Speech Notes for an Address to the Canadian Bar Association (Ontario)

The Liabilities of Internet Service Providers - and what we plan to do about them

by

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The views expressed in this speech are those of the author and do not reflect the views of the Canadian Association of Internet Providers, except to the extent that previously approved documents or positions of CAIP are cited.

Thank you for the opportunity of speaking tonight. I was advised to stick to what I know, and so this will necessitate a brief speech.

There was a story told by the head of the legal section of a large on-line service provider about a new lawyer he had just hired. She said "I don't know anything about Internet law". He said "don't worry; there only two cases, you can read them in an afternoon, and they contradict each other." He was referring of course to Stratton Oakmonth versus Prodigy and Cubby v. Compuserve .

You can learn all about the law of the Internet in an afternoon, in one sense. In another, the Internet gives rise to some delicious legal and regulatory issues about which society will be debating for years to come. These include the possibilities for economic and moral regulation of the Internet, as well as determining the legal rights in new forms of property. The previous speakers, Simon Chester and Lesley Harris, have given a thorough review of the "propertarian " aspects of Internet issues and there is nothing I can add to what they have said.

I shall try to limit my remarks to those aspects of the Internet that relate to speech and communication.

I shall start with the basics. CAIP is the Canadian Association of Internet Providers, an industry association which has gathered the major Internet service providers. Currently we number about forty five (45) members, including the Stentor telephone companies, the larger independent Internet service providers, hereafter referred to as ISP's, and several major cable companies. We have regional national and local members.

An Internet service provider runs a simple business. You lease lines from the telephone companies to provide dial access from the telephone company's switches. You lease dedicated high capacity optical fibre pipes from companies like Sprint or MCI that allow access to the Internet from your central office. In that respect ISP's are customers of telephone companies, performing a value-added service.

The customer supplies himself with the access to the telephone company through his own leased lines. While the customer may soon have other options, including cable, local radio-based access, or even satellite access, for the moment, the telephone companies control the facilities that allow mass market access to the Internet.

Second, the ISP supplies the customer with a disc of software that enables him to use the Internet, and supplies on-line support staff to explain the many difficulties that inevitably arise when users accustom themselves to vast amounts of new software without the benefit of explanatory books.

Third, the ISP can offer other services, such as for instance, the development of web-pages for customers. Large

ISP's may also be developing other services, but they have not been announced yet and I know nothing about what they might be.

CAIP was founded last year because it was felt that Internet Service Providers would need the ability to act collectively for common purposes. And in this the founders were right. The ISP, and the Internet generally, has attracted the attention of every tax-collector known to man, including the copyright lawyer, the subsidizer of Canadian broadcasting, and the subsidizers of local telephone calls. Because it is the cheapest form of world-wide publishing yet developed, it has also attracted the attention of the upholders of various orthodoxies realize that this medium allows the propagation of heresy, pornography, and thoughtcrime outside the control of traditional broadcasting or publishing regimes.

Again, let's look to some other basic facts. While 30% of Canadian households possess a computer, only some 8% of households report that the Internet was accessed from home. (Stats Can household facilities survey 1996). A telephone survey of 2,600 Canadians taken in September by International Data Corporation (Canada) Ltd. showed that residential access 8.9%, school access 4.9% and access from work 8.8%. IDC calculates that household access will rise to 10.5% by the end of this year and 30.5% by the end of the year 2000. Compare this to the fact that the telephone was invented in the 1880's and that telephone penetration rose to the thirty percent level only around the 1930's.

Access to the Internet was made possible by the three important developments: the cheap computer, a somewhat deregulated and largely competitive telephone system, and the invention of protocols that allow computers to talk to one another.

In policy terms the most important decision was to break up AT&T. Without the stimulus of competition, the Internet might remain the preserve of scholars in subsidized environments. Without the cheap computer, there would not be the physical apparatus to make it possible, and without TC/IP protocol from Tim Berners-Lee of CERN, and others like it, such as JAVA, the computers could not link.

Computers have been invented, and nothing can be done to make them stop communicating. But compare the computer's communicating capacity to the miserable conduits through which signals must pass to reach the Internet. My modem is 28.8 kilobits per second. My computer runs on hundreds of millions of bits per second. Three to four orders of magnitude separate the internal speed of my computer from the speed of the device through which it communicates to the outer world. Computers are a bit like the great English physicist Stephen Hawking, forced to communicate to the world through wholly inadequate bodies. This amazing device on my desktop is still communicating through a wire whose basic characteristics were laid down in the time of Queen Victoria!

The Internet is therefore only the first stage of the linking of people through computers. It is the first manifestation of what happens when communications media are fully computerized. If this is what can be done over modems running in the thousands of bits per second, imagine what can be done when the whole network is one vast series of linked nodes of intelligence, pulling down information and processing power to any place on the globe. The desktop computer as such may dissolve back into the network: and we will be wholly indifferent as to where the intelligence is located so long as it works for us.

Vinton Cerf, the guy who runs the Internet operations for MCI, the US long distance operator, expects there to be 300 million nodes on the Internet by the end of the year 2001. This is three hundred million potential websites, publishers, libraries, parallel processors, and television broadcasters. Or as I have said: imagine a world where every telephone number is a potential broadcaster. I think you get the point. There seems to be no scarcity here to regulate.

So let us turn to some imaginary questions that government might think need answering.

Q. How will the Internet affect the future of your organization?

A.The Internet, understood as the linking of computers to each other over ever better communications devices, will continue to revolutionize how you do work, what work is, how you entertain yourself, whether your organization will continue to exist, and whether your trade or business has power. The Internet is everything you can think. Like Mozart, it cannot be overrated.

Q. What is the appropriate role for governments in the ongoing development of the Internet?

A. Government should provide a stable and transparent legal structure in which the ability of people to communicate with one another cheaply and freely through computers will be assured to the extent that technology and markets permit.

Q. What additional measures are needed to address concerns about things such as rates charged by service suppliers, standards, or content issues (e.g. Canadian content, pornography, libel, liability)?

A.

1. rates for access will be set in increasing competitive conditions, as wired and wireless options expand. Current telecommunications policies in this regard are moving in the right direction.
2. Standards will be set cooperatively. The Internet runs on protocols that took no government to create or enforce.
3. The existence of Canadian content is guaranteed by the presence of Canadians on the Internet: we do not worry about Canadian content on the telephone system as Canadian speakers provide the content. If something like programming content that we associate with broadcasting needs to be supplied, then existing subsidy mechanisms, such a Telefilm and the CBC, can provide such content.
4. As to other forms of content, CAIP has no objection to the publishers of material being held responsible for their speech and publications. We simply insist that ISP's are transparent conduits, and as such have the same liabilities as telephone companies for the traffic passing through our routers.

Q. What measures are needed to ensure that public good applications, such as education, health, public safety, figure prominently in the development of the Internet in Canada?

A. I am not sure that anything need be done that cannot be done by the institutions themselves. As Internet access depends on cheap computers and cheap bandwidth, and both result from competitive market conditions, public goods will flow from the widespread availability and use by public institutions of the Internet. If the government finds ways to broaden citizen participation by use of the Internet, or lever its production of Internet documents into some national good, who could object? But the government has no special role to play in fostering some uses of the Internet at the expense of all others, as subsidies would imply.

Q. Should the ISP industry consider special rate structures for public institutions like schools and hospitals?

A. No. CAIP opposes social subsidies for transmissions for special institutions. Government can act to keep bandwidth cheap, by allowing for competition in delivery systems, and computers can be relied upon to become ever cheaper. The rest will follow. Subsidies are always elements of distortion that cause the "need" for regulation.

Q. How can the Internet provide more information and services in the French language?

A. It can't. The entity called the Internet provides nothing. People using the Internet provide materials in their own language, if they so choose. Internet access is slightly lower for French language speakers in Canada (~13%), from all sources, then it is for English language speakers (19%), and it is lower for them than for those in Canada whose primary language is other than either (22%). So what?

Q. Regarding the application of existing legislation:

- *Should content services delivered by the Internet and or ISP's be subject to the Broadcasting Act?*
- *Should ISP's be regulated as common carriers under the Telecommunications Act?*

A. To the question whether we *should* apply the Broadcasting Act, I can only say that this is absurd, and as to whether broadcasting regulation could be made to apply, I can only say that it would be impossible. Where is the scarcity that would make regulation effective, even if it were legal and constitutionally possible? If every telephone number or IP address in North America is a potential source of programming, and there are billions such numbers, where is the antenna that government can take down? What is it that you can effectively padlock? What is the entry barrier that gives a licence any economic value? What scarcity rent can be extracted from an endless supply of

cheap bandwidth?

As to the question of whether we should apply the Broadcasting Act, I can only say that it is to misconstrue the nature of the technology in a quite fundamental way. I realize that much ink will be spilled on this question as to the constitutionality of applying the Broadcasting Act to the Internet, and I shall be doing my share presently. But one thing stands out clearly from two recent cases where the Courts have had to consider the real nature of technologies in order to ascertain constitutional issues. I refer to the Alberta Government Telephones (AGT) case, where the Supreme Court in 1987, and the Canadian federal courts before them, had to consider the nature of the telephone system and determine whether jurisdiction over it could be divided along the lines of intraprovincial-extraprovincial traffic. And I refer also to the recent case of *ACLU v. Reno* where the US Federal Court of Appeals had some fundamental observations to make of the Internet.

In both cases, the approach of the Court was to take evidence concerning the nature and operations of the system under consideration. The technology was examined in depth. In the Canadian case regarding telephones, the examination of the technology of telecommunications revealed clearly that they were "connecting undertakings" within the meaning of the exception to provincial powers in section 92 of the Constitution Act, 1867. The same logic was applied to find that even wholly intraprovincial telephone companies were "connecting undertakings" in the Guèvremont case a few years later. If I had been able to collect $50 from every telecom bureaucrat who said that the feds would never gain full jurisdiction over Canadian telecommunications, either because they would settle, or that the law was not on the federal side, I could feed you all with French champagne for two hours.

In the case of the Internet, I refer to Mr. Justice Dalzell's remarks in ACLU v. Reno, to the effect that "First Amendment jurisprudence compels us to consider the special qualities of the new medium in determining whether the Communications Decency Act is a constitutional exercise of governmental power", and as to the Internet itself, he found

"First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical to both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers."

I could think of no greater contrast with the over-the-air broadcasting system than this. And that is why, when all the recondite legal arguments regarding spectrum scarcity, treaty-making powers, POGG, and video-on-demand are finished, the learned justices of this land will click their mice on to the Internet and discover for themselves that this is no broadcasting system.

Q. Regarding the application of existing legislation:

- *Should ISP's be regulated as common carriers under the Telecommunications Act?*

A. No. Common carriers have obligations to serve which are irrelevant in a competitive environment where ISP's do not control access to bottleneck facilities. In fact, the Telecommunications Act excludes ISP's from the Act entirely.

Q. Should ISP's be held liable for content delivered over their networks or are they just providing a transparent conduit?

A. They are a transparent conduit.

Q. Should ISP's be liable for the content stored on their servers or their customers' servers?

A. Not in general. Anyone who has stood in the middle of a room full of electronic boxes and listened to the hum of traffic can tell you that there is little point in making the ISP liable for stored information. In CAIP's view, the ISP should be liable to take such actions as are required by law to bring his content into conformity with the law, to the extent he is informed by proper authorities of this content and validly required to take legally sanctioned action. A general liability for content on one's servers - content that one has not edited or created - would serve no purpose.

As to content that one has created or edited, then one should have all the normal liabilities of publishers and writers.

Q. If no, who should be liable for illegal content on servers and what are the appropriate mechanisms to deal with it? Do existing laws need modifications to address these concerns?

A. The authors and publishers of web pages should be responsible for the content of same. ISP's are not to be liable merely because offending or illegal materials happen to be stored, cached or transferred through their routers and servers. To this end CAIP has developed and approved a Code of Conduct that is essentially complaint-driven, and which we believe respects the interest of society in a lawful social discourse, and that of speakers for free speech.
