Spinning a Legal Web:
The Impact of the Internet on Canadian Law

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Abstract: Much of the discussion about the Internet's impact on the law focuses on issues of jurisdiction and enforcement. This paper suggests that the rise of the Internet is also having a profound impact on the content and scope of existing laws, as well as creating impetus for the development of policy and legislation on new issues. This paper briefly discusses three distinct areas of law—child pornography, privacy, and broadcasting—that have been affected by the Internet in separate ways.

Introduction
The Internet is sometimes referred to as being a “lawless” place. In fact, nothing could be further from the truth. There are dozens, probably hundreds, of laws in Canada alone that apply to activities carried on via the Internet. A bank must comply with banking regulations in setting up on-line payment systems just as it does off-line. Pyramid schemes are still prohibited under the Competition Act even when carried on over the Internet. Fraud is still fraud, regardless of whether it is perpetrated on the Web or not.

But that is not to say that the rise of the Internet has not had a profound impact on the Canadian legal system. The unique characteristics of the Internet—its global nature, its structure as a decentralized network of networks, and the ease and anonymity with which information can be copied and transferred—have made the enforcement of laws more difficult (which is what is typically meant by

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the assertion that the Internet is lawless). That, however, is the subject of another paper. In addition to the issues of jurisdiction and enforcement, those unique characteristics of the Internet have also led to increased scrutiny of the scope and content of existing legislation.

This paper will briefly discuss three areas of the law that have been affected by the Internet in three different ways. In the first example, existing legislation was perceived to be inadequate to deal with the Web environment and amendments were put in place to specifically address the Internet. In the second example, the Internet was partly responsible for putting a “new” issue on the policy agenda and ultimately into legislation. Finally, the third example looks at an existing legislative regime that was re-evaluated and reinterpreted in light of changes brought about by the Internet.

**Child Pornography**

As noted above, there are many laws in Canada that predate the Internet age but which, at least theoretically, do apply to activity on the Internet. In some cases, pre-existing legislation has been perceived to be inadequate to deal with the circumstances presented by the Internet. A good example of this is child pornography. Section 163.1 of Canada’s Criminal Code prohibits the production, distribution, and possession of child pornography. Until the fall of 2001, there was nothing in these provisions that specifically dealt with the Internet, nor was there anything implying that distribution of child pornography over the Internet or coming into possession of child pornography from the Internet would not be caught.

Nonetheless, the widespread use of the Internet to distribute pornography in general, and child pornography in particular, the ease with which computerized images can be transferred electronically and downloaded, and the difficulty of identifying and apprehending actual users led to calls for legislation to specifically deal with child pornography on the Internet. In particular, there were concerns that the word “distribution” might not be sufficient to catch posting files to a Web site or transmitting files over the Internet and that persons accessing pornographic content electronically might not be considered to legally be in “possession” of it. As well, some people felt that Internet service providers and bulletin board hosts should be held responsible for the content provided on their sites.

As a result, a bill was introduced in the House of Commons in 1997 that sought to license all Internet service providers (under the subsequent 1998 bill, the Canadian Radio-television and Telecommunications Commission would have been the licensing body). Under the legislation, ISPs would have been required to co-operate in minimizing the use of the Internet for the publication and proliferation of child pornography. ISPs would have been required to block access to sites containing child porn, and anyone with a child pornography conviction would not have been able to receive an ISP licence.

Not surprisingly, ISPs were less than thrilled with the concept of a licensing regime. Luckily for them, both the 1997 and subsequent 1998 bills died when Parliament was dissolved. However, the concern about the inadequacy of the existing
Code provisions remained. In 2000, an omnibus bill making a number of changes to the Criminal Code was introduced. Among the amendments were changes to the provisions on child pornography to explicitly address on-line distribution and possession. This time, the proposal did not seek to directly regulate ISPs. Rather, it focused on enhancing current criminal provisions by adding prohibitions on “transmitting,” “making available,” and “intentionally accessing” child pornography. In addition, judges were given the power to order the deletion of child pornography found on computer systems in Canada and the forfeiture of materials and/or equipment used to commit offences. Finally, a new provision was added to the Code to prohibit Internet “luring.” That is, it was made an offence to communicate via a computer system with any person whom the accused believes is under a certain age for the purpose of facilitating sexual offences in relation to children or child abduction.

The bill passed into law in October 2001. The sections of the bill dealing with child pornography and Internet luring came into effect in 2002. While the old provisions in Section 163.1 may have caught some or even most child pornography distributed over and accessed from the Internet, these amendments clarify that all such Internet activity is prohibited. The “making accessible” addition ensures that posting pornographic materials to a Web site is illegal, while the “intentionally accessing” provision will ensure that viewing pornographic material is also caught. As well, the ability of judges to order the deletion of material from computer systems does ensure that ISPs have a limited responsibility for eliminating child pornography from their sites—a responsibility that did not exist under the old Criminal Code provisions.

The amendments are not a perfect solution. For example, deletion of material on computer systems can only be ordered within the court’s jurisdiction. Canadian judges have no power to delete pornographic content located on servers outside Canada.

Privacy

The rise of the “information age” has made privacy a hot topic in recent years. Privacy concerns, particularly concerns about misuse of personal data, have been largely driven by the digitization of information. Because digital information can be so easily copied and transferred, privacy advocates have noted that personal information, ranging from bank records to health files, can be and sometimes is collected and provided to individuals and companies without a person’s knowledge or consent and often with little regard for the accuracy or security of such information. The rise of the Internet, with its ability to quickly copy and disseminate information around the globe instantaneously, has only heightened such fears.

As a result, the European Union enacted a directive on personal data protection in 1998. The directive contained the threat that Europe might refuse to transfer personal data to countries that did not appropriately protect such information. Largely as a result, the Canadian government has introduced and passed new privacy legislation. The Personal Information Protection and Electronic Docu-
ments Act, or PIPEDA, came into effect on January 1, 2001. Initially, it applies only to federal works, undertakings, and businesses (that is, most federally regulated companies such as airlines and broadcasters) and to provincial companies that disclose personal information across provincial boundaries for commercial gain. Personal health data received a temporary exemption until January 2002, while the law will apply to all companies, including provincial companies, by 2004 unless a province has similar legislation in effect by such time (and barring any successful jurisdictional challenge).

As stated in the Act itself, its purpose “is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.”

The PIPEDA requires companies to obtain consent before they collect, use, or disclose personal information in the course of commercial activity. However, what is consent will differ (for example, it may be implied in some circumstances) depending on the sensitivity of the information, the expectations of the individual concerned, and the circumstances surrounding consent. There are also a host of exemptions. For example, personal information may be collected without consent for journalistic, artistic, or literary purposes, while exemptions on obtaining consent to use information exist for law enforcement and emergency situations.

Companies must comply with the 10 principles set forth in the Canadian Standards Association Model Code for the Protection of Personal Information, which is attached to and forms part of the new legislation. The principles include accountability, accuracy, security, consent, and access among others. While the Code generally uses non-mandatory language (providing only recommendations of what a company “should” do), the legislation is not without some teeth.

Individuals can lodge a complaint with the federal Privacy Commissioner. The Commissioner, on a complaint or on its own initiative, may launch an investigation in which he or she can compel oral testimony and examine documents. The Commissioner can also conduct random audits of the “personal information management practices” of a company. In certain circumstances, the Commissioner and complainants can also apply for a court hearing; the court has the power to order a company to comply with the Act’s requirements and award monetary damages to complainants. Finally, the Act provides for criminal sanctions for certain behaviour, including destroying personal information after someone has requested it or firing an employee for informing on the company’s failure to comply with the Act.

The PIPEDA is not a panacea for modern privacy issues. It does not address all of the privacy concerns raised by the digitization of information and the rise of the Internet, nor does it guarantee that personal information collected by corporations and other organizations will be properly used. However, it is an interesting
example of how legislation has been proposed and passed to attempt to address some of the “new” issues that have arisen in the Internet age.

Broadcast Regulation

Canadian airwaves have long been regulated to oversee the use of frequencies (which, at least once, were a scarce resource), but also to implement cultural and economic objectives, particularly the production of quality Canadian content and the maintenance of a vibrant Canadian production industry.

Over the years, a complicated set of rules and regulations has been designed to meet these objectives. For example, radio and television broadcasters must comply with minimum Canadian content scheduling, and sometimes expenditure, requirements. Distributors must give priority to local and regional stations and must comply with the simultaneous substitution rules. This regulatory regime is set out in the Broadcasting Act and its accompanying regulations and is overseen by the Canadian Radio-television and Telecommunications Commission (the CRTC), the body that licenses broadcasters and distributors.

The current Broadcasting Act contains definitions that are very broad. These were implemented expressly to avoid the need to continuously revise the legislation every time new technology emerged. Thus, the definition of “broadcasting” in the Act is “any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication, for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.” “Broadcasting receiving apparatus” is, again, broadly defined as anything intended for or capable of being used to receive broadcasting, while “program” is defined as sounds and/or visual images intended to inform, enlighten, or entertain, but does not include images consisting predominantly of alphanumeric text.

Initially, the Internet was almost purely text-based. However, as bandwidth began to expand, an increasing amount of audio and some video began to be streamed over the Internet. The question then arose, did the CRTC have jurisdiction to regulate this content, given the broad definitions in the Broadcasting Act? And even if it had the jurisdiction to regulate the Internet, was such regulation a good idea?

The commission decided to address these issues head-on and announced a public process to consider them. After written and oral submissions from interested parties, including traditional broadcasters and distributors, content producers, new-media companies, and individual Canadians, the commission released its decision (the “Decision”) in May 17, 1999 (Canadian Radio-television and Telecommunications Commission). In the Decision, the commission noted that the vast majority of content on the Web at that time still consisted of written text, which, under the definition of program in the Broadcasting Act, was outside the CRTC’s jurisdiction to regulate. The commission then went through the definition of “broadcasting” in the Act phrase by phrase and determined that where an Internet site was composed predominantly of audio and/or video, it was indeed broadcasting and therefore fell under its jurisdiction.
The commission next considered the policy question. It recognized that the Internet is fundamentally different from traditional media. For one, it is still largely an information and commerce medium, rather than an entertainment medium. As well, the ease and low cost of access, unlimited capacity, and a significant amount of market demand have resulted in the availability of a significant amount of Canadian local and regional content. This is radically different from traditional media, where Canadian content regulations are considered necessary because the market would not otherwise produce a sufficient amount of high-quality Canadian content. Finally, the commission determined that Internet broadcasting was not materially impacting existing broadcasters. Rather, it felt that existing media had a competitive advantage in launching and sustaining Internet media activities.

Under the Act, the commission may exempt from regulation a class of broadcasting undertakings if it believes they “will not contribute in a material manner to the implementation of the broadcasting policy objectives” set forth in the Act. The commission decided that Internet broadcasters met this test and exempted them from regulation (“Exemption Order for New Media Broadcasting Undertakings,” 1999).

The commission took 10 months to release the Decision after commencing the proceeding and another seven months to release its exemption order. By that time, the Internet had already begun to morph into a more entertainment-oriented technology. In particular, before the exemption order was even released, a Web-caster called iCraveTV had started operations. iCrave picked up the signals of over-the-air television stations using an antennae, converted them to digital format, and rebroadcast them over the Internet. It immediately created a furor as Canadian and American broadcasters and rights holders launched lawsuits seeking to shut it down. iCrave claimed it was only doing what cable companies do, just using a different technology. It noted that cable companies are allowed to retransmit distant signals under the Copyright Act (section 31) provided they pay a royalty. Broadcasters and content producers disagreed, arguing that streaming video over the Internet is fundamentally different from cable retransmissions given the global nature of the Internet and a business model that consists of placing banner ads around the TV signal.

iCrave was quickly shut down, largely because it had done little to prevent Americans from accessing the site and the powerful U.S. motion picture industry succeeded in obtaining an injunction in the U.S. courts. However, another Web-casting company, Jump TV, soon sprang up. It sought to avoid some of iCrave’s problems by first going to the Copyright Board of Canada to implement a tariff for Internet retransmissions. It also promised that new technology would prevent access outside the country. At the same time, some of the rights holders who had been affected by iCrave formed a coalition to lobby the government for changes to the Copyright Act to specifically exclude Internet-based retransmissions from the Act. The government responded in June 2001, announcing a procedure for copyright reform and launching a consultation process on the retransmission regime.
In December 2001, amendments to the retransmission portion of the Act were proposed. The government’s solution was to establish a new regulation-making power with the intention to set out by regulation (being quicker and easier to change with technological developments) conditions on retransmitters that would meet many of the concerns of the rights holders. Jump TV withdrew its application to the Copyright Board in the fall of 2001, leaving the government to solve the issue through this legislative reform.

There are perhaps several lessons that can be learned from this tale. One is that the Internet changes more rapidly than our laws can keep up. Another is that traditional media are being materially affected by the Internet and, while broadcasting regulation will continue to exist for the foreseeable future, intellectual property laws, particularly copyright law, have taken on new importance in dealing with that impact.

Legislatively, the existing Broadcasting Act was broad enough to encompass the Internet, yet the Internet was considered sufficiently different from traditional media to merit exclusion from the legislative regime on a policy basis. To its credit, the CRTC did recognize that the nature of the Internet would likely change and that it may not continue to be predominantly text-based. It exempted Internet broadcasters only for a five-year period and will re-evaluate its role at that time. The question then may well be, is the CRTC able to regulate Internet broadcasters—or even traditional broadcasters? It appears that the Copyright Act, on the other hand, like the child pornography provisions in the Criminal Code, will be amended to specifically address how the Internet fits into the retransmission regime. In addition, the problems raised by Napster and MP3 suggest a more radical overhaul of this increasingly important piece of legislation may be needed.

Conclusion
Despite the Internet’s image as a law-free zone (or perhaps because of that image), the growth of the Internet has had an important impact on the Canadian legal system. Child pornography, privacy, and broadcasting are just three examples of very different areas of the law, each of which has been critically affected by the Internet and each of which has reacted differently to address that impact.

Notes
1. For a more in-depth discussion of these and other issues (although somewhat out of date), see M. Racicot, M. Hayes, A. Szibbo, & P. Trudel, The Cyberspace Is Not a No Law Land, a study commissioned by Industry Canada in 1996 (http://strategis.ic.gc.ca/SSG.Camera/03117e.html).
2. The prohibition against possession was recently challenged under the Charter of Rights as an infringement of freedom of expression. The Supreme Court of Canada, by majority decision, upheld the provision as a reasonable limitation on the right to free expression, but read in two minor exceptions to eliminate the overbreadth of the provision (see R. v. Sharpe, [2001] 1 S.C.R. 45).
3. This regime requires Canadian distributors, if requested by a conventional Canadian television service, to replace the signal of a U.S. network with the signal of that Canadian service where the two services are playing the same program at the same time. So, for example, if Global chooses to schedule The Simpsons at the same time as it is scheduled on Fox, then Global’s signal—complete with all its advertising—will actually air on both channels.
References