Id. § 43(1).
(1) the right to the integrity of the work; (2) the right to be associated with the work as its author by name or under a pseudonym; and (3) the right to remain anonymous. Moral rights may not be assigned, although they may be waived. Therefore, moral rights are not transferred with the transfer of copyright ownership. An assignment of copyright does not, by that act alone, constitute a waiver of moral rights. Moral rights extend for the term of copyright in the work. Any act or omission that is contrary to any of the moral rights is, in the absence of consent by the author, an infringement. The author’s right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, distorted, mutilated or otherwise modified; or used in association with a product, service, cause or institution. Prejudice is deemed to occur in the event of any distortion, mutilation or modification of a painting, sculpture or engraving. By way of example, moral rights have been asserted to attempt to prohibit the modification of screen displays in video games.

I. Right of Restraint

A very important right in the periodical publishing business is the right of restraint reserved to authors. This right is available to an author even where an employer owns the copyright in works authored during the course of his or her employment. Where a work created by an employee is an article or other contribution to a newspaper, magazine or similar periodical, the right or restraint is available. In such a situation, there is, in the absence of any agreement to the contrary, deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical. It is not clear whether formats such as disks and on-line services will qualify as periodicals. This reservation in favor of employee authors is very important in light of the current trend to move from traditional paper publications

112. Id. § 14.1(1).
113. Id. § 14.1(2).
114. Id. § 14.1(3).
115. Id. § 14.2(1).
116. Id. § 28.1.
117. Id. § 28.2(1)(a).
118. Id. § 28.2(1)(b).
119. Id. § 28.2(2).
121. Copyright Act, R.S.C., ch. C-42, § 13(3) (1985) (Can.).
to publishing through electronic media. A simple example will illustrate this situation. Suppose an employee of a U.S. newspaper authors a work during the course of employment. The employer publisher then distributes that work as part of its whole newspaper or magazine through an on-line service which is available in Canada. If the on-line service does not constitute a "newspaper, magazine or similar periodical," the publisher and all of its licensees along the on-line service distribution chain, absent contrary agreement, may violate the employee's right of restraint in respect of activities in Canada.

M. Performer's Rights

A performer giving a live performance of a work has the sole right to fix the performance by means which allow sound reproduction, such as by audio record, tape, compact disc, or video; to reproduce unauthorized fixations; and to provide live communication of the performance. Rights in the performance of an artistic work extend only to live communication of the performer. There is no prohibition against fixation or reproduction of the performance. The term of the right is the balance of the calendar year during which the performance took place plus 50 years. Anyone who does such activity without the authority of the performer infringes.

III. COPYRIGHT ISSUES ON THE INTERNET

The legal community has discussed and considered the question of whether the Internet can be governed by current copyright law. The United States and Canada, among other governments, have each concluded significant studies on issues relating to the Information Highway in general, and the Internet in particular. The overall view suggests that current copyright law, with a few adjustments, can accommodate the issues presented by the Internet. Copyright will once again be elastic enough to accommodate the latest in a long line of new technologies. While some have advocated much greater changes, the U.S. and Canadian reports do not advocate a major overhaul of
copyright law. This section includes an overview of current Canadian copyright as it pertains to the Internet.

A. Production or Reproduction

A copyright owner has the sole right to produce or reproduce the work or any substantial part in any material form. The term "produce" refers to the materialization of a work in a given form which may be different from the original. The term "reproduce" means the duplication of an original. The sole right to produce or reproduce a work in any material form effectively extends the protection for the production or reproduction of the work in different media and dimensions. Thus, an unauthorized reproduction of a two-dimensional painting in a three-dimensional sculpture constitutes copyright infringement in the painting, even though there may also be a separate copyright in the sculpture. What constitutes a substantial part of a work is a question of fact.

Whenever a work protected by copyright is copied without permission in any form or medium, whether on paper, disk or otherwise, an infringing act occurs. For example, the copyright in the object code of a program may protect the screen display. Making a copy in a hard drive would also violate this right. When a user loads text, a picture, or music into a computer so that a copy is made without permission, an infringement occurs. Similarly, there is infringement when one downloads a copy of such a work without authorization. Whether uploading a work implicitly authorizes another person to download the program depends on the circumstances.

B. Performance in Public

The copyright owner has the sole right to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public. The term "delivered" is used with reference to communication by audible or visual means, rather than the physical delivery of a tangible object. The term "perform" is not limited only to musical or dramatic works but extends to all kinds of works, including literary and artistic works. A "performance" means any

129. Copyright Act, R.S.C., ch. C-42, § 1 (1985) (Can.).
132. See discussion infra Part III.J.
133. Copyright Act, R.S.C., ch. C-42, § 1 (1985) (Can.).
acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument, radio receiving set or television receiving set.\textsuperscript{136} One performs a work when one causes the work to be heard or seen.\textsuperscript{137} A musical work is performed when it is audibly reproduced by the voice, by musical instruments or by mechanical methods of reproduction.\textsuperscript{138} A work may also be performed visually as long as the work has some dramatic action. A representation may be live or by means of a mechanical instrument, including electronic devices such as audio tape recorders and video cassette recorders.\textsuperscript{139} There is therefore no reason why a mechanical instrument should not include a computer.

One can analogize performance via a computer network with a radio station broadcast. Both cases involve the transmittal of information. In both cases, what is received cannot be audibly perceived without the aid of a mechanical device and, in both cases, a medium other than the sounds themselves is used to transmit the performance. On the other hand, one could argue that, in the case of a computer network, what is uploaded and downloaded is not a performance of the musical composition, but a copy of the sound recording. It is arguable that the concept of performance requires immediacy. When a radio signal is received by an ordinary receiver, it is immediately converted into sound waves rather than being stored for later playback. The exact same process is used to transmit text files. Such literary works are not performed when they are transmitted.

A computer, on the other hand, may either perform the work immediately, or store it in memory for later use, or both. If the work is stored, the downloading process is more like a form of electronically mailing the record itself rather than a performance of the musical composition. The computer, using its sound card, special software and a modem, may act in the same fashion as a radio receiving real time audio events. An example is the RealAudio and RealVideo formats which allow real time sound or pictures. These formats, depending on the sender’s wishes, are capable of being stored on disk. The distinction between performance and downloading does not really exist for artistic works. A network or BBS user, when browsing image files, may be able to see the files before they are downloaded. Thus, the information system is truly displaying the work.

\begin{itemize}
\item \textsuperscript{136} Copyright Act, R.S.C., ch. C-42, § 2 (1985) (Can.).
\item \textsuperscript{137} Canadian Admiral Corp. v. Rediffusion, Inc., [1954] Ex. C.R. 382, 404.
\item \textsuperscript{138} Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp., [1939] 4 D.L.R. 353.
\item \textsuperscript{139} Warner Brothers-Seven Arts Ltd. v. CESM-TV, Ltd., [1971] 65 C.P.R. 215.
\end{itemize}
The performance of a work will not constitute infringement unless the performance is made in public. It is difficult to determine to what extent a performance is private, and when it becomes a performance in public. In the absence of a statutory definition of a performance "in public," the courts have been called upon to determine whether performances were made in public on several occasions. The test to be applied in order to determine what constitutes a performance of a work in public is the character of the audience.\(^{140}\) An early Canadian case held that even a large number of private performances, solely because of their numbers, do not become public performances.\(^{141}\) However, this view was criticized in a 1993 decision of the Federal Court of Appeal.\(^ {142}\) There, the court considered a number of foreign decisions and said that they take a more realistic view of the impact in effect of technological developments. The court concluded that the plain and usual meaning of the words "in public" means without concealment and to the knowledge of all.

At least one U.S. copyright decision has found that a display of photographs to subscribers to a BBS constituted a display "in public."\(^ {143}\) Though limited to subscribers, the audience consisted of a substantial number of persons outside of a normal circle of family and its social acquaintances. The court concluded that the open to all approach of the BBS made the displays of the digitized photographs public. Anyone with an appropriately equipped computer could log onto the BBS. Once logged on, subscribers could browse through different BBS directories to look at the pictures, and customers could also download the high quality computerized copies of the photographs and then store the copied image onto their computer.

It is therefore arguable that the making available of a work to be seen or heard by others by means of a network of computers will constitute a performance. If the number of computers within the network is sufficiently large, or if there is no limit to the accessibility of the work, the performance may be one given in public and may therefore fall within this right of the copyright owner. However, the Copyright Act states that the act of communicating a work to the public by telecommunication\(^ {144}\) does not constitute the act of performing or delivering the work in public, nor does it constitute an authorization to

\(^{141}\) Id.
\(^{142}\) Canadian Cable Television Ass'n v. Copyright Bd., [1993] 2 F.C. 139.
\(^{144}\) See discussion infra Part III.G.
do the act of performing or delivering the work in public. Therefore, if the work is merely made available by virtue of the transmission, it is arguable that there is no performance in public and therefore no infringement.

C. Publication

The owner of copyright has the right, in respect of an unpublished work, to publish the work or any substantial part thereof. Although “publish” is not defined in the Copyright Act, the Act does define “publication” as, among other things, the making of copies of the work available to the public. However, it does not include the performance in public of a literary, dramatic or musical work, the delivery in public of a lecture, the communication of a work to the public by telecommunication or the exhibition in public or an artistic work. The definition of publication refers to copies. At least one commentator has suggested that, unless copies are made available, there is no publication. Until 1994, publication was defined by reference to the “issuance” of copies of the work to the public; now it is defined by reference to the “availability” of such copies of the work to the public. Transmission of documents on the Internet does not involve the physical issuing or distribution of copies but rather the making available of copies. The question of how and whether copies of a work are made available, namely issues of accessibility and attainability, remain unresolved; this may depend on the nature of the work itself as well as the targeted audience. However, it seems that making a work available for downloading of a copy by a receiving computer may effect a publication. Where this is done without the authority of the copyright owner, such activity would be an infringing act.

D. Translation

The copyright owner has the sole right to produce, reproduce, perform or publish any translation of the work. A translation clearly includes the conversion of a work from one human language into another, such as from English to French. It is probable, although not yet clear, that the modification of one informatics language, such as

146. Id. § 3(1).
147. Id. § 4(1).
149. Copyright Act, R.S.C., ch. C-42, § 3(1)(a) (1985) (Can.).
COBOL 1, to a more evolved language, such as COBOL 3, may be considered as a translation. A translation from a human language to an informatics language or vice versa is less clear. The unauthorized production, reproduction, performance, or publication of a translation of a work on the Internet is no different than the same activities in respect of a copy thereof, and may therefore constitute infringement.

E. Making of Contrivance

The copyright owner has, in the case of a literary, dramatic or musical work, the sole right to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered. This provision does not confer on the copyright owner the right to make a contrivance by means of which an artistic work may be mechanically performed or delivered. Therefore, it may not apply to the making of a CD-ROM comprising a series of photographs. We have already seen that an artistic work, such as a photograph, may be performed by making it available visually.

A “cinematograph” includes any work expressed by any process analogous to cinematography. Again, a recent amendment to the Copyright Act has contemplated modern technological developments. Until 1994, a cinematograph was defined to include any work “produced” by any process analogous to cinematography. The term referred to the processes involved in production, namely the projection of a series of photographs upon a screen in a timeless sequence so as to give the illusion of motion. It required a “negative and photograph, or a series of negatives and photographs in material form having a more or less permanent endurance.” Accordingly, prior to the amendment, television processes, videotapes, videograms, holograms, video disks, and other technologies which do not produce images by way of negatives and photographs were considered to be excluded from the definition until the Copyright Board reached the conclusion in 1991 that a videotape is produced by a process analogous to cinematography. However, this issue is now moot because the new

151. Copyright Act, R.S.C., ch. C-42, § 3(1)(d) (1985) (Can.).
152. See discussion infra Part III.B.
definition references any work expressed by any process analogous to cinematography. At least one author suggests that, as a result of this amendment, the definition of cinematograph now includes videotapes, laser recordings and all other motion picture reproductive recordings.\textsuperscript{156}

The better view is that the term "other contrivances" extends not only to records and perforated rolls but to things of the same genus. It seems that the term could apply to any device allowing reproduction of sound through machinery or mechanisms. It could include tapes, videotapes, soundtracks of cinematographic films, chips, laser disks, compact disks, software, etc. It appears to cover sound recordings in general, regardless of the medium in which the recording is made or the method by which the sounds are produced or reproduced.\textsuperscript{157}

While the right refers to a work being "mechanically" performed, the better view is that it means performed through any machine, and would include performance through an electronic machine such as a computer.\textsuperscript{158} This view is confirmed by the fact that it has been held that a videotape is a contrivance by means of which a work may be mechanically performed. When a videotape is inserted in an appropriate machine, it reproduces the sound and images recorded thereon on the viewer’s television set automatically without intervening means.\textsuperscript{159}

The term "make" in relation to a contrivance is not defined in the Copyright Act. It has been held to include the direct sense of physically causing a contrivance to come into being. A person who by means of devices or procedures forms materials into disks, and imprints thereon grooves and tracks by means of which the work may be mechanically performed, makes a record.\textsuperscript{160} However, it may also include the general activity of bringing about the production of the contrivance and the indirect actions associated therewith. The question is whether someone who uploads a textual, dramatic or musical work into a computer, a computer disk or a BBS, or downloads a work received through the Internet, “makes” such a contrivance.

\textbf{F. Cinematographic Rights}

The copyright owner has, in the case of any literary, dramatic,
musical or artistic work, the right to reproduce, adapt and publicly present the work by cinematograph. As we have seen, a “cinematograph” is now defined to include any work expressed by any process analogous to cinematography. Therefore, it probably includes all contrivances for reproducing visual images. With respect to cinematographic rights, the activities cover reproduction, adaptation and public presentation. Reproduction is discussed above. “Adaptation” means the alteration as to fit for a new use or the change by adaptation. “Public presentation” is interestingly used instead of “performance.” The term “present” or “presentation” is not defined in the Copyright Act. It means to show, exhibit or display. A “presentation” would seem to mean something different than a “performance” because of the choice of a different word in the statute. For a presentation of a work as a cinematograph to violate the rights of the copyright owner, it must be done “publicly.” The cases have said that the phrases “to the public” and “in public,” which are both used in the Copyright Act, each have different meanings. The words “to the public” are of broader effect than “in public.” This suggests that “publicly” may also be interpreted differently from either of those terms. However, it seems that the presentation of a work by cinematography in an unrestricted fashion on the Internet would be done publicly and therefore would infringe copyright if done without the consent of the copyright owner.

G. Communication by Telecommunication

The copyright owner has, in the case of any literary, dramatic, musical, or artistic work, the right to communicate the work to the public by telecommunication. While communication does not usually mean a performance, it is apt to include performances in its meaning along with other modes of representation applicable to other kinds of artistic or literary works that are not performed. The term

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161. Copyright Act, R.S.C., ch. C-42, § 3(1)(e) (1985) (Can.).
162. See discussion supra Part III.E.
163. See discussion supra Part III.A.
164. WEBSTER'S 3d NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1986).
165. Id.
167. Id.
168. Playboy Enters. Inc. v. Frena, 839 F. Supp. 1552; see also discussion supra Part III.B.
169. Copyright Act, R.S.C., ch. C-42, § 3(1)(f) (1985) (Can.).
170. Composers, Authors & Publishers Ass'n of Can. Ltd. v. CTV Television Network
"communicate" is broad enough to include a performance within the traditional concepts of copyright.\textsuperscript{171}

"Telecommunication" is "any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system."\textsuperscript{172} This definition could encompass all kinds of telecommunications systems. There is little doubt that the transmission of communications from and to computers which connect through the Internet by way of telephone lines constitute a telecommunication. This is another case of a recent definitional amendment which contemplates new technologies. Until recently, the right related to "radio communication."\textsuperscript{173} A recent decision has held that, by changing the description of the right from "radio communication," which only covered radio waves and not wired systems, to "telecommunication," the Copyright Act has eliminated any distinction between transmission by radio waves and transmission by guided signals by means of wire or cable.\textsuperscript{174} It is no longer necessary to distinguish between the two methods of transmission.\textsuperscript{175}

Communication of a work by telecommunication violates copyright if it is made "to the public."\textsuperscript{176} The term "to the public" is distinctly different from "in public."\textsuperscript{177} The words "to the public" are of broader effect.\textsuperscript{178} The Act provides a hint as to who may be included as part of the public, such as persons who occupy apartments, hotel rooms, or dwelling units situated in the same building, even if communications made to such persons were intended to be received exclusively by such persons.\textsuperscript{179} On this basis, it would be difficult to conclude that a communication by computer to others on the Internet is not a telecommunication to the public.

Communicating a work to the public by telecommunication does not constitute the act of performing or delivering the work in public or the authorization to do such acts.\textsuperscript{180} A person whose only act in respect of the communication of a work to the public consists of providing the means of telecommunication necessary for another person to so

\textsuperscript{171} Canadian Cable Television Ass'n v. Copyright Bd., 34 C.P.R.3d at 536-37.
\textsuperscript{172} Copyright Act, R.S.C., ch. C-42, § 2 (1985) (Can.).
\textsuperscript{173} See Canadian Cable Television, 34 C.P.R.3d at 536-37.
\textsuperscript{174} Id. at 537.
\textsuperscript{175} Id.
\textsuperscript{176} See id. at 537.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 538.
\textsuperscript{179} Copyright Act, R.S.C., ch. C-42, § 3(1.2) (1985) (Can.).
\textsuperscript{180} Id. § 3(4).
communicate the work does not communicate that work to the public. Therefore, a telecommunications carrier would not be liable for telecommunicating a work. However, one who communicated a work to the Internet would be.

SOCAN, the music performing rights collective, has proposed a tariff for the transmission of musical works to subscribers via a telecommunications service that prior tariffs do not cover. If the tariff is approved, anyone who operates a telecommunications service through one or more computers or other devices connected to a telecommunications network would need a license to communicate the work to the public by telecommunication in Canada, if each subscriber can access the transmission of musical works independently of any other person having access to the service. If the work is within SOCAN's repertoire, the licensee would pay a monthly fee. For those telecommunication services that do not earn revenue from advertisements on the service, the fee would be $0.25 per subscriber. In the case of those telecommunication services that earn revenue from advertisements on the service, the fee would be three-point-two percent (3.2%) of gross revenues, with a minimum fee of $0.25 per subscriber.

For the purpose of this tariff, a "telecommunications service" includes a computer on-line service, a BBS, a network server or service provider or similar operation that provides for or authorizes the digital encoding, random access and/or storage of musical works or portions of musical works in a digitally encoded form for the transmission of those musical works in digital form via a telecommunications network. A telecommunications service also includes a service that provides access to such a telecommunications network to a subscriber's computer or other device that allows the transmission of material to be accessed by each subscriber independently of any other person having access to this service. A "telecommunication service" would not include a music supplier covered under Tariff 16 or a transmitter

181. Id. § 3(1.3).
184. Id.
185. Id.
186. Id.
187. Id. Tariff No. 16.
188. Id. Tariff No. 16.
189. Id.
A "subscriber" means a person who can access or is contractually entitled to access the service provided by the telecommunications service in a given month. "Gross revenues" include a total of all amounts paid by subscribers for the right to access the transmissions of musical works and all amounts paid for the preparation, storage or transmission of advertisements on the service. "Advertisements on the service" include any sponsorship announcement, trade-mark, commercial message or advertisements displayed, communicated or accessible during connection to or with the service or to which the subscriber's attention is directly or indirectly guided by means of a hypertext link or other means.

H. Public Exhibition

The copyright owner has the sole right to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart, or plan. The Copyright Act does not define the terms "present" and "public exhibition." It seems that the expression "public exhibition" encompasses a display to a particular section, group or portion of a community. It is at least arguable that the posting of an artistic work covered by this provision to an audience other than a private one may constitute a presentation at a public exhibition, and therefore an infringement of copyright if done without the authorization of the copyright owner.

I. Rental Rights

The owner of copyright in certain works has the right to control rentals. The works subject to rental rights are: (1) computer programs reproducible in the ordinary course of their use, other than by reproductions during its execution in conjunction with a machine, device or computer; and (2) a record, perforated roll or other contrivance that can enable the mechanical reproduction of sounds. An arrangement, whatever its form, constitutes a rental if, and only if, (1) it is in substance a rental, having regard to all the circumstances;

190. Id. Tariff No. 17.
191. Id. Tariff No. 22.
192. Id.
193. Id.
194. Copyright Act, R.S.C., ch. C-42, § 3(1)(g) (1985) (Can.).
195. RICHARD AND CARRERE, supra note 148, § 5.18.4.
197. Id. § 3(1)(b).
198. Id. § 5(4)(c).
and (2) the parties enter the arrangement with motive of gain in relation to the overall operations of the person who makes the rental. A person who rents out a computer program or a sound contrivance with the intention of recovering no more than the costs, including overhead, associated with the rental operations does not by that act alone have a motive of gain in relation to the rental operations. "Motive of gain" has been defined to mean "for a profit." It remains undetermined whether a "rental" requires the transfer of a tangible copy. If it does, a rental may not be able to be effected through the Internet. However, if the act of renting does not require transfer of a tangible copy, rental may be effected through the transmission of a copy, subject to the destruction or return on completion of use by the renter. Two European Community officials have taken the view that a rental may be effected electronically.

J. Authorization

The copyright owner also has the right to authorize any of the foregoing activities which comprise the bundle of rights in copyright. The right of authorization is a separate right. In other words, the copyright owner has the sole right to do the acts enumerated in the Copyright Act and the sole right to authorize others to do these acts. The Copyright Act does not define the term "authorize." The term has been considered on many occasions in the jurisprudence, and Canadian and English courts have interpreted it according to its ordinary meaning. To "authorize" means to grant or purport to grant to a third person the right to do the act complained of, whether the intention is that the grantee shall do the act on his own accord, or only on account of the grantor. The word authorize has been construed

199. Id. §§ 3(2), 5(5).
200. Id. §§ 3(3), 5(6).
201. Composers Authors and Publishers Ass'n of Can., Ltd. v. Western Fair Ass'n, 1951 S.C.R. 596, 600-01 (Can.).
203. See id.
204. Copyright Act, R.S.C., ch. C-42, § 3(1) (1985) (Can.).
207. See Copyright Act, R.S.C., ch. C-42, § 3(1) (1985) (Can.).
209. Id. at 499.
judicially to include sanctioning, approving, or countenancing.\textsuperscript{210} The authorization need not be specific.\textsuperscript{211} A court may infer an authorization or permission from acts which fall short of being direct and positive.\textsuperscript{212} Indifference, exhibited by acts of commission or omission, of a certain degree may provide a basis for inferring authorization or permission.\textsuperscript{213} Whether certain conduct amounts to implicit authorization is a question of fact in each case regarding what to infer from such conduct.\textsuperscript{214} Where authorization for infringing activity originates from a jurisdiction apart from that where the infringement occurs, exposure to liability for the authorization is in the jurisdiction where the infringement occurs.\textsuperscript{215}

Several issues arise with regards to an implied authorization. Does a person who makes a work available or enables others to infringe authorize the act? In the present context, does posting a work on the Internet implicitly authorize any activity with regard to the work which is otherwise reserved to the copyright owner, such as to download a copy? Further, does the linking by B of its site to A’s site constitute or purport to be an authorization by B to copy works posted on A’s site? It has been held that the owner of a coin-operated juke box placed in a restaurant did not authorize the performance of the musical work in the restaurant.\textsuperscript{216} An Australian case held that a university, by providing a photocopying machine near its library, authorized the reproduction of a literary work because, at all material times, the university was in a position to control the use of the machine.\textsuperscript{217} However, in England, it was held that a company that sells to the public audio systems capable of copying pre-recorded tapes did not authorize such an act, because of the absence of control over use of the machines by end users.\textsuperscript{218}

Considering these cases, it is arguable that the authorization to do a prohibited act is linked to the notion of control over the means by which the act is done. Therefore, one might argue that, because the

\begin{itemize}
\item \textsuperscript{210} Underwriters' Survey Bureau, [1938] Ex. C.R. at 123.
\item \textsuperscript{211} See Performing Right Soc'y, Ltd. v. CIRYL Theatrical Syndicate Ltd., [1924] 1 K.B. 1, 9 (C.A.).
\item \textsuperscript{212} Id.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} See John, supra note 202, at 78.
\item \textsuperscript{217} Univ. of N.S.W. v. Moorehouse, 133 C.L.R. 1. (High Ct. of Austl. 1975).
\item \textsuperscript{218} CBS Songs Ltd. v. Amstrad Consumer Elecs. Plc, [1988] 2 W.L.R. 1191 (C.A.).
\end{itemize}
person who uploads a copy of a work does not have control over the means by which another person on the Internet might download a copy or perform the work, the uploader may not be liable for authorizing copyright infringement. The answers will depend on the specific facts of any particular situation and the information provided or restrictions posted with the work in question.

K. Reproduction or Publication of Contrivance

The copyright owner has, in respect of any record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced, the sole right to do certain activities in respect of the contrivance or any substantial part thereof. These acts include the reproduction of the contrivance in any material form or the publication of the contrivance if it is unpublished. There is a separate copyright in the contrivance itself, regardless of the fact that the underlying literary, dramatic or musical work may not be protected under the Copyright Act. In the case of a record, disk or the like, copyright protection will subsist in the record and not only in the master disk. The uploading of a copy of a sound contrivance may be a reproduction in a material form and may therefore constitute a violation of the rights of the owner of copyright in the mechanical contrivance if done without the authority of the copyright owner.

L. Sale or Lease

Selling a copy of a work, leasing it for hire, or exposing it by trade or offer for sale or hire, knowing that it is an infringing copy, infringes copyright in that work. Therefore, the sale, lease, exposure by trade or offer for sale of a work on the Internet is an infringement if the person knows the work is an infringing copy. “Knowledge” means the notice of facts that would suggest to a reasonable person that the work is an infringing copy. Where copyright in a work is registered, one is deemed to have reasonable ground to suspect that copyright subsists in the work. There is a duty to make reasonable inquiries to determine whether a sale or other transaction would involve an infringing

220. Id. § 5(4)(a).
221. Id. § 5(4)(b).
copies.  

M. Distribution

One infringes copyright by distributing, either for the purposes of trade or to such an extent as to affect the owner of copyright prejudicially, a copy which one knows is an infringing copy.  The "knowledge" requirement is discussed above. Distributing infringing copies via the Internet would violate this right even if a copy is not made by the "distributor," so long as it is for the purposes of trade or if it prejudices the copyright owner. United States copyright law provides copyright owners a right to control distribution of copies of their works. In Canada, the bundle of rights of the copyright owner does not encompass this distribution right, unless the distributor knows that the copies are infringing copies. In the United States, any public distribution of a work protected by copyright is a right reserved to the owner of copyright. In one case, the court held that making digital copies of Playboy's photographs available on a BBS violated the U.S. distribution right of the copyright owner. This distribution right has been the subject of much discussion in the United States in relation to the Internet.

N. Exhibition in Public

Exhibiting a work in public through trade, knowing that work infringes or would infringe copyright, is an infringement. Therefore, merely posting a work in public with the requisite knowledge, and as part of one's trade, would constitute an infringement if the posting was not authorized by the copyright owner.

228. See discussion supra Part II.L.
235. See discussion supra Part III.B.
236. See discussion supra Part III.L.
237. This is to be contrasted with the exhibition for purposes other than for trade. See discussion supra Part III.H.
O. Importation

Importing a work for sale or hire into Canada, knowing the work is an infringement if the work was made in Canada, constitutes infringement. Although the production and sale of books, records, videotapes or any other type of work may be lawful in another country, it is an infringement to import a work for sale or hire into Canada without the authority of the Canadian copyright owner. It is not clear whether importation requires the delivery of a physical copy across the border. To the extent copies of a work can be "imported" by downloading copies from the Internet, the act could amount to infringement. The U.S. NII Report suggests that there is no importation absent movement of a tangible copy across the border.

P. Browsing

Internet browsing raises particularly controversial, copyright issues. The copyright owner has no right to control browsing of tangible copies. Anyone can browse through books in a library or magazines in a store. However, there has been a strong movement among copyright owners to include a right to control browsing. This is because it is necessary to produce a "copy," albeit ephemeral, on one's own computer to browse a work.

Q. Jurisdiction

One clear problem related to copyright issues on the Internet relates to jurisdiction. For example, when a work is uploaded or transmitted from a location in Canada and received or downloaded in a foreign jurisdiction, or vice versa, to the extent that a copyright violation occurs, the question remains whether the violation occurs in the sending or receiving jurisdiction, or both. The violation probably occurs where the infringer committed the act, as defined in relation to the right of the copyright owner. However, this begs the question. Is a copy made where the work is uploaded or transmitted, or where it is downloaded or received? In a recent case, a United States District Court held that a Nevada software manufacturer operating a nationwide

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240. See NII REPORT, supra note 17, at 72.
242. See discussion infra Part V.C. (discussing proposed legislative changes to make "browsing" an act of reproduction).
BBS was subject to California jurisdiction on the ground that false statements it posted on its service were made to third persons outside of California concerning a resident California corporation.243 A similar Canadian case held that a broadcaster in Washington State might infringe on Canadian copyrights by broadcasting close to the border.244

IV. EXAMPLES OF INFRINGING ACTIVITY ON THE INTERNET

There have already been a number of cases in the United States and Canada involving copyright infringement on the Internet. Some have been settled and others the subject of interlocutory decisions. None have been adjudicated after a full trial. There are subtle differences between the copyright law of the United States and Canada so any decisions rendered in the United States are more illustrative than guiding. Nevertheless, they are briefly summarized below in the categories of text, software, artistic and musical works.

A. Textual Works

Several cases involved infringement of copyright in textual works on the Internet. In Canada, Time Again Productions sued the estate of Marshall McLuhan and others for, among other things, alleged dissemination of copies by McLuhan on the Internet without authorization.245 The parties settled. There have also been several suits in the United States. In one, World Library sued Pacific Hitech,246 who allegedly "innocently" downloaded more than 800 works from a CD-ROM holding hundreds of literary works published by World Library and began selling them on the Internet. The parties settled the suit when Pacific Hitech agreed to stop selling its version of the works and to destroy its master and all unsold copies.247

In three highly publicized cases, the Religious Technology Center (RTC), one of the formal entities constituting the Church of Scientology, founded by L. Ron Hubbard, sued individuals and service producers for placing allegedly unpublished materials of the Church on the Internet.248 The Church maintains that some of its core religious...
documents authored by Hubbard are subject to copyright and trade secret protection and have been “stolen” and distributed by former Scientologists.\(^{249}\) Although most, if not all, these materials have been widely disseminated on the Internet, in open court records, and elsewhere, the Church appears to make it a point to sue whomever obtains and distributes a copy of any such materials.\(^{250}\)

The first case involved a claim made against F.A.C.T.NET Inc. (FACTNET), a nonprofit educational and charitable company run by two former scientologists.\(^{251}\) FACTNET maintains a library and archive information concerning an ongoing public controversy regarding the Church’s status as a religious tax exempt organization. Since leaving the Church, two principals of FACTNET charged that the Church’s practices involved harmful psychological coercion which resulted in physical harm to a significant number of its followers. Much of the information they maintain is available on FACTNET’s bulletin board service on the Internet. RTC sued FACTNET for copyright infringement and trade secret misappropriation, alleging that FACTNET placed on the Internet unauthorized copies of the unpublished religious works.\(^{252}\) FACTNET denied posting any works of the Church, with the exception of a single mistaken posting of an unsealed public court document in another proceeding in California involving the Church. RTC obtained an ex parte temporary restraining order prohibiting any use, copying, or reproduction of the works.\(^{253}\) The court also ordered the seizure of materials, computer equipment, computer software, and documents from FACTNET’s premises.\(^{254}\) However, the court later denied RTC’s preliminary injunction motion.\(^{255}\) The court rejected the infringement claim, ruling that, while FACTNET copied works, its activity fell within the fair use limitation. The copying was not commercial in nature and was for the purpose of advancing the understanding of issues concerning the Church which were the subject of ongoing public controversy.\(^{256}\) As

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\(^{249}\) Posting of Scientology Texts to Internet Was Not Fair Use, 53 Pat., Trademark & Copyright J. (BNA) No. 1301, at 5 (Nov. 7, 1996).


\(^{252}\) Id.

\(^{253}\) Id. at 1522.

\(^{254}\) Id.

\(^{255}\) Id. at 1523.

\(^{256}\) It is important to note that the exemption for fair dealing in Canada is significantly more restrictive than the fair use defense in the United States. See discussion supra Part II.1.

such, the postings were considered as having been made for the purposes of criticism, comment or research falling within the United States fair use doctrine.258

In another case, RTC sued an operator of a BBS and an Internet access provider for the posting of materials.259 Dennis Erlich was a former minister and local critic of the Church who used the on-line USENET news group for discussion and criticism of Scientology on the Internet. Erlich gained access to the Internet through a BBS operated by Thomas Klemesrud. The BBS was, in turn, connected to the Internet and other USENET BBS sites through an Internet access provider, Netcom On-line Communication Services Inc., one of the largest such providers in the United States. Erlich used a modem to connect to the BBS, and then transmitted his messages to the BBS where they were automatically stored for three days for the convenience of users. Erlich’s initial act of posting a message to the USENET resulted in the automatic copying of the message on the BBS computer to Netcom’s computer and onto other computers on the USENET. The Netcom system maintained postings for an 11 day period. Once on Netcom’s computers, messages were available to Netcom’s customers and USENET neighbors, who could download the messages to their own computers. RTC accused Erlich of infringing its copyrights by posting portions of its works on his USENET news group.260 After failing to convince Erlich to stop his postings, RTC contacted the BBS, who refused to block Erlich’s access to their systems. RTC then sued Erlich, Klemesrud and Netcom for copyright infringement.261 The court granted RTC’s motion for a preliminary injunction against Erlich.262 The court concluded that RTC showed a likelihood of success on its copyright infringement claims against Erlich and that his use of the RTC works was not a fair use.263

In yet another case involving the Church, RTC sued another former Scientologist, Arnoldo Lerma, who posted a copy of a document on the Internet.264 The document was a declaration filed in

258. See id. at 1524-26.
260. Id. at 1365-66.
261. Id. at 1366.
262. Id. at 1366 n.3.
263. Netcom moved for summary judgment, Klemesrud moved for judgment on the pleadings, and RTC moved for a preliminary injunction against Netcom and Klemesrud. 907 F. Supp. at 1366. This aspect of the case is discussed in the context of the liability of BBS operators in infra Part IV.E.
the court file in a pending case. The Washington Post obtained portions of the alleged “secret” materials of the Church from the court file. The Post used three short quotes from the declaration in a news story about Lerma. After the article was published in the Post, RTC joined the Post in the case against Lerma. RTC also sued the Internet service provider, Digital Gateway Systems. RTC sought a temporary restraining order to prevent the Post from any further use of the materials. The Post defended on the basis that an injunction would be a prior restraint on news reporting contrary to the First Amendment in the U.S. Constitution. The court denied a temporary restraining order and a preliminary injunction. The court has subsequently denied RTC’s motion for reconsideration. RTC is appealing. With respect to Lerma, although RTC had initially been successful in seizing his computer and most of his software, the court later held that much of what was seized exceeded the scope of the court’s order and should be returned. However, the court subsequently held that Lerma infringed copyright. The court held that there was such compelling evidence of infringement that there was no need to send the case to a jury.

RTC has not confined its suits to the United States. It has also threatened suit in the Netherlands against X54ALL, an Internet provider which allegedly posted material that the Church filed in one of its U.S. lawsuits. No action has yet been instituted.

B. Computer Programs and Data

In addition to the cases above involving text and documents, there have been several cases involving copyright claims for the unauthorized copying of programs. In the first case, Sega
Entertainment v. MAPHIA,\textsuperscript{277} the court granted a preliminary injunction against the uploading and downloading of copyrighted computer software (video games) permitted by the BBS. The court also upheld the seizure of the computer memory devices which had been distributed by the BBS operator so that the Sega games could be played.\textsuperscript{278} Microsoft has also launched at least two suits in the United States which have involved seizures of infringing materials.\textsuperscript{279} Macromedia sued 67 subscribers of America Online for illegally distributing copies of Macromedia's software through America Online's e-mail service. Also named as defendants were 100 "John Does", or unknown defendants.\textsuperscript{280}

In a more recent case, an individual named Zeidenberg formed a company Silken Mountain Web Services Inc. to create a database of telephone listings available over the Internet.\textsuperscript{281} Zeidenberg purchased several versions of ProCD Inc.'s SELECT PHONE comprehensive national directory of residential and business listings on CD-ROM disks. Each disk contains both telephone listings and a software program used to access, retrieve and download the data. The SELECT PHONE package was sold subject to a license agreement which provided, among other things, that the software and data may be copied only for personal use and that distribution and sublicensing of the data and software was prohibited. Zeidenberg assembled his own database part of which included data from the SELECT PHONE disks. He used the SELECT PHONE software to download listings from the SELECT PHONE database to his own. Zeidenberg copied the software into the RAM of his computer. He wrote his own software to allow users to search his database. He then made his database available to users for free over the Internet. An average of about 20,000 visits a day were made to his database. ProCD sued Zeidenberg and his company for copyright infringement and ancillary claims. ProCD was granted a preliminary injunction. Both sides sought summary judgment.

Zeidenberg argued that the telephone listing data was not protected by copyright in the United States. The court agreed, relying on the U.S. Supreme Court decision which held that a telephone

\textsuperscript{277} Sega Enter. Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994).
\textsuperscript{278} Id.
\textsuperscript{280} Macromedia Inc. v. V.R. Hacker, No., C-95-1261 (N.D. Cal.).
\textsuperscript{281} ProCD Inc. v. Zeidenberg, 908 F. Supp. 640 (W.D. Wis. 1996), rev'd, 86 F.3d 1447 (7th Cir. 1996).
company's white pages were not entitled to a copyright protection because the raw data contained in the listings were not arranged in an original manner and lacked the minimal degree of creativity necessary to constitute a copyright compilation of facts.\textsuperscript{282} In this particular case, the nature of the compilation of data and the manner in which Zeidenberg copied the software enabled him to avoid liability for reproducing the data. On the other hand, the software component did represent original expression or creativity and was protected by copyright. The question was whether Zeidenberg infringed copyright in the software by copying the software onto his hard drive for purposes of offering the listing on the Internet.\textsuperscript{283} The court held that Zeidenberg was entitled to rely on the exception to infringement which entitles the owner of a copy of a computer program to make another copy if the copy is created as an essential step in the utilization of the computer program in conjunction with the machine that is used in no other manner.\textsuperscript{284} The fact that the copy was made onto the hard drive of Zeidenberg's computer did not disentitle him to rely upon this exception.\textsuperscript{285}

C. Artistic Works

Artistic works have also been the subject of copyright infringing activities on the Internet. One such case was \textit{Playboy Enterprises Inc. v. Frena}.\textsuperscript{286} Frena operated a subscription BBS that distributed unauthorized copies of Playboy's copyrighted photographs.\textsuperscript{287} The court held that Frena had violated Playboy's copyright in its photographs by making digitized images thereof available to his BBS subscribers through modem access.\textsuperscript{288} Playboy also complained to a number of universities after it discovered that students were posting copies of its photographs on the Internet using university accounts.\textsuperscript{289}

\begin{itemize}
\item \textsuperscript{283} ProCD Inc. v. Zeidenberg, 908 F. Supp. 640 (W.D. Wis. 1996), \textit{rev'd on other grounds}, 86 F.3d 1447 (7th Cir. 1996).
\item \textsuperscript{284} \textit{Id.}
\item \textsuperscript{285} 17 U.S.C.A. § 117 (West 1996). This is similar to the exception in the Canadian Copyright Act, R.S.C., ch. C-42, § 27(2)(n) (1985) (Can.); see discussion \textit{supra} Part II.
\item \textsuperscript{286} Playboy Enters. Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).
\item \textsuperscript{287} \textit{Id.} at 1554.
\item \textsuperscript{288} \textit{Id.} at 1559.
\end{itemize}
Dutton Children's Books forced a New Mexico State University student, Matt Carlson, to remove from his home page reproductions of WINNIE-THE-POOH images.  

D. Musical Works

Musical works have also been subject to unauthorized copying activities on the Internet. Elvis Presley Enterprises Inc. recently ordered the removal of sound clips of "Blue Suede Shoes" and "Hound Dog" from a fan's home page, along with images she had scanned from Graceland postcards. Sony Music Entertainment Inc. sent notices to creators of Web pages honoring Pearl Jam, one of its recording bands, asking them to delete sound clips. A Web site is dedicated to Frank Sinatra's songs, and all of the lyrics are provided. It is not known whether these materials are posted under license.

A highly publicized litigation relating to music on the Internet involved a lawsuit brought by Frank Music Corporation against CompuServe Inc. for copyright infringement. CompuServe maintains a BBS, the CompuServe Information Service (CIS), used by subscribers to exchange a wide variety of information. CompuServe's "MIDI/music forum" allows a CIS subscriber who has reduced a musical performance to a MIDI file to transmit or upload the file to the CIS for the benefit of other subscribers or to download similar files uploaded by other subscribers. Frank alleged copyright infringement of the song "Unchained Melody" and more than 900 other songs owned by music publisher principals of the Harry Fox Agency Inc., a major licensing agency for music publishers. Frank instituted a class action suit for infringement based upon the copying of

290. Id.
292. Id.
293. Id.
294. See id.
297. See Voorhees, supra note 295
299. See Voorhees, supra note 295.
E. Bulletin Board Systems

One particular computer venue on the Internet that has given rise to a number of intellectual property and related disputes is the bulletin board system, or BBS. A BBS is an electronic network on which subscribers can download information from the bulletin board to their own computer. Subscribers can also upload information from their own computers to the BBS. Many BBS operators provide little control over the nature and extent of information transmitted by their subscribers. Of particular interest is the potential exposure to vicarious or contributory liability for a BBS operator who merely makes the system available to subscribers. In the cases above, several BBSs were involved in copyright infringement litigation. The vicarious liability of BBS operators was already an issue in copyright cases.

*Playboy* and *Sega* also involved copyright infringement claims against the defendant BBS. In *Playboy*, the defendant was held to have infringed copyright by the public distribution of copies. In *Sega*, the uploading and downloading of software by the BBS was held to be an infringement of copyright.

In two of the Church of Scientology cases in the United States alleging copyright infringement, RTC also sued the Internet service providers and BBS operators. In the *Lerma* case, any issues against the Internet service provider have yet to be determined. In the *Netcom* case, the court denied motions for summary judgment by the BBS.

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300. See id.
301. See id.
303. *Sega Enter. Ltd. v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996); see discussion *supra* Parts IV.B.
Klemesrud and the service provider Netcom. The court held that the BBS operator and access provider did not directly infringe copyright but may have engaged in contributory copyright infringement, a cause of action available in the United States but not in Canada. Netcom attempted to avoid liability by arguing that its legal position was like that of a landlord who was not responsible for the actions of its tenants. However, the court said providing a service that allows for the automatic distribution of postings goes well beyond renting premises to an infringer.

The court in Netcom said that it was more persuaded by the argument that it is beyond the ability of a BBS operator to quickly and fairly determine what is and what is not infringement. Where a BBS operator cannot reasonably verify a claim of infringement, the operator’s lack of knowledge will be found reasonable and there will not be liability for contributory infringement. Liability as a contributory infringer, which does not exist under Canadian copyright law, is established in the United States where the defendant, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. In Canada, Netcom may have been liable for exhibiting or distributing copies if it would have had reason to believe that the copies constituted infringements.

Netcom was not held directly liable because it did not take any affirmative action that directly resulted in the copying of the work, other than the operation of a BBS that automatically forwards messages retrieved from subscribers on to the USENET BBS sites and temporarily stores copies on the system. The court said that the storage on a BBS of infringing copies and retransmission to other servers is not a direct infringement by a BBS operator of the exclusive right to reproduce the work where such copies are uploaded by an infringing user.

The Netcom court also questioned the conclusion in Playboy Enterprises Inc. v. Frena that the defendant there infringed the U.S. right to publicly distribute display copies of its work. The Netcom court was not convinced that the mere possession of a digital copy on a

308. See id.
309. Id. at 1375; see also, Joan E. Rigdon, Netcom Loses Copyright Fight in Federal Court, WALL ST. J., Nov 28, 1995, at B-1.
311. Id.
312. Id. at 1373.
313. Id.
BBS that is accessible to some members of the public constitutes direct infringement by the BBS operator. The court was of the view that only the subscriber should be held liable for causing the distribution of the work as the actions of the BBS are automatic and indiscriminate. The BBS merely stores and passes along all messages sent by its subscribers and others; it should not be seen as causing these works to be publicly distributed or displayed. The court went on to say that, even if one accepts the Playboy holding, the Netcom situation was different because the BBS in Playboy maintained an archive of files for its users. Netcom does not maintain an archive of files, but merely provides access to the Internet. Nor does Netcom create or control the content of information available to its subscribers; it merely provides access to the Internet.

The court said that Netcom might also be vicariously liable based on its relationship to Erlich because it exercised its ability to police users' conduct. There was evidence that Netcom acted to suspend subscribers' accounts on more than a thousand occasions and that it could delete specific postings. Therefore, the courts found that a genuine issue of fact as to whether Netcom has the right and ability to exercise control over the activities of its subscribers and of the materials posted by Erlich in particular was raised.

Klemesrud, the BBS operator, also avoided liability for direct infringement on the basis that he took no affirmative steps to cause the copies to be made. Vicarious liability allegations failed because there was no allegation that Klemesrud had a financial interest in Erlich's infringement. However, the contributory infringement allegation survived against both parties.

In the Frank v. CompuServe case, the plaintiff alleged that CompuServe knew or should have known that unauthorized reproductions were taking place within its MIDI Forum. While Playboy v. Frena suggests that significant knowledge is not required,

316. Id.
317. Id.
318. Id. at 1376.
319. Id.
320. Id. at 1381.
321. Id. at 1382.
322. Id. at 1381.
RTC v. Netcom suggests that it is.\textsuperscript{325} For BBS operators and information service providers such as CompuServe, the level of knowledge tapers along a continuum. At one extreme is the BBS operator who loads the works on the system itself. At the other extreme is the BBS operator whose system is used in a purely transitory way for occasional binary uploads and downloads of files that happen to contain copyright protected works. Systems like that of CompuServe fall in the middle. For example, the MIDI Forum has a "library" section and an associated menu structure that assists subscribers in uploading and downloading binary files, including textual information, non-musical sound files, such as sound effects, and musical works. One might argue that CompuServe has invited persons to upload and download musical works. However, it is unclear whether CompuServe has a duty to monitor every sound image or image file on its system. Even if the file is monitored, how can providers like CompuServe know that the file embodies a work protected by copyright or that the person uploading the file does not have authorization? In light of the settlement in \textit{Frank}, there is not yet an answer to this question.

The liability of a BBS for the activities of its subscribers is a difficult issue. It is arguable that a BBS is merely a passive carrier, like a telephone company, and should not be liable for on-line legal violations because the BBS has no control over the content that is transmitted on the network and should not be required or permitted to assume such control. If BBSs and networks are treated as common carriers, they would have no duty to monitor transmissions. Such treatment would completely exonerate the networks from liability. However, this would not enable BBS operators to avoid liability where they are aware of, or encourage, infringements. It is also arguable that a BBS is more like a publisher in that it has the ability, the right and the obligation to filter content. The problem is that imposing filtering obligations upon operators of BBSs and information network providers may be unworkable.

There have been various models and proposals to resolve the issue. One is an analogy of a BBS to a library.\textsuperscript{326} While this may have considerable appeal, the match is not an exact one. In a library, there is at least one legitimate copy of the work. In the typical BBS or network information provider "library," it is unclear if any of the uploaded files

\textsuperscript{326} \textit{Id.} at 1378 n.25.
is a legitimate copy. In addition, the vast bulk of the library’s activities consists of loaning copies of the work. The work cannot be enjoyed simultaneously by two patrons unless two legitimate copies of the work belong to the library and are available for loan. With a computer BBS or network, an infinite number of copies can exist simultaneously.\textsuperscript{327}

Another solution may be to leave the information service providers and BBS operators alone and focus on the software providers. As noted earlier, computer music files are essentially worthless without specialized software that reads the music files and converts the data stored therein into sound. Similarly, without a separate program to display an image file, even if it is part of the operating system, the image file cannot be enjoyed. In the United States, a mandatory license fee must be paid by the manufacturers and importers of digital recording apparatus. It has been suggested that manufacturers or publishers of software programs designed to copy, display, transmit or modify images or music might be required to pay a license fee. This solution has the virtue of being simple. The problem is that the analogy between computer software and digital recording hardware is incomplete.\textsuperscript{328} Hardware cannot easily be duplicated; software can.

Another suggested approach is to use blanket licenses such as those used by SOCAN for the performance of musical works by radio stations, restaurants, and other public establishments. The amount of the license fee is usually a variable based upon the size or volume of business of the licensee. No burdensome auditing requirement is imposed on the licensor or the licensee. Although the blanket license has some appeal, it too has its problems. Unlike a radio station, which obtains the right to perform a musical work in exchange for a license fee, a BBS simply offers a facility. It is the users of the system that initiate the transmissions, reproductions or performances of the copyrighted works.\textsuperscript{329}

V. LEGISLATIVE RECOMMENDATIONS

In September 1995, the Canadian Information Highway Advisory Council (IHAC) released its final report entitled \textit{The Challenge of the Information Highway}.\textsuperscript{330} The report was structured around fifteen public policy issues identified by the federal government. One issue

\begin{footnotesize}
\begin{itemize}
\item[327.] \textit{New Information Technologies}, \textit{supra} note 5, at 473.
\item[328.] \textit{Id.}
\item[329.] \textit{Id.} at 473–74.
\item[330.] IHAC \textit{Report}, \textit{supra} note 128.
\end{itemize}
\end{footnotesize}
concerned how copyright and intellectual property should be addressed in the context of the Information Highway.\textsuperscript{331} Content based products and services such as books, computer programs, audio-visual programs, sound recordings and databases will increasingly rely on electronic distribution channels, including the Internet to reach markets. The IHAC articulated a series of principles to help stakeholders, both copyright owners and content users, address issues raised by increased digitization.\textsuperscript{332}

The IHAC recommended that, in the context of accelerated digitization of information, the federal government should adopt principles for copyright based on a number of factors: \textsuperscript{333}

1. maintaining a balance between the rights of creators to benefit from the use of their works and the needs of users, including the education and learning community, to access and use those works on reasonable terms;

2. encouraging industry, creators and user communities to develop and implement an administrative and regulatory framework that is easily understood and implemented by all interested parties and not seen as a barrier to access or use of content on the Information Highway;

3. recognizing creativity as required for the information-based economy and the multiple roles of the individuals, creators, disseminators and users of information, on the information highway;

4. encouraging the creation of works as critical to national and cultural identity and economic development; and

5. facilitating the exchange of information.

In addition to these general principles, the IHAC also proposed specific recommendations relating to copyright.

\textit{A. Categories of Works}

The IHAC concluded that multimedia works are protected under the \textit{Copyright Act} and that all such works created and stored in a digital medium need not enjoy \textit{sui generis} protection.\textsuperscript{334} The IHAC concluded that multimedia works have sufficient protection under the existing definition of "compilations."\textsuperscript{335} The digitization of works, in itself,

\begin{footnotesize}
\begin{itemize}
\item[331.] \textit{Id.} at vii.
\item[332.] \textit{Id.} at 112.
\item[333.] \textit{Id.} Recommendation 6.1.
\item[334.] \textit{Id.} Recommendation 6.2.
\item[335.] Copyright Act, R.S.C., ch. C-42, § 2 (1985) (Can.); \textit{see} discussion supra Part II.B.
\end{itemize}
\end{footnotesize}
generally does not result in the creation of new works, but rather constitutes the expression of copyright subject matter in a different format.

B. Communication of Works

The IHAC also decided that the right to communicate a work to the public by telecommunication embraces the communication of material to the public, regardless of whether or not the materials are made available on an on-demand basis.\textsuperscript{336} If further consideration establishes that this is not clear, the Copyright Act should be amended to state clearly that a communication offered to the public by means of telecommunication is subject to the authorization of the copyright owner, even where such communication is made on-demand to separate individual users. The IHAC recommended that the Copyright Act be amended to make it clear that the right to communicate a work to the public by telecommunication includes the transmittal of works that are received at different times or at the convenience of the user, such as through on-demand services.\textsuperscript{337}

C. Browsing

In its report, the IHAC concluded that the act of browsing a work in a digital environment should be considered an act of reproduction.\textsuperscript{338} In other words, browsing a work could mean either accessing a work, even if it is temporary or ephemeral in nature, or the making of a copy. The IHAC said that in some countries accessing a work in a digital environment is considered a reproduction, even where the work is temporarily stored in the random access memory, or “RAM,” of a computer. This may be the most controversial recommendation of the IHAC in relation to copyright issues.

Users are concerned that a broad interpretation of browsing would limit the ability of users to access works. They are of the view that browsing a work simply for the purposes of determining whether they would like to use it could mean users would be unwittingly liable for copyright infringement. On the other hand, creators believe that the ability of users to access works should not be a matter of concern because copyright owners would authorize, in advance, the use of their works before the work is made available. The IHAC was cognizant of the need to strike a balance between the interests of creators and users.

\textsuperscript{336} IHAC REPORT, supra note 128, Recommendation 6.3.
\textsuperscript{337} Id. Recommendation 6.3(a).
\textsuperscript{338} Id. Recommendation 6.4(a).
In the result, there was general agreement that copyright owners must be able to determine whether and when browsing should be permitted on the Internet. The IHAC concluded that it should be left to the copyright owner to determine whether and when browsing should be permitted on the Internet. The owner should identify what part of their work is appropriate for browsing.

The IHAC recommended that the Copyright Act be amended to provide clarification of what constitutes browsing and what works are publicly available. The IHAC recommended that the Act be amended to provide a definition of browse to mean "a temporary materialization of a work on a video screen, television monitor or similar device, or the performance of the audio portion of such a work on a speaker or similar device by a user, but does not include the making of a permanent reproduction of the work in any material form." The IHAC also recommended that the Copyright Act should provide a definition of "publicly available work," although the IHAC did not propose one.

D. Fair Dealing

The IHAC felt that the current fair dealing provisions should be made more specific in order to provide guidance for users on the Internet. Specific criteria and guidelines as to the scope of the fair dealing exception should be provided, including explicit clarification that fair dealing applies to the making of an electronic copy of a work and to the storage and transmission of that copy by electronic means.

E. Distribution Right

The IHAC said that the right to communicate to the public by telecommunication currently contained in the Copyright Act clearly applies to the electronic transmission of works to the public. The IHAC therefore concluded that there is no need to introduce any new right, such as an electronic distribution right. The U.S. distribution right is "exhausted" with its first use or distribution, commonly referred to as the first sale doctrine, other than with regard to importation. The IHAC said that, since there is no need for an

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339. Id. Recommendation 6.4(b).
340. Id. Recommendation 6.4(c).
342. IHAC REPORT, supra note 128, Recommendation 6.5.
343. Id. Recommendation 6.9.
electronic distribution right in Canadian law, there is no need to consider the introduction of a first sale doctrine.\textsuperscript{345}

\textbf{F. Moral Rights}

The nature of the digital environment allows for the easy modification of works, which, in turn, could lead to the infringement of moral rights without the knowledge of the author. Since the pictures, snippets of works, and links to other pages in one particular Internet site do not change the works immutably, it is arguable that the creators of such sites do not offend the moral rights of the authors of the various pieces that they have borrowed. In \textit{Nintendo of America v. Camerica Corp.},\textsuperscript{346} the plaintiffs sought an interlocutory injunction to restrain a competitor from issuing a video game peripheral that allows a player to alter the game characteristics of video games, on the basis that their moral right as author to the games was breached.\textsuperscript{347} The court denied the injunction, finding that the peripheral did not permanently change the characteristics of a particular video game, and because the plaintiffs failed to establish "irreparable harm," one of the criteria for an injunction because they were unable to show the loss of a single sale since the defendant started shipping.\textsuperscript{348}

While many argue that works should be made widely available on the Internet, the IHAC was of the view that, given the importance of safeguarding the integrity of such works, users should not be able to modify them. It found that the public interest lay in both the free availability of such works and in their remaining intact with their sources clearly identified. Consequently, the IHAC recommended that the moral right of integrity should be maintained.\textsuperscript{349} The IHAC decided that the legal framework governing copyright should ensure, rather than curtail, the development of systems to monitor the uses of copyright on the Internet. The IHAC also advised against affording certain works a regime of protection limited only to moral rights.

\textbf{G. Bulletin Board Systems}

Legislation has been enacted in the United States that would

\textsuperscript{345} \textit{IHAC Report, supra} note 128, Recommendation 6.10.
\textsuperscript{346} \textit{[1991]} 34 C.P.R.3d 193.
\textsuperscript{347} \textit{Id}.
\textsuperscript{348} \textit{Id}.
\textsuperscript{349} \textit{IHAC Report, supra} note 128, Recommendation 6.6(a); \textit{see} discussion \textit{supra} Part II.J.
shield on-line services from liability for transmitting obscene materials if they use good faith efforts to provide users with controls to screen out adult fare. In Canada, the IHAC also made recommendations relating to BBSs. The IHAC 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 that, with the absence of any recourse to some form of defence mechanism, the copyright liability of BBS operators could be too rigidly interpreted. Therefore, the IHAC recommended that the Copyright Act be amended to provide that no owner or operator of a BBS should be liable for copyright infringement if it did not have actual or constructive knowledge that the material infringed copyright and it acted reasonably to limit potential abuses.

H. Crown Copyright

The IHAC held that ensuring universal and easy access to public information on the Internet does not require the abolition of Crown copyright, but instead requires a more liberal approach to making works of the Crown available to the public. It recommended that the federal government should adopt a more flexible policy with respect to Crown copyright and should make a greater effort to make public information available on the Internet without requiring payment or prior authorization. The federal government, where necessary to justify costs, should retain the ability to generate revenues, but where Crown copyright is asserted for generating revenue, licensing should be based on the principle of nonexclusivity. More specifically, the IHAC recommended that Crown copyright should be maintained. The federal government should, as a rule, place federal government information and data in the public domain. Where Crown copyright is asserted for generating revenue, licensing should be based on the principles of nonexclusivity and the recovery of no more than the...
marginal costs incurred in the reproduction of the information or
data.\textsuperscript{355} It was also recommended that the federal government should
create and maintain an inventory of Crown works covered by
intellectual property that is of potential interest to the learning
community and the information production sector at large. The
government should negotiate nonexclusive licenses for its use on the
basis of cost recovery for digitization, processing and distribution, and
invite provincial and territorial governments to provide similar
services.\textsuperscript{356}

\textbf{G. Encryption}

The IHAC recommended that the \textit{Copyright Act} be amended to
make it a criminal offense to tamper or bypass copy guards or
encryption technologies for the purposes of infringing copyright.\textsuperscript{357}

\textbf{H. Administration}

The IHAC also made a number of recommendations with respect
to administration and public education. It said that the role of
government should be to encourage, but not to engage in, the creation
and operation of systems to streamline rights clearance for users. In
the context of enforcement, the IHAC recommended that the federal
government should take certain actions. It should assist in the
development and standardization of user-acceptable ways to track use
of protected works.\textsuperscript{358} It should assist in the development and use of
"identifiers" to be included in the distribution of protected works in a
digital format to make it easier to trace copyright ownership and
unauthorized use of protected materials.\textsuperscript{359} It should take an active
role, in partnership with industry and the creator and user communities,
in a public education campaign to better inform users and creators
about the use of copyright.\textsuperscript{360} It should consider the full range of policy
instruments at its disposal to ensure effective copyright protection in
order to support the creation of new Canadian works.\textsuperscript{361} The IHAC
also made some recommendations with respect to rights clearance. It
recommended that the government should encourage the industry, the
creator and user communities in the creation of administrative systems

\textsuperscript{355.} \textit{Id.} Recommendation 6.7(c).
\textsuperscript{356.} \textit{Id.} Recommendation 6.8.
\textsuperscript{357.} \textit{Id.} Recommendation 6.11(e).
\textsuperscript{358.} \textit{Id.} Recommendation 6.11(c).
\textsuperscript{359.} \textit{Id.} Recommendation 6.11(b).
\textsuperscript{360.} \textit{Id.} Recommendation 6.11(e).
\textsuperscript{361.} \textit{Id.} Recommendation 6.11(d).
to streamline the clearance of rights for use of works in digital medium.\(^{362}\) However, it said that compulsory licensing should not be considered in the commercial marketplace.\(^{363}\)

I. United States Legislative Developments

The U.S. government report made a number of recommendations to amend copyright legislation to fine tune it for the digital and Internet environment.\(^{364}\) Many of the recommendations relate to rights which are different from those, or do not even exist, in Canada. However, a brief summary of a few key ones may be in order. The Report said that current U.S. copyright law is unclear in its definition of the distribution right, particularly as to whether the transmission of a copyrighted work over the Internet constitutes a distribution. Therefore, the Report recommends "that the Copyright Act be amended to expressly recognize that copies can be distributed to the public by transmission, and that such transmissions fall within the exclusive distribution right of the copyright owner."\(^{365}\)

The current definition of "transmit" in the U.S. copyright law includes only the transmission of a performance or display.\(^{366}\) Because the Report proposes that the distribution of copies should include transmission, it also recommends the amendment of the definition of "transmit" to include transmission of a copy.\(^{367}\) The definition of the term "publication" also required a revision to bring it in line with technological developments. The legislative history of the Copyright Act makes it clear that if a material object does not change hands, no publication has taken place, no matter how many people are exposed to the work. The Report therefore recommends "that the definition of publication . . . be amended to recognize that a work may be published through the distribution of copies of the work to the public by transmission."\(^{368}\) The Report recommends that all provisions governing the importation of infringing materials should include importation by transmission. It thus recommends "that . . . the Copyright Act be amended to include importation by carriage or

\(^{362}\) Id. Recommendation 6.12(a).

\(^{363}\) Id. Recommendation 6.12(b); but see, discussion of proposed Tariff No. 22 for the telecommunication of music \textit{supra} Part II.G.

\(^{364}\) \textit{NEW INFORMATION TECHNOLOGIES}, \textit{supra} note 5.

\(^{365}\) \textit{Id.} at 213.


\(^{367}\) \textit{NII Report}, \textit{supra} note 17, at 217.

\(^{368}\) \textit{Id.} at 219.
shipping of copies as well as by transmission of them.  

The U.S. copyright law had no performance right for either recording artists or copyright owners of sound recordings. On November 1, 1995, President Clinton signed an amendment to the U.S. legislation that grants owners and performers a limited performance right for the digital performance of sound recordings. The Report makes plain, however, that this limited amendment, which occurred after publication of the Report, is an insufficient change. The Reports calls for a full performance right; particularly with respect to all digital transmissions. Other legislation has been introduced in the United States in the form of separate bills to amend the Copyright Act in response to the NII Report.

VI. CONCLUSION

The intellectual property and related issues will inevitably proliferate as the Internet and on-line services continue to grow, users continue to multiply, and businesses increasingly recognize the Internet and on-line services as markets for goods and services or as a highway for advertising and effecting commercial transactions. Lawsuits have already arisen over most types of intellectual property and related issues. While current Canadian law is probably sufficient to deal with these issues, with some fine tuning by judges who appreciate the technology and traffic on the Internet, we will, no doubt, see many interesting issues arise.

369. Id. at 221.
371. NII REPORT, supra note 17, at 225.