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COPYRIGHT IN CYBERSPACE:
A SURVEY OF NATIONAL POLICY PROPOSALS FOR ON-LINE
SERVICE PROVIDER COPYRIGHT LIABILITY AND
AN ARGUMENT FOR INTERNATIONAL HARMONIZATION

Kristin Ashurst Hughes*

INTRODUCTION

On December 29, 1995, the on-line service provider CompuServe Inc. (CompuServe) announced that, in compliance with a German government order,¹ it was terminating its subscribers' access to more than 200 Internet² newsgroups³ serving as discussion forums on a wide range of

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1. See Michelle Quinn, *CompuServe Halts Access To Internet Sex Groups*, S.F. CHRON., Dec. 29, 1995, at A1 (reporting on CompuServe's compliance with a German order restricting access to sexually explicit newsgroups). *But see Stories Conflict on Internet Ban*, S.F. CHRON., Jan. 3, 1996, at B2 (reporting that the German government denies specifying the banned newsgroups or threatening to instigate criminal charges if CompuServe did not comply with the order). Following the ban on sexual newsgroups, the German government issued warnings to CompuServe and America On-line regarding their potential implication in the illegal distribution of Neo-Nazi materials which were available on the global Internet. *German Officials Warn Against Internet Access to Neo-Nazi Material*, FT. WORTH STAR-TELEGRAM, Feb. 3, 1996, at 9. German prosecutors may charge Internet providers for distribution of illegal materials made available on the Internet by a Canadian subscriber who uploaded Neo-Nazi materials onto the Internet. *Id.*

2. See generally *A Survey of the Internet: The Accidental Superhighway*, ECONOMIST, July 1, 1995, at 1 (describing the Internet). The Internet is an electronic network that uses computers and telephone lines to transmit data between users. *Id.* The Internet began in 1969 as a U.S. military communications tool, known as ARPANET, which was designed to facilitate communication in the event of a catastrophe. *Id.* at 9. Today, the Internet is seen as the foundation for the larger "information superhighway," which is defined as a future network of high speed cable and telephone lines that will be television-based and connect computers with telephones, televisions, wireless and satellite for fast, direct communications. *Id.* at 4. The "information superhighway" will have components within each country (the National Information Infrastruc-

sexual topics. The access ban affected all CompuServe users world-wide because CompuServe was unable to selectively exclude the questionable material from just the German border.⁴ This global black-out affecting

ture(s) (NII)) that will be connected to comprise the global information infrastructure (GII). *Id.*

Outside of the military, the Internet was first used by university researchers as a way to send electronic mail messages (E-mail) to colleges around the world. *Id.* at 1. Today, the Internet serves both academic and commercial needs with the number of users estimated to be thirty million or more. *See id.* at 3 (outlining the growth of the Internet, which has doubled in size every year since 1988, and estimating usage based on current numbers and expected growth rates). It is predicted that by 1997 the total number of Internet users will be greater than the populations of most nations. *Id.*

The Internet is a collection of communication tools, and may be used to send electronic mail (E-mail), transfer files between parties (FTP), connect to the multimedia World Wide Web, or participate in newsgroups (also referred to as bulletin boards) where users can carry on real time communications or post messages to a central address and then read and respond at their leisure. *See generally* STANFORD RESEARCH INSTITUTE, INTERNET: GETTING STARTED (April Marine, ed., 1992) (describing the Internet and all its related features). Newsgroups are usually subject-specific, may require subscription, and may or may not be moderated. *See generally* Larry R. Moffitt, *What's On The Internet*, WASH. TIMES, July 10, 1995, at C11 (defining newsgroups as discussion forums existing on the Internet).

3. *See* Moffitt, *supra* note 2, at C11 (defining Internet newsgroups).

4. Michael Meyer, *A Bad Dream Comes True in Cyberspace*, NEWSWEEK, Jan. 8, 1996, at 65. The global ban resulting from CompuServe's acquiescence to the German order and German decency standards is generating international outrage and cries of undue censorship. *See* Quinn, *supra* note 1, at A1 (quoting critics of both the German order and CompuServe's compliance). In response to the CompuServe action, Lori Fena, executive director of the San Francisco based computer civil-rights group Electronic Frontier Foundation asked, "[w]ill all the world's governments now try to regulate the Net?" *See* Meyer, *supra*, at 65 (quoting Fena and her reaction to CompuServe's compliance with the German order).

Fena's question may have tempted fate, for just days after the German order, the Chinese State Council and Communist Party's Central Committee announced a new concentrated effort to prevent Chinese Internet users from accessing pornographic materials on-line. *China Clamps Down On Pornography*, S.F. CHRON., Jan. 1, 1996, at A10. Governmental censorship actions may soon be unnecessary however, due to the development of technological devices that permit the provider, or user, to apply self-censorship by blocking out unwanted materials. *See* Meyer, *supra*, at 65 (describing technological developments to facilitate self-regulation of the Internet). CompuServe is investigating ways to limit material by region and creating software that permits users to adapt the Internet to their personal needs. *Id.* Yet some members of the on-line service provider community are skeptical about the ability of technology to restrict material from geographical borders and argue that, even if it were possible, users could circumvent the prohibition by interlinking with an access point in another

all CompuServe subscribers presents the reality of one domestic norm having an international impact on the regulation of Internet material.⁵

country. See Jared Sandberg, *CompuServe Seeks a High-Tech Answer to Fracas Over Bar on Adult Material*, WALL ST. J., Jan. 5, 1996, at B2 (providing criticism of the CompuServe proposal as impractical and diminished by alternative solutions). Opponents of technology based border controls look more favorably to solutions that are geared toward individual control. *Id.* For example, devices are being marketed that allow users to determine which newsgroups can be accessed from their personal computer, which CompuServe plans to incorporate for its members by mid-1996. Meyer, *supra*, at 65. The on-line and computer industries are currently formulating a rating and identification system for the Internet that will let users filter information for personal needs, known as the Platform for Internet Content Selection or PICS. *Id.*

5. *Cyberspace Reacts*, S.F. CHRON., Dec. 30, 1995, at D3. To date, there have only been domestic curtailments of libel, pornography and copyright infringement on the Internet. See discussion *infra*. In the United Kingdom, a London lecturer sued a fellow nuclear physicist over remarks made on a Usenet chat group. Frances Gibb, *Menace of Internet Libel Prompts New Defamation Bill*, LONDON TIMES, July 2, 1995, at 6. The parties settled out of court before Britain's first Internet libel case went to trial. *Id.* The rise in incidents of libel on the Internet led Britain's Lord Chancellor to draft a Defamation Bill that provides on-line providers with a defense when their subscribers violate the law. *Id.* In the U.S., federal and state courts have held on-line service providers to different levels of liability (for subscribers' libel) dependent upon the varying editorial actions of the on-line providers. See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) (holding on-line provider not liable due to lack of editorial control); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. 1794, 1795 (N.Y. Sup. Ct. 1995) (holding on-line provider liable due to editorial actions). But see Jared Sandberg, *Securities Company that had Sued Prodigy Services for Libel Drops Suit*, WALL ST. J., Oct. 25, 1995, at B7 (reporting on the out of court settlement between parties and Stratton's retraction of their opposition to Prodigy's appeal). In the U.S., Internet users have been found guilty of violating obscenity laws by initiating interstate Internet transmissions. See *United States v. Thomas*, 74 F.3d 701, 710 (6th Cir. 1996) (prosecuting the Thomas' for uploading pornographic material in California that was downloaded in Tennessee and deemed illegal under the contemporary community standards test applying Memphis standards). See also Andrew Grosso, *The National Information Infrastructure*, 41 FED. B. NEWS & J. 481, 484 (1994) (questioning the effects of applying community standards to Internet transactions). Hypothetical inquiries ask if an application of community standards to Internet transmissions permits law enforcement to manufacture crimes and venues? *Id.* Will the most restrictive standard become the country's *de facto* standard? *Id.* Will criminal statutes have to be modified due to the advent of the NII? *Id.*

For variations within U.S. pornographic legislation as applied to the Internet, compare S. 314, 104th Cong., 1st Sess. (1995) (amending the Communications Act of 1934 to make Internet transmissions of "obscene, lewd, lascivious, filthy, or indecent" material criminal acts) with H.R. 1978, 104th Cong., 1st Sess. (1995) (excluding FCC regulation of the Internet and promoting protection for on-line service providers who try to restrict indecent material from their networks). See also Mike Mills, *Telecom-*

In light of this incident, it is pertinent that the legal community examine the varying domestic standards that currently regulate the pornographic, defamatory and copyrighted material⁶ found on the Internet. In addition, society-at-large must question how differences among nations could result in *de facto* standards and further Internet content restriction.⁷ Society-at-large must also ask how a failure to harmonize laws at the international level could perpetuate legal confusion that would cripple the Internet by deterring participation.⁸

While studies find plentiful proliferation of pornography on the Internet,⁹ and while incidents of Internet libel have been numerous,¹⁰

munications Bill Passed, WASH. POST, Feb. 2, 1995, at A1 (reporting that the telecommunication bill that passed in Congress includes the general provisions of S. 314 and H.R. 1978).

On-line service providers have been found guilty in the U.S. for violating copyright infringement laws when their subscribers have uploaded copyrighted material without permission. See *infra* notes 49-50, 71, 73, 107 and accompanying text (discussing U.S. and Canadian case law relating to copyright infringement and the Internet).

6. See generally Edward A. Cavazos & G. Chin Chao, *System Operator Liability for a User's Copyright Infringement*, 4 TEX. INTELL. PROP. L.J. 13 (1995); Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Question of the Global Information Infrastructure*, 42 COPYRIGHT SOC'Y U.S.A. 318 (1995); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994); Robert A. Cinque, Note, *Making Cyberspace Safe for Copyright: The Protection of Electronic Works in a Protocol to the Berne Convention*, 18 FORDHAM INT'L L.J. 1258 (1995); Kelly Tickle, Comment, *The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on their Bulletin Boards*, 80 IOWA L. REV. 391 (1995).

7. Cf. Grosso, *supra* note 5, at 484 (discussing the potential for content restriction if the most rigorous contemporary community standard is applied to the entire nation when pornography is regulated on the Internet).

8. See Robert Rice, *Publishers Pull Their Digits Out*, FIN. TIMES, Mar. 20, 1995, at 13 (noting that publishers and creators lack confidence in the current copyright laws' ability to protect material on the Internet). Copyright owners are resisting putting their work on the Internet due to fears of infringement and piracy. *Id.* Some copyright attorneys believe that there must be an internationalization of protection because varying domestic laws are not acceptable forms of protection on the Internet. *Id.*

9. See Philip Elmer-DeWitt, *Marketing Pornography on the Information Superhighway*, TIME, July 3, 1995, at 38 (stating findings by Carnegie Mellon University that 83.5% of the digital images on Usenet newsgroups are pornographic). But see Bill Schackner, *CMU to Probe Computer Porn Data University Panel: Allegations Warrant Closer Look at Study*, PITTSBURGH POST-GAZETTE, Aug. 9, 1995, at A1 (questioning the validity of the Carnegie Mellon on-line pornography study).

10. See Gibb, *supra* note 5, at 6 (reporting that the rise in Internet libel inci-

copyrighted material is presently posted on the Internet with much trepidation.¹¹ The uncertain protection standards for copyrighted works (and their questionable effectiveness) generate hesitation within copyright owners and, as a result, copyrighted materials are in no way meeting their potential Internet volume.¹² A failure to harmonize protection levels for copyrighted materials could negatively affect both the future developments of the Internet and the copyright industry.¹³ For, at the heart of the Internet there is both the communication of ideas, expressions and information and the organizations, businesses and individuals providing society with their access to the Internet.¹⁴ If the copyright owner is hesitant due to lack of protection, or if the on-line provider is hesitant due to a feared risk of liability, society-at-large will suffer.¹⁵

dents in the UK led to legislative initiatives).

11. See Rice, *supra* note 8, at 13 (noting copyright owners' hesitations toward the Internet).

12. *Id.*

13. See *infra* notes 14-15 and accompanying text (discussing the relationship between the Internet and copyrighted material).

14. See Stephen John Saxby, Public Policy and Legal Regulation of the Information Market in the Digital Network Environment 25 (1995) (unpublished Ph.D Thesis, Southampton University (England)) (available on the World Wide Web at <http://www.echo.lu/legal/en/access/saxby/intro.html>) (providing information on the Internet's capacity and growth rate). The Internet connects an estimated 15,000 networks and there were an average of 43,000 articles posted each day on the USENET electronic bulletin boards at the end of 1993. *Id.* at 16. The number of U.S. residents using the Internet doubled in 1995, from approximately 5 to 10 million users. 9.5 Million Use the Internet, INTERNET WK., Jan. 22, 1996, available in 1996 WL 70554-34.

For the economic significance of each industry, compare Saxby, *supra*, at 28, which estimates that by the year 2000, the global telecommunications industry, of which the Internet is a part, will be a \$1.1 trillion industry, and Economist, Inc., *Copyright Industries in the U.S. Economy; 1993 Perspective* (Oct. 1993) cited in CRAIG JOYCE ET AL., COPYRIGHT LAW 2 (3d ed. 1994) which provides economic data stating that "[i]n 1991, the [U.S.] copyright industries generated \$325 billion . . . [were] a 5.6% share of the U.S. Gross Domestic Product . . . [and] employed 4.8% of total U.S. employment."

15. See Nancy Dunne, *Superhighway Patents Plan*, FIN. TIMES, Sept. 6, 1995, at 4 (recording the opinion of the late U.S. Commerce Secretary Ronald H. Brown, who believed companies would not engage in on-line transactions unless patent and copyright laws are clarified). The two industries (copyright and on-line providers) have already demonstrated their impact on each other by generating government policies, lawsuits and legislation that focus on their union. See, e.g., Information Infrastructure Task Force, The Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure* (Sept. 1995) [hereinafter *White Paper*]

This Comment discusses how the varying domestic standards of liability apply to on-line service providers when their subscribers cross legal boundaries and infringe the rights of copyright owners by uploading¹⁶ copyrighted material on electronic bulletin board services¹⁷ without authorization. This discussion takes place in an international context by focusing on the divergent positions of the U.S. and Canada as articulated in each country's recently released final policy reports on copyright law and the Internet.¹⁸ This comparison precedes an argument for the international harmonization of liability laws applying to copyright infringement on the Internet.

Part I of this Comment demonstrates the potential evolution of new *de facto* copyright infringement standards for application to the Internet. Part II of this Comment compares divergent policy positions on Internet copyright liability as outlined in the final reports of the United States and Canada. Part II also surveys the developing Internet policy positions of the European Community (EU), United Kingdom (UK), and G7. Part III focuses on existing examples of, and support for, international harmony within the field of copyright. Part IV recommends an international standard of liability for on-line service providers.

(detailing the Clinton Administration's position on copyright law and the Internet); *infra* parts I, II A-C (discussing U.S. and Canadian case law related to copyright infringement and the Internet); S. 1284, 104th Cong., 1st Sess. (1995) (proposing amendments to the U.S. Copyright Act to make the current law adaptable to the future electronic network environment); H.R. 2441, 104th Cong., 1st Sess. (1995) (House companion to S. 1284); *National Information Infrastructure Copyright Protection Act: Hearings on S. 1284 and H.R. 2441 Before the Senate Comm. on the Judiciary and the House Subcomm. on Courts and Intellectual Property*, 104th Cong., 1st Sess. (1995) [hereinafter *Hearings* 1st Sess.] (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services) (supporting the goals of the proposed legislation and its changes to the Copyright Act of 1976).

16. *See Sega Enter. Ltd. v. Maphia*, 857 F. Supp. 679, 683 (N.D. Cal. 1994) (holding that uploading occurs when an Internet user stores material on a bulletin board by transmitting the information over the telephone lines).

17. *See id.* (defining electronic bulletin boards as "[e]lectronic storage media, such as computer memories or hard disks, which [are] attached to telephone lines via modem devices, and controlled by a computer.").

18. *White Paper*, *supra* note 15; Information Highway Advisory Council, *Connection Community Content: The Challenge of the Information Highway*, (Sept. 1995) [hereinafter *IHAC Report*]; *see infra* part II.A-C (discussing U.S. and Canadian policy proposals for on-line service providers' copyright infringement liability).

I. CONFUSION WITHIN CYBERSPACE¹⁹ AND COPYRIGHT

There is something new within the laws of copyright: the Internet. In conjunction with the Internet are the on-line service providers: a collection of businesses and educational systems bringing the Internet into homes, offices, and schools. When the providers deliver the Internet, they also bring all its information and materials.²⁰ This act of deliverance is forcing a reevaluation of contemporary copyright laws.²¹ Reevaluation is necessary to adjust the laws to this new mode of communication, and to determine the exact legal parameters of Internet transactions.

With the advent of the Internet comes legal discrepancies regarding the correct definition of on-line service providers,²² and the correct classification of their actions.²³ These discrepancies are crucial in the assessment of copyright infringement as they create a potential range of copyright liability for the on-line service provider.²⁴

A. THE LEGAL IDENTITY OF ON-LINE SERVICE PROVIDERS

No consistent definition of an on-line service provider currently exists for use in determining its liability for copyright infringement in the U.S. This definitional inefficiency results from the U.S. courts' application of varying definitional terms in different factual contexts.²⁵ The Clinton Administration's final policy report on copyright law and the Internet, *Intellectual Property and the National Information Infrastructure*²⁶ (White Paper), compiled by an Administration Working Group (Working

19. WILLIAM GIBSON, *NEUROMANCER* (1984). Author William Gibson coined the term "cyberspace" in his 1984 science fiction novel, *Neuromancer*. *Id.* The term "cyberspace" describes the abstract space "inside" the computer networks where users communicate and transfer information. *Id.*

20. See Saxby, *supra* note 14, at 16 (noting Internet transaction rates).

21. See *White Paper*, *supra* note 15, at 19-155, 211-35 (assessing the U.S. copyright law's adaptability to the Internet); *IHAC Report*, *supra* note 18, at 35-9, 112-20 (addressing the Canadian copyright law's adaptability to the Internet).

22. See *infra* part I.A (outlining different definitions of on-line service providers).

23. See *infra* part I.B (providing examples of conflicting copyright terms).

24. *Id.* (explaining how different interpretations of copyright terms leads to different applications of infringement liability).

25. See *infra* part I.A (providing examples of the different definitions policy makers and courts use in describing the on-line service providers).

26. See *White Paper*, *supra* note 15.

Group), exacerbates this inefficiency by utilizing multiple definitions when referring to on-line service providers.²⁷

The White Paper both acknowledges²⁸ and contributes²⁹ to this definitional confusion as the White Paper first refers to the on-line providers as service providers.³⁰ It then identifies the on-line providers as distributors when arguing that on-line providers should not be dismissed from infringement liability, despite their difficulties in screening volumes of material.³¹ Finally, for the purposes of copyright infringement liability resulting from subscribers' actions, the White Paper categorizes on-line providers as electronic publishers.³² The White Paper derives this last classification from the fact that service providers inherently provide their subscribers with uploading functions that facilitate the reproduction of material.³³

Both the U.S. and Canadian final policy proposals on copyright law and the Internet agree that on-line service providers are not common carriers.³⁴ This final definition would, however, be the most beneficial

27. See *infra* part I.A (providing examples of the different definitions policy makers and courts use in describing the on-line service providers).

28. See *White Paper*, *supra* note 15, at 122 (recognizing that, due to the multiple functions on-line service providers perform, no single rule applies to them).

29. See *infra* notes 30-33 and accompanying text (presenting three definitions used in the *White Paper*).

30. *White Paper*, *supra* note 15, at 115-16.

31. See *id.* at 116-17 (making analogies between identified distributors and on-line service providers).

32. *Id.* at 122. In litigation not related to copyright, the courts have classified the providers as disseminators and specifically not as publishers. See *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991) (holding providers were not publishers due to practicalities that made it impossible for them to pre-screen material before transmission). Alternatively, the providers have been identified as publishers due to their editorial actions. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995) (holding Prodigy liable for copyright infringement because it acted as a publisher when it pre-screened material before transmission).

33. See *White Paper*, *supra* note 15, at 122 (determining that when the on-line providers allow their users to upload material onto bulletin boards the providers are acting as publishers).

34. See *id.* at 122 & n.393 (implying the on-line service providers are not common carriers because they control who and what is on their system); *IHAC Report*, *supra* note 18, at 37 (stipulating that on-line providers are liable for copyright infringement and thus excluding them from the category of common carrier). See generally 47 U.S.C. § 153(H) (defining common carriers as engaged in interstate or foreign communications transmitted by wire or radio or energy).

for the providers because both countries exclude common carriers from copyright liability for their users' illegal actions.³⁵ In contrast, both countries' statutory laws hold publishers directly liable for copyright infringement.³⁶

In contrast to this collage of definitions (and the Working Group's final assessment), two U.S. court decisions in the first half of the 1990s defined the on-line service providers in copyright infringement litigation as distributors.³⁷ This definition may, however, be a short lived trend if recent developments are harbingers of future holdings. In *Religious Technology Center v. Netcom On-line Communication Services, Inc.*,³⁸ the court held that on-line service providers are not distributors.³⁹ The court rejected this definition under the logic that when a subscriber is responsible for the material's upload, the on-line service provider is merely storing the message and indiscriminately passing it along.⁴⁰ The court did not find this activity synonymous with acts of distribution.⁴¹

These variations in definition are not, by themselves, significant. It is common within the production and distribution of intellectual property for a business to perform multiple roles. For example, a publishing house may be both a publisher and a distributor. What is significant here is that *one* on-line transaction can *simultaneously* classify an on-line service provider into several different roles and levels of liability.⁴²

35. 17 U.S.C. § 111(a)(3) (1988); *IHAC Report*, *supra* note 18, at 37.

36. The Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (1988 & Supp. V 1993); Copyright Act, R.S.C., ch. C-42, 1985, *amended by* R.S.C., ch. C-15 1988 (Can). See 17 U.S.C. §§ 106, 106A (stipulating that the exclusive rights of the copyright owner include distribution and publication by implication); Copyright Act, R.S.C., ch. C-42, *amended by* R.S.C., ch. C-15, § 3(I) 1988 (Can) (stipulating the exclusive rights of the copyright owner which include distribution and publication).

37. *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993); *Sega Enter. Ltd. v. Maphia*, 857 F. Supp. 679, 684 (N.D. Cal. 1994).

38. 907 F. Supp. 1361 (N.D. Cal. 1995).

39. *Id.* at 1370-71

40. *Id.* at 1372.

41. *Id.*

42. See *White Paper*, *supra* note 15, at 213-20 & app. 1 (recommending that the Copyright Act be amended to clarify that a transmission falls within the copyright owner's exclusive rights of distribution, publication, reproduction, public performance, and public display rights); S. 1284, 104th Cong., 1st Sess., 2 (1995) (amending the Copyright Act of 1976 to include the word transmission within the definitions of "distribution" and "publication"); *Hearings* 1st Sess., *supra* note 15, at 6-14 (statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services) (supporting the amendments in S. 1284, clarifying that a transmission is a protected right of the copyright owner).

Thus, what is the proper definition, and level of liability, for a business entity that in *one* transaction may engage in multiple copyright actions in multiple countries? This question remains unanswered⁴³ but, in the case of the German newsgroup dispute (regarding the distribution of potentially illegal elicited material), CompuServe's reaction was to comply with the prevailing highest standard.⁴⁴ As a result of this compliance, information is not available to Internet community members who could otherwise legally receive the material.⁴⁵

In the case of copyright infringement, this area of the law lacks even a synthesized standard with which providers can comply. A hypothetical example illustrates this point. Suppose that an international on-line provider complies with the Canadian policy proposals by taking action to prevent infringement.⁴⁶ In so doing, the provider might withhold public domain material contained within the screened material,⁴⁷ and thus violate Article 10(1) of the European Community Human Rights Convention.⁴⁸ Furthermore, in the U.S., the provider's preventative actions would not ensure it a defense against infringement claims.⁴⁹ Instead, the provider's actions could expose it to the possibility that U.S. courts will find it is taking too active a role in the provision of materials and deem the provider to be a publisher — a definition that, if carried over

43. See *infra* part IV (recommending an international adaptation of contributory liability for on-line service providers).

44. See *supra* notes 1, 4 and accompanying text (discussing the December 1995 CompuServe incident in Germany).

45. *Id.* Cf. *United States v. Thomas*, 74 F.3d 701, 707-709 (6th Cir. 1996) (applying Tennessee pornographic standards to prohibit material uploaded in California).

46. See *IHAC Report*, *supra* note 18, at 120 (stipulating the availability of a statutory defense to copyright infringement must include examples of action taken to prevent infringement); see also *infra* part II.B (discussing the Canadian policy proposals).

47. See 17 U.S.C. § 102(b) (1994) (stipulating that not all expression is protected by copyright regardless of the form in which it is embodied); *Copyright Act*, R.S.C. ch. 32, § 5 (Can) (codifying the requirements of originality in expression for copyright protection).

48. European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, cited in Saxby, *supra* note 14, at 41 n.2. See *infra* part II.D.1 (discussing the significance of Article 10(1)).

49. See *White Paper*, *supra* note 15, at 117 (advising that preventative measures taken by on-line service providers should reduce, but not excuse, liability for copyright infringement); *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993) (dismissing defendant's claims of preventative action as insignificant in relation to the acts of copying and distribution).

into other litigation (i.e., libel), may expose the provider to increased liability.⁵⁰

In the above hypothetical, the question for the on-line provider remains as to what is the proper legal standard when reacting to the actions of its subscribers. This question compounds further if the scenario includes an anonymous uploader.⁵¹ The uploader's intentions and use of the material can be decisive in determining copyright infringement.⁵² If the uploader is anonymous, then so, by definition, are her motivations, thus depriving the on-line service provider of a potential defense.⁵³

B. THE LEGALITY OF INTERNET TRANSMISSIONS

The finding of infringing acts determines copyright infringement. For example, the reproduction of the protected work without permission from the copyright owner is an infringing act constituting copyright infringement.⁵⁴ Currently, there is a lack of international consensus regarding the proper definition of several potentially infringing acts.⁵⁵ The Internet's innate ability to instantaneously distribute works around

50. See, e.g., *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. 1794, (N.Y. Sup. Ct. 1995) (holding Prodigy liable for copyright infringement because the court found Prodigy acted as a publisher when it pre-screened material before transmission).

51. See *United States v. Baker*, 890 F. Supp. 1375, 1379 (E.D. Mich. 1995) (adjudicating the legality of e-mail transmissions with one defendant remaining unknown); *Sega Enter. Ltd. v. Maphia*, 857 F. Supp. 679, 683 (N.D. Cal. 1994) (discussing the occurrence of anonymous Internet users).

52. See 17 U.S.C. § 107 (1988 & Supp. V 1993) (providing a "fair use" defense for charges of copyright infringement). Certain unauthorized uses of copyright material are permissible. *Id.* These excused acts include using the protected material for criticism, comment, news reporting, teaching, scholarship, or research. *Id.* The law provides four non-exclusive factors to be used by the courts in determining application of the fair use defense. *Id.* These four factors consider the user's purpose (including any financial gains), the nature of the copyrighted work, what portion of the work was infringed, and the effect of the infringement on the protected work's market value. *Id.* See also 17 U.S.C. §§ 108-20, 1001-10 (1988 & Supp. V 1993) (delineating limits on the copyright owner's exclusive rights).

53. Cf. 839 F. Supp. at 1557 (arguing the subscribers' use of the material was fair and, therefore, the on-line provider was not liable for copyright infringement).

54. 17 U.S.C. § 106(1) (1988). See *infra* note 67 (listing the exclusive rights of the copyright owner).

55. See *infra* notes 56-61 and accompanying text (discussing definition discrepancies of copyright terms).

the globe increases the significance of these discrepancies.⁵⁶ This significance increases further with the acknowledgment that the very definition of "distribution" is, itself, disputed both within, and between, nations.⁵⁷

Additionally, there is no international agreement on whether the browsing of material on the Internet should be permissible, or defined as falling under the exclusive rights of the copyright owner.⁵⁸ The U.S. policy proposal states that Internet browsing implicates the exclusive rights of reproduction and public display.⁵⁹ Thus, browsing constitutes direct copyright infringement if the user does not have prior permission from the copyright owner.⁶⁰ In contrast, the Canadian Copyright Subcommittee recommends clarifying the current law to stipulate that browsing does not constitute a reproduction of the work, and is not an infringing activity *per se*.⁶¹

A hypothetical example illustrates the definitional problems presented above. Assuming the application of national treatment,⁶² a Canadian

56. See Saxby, *supra* note 14, at 30 (pointing out the continuation of different national definitions is not compatible with development of the global information superhighway).

57. See *White Paper*, *supra* note 15, at 213 (acknowledging that, within the U.S., there is confusion regarding what constitutes a distribution, and then asserting that an on-line transmission is a distribution); *Committee of Experts on a Possible Protocol to the Berne Convention* 66-90, World Intellectual Property Organization (WIPO), BCP/C-E/V/9-INR/CE/IV/8 (Draft Report) (5th Sess.) (Sept. 7, 1995) (debating the definition of "distribution" and the application of proposed definitions to the digital environment). The EU, Australian, and Indian delegations agree that the definition of distribution should refer to physical copies only at this time. *Id.* at 67. In contrast, the delegations of Germany and the UK agree on applying the distribution right to both print and electronically transmitted copies. *Id.* at 70-71.

58. See *infra* notes 59-61 and accompanying text (illustrating two domestic positions on the status of Internet browsing in relation to copyright infringement).

59. *White Paper*, *supra* note 15, at 64, 72.

60. 17 U.S.C. §§ 106(1), 106(5) (1988 & Supp. V 1993).

61. *IHAC Report*, *supra* note 18, at 114-15. The Canadian policy proposal states that the copyright owner should be permitted to determine when browsing is permissible by identifying works available for browsing. *Id.* at 115. To achieve a balance between copyright owners and Internet users, the Subcommittee stipulated that browsing does not constitute reproduction. *Id.*

62. See 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 17.05, 17-39 (1995) (explaining that the leading international copyright treaties stipulate national treatment as the standard of protection for foreign works). National treatment agreements grant foreign works protection in accordance with the domestic laws governing the state where the infringement took place. *Id.* For the inclusion of national treatment in specific treaties see The Berne Convention for the Protection of

user innocently browsing an American work on the Internet does not infringe upon exclusive rights unless the copyright owner has specifically denied browsing access to the work.⁶³ Alternatively, an American user innocently browsing a Canadian work infringes upon the copyright owner's rights, and the on-line provider is liable for illegal reproduction and distribution.⁶⁴ As illustrated, under current law and policy proposals, the same Internet action will yield different results in two different countries. This example highlights the complexities behind the questions of the proper legal definition and function of an on-line service provider, and related Internet transactions. The undetermined answer to these questions lies in the harmonization of both liability laws and functional definitions to provide clear uniform standards for the protection of copyright owners, Internet users, and on-line service providers.

II. POLICY PROPOSALS FOR THE FUTURE OF COPYRIGHT IN "CYBERSPACE"

A. THE UNITED STATES

In September 1995, the Clinton Administration's Working Group on Intellectual Property Rights (part of the Information Infrastructure Task Force⁶⁵) released its report, *Intellectual Property and the National Information Infrastructure*.⁶⁶ The Working Group addresses the applica-

Artistic and Literary Works, art. 5(1)&(2); Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, April 15, 1994, art. 3, 33 I.L.M. 1, 83-111.

63. *IHAC Report*, *supra* note 18, at 114-15.

64. *White Paper*, *supra* note 15, at 64, 72.

65. *See id.* at 1 (explaining the history of the Information Infrastructure Task Force (IITF)). In February 1993, President Clinton formed the IITF, which is a federal inter-agency task force charged with articulating the Administration's policy regarding the National Information Infrastructure. *Id.* The IITF was chaired by the late Secretary of Commerce Ronald H. Brown and is comprised of three committees, including the Information Policy Committee. *Id.* The Policy Committee established the Working Group on Intellectual Property Rights, chaired by Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Bruce A. Lehman. *Id.* at 3. The Working Group investigates the intellectual property implications of the NII and makes necessary law and policy recommendations. *Id.*

66. *White Paper*, *supra* note 15. *See* Information Infrastructure Task Force, Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights* (July 1994) (articulating the Working Group's initial find-

tion of existing copyright law⁶⁷ in the future environment of the National Information Infrastructure (NII). The Working Group supports maintaining the full range of liability standards⁶⁸ currently applicable to

ings regarding the relationship between intellectual property laws and the Internet). Following the publication of its preliminary draft, the Working Group established a four month comment period and held four days of public hearings before issuing its final report. *White Paper*, *supra* note 15, at 4.

67. See 17 U.S.C. §§ 101-1010 (1988 & Supp. V 1993) (codifying existing copyright legislation). The Copyright Act of 1976 grants copyright owners exclusive rights for the protection of their original expressions, which are embodied in a copyrighted work. *Id.* The exclusive rights of a copyright owner are the following: to reproduce the work; to prepare derivative works; to distribute the work; to perform the work publicly; to display the work publicly; and, to claim rights to attribution and integrity. 17 U.S.C. §§ 106-106A (1988 & Supp. V 1993). *But see* 17 U.S.C. §§ 107-20 (1988 & Supp. V 1993) (delineating the limitations on the copyright owner's exclusive rights and stipulating permissible activities of non copyright owners). Not all works, or all elements of a work, are protected by copyright. See 17 U.S.C. §§ 102-05 (1988 & Supp. V 1996) (specifying the types of works protected and the requirements for protection).

Copyright infringement occurs when an exclusive right is violated or copyright-ed works are illegally imported into the United States. See 17 U.S.C. § 501(a) (Supp. V 1993) (listing infringing actions); 17 U.S.C. § 602(a) (1988) (delineating infringing actions). Infringement occurs when just one unauthorized copy is made. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 [hereinafter 1476 Report] (indicating that the use of the words "copies" or "phonorecords" in the bill was not meant to exclude the singular use of the word).

An infringer is *anyone* who violates the copyright owner's exclusive rights. 17 U.S.C. § 501(a) (1988 & Supp. V 1993). Liability is not excused for lack of intent or knowledge. 17 U.S.C. § 504(c)(2) (1988 & Supp. V 1993). The court in these circumstances does have discretion to reduce the statutory damage award. *Id.* There are permissible uses of a copyrighted work without the copyright owner's prior permission. 17 U.S.C. §§ 107-12 (1988 & Supp. V 1996). The copyright owner's exclusive rights are violated when protected expressions are copied in excess of a mere *de minimis* level. See JOYCE, *supra* note 14, at 693 (explaining that *de minimis* copying is not infringement because it does not impact the copyright owner's ability to market the work). The courts have established a test of substantial similarity as the threshold criteria for infringement and do not require verbatim reproduction of the copyrighted work to find infringement. See *generally* NIMMER, *supra* note 62, § 13-.03[A], 13-29 to 13-60 (identifying methods employed by the courts to determine substantial similarity). There is no uniform rule within the courts regarding the appropriate viewpoint to apply when assessing the substantial similarity of the two works. *Id.* § 13.03[E], 13-88 to 13-120. Some courts view the work as an "ordinary observer" would, while other courts view the work from the perspective of the "intended" audience when a copy contains "specialized expertise." *Id.* § 13.03[E], 13-89, 13-103.

68. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 & n.17 (1984) (discussing liability standards for copyright infringement). The Court notes that,

copyright infringers and applying them to on-line service providers when their subscribers violate the exclusive rights of copyright owners.⁶⁹ This advocacy for sustaining the *status quo* is generating debate within the copyright community and serves as the focal point for Congressional

because an infringer can either put the work to an unauthorized use, or authorize another to use the work without authority from the copyright owner, vicarious and contributory liability are applicable to copyright despite the 1976 Copyright Act's silence on the issue of one's liability for infringement that is committed by another. *Id.* See also 1476 Report, *supra* note 67, at 47 (stating that granting the copyright owner the right to authorize use of the work is intended to imply the applicability of vicarious and contributory negligence).

69. See *White Paper*, *supra* note 15, at 117 (expressing the view that "[t]he best policy is to hold the service provider liable."). Additionally the report states, "[t]he Working Group believes it is—at best—premature to reduce the liability of any type of service provider in the NII environment." *Id.* at 122.

hearings.⁷⁰ Adding to the controversy, recent U.S. case law has both

70. See *National Information Infrastructure Copyright Protection Act of 1995: Hearings on H.R. 2441 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 2d Sess., at 3 (1996) [hereinafter *Hearings 2d Sess.*] (statement of Chairman Moorhead) (attempting to quell the dispute over copyright liability on the Internet by stating that he supports continued discussion of the issue and consideration of a statutory amendment to modify the current law in light of Internet developments); George Leopold, *Factions Feud Over Copyright Legislation*, ELECTRONIC ENGINEERING TIMES, Feb. 12, 1996, at 4 (reporting that Congressional hearings on copyright legislation became an open forum for the dispute between the movie and music industries and the consumer electronics industry regarding copyright liability standards on the Internet).

See generally *Washington Lawmakers Debate Copyrights Applied to the Internet*, COMPUTER RESELLER NEWS, Feb. 12, 1996, at 180 (reporting that Representative Patricia Schroeder (D-Colo) supports maintaining current copyright liability laws); *id.* (reporting that the president of the Motion Picture Association of America, Jack Valenti, is against granted exceptions to copyright liability for on-line providers when their users infringe copyright laws; *Hearings 2d Sess.*, *supra*, at 35-41 (statement of Edward P. Murphy, National Music Publisher's Association, Inc.) (urging maintenance of current liability standards on the basis that counter-arguments lack substance, the current laws grant innocent infringers reductions in damage payments, and any alteration of current standards will harm copyright protection and diminish the potential for alternative solutions such as licensing agreements); *id.* at 277-96 (statement of William J. Cook, firm of William, Brinks, Hofer, Gilson, Lione) (arguing that on-line infringement threatens the value of copyright and that standards in addition to current liability should be implemented, requiring the providers to remove infringing material from the bulletin boards because they are the actors in the best position to regulate on-line copyright infringement); *id.* at 84-91 (statement of Garry L. McDaniels, President, Skills Bank Corporation) (testifying that the Software Publishers Association relies on current protection standards and does not favor any alterations or reductions in the law's liability standards); Carolyn Skorneck, *Copyright Violators Should Face Criminal Penalties*, ASSOC. PRESS, Feb. 7, 1996, available in 1996 WL 4410547 (reporting that Representative Rick Boucher (D-Va) proposed exempting on-line providers from copyright liability on the premise that they are unable to monitor material or control subscribers); Mike Snider, *Opposition Grows to Copyright Reform*, USA TODAY, Feb. 14, 1996, at 2B (reporting that more than two dozen companies and business associations sent a letter to Congress in opposition to the White Paper's legislative proposals on the grounds that the legislation contains excessive liability standards for those opposing the bill); *Hearings 2d Sess.*, *supra*, at 234-62 (statement of Stephen M. Heaton, General Counsel and Secretary, CompuServe, Inc.) (arguing on-line providers should have an exemption from copyright liability and should not be coerced into policing the Internet for violations of copyright); *id.* at 62-69 (statement of Edward J. Black, Computer & Communications Industry Association) (testifying that application of current liability standards to on-line providers will discourage further growth of the Internet due to fears of liability); *id.* at 273-77 (statement of Scott Purcell, President HLG Internet Inc.) (stating that the Internet's unique

applied and questioned this general policy.⁷¹

The Working Group concludes its controversial policy proposal by stating that, within the confines of current law, service providers may reduce their liability if they investigate and act when informed that infringing material is on their systems.⁷² Contemporary case law, however, disputes the judicial application of this suggestion.⁷³

The Working Group's report asserts that deviation from the existing liability norms will harm the rights of copyright owners, and weaken the underlying principles of copyright law.⁷⁴ The Working Group rationalizes applying current standards of liability to on-line providers by first declaring that on-line service providers are for-profit businesses.⁷⁵ The

features make traditional laws impractical as is a pre-screening requirement because the Internet could only pre-screen material at the sacrifice of its very essence and the result would be a halt in Internet growth).

71. *Compare* Playboy Enter., Inc. v. Frena, 839 F. Supp. 1552, 1554-1558 (M.D. Fla. 1993) (holding an electronic bulletin board operator directly liable for the distribution of copyrighted photographs that were uploaded by bulletin board subscribers without the operator's knowledge) and Sega Enter. Ltd. v. Maphia, 857 F. Supp. 679, 686-87 (N.D. Cal. 1994) (holding both the provider and operator of an electronic bulletin board contributorily and directly liable for the subscribers' infringing actions because the copying was known, facilitated, and distributed by the defendants) with Religious Tech. Ctr. v. Netcom On-line Comm. Servs., Inc, 907 F. Supp. 1361, 1361 (N.D. Cal. 1995) (dismissing charges against an on-line provider for direct and vicarious copyright infringement liability and questioning the current standards for contributory liability).

72. *White Paper*, *supra* note 15, at 116-17.

73. *See* Playboy Enter., 839 F. Supp. at 1554 (holding a bulletin board operator directly liable for copyright infringement despite his claim that he removed the infringing material upon notification of its presence on his board and subsequently monitored the board to prevent further infringement).

74. *White Paper*, *supra* note 15, at 114. The Working Group also argues that altering the liability laws for on-line service providers would set a dangerous precedent and be unfair to all other types of distributors. *Id.* at 122. Additionally, the Working Group supports maintenance of the *status quo* by suggesting that changes in liability standards would reduce the need for, and thus discourage the pursuit of, anti-infringing technological devices and alternative practices such as insurance, indemnification and collective licensing agreements. *Id.* at 123. *But see IHAC Report*, *supra* note 18, at 114-20 (reducing the liability for browsing actions and for on-line service providers while recommending support for collective rights clearance and public education programs. *See also Software Developed to Block Kids From Internet Pornography*, ED. TECH. NEWS, Aug. 1, 1995, available in 1995 WL 2388309 (demonstrating there is software available to curb the Internet and personally restrict materials from entering the individual home).

75. *See White Paper*, *supra* note 15, at 117 (noting that "[o]n-line service provid-

Working Group then determines that liability for copyright infringement is a cost of doing business and that this industry must accept this cost because other types of distribution businesses have similarly done so.⁷⁶ Different circumstances and the on-line industry's distinct characteristics, however, challenge the Working Group's comparisons of on-line providers to other types of distributors.⁷⁷ Policy proposals addressing on-line service provider liability for copyright infringement on the Internet must account for the significance of unprecedented direct public interaction⁷⁸

ers have a business relationship with their subscribers."). In contrast to this proposition are the examples of educational or non-profit providers of on-line access. *See, e.g.,* Louise Kehoe, *So How Big Is Cyberspace?*, FIN. TIMES, Feb. 20, 1995, at 13 (reporting that in January 1995, commercial servers surpassed educational on-line providers for the first time); *United States v. Baker*, 890 F. Supp. 1375, 1379 n.4 (E.D. Mich. 1995) (finding that a university system provided Internet access to the defendant charged with transmitting threats in electronic e-mail); *Religious Tech. Ctr. v. F.A.C.T.NET, Inc.*, 901 F. Supp. 1519, 1519 (D. Colo. 1995) (noting plaintiff is suing a non-profit educational and charitable corporation for copyright infringement). Plaintiff alleges defendant violated plaintiff's copyright by posting specific material on the F.A.C.T.NET electronic bulletin board. *Id.*

76. *White Paper*, *supra* note 15, at 117 (noting "[a]gain, this problem has been a part of the cost of doing business for many other distributors of material that is provided to them by others."). The Working Group also justifies holding the on-line providers liable by declaring "[s]ervice providers reap rewards for infringing activity." *Id.* at 117.

77. *See id.* at 116 (drawing an analogy between on-line providers and photo finishers, the latter having been held strictly liable for copyright infringement). To negate the on-line providers' argument that the sheer volume of material makes screening it for infringement impossible, the Working Group suggests that, despite an inability to view undeveloped film before reproduction, photo developers have been held strictly liable. *See id.* at 116 n.374 (citing to *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345 (8th Cir. 1994). *But see* 23 F.3d 1345 (holding photo developer liable for reproducing *photographs that were clearly marked with copyright notices*) [emphasis added]. In dismissing the argument that sheer volume makes it difficult for the on-line providers to monitor for copyright infringement, the Working Group also compares on-line service providers to book sellers, newsstands, computer software retailers and record stores and suggests that these distributors have been held liable for copyright infringement despite handling large volumes of material. *White Paper*, *supra* note 15, at 116. *But see* *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (recognizing that "[h]igh technology has markedly increased the speed with which information is gathered and processed . . . once [an on-line service provider] decide[s] to carry a publication [i.e. a bulletin board], it will have little or no editorial control over that publication's contents.").

78. *Compare White Paper*, *supra* note 15, at 106 (acknowledging that digital works are easily manipulated and declaring that unauthorized manipulations are both infringing reproductions and derivative works, but failing to comment on the control

that is responsible for transmitting enormous volumes of material in real time.⁷⁹

Absent from the Working Group's report is a full discussion of the economic ramifications of holding service providers liable for copyright infringement.⁸⁰ It is the clear position of the Working Group that on-line businesses can function and prosper without infringing or facilitating the infringement of a copyright owner's exclusive rights.⁸¹ The Working Group recognizes that there is variation among service providers in terms of size, purpose, and activities, but concludes that applying existing standards of liability to all service providers is appropriate at this time.⁸² Holding the on-line service providers liable for the infringing actions of their subscribers is a recognized policy decision.⁸³ Again, it

problems that this ease of manipulation will present for on-line providers held liable for their subscribers' activities) with Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 401-04 (1995) (noting that publishers and distributors traditionally served as a link between the creator and the user, but that electronic bulletin boards facilitate direct communication among individuals and this decentralization creates a newly structured environment in which copyright law's ability to govern should be questioned).

79. See Jack Schofield, *Switching on the World US Giant*, GUARDIAN, May 12, 1994, at 17 (reporting that CompuServe serves 138 countries and has 1.9 million subscribers who can access 2,000 databases containing 320,000 files and programs).

80. See *White Paper*, *supra* note 15, at 117-18 (providing no economic information regarding the costs of screening material for copyright infringement). There is no discussion of the dollar costs attached to technological or human screening methods, and no discussion of the economic impact of screening on small bulletin board operators who lack the resources of the larger providers. *Id.*

81. See *id.* (assuming that the on-line providers can contribute to the growth of the NII without engaging or assisting in copyright infringement).

82. See *id.* at 123 (deciding that the NII environment is too unstable to support new legal standards).

83. See *id.* at 117 (proclaiming that holding the on-line service providers liable is a better policy than placing the onus on the copyright owners to stop infringement). The Working Group asserts that the providers are the best party to be held liable for copyright infringement because they are business operations, in a business relationship with their subscribers, and are in the best position to identify infringers. *Id.* While this argument has merit, it does not acknowledge the fact that not all lawless subscribers are identifiable. See *United States v. Baker*, 890 F. Supp. 1375, 1379 (E.D. Mich. 1995) (addressing the legality of threatening E-mail messages, and recording the fact that the identity and whereabouts of one defendant are unknown); *Sega Enter. Ltd. v. Maphia*, 857 F. Supp. 679, 683 (N.D. Cal. 1994) (addressing the legality of bulletin board postings, and recording the fact that infringing subscribers use aliases or pseudonyms to communicate).

is the Working Group's opinion that deviation from the existing liability norms will harm the rights of copyright owners and weaken the underlying principles of copyright law to an unacceptable level.⁸⁴

U.S. copyright law is grounded in the federal Constitution.⁸⁵ The law's underlying principles advocate extending protection to inventors and authors to secure them economic benefits and, in turn, encourage public disclosure of the works.⁸⁶ The desired result is a net benefit to society at large.⁸⁷ In the face of new technology that also brings with it many societal benefits,⁸⁸ the U.S. must reevaluate the proper source and balance of the traditionally desired net benefit.⁸⁹ The U.S. copyright law's failure to placate copyright owners,⁹⁰ and provide consistent courtroom application,⁹¹ challenges the practicality of its continuance. In a broader context, the recognition, by some foreign nations, of the need for a new balance, in the needs and rights of both copyright own-

84. See *White Paper*, *supra* note 15, at 114 (predicting that changes in liability standards would significantly impair copyright law). The Working Group argues that altering liability standards for on-line service providers would harm copyright law by setting a dangerous precedent. *Id.* at 122. The Working Group further supports its prediction by stating that a change in liability standards would harm the development of procedures to prohibit infringement. *Id.* at 123.

85. U.S. CONST., art. I, § 8, cl. 8.

86. See JOYCE, *supra* note 14, at 10 (recounting U.S. copyright history).

87. *Id.*

88. See Don Clark, *New Vision of Communications*, S.F. CHRON., Nov. 23, 1992, at B1 (reporting on President Clinton's vision of the NII). The President believes the NII can create new jobs, services and products in the areas of education, health care, government, and manufacturing. *Id.* See also *Democracy and Technology*, ECONOMIST, June 17, 1995, at 21 (discussing the impact of the Internet on democracy).

89. See *Hearings* 2d Sess., *supra* note 70, at 16 (statement of Congressman Boucher) (declaring that to encourage continued technological developments new copyright legislation must strike a balance between the needs of intellectual property protection and the needs of Internet users).

90. See Rice, *supra* note 8, at 13 (discussing the hesitations of copyright owners to place their material on the Internet).

91. See *Religious Tech. Ctr. v. Netcom On-line Comm. Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (dismissing charges of direct and vicarious liability as inappropriate standards for the activities of on-line service providers).

ers and Internet users,⁹² may weaken international acceptance of current U.S. law.

B. CANADA

The Information Highway Advisory Council (IHAC)⁹³ issued its final report, *Connection Community Content: The Challenge of the Information Highway*,⁹⁴ at the end of September 1995. The report covers fifteen business, legal,⁹⁵ and cultural issues affecting, and affected by, the

92. See *IHAC Report*, *supra* note 18, at 36 (premising the report on the need for a balance between copyright owners and Internet users); Legal Advisory Board (LAB), *Reply to the Green Paper on Copyright and Related Rights in the Information Society*, available on the World Wide Web at <http://www.echo.lu/legal/en/ipr/reply/reply.html> [hereinafter LAB] (advocating that future considerations of society's net benefits must not assume that a continuance of intellectual property protection provides the proper benefit, but rather that, in the new environment of digital technology, a balance between the interests of rights holders, society and the economy be given increased consideration).

93. See Andrea F. Rush, *Keeping Pace with Technological Change Can Be Tough: Interpret Existing Copyright Law Flexibly*, LAW. WKLY., June 30, 1995, at 12 (explaining the history of the IHAC). Industry Minister John Manley initiated the IHAC in March, 1994 and established five working groups, including the Working Group on Canadian Content and Culture. *Id.* This Working Group formed a Subcommittee on Copyright in August, 1994. *Id.*

94. *IHAC Report*, *supra* note 18. See also Information Highway Advisory Council, Copyright Subcommittee, *Copyright and the Information Highway: Preliminary Report of the Copyright Subcommittee* (Dec. 1994) [hereinafter *Preliminary Report*] (documenting the initial findings of the Copyright Subcommittee).

95. See *IHAC Report*, *supra* note 18, at 35 (analyzing current Canadian copyright law in relation to the information highway). Current copyright law is governed by the federal Copyright Act. *The Copyright Act*, R.S.C., ch. C-42 (1985) amended by R.S.C. ch. C-15 (1988). The Act grants copyright owners exclusive rights for the protection of their property interests in original expressions. *Id.* §§ 3(1), 12, 14.1 & 14.2 (1988).

Copyright infringement is the violation of these rights or the illegal importation into Canada of copyrighted works. *Id.* §§ 27(1), (4) & 28.1, 28.2 (1988). Unlike the U.S., which only requires the claimant to show more than a *de minimis* level of copying for the charge of copyright infringement, the Canadian courts require the claimant to demonstrate that a substantial portion of the work was copied without authorization. Compare MILAN CHROMECEK & STUART C. MCCORMACK, *WORLD INTELLECTUAL PROPERTY GUIDEBOOK CANADA* 4-25 (Donald S. Chisum ed., 1991) (explaining that in Canada the claimant must prove that there has been a substantial taking of the copyrighted work to succeed in an infringement action) with JOYCE, *supra* note 14, at 693 (discussing the threshold of *de minimis* copying for infringement claims required in the U.S.).

developing information highway infrastructure.⁹⁶ Contained within *Connection Community Content*, is the final report of the Working Group on Canadian Content and Culture's SubCommittee on Copyright.⁹⁷

The SubCommittee believes in holding on-line service providers liable, but not directly liable, for subscribers' copyright infringements.⁹⁸

Both the U.S. and Canadian courts examine the works in question for substantial similarity, but only the Canadians apply one uniform test for assessing similarity by evaluating the work from the perspective of the intended audience. Compare CHROMECEK, *supra*, at 4-26 (explaining that in Canada the two works are compared to determine if the intended audience would recognize similarities between them) with *White Paper*, *supra* note 15, at 105 (noting that there is no uniform rule within the U.S. courts regarding the appropriate viewpoint to apply when assessing the substantial similarity of the two works).

96. See *IHAC Report*, *supra* note 18, at viii (listing the issues addressed by the IHAC).

97. *Id.* at 35, 112. The Copyright SubCommittee specifies issues and gives advice relating to the role of copyright in developing the national information highway. See Rush, *supra* note 93, at 12 (discussing the SubCommittee's assignments and findings). The SubCommittee's emphasis on the role of copyright in building the Canadian information infrastructure was mandated by the IHAC. *Id.*

98. See *IHAC Report*, *supra* note 18, at 38 (stipulating the liability standards for bulletin board operators). See also *The Copyright Act*, R.S.C. ch. C-42, amended by R.S.C. ch. C-15 (1988) §§ 27(1), 27(4), 27(5) (1985) (classifying infringing behavior as either direct or indirect); CHROMECEK, *supra* note 95, at 4-24 to 4-28 (explaining the distinctions between direct and indirect infringement).

Direct infringement is the unauthorized use of a copyrighted work in a manner reserved as the exclusive right of the copyright owner. *Id.* at 4-25. Direct infringement also applies when one authorizes another to use the work without securing the copyright owner's prior permission. *Id.* Indirect infringement is the selling, distributing, importing, or exhibiting of infringing goods or the facilitating of unlawful public performances of copyrighted works. *Id.* at 4-27-28. Generally, indirect infringement applies to activities which are not reserved as exclusive rights of the copyright owner but nonetheless infringe upon the copyright owner's statutory rights, for example by weakening the owner's economic interest in the work. *The Copyright Act*, R.S.C., ch. C-42 (1985) amended by R.S.C. ch. C-15 (1988). Damaging the work's integrity, and thus harming the copyright owner's moral rights, is also an example of indirect infringement. CHROMECEK, *supra* note 95, §§ 28.1-28.2.

In Canada, as distinguished from the U.S., because the act of authorizing another to use the copyrighted work in an infringing manner is categorized as an act of direct infringement, the Canadian copyright law does not emphasize vicarious or contributory liability. *The Copyright Act*, R.S.C., ch. C-42, §§ 27(1), 27(4), 27(5) (1985). Liability for copyright infringement is reduced or excused when the defendant lacks knowledge of the actual copyright or copyright infringement. *Id.* §§ 27(4), 27(5) & 39. See also CHROMECEK, *supra* note 95, at 4-28 (explaining when a lack of knowledge mitigates damages or excuses liability). In a charge of direct infringement, if the

The IHAC final report modifies current law to stipulate that providers should have a defense to liability claims if they can prove both a lack of actual or constructive knowledge of the infringement (current standard), and show that attempts to limit potential copyright abuse have been made (new standard).⁹⁹ This policy proposal emerges from a general precept that asks how copyrighted works can nurture the Internet for the benefit of all Canadians while balancing the creator's protection needs.¹⁰⁰

Granting on-line service providers substantially the same protections as indirect copyright infringers¹⁰¹ is a SubCommittee policy decision.¹⁰² This decision may have its origin in Canada's increasing support for the deregulation of the communications industry.¹⁰³ Also

copyrighted work is not registered with the Copyright Office and the defendant can prove successfully a reasonable lack of knowledge in the work's copyright the plaintiff can, at most, receive an injunction. *Id.* The defendant has a complete defense to charges of indirect infringement if she can show a reasonable lack of knowledge that the activity in question is tantamount to copyright infringement. *Id.*

Additional defenses against claims of copyright infringement are available to the defendant through claims of no taking, no substantial taking, or statutory provisions. See *The Copyright Act*, R.S.C., ch. C-42 § 27(2) (1985) (providing statutory fair dealing defenses for claims of copyright infringement); see also CHROMECEK, *supra* note 95, at 4-32 (noting that the breadth of, and purpose for, the copying are determinative in deciding if an infringement is excused under a defense of fair dealing).

99. See *IHAC Report*, *supra* note 18, at 38 (delineating the criteria for a statutory defense that will apply to the bulletin board operators).

100. See *Preliminary Report*, *supra* note 94, at 1 (stating that the mandate of the Copyright SubCommittee is, "[t]o make recommendations on the ways in which copyright can be used to enhance the Information Highway to the benefit of Canadians."); *IHAC*, *supra* note 18, at 39 (stating "[o]ur challenge is to determine which traditions we can forgo in order to successfully address global changes . . ."). Compare *id.* at 2 (describing the Copyright SubCommittee's approach as one that is looking for ways to balance the needs of creators and users) with *White Paper*, *supra* note 15, at 2 (reporting that the Working Group's main focus is on the relevance of existing copyright law in the NII environment).

101. Compare *The Copyright Act*, R.S.C., ch. C-42, § 27(4) (1985) (granting indirect infringers a defense when they lack knowledge of the copyright infringement) with *IHAC Report*, *supra* note 18, at 120 (granting bulletin board providers a statutory defense against copyright liability charges when the provider did not know of the infringing activity and took reasonable measures to restrict infringement).

102. See *IHAC Report*, *supra* note 18, at 36 (stating that an IHAC principle is to support a balance between creators and Internet users).

103. *Preliminary Report*, *supra* note 94, at 28 (indicating a preference for allowing market demands to dictate which products and services are available for the consumer). Cf. Emma Tucker & Alan Cane, *G7 Seeks Right Road to Superhighway*, *FIN.*

relevant is the SubCommittee's view of the Internet as a significant asset to Canadian society.¹⁰⁴

This value judgment encourages the Internet's growth and serves as the basis behind the proposals to exempt the on-line service providers from direct liability and provide them with a statutory defense.¹⁰⁵ The SubCommittee believes that, if flexibly interpreted, the current copyright laws will keep pace with technology.¹⁰⁶ Thus, when faced with the decision to apply either direct or indirect liability, the SubCommittee chose a middle ground by applying a heightened standard of indirect liability. The SubCommittee supports its proposed standard by arguing that the existing copyright laws are generally adequate and flexible enough to protect digital works.¹⁰⁷

This policy of flexible interpretation and a heightened standard of liability has yet to be tested in the Canadian courts.¹⁰⁸ However, the recent U.S. court decision in *Religious Technology Center v. Netcom*

TIMES, Feb. 22, 1995, at 2 (reporting that the European Union is liberalizing its telecommunication market and sees this as necessary for the development of the GII).

104. See *IHAC Report*, *supra* note 18, at 4 (forecasting the information highway will improve the quality of Canadian life).

105. See *id.* at 39 (stating that cultural policies -- including copyright -- must drive change).

106. See *id.* at 120 (ensuring legal flexibility by including a statutory defense for bulletin board operators that is meant to prohibit the courts from interpreting the current liability laws too rigidly); see also Rush, *supra* note 93, at 12 (recording a SubCommittee member's support for legal flexibility).

107. See *IHAC Report*, *supra* note 18, at 38 (summarizing the SubCommittee's views that the current law can protect copyright on the information highway because the law is flexible). But see *Preliminary Report*, *supra* note 94, at 14 (noting that the Canadian courts have never addressed the issue of on-line service provider liability for subscribers' infringing actions). See also CHROMECEK, *supra* note 95, at 1-14 to 1-15 (indicating that the Canadian courts often refer to U.S. court decisions).

It is the exclusive right of copyright owners to communicate their work to the public by telecommunication. *The Copyright Act*, R.S.C., ch. C-42, § 3(1)(f) (1985). Under Canadian law, telecommunication is defined as "any transmission of signs, signals, writings, images, sounds, or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system, which includes any part of a network whose object is to communicate works to the public or to transmit by telecommunication, work that is communicated to the public by another person." CHROMECEK, *supra* note 95, at 4-30. To date, copyright owners have not claimed that on-line activities are violating their telecommunication rights. *Preliminary Report*, *supra* note 94, at 10. The focus of the telecommunication rights debates is on whether or not bulletin board postings would be deemed public for the sake of the telecommunication criteria. *Id.*

108. See *supra* note 107 and accompanying text (discussing the policy proposals and their lack of prior court history).

*On-line Communication Services, Inc.*¹⁰⁹ supports the policy's predisposition for practical application. In *Netcom* the court dismissed the plaintiff's charges of direct and vicarious liability but retained for litigation the question of contributory liability.¹¹⁰ The court will determine Netcom's contributory liability by applying a standard similar to the Canadian proposal. This standard will assess Netcom's contributory liability by determining their knowledge of, and actions toward, the alleged infringing material.¹¹¹

C. COMPARISON OF THE PROPOSALS

The U.S. and Canadian policies both agree to holding on-line service providers liable for the infringing actions of their subscribers.¹¹² However, the two policies differ on the appropriateness of modifying current copyright law.¹¹³ This difference triggers opposing applications of direct liability to on-line service providers¹¹⁴ and different defense options for providers.¹¹⁵

U.S. policy maintains current copyright laws. Thus on-line service providers are subject to direct liability.¹¹⁶ A lack of knowledge, in conjunction with active measures to discourage infringement, does not

109. 907 F. Supp. 1361 (N.D. Cal. 1995).

110. *Id.* at 1361.

111. *Id.* at 1373-74.

112. Compare *supra* notes 73-74 and accompanying text (discussing on-line service providers' liability for the infringing actions of their subscribers) with *supra* notes 98-99 and accompanying text (noting that on-line providers are liable, but not strictly liable, for their subscribers' infringing actions).

113. Compare *supra* notes 69, 74 and accompanying text (maintaining and applying current liability standards to on-line providers) with *supra* note 99 and accompanying text (conditionally dismissing on-line providers from direct infringement liability and granting them a statutory defense).

114. Compare *supra* note 42 and accompanying text (implying on-line service providers can be directly liable for reproduction and distribution of infringing material resulting from their subscribers' on-line transmissions) with *supra* notes 98-99 and accompanying text (declining to apply direct infringement liability to bulletin board operators).

115. Compare *supra* note 72 and accompanying text (reducing damage awards when the on-line provider lacks knowledge of the infringement) with *supra* note 99 and accompanying text (providing a complete defense to infringement liability claims when the bulletin board operator lacks knowledge of the infringement and has acted to limit infringement from occurring on the board).

116. See *supra* notes 68-69 & 74 and accompanying text (rejecting modification of liability laws to accommodate the activities of on-line service providers).

provide a defense for the on-line service providers under U.S. policy.¹¹⁷ In contrast, the Canadian SubCommittee selectively applies and modifies current law to exempt on-line providers from direct liability, yet increases their threshold defense requirements under an indirect liability standard.¹¹⁸ This is done by stipulating that, like other indirect infringers, the on-line providers must lack knowledge of actual infringing incidents but that, in addition, they must have acted to limit potential copyright abuse.¹¹⁹

Arguably, granting on-line service providers a statutory defense with a lack of knowledge as one of the criteria is easier for the Canadian policy makers, as their law already contains a defense of innocence for certain categories of copyright infringement.¹²⁰ In contrast, the U.S. copyright law does not consider the level of the infringer's intent in any infringement adjudication as a defense to liability; to do so for on-line providers would be a break from tradition.¹²¹ However, in *United States v. LaMacchia*,¹²² the U.S. Justice Department attempted to reclassify specific on-line copyright infringement actions as violations of the wire fraud statute.¹²³ While the attempt was unsuccessful,¹²⁴ it supports an inferential argument that classification of on-line providers as distributors akin to publishing houses, news distributors, motion picture companies, radio stations, and television broadcast systems, may be inappropriate. As the government's attempt suggests, consideration of new definitions and forms of liability may be the most appropriate solution to this challenging problem of on-line copyright infringement.

The observation that the two nations began their assessments from different perspectives is also determinative in explaining the differences in the policy proposals. The U.S. report's premise is that the advent of

117. *Id.*

118. See *supra* notes 98-99 and accompanying text (presenting the Canadian liability standard for on-line service providers).

119. See *supra* notes 101-02 and accompanying text (stipulating that bulletin board operators will be treated as indirect infringers if they lacked knowledge of the infringement and acted to prevent infringement).

120. *The Copyright Act*, ch. C-30, §§ 27(4)-27(5) (1985).

121. See 17 U.S.C. § 504(c)(2) (1988 & Supp. V 1993) (stipulating that innocence may reduce, but not excuse, liability for copyright infringement); see also *White Paper*, *supra* note 15, at 122 (stating that distributors other than on-line service providers are held liable for copyright infringement).

122. 871 F. Supp. 535 (D. Mass. 1994).

123. *Id.* at 535.

124. *Id.*

the Internet cannot weaken copyright protection.¹²⁵ Alternatively, the Canadian policy asks and answers the question of how copyright material can strengthen the Internet.¹²⁶ The result of these polar policies is conflicting legal standards that contribute to the confusion surrounding copyright law's application to the Internet.¹²⁷

D. SELECTIVE SURVEY OF ADDITIONAL POLICIES

As of September 1995, no other nation had a policy position regarding liability standards for on-line service providers in incidents of copyright infringement. Many nations, however, are in the process of formulating their own Internet-related policies. Their approaches within these policies to the new technological challenges may serve as indicators of their overall values and priorities that will be applied when a clash arises between intellectual property protection and the advancement of the Internet.

1. *The European Union (EU)*

The EU began its study of the Internet in 1994,¹²⁸ and while it does not, as of yet, have a Community-wide Information Infrastructure plan¹²⁹ investigation into relevant issues is ongoing.¹³⁰ Hence, the

125. See *White Paper*, *supra* note 15, at 5 (stating that the report's focus is on the concerns of intellectual property as generated by the NII). To mitigate these concerns the Working Group advises against changing the liability laws to accommodate the Internet because alterations would threaten the rights of copyright owners. *Id.* at 114. The Working Group argues that altering the liability standards would hamper attempts to reduce the protection risks copyright owners are exposed to by the Internet. *Id.* at 123. Senator Patrick Leahy has supported the Working Group's general focus by stating that copyright laws must be updated to protect material placed on-line and to secure the rights of copyright owners so that the tradition of protection for intellectual property is not broken. *Hearings* 1st Sess., *supra* note 15, at 24 (statement of Senator Patrick Leahy).

126. See *Preliminary Report*, *supra* note 94, at 1 (stating that the Subcommittee's key task is discovering how copyright can enhance the information highway); *IHAC Report*, *supra* note 18, at 39 (stating that cultural policies must drive change).

127. See *infra* parts I, II.A-B.

128. See Bangemann Group, *Europe and the Global Information Society - Recommendations of the High-level Group on the Information Society to the Corfu European Council*, BULL. EUR. UNION SUPP., Office of Official Publications of the European Communities, Feb. 1994 at 6 (informing the reader on the EU's study of the Information Highway).

129. See Saxby, *supra* note 14, at 34 (discussing the developmental pace of EU

EU has issued selective proposals for specific areas relating to the Internet, including copyright. The report, *Copyright and Related Rights in the Information Society*,¹³¹ is silent on the question of the on-line service provider's correct liability for subscribers' actions of copyright infringement.¹³²

A 1991 European Community (EC) Directive¹³³ focusing on computer programs outlines legal standards¹³⁴ that suggest suppressing the interests of right-holders to support market growth in new industries.¹³⁵ This perspective appears akin to the current Canadian objective of market development and balance among content users and providers.¹³⁶ However, the 1994 report, *Europe's Way to the Information Society: An Action Plan*,¹³⁷ discusses the legal framework for a European information infrastructure. This Commission Communication to the Council report recommends, as the U.S. White Paper does to its Administration,¹³⁸ that the Commission emphasize and ensure protective conditions for copyright material, to encourage information providers partici-

information highway proposals). The studies of the U.S. Task Force on the Information Infrastructure spurred the EU information highway policy proposals. *Id.* at 5 It was at the 1995 G7 conference on the global information infrastructure that the EU formally recognized the importance of a strong international network. *Id.* at 34.

130. See *Europe's Way to the Information Society, An Action Plan: Communication from the Commission to the Council and the European Parliament and to the Economic and Social Committee and the Committee of Regions*, COM(94)347 final at 16 [hereinafter *Commission Communication*] (providing a time table for future initiatives). See also *EC Progress in IP Protection*, BUS. LAW BRIEF, Oct. 23, 1995, at 8 (reporting on the EU's progress in harmonization of intellectual property rights as a reaction to new technologies).

131. *Copyright and Related Rights in the Information Society: Green Paper from the Commission to the European Council*, COM(95)382 final [hereinafter *Green Paper*].

132. *Id.*

133. The Council Directive on the Legal Protection of Computer Programs 91/250/EEC, 1991 O.J. (L 122) 42.

134. See Saxby, *supra* note 14, at 14 (commenting that the Directive permits computer programmers to dissect copyrighted programs for the purpose of future development).

135. See *id.* (viewing the EC Directive as putting computer program market needs before the interests of copyright owners).

136. See *IHAC Report*, *supra* note 18, at 38 (stating that "[t]he government should encourage . . . clearance of rights for use of works in a digital medium.").

137. *Commission Communication*, *supra* note 130, at 2.

138. See *White Paper*, *supra* note 15, at 13 (implying that success of the NII is embedded in protecting the rights of copyright owners).

pation in the information infrastructure.¹³⁹ In comparing these two reports, a clear, consistent EU position on the desired balance between creators and users of new technology appears elusive.

To add further complexity to the Internet policy issues, the EU, unlike the U.S. and Canada, is developing its Internet policies within the boundaries of Article 10(1) of the EC's Human Rights Convention.¹⁴⁰ Article 10(1) secures the right to freely receive and distribute information and ideas across boundaries without governmental interference.¹⁴¹ Policies that attempt to curb on-line service provider liability by encouraging only navigated access to the Internet,¹⁴² or support restriction of Internet material,¹⁴³ may jeopardize Article 10(1).¹⁴⁴

Perhaps as a compromise between all competing interests, the EU supports organizing collective rights management bodies for copyrighted material on the Internet.¹⁴⁵ Efficient centralized rights management sys-

139. See Commission Communication, *supra* note 130, construed in Saxby, *supra* note 14, at 46 (noting that the Commission Communication acknowledges the necessity of information material to a European Information Infrastructure (EII), and advises that the Commission secure protection for information providers in order to encourage their necessary participation in the project).

140. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 222, 230.

141. *Id.* See LAB, *supra* note 92, at "Human Rights" (remarking that the Green Paper's proposals to expand the copyright owner's rights to include the rights of digital transmission, reproduction and viewing could jeopardize Article 10 by infringing on the Community's citizens' basic rights to freedom of expression).

142. Cf. William Webb, *Prodigy to Appeal State Court Decision*, EDITOR & PUBLISHER MAG., June 24, 1995, at 46 (reporting that Prodigy Services Company used software to screen obscenities from reaching their subscribers).

143. See S. 314, 104th Cong., 1st Sess. (1995) (proposing amendments to the U.S. Communication Act of 1934 to prohibit "indecent" material from the information highway).

144. See Saxby, *supra* note 14, at 19 (advising that user access must be considered due to Article 10(1) of the Human Rights Convention). But see *id.* at 41 (explaining that the historic emphasis on "rights" to public information is shifting to a new emphasis on the information's commercial potential); see also *id.* at 19 nn.87 & 89 (citing to Groppera Radio AG and Others v. Switzerland, 12 Eur. Ct. H.R. 321 (1990)); BBC Enter., Ltd., v. High-Tech Xtravision Ltd., 3 All E.R. 257 (1991) (citing to cases where the European courts have not found commercial telecommunication activities to have violated Article 10(1)).

145. See Green Paper, *supra* note 131, at 77 (stating that "[s]ystems of management are most important in order to ensure the healthy development of the information society."). But see *id.* for a discussion of why the Commission emphatically rejects suggestions for implementing compulsory licenses programs. Alternatively, see *Settlement Reached in Music Publishers' Class Action Against On-Line Provider*, PAT.,

terms can aid users in securing permission to use a work and thus reduce infringement specifically, and on-line service provider liability indirectly.¹⁴⁶ Centralized rights management, with an international scope, can compensate for contrasting domestic policies by increasing awareness of nationally defined rights.¹⁴⁷

2. *The United Kingdom (UK)*

Within Europe, the UK has the most Internet users per country.¹⁴⁸ Yet the UK does not have a cohesive national policy regarding use of the Internet.¹⁴⁹ Reports to date have generally focused on the establishment of an information infrastructure, as opposed to detailing policy to regulate the infrastructure once it is in place.¹⁵⁰

Regulation of the Internet's commercial components may be delayed further while the UK assesses its Crown copyright policies. Currently, Crown copyright limits free access to government works.¹⁵¹ However, in the dawn of the information society, this historic practice is restricting the free flow of information via the Internet and, thus, is proving to

TRADEMARK & COPYRIGHT J. (BNA) Nov. 9, 1995, at 48, for a report on the settlement terms that include a licensing agreement between the plaintiff, music publisher Frank Music Corp., and the defendant on-line service provider CompuServe in their recent copyright infringement case.

146. Cf. Green Paper, *supra* note 131, at 76 (proposing that integrated rights management systems will aid in copyright identification and are of value to the new technologies).

147. Cf. *id.* (predicting that users could obtain varied rights information if different societies combined databases and worked together).

148. Kehoe, *supra* note 75, at 13.

149. See Saxby, *supra* note 14, at 34 (noting that a UK policy on the information highway is far from completion).

150. See *id.* at 34 n.107 (reporting that one of the first governmental reports focuses on making public services electronically available). As a result of the new digital environment the 1988 Copyright, Design and Patents Act has already been amended four times. *Id.* at 68. However, libel incidents on the Internet have generated new policy proposals to address the liability of on-line service providers for the libelous statements of their subscribers. See Gibb, *supra* note 5, at 6 (reporting on legislation proposals to excuse on-line providers from liability for libelous statements posted on their bulletin boards).

151. See Michael Prest, *Copyright Row Clouds HMSO Privatization*, GUARDIAN, Oct. 22, 1995, at 4 (explaining that in the UK, most government works are protected by Crown copyright). The government printing office is subject to budgetary regulations that require the office to sell publications for cost or profit. *Id.* This policy prohibits the printing office from making materials available for free on the Internet. *Id.*

be a problematic regulation.¹⁵² The incompatibility of UK Crown copyright policies and the Internet is further highlighted by other governments that are currently using the Internet to disseminate government documents as a means to familiarize their citizens with the Internet.¹⁵³

The government appears uncertain on the proper future for the principles of Crown copyright.¹⁵⁴ Yet, a recent government report¹⁵⁵ conveys concern for intellectual property regulations potential effects on the establishment of the information infrastructure.¹⁵⁶ The report's concerns suggest that the UK may focus more on infrastructure development than on copyright protection.¹⁵⁷ This suggestion gives an indication of future government policy regarding the liability of on-line service providers.

152. See Richard Norton-Taylor, *Internet: Freeing Statutes for the Net*, GUARDIAN, Oct. 19, 1995, at 2 (highlighting the problems Crown copyright presents for British involvement in a national and global information infrastructure). Other nations are bypassing the Crown copyright and putting British information on their bulletin boards. *Id.* Additionally, Crown copyright laws affect the UK's competitiveness on the information highway by hampering development, limiting access, and discouraging user involvement. *Id.*

153. See *id.* (noting that in contrast to the UK, other Crown copyright nations, such as Canada and Australia, have placed free government materials on the Internet to boost the national information infrastructure and encourage public use of electronic telecommunication devices); IHAC, *supra* note 18, at 117 (recommending that Crown copyright policies be interpreted flexibly and that the government ensure universal and easy access to information by placing federal materials in the public domain).

154. See Norton-Taylor, *supra* note 152, at 2 (stating that, at this time, the government is reviewing its Crown copyright laws to accommodate the new information highway).

155. COMPETITIVENESS - FORGING AHEAD, Cmnd 2867 HMSO (May 1995), *cited in* Saxby, *supra* note 14, at 67 n.82.

156. See Saxby, *supra* note 14, at 67 (stating the British government's concern that intellectual property regulations are adversely affecting information highway development).

157. *Id.*

3. *The G7*

Adding to the policies of the EU¹⁵⁸ and the UK,¹⁵⁹ nations such as Australia¹⁶⁰ and Japan,¹⁶¹ as well as collective bodies such as the Berne Convention¹⁶² and the G7,¹⁶³ have issued statements of support for the Internet's development and have broached the subject of determining the permissible interplay between the Internet and intellectual property. These reports, however, do not speak directly to the issue of on-line service provider liability.

At the 1995 G7 Ministerial Conference on the Information Society,¹⁶⁴ the collective body focused on the development of the Global Information Infrastructure, and agreed to support an "international consensus on common principles" for enhancing the growth of the infrastructure.¹⁶⁵ This G7 ideal of international cooperation is essential. Developers of the information infrastructure will have to navigate through the confusing maze that exists within the interplay of national borders, copyright, and cyberspace.¹⁶⁶ In such tumultuous waters, cooperation is essential for survival.

158. Green Paper, *supra* note 131.

159. *Competitiveness - Forging Ahead*, Cm.2867 HMSO (May 1995), cited in Saxby, *supra* note 14, at 67 n.82.

160. See *Australia Considers the Copyright Implications of the Multimedia Age*, MUSIC & COPYRIGHT, Aug. 3, 1994, at 11 (reporting that the Australian government convened a Copyright Convergence Group in January 1994 to examine eleven areas of copyright law in possible need of amendment due to new technologies).

161. JAPANESE INSTITUTE FOR INTELLECTUAL PROPERTY, *Exposure '94: A Proposal of a New Rule on Intellectual Property for Multimedia*, cited in *Preliminary Report*, *supra* note 94, at 3.

162. See JOYCE, *supra* note 14, at 984 (describing the Berne Convention). The Berne Convention for the Protection of Literary and Artistic Works was established in 1886 and is governed by the WIPO, an intergovernmental organization that is a specialized agency within the United Nations. *Id.* at 984-85. The Berne Convention's primary task is to assist in the global protection of intellectual property. *Id.* at 985.

163. G7 INFORMATION SOCIETY PILOT PROJECTS PROGRESS REPORT, June 1995 [hereinafter G7 INFORMATION SOCIETY].

164. G7 Ministerial Conference on the Information Society, Feb. 25-26, 1995, Brussels, Belgium.

165. G7 INFORMATION SOCIETY, *supra* note 163, at 2.

166. See *infra* parts I, IIA-B.

III. INTERNATIONAL HARMONIZATION

The idea of international harmonization is not new to copyright. Since the founding of the Berne Convention for the Protection of Literary and Artistic Works in 1886,¹⁶⁷ nations have been conferring on norms for intellectual property protection. In more recent times, the intellectual property agreements within the North American Free Trade Agreement,¹⁶⁸ and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS),¹⁶⁹ stand as testaments to this practical and viable option.

A. SUPPORT FOR INTERNET HARMONIZATION

As nations develop their domestic Internet policies, they recognize that each national information infrastructure cannot develop in isolation.¹⁷⁰ This is due in part to the Internet's innate characteristic of global expansion. The parallel growth of the domestic and global infrastructures also presents the potential for harmonization of new copyright policies.

At the 1995 G7 Ministerial Conference on the Information Society, the member nations generally agreed on access to Internet services, supported an adaptable Internet regulatory framework, and made it a goal that governments work together to form plans for the future global information infrastructure.¹⁷¹ In support of these goals, the G7 established a "Government Online" project to facilitate access to government information.¹⁷² This inclination toward cooperation in infrastructure de-

167. Joyce, *supra* note 14, at 984-85.

168. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., art. 1701-18, 32 I.L.M. 296.

169. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, April 15, 1994, art. 3, 33 I.L.M. 1, 83-111.

170. See G7 INFORMATION SOCIETY, *supra* note 163, at 4 (establishing a global inventory project to aid development of the information infrastructures); see also Commission Communication, *supra* note 130, at 2 (calling for international discussions due to the global nature of the issue).

171. See Tom Buerkle, *Rivals and Allies Circle the Info-Highway*, INT'L HERALD TRIB., Feb. 21, 1995, at 1 (reporting on the broad GII agreements reached by the G7 members in preparation for their information superhighway summit meeting).

172. See G7 INFORMATION SOCIETY, *supra* note 163, at 33 (summarizing the goals of the Government Online project). The project has three main objectives: to encourage governmental use of electronic communications, to provide users with on-line government services, and to encourage complex electronic transactions. *Id.*

velopment lends ideological support to harmonization attempts for Internet copyright liability laws.

B. SUPPORT FOR HARMONIZATION OF INTERNET RELATED INTELLECTUAL PROPERTY RIGHTS POLICIES

Nations recognize that the harmonization of Internet and copyright policies is necessary for the success of their national information infrastructures.¹⁷³ As an example, the EU is currently harmonizing several copyright regulations within its member nations.¹⁷⁴ The EU deems this harmonization necessary to deter the presently varied protection standards from adversely impacting the information infrastructure.¹⁷⁵

Legal dichotomies between nations are detrimental to all countries.¹⁷⁶ They hamper the international communication network's access to information and its economic growth potential by deterring content providers from exposing their copyrighted materials to the Internet.¹⁷⁷ EU member nations support the harmonization efforts much for the same reasons as the UK,¹⁷⁸ which recognizes that anything less than

173. See *infra* notes 174-75 and accompanying text (providing arguments for the necessity of harmonization). See also *White Paper*, *supra* note 15, at 131, 149 (supporting international harmonization of copyright laws to facilitate Internet transactions and enhance protection of intellectual property rights); Commission Communication, *supra* note 130, at 5 (stating that the WIPO is the correct forum for discussion of Internet and intellectual property protection issues).

174. See Green Paper, *supra* note 131, at 4 (discussing current copyright harmonization efforts). There are currently five directives to harmonize copyright and related rights in relation to computer programs, rental rights, satellite and cable rights, protection terms and protections for databases. *Id.*

175. See *id.* (stating the need for harmonization). The EC deems harmonization of protection policies necessary to avoid obstacles to the development of the information highway. *Id.* These obstacles are identified as: difficulties in gaining permission to use a work; too many restrictions on businesses that may shut them down; prohibition of the free movement of materials; and paralyzing new services. *Id.*

176. See Bangemann Group, *supra* note 128, at 11 (warning that there will be wide-spread repercussions if a unified strategy is not applied to the development of the information highway).

177. See Green Paper, *supra* note 131, at 4 (noting that different protection policies inhibit the free flow of information); Saxby, *supra* note 14, at 26 (drawing attention to the fact that different technological applications are more costly than uniform hardware standards and increase transmission costs); *id.* at 70 (expressing the views of copyright owners by stating that "[t]he initial enthusiasm of publishers and information providers to use the Internet has been tempered by concerns about management of intellectual property rights, security and payment systems.").

178. See Saxby, *supra* note 14, at 67 (commenting that the UK pragmatically real-

harmonization would be detrimental to each domestic information market at a time when the information infrastructure is developing into a pre-dominant component of the national economy.¹⁷⁹

On a scale even greater than that of the EU, the Berne Convention's governing body, the World Intellectual Property Organization (WIPO), agreed in February 1996 to initiate a new Protocol to the Berne Convention.¹⁸⁰ WIPO member nations committed themselves to drafting a protocol to address the impact of new computerized technologies on copyright protection.¹⁸¹ This agreement resulted from the insistence of the U.S. and representatives of the EU, who argued that the new digital environment creates a need for clarification of current terminology and supplemental protection provisions.¹⁸²

The harmonization of copyright policies is also a crucial component of the public service goal to provide all citizens with sufficient access to information on the Internet.¹⁸³ Governments must take notice of the argument that the information superhighway should not become a roadway only for those who "have" at the exclusion of those who "have not", with the median line drawn by economic factors.¹⁸⁴ Disunity of

izes that disharmony within the EU will restrain the information highway). To further support the principle of harmonization, the UK is contemplating initiating a nationwide electronic copyright clearinghouse. *Id.* at 70 & n.126.

179. See *id.* at 17-18 (suggesting that "[a]s the economies of nations become ever more reliant upon the product of the global information industry, attention will focus upon the work of bodies such as . . . (the GATT) . . . in providing access to technology in the form of goods and services through negotiated agreements."). Thus, the current actions of the EU, and the contemporary opinions of legal commentators, suggests that harmonization and international agreement will become an integral part of the information infrastructure due to its international nature and composition. *Id.*

180. *Berne Protocol Expert Committee Calls for Diplomatic Conference*, PATENT, TRADEMARK & COPYRIGHT L. DAILY, Feb. 13, 1996, at D2. Preparations for the protocol are to take place in May 1996 with a proposed text to be presented in December 1996. *Id.*

181. *Id.*

182. *Id.*

183. See *Democracy and Technology*, *supra* note 88, at 21 (reporting that the U.S. Administration has placed over 100,000 documents on the Internet but that other governments are hesitant to be as prolific on the Internet); Tim Jackson, *Time for the UK to Network Public Information*, FIN. TIMES, Apr. 18, 1995, at 15 (comparing the volumes of U.S. and UK government materials on-line and noting the U.S. volume is much greater). Cf. Saxby, *supra* note 14, at 10 (stressing need to harmonize access policies to ensure the global information infrastructure carries a wide breadth of information that will represent different views).

184. See Tucker, *supra* note 103, at 2 (reporting that the G7 is sensitive to do-

laws that result in higher costs for on-line provisions, due to factors such as insurance, indemnification, and litigation costs, cannot occur at the expense of citizen access to the new communication tools.¹⁸⁵ Indeed, the information superhighway has the potential to lower the cost, and increase the volume, of information sources.¹⁸⁶ Legal uncertainties that stymie provisions should not be permitted to hinder these benefits.

C. AN ARGUMENT AGAINST HARMONIZATION

New policy proposals and a push for harmonizing legislation are not the exclusive means for protecting copyright on the information superhighway.¹⁸⁷ The current laws are arguably clear, for the courts have successfully applied them.¹⁸⁸ It is possible, therefore, that judicial interpretation will continue to develop an appropriate body of law applicable to the Internet.¹⁸⁹

mestic discrepancies in the areas of technology know-how and infrastructure development that may add to the rift between the developed and developing countries); Emma Tucker, *EU Slow to Wire Up Democracy*, FIN. TIMES, Feb. 20, 1995, at 13 (reporting that the U.S. has to address the domestic problem of a social divide forming between information haves and have-nots).

185. Cf. Skorneck, *supra* note 70 (citing Ed Black, President, Computer & Communications Industry Association, as saying that a standard of strict liability imposed upon the on-line providers would mean higher costs for subscribers).

186. See *Let the Digital Age Bloom*, ECONOMIST, Feb. 25, 1995, at 16 (reporting that the cost of communicating is decreasing dramatically).

187. See *Preliminary Report*, *supra* note 94, at 27-28 (outlining technological protective measures such as encryption, fingerprinting, tagging, and conversion); Green Paper, *supra* note 131, at 75-78 (discussing the collective options of rights management and licensing for broad copyright protection); *White Paper*, *supra* note 15, at 123 (mentioning copyright protection measures of insurance, indemnification and warranties). See also *Let the Digital Age Bloom*, *supra* note 186, at 16 (arguing governments should not attempt to regulate the Internet at all).

188. See *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding an on-line service provider liable for copyright infringement); *Sega Enter. Ltd. v. Maphia*, 857 F. Supp. 679 (N.D. Cal. 1994) (holding an on-line bulletin board operator liable for copyright infringement). But see *Religious Tech. Ctr. v. Netcom On-line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1371 & n.16 (N.D. Cal. 1995) (noting that the *Playboy* decision has been criticized).

189. See Saxby, *supra* note 14, at 25 (indicating that the information superhighway will be in development for at least thirty years and thus questioning the preference for fast legislative action over the potential for protracted common and civil law development).

The observation that the development of the information superhighway is just beginning, and will continue into the next century,¹⁹⁰ supports the argument raised above. This same observation also supports those who question if an impetus for urgent harmonization of policies is preferable given the option of allowing courts to develop laws over time, without interpretation of legislative policies that are not supported by practice and experience.¹⁹¹ Furthermore, 80% of the planet's population currently lacks access to basic telecommunications technology.¹⁹² This calls into question whether the end of the millennium is the appropriate time to harmonize legal systems for the global information infrastructure, since only 20% of the world population is participating.

The actual willingness and motivation of the potential harmonizing parties is also questionable. For example, in the National Information Infrastructure Advisory Council's¹⁹³ report, entitled *Fundamental Intellectual Property Principles*,¹⁹⁴ the Council argues in favor of harmonization, but only insofar as it is consistent with U.S. interests.¹⁹⁵ Harmonization, by its very nature, demands compromise. Participation could result in nations losing their ability to direct market policies through economic domination.¹⁹⁶

190. *Id.*

191. *See generally* Hearings 2d Sess., *supra* note 70, at 41 (statement of Edward P. Murphy, National Music Publisher's Association, Inc.) (arguing that courts are the proper forum for determination of copyright liability due to ever changing fact scenarios); Skorneck, *supra* note 70 (citing Jack Valenti, President, Motion Picture Association of America, as saying he opposes new copyright legislation to alter the liability standards because he views it as too rapid a change in unknown territory with unknown consequences he believes will be damaging to copyright protection).

192. Saxby, *supra* note 14, at 25 n.14.

193. *See* Carolyn Lochhead, *Silicon Valley CEO Named to U.S. Panel*, S.F. CHRON., Jan. 7, 1994, at A11 (reporting that President Clinton established the NII Advisory Council, which is comprised of members from the private sector, to balance the federal inter-agency IITF).

194. NII Advisory Council, *Fundamental Intellectual Property Principles*, cited in Saxby, *supra* note 14, at 30.

195. *See id.* (interpreting the NII Advisory Council report). The U.S. may support this position by arguing that the national proposal regarding on-line service provider liability is the only one supported by case law. *See supra* note 107 and accompanying text (noting that, to date, Canadian courts have not adjudicated an on-line copyright infringement case). *But see supra* notes 37-41 and accompanying text (noting that U.S. courts have not applied the Working Group's definition of on-line service providers); *see also supra* notes 109-11 and accompanying text (citing the *Netcom* ruling that questions the current U.S. liability standards for on-line service providers).

196. *Cf.* Saxby, *supra* note 14, at 67 n.80 (drawing attention to the fact that in

IV. RECOMMENDATIONS

All national copyright liability laws must confront the challenges facing them as a result of Internet transmissions. The Internet's global and decentralized features render the existing laws (which operate within domestic borders and focus on centralized control) impractical to address contemporary circumstances.¹⁹⁷ The best solution to this crisis is a modification and harmonization of domestic laws to incorporate a standard of contributory liability which includes a statutory defense for the on-line service providers facing infringement charges due to their subscribers' actions.¹⁹⁸

The on-line service providers should have a statutory defense against infringement claims if they prove a lack of knowledge, and demonstrate attempts to limit the distribution of infringing material when notified of its presence on the electronic bulletin board.¹⁹⁹ A provider reasonably lacks knowledge of the infringement when there is no copyright notice on the work in question, or the copyright owner does not notify the bulletin board provider of the alleged infringement before claiming the provider liable.²⁰⁰ The provider may also constructively lack knowledge of the infringement when there is reasonable support for a finding of fair use.²⁰¹ Upon knowledge of the infringement the provider should

1991, the European market for on-line information services was one third that of the U.S.).

197. See Clinton Wilder & Kate Maddox, *Getting Established on the Web is More Risky than You'd Think*, INFO. WEEK, Jan. 8, 1996, at 14 (noting that businesses are hesitant to use the Internet because its global reach calls into question which of the applicable legal standards to follow in operating on the Internet). The global reach of the Internet also generates concerns of unwanted exposure to multiple jurisdictions in potential disputes. *Id.*

198. See *IHAC Report*, *supra* note 18, at 120 (recommending a standard of contributory liability for on-line service providers with liability excused when there is a lack of knowledge and evidence that the provider attempted to prevent infringement).

199. *Id.* See also *Hearings* 2d Sess., *supra* note 70, at 16-18 (statement of Congressman Boucher) (stating that strict liability should not apply to the on-line service providers but that when the provider knows of the infringement and can eliminate it from the bulletin board, the law should hold them to this task).

200. *Religious Tech. Ctr. v. Netcom On-line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1374-75 (N.D. Cal. 1995).

201. *Id.* See 17 U.S.C. § 107 (1988 & Supp. V 1993) (limiting the copyright owner's exclusive rights when a work is used for specified, non-commercial purposes that do not damage the work's market value). See *NIMMER*, *supra* note 62, §§ 13.05, 13-152 (explaining that fair use is a court derived defense that was not codified until 1976 and is a defense extremely dependent upon the facts of each case).

attempt to limit the distribution of the alleged infringing material, by removing the material from the bulletin board.²⁰² This standard of contributory liability is a workable balance of protection for copyright owners and continued access for Internet users.²⁰³ This balance is achieved by engaging the provider's assistance in limiting infringement, but not requiring that the provider insure against liability by prescreening material and undoubtedly reducing permissible Internet content in the process.

Domestic implementation of this standard is feasible for both the U.S. and Canada. The Canadian Parliament should amend section 27(3) of the Copyright Act²⁰⁴ by adding thereto Recommendation 6.16, as drafted by the Information Highway Advisory Council in their final report.²⁰⁵ To implement this same standard, the U.S. Congress should amend section 501(a) of the Copyright Act of 1976,²⁰⁶ excluding owners and operators of electronic bulletin board systems from the infringer classification. The amendment should stipulate that exclusion is contingent upon the owner or operator lacking actual or constructive knowledge that a subscriber has uploaded or downloaded infringing material to or from the electronic bulletin board system. The exclusion should apply only when the owner or operator acts reasonably to limit potential copyright abuses upon notice, or constructive notice, of the alleged infringement.

Canadian incorporation of the proposed liability standard would not create a dichotomy within the Copyright Act, because the Act currently excuses innocent indirect infringers from copyright liability.²⁰⁷ In con-

202. *Religious Tech. Ctr. v. Netcom On-line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1374-75 (N.D. Cal. 1995).

203. *IHAC Report*, *supra* note 18, at 36.

204. *The Copyright Act*, R.S., ch. C-30, 1985, *as amended* R.S., ch. 15, § 27(3) (1988).

205. *IHAC Report*, *supra* note 18, at 120. Recommendation 6.16 specifies:

No owner or operator of bulletin board systems should be liable for copyright infringement if:

- a. they did not have actual or constructive knowledge that the material infringed copyright; and
- b. they acted reasonably to limit potential abuses.

Id.

206. See 17 U.S.C. § 501(a) (1994) (defining the term "anyone" as "all individuals and state government bodies."). See also 17 U.S.C. § 101 (1994) (providing definitions which should be amended to include the terms "electronic bulletin board;" "upload;" and "download").

207. *The Copyright Act*, R.S.C. ch. C-42, 1985, *amended by* R.S.C. ch. C-15, § 27(4) (1988).

trast, an amendment to section 501(a) of the U.S. copyright statute would be the only liability exemption for identified infringing activity, and would thus create a discrepancy within the Copyright Act.²⁰⁸ This discrepancy, however, is the practical result of technological invention. It is unreasonable to assume that the same standards can be applicable to both centralized and decentralized modes of distribution.²⁰⁹

In this vein it is pertinent to note that the Copyright Act of 1976 contains internal variances that accommodate prior technological developments. For instance, the statute makes certain allowances for coin-operated phonorecord players,²¹⁰ satellite carriers,²¹¹ semiconductor chips,²¹² and digital audio recording devices.²¹³ The recommended amendment to section 501(a) would thus be a furtherance of past statutory modifications which Congress deemed necessary to keep the Copyright Act applicable and enforceable.

International harmony is an invaluable component of the recommended standard. Harmony is arguably necessary to insure that the providers do not covet the most stringent domestic criteria as a *de facto* standard to insure against all potential liability claims, and restrict Internet content in the process.²¹⁴ The inherent workings of the Internet, enabling it to transcend national boundaries and confining it to no one domestic governor, add impetus to the argument for harmonization. These features illustrate the international characteristic of the Internet, and thus the need for an international solution to the problem of appropriate liability for on-line copyright infringement.²¹⁵

208. See generally NIMMER, *supra* note 62, §§ 13.08, 13-289 (explaining that under the U.S. Copyright Act innocence is not a defense to infringement liability).

209. Hearings 2d Sess., *supra* note 70, at 273-77 (statement of Scott Purcell, President, HLC Internet Inc.) (testifying that the Internet is unique, and that, unlike a bookstore, it cannot select in advance the material it supplies because subscribers are located internationally and there is no centralized server which could realistically screen or organize material in advance of its transmission).

210. 17 U.S.C. § 116 (1994).

211. 17 U.S.C. § 119 (1994).

212. 17 U.S.C. § 907 (1994).

213. 17 U.S.C. § 1008 (1994).

214. Cf. *supra* notes 1, 4 & 7 and accompanying text (discussing the potential *de facto* on-line standards for pornography and sexual material due to the CompuServe incident in Germany and the Thomas case in the U.S.).

215. Cf. David Johnston, *Cracking Down on Cybercrime*, MONTREAL GAZETTE, June 18, 1995, at A5 (reporting on an Interpol agreement that commits forty countries to the creation of a new committee on cybercrime); *U.S. Customs Warns Against Kid Porn on BBS*, NEWSBYTES NEWS NETWORK, Nov. 28, 1994, available in 1994 WL

To advance the prospect of an internationally recognized standard of contributory liability for on-line service providers, Canada should present the Information Highway Advisory Council's Recommendation 6.16²¹⁶ to the WIPO in light of its current new protocol deliberations.²¹⁷ The Berne committee of experts' 1996 protocol deliberations must confront the ramifications of global Internet transmissions. The committee should include, in its final protocol proposal to the voting diplomatic conference, an amendment to article 5, section 2, of the governing Paris Text of July 24, 1971.²¹⁸

The proposed amendment should include an exception to the protection standards governing the author's rights in relation to the owner or operator of an electronic bulletin board service. The amendment should stipulate that no author may hold an owner or operator directly liable for the infringing actions of a bulletin board subscriber. Additionally, an electronic bulletin board owner or operator may only be held contributorily liable if: the owner or operator had knowledge or constructive knowledge of the alleged infringement and did not act to prevent further infringement; or the owner or operator had notice or constructive notice of the alleged infringement but did not act to limit it. Admittedly, if adoption of the proposed amendment occurs before member nations modify their domestic laws, the new Berne protocol would be in conflict with Article 19 of the Paris Text²¹⁹ and, as an example, section 2 of the U.S. Berne Convention Implementation Act of 1988.²²⁰ However,

3222631 (illustrating international cooperation by explaining how U.S. Customs Agents have notified authorities in the UK, Sweden, Switzerland, Holland, Norway, and Mexico, regarding their nationals' violations of child pornography laws over the Internet).

216. IHAC, *supra* note 18, at 120. Cf. *Berne Protocol Expert Committee Calls for Diplomatic Conference*, *supra* note 179, at D2 (highlighting the practice of member nations to present their domestic proposals to WIPO by referencing the current EU proposal before WIPO for *sui generis* protection of databases and the U.S. proposed new definition of "transmission" that is derived from the U.S. White Paper).

217. See *supra* notes 180-82 and accompanying text (introducing the new protocol to the Berne Convention).

218. See The Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 5, § 2 (delineating author's rights of protection based upon the principle of national treatment).

219. See *id.* art. 19 (declaring the Berne Convention shall not override higher domestic protection provisions).

220. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853, § 2 (codified at 17 U.S.C. § 101 (1994)) (declaring the U.S. will adhere to the Berne Convention in so much as adherence to Berne does not conflict with domestic laws).

again using the U.S. as an example, Berne member nations have previously made adjustments to their domestic laws to comply with Convention provisions.²²¹ Hence, a potential conflict of laws caused by the recommended amendment may be addressed either in a proactive or retroactive manner.

In the alternative to the recommendation of domestic modification and international harmonization, individual countries can maintain the *status quo* and apply national treatment to incidents of copyright infringement.²²² Yet, this alternative fails to clarify the current disparities in the law, or address the Internet's features of international scope and breadth that assist the individual user in initiating transnational transmissions instantaneously.²²³ Likewise, a third option, classifying the on-line service providers as common carriers and thus excusing them from all liability, also fails.²²⁴ This failure is due to the option's preference for on-line providers, and thus its rejection of the needed balance between Internet users and copyright owners. The continued success of both the communication and intellectual property markets requires a balance between the competing interests.²²⁵

Given the alternatives,²²⁶ a standard of contributory liability, with

221. See *id.* §§ 4, 5, 7, & 9 (providing for new architectural protections; striking recordation requirements; striking notice requirements; and striking registration requirements to comply with the Berne Convention).

222. See *White Paper*, *supra* note 15, at 148-50 (advocating the application of national treatment to the digital environment).

223. See *id.* at 150. The report follows the national treatment argument and notes that there is a need for one, clear definition of "transmissions." Elkin-Koren, *supra* note 78, at 401 (arguing that electronic bulletin boards are decentralized, enable individuals to communicate directly, and abolish the traditional mode of intermediary distributors).

224. See *White Paper*, *supra* note 15, at 122 (dismissing the classification of on-line providers as common carriers); *IHAC Report*, *supra* note 18, at 37 (denying on-line providers the status of common carrier). But see *V Chip Vote Predicted*, COMM. DAILY, Aug. 1, 1995, at 2 (reporting that Senator Exon, the author of the "Communications Decency Act" S. 314, 104th Cong., 1st Sess. (1995), stated his bill would grant the on-line service providers common carrier status); Mike Mills, *Telecommunications Bill Passed*, WASH. POST, Feb. 2, 1996, at A1 (reporting that the new telecommunication bill includes provisions that excuse the on-line providers from liability for indecent transmissions if they are found akin to common carriers by only transmitting the message).

225. See *IHAC Report*, *supra* note 18, at 36 (stressing the need for a balance between copyright owners and Internet users).

226. See generally *Hearings* 2d Sess., *supra* note 70, at 279 (statement of William J. Cook, firm of William, Brinks, Hofer, Gilson, Lione) (arguing for an increased lia-

defense recourse, is the best application of copyright law to infringing Internet transactions. Adherence to this plan admittedly requires some nations to reduce their current copyright protection levels.²²⁷ Yet, maintenance of direct liability standards, or standards without a statutory defense, are not responsive to the unique distribution chain of the Internet.²²⁸ Given the volume of data, the expansive growth rate and the international make-up of the subscribers, the Internet is not akin to previous examples of centralized distribution in which accountability was, and is, more easily determined.²²⁹

The proposed contributory liability standard's leniency towards on-line service providers is debatable. Reference to current U.S. case law does not suggest, however, that the proposed statutory defense provisions²³⁰ are easily satisfied, and thus in practice, will naturally transpire into a de facto exclusion of the defendant from all liability claims. In *Religious Technology Center v. Netcom On-line Communication Services, Inc.*,²³¹ the defendant argues that the court's defense criteria (requiring a lack of knowledge and action upon notification of the infringing material) are too stringent for practical compliance.²³² Prior to a final holding in *Netcom*, Judge Whyte indicated that when the alleged material contains a copyright notice, and the server is made aware that alleged infringing

bility standard that would require the on-line providers to remove infringing material under the rationale that they are the actors best situated to police copyright infringement on the Internet); *id.* at 235 (statement of Stephen M. Heaton, General Counsel and Secretary, CompuServe, Inc.) (favoring a complete exemption of on-line service providers from copyright liability with no requirement upon them to delete alleged infringing material on the grounds that determination of infringement is difficult and should be left to the courts, not imposed upon the on-line providers). *See also* Richard Raysman and Peter Brown, *Internet Copyright Developments*, N.Y.L.J. Jan. 9, 1996, at 3 (reporting on the alternative proposal for a "Digital Mediation Board" that would be comprised of copyright experts who would attempt to resolve disputes quickly, on-line, and use the judicial system only as a final recourse).

227. *See* 17 U.S.C. § 504(c)(2) (1994) (reducing, but not excusing, liability damages when the infringer is innocent).

228. *See* Elkin-Koren, *supra* note 78, at 404 (arguing contemporary standards of liability are not responsive to the decentralized characteristics of the on-line service providers).

229. *Id.* *See supra* notes 2, 14 & 79 (providing general information regarding the Internet's scope and growth rate).

230. *See supra* notes 198-201 and accompanying text (outlining defense provisions).

231. 907 F. Supp. 1361 (N.D. Cal. 1995).

232. *Netcom*, 907 F. Supp. at 1374-75.

material is on a bulletin board, noncompliance with the provisions renders likely the court's finding of liability.²³³

Critics of this contributory liability standard are reminded that this proposal in no way prohibits the copyright owner's recourse against the infringing subscriber. In addition, this legal standard is likely to be supplemented by alternative monitoring agreements, and technological devices, that will increase the protection available to copyright material on the Internet.²³⁴ By providing a practical solution to competing interests, the international harmonization of a contributory liability standard for on-line service providers will help to build the necessary balance between copyright owners, Internet users, and Internet providers.²³⁵ A clear and universal standard, coupled with a clarification of terms, will dissipate confusions, assist in administration, and support the forecasted growths of both intellectual property and the information infrastructure.²³⁶

CONCLUSION

The pertinent question facing copyright law since the advent of the Internet is: Exactly what are the legal parameters of this new environment? This question challenges the existing copyright laws, and threatens to paralyze Internet advancements, if an answer is not provided soon.²³⁷ The best answer to this puzzlement is one that modifies all

233. *Id.* at 1381.

234. See *supra* notes 4 & 226 (outlining various methods for on-line copyright protection). See also Christine Wolff, *Schools Policing Internet Use*, CINCINNATI ENQUIRER, Jan. 5, 1996, at C3 (reporting that schools are requiring students to agree to usage policies before granting them Internet access and are supplementing the policies with technological "fire-walls" that block "inappropriate" material available from the Internet provider); Richard Raysman & Peter Brown, *Internet Copyright Developments*, N.Y.L.J., Jan. 9, 1996, at 3 (detecting plagiarism of digital images is technically possible as is the ability to electronically code material to alert the copyright owner when illegal copying occurs); Robert T. Haslam and Thomas P. Maliska, *Encryption Ensures Privacy of Online Expression*, NAT'L L.J., Feb. 12, 1996, at C13 (explaining that encryption can be used in on-line publication to restrict access to the work and protect copyright interests).

235. See *IHAC Report*, *supra* note 18, at 36 (requiring that new policy proposals provide a balance between copyright owners and Internet users).

236. See Green Paper, *supra* note 131, at 3 (asserting that expansion of the information superhighway will require cohesion at the international level); *id.* at 4 (citing the EU Directive on database protection as an example of the level of harmonization needed within intellectual property to keep it viable in the digital age).

237. See *id.* at 7-10 (noting that the GII will face obstacles if copyright cannot

current copyright laws to implement the Canadian standard of contributory liability²³⁸ for on-line service providers. When Internet subscribers cross the legal meridian and infringe the rights of copyright owners by posting copyrighted material on electronic bulletin board services without authorization, on-line service providers should not be held directly liable.

This legal standard provides both breadth and continued protection in the international environment that both the Internet and intellectual property share. Ideally, some countries would prefer not to alter their current laws and instead maintain the *status quo*.²³⁹ However, given the Internet's far reaching political, cultural, economic, and social ramifications, compromise of some kind seems inevitable.²⁴⁰ The most significant impact of this proposal for change is its apparent reduction in copyright protection within some nations.²⁴¹ Yet, the practical applications of the new laws will earn them respect and adherence, which is more conducive to overall protection than impractical regulations ignored in the face of realistic practices.²⁴²

Finally, copyright material is not the only driver on the information superhighway. As the roadway expands, other vehicles (i.e., commercial transactions and illegal pornographic transmissions) will demand regulations, too.²⁴³ Inevitably, the information superhighway will have a "speed limit" to facilitate its use and provide protection for all. Copy-

move freely). See also Wilder, *supra* note 196, at 14 (reporting that businesses are hesitant to establish Internet sites due to fears of potential copyright liability they could incur if members of the general public transmit infringing material to the business without their advanced knowledge or consent).

238. See *IHAC Report*, *supra* note 18, at 120 (recommending contributory liability with a statutory defense as the standard for on-line service providers' copyright liability).

239. See *White Paper*, *supra* note 15, at 122 (stating it is too soon to contemplate reducing the liability standards for on-line service providers).

240. See Elkin-Koren, *supra* note 78, at 348-49 (arguing that contemporary standards of copyright liability will have a negative effect on the "new opportunities for social dialogue.").

241. See 17 U.S.C. § 504(c)(2) (1994) (denying excusal from liability for a defense of innocence).

242. Compare *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (applying current copyright law to an on-line service provider) with *Religious Tech. Ctr. v. Netcom On-line Comm. Servs., Inc.*, 907 F. Supp. 1361, n.16 (N.D. Cal. 1995) (noting criticism of the *Playboy* decision).

243. See Meyer, *supra* note 4, at 65 (discussing general regulatory measures on-line service providers are pursuing to limit transmissions of pornography).

right law should be at the light when it turns green instead of being stuck in the traffic jam.