A Torrent of Copyright Infringement?
Liability for BitTorrent File-Sharers and File-Sharing Facilitators Under Current and Proposed Canadian Copyright Law

Allen Mendelsohn

Faculty of Law
McGill University
Montreal

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ABSTRACT

[Le résumé français suit l'anglais.]

BitTorrent has become the primary means to share large files (movies, television shows, and music) over the internet. Canadian copyright law and jurisprudence have not kept pace with technology, and as a result there is no definitive pronouncement on the liability for copyright infringement of BitTorrent file-sharers, i.e. users, and file-sharing facilitators, i.e. Internet Service Providers (ISPs) and torrent search engines. Extrapolating from existing law and Canadian and foreign jurisprudence, I conclude that: (i) BitTorrent file-sharers are liable although there may be situations where fair dealing could apply; (ii) it may be possible to show ISPs are liable based on certain findings of fact; and (iii) torrent search engines should not be liable for infringement. There have been three successive attempts to reform copyright law that have addressed internet issues generally and file-sharing in particular. Under the most recent attempt, Bill C-32, file-sharers would be liable under the new "making available" right, and file-sharing facilitators could be liable under the new "enabling" concept of secondary infringement introduced with the bill.

RÉSUMÉ

BitTorrent est devenu le principal moyen de partager des fichiers volumineux (films, émissions de télévision et musique) sur Internet. La loi canadienne sur le droit d'auteur et la jurisprudence n'ont pas suivi le rythme de la technologie, et conséquemment, on ne s'est pas prononcé définitivement quant à la responsabilité pour la violation des droits d'auteur des personnes partageant des fichiers par *BitTorrent*, i.e. utilisateurs, et facilitateurs de partage de fichiers, i.e. fournisseurs de services Internet (FSI) et moteurs de recherche *torrent*. En extrapolant à partir de la loi existante et de la jurisprudence canadienne et étrangère, je conclus que : (i) les personnes partageant des fichiers par *BitTorrent* engagent leur responsabilité quoiqu'il pourrait y avoir des situations où une utilisation équitable pourrait être justifiée; (ii) il peut être possible de démontrer que les FSI sont responsables en se fondant sur certaines constatations de faits; et (iii) les moteurs de recherche *torrent* ne devraient pas être tenus responsables des violations. Il y a eu trois tentatives successives de réforme de la loi sur le droit d'auteur qui ont traité de façon générale des questions reliées à l'Internet et du partage de fichiers en particulier. En vertu de la tentative la plus récente, le projet de loi C-32, les personnes partageant des fichiers seraient responsables sous le nouveau droit «de mise à la disposition» et les moteurs de recherche *torrent* et les FSI pourraient être responsables en vertu du nouveau concept de violation secondaire de «faciliter» introduit par ce projet de loi.

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1.0 INTRODUCTION

The internet has been described as the "Wild West" by authors and pundits too numerous to mention.[1] The Wild West evokes images of lawlessness, of no authority; of a place where the participants make their own rules. The metaphor is used in a variety of circumstances in regard to the internet. From hate speech of all forms to pornography of all forms to electronic mail scams of all forms, the internet makes activities that may be especially heinous in the "real world" easy, quick, and mostly anonymous. Nowhere is it more significant than in the downloading of copyrighted materials.[2]

Imagine the individual who walks into his local record shop or video store and tucks a DVD of the latest Hollywood blockbuster under his shirt and walks out. There is no doubt in everyone's mind that this is theft, pure and simple. Yet the same thing is happening every second on the internet. Individuals are downloading that latest Hollywood blockbuster and watching it on their computers or other media devices, or serving it up on their televisions, just like

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[1] For an example of the use of this metaphor by no less than the House of Lords, see U.K., H.L. (Science and Technology Committee), "Personal Internet Security", 5th Report of Session 2006-2007, HL Paper 165-I, online: UK Parliament <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldsctech/165/165i.pdf>, at 6.

[2] Please note that for the purposes of the present analysis, it is assumed that all the works discussed herein (specifically music, television shows, and films), are in fact copyrighted, except in the situations where noted. For a discussion of how music and films hold copyrights in Canada, see e.g. D. Vaver, *Intellectual Property Law – Copyright, Patents, Trade-marks* (Concord: Irwin Law, 1997) at 30 ff., and generally *The Copyright Act*, R.S.C. 1985, c. C-42, as am., [the *Act*], s. 2 definitions and s. 5. There is no issue with respect to downloading materials that are not copyrighted, for example works in the public domain. Or for that matter, works which are copyrighted but the copyright owner has allowed to be freely distributed.

that stolen DVD. But what's the difference? The difference is in how the downloader perceives the act. The average user who downloads one of these blockbusters does not refer to it as theft, but as "sharing."[3] The broad term used all over the internet for this type of activity is "file-sharing,"[4] as that blockbuster is simply a file (or a set of files) to a computer, like a Word document or a spreadsheet. The internet users who are downloading files are perhaps deluding themselves, or self-rationalizing, into thinking they are sharing, not stealing. As noted Canadian copyright expert Daniel Gervais has said, "internet users apparently do not agree that their file-sharing behaviour is morally wrong."[5]

Copyright in Canada, and specifically the *Act*, "is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator." [6] *Obtaining a just reward for the creator*. This would tend to give credence to the notion that the downloading is in fact theft of a copyrighted work; or at the very least, copyright infringement according to Canadian law.[7]

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[3] For an interesting take on the sharing / theft dichotomy and a proposal for the future of turning theft into true sharing (with compensation for the copyright owners), see Jessica Litman, "Sharing and Stealing" (2004) 27 Hastings Comm. & Ent. L.J. 1.

[4] See e.g. *Definition of file-sharing*, online: PC Magazine <http://www.pcmag.com/encyclopedia_term/0,2542,t=file+sharing&i=43177,00.asp>, and *File-sharing*, online: CIPPIC <http://www.cippic.ca/file-sharing/>.

[5] D. Gervais, "The Purpose of Copyright Law in Canada" (2005) 2:2 U.O.L.T.J. 315 [Gervais, "Purpose"] at 335.

[6] *Théberge v. Galerie d'Art du Petit Champlain Inc.* [2002] 2 S.C.R. 336 at para. 30 [*Théberge*].

[7] While the issue of downloading as copyright infringement is discussed at length herein, a discussion of the relationship between the common-sense notion of theft and copyright

But is it? To date, courts have sent mixed messages with regard to file-sharing and copyright infringement. In one of the most widely discussed of these cases, the United States Supreme Court held that a company that distributes software for file-sharing could be sued for copyright infringement.[8] In Canada, the Federal Court (Trial Division) stated that merely placing a file on your computer for sharing might not in fact be copyright violation.[9] Additionally, the Supreme Court held Internet Service Providers would not be held to have infringed copyright even as they facilitated it, because they could not necessarily be seen to *authorize* it.[10]

A mixed message from the courts is not the only issue at play here. The primary issue is one of technology, and the fact that "the law often lags behind technology."[11] File-sharing as I have introduced it here is a broad term that covers

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infringement is beyond the scope of the present paper. For an introduction to that topic, please see Gervais, "Purpose" *supra* note 5 at para. 42 ff. Interestingly, American Vice-President Joe Biden, in recently announcing the White House's efforts to curb intellectual property piracy, said that "Piracy is theft, clean and simple, it's smash and grab. Theft in every culture should be punished, and intellectual property is no different." See "US unveils strategy to fight piracy of intellectual property," (22 June 2010) online: Yahoo! News <http://ca.news.yahoo.com/s/afp/100622/usa/us_copyright_trade>.

[8] *MGM Studios Inc. v. Grokster, Ltd*., 545 U.S. 913 (2005) [*Grokster*]. For a more detailed discussion of the case see section 3.2, *infra*.

[9] *BMG Canada Inc. v. John Doe*, [2004] 3 F.C.R. 241 (T.D.) [*BMG (TD)*]. For a more detailed discussion of the case see section 3.1.2, *infra*.

[10] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, [2004]* 2 S.C.R. 427 [the *Tariff-22 case*]. For a more detailed discussion of the case see section 3.1.1, *infra*.

[11] Sunny Handa, *Copyright Law in Canada* (Markham: Butterworths Canada Ltd, 2002) at 15, footnote 11.

a number of technologies.[12] So while the *Tariff-22 case* dealt with one manner of file-sharing, and *Grokster* dealt with a form of peer to peer ("P2P") file-sharing technology, neither of them deals with the most common type of file-sharing technology being used today, BitTorrent.[13] The technologies are not merely different in nomenclature; the manner in which they function may have repercussions as to how the existing law may be applied to the facts of a particular lawsuit, should one arrive in front of the courts. The *Act* was originally drafted in 1921 and underwent its major overhaul in 1988; it was not written to handle the evolving technology of the internet. In response, successive governments have proposed certain overhauls and modernizations of the *Act* – the Liberal government introduced Bill C-60[14] in 2005 and the Conservative government introduced Bill C-61[15] in 2008. Most recently, in June of 2010 the Conservatives once again introduced legislation, this time Bill C-32,[16] the third attempt to modernize copyright law in these technological times. However even in these

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[12] See section 2, *infra*.

[13] Unfortunately internet statistics about use of different technologies are notoriously and inherently unreliable. A quick search will yield wildly varying numbers for P2P as a proportion of internet traffic, from as low as 0.5% to as high as two-thirds, or even 90% (see "what percentage of traffic on the Internet is peer-to-peer file sharing?" (*sic*) online: <http://www.newamerica.net/blog/wireless-future/2009/what-percentage-traffic-internet-peer-peer-file-sharing-9991>). However, see "BitTorrent still king of Internet Traffic," (18 February 2009) online: TorrentFreak <http://torrentfreak.com/bittorrent-still-king-of-P2P-traffic-090218/>.

[14] *An Act to amend the Copyright Act,* 1st Sess., 38th Parl., 2005.

[15] *An Act to amend the Copyright Act*, 2nd Sess., 39th Parl., 2008.

[16] *An Act to amend the Copyright Act*, 3rd Sess., 40th Parl., 2010 ["Bill C-32" or *The Copyright Modernization Act*].

modern bills, there is no specific mention of the technologies discussed here – no "file-sharing," no "P2P," no "BitTorrent."[17] By not specifically naming technologies, the governments are either already behind the times, or more likely, have attempted to provide general rules which may apply to a number of technologies, both known and unknown, attempting to stay ahead of the curve, which may be impossible considering the speed at which technology is changing.

This paper is not meant to berate the lawmakers for their efforts; in fact they should be applauded for their goal to "update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet."[18] At the same time, they have not necessarily shown their intent to support what should be the balancing goal – to update the rights and protections of *users* to better address the challenges and opportunities of the Internet. If copyright is truly a balance as described in *Théberge*, should there not be both?

The fact is, however, that the lawmakers can't keep up, and the parties involved, specifically the file-sharers and what I will call the file-sharing facilitators[19] – the Internet Service Providers (ISPs) and operators of file-sharing

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[17] While Bill C-32 does not *specifically* mention these technologies, one provision is widely regarded as targeting P2P services, by creating a new type of infringement, "providing… a service… designed primarily to enable acts of copyright infringement… by means of the internet" (cl. 18). See section 5.2, *infra*, for a detailed discussion. Additionally, Bill C-61 had extended a new right (in Canadian copyright law), the "making available" right (cls. 7(1) and 9) which could have been used against torrent or other P2P users, as did Bill C-60 (cls. 2 and 8(1)) ; Bill C-32 contains this as well. See section 5.1, *infra*, for a detailed discussion.

[18] Bill C-32, Summary, point (a).

[19] The phrase "file-sharing facilitators" has previously been used in reference to producers of file-sharing software such as Napster and torrent search indexers like isoHunt and the Pirate Bay. Its earliest appearance in a scholarly work appears to be in Liz Robinson, "Music on the Internet: An

search engines – are left in the dark as to their status with regard to copyright infringement and BitTorrent. BitTorrent technology has taken over the internet; BitTorrent file-sharers and facilitators need to know where they stand, and where they may stand in the future. This paper looks to fill that gap, to present the arguments and discussion the Canadian courts have yet to hear with regard to BitTorrent,[20] but will undoubtedly hear in the future. Canada is a hub for BitTorrent activity, in the "embarrassing position of harboring five of the top eight remaining unauthorized BitTorrent sites, including the new number-one ranked site, isoHunt."[21]

This paper takes a methodical, analytical approach in moving forward. First, I will take a technological detour through the world of file-sharing, P2P, and BitTorrent. It is necessary to understand and differentiate the technologies before we can make pronouncements as to their role in copyright infringement. Where courts have made decisions on existing file-sharing and P2P technologies, their reasoning may have been based on the specific aspects of that particular

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International Copyright Dilemma" (2000) 23 Hawaii L. Rev. 183 in reference to MP3.com (see section 2.1, *infra* for an explanation of MP3.com). Its use has recently expanded to include other file-sharing programs like Napster and Kazaa and torrent search engines like the Pirate Bay in popular culture (see e.g. "'Rampant piracy' of Olympics footage must be stopped" online: Live Leak: <http://item.liveleak.com/view?i=bf5_1219359820&c=1>). I have extended the phrase to include ISPs because they facilitate users getting on the internet, and thus the act of file-sharing; see the *Tariff-22 case*: "I conclude that the *Copyright Act*… does not impose liability for infringement on intermediaries who supply software and hardware to **facilitate** use of the Internet", *supra* note 10 at para. 101 (my emphasis). ISPs as "facilitators" are discussed in more detail in section 4.2, *infra*.

[20] See section 3.1.3, *infra*.

[21] C. Donald Brown, "Can Canada Clean Up Its Copyright Act?" online: e-Commerce Times <http://www.ecommercetimes.com/rsstory/70311.html>.

technology. As BitTorrent functions differently, this may have implications for the applicability of existing court rulings, so it is necessary to understand the difference between the technologies and how they have evolved. I will then turn to a review of the Canadian jurisprudence, and follow with the American jurisprudence which is considerably more developed, and discuss its applicability in Canadian law. In this context, I will examine jurisdiction, an essential component in any discussion of legal aspects of the internet, focusing on the real and substantial connection test as elucidated in the *Tariff-22 case*. I will also examine a very recent and interesting Australian case, which Canadian courts will undoubtedly look to should the same issues present themselves in a Canadian court.

The meat of the discussion in this paper is an analysis of whether file-sharers and facilitators are liable for copyright infringement under Canadian law. While in theory the liability issue affects file-sharers more than anyone else given their sheer numbers, in practice in the BitTorrent world, lawsuits are targeted more at operators of various torrent-related websites.[22] While liability may seem obvious to entertainment industry executives, because "(c)opyright infringement is running rampant via P2P technology, and the financial health and survival of the entertainment industry is suffering as a result,"[23] liability for infringement

[22] See Barry Sookman, "What do LimeWire, Napster, Kazaa, and Isohunt all have in common?" (13 May 2010) online: <http://www.barrysookman.com/2010/05/13/blogged-what-do-limewire-napster-kazaa-and-isohunt-all-have-in-common/>.

[23] Kelly M. Maxwell, "Software doesn't Infringe, Users do? A Critical Look at MGM v. Grokster and the Recommendation of Appropriate P2P Copyright Infringement Standards" (2005) 13 CommLaw Conspectus 335 at 335. While I recognize that this was written in the context of

may not necessarily be the case. There are significant technological features in BitTorrent technology that differentiate it from previous technologies and that might influence a court's holding. Additional rulings like *BMG (TD)* have muddied the waters. There is no question that this is a legal grey area. My hope is that a thorough analysis will provide some clues for future litigants as to the legality of BitTorrent.

In the same way the government is looking towards the future, I will as well. Bill C-32 may be a step in the right direction in attempting to clarify some of the issues related to copyright in a digital age. I will examine its provisions that will influence BitTorrent file-sharers and facilitators, and attempt to project into the future the legal regime that will exist with regard to BitTorrent technology.

I do not purport to take a moral, ethical, or other personal stand on copyright infringement and the use of BitTorrent or other P2P networks.[24] The reader can find volumes of papers and books on the subject.[25] This is an analytical

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American jurisprudence, the principle undoubtedly applies to Canada as well, as file-sharing is an international phenomenon, with international effects.

[24] I will admit for the sake of full disclosure that I do in fact use BitTorrent on a semi-regular basis to download a variety of copyrighted content, including music, television shows, and movies. Finding that it is not copyright infringement would certainly be of comfort to me and all my acquaintances who use BitTorrent, yet I look to set aside any bias in this paper.

[25] For a good starting point (though with a very certain point of view), see one of the seminal books concerning copyright in the digital age, Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books, 2004). A key conclusion made by Lessig is probably in line with my own opinion, when he states, "Rather than seeking to destroy the Internet or the P2P technologies that are currently harming content providers on the Internet, we should find a relatively simple way to compensate those who are harmed" (at 204, or 301 of the free edition online: <http://www.free-culture.cc/freeculture.pdf>).

paper on the infringement of copyright and BitTorrent under current and proposed Canadian copyright law, presented in as clinical manner as possible, drawing on the law, jurisprudence, and doctrine to make specific conclusions regarding liability for copyright infringement.

2.0 TORRENTS AND OTHER P2P TECHNOLOGIES

2.1 File-sharing on the internet – an introduction and brief history[26]

There are numerous factors that distinguish the different types of file-sharing on the internet. One of the most important distinctions to be made is that of centralization vs. decentralization, as this has significant implications regarding how parties can react to infringement and what measures can be taken. As Daniel Gervais writes:

> While Napster was essentially a database and a server which could be physically shut down, P2P technology does not have a central command point. Rather, it uses the main strength of the Internet and one of its

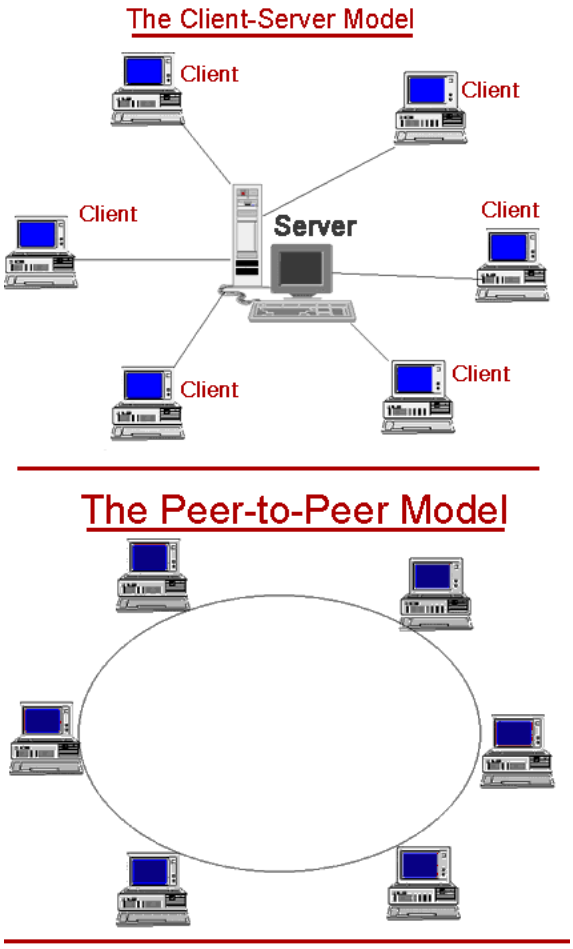
[26] Where not specifically cited, the facts in sections 2.1 and 2.2 are culled from a variety of sources, including my own expertise as Vice-President of an internet development company (see http://www.plankdesign.com). Among the principal sources used are the following: Bob Rietjens, "Give and Ye Shall Receive! The Copyright Implications of BitTorrent" (2005) 2:3 SCRIPT-Ed 327 esp. 329 ff.; Ulric M. Lewen, "Internet File-Sharing: Swedish Pirates Challenge the U.S." (2008) 16 Cardozo J. Int'l & Comp. L. 173 esp. at 176 ff.; Rebecca Giblin, "A Bit Liable? A Guide to Navigating the U.S. Secondary Liability Patchwork (2008) 25 Santa Clara Computer & High Tech. L.J. 7 esp. at 9 ff.; Jimmy Tran, "An overview of file sharing using BitTorrent" online: Ryerson University <http://www.scs.ryerson.ca/~q2tran/Downloads/FSBitTorrent.pdf>; M.S. Smith, "The History of File-sharing: Where Did it All Begin?" online: <http://www.brighthub.com/computing/smb-security/articles/67395.aspx>; *History,* online: <http://www.filesharing.com/history/>; *How BitTorrent Works*, online: <http://computer.howstuffworks.com/bittorrent.htm>; Miscellaneous Wikipedia entries, online: Wikipedia <http://en.wikipedia.org/wiki/Peer_to_peer>, <http://en.wikipedia.org/wiki/Peer-to-peer_file_sharing>, <http://en.wikipedia.org/wiki/BitTorrent_%28protocol%29>, <http://en.wikipedia.org/wiki/Timeline_of_file_sharing>.

> original design features, namely redundancy to the point of virtual indestructibility: there is simply no central tap to close.[27]

This serves nicely as an introduction to P2P technology and file-sharing. It brings us to the present day with a neat dichotomy – the client-server model versus the P2P model. In a client-server model, a person, sitting at his home computer, sends a request to a bigger computer that holds a selection of files, and that bigger computer, the *server*, sends the files to the person, the *client*; whereas in a P2P model, there is no such server. A diagram may help to illustrate the point[28]:

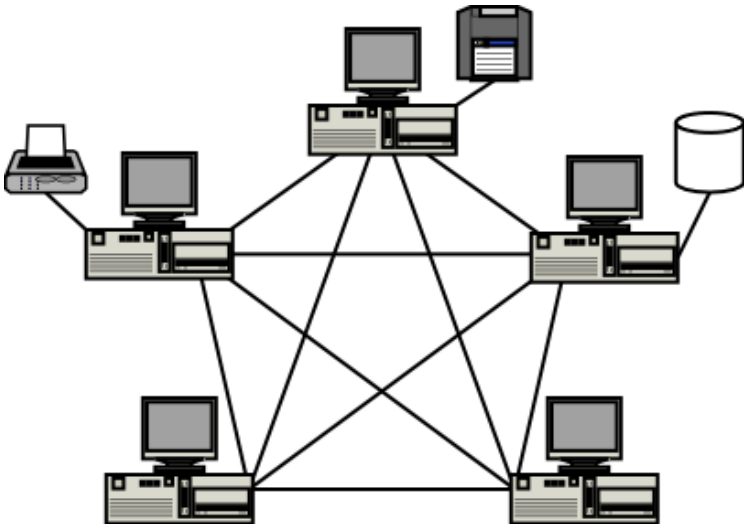
[27] "The Price of Social Norms: Towards A Liability Regime For File-Sharing" (2004) 12.1 J. of Intell. Prop. L. 39 [Gervais, "Price"] at 51.

[28] Diagram found online: <http://www.ibiblio.org/team/intro/search/peer_to_peer1.gif>.



The lines in the diagram represent the flow of data; for BitTorrent, that would be the movie or television or music files being downloaded. Whereas in the client-server model it is easy to see how shutting down the server would stop the flow of information, this would be quite difficult in a P2P model. This becomes even clearer with another, perhaps more accurate, diagram of a P2P model:[29]

[29] Diagram found online: <http://www.pcc-services.com/images/peertopeer.png>.



As the reader can see, all of the computers are interrelated, making shutting down such a network virtually impossible.

Understanding this basic difference is the essential first step in understanding the development of internet file-sharing technology over time. In the beginning, all files were downloaded with a client-server model. In 1979, Usenet became the first widely-used method for transferring files. It generally runs on a client-server model, though often there are multiple servers instead of just one. While still used today, it has for the most part been replaced by much faster, more efficient P2P systems. At the same time, because of the legal attacks on P2P networks, Usenet has enjoyed a renaissance as an alternative,[30] though this has led to its own set of legal battles.[31]

[30] See Jeremy Kirk, "Study: Other network traffic surpassing P2P growth," online: <http://www.itworld.com/internet/62869/study-other-network-traffic-surpassing-P2P-growth>.

[31] The RIAA (Recording Industry Association of America) in 2007 sued Usenet.com, a provider of Usenet services, for inducing copyright infringement. See E. Bangeman, "RIAA shifts legal battle to a new front, sues Usenet access provider," Arts Technica online: <http://arstechnica.com/tech-policy/news/2007/10/riaa-shifts-legal-battle-to-a-new-front-sues-

In 1997 MP3.com was launched as a method for users to download legally uploaded MP3's.[32] Mostly independent artists would upload MP3's to the site and users could download them in a typical client-client server model. MP3.com caught the eye of record companies, and resulting litigation[33] proved too financially handicapping to allow MP3.com to continue under that model.

In 1999 the first P2P system, Napster, was developed by Shawn Fanning. Napster allowed users to list the MP3's they had on their own computers for the purposes of sharing (though other file types would be indexed, it was used almost entirely for MP3 files). Simply, the process went as follows.[34] Users downloaded a program onto their own computer from the Napster website. The Napster program then indexed all the MP3 files on that user's ("peer's") computer, and sent that information to a central server (or more specifically, several servers) owned and operated by Napster. Users who wanted to download MP3's would use the software to search the central database of songs, and when the MP3 file was found, the song would be downloaded from another user's ("peer's") computer directly to the person who had done the search. As the MP3 files were transferred from one user / peer to another, this is a P2P network. However, it is not a *true*

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usenet-access-provider.ars> summarizing *Arista Records LLC v. USENET.com*, 633 F. Supp. 2d 124 (S.D.N.Y. 2009).

[32] MP3 is the standard for digitally-compressed music, playable across multiple platforms. See online: <http://en.wikipedia.org/wiki/MP3.com>.

[33] *UMG Recordings, Inc. v. MP3.com* Inc. 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

[34] For a full description of how Napster works, see *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001) ["*Napster II*"] at paras. 6-12.

P2P network, as the reader may have noticed: all the information about the files was stored in the central servers at Napster. This made it all too easy a target, and in the *Napster* case,[35] a consortium of record labels was able to get Napster shut down, and it filed for bankruptcy in 2002.

The next generation of P2P applications emerged in the wake of Napster's legal trouble. These included Kazaa, Limewire, Grokster, and Morpheus.[36] These were truly decentralized, without Napster's central servers that stored the information. In these P2P networks, the users would still download software from the company's website, and the software included a search function, integrated right into the technology. Upon a peer's search, the software would search the other peers' computers *directly*, or, depending on the network, "supernodes" (computers on the network used to store information about the files and handle data direction flow). Once the file was found, the software downloaded the file to the requesting user's computer.

An important development around this time was the proliferation of high-speed / broadband connections for users. When MP3.com was popular in 1999, most users were connecting to the internet via phone lines, which had a maximum connection speed of 56kb/second. As the early 2000's dawned, more individuals

[35] See section 3.2 *infra*, for a more detailed discussion of the case.

[36] These should be referred to as "P2P clients" or "P2P applications" and not *networks* per se. A "client" is the piece of software downloaded by the user in order to use the network. The networks (sometimes referred to as protocols, depending on the context) used by these clients were the Gnutella network (used by Limewire, though later Limewire would work with the BitTorrent protocol as well), and the FastTrack protocol used by Grokster, Morpheus, and Kazaa, though Morpheus switched from the FastTrack protocol to Gnutella in March 2003. The reader only needs to know that all of these protocols and clients functioned in roughly the same way.

were using cable or DSL (Digitial Subscriber Line) services to increase their connection speed to up to 1.5 Mb / sec.[37] As a result of this more than 25-fold increase in download speed, users realized that they could download much larger files, such as movies and television programs whose file size is roughly 500-1000 megabytes vs. a mere 4-5 megabytes for an MP3. This would have an enormous impact on the usage of P2P networks for downloading. However, while users speed had increased, the file transfers over the existing P2P networks were still slow because of an inherent weakness in the existing P2P functionality – a bottleneck was being created not by the speed of the user's connection, but by the speed at which the peer being downloaded *from* could upload the file, which speed was always restricted by the user's ISP, i.e. their uploading speed. The final generation of P2P networks, BitTorrent, was designed to get around this bottleneck.[38] In the next section, I examine how that was made possible.

2.2 BitTorrent vs. Other P2P Technologies for Beginners

As just mentioned, the bottleneck at the uploader's end of the P2P chain made it difficult for the downloader to rapidly download a large file. In 2002, software developer Bram Cohen thought there should be a better way. The result

[37] See e.g. Charlotte Alice, "The History of High Speed Internet Access," ezine @rticles online: <http://ezinearticles.com/?The-History-of-High-Speed-Internet-Access&id=113855>. As reported by the FCC, between 2000 and 2003 broadband penetration in the United States went up by approximately 50% every year – see "Making the Connections," online: Federal Communications Commission <"http://www.fcc.gov/omd/history/internet/making-connections.html">.

[38] See Clive Thompson, "The BitTorrent Effect," online: Wired <http://www.wired.com/wired/archive/13.01/bittorrent.html> ["Thompson"].

was BitTorrent, a protocol[39] that drastically cut downloading times by factors of a hundred or more.[40] While somewhat complex technologically, a simple analogy[41] can explain how this is done.

Imagine there is a book of one hundred pages in the hands of one of your colleagues; let's call him "Professor John Q. Seed". You would like a copy of that book, as would nine other people, all of you members of the same family, the "Leech" family. Professor Seed is happy to make you and the other nine Leeches a copy with the photocopier he has in his office. He stands at the photocopier, turning the pages one by one and making copies until all the pages have been copied, while you stand there waiting. He hands you the new copy of the book, and then goes back to the photocopy machine and starts to make a second copy. You go off with five of the remaining Leeches to the office next door where there are several other photocopiers, and begin making a copy of your copy while the five Leeches wait. The process does speed up as additional full copies are made, but there is always a bottleneck while the 100 pages are being photocopied and

[39] The term BitTorrent can actually refer to a number of different things depending on the context - the protocol or network itself, the client used to access the network [though there are now many other, more popular clients such as uTorrent, BitComet, Azereus (recently renamed "Vuze") and Transmission], or the company founded by Bram Cohen to promote and capitalize on the new technology. Throughout this paper, BitTorrent refers to the protocol unless otherwise specified.

[40] An hour-long television show in HD is approximately 350 Mb. While it may take several hours to download it through one of the previous P2P networks, BitTorrent manages to do it in minutes. See Thompson, *supra* note 38.

[41] This analogy is adapted from the analogy used in the widely-circulated BitTorrent FAQs (Frequently Asked Questions) see e.g. *Brian's BitTorrent FAQ and Guide*, online: <http://dessent.net/btfaq/>.

people have to wait. This is the uploader's bottleneck mentioned earlier; you could very easily carry a hundred pages in your hands if someone gives them to you (your "download speed") but you have to stand there and wait while a hundred pages are copied (their "upload speed").

Now, imagine the same scenario where instead of Professor Seed standing at the photocopy machine copying 100 pages, he *rips apart the book* into ten different chunks of ten pages each. Scandalous I know, but there is a method to his madness. After ripping apart the book, he hands each of the Leeches in his office a segment of ten pages. The Leeches then head off to the office next door which happens to have ten photocopiers in it. Each of the Leeches proclaims "I have pages such-and-such, and I still need pages this and that." When these proclamations are made, a big magical blackboard in the office is updated automatically to indicate who has what pages, and who needs which pages. By looking up at the blackboard, each Leech can quickly identify who has copies of the pages he needs. A Leech goes over to one of the other Leeches who has some pages he needs, gets them, and quickly photocopies them. This happens for five pairs of Leeches simultaneously. Each Leech now has twenty pages of the book. The blackboard is updated accordingly, and the Leeches repeat the process, going to another Leech who has pages he is missing, and copies them. The process repeats itself until very quickly, each of the Leeches has a complete copy of the book; much faster than when ten Leeches had to stand around waiting for someone to photocopy the full one hundred pages. This is BitTorrent in a nutshell.

The analogy can demonstrate how the transfer can be speeded up even further. Imagine instead of ten Leeches, there were fifty; and instead of Professor Seed ripping apart the book into ten chunks, he rips it up into fifty. This has the effect of both reducing the time waiting for copying by a factor of five (for the copying of ten pages vs. two pages), and increasing the number of simultaneous exchanges by a factor of five. The smaller the chunks, the more exchanges take place, the faster everyone gets the book. This is why in the BitTorrent world the more popular files download that much faster.[42] This is the opposite of what happens in either the client-server model or a previous P2P network, because in those cases, the line of Leeches is that much longer, and as a single Leech, you just have to stand around and wait your turn.

It is time to move the analogy into reality. The "book" in the BitTorrent world is a file, most often a large video file containing a movie or television program. Professor Seed, the person who had the original, entire file, is called a *seed*, or *seeder*. Each member of the Leech family who wants the file is called a *leecher*. The magical blackboard that keeps track of who has what chunks and who needs what chunks is called a *tracker*. In BitTorrent parlance, the "chunks" are often referred to as *blocks*, though the word chunk is used as well. The act of a leecher photocopying one of the chunks he is missing is simply "downloading" a block of data. Where the analogy fails is that human beings can't be in two places at once, but computers can, at least in the sense of being connected to multiple computers at once. So while in the office only one "exchange" of pages is

[42] Thompson, *supra* note 38, and Rietjens, *supra* note 26 at 329.

happening at any given time (because each Leech can only go to one other Leech at a time), under the BitTorrent protocol each leecher can actually be connected to several other leechers *at the same time*, thus downloading multiple little blocks all at the same time. This increases the leecher's download speed that much more.

There are certain elements of the BitTorrent system that did not make it into the analogy. In the analogy, it was easy enough to find Professor Seed and his book. But there are millions of files accessible by BitTorrent. So seeders, when they make a file available, also make a separate, related file available called the *torrent file* (sometimes referred to as a "dot-torrent file" because of the .torrent file extension). This is a small file that contains information about the actual media file – what it is, how many blocks it got broken up into, a list of those blocks, and how to put those blocks back together. Perhaps most importantly, the torrent file has the location of the tracker on the internet, using a URL ("Uniform Resource Locator," the standard for "locations" on the internet). Then a leecher who wants a particular file uses what is called a *torrent file indexer* or *search engine*[43] – one of my file-sharing facilitators – to search for the torrent file, which he downloads to his own computer. The torrent file is opened by the user's

[43] Examples of these indexers or search engines will be familiar to those who follow torrent issues in the news – The Pirate Bay, Mininova, and isoHunt have all been target of lawsuits or injunctions by industry groups. See eg. "US Court Wants isoHunt to Remove Infringing Torrents," (31 March 2010) online: Torrent Freak <http://torrentfreak.com/us-court-wants-isohunt-to-remove-infringing-torrents-100331/>; Barry Sookman, "Mininova gone, who's left and where are they located?" (27 November 2009) online: Barry Sookman <http://www.barrysookman.com/2009/11/27/mininova-gone-who%E2%80%99s-left-and-where-are-they-located/>. Some of these sites host trackers as well, some do not. The indexing of files and hosting of trackers are two distinct activities.

BitTorrent client[44] and the process of "torrenting" begins, amongst all the peers who have downloaded the same torrent file and who are all connected to the same tracker; these users are called a "swarm." The "peers" in this P2P network are all the seeds and leechers. However, at the same time it is probably a misnomer to refer to all people using BitTorrent as a "network." Each swarm may itself be considered a network, yet there is absolutely nothing, technologically-speaking, that links all BitTorrent users together, unlike previous P2P networks such as Gnutella or Kazaa. With BitTorrent technology, users are only ever linked by a particular tracker. Finally, in our analogy, there was just the one swarm and a one-time only download. In the real BitTorrent world, once a user gets the entire file, that file becomes available to future swarms (assuming the user hasn't moved it or deleted it), so the leecher may become a seed.

The analogy has enabled us to distinguish the key feature differences between BitTorrent and other P2P networks. First, the fact that the media file is broken up into blocks before it is copied over the internet,[45] making the system exponentially faster than traditional client-server models or other P2P networks. Additionally, we can see how there are distinct parts to the BitTorrent world: the torrent file, the tracker and the indexer or search engine can all be or come from different parties. File-sharers find the needed files in different ways, usually

[44] See *supra* note 39.

[45] Technologically-inclined readers will recognize that in fact, at the most basic level, all data transferred over the internet is broken up into chunks as the internet is a packet-switched network (see e.g. Barry M. Leiner et al, "A Brief History of the Internet," online: Internet Society <http://www.isoc.org/internet/history/brief.shtml>). I am stressing at this point the way the BitTorrent protocol is different from the other P2P networks.

through the software in previous P2P systems, but through separate search engines for BitTorrent. This may have significant implications for a legal analysis, and for the legal reactions of copyright holders.

3. COPYRIGHT, P2P, AND BITTORRENT – JURISPRUDENCE

In analyzing the copyright implications of BitTorrent, I need to turn to the existing jurisprudence as the launching point for the analysis, examining what courts in Canada and elsewhere have said about copyrights and P2P technologies. This is by no means an exhaustive survey, and I will focus on the most important jurisprudence and that which is germane to the analysis of section 4 of the present paper, where supplementary jurisprudence will be introduced. What is presented here I consider to be the building blocks for the analysis. I first look to Canadian jurisprudence, then to the United States and other common-law countries to see what conclusions their courts have drawn with regard to BitTorrent and other related P2P technologies.

3.1 Canadian jurisprudence

3.1.1 The Trilogy

In 2002 and 2004, the Supreme Court of Canada released a series of three judgments which have become commonly known as the "trilogy" or "copyright trilogy."[46] These three cases – *Théberge*, *CCH Canadian Ltd. v. Law Society of*

[46] See e.g. Gervais, "Purpose", *supra* note 5, and Sunny Handa & Alexander Matheson, "Copyright Law and The Internet — The Tariff 22 Case," online: Blakes <http://www.blakes.com/english/view_disc.asp?ID=181>.

Upper Canada,[47] and the *Tariff-22 case* – have proved to be watersheds for copyright law in Canada and should be used as the basis for any copyright analysis, including my own. The trilogy, while clarifying several specific matters in relation to copyright, has also been described as granting a *purpose* to copyright law in Canada,[48] specifically that "copyright should be seen less as a tool to protect author or owner rights, and more as a policy-oriented statute aimed at balancing user and owner rights in the broader public interest."[49]

In *Théberge*, the respondent Théberge, a respected artist, had sought a seizure before judgment of certain reproductions of his works made by the appellant art gallery. The art gallery had been legally contracted to create certain reproductions, but not in the manner under dispute (transferring a paper-backed poster to a canvas-backed one). The reproductions created no additional copies (once the ink had been transferred, it vanished from the original), and this was dispositive for the majority in concluding that no infringement had taken place. As Binnie J. wrote (under the heading *The Proposed Test Would Depart from the General Principle that Breach of Copyright Requires Copying*):

> (a)s one would expect from the very word "copyright", "reproduction" is usually defined as the act of producing additional or new copies of the work **in any material form**. Multiplication of the copies would be a necessary consequence of this physical concept of "reproduction"[50] (underlined emphasis in original, bolded emphasis mine).

[47] [2004] 1 S.C.R. 339 [*CCH*].

[48] Gervais, "Purpose", *supra* note 5, and Sara Wei-Ming Chan, "Canadian Copyright Reform - 'User Rights' in the Digital Era" (2009) 67(2) U.T. Fac. L. Rev. 235.

[49] Chan, *ibid* at para 2.

[50] *Supra* note 6 at para 42.

While the disposition of the case and its meaning as it pertains to canvas-backed reproductions of work may be of little importance to some,[51] I feel that the above quote is quite pertinent to our discussion of BitTorrent, to which I will return in section 4.1.

What the commentators have focused on in *Théberge* is the Court's pronunciation about the role of copyright and the *Act*, and the "balancing act" the *Act* espouses.[52] I cited it in the introduction, yet it bears repeating in its expanded form:

> The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)(…)
>
> The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. **Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it**.[53] (my emphasis, for the purposes of discussion in section 4.1.1)

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[51] Gervais writes, somewhat sarcastically, that "the issue of whether canvas-backing is a reproduction is of prime importance to poster shops and a small number of contemporary artists, it does not fundamentally alter the copyright landscape." "Purpose," s*upra* note 5 at 319.

[52] It should be noted that not all scholars have approved of the decision. See for example Orit Fischman Afori, "Copyright Infringement without Copying - Reflections on the *Théberge* Case" (2007-2008) 39 Ottawa L. Rev. 23 where the author writes "In our opinion, the majority's decision is wrong, both with respect to the solution preferred in the basic conflict between property rights in a chattel and in copyright, and with respect to drawing the boundaries of the reproduction and adaptation rights in Canadian copyright law" at 24.

[53] *Supra* note 6 at paras. 30-31.

Gervais points out that this case is of "exceptional importance;"[54] of this there can be no doubt. It has established the purpose of copyright as a balancing act, and it established the importance of competing economic rights of the copyright holder and the rights of the purchaser of the copyrighted work. These competing interests are integral to the discussion of whether BitTorrent file-sharing is in fact copyright infringement.

Théberge contained a strong dissent written by Gonthier J. and supported by L'Heureux-Dubé and LeBel JJ. The focus in dissent is on section 3(1) of the *Act*, which describes copyright as (in part, as emphasized by Gonthier J.[55]) "…the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever...". He goes on to break down this section into three parts – produce/reproduce, substantial part, and in any material form whatever. Under the produce/reproduce heading, he finds the majority's requirement of "multiplication" is in error, citing the *Apple* case[56] to state that the *Act* was drafted in such general terms as to include reproduction by new technologies. However, as Binnie J. points out in the majority decision, in *Apple*, unlike in the present case, there was in fact a multiplication of copies.[57] Gonthier J. goes on to say that

[54] "Purpose", *supra* note 5 at 320.

[55] *Supra* note 6 at para. 136.

[56] *Apple Computer, Inc. v. Mackintosh Computers Ltd.*, [1987] 1 F.C. 173, aff'd, [1988] 1 F.C. 673, aff'd [1990] 2 S.C.R. 209 ["*Apple*"].

[57] *Supra* note 6 at para. 45.

a "substantial part" has been reproduced and that the "in any material form whatever" must be dealt with as per the facts of each case. He determines that the "medium" was in fact changed, and it is irrelevant whether the first medium was destroyed in place of another, especially because "when a person reproduces a work and at the same time destroys a copy of it, we assume that the person derives some benefit from doing so."[58] In this case, the art gallery sold the reproduction for more than they could have sold the original.

Considering Gonthier J.'s strong dissent, and the fact that *Théberge* was decided by a slim 4-3 majority (with two justices not having participated in the case), the issue became whether the majority's "balanced approach" for copyright would be approved in subsequent jurisprudence. In the second case of the trilogy, *CCH*, the question was answered, as McLachlin C.J.C., writing for a unanimous nine-member court, approves of *Théberge*'s paragraphs 30 and 31 as quoted above, by stating that "(i)n interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals."[59]

The facts of *CCH* are straightforward. The Law Society of Upper Canada ("LSUC"), in its Great Library, operated a self-service photocopying machine that allowed LSUC members and qualified researchers to make copies of legal materials in the Library. Additionally, the Library, upon request, would photocopy materials for users not in the library, and would deliver the materials to them in person, by mail, or by fax (the "custom photocopy service'). All the

[58] *Supra* note 6 at para. 158.

[59] *Supra* note 47 at para. 10.

respondents including CCH were publishers of legal materials, and commenced copyright infringement actions against the LSUC. The Supreme Court held that the LSUC does not infringe copyright when offering the custom photocopy service; additionally, the LSUC did not authorize infringement of copyright by having the self-serve photocopiers in the Library. Finally, the Supreme Court held that there was no secondary infringement by the LSUC, as the fax transmissions were not communications to the public as per section 3(1)(f) of the *Act*.

The case presents a number of very important discussions and conclusions with regard to certain elements of Canadian copyright law, and has had a major impact on several areas.[60] First, and least important to our discussion of BitTorrent,[61] is the concept of originality as the standard for the existence of copyright.[62] McLachlin C.J.C. concludes that the standard for originality in copyright law should fall between two established standards of originality, the "sweat of the brow" or "industriousness" standard of originality, and the standard that a work must be creative to be "original."[63] McLachlin C.J.C. concludes that

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[60] For a detailed examination of *CCH* and its impact on Canadian copyright law, see e.g. Daniel J. Gervais, "Canadian Copyright Law Post-CCH" (2004) 18 I.P.J. 131 [Gervais, "Post-CCH"]; Parveen Esmail, "*CCH Canada v. Law Society of Upper Canada*: Case Comment on Landmark Copyright Case" (2005) 10 Appeal 13.

[61] All of the files exchanged over BitTorrent would be subject to copyright under any standard; as McLachlin C.J.C. writes, 'creative works will by definition be "original" and covered by copyright' at para. 25.

[62] See s. 5 of the *Act* – "…copyright shall subsist in Canada, for the term hereinafter mentioned, in every **original** literary, dramatic, musical and artistic work…" (my emphasis).

[63] *Supra* note 47 at para. 15. Daniel Gervais disagrees that it is in fact a middle ground. He claims that what raises something above the purely mechanical and trivial is in fact a modicum of

the standard should be one of "more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment."[64]

CCH is perhaps best known for its clarification of fair dealing as per s. 29 of the *Act* and its notion of user rights.[65] McLachlin C.J.C. writes under the shadow of the balancing act of *Théberge* when she states:

> The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171[66]: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."[67]

Michael Geist has interpreted the Court's position regarding these user rights as "an integral part of the copyright balance."[68] The Chief Justice then analyzes

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creativity, thus we have essentially adopted this American standard. See Geist "Post-CCH", *supra* note 60 at 139 ff.

[64] *Supra* note 47 at para. 16.

[65] See e.g. Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use" (2008) 53 McGill L.J. 309, Gervais, "Purpose", *supra* note 5 and Chan, *supra* note 48.

[66] Citing David Vaver, *Copyright Law*. (Toronto: Irwin Law, 2000).

[67] *Supra* note 47 at para. 48.

[68] 'McKennitt Op-Ed: "Pirates are Killing Musicians, Composers, Lyricists, Even Popcorn Vendors"' (6 July 2010) online: Michael Geist <http://www.michaelgeist.ca/content/view/5172/125/>.

whether something can be considered fair dealing under the rubric of six factors,[69] and concludes that the LSUC's dealings were fair. I will examine the elements of fair dealing in Canada in more detail in section 4.1, *infra*.

The third and final important element to emerge from *CCH* is the concept of authorization,[70] and how it was clarified by the Court. Prior to *CCH*, in Canadian copyright law, McLachlin C.J.C. writes, authorization meant to "sanction, approve, and countenance."[71] The Chief Justice clarifies that countenance "in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, '[g]ive approval to; sanction, permit; favour, encourage.'"[72]The Chief Justice's description of how this should work in practice bears citing in its entirety (citations in original omitted for clarity):

> Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference. However, **a person does not authorize infringement by authorizing the mere use of equipment that *could* be used to infringe copyright**. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. This presumption may be rebutted if it is

[69] The factors are: the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work, and the effect of the dealing on the work. See *CCH*, *supra* note 48 paras. 65 ff. for a detailed examination of these factors; see also D'Agostino, *supra*, note 65 at paras. 19 ff.

[70] Under s. 27(1) of the *Act*, it is infringement for anyone to do what only the copyright owner has the right to do. One of the things the copyright owner has the exclusive right to do is **authorize** the production, reproduction, performance, transmission by means of telecommunications, etc. of works (see s. 3 of the *Act*).

[71] *Supra* note 47 at para. 38.

[72] *Ibid*.

> shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement.[73] (my emphasis)

McLachlin C.J.C. later applies the bolded statement in the above quote to the photocopiers of the facts of the case to, adding that "I think it is equally plausible that the patrons using the machines were doing so in a lawful manner,"[74] adding that the LSUC did not have sufficient control to be seen as having authorized. Gervais sums up the Court's position on authorization thusly: "(p)roviding means to infringe (at least without additional evidence, such as intent to 'approve' or at least direct knowledge of the direct infringer's purpose) does not constitute an authorization."[75]

The thread of discussion of authorization was picked up in the final case of the trilogy, the *Tariff-22 case*, with regard to the liability of ISPs. In addition to the authorization discussion and more about the concept of communication under the *Act*, the case advanced a new standard (or more precisely, an old standard applied to a new situation) for the application of local copyright laws considering the global nature of the internet. This second element has caused the case to find interest not only in Canada, but elsewhere.[76]

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[73] *Ibid*.

[74] *Supra* note 47 at para. 43.

[75] "Purpose", *supra* note 5 at 322.

[76] See e.g. Susanna H.S. Leong & Cheng Lim Saw, "Copyright Infringement in a Borderless World – Does Territoriality Matter? *Society of Composers, Authors, and Music Publishers of Canada v. Canadian Association of Internet Providers* [2004 2 SCR 427]", (2007) 15(1) Int'l J.L. & I.T. 38, whose authors are from Singapore, and who write that this part of the decision has "wide-

Released in 2004, the facts of the case date back to 1995, when the Society of Composers, Authors and Music Publishers of Canada ("SOCAN"[77]) asked the Copyright Board of Canada to impose a new tariff (Tariff 22) for royalties on Canadian copyrighted music downloaded over the internet. The music files were being downloaded by Canadians from servers outside of Canada, in a typical client-server model.[78] The Copyright Board convened a hearing to determine who, if anyone, should pay the tariff. The focus fell on the appellant / cross-respondent ISPs, familiar names such as Bell Sympatico and Rogers, who act in the dual capacity of selling internet access to consumers and hosting websites which may contain copyrighted music. The Copyright Board, and the Federal Court of Appeal,[79] both ruled that the ISPs were excluded from copyright liability when they are merely a conduit for transmission of the copyrighted works. However, the Court of Appeal also ruled (not unanimously) that when the ISPs "cached" data they were no longer a mere intermediary and would be liable. Binnie J. concurs with the Court of Appeal's dissent on this issue, that caching was merely a matter of making the internet more efficient.

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ranging implications for copyright owners, users and service providers in the Internet community far beyond Canadian shores" at 40.

[77] From the SOCAN website: "SOCAN is the Canadian copyright collective that administers the performing rights of more than 90,000 composer, author and music publisher members by licensing the use of their music in Canada. We collect licence fees on their behalf and distribute royalties to them." Online: SOCAN <http://www.socan.ca/jsp/en/pub/index.jsp>.

[78] The music may not necessarily have been downloaded as a file, but "streamed" from a website, i.e. played from the website directly.

[79] See [2002] 4 F.C. 3.

The first step in Binnie J.'s analysis is to address the "conundrum" (as he called it) of "trying to apply national laws to a fast-evolving technology that in essence respects no national boundaries."[80] Specifically, he recognizes the need to determine whether a "communication" had occurred to the public by telecommunication as per s. 3(1)(f) of the *Act*. The Copyright Board had decided that for a communication to occur in Canada, the server must be located in Canada. Binnie J. stated that this was "too rigid and mechanical a test."[81] Binnie J. clearly understands how the internet works when he writes that "(a)n Internet communication that crosses one or more national boundaries 'occurs' in more than one country, at a minimum the country of transmission and the country of reception."[82] The Federal Court of Appeal had determined that the Copyright Board had erred in its location of the host server test, preferring a real and substantial connection test. Binnie J. agreed, and found that a telecommunication from somewhere else to Canada, or vice versa, "is both here and there."[83] Binnie J. examines the long history of the real and substantial connection test in other areas of law,[84] and concludes that a "real and substantial connection to Canada is sufficient to support the application of our *Copyright Act* to international Internet transmissions in a way that will accord with international comity and be

[80] *Supra* note 10 at para. 41.

[81] *Supra* note 10 at para. 44.

[82] *Ibid*.

[83] *Supra* note 10 at para. 59.

[84] For a review and analysis of this history, see Joost Blom & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38 U.B.C. L. Rev. 373.

consistent with the objectives of order and fairness."[85] He then outlines the connecting factors that would be relevant for the internet – the *situs* of the content provider, the host server, the intermediaries and the end user, with the weight of the factors being variable depending on the nature of the dispute and the facts of a particular transmission. Considering Canadian jurisprudence and worldwide practice, Binnie J. concludes that even if internet transmissions originated elsewhere, if they were received in Canada they should be subject to our copyright law. Finally, it should be noted that LeBel J. dissented on this particular issue, preferring the host server test the Copyright Board had used, as the real and substantial connection test was developed in other contexts and thus "inappropriate to determine whether a communication occurred within Canada."[86] The host server test is better according to him because "it has the virtue of simplicity; it best accords with the principle of territoriality and harmonizes our copyright law with international treaty principles; and it diminishes privacy concerns."[87] No doubt LeBel J. did not have any P2P communications in mind when he made this determination.

Having concluded that Canadian copyright law can apply even if the transmissions originated outside Canada, Binnie J. turns to the liability of ISPs, under two headings. First, whether the ISPs should benefit from the s. 2.4(1)(b) exception for communications providers, and second, whether the ISPs were

[85] *Supra* note 10 at para. 60.

[86] *Supra* note 10 at para. 135.

[87] *Supra* note 10 at para. 156.

authorizing infringement. In the shadow of *CCH*, we can see how ISPs were treated similarly as the LSUC in their first capacity as sellers of internet access to the public. Binnie J. writes:

> Parliament has spoken on this issue. In a 1988 amendment to the *Copyright Act*, R.S.C. 1985, c. C-42,[88] it made it clear that Internet intermediaries, as such, are not to be considered parties to the infringing communication. They are service providers, not participants in the content of the communication. In light of Parliament's legislative policy, when applied to the findings of fact by the Copyright Board, I agree with the Board's conclusion that as a matter of law the appellants did not, in general, "communicate" or "authorize" the communication of musical works in Canada in violation of the respondent's copyright within the meaning of the *Copyright Act*.[89]

Binnie J. uses the "balance" discussion of the two previous cases in the trilogy and indicates that s. 2.4(1)(b) is an important element of that balance. Binnie J. does specify that an ISP would benefit from the s. 2.4(1)(b) shield from liability only if it "does not itself engage in acts that relate to the content of the communication, i.e., whose participation is content neutral, but confines itself to providing 'a conduit' for information communicated by others."[90]

Finally, Binnie J. picks up the "authorization" thread from *CCH*. SOCAN claimed the ISPs were authorizing infringement because they knew that material placed on their servers was copyrighted. Yet Binnie J. takes the *CCH*

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[88] Here Binnie J. was referring specifically to s. 2.4(1)(b) of the *Act* which states "For the purposes of communication to the public by telecommunication,… a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public."

[89] *Supra* note 10 at para. 5.

[90] *Supra* note 10 at para. 92.

photocopiers and makes a parallel, in that they both were used to copy or download a large amount of non-copyrighted material.[91] The operation of the internet is more complicated than a photocopier, yet Binnie J. concludes that: "when massive amounts of non-copyrighted material are accessible to the end user, it is not possible to impute to the Internet Service Provider, based solely on the provision of Internet facilities, an authority to download copyrighted material as opposed to non-copyrighted material."[92]

The trilogy has provided the essential starting point for the discussion of copyright infringement of BitTorrent file-sharers and facilitators. I now turn to the Canadian cases that have, at least to some extent, looked at P2P technologies in some form.

3.1.2 BMG Canada Inc. v. John Doe

BMG (TD) was the first Canadian case to apply the authorization concept as specified in *CCH*.[93] The plaintiffs were a group of Canadian record companies known collectively as the Canadian Recording Industry Association ("CRIA"). They sought to sue twenty-nine anonymous users of the Kazaa and iMesh P2P networks for file-sharing of copyrighted music. As these users were unknown, the

[91] This appears to echo the American Sony Betamax decision in the United States, *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984) [*Sony*], where Sony was not liable for copyright infringement because the video recording technology had substantial non-infringing uses. *Sony* is discussed in section 3.2, *infra*.

[92] *Supra* note 10 at para. 123.

[93] Gervais, "Post-CCH", *supra* note 60.

first step was to seek their identities from their ISPs through the Federal Court (Trial Division). The ISPs objected to providing the identities of the users. Much of the case deals with the procedure of seeking identities and privacy issues under PIPEDA,[94] the linking of these users to their IP addresses, and when the ISPs must disclose the information. Those issues are of less importance to my discussion here.

However, von Finckenstein J. makes some very interesting and controversial pronouncements regarding the downloading of music through these P2P networks. The CRIA alleged that the activities of the twenty-nine users (downloading the P2P software, running the P2P applications, downloading the song files, and making available the song files for other peers to download) amounted to copyright infringement. The CRIA alleged that this was infringement by reproduction (as per ss. 18(1) and 27(1) of the *Act*); by authorization of the reproduction (ss. 18(1) and 27(1)); by distribution of unauthorized copies (s 27(2)(b)); and by possession of unauthorized copies which the users knew or ought to have known infringed copyright (s. 27(2)(d)). First, the Court states that downloading a song for personal use does not amount to copyright infringement, as per the exemption in s. 80(1)(a) of the *Act*, as it is "for private use." The Court states that there had been no evidence put forth that the users either distributed or authorized reproductions of the sound recording. As von Finckenstein J. writes, the users "merely placed personal copies into their shared directories which were

[94] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

accessible by other computer users via a P2P service."[95] With respect to distribution, von Finckenstein J. is very explicit as it regards P2P technologies:

> The mere fact of placing a copy on a shared directory in a computer where that copy can be accessed via a P2P service does not amount to distribution. **Before it constitutes distribution, there must be a positive act by the owner of the shared directory, such as sending out the copies or advertising that they are available for copying.** No such evidence was presented by the plaintiffs in this case. They merely presented evidence that the alleged infringers made copies available on their shared drives. The exclusive right to make available is included in the World Intellectual Property Organization Performances and Phonograms Treaty, (WPPT), 20/12/1996 (CRNR/DC/95, December 23, 1996), however that treaty has not yet been implemented in Canada and therefore does not form part of Canadian copyright law.[96] (my emphasis)

The Court further pronounced on authorization, applying *CCH*:

> As far as authorization is concerned, the case of *CCH Canada Ltd v. Law Society of Canada*, 2004 SCC 13, established that setting up the facilities that allow copying does not amount to authorizing infringement. I cannot see a real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service. In either case the preconditions to copying and infringement are set up but the element of authorization is missing.[97]

These statements amounted to a bombshell; they gave hope to downloaders of music (and other copyrighted works) over P2P networks everywhere. The Federal Court of Appeal, however, would have more to say on the issue and the conclusions of von Finckenstein J.[98] That Court felt the discussion of copyright

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[95] *Supra* note 9 at para. 26.

[96] *Supra* note 9 at para. 28.

[97] *Supra* note 9 at para. 27.

[98] *BMG Canada Inc. v. John Doe*, [2005] 4 F.C.R. 81 (C.A.) [*BMG (CA)*].

infringement at the Trial Division was premature, as this was just at a preliminary stage of the case. The Court of Appeal judgment uses language such as "conclusions such as these should not have been made"[99] and "it is premature to reach any conclusions as to the applicability of the *CCH* case."[100] Sexton J.A. states firmly that "I… wish to make it clear that if this case proceeds further, it should be done on the basis that no findings to date on the issue of infringement have been made."[101]

P2P users were left in confusion. Did the pronouncements at the Trial Division have any weight? Scholars seem to be divided on the question. Hagen and Engfield state that despite the Court of Appeal statements, "a strong case can be made that P2P file sharing is permitted by Canadian copyright law in some circumstances."[102] Gervais, on the other hand, believes that no matter whether von Finckenstein's pronouncements should be considered *obiter* or not, he was in error nonetheless.[103] Gervais questions whether a P2P user is actually being "passive," preferring to call them proactive. Gervais writes that P2P users "have to take at least one additional step to identify the file as available to other P2P users,"[104] which he says obviously makes it infringement. I will return to this

[99] *Ibid* at para. 47.

[100] *Ibid* at para. 51.

[101] *Ibid* at para. 54.

[102] Gregory R. Hagen and Nyall Engfield, "Canadian Copyright Reform: P2P Sharing, Making Available and the Three-Step Test" (2006) 3:2 U.O.L.T.J. 477 at para 15.

[103] "Post-CCH", *supra* note 60.

[104] *Ibid* at 150.

point in the analysis section *infra*, yet for now I will say I believe that Gervais is incorrect, as in certain circumstances using P2P software, in fact that "one additional step" is not present at all.

3.1.3 Canadian BitTorrent Jurisprudence

The astute reader may wonder why the Canadian BitTorrent jurisprudence was not front and center in my analysis. The answer is simple – there really isn't any. A search of Canadian jurisprudence for "BitTorrent" or "torrent" and "peer-to-peer" returns a mere five cases, none of which provides any real insight into copyright infringement. Three of these are in the criminal law sphere, child pornography cases where the accused had exchanged child pornography files over BitTorrent and other P2P networks.[105]

In the fourth case, *Déjà Musique inc. c. Brulotte*,[106] the plaintiffs (record companies and Quebec-based industry groups including ADISQ and the APFTQ) applied for an injunction to stop the defendants from distributing torrent files of copyrighted materials through the website Quebectorrent.com. The motion was uncontested,[107] however, and Tessier J.C.S. simply granted the injunction to close

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[105] *R. c. Couture*, 2010 QCCA 614; *R. v. Johannson*, 2008 SKQB 451; and *R. v. Trapp*, 2009 SKPC 109.

[106] [2008] J.Q. no. 7409 (C.S.) [*Déjà Musique*].

[107] The defendant Brulotte was not in a financial position to battle the deep pockets of the industry, and did not want to mount a bad defence and lose on the merits which would have set precedent. See Brulotte's and his attorney's statements at "No Anti-BitTorrent Precedent Achieved in Canada" online: Torrent Freak <http://torrentfreak.com/no-anti-bittorrent-precedent-achieved-in-canada-080712/>.

down the website and damages, "CONSIDÉRANT la Loi sur le droit d'auteur et la jurisprudence en la matière."[108]

The final case, *isoHunt Web Technologies Inc. v. EMI Group Canada Inc.*,[109] deals with many of the issues at hand. The website isoHunt, as mentioned in my introduction, is the largest BitTorrent search engine in the world and is currently located in Canada. isoHunt is involved in litigation in the United States where it is being sued by major Hollywood studios for enabling copyright infringement.[110] In Canada, isoHunt has received cease and desist letters from the CRIA, but no lawsuit had been filed, so they took the initiative and initiated an action against the CRIA in order to have a court determine the legality of BitTorrent search engines once and for all.[111] Gary Fung, founder of isoHunt, stated that he felt this lawsuit would be "a follow up to the QuebecTorrent case."[112] At the time of this writing, the case has not proceeded past procedural matters regarding affidavits and whether to proceed by trial or petition. In deciding that the suit should proceed by way of trial, Curtis J. makes a pronouncement in an oral, in chambers ruling about the importance of this case and the issues surrounding it:

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[108] *Ibid*, at para. 3. The reason translates to "CONSIDERING the *Copyright Act* and the jurisprudence in the subject matter" (my translation).

[109] 2009 BCSC 1837, leave to appeal refused, 2009 BCCA 618 [*isoHunt*].

[110] *Columbia Pictures Indus. v. Fung*, U.S. Dist. LEXIS 122661 (Cent. Dist. CA 2009) [*Fung*], discussed in section 3.2.1 *infra*.

[111] See "isoHunt Sues the CRIA to Legalize BitTorrent Sites" (5 September 2008) online: Torrent Freak <http://torrentfreak.com/isohunt-sues-the-cria-to-legalize-bittorrent-sites-080905/>.

[112] *Ibid*. Mr. Fung was referring to *Déjà Musique*.

> Are serious questions of law raised? Yes, this case raises a very serious question which is of importance to a large number of people far beyond the Petitioner in this case and, for that matter, the Respondents. It is well known in Canada that through the use of the internet many people can download copyright material. It is important for the law at some point to clearly delineate what the limits of facilities which allow this to be done are. Obviously, as stated, isoHunt in this case is not the one doing the illegal copying. It is people using isoHunt's technology that are. IsoHunt's technology also permits copying of publicly available material. There is an interest in the law not limiting the availability of those services, so this is a very complex and important question to be decided.[113]

In addition to recognizing the importance and potential far-reaching impact of the suit, Curtis J. recognized the issues at the heart of the case, specifically the authorization issue:

> The subject of authorizing has been given judicial consideration and authorizing raises two factual issues: knowledge and whether remedial action has been taken to prevent copying of copyright material without the holder's consent. These are two important factual issues and they relate to what the business isoHunt Web Page 2 Technologies, Inc. knows about what is really being done with its website and the state of knowledge of its directors and people operating it and also whether it has made a genuine, workable effort to try and remediate any illegal use of what it is facilitating.[114]

Undoubtedly *isoHunt* will be a case of supreme importance on this issue, with Mr. Fung promising to take the case to the Supreme Court if necessary, barring settlement.[115] For now, however, there continues to be a hole in the jurisprudence in Canada regarding copyright and BitTorrent and the actors in the BitTorrent world.

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[113] *Supra* note 109 (BCSC) at para. 12.

[114] *Ibid* at para. 6.

[115] *Supra* note 111.

3.2 American Jurisprudence

The United States has developed a much richer jurisprudence than Canada in the area of P2P file-sharing. This is not surprising, considering the sheer size of the entertainment industry in the United States[116] and the fact that the U.S. is the center of the entertainment industry worldwide. It is reasonable to assume that the major studios and recording labels would pursue the majority of their lawsuits at home. American courts, have worked their way through all the generations of file-sharing technologies up to and including BitTorrent. I shall trace the evolution of this jurisprudence in this section.

Examining American jurisprudence is not merely an intellectual exercise, for it routinely has been cited by Canadian courts in various areas of law – and especially and increasingly in intellectual property law – in the phenomenon referred to as *transjudicialism*.[117] A number of the cases described in the previous section looked to American jurisprudence,[118] and it can be said that "transjudicial methodology may already have gained a foothold in IP decision-making -- at least

[116] The movie and television industry, for example, supported 2.4 million jobs, and over $140 billion in total wages in 2008. See "The Motion Picture & Television Industry Contribution to the U.S. Economy - Supplementary Report April 2010," online: Motion Picture Association of America <http://www.mpaa.org/Resources/6a507b67-e219-43a3-a4ce-9788d6f1fb5e.pdf>.

[117] See Myra J. Tawfik, "No Longer Living in Splendid Isolation: The Globalization of National Courts and the Internationalization of Intellectual Property Law" (2007) 32 Queen's L.J. 573.

[118] For example, the *Tariff-22 case* cites *Napster II*, *CCH* cites *Feist Publications Inc. v. Rural Telephone Service Co.*, (1991) 499 U.S. 340, and *BMG (T.D.)* cites *Grokster*.

at the level of the Supreme Court of Canada."[119] In Intellectual Property law, there is a very good reason for this; as Binnie J. wrote in *Théberge*, "(i)n light of the globalization of the so-called 'cultural industries', it is desirable, within the limits permitted by our own legislation, to harmonize our interpretation of copyright protection with other like-minded jurisdictions."[120] The importance of foreign judgments and reasoning in Canada should only escalate, considering the growing internationalization of law generally.[121] I cannot understate the importance of American jurisprudence, especially as it is so far ahead of our own in the area of P2P technologies. Of course, in considering the application of American jurisprudence to Canadian law, one must always remain cognizant of the significant differences between American and Canadian copyright laws.[122]

While not a P2P case, the starting point for discussion of American jurisprudence must be *Sony*. Its decision by Justice Stevens has been cited in over 600 other cases in the U.S. (as of the summer of 2010),[123] including all of the

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[119] Tawfik, *supra* note 117 at para. 3.

[120] *Supra* note 6 at para. 5.

[121] Tawfik, *supra* note 117.

[122] While a full discussion of the differences between the two is of course well beyond the scope of the present paper, some of the more important differences (at least for my present purposes) are Canada's lack of DMCA [*Digital Millennium Copyright Act*, 17 U.S.C. § 512 (1998)]-style legislation; the open ended concept of fair use in the U.S. (see 17 U.S.C. § 107 and *infra* note 133) vs. Canada's enumerated fair dealing exceptions in s. 29 of the *Act* ; the authorization concept in Canada vs. contributory infringement in the U.S. (see *infra* note 128); and the absence of the doctrine of copyright misuse in Canada.

[123] Lexis-Nexis Quicklaw search on June 23, 2010 yielded 607 cases in all American courts citing *Sony*.

subsequent cases discussed in this section,[124] though it generally gets distinguished.[125] It is the starting point because *Sony* was the "first U.S. copyright case to challenge the sale of a technology designed for use to make copies of copyrighted works."[126] The facts are straightforward; Sony had developed the Betamax, a home video recording machine that was able to record television programs to be played back at the recorder's convenience. By recording and playing back copyrighted television programs, the studios, including Universal, claimed that Sony was manufacturing a device that facilitated copyright infringement, so Sony should be held liable for the infringement of the people using the machines, especially considering the way Sony marketed the product and profited from it.[127] The studios argued Sony knew or had reason to know[128] users were making unauthorized copies of these copyrighted television programs,

[124] For a discussion of the legacy of *Sony* in a wide variety of cases, see Pamela Samuelson, "The Generativity of *Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens" 74 Fordham L. Rev. 101.

[125] For a detailed discussion of how the *Sony* standard was applied or differentiated by the P2P cases, see Jesse M. Feder, "Is Betamax Obsolete?: Sony Corp. of America V. Universal City Studios, Inc. In The Age of Napster" (2004) 37 Creighton L. Rev. 859.

[126] Samuelson, *supra* note 124 at 111.

[127] This would make it *vicarious liability* (or vicarious infringement) under U.S. Copyright law. See Feder, *supra* note 125 at 868-870.

[128] Knowledge of another's infringement, and participation (i.e. materially contributing to or inducing), are the two factors for *contributory infringement* under U.S. copyright law at the time of *Sony*. See Feder, *supra* note 125 at 871-872 and Michael L. Rustad, *Internet Law in a Nutshell* (St. Paul: Thomson Reuters: 2009). Contributory infringement and vicarious infringement are the two forms of secondary infringement under U.S. Copyright law and form the basis of most of the P2P lawsuits in the United States, targeting the software makers and websites instead of the direct infringers, the downloaders (Rustad at 304).

violating the copyright holders' exclusive rights to make copies.[129] Sony argued that the Betamax had many non-infringing uses and that the practice of time-shifting should qualify as fair use.

The Supreme Court, by the slimmest of majorities, 5-4,[130] held for Sony, importing the doctrine of the staple article of commerce from patent law, where:

> it would be sufficient to defeat a claim that a manufacturer of copying equipment is liable as a contributory infringer for the defendant manufacturer to show that the product is "capable of substantial" or "commercially significant noninfringing uses," even assuming that the elements of knowledge and participation are met.[131]

The Court added that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."[132] Additionally, the Court would go on to describe the time-shifting of programs as fair use under U.S. copyright law.[133]

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[129] As per 17 U.S.C. § 106(1) (1976), which reads (in part) "…the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords".

[130] The case was so tight there were oral arguments over two different terms and there were negotiations that changed the majority, which was close to ruling against Sony. See Samuelson, *supra* note 124 at 112 and Feder, *supra*, note 125 at 874-875.

[131] Feder, *supra* note 125 at 875-876.

[132] *Supra* note 91 at 442. There was evidence that there were non-infringing uses, including television producers who did not mind that their programs were being recorded, including Fred Rogers of *Mister Rogers Neighborhood*, who welcomed the recording of children's television programs for viewing at a convenient time.

[133] As per 17 U.S.C. § 107, which describes 4 non-exhaustive factors to consider fair use - (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the

Blackmun J.'s dissent, on the other hand, focused on the fact that making a single copy of a copyrighted work infringed the exclusive right to make copies under § 106(1). Nonetheless, American courts were left with the *Sony* majority in attempting to apply it to the P2P cases that follow.

The notable first of these cases is *Napster II*. As mentioned above, Napster was the first P2P network, though with central information storage, where users could download MP3's. Eighteen record companies in the United States, including the "big four" (Universal, Sony, EMI, and Warner) and certain music publishers filed complaints against Napster for both contributory and vicarious infringement. At the Ninth Circuit Court of Appeals, Napster was held liable, but the analysis of *Sony* was considerably different from the district court.[134] Despite their rejection of the district court's findings, the Ninth Circuit still held that there was contributory infringement because Napster knew there was infringing material on their system and did nothing about it.[135] The Circuit Court agreed with the District Court and found that Napster would be vicariously liable, because of "Napster's failure to police the system's 'premises,' combined with a showing that

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effect of the use upon the potential market for or value of the copyrighted work. Canada's concept of "fair dealing" as per s. 29 of the *Act* and outlined in *Théberge* is similar, but far from equivalent. A comparison of the two concepts is beyond the scope of this paper, but see D'Agostino, *supra* note 65.

[134] Feder, *supra* note 125.

[135] *Supra* note 34 at 1021.

Napster financially benefits from the continuing availability of infringing files on its system."[136]

While other P2P cases followed in the immediate wake of *Napster II*,[137] the case that is considered its successor is *Grokster*. In *Grokster*, several owners of copyrighted content (movie studios such as MGM, 20th Century Fox and Disney, as well as several record labels and music publishers) sued the makers of two fully-decentralized P2P networks, Grokster and StreamCast. At both the District Court[138] and the Ninth Circuit Court of Appeals,[139] the holding was for defendants, based on *Sony*.[140] The Supreme Court unanimously reversed,

[136] *Supra* note 34 at 1024.

[137] Most interesting was *In re: Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), concerning a program similar to Napster except that it "piggybacked" on the AOL Instant Messenger software. See Ashley R. Hudson, "Can't Get No Satisfaction: The Rise (and Fall?) of Grokster and Peer-to-Peer File Sharing" (2007) 59 Ark. L. Rev. 889 at 901, footnote 89. The Court found Aimster liable for secondary infringement, though not via the same path as in *Napster II*. The Court said that Aimster showing the technology *could* be used for non-infringing purposes was not sufficient to escape liability (as Aimster had read *Sony*); and Aimster's own tutorial seemed to emphasize copyright infringement, so Aimster was encouraging this use, and thus liable for contributory infringement (or more precisely, *would be* liable at trial, for this was all in the context of a preliminary injunction as in the *Napster II* case).

[138] 259 F. Supp.2d 1029 (C.D. Cal. 2003).

[139] 380 F.3d 1154 (9th Cir. 2004).

[140] There was no contributory infringement because "(t)he technology has numerous other uses" (*ibid* at 1164) and if, as in *Sony*, there were non-infringing users, the defendants needed "reasonable knowledge of specific infringing files and failed to act on that knowledge to prevent infringement" (*ibid* at 1161) which they did not. The Supreme Court specifically rebutted this reading of *Sony*. Also, there was no vicarious infringement because there was "no right and ability to supervise", given the completely decentralized nature of the networks, unlike Napster.

introducing a third type of secondary liability[141] after contributory and vicarious, importing "inducement" liability from patent law:

> For the same reasons that Sony took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that **one who distributes a device with the object of promoting its use to infringe copyright**, **as shown by clear expression or other affirmative steps taken to foster infringement, is liable** for the resulting acts of infringement by third parties.[142] (my emphasis)

In reading *Grokster*, several points need to be made clear. First, the *Sony* standard still existed; the Court merely stated it did not apply in this case.[143] The key question that arose from this new copyright doctrine was whether the mere act of releasing a product that can infringe copyright is enough to satisfy the inducement standard, or more plainly, how much intent needs to be shown to apply the doctrine.[144] In the *Grokster* facts, it was abundantly evident through their advertising that the software makers were going after Napster's market, a clear showing of intent; but it may not be so simple in the future. Finally, the Supreme Court did not really specify or enumerate factors that should be considered under

[141] There is admittedly some confusion as to whether it should be properly called a third type of secondary infringement or merely an extension of previous types. See Hudson, *supra* note 137 at 907.

[142] *Grokster*, *supra* note 8 at 936-937.

[143] Hudson, *supra* note 137.

[144] Giblin, *supra* note 26 at 16-17.

the inducement theory,[145] although it obviously would include advertising as Grokster had done.

3.2.1 American BitTorrent Jurisprudence

Having successfully battled the creators of P2P technologies, the entertainment industry then switched gears and chose to take on the individual file-sharers[146] and several file-sharing facilitators. The industry has yet to take on BitTorrent Inc. itself, and it is debatable whether the *Grokster* inducement standard would apply to it.[147] For now, the entertainment industry has found other BitTorrent actors to sue.

Most important to my analysis is *Fung*, as it represents what I would call the companion case to the *isoHunt* case in Canada discussed above and deals with

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[145] Matthew Helton, "Secondary Liability for Copyright Infringement: BitTorrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce" (2006) 40 Colum. J.L. & Soc. Probs. 1.

[146] This actually began prior to *Grokster*, in 2003 when the RIAA began filing numerous lawsuits against individual file-sharers. See Lewen, *supra* note 26 at 181. Unfortunately for my analysis, very few of these cases actually get to trial, and what is reported tends to be motions for discovery so entertainment companies can convert John or Jane Does into named individuals which motions are generally granted; see e.g. Warner *Bros. Records Inc. vs. Does 1-4* U.S. Dist. LEXIS 48829 (Utah Cent. Div. 2007), or *UMG Recordings Inc. v. John Doe* U.S. Dist. LEXIS 79087 (N.D. Cal. Oak. Div. 2008).

[147] Giblin argues that it would depend on the standard used, i.e. how much intent is required to be shown as discussed above. She describes the "Active Step" theory under which BitTorrent Inc. would most likely not be liable, vs. the "The Distribution Plus Intent" theory, which is a much lesser standard under which BitTorrent Inc. could be liable; see *supra* note 26 at 17 ff. Others have argued that a case against BitTorrent may be destined to fail, considering the technological differences between BitTorrent and Grokster, although a court could always find legal standards to back a pre-destined conclusion; see Rhys Boyd-Farrell, "Legal Analysis of the Implications of *MGM v. Grokster* for BitTorrent" (2006) 11 J. of Intell. Prop. L. 77.

several issues at hand. In *Fung*, a number of major motion picture studios (including Columbia, Disney, Paramount, and Warner Brothers) sued Gary Fung, founder of a number of torrent search engine websites including isoHunt.com and torrentbox.com, alleging that his sites facilitated the downloading of their copyrighted materials. Citing the inducement theory of *Grokster*, the Court found Fung liable, granting summary judgment, as there was "evidence of Defendants' intent to induce infringement (that was) overwhelming and beyond reasonable dispute."[148] This included a listing of "Box Office Movies," and statements the Court said were made by Fung to encourage infringement, such as linking to torrent files of popular movies like Lord of the Rings: Return of the King with the message "if you're curious, try this." Perhaps most egregious was Fung's statement on the site that "they accuse us for [sic] thieves, and they r [sic] right. Only we r [sic] 'stealing' from the lechers (them) and not the originators (artists)."[149] The Court said Fung profited from the activities on his sites. Most interestingly, the Court said that Fung implemented technical features to facilitate infringement, and the key technical feature was *allowing users to find torrent files*. This would seem odd, as this is the whole raison-d'être of the sites. While Fung had argued that BitTorrent was different technologically than either Napster or Grokster, Wilson J. simply shrugged it off and said "(d)efendants' technology is

[148] *Fung*, *supra* note 110 at 39.

[149] Reproduced by the Court, *ibid* at 43.

nothing more than old wine in a new bottle."[150] Finally, the Court said that isoHunt could not benefit from the safe harbour defence of the DMCA.[151]

There is a lot to take away from this case for BitTorrent site operators, at least in the U.S. Law professor and Director of the High Tech Law Institute Eric Goldman writes that "courts don't really care how file sharing technology works under the hood;"[152] this is made abundantly clear by the Court's "old wine" statement. Furthermore, the Court stated that inducement is a separate type of secondary infringement from contributory or vicarious.[153] The Court seemed much more interested in the website's marketing activities and what the operators said to their users than how the site functions. The Court was also very interested in how the sites organized the material – the taxonomy of lists of top downloads – as evidence of knowledge. This case has wide-reaching implications for BitTorrent, but it is far from over. A permanent injunction to close down isoHunt

[150] *Ibid* at 70.

[151] *Digital Millennium Copyright Act*, 17 U.S.C. § 512 (1998). § 512(d) offers protection for "service providers" who provide "information location tools", i.e. search engines. The provision requires the service provider not to have knowledge (or imputed knowledge) and not take any action, and the Court said Fung's sites failed in this regard as he turned a blind eye to obvious infringement, i.e. was "willfully ignorant", so the protection was not available.

[152] "Torrent Sites Induce Infringement and Lose DMCA Safe Harbor--Columbia v. Fung" (30 December 2009) online: Eric Goldman Technology and Marketing Law Blog <http://blog.ericgoldman.org/archives/2009/12/torrent_sites_i.htm>.

[153] *Ibid*.

in the U.S. unless it censored its search engine based on a list of keywords was granted in May 2010,[154] and an appeal was filed June 10, 2010.[155]

3.3 Other jurisdictions

It is useful to examine BitTorrent cases from other jurisdictions, especially from a Commonwealth jurisdiction where Canadian courts might look for guidance under similar circumstances of fact, where no Canadian precedent exists.

Very recently in Australia, the Federal Court of Australia found that while users of BitTorrent were infringing copyright, the ISPs who had facilitated the infringement were not.[156] Plaintiffs in the case included major film and television studios (including Warner Bros. Paramount, Sony, 20th Century Fox, and NBC) grouped together as the Australian Federation Against Copyright Theft (AFACT). They alleged that defendant ISP iiNet's customers were using BitTorrent to download films and television shows without permission or license, and that iiNet should be liable for authorizing this downloading. On the first part, the Court agreed, determining the applicants had proven primary infringement on the part of

[154] See "IsoHunt forced to shut down in U.S." (22 May 2010) online: TorrentFreak <http://torrentfreak.com/isohunt-forced-to-shut-down-in-the-u-s-100522/>.

[155] U.S. Court of Appeals, Ninth Circuit, case number 10-55946.

[156] *Roadshow Films Pty Ltd v. iiNet Limited (No. 3)* [2010] FCA 24 [*AFACT*] Plaintiffs are appealing the ruling and the hearing is taking place in August 2010. See Andrew Colley, "AFACT to appeal iiNet decision" (25 February 2010) online: Australian IT <http://www.theaustralian.com.au/australian-it/afact-appeals-iinet-decision/story-e6frgakx-1225834283998>.

the iiNet users.[157] On the other hand, the Court did **not** find that iiNet had authorized copyright infringement as per the Australian *Copyright Act*.[158] In a bizarre parallel to *CCH* in Canada, the Court was forced to distinguish the leading Australian case on authorization where a University library with a photocopier **had** been found to authorize copyright infringement, unlike in *CCH*.[159] Essentially, Judge Cowdroy ruled that iiNet did not have any control over its users; it was simply providing a way onto the internet. Judge Cowdroy said iiNet "has not provided the 'means' of infringement. It has provided one of the facilities which has enabled infringements to occur, but that is a distinct consideration… The BitTorrent system is the 'means' of infringement."[160] The Court also distinguished Australia's own Kazaa case[161] based on the technology, appreciating the differences unlike in *Fung*:

> However, there are important technical differences between the technologies. The Kazaa system had, according to the applicants in those proceedings, 'P2P characteristics [however] it is now clear that it has many features in common with client/server and centrally indexed

[157] AFACT, *Ibid* at para. 356.

[158] *Copyright Act 1968* (Cth), specifically s. 101 which reads (in part) "…a copyright subsisting by virtue of this Part is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright."

[159] *Moorhouse & Angus and Robertson (Publishers) Pty Ltd v University of New South Wales* (1974), 3 A.L.R. 1 (N.S.W.S.C.) [*Moorhouse*]. The Court concluded "The University had the power to control both the use of the books and the use of the machines. In the circumstances, if a person who was allowed to use the library made a copy of a substantial part of a book taken from the open shelves of the library...it can be inferred that the University authorized him to do so" at 14.

[160] *Supra* note 156 at para. 424.

[161] *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

> systems'. The BitTorrent system appears to have more P2P characteristics than client/server characteristics.[162]

In addition to differentiating the technology, the "Kazaa system" was actively encouraging its users to infringe copyright, while iiNet could not be found to be doing so. All in all, it is a fascinating and thorough (636 paragraphs, almost 200 pages) judgment which provides insight into BitTorrent and ISPs that should be applicable in other jurisdictions, including Canada.[163]

4.0 IS THERE A TORRENT OF COPYRIGHT INFRINGEMENT UNDER CURRENT COPRIGHT LAW?

With the foundation of my analysis built on the basic jurisprudence, I now turn to answer the question: is there a torrent of copyright infringement?[164] I am sure the reader would like a simple answer; unfortunately there isn't one, though at first glance it would appear simpler in the case of ISPs given the *Tariff-22* holding. I will discuss, in turn, BitTorrent file-sharers, and my two categories of BitTorrent facilitators.

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[162] S*upra* note 156 at para. 360.

[163] The Court readily referred to a number of American cases and legislation in its judgment, and there is no reason to believe it would not be reciprocated. Furthermore, there is no reason a case of this importance would not be cited in a Canadian court. Binnie J. in the *Tariff-22 case* readily cited several Australian cases and legislation. See also Tawfik, *supra* note 117.

[164] Please note that for the purposes of the present analysis, I assume that the reader has knowledge of the basic concepts of copyright infringement, both primary and secondary as defined in the *Act* (see s. 27(1) for primary infringement and s. 27(2) for secondary infringement), also the definition of infringing in s. 2; see Handa, *supra* note 11 at 260 ff.

There are certain preliminary issues to discuss (and dismiss) prior to the analysis. These are items I expect certain sharp-eyed readers may think would impact my analysis in this section, but for one reason or another I don't believe they should. The first issue is the notion of **fixation**. Given that all of the files transferred over BitTorrent are electronic files that are not "fixed" on any medium besides the user's hard drive and can be deleted at a whim (and replaced by other data), the astute reader may wonder if they are indeed copyrighted at all as perhaps they are not "fixed" in the traditional copyright sense, and the entire question of copyrighted BitTorrent files would be moot. Fixation is not a requirement in the *Act*, yet it has emerged through the jurisprudence as a requirement in some cases.[165] The most enduring jurisprudence in this regard states that for a work to receive copyright protection, it "must be expressed in some material form capable of identification and having a more or less permanent endurance."[166] The argument that the files are not fixed may be especially true in regard to television programs transferred over BitTorrent, where the original broadcast may not have been considered fixed,[167] unlike a DVD of a movie or a CD of music. Any argument with regard to fixation I believe is without merit. First, the Supreme Court in the *Tariff-22 case* did not even address the issue – it

[165] See Handa, *supra* note 11 at 234; Vaver, *Copyright Law, supra* note 66 at 63 ff.

[166] *Canadian Admiral Corp. v. Rediffusion, Inc.*, [1954] Ex. C.R. 382 at 394 [*Canadian Admiral*].

[167] This in fact was the case in *Canadian Admiral*, *ibid*, as a television broadcast was not considered fixed. However, that broadcast was of a live football game, so there was never an original master tape or other medium on which the program was fixed, unlike an episode of *Lost*, for example, where the final episode was fixed on some (most likely digital) medium before it was broadcast.

was taken as a given that the music files in question, downloaded or transmitted over the internet, were copyrighted. The same was true in *BMG (TD)* – von Finckenstein J. clearly stated regarding the files at issue that "the plaintiffs have a legitimate copyright in their works."[168] Finally, in a decision released in July of 2010, the Copyright Board of Canada broadened the notion of what a "material form" can include, up to and including "digital temporary incidental copies."[169] The Board also referred to *Napster II* to state that "downloading a musical file infringes the exclusive right of reproduction."[170] The fact that the copies started out in digital form and ended in digital form was not even relevant, they were still considered copyrightable.[171] Some of the music files were even temporary, never saved on a hard drive; these were still considered "fixed." A media file that is saved on a hard drive is certainly more fixed than a temporary file. The issue of fixation is a non-starter for files retrieved via BitTorrent.

Secondly, the issue of jurisdiction and applicability of the *Act* will undoubtedly come up in any discussion of the internet; this is the reason I discussed the real and substantial connection test outlined in the *Tariff-22 case*. Is

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[168] S*upra* note 9 at para. 42.

[169] *Commercial Radio Tariff - Statement of Royalties To Be Collected by SOCAN, Re:Sound, CSI, Avla/Soproq and ARTISTI in Respect Of Commercial Radio Stations* (9 July 2010), online: Copyright Board of Canada <http://www.cb-cda.gc.ca/decisions/2010/20100709.pdf> [*Commercial Radio Tariff 2010*].

[170] *Ibid* at para. 131.

[171] See Barry Sookman, "When do broadcasters reproduce works? The Copyright Board clarifies the law in the Commercial Radio Tariff case" (18 July 2010) online: Barry Sookman <http://www.barrysookman.com/2010/07/18/blogged-when-do-broadcasters-reproduce-works-the-copyright-board-clarifies-the-law-in-the-commercial-radio-tariff-case/>.

there a real and substantial connection to Canada in a BitTorrent situation? In the *Tariff-22 case* there was, but that involved a much simpler client-server model. The source of the file, the server, may have been outside Canada, but this was balanced by the fact the client was in Canada. In a BitTorrent swarm, the source of the parts of the file, the peers, can number in the hundreds, and will undoubtedly come from all around the world. For the purposes of our discussion, as of this writing I am running BitTorrent to download the most recent episode of *The Late Show with David Letterman*. Through my BitTorrent client, I am able to identify the country of origin of the roughly sixty peers in the swarm. They come from Canada, the United States, Switzerland, Norway, Russia, Japan, Brazil, Italy, Turkey, Kazakhstan, and, well, you get the idea – the peers are everywhere. This is significantly more complicated than the *Tariff-22 case* model.

The one Canadian BitTorrent case, *isoHunt*, is of little help given that isoHunt was plaintiff in that case (and thus chose the forum) and located in Canada. Recall the factors used by Binnie J. to establish a real and substantial connection in internet cases: the *situs* of the content provider, the host server, the intermediaries, and the end user; their weight would vary depending on the facts of the case. For BitTorrent, there is no host server, both the intermediaries and the "content provider"(s) are the seeds and they are everywhere, leaving only the end user with a true connection to Canada. Yet explicit comments from Binnie J. should be dispositive: "this Court has recognized, as a sufficient 'connection' for

taking jurisdiction, situations where Canada is the country of … reception,"[172] drawing from Supreme Court jurisprudence regarding reception of a phone call.[173] I believe that this would be a direct parallel to the Canadian BitTorrent file-sharer – he "receives" the data transmission in Canada. It is irrelevant that the transmission originates in multiple countries; receipt of the transmission of the file would be a sufficient connection to grant Canada jurisdiction and render the *Act* applicable. This conclusion can be supported with American jurisprudence, specifically the *Fung* case, where it was held that the downloader being in the U.S. was sufficient to establish American jurisdiction.[174]

The issue of jurisdiction over Canadian ISPs in regards to BitTorrent is clear cut, considering the *Tariff-22 case* and the fact that Canadian ISPs would be dealing with thousands or millions of receptions in Canada; thus the reasoning just discussed would apply. The situation concerning my other facilitators, the indexers, is more muddled. Yes, isoHunt is located in Canada, but what if the overwhelming majority of its users are not Canadian? What if none are, in which case, none of the transmissions facilitated by the indexer would be received in Canada. Yet at the same time, the "intermediary" of the real and substantial connection factors would be in Canada. If the case dealt with the infringement

[172] The *Tariff-22 case*, *supra* note 10 at para. 63; see also para. 76 – "Canada could exercise copyright jurisdiction in respect of… transmissions originating abroad but received here."

[173] *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626.

[174] See *Fung*, *supra* note 110 at 30.

facilitated by this Canadian actor, this factor would be given the most weight, and a real and substantial connection would be established.

With the issues of fixation and jurisdiction disposed of, I can now turn to finally answer the question: is there is a torrent of copyright infringement for each of my BitTorrent actors?

4.1 BitTorrent File-sharers

In regard to file-sharers (or BitTorrent "users"; I will use the terms interchangeably), there are several lines of reasoning to discuss. First, I will examine the comments of von Finckenstein J. that file-sharing is legal and determine if they stand up to a rigorous analysis. The balancing of copyright and user rights of *Théberge* may offer file-sharers some hope, while certain basic copyright concepts in conjunction with the differentiation of BitTorrent's technology compared to previous generations of file-sharing may provide insight as well.

4.1.1 The BMG Bombshell

Any discussion of the infringement by BitTorrent users must begin with von Finckenstein J.'s pronouncements in *BMG (TD)*. Let me repeat what I like to call the money quotes, the statements that brought hope to file-sharers everywhere:

> I cannot see a real difference between a library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service. In either case the preconditions to copying and infringement are set up but the element of authorization is missing.

> (…)
> The mere fact of placing a copy on a shared directory in a computer where that copy can be accessed via a P2P service does not amount to distribution. Before it constitutes distribution, there must be a positive act by the owner of the shared directory, such as sending out the copies or advertising that they are available for copying.[175]

P2P users seized the judgment as evidence that they could download at will.[176] Authors have called the decision "controversial."[177] It may or may not be controversial, but as previously mentioned, the statements amounted to a bombshell. No other cases have been decided in favour of the user in this way. Yes, *CCH* provided some hope for alleged copyright infringers when the Supreme Court gave credence to the concept of user rights in the copyright balance (see discussion in the next sub-section), but it was this pronouncement, this very specific comment that file-sharing was OK, that BitTorrent users felt they could hang their hats on. But can they?

There are several specific lines of reasoning in *BMG (TD)*. First, I would like to discuss von Finckenstein J.'s statements that downloading a song for personal use would fall under the private copying exemption of Part VIII

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[175] *Supra* note 9 at paras. 27-28.

[176] See e.g. "Keep on downloading! Cdn file sharers told" (31 March 2004) online: p2pnet news <http://www.p2pnet.net/story/1118>.

[177] Gervais, "Purpose", *supra* note 5 at 324, note 33; John P. Beardwood, "Revolution in Canadian copyright law? How the jurisdiction shifted the balance between creator's rights and user's rights" (2005) 2 Computer Law Review International 40; David van der Woerd "Pyrrhic Victory for Downloaders in Music Industry Appeal" (November 2005) online: Ross & McBride LLP <http://www.rossmcbride.com/articles/Pyrrhic-Victory-for-Downloaders-in-Music-Industry-Appeal/>.

(specifically s.80) of the *Act*.[178] Important to our discussion of BitTorrent, I must note that the private copying exception applies only to musical works, so the movies and television shows that are generally downloaded through BitTorrent would never benefit from this exception. Notwithstanding that point, I believe von Finckenstein J. was in error in his application of s. 80, misreading its application. von Finckenstein J. relies on the Copyright Board's *Private Copying Decision 2003-2004*[179] to support his claim that the private copying exemption should apply. The Copyright Board however, *on the very same page von Finckenstein J. cites*, states that "making a copy of a CD of the latest release by the hottest star to give to one's friend is still an infringing action, as it is not a copy for personal use."[180] In my opinion, it is *this* analogy that would apply to a P2P downloading situation; while the "peers" on the BitTorrent network may not be the user's "friends" *per se*, this analogy is apt. A user who gets a copy of a CD over BitTorrent in my opinion is no different than someone who gets a copy from a friend; the original seed source of the CD simply has a lot of friends. The Copyright Board drew the same conclusion, following up its previous comment

[178] Which reads (in part) "the act of reproducing all or any substantial part of a musical work embodied in a sound recording . . . onto an audio recording medium for the private use of the person who makes the copy does not constitute an infringement."

[179] *Private Copying 2003-2004*, (12 December 2003) online: Copyright Board of Canada <http://www.cb-cda.gc.ca/decisions/2003/20031212-c-b.pdf>.

[180] *Ibid*, at 20.

with "(i)n the same vein, distributing this same copy to friends online is prohibited"[181]

The Copyright Board then goes on to explicitly state in regards to the private copying regime that "(p)eer-to-peer distribution on the Internet is not addressed as such in the regime."[182] I find it incredulous that von Finckenstein J. would apply the private copying regime in a P2P situation when the Board categorically stated that it did not apply. Finally, von Finckenstein J. ignored the media that are subject to the private copying levy as discussed in *Private Copying 2003-2004* – various forms of CDs, audiocassettes, mini-discs, and non-removable memory permanently embedded in digital audio recorders (i.e. MP3 players).[183] What is missing from that list? Any mention of a computer hard drive. This is how users would store media downloaded through a P2P network (at least initially). Additionally, the levy on digital audio recorders, the closest analog to a hard drive in the list, was struck down by the Federal Court of Appeal.[184] In fact the Court said that the memory in some MP3 players and hard drives were "technically indistinguishable."[185] This is even more of an indication that von

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[181] *Ibid*.

[182] *Ibid*.

[183] See "Private Copying Fact Sheet - Copyright Board's Private Copying 2003-2004 Decision" (12 December 2003) online: Copyright Board of Canada <http://www.cb-cda.gc.ca/decisions/2003/20031212-c-fs-e.html>.

[184] *Canadian Private Copying Collective v. Canadian Storage Media Alliance*, 2004 FCA 424 [*Private Copying III*], upheld more recently in *Apple Canada Inc. v. Canadian Private Copying Collective*, 2008 FCA 9.

[185] *Private Copying III*, *ibid* at para 151.

Finckenstein J. should not have applied the exemption. The Federal Court of Appeal would seem to agree with me, when it states that the lower Court never performed the analysis necessary to determine if s.80 should apply, "(f)or example, if the users were not using an 'audio recording medium'",[186] as I have just argued. All of these factors would indicate that there is no way the private copying regime should have been applied by von Finckenstein J. in these circumstances, and BitTorrent music file-sharers should not expect any protection from the s.80 private copying exception in the future.

Certain authors argue that s.80 should not apply to P2P situations for other reasons.[187] Other authors have disagreed with my analysis and have stated that the private copying exception should apply.[188] The latter recognize the argument regarding hard drives that I have made: "(o)ne might argue in support of the notion that file sharing is an infringement that a computer hard drive is more like hardware than the audio recording media that was contemplated by legislators because it is embedded into computer hardware."[189] They dismiss this argument by stating that a computer hard drive is not permanently embedded.[190] With all

[186] *BMG (CA)*, *supra* note 98 at para. 50.

[187] Gervais, "Post-CCH" *supra* note 6 at 150 ff. discusses private copying. While he mentions the hard drive argument (actually coming to the opposite conclusion), he suggests that the limitation of s. 80(2)(c) - that if it is "communication to the public" the private copying exemption does not apply – is in play as the uploading activity of P2P networks would be communication to the public. I agree with that part of his assessment.

[188] Hagen & Engfield, *supra* note 102.

[189] *Ibid* at para. 20.

[190] Ibid at para. 22.

respect, I must disagree with this reasoning. Yes, with a screwdriver and some knowledge someone could remove a computer hard drive and possibly place it in another computer; yet no one other than computer experts would ever attempt such a thing. Further, even memory in an iPod could be removed with the right tools. Hagen & Engfield further argue that the recording medium of a hard drive adheres to the s.79 of the *Act* requirement that it be "of a kind ordinarily used by individual consumers for that purpose."[191] I do not find this argument convincing. Given that the Federal Court of Appeal determined that the memory in MP3 players such as an iPod is not a recording medium per this definition and subject to the levy,[192] how can a computer hard drive be? The memory in an iPod is *specifically built* for the purpose of storing music;[193] the computer's hard drive is designed and built for storage of *any* data, from software to spreadsheets to pictures of the family vacation. It is "ordinarily used" by individuals for hundreds of purposes, and thus even less of a medium for that ordinary purpose than the iPod's memory.

One final point should be made about the private copying scheme: s.80 specifically states that it is not infringement when it is for the private use *of the person who makes the copy*. Indeed, the criticism of the *Private Copying III*

[191] *Supra* note 102 at para 24.

[192] *Supra* note 184.

[193] This fact leads me to personally believe the *Private Copying III* decision was in error. I actually find it incredulous that the memory in an iPod is not considered a medium for recording as envisaged by the Part VIII scheme; yet it is established jurisprudence, so it must be treated as such.

decision is usually centered on the fact that people who bought a music CD may not be able to legally copy it onto their iPods.[194] Someone who makes the copy and subsequently distributes it via BitTorrent is not doing it for *his* private use, but for the private use of *others*. The private copying exemption was not designed to cover the free copying of music by others over P2P networks, and it should not have been applied by von Finckenstein J.

The other, perhaps more tenable line of reasoning from von Finckenstein J. concerns the dual prongs of distribution and authorization as elucidated *CCH*. Recall what he wrote about distribution: "there must be a positive act by the owner of the shared directory, such as sending out the copies or advertising that they are available for copying."[195] It should be noted that the Court of Appeal questioned this statement: "(i)t is not clear that the legislation requires a 'positive act' and no authority is cited in support of his conclusion."[196] Even though the statement is questioned, it is not explicitly rejected. Furthermore, certain authors have suggested that a plain reading of s. 27(2)(b) of the *Act* could lead one to infer the requirement of a positive act.[197] I would therefore argue that for now, the positive act requirement is a reasonable one.

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[194] See e.g. Michael Geist, "CRIA's Higher Risk Strategy" (28 July 2005) online: Michael Geist <http://www.michaelgeist.ca/content/view/917/85/>.

[195] *Supra* note 96.

[196] *BMG (CA)*, *supra* note 98 at para. 52.

[197] Hagen & Engfield, *supra* note 102 at para. 35.

So is there a positive act in regards to BitTorrent? Daniel Gervais thinks von Finckenstein J. was in error here – he believes that there *is* a positive act on behalf of file-sharers, as they have to take an additional step to make the file available to the network.[198] Gervais states that the additional step "corresponds to a choice made by the user, even a default choice but one that was explained and agreed to by the user."[199] What is missing from Gervais' comments in my opinion is the distinction between a user who uploads a file *for the first time*, and one who is simply involved in the swarm. Further, I don't think a "default choice" as Gervais describes it is a "choice" at all.

Let me begin with the default choice argument. First, it is necessary to understand how a BitTorrent client operates. When you download and install a BitTorrent client on your computer, it will *automatically* (i.e. by default) create a file directory on your computer for the storing and sharing of files, or *automatically* use an existing folder, depending on the client and computer operating system.[200] This, I presume, is the "default choice" Gervais describes. Where he and I disagree is the "choice" part. No choice was made by the user; the "choice" such as it is was made by the BitTorrent client. There was no positive act in the creation of the directory; it happened automatically. Gervais believes that

[198] *Supra* note 104.

[199] "Post-CCH", s*upra* note 60 at 150, note 71.

[200] For example, the client uTorrent running on Windows XP will use the c:\my documents\downloads folder which is already there by default in Windows.

the default choice was "explained and agreed to by the user,"[201] but this is not necessarily the case. For several BitTorrent clients, an expedited setup will not indicate the directory where the files are stored. Furthermore, even if the default directory is shown to the user during setup of the client, the average user is simply clicking on "next" in the process to get it done as quickly as possible. There was never any explanation to the user, and his agreement was fleeting and tenuous at best. I do not perceive any of this as a "positive act" the way Gervais does. Why is this discussion important? It is important because any file a user downloads through the client into that default directory will *automatically be made available for upload* to other BitTorrent users (assuming the user does not manually move the files out of that directory). This functioning of BitTorrent is hinted at by Hagen & Engfield: "in some P2P technology… the making available is not controlled by the downloader at all (and perhaps even where there is a default setting to share)."[202] There was never a positive act, not even the *simplest of positive acts*, i.e. putting a file in a directory to make it available. von Finckenstein J. states that putting the file in a shared directory was not enough of a "positive act"[203] and I believe that in the circumstances I've described, there is not even that. von Finckenstein J. cites as examples of positive acts "sending out

[201] "S*upra* note 199.

[202] *Supra* note 102 at para. 33. Note, however, this is a fleeting line in their analysis and made at the very end of the context of them agreeing with von Finckenstein J. regarding the authorization argument, not the distribution argument.

[203] *BMG (TD)*, *supra* note 9 at para 26: "They merely placed personal copies into their shared directories which were accessible by other computer users via a P2P service."

the copies or advertising that they are available for copying." This is certainly not the case in the circumstances I have described, nor could any analogy be made. Under this sharing scenario I believe *BMG (TD)*'s reasoning would apply and distribution under 27(2)(b) would not be present.

Compare this to the case where the user is the *first* to make a media file available through the BitTorrent protocol, instead of just sharing what he has downloaded from others. When a user wants to share a file, he must, yes, place the file in a shared directory, but he must also at the very least create the torrent file with all the information and upload that file to a tracker. Additionally, he may have to take the steps of creating the media file(s) in the first place (for example converting an audio CD to a set of MP3 files), and may choose to upload the tracker information to a BitTorrent index or search engine. Many of these acts should be considered "positive" as I am discussing them here. Indeed, particularly the act of uploading the torrent file to the tracker might be considered an analog to "advertising they are available for copying" as von Finckenstein J. would say. Under this specific scenario and under von Finckenstein J.'s requirements, I believe a BitTorrent user *would* be liable for copyright infringement under the tenet of distribution of s. 27(2)(b) of the *Act*.

Turning to the authorization discussion of *BMG (TD)*, I can see how von Finckenstein J. would have jumped at the opportunity to apply the authorization standard of *CCH*. *CCH* presented a whole new dynamic in copyright that would be picked up in the *Tariff-22 case*. Yet von Finckenstein J. really dropped the ball in this regard. Let's revisit his key quote: "I cannot see a real difference between a

library that places a photocopy machine in a room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service."[204] Even if he can't see the difference, I can. The library is *providing the means* to potentially infringe copyright, while the "computer user" is *using those means* to potentially infringe copyright. The correct, or at least more apt, analogy would have been to compare the lawyers and academics in the library to the computer users; or alternatively, the library to the producers of the P2P software or to ISPs. Of course, this latter analogy was the one used by Binnie J. in the *Tariff-22 case*. It made sense there – ISPs were the "conduit"[205] to the facilitating technology, just the way the LSUC was the conduit to the facilitating technology. But truly, *AFACT* did the best job of distinguishing the authorization of users from that of ISPs, where the users were liable for copyright infringement yet the ISPs were not. In *AFACT*, in fact the judge went one step further, stating that the *means* of infringement was the BitTorrent system itself and not the ISPs, because they just provided the facilities to use the means.[206] The Court in *AFACT* understood the distinction between providing the means, using the means, and facilitating the use of the means, in a manner the Court in *BMG (TD)* did not.

Now, I realize there may be a different interpretation of von Finckenstein J.'s remarks. He may in fact have been saying that the P2P user was authorizing (or in his belief, not authorizing) *other* P2P users in the swarm to infringe

[204] *Supra* note 97.

[205] *Supra* note 90.

[206] *Supra* note 160.

copyright. The distinction is really not made clear by his comments, brief as they are. This would probably make at least a little more sense given the photocopy analogy. He may have been saying that as a P2P user, one offers both the means and the infringing materials by having the files in the shared directory. In *AFACT*, this would have been grounds for infringement, making an analogy to their own library case, *Moorehouse*.

No matter which interpretation of the analogy you prefer, von Finckenstein J.'s analogous reasoning was flawed and I believe his conclusion was incorrect; someone who is using BitTorrent is in fact authorizing infringement. Bear in mind what McLachlin C.J.C. said in *CCH* about authorization: "(a)uthorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference."[207] Recall that a BitTorrent user who downloads a file allows that same file to be available for upload. The user who downloads a copy of the latest blockbuster is likely aware that that blockbuster has some sort of protection, even if he doesn't know anything about copyright or intellectual property law. Most BitTorrent users are at least vaguely aware of how BitTorrent works, to the extent that the files they download are subsequently available for other users to download – this is implicit in the notion of file-*sharing*. By not doing anything about this pattern of file-sharing, they are exhibiting the "sufficient degree of indifference" envisaged by the *CCH* court. McLachlin C.J.C. also stated that even if the people photocopying

[207] *Supra* note 73.

in the library were infringing, the LSUC did not have sufficient control over the library patrons to impute liability. Yet P2P or BitTorrent users would be the exact opposite – of course they *would* have sufficient control over their actions. They could choose to not use BitTorrent in the first place or even better, they could remove infringing downloaded files from the shared directory. McLachlin C.J.C. stated that "a person does not authorize infringement by authorizing the mere use of equipment that **could** be used to infringe copyright,"[208] and added that courts should presume that someone authorizes only in accordance with the law, but that the presumption can be rebutted if there is a relationship of control. I believe that this is satisfied for the user-to-user interpretation. A BitTorrent user who leaves the file in the shared directory, knowing that it is a copy of the latest blockbuster, has a level of control over that file and the means of infringement, and thus the presumption is rebutted. A BitTorrent user likely knows the files he is sharing have some sort of copyright – some studies have shown that up to 99% of files available via BitTorrent are most likely subject to copyright.[209] Thus the user who leaves the file in the directory has the control required for authorization to occur as per the *CCH* test.

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[208] *Ibid* (my emphasis).

[209] Ed Felton, "Census of files available via BitTorrent" (29 January 2010) online: Freedom to Tinker, blog of Princeton's Center for Information Technology Policy <http://www.freedom-to-tinker.com/blog/felten/census-files-available-bittorrent>. Other studies have pegged the proportion as 97.9% of non-pornography files - see Internet Commerce Security Laboratory, "Investigation into the extent of infringing content on BitTorrent Networks" (April 2010) online: ICSL <http://www.afact.org.au/research/bt_report_final.pdf>.

von Finckenstein J. also quickly dismissed the notion that the P2P users were secondary infringers under s. 27(2) of the *Act* because there had been no evidence of knowledge on the part of the defendants.[210] While this may have been true, the Court of Appeal took him to task for this statement, recognizing that s. 27(2) includes "should have known" language that would make it secondary infringement.[211] The Court of Appeal was absolutely correct on this point. Can we impute knowledge of copyright on the works that BitTorrent users are downloading? I would argue yes. In this day and age, with the media attention focused on copyright issues and the internet, and users downloading blockbuster movies and first-run television shows, they probably even *know* that there is copyright on them (as I wrote in the previous paragraph), let alone *should know*. I would find it incredulous if a court found that a BitTorrent user was so naïve as to not believe that the copy of the latest Harry Potter movie he was distributing, or possessing, or even to use his own word, *sharing*, was not subject to some sort of protection.

The final discussion that needs to take place emerging from the *BMG* bombshell is the notion of the "making available" right. von Finckenstein J., in discussing the plaintiffs' evidence that users "made copies available on their hard drives,"[212] makes it clear that he believes the making available right that exists elsewhere is not present in Canadian copyright law; because while it exists in

[210] *BMG (TD)*, *supra* note 9 at para. 29.

[211] *BMG (CA)*, *supra* note 98 at para. 53.

[212] *BMG (TD)*, *supra* note 9 at para. 28.

international treaties,[213] these have not been ratified in Canada even though Canada is a signatory. Some authors have argued that the rights of communication and reproduction in combination provide the same protection as making available.[214] Others have argued that making available does not necessarily constitute communication, because if the work "made available" is not taken up at the other end by someone, there is no communication.[215] The Court of Appeal did not even comment on this issue, and thus according to one author "defused the making available bomb."[216] *BMG (TD)* would appear to stand for the proposition that *if* the making available right was explicitly part of Canadian law, P2P and thus BitTorrent users would be liable for copyright infringement.[217] This would be bolstered by the conclusion in *AFACT* that BitTorrent users were liable because they had "made available" files for sharing. Considering my analysis that there are still several ways a BitTorrent user is liable for infringement, I do not think any

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[213] von Finckenstein J. cites the *World Intellectual Property Organization Performances and Phonograms Treaty*, 20 December, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 [WPPT]; the right is also in the World Intellectual Property Organization Copyright Treaty, 20 December, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 [WPT, with the WPPT collectively the "WIPO treaties"] article 6, Right of Distribution, which states "Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership." The right is also found in article 8 of the WPT under the "Right of Communication to the Public," which includes "…the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

[214] Gervais "Purpose", *supra* note 5 at 324-325, note 33.

[215] Hagen & Engfield, *supra* note 102 at para. 38.

[216] David Fewer, "Making Available: Existential Inquiries" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 267.

[217] Hagen & Engfield, *supra* note 102 draw this same conclusion, at para. 38.

further analysis is warranted under this heading. However, given the provisions of Bill C-32, this is an issue I will return to in the analysis in section 5.2, *infra*.

4.1.2 The User Rights Balance and Fair Dealing

The *Act*'s balance as described in *Théberge*[218] and reaffirmed in *CCH*[219] provides another avenue file-sharers could take in order to deem what they do as not being infringement. Several passages from *Théberge*'s majority opinion might give credence to the notion that user rights would provide protection to a BitTorrent user, whether as an uploader or a downloader. The Court states that the "users, who are often 'owners of a copy' of a protected work, have 'rights.'"[220] Are these rights sufficient to provide protection to a BitTorrent user? Let me examine some of Binnie J's specific statements about the balance, taking as presumed that the balance of Canadian copyright law is in fact part of our jurisprudence and the law of the land.[221]

One of the most thought-provoking lines from Binnie J. for the file-sharers is the following: "once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens

[218] See *supra* note 53 and accompanying quote.

[219] See *supra* note 59 and accompanying quote.

[220] Gervais, "Purpose", *supra* note 5 at 320.

[221] One author has argued against the "widespread agreement" (his words) that there exists a balance in copyright law generally (not just Canada) and prefers to think of the interplay between users and authors as a "dialogue." See Abraham Drassinower, "From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law," (2009) 34 J. Corp. L. 991.

to it."[222] It is very easy to take this statement and insert it into the BitTorrent sphere. A BitTorrent user buys a legal copy of the latest Harry Potter movie on DVD. The purchaser, according to Binnie J., would have the right to determine what happens to it, and thus he could share it with another BitTorrent user. But would Binnie J. actually go that far? I would argue that he would not. Look at the balance argument from the other side of the rights coin – obtaining a just reward for the creator. I believe a very simple question should be asked here – what does the act of downloading a copy of a work over BitTorrent do to the "just rewards" of the creator? The simple answer is that it robs him of some of those economic rewards. A person who has downloaded a copy of that Harry Potter movie has removed the price of the DVD, or at least the creator's share of it,[223] from the creator's pocketbook. Now, it could easily be argued that the person who downloaded the Harry Potter movie may not have purchased the DVD himself, and that is a legitimate point. Yet if only one person who *would have* bought the DVD chose to download it for free instead, the copyright owner's economic rights

[222] *Supra* note 6 at para. 31.

[223]Supporters of file-sharing who claim they are doing nothing wrong often use the argument that the overwhelming majority of the cost of a CD or DVD goes to persons who are not the artists, such as record companies or other distributors. Artists themselves make this argument – see e.g. Janis Ian, "The Internet Debacle – An Alternative View", online: JanisIan.com <http://www.janisian.com/article-internet_debacle.html>. While personally I agree that artists are undercompensated for the works they create compared to those who distribute them, that argument is irrelevant for the purposes of determining whether BitTorrent file-sharing infringes copyright or not. Making a business model argument in a legal context is a non-sequitur in my opinion. Even if the artist's share of a CD is 50 cents of the total price [see e.g. "Record sales: Where does the money go?" (9 June 2006) online: <http://bandzoogle.com/blog/blogposts/record-sales-where-does-the-money-go-2300.cfm>], that is still 50 cents the artist is not getting.

have been violated. We are back to our DVD shoplifter from the introduction – that one person who took the DVD has violated the economic rights of the copyright holder.

I would like to recall the context of *Théberge*, and the one specific fact that in my opinion was determinative – there was no multiplication of copies.[224] Binnie J. spends considerable space in the judgment discussing the importance of multiplication of copies,[225] in part to distinguish the dissenting opinion but also to stress the rights of the copyright owner after purchase; he makes the determination that Théberge's rights were not infringed because the art gallery had simply transferred the work onto a different medium. The purchaser art gallery (the rights holder after the purchase) had the right to determine what to do with it, as per his quote, in this case transfer it to another medium. What would Binnie J. have concluded if instead of simply transferring the print from one medium to another the art gallery had taken the print and created ten copies of it and sold them? Or a thousand? Or a million? There is no question in my mind that Binnie J. would have stressed the economic rights of the original artist in that case. Yes, he may still have talked about the balance in copyright law, but in disposing of the case he most likely would have come down on the side of the artist who was denied all those sales of his work.

Binnie J. also states in his discussion of the balance that "it would be as inefficient to overcompensate artists and authors for the right of reproduction as it

[224] Multiplication of copies is discussed in more detail in section 4.1.4 *infra*.

[225] *Supra* note 6 at para 42 ff.

would be self-defeating to undercompensate them."[226] I believe this is merely a restatement of the general principle that we must balance the rights, in this case the economic rights, of the artists. The compensation of the artists should be balanced by the rights of the subsequent copyright holders or users in our case. So where would Binnie J. draw the line for BitTorrent users? At what point does the balance tip, so to speak, going from undercompensating the artists to overcompensating them? As *Théberge* really deals with a different factual situation than BitTorrent downloads, it is impossible to extend any reasoning from that case in this regard. However from a purely common sense point of view, I would argue, as I have just done, that the moment a single user downloaded for free what he would otherwise have purchased, the balance has been tipped. These are the "just rewards" for the creator that have permeated my analysis.

McLachlin C.J.C. picks up the balance thread in *CCH*, but it does not necessarily provide any additional support for file-sharers given the context. Her first mention of the balance is to introduce the concept citing *Théberge* and states that courts should always strive to maintain the balance in interpreting the *Act*. [227] She uses the balance concept to criticize *Moorhouse* by stating that the conclusion of that Court was too favourable to owners' rights and "unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole."[228] While this is a reasonable conclusion in the context of legal works and

[226] *Supra* note 6 at para. 31.

[227] *Supra* note 47 at para. 10.

[228] *Ibid* at para. 41.

scholarship, I highly doubt that copyrighted works available through BitTorrent contribute much to the good of society, except perhaps for criticism, and no one is arguing that the average BitTorrent user is downloading for that purpose (though there may be an exception as will be discussed below).

Finally, the *CCH* judgment makes the connection between the balance of copyright law and fair dealing of s. 29 of the *Act* – "(t)he fair dealing exception … is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."[229] Interestingly, this would tend to elevate fair dealing to something more than the standard of a simple exception of defence like private copying, perhaps putting it on par with the rights in s. 3.[230] Given the elevated status of fair dealing, BitTorrent users might take this interpretation of the user's fair dealing rights and believe their downloading could constitute fair dealing. However, there is no doubt in my view that fair dealing should not apply to BitTorrent in the standard user situation where the files are shared for one's own use. The *sine qua non* of the s. 29 exemption is that the use of the copyrighted material for research or private study; ss. 29.1 and 29.2 add criticism, review, or news reporting as standards for fair dealing. The average BitTorrent user would not satisfy any of these pre-conditions. The Court did state that research can be interpreted broadly so that user rights are not constrained; it may even include commercial

[229] *Ibid* at para. 48.

[230] See Gervais, "Post-CCH" *supra* note 60 at 155 ff. wherein he argues that *CCH* elevates fair dealing to an "exception *primus inter pares*" (at 155), i.e. first among equals.

dealings.[231] Even if the average user claimed he was downloading something for research, courts are tasked with assessing the user's true motives;[232] and in almost all cases I am confident the user would be found to be downloading a movie, TV show or music for their own entertainment. As for private study, the *CCH* Court did not define it, only using it in the context of what the Library said in its policy. Authors and courts have simply used common sense definitions, stating that private study "connotes a form of study which is personal to the person undertaking it"[233] or that study is "applying oneself to acquire knowledge or learning, or examining and analyzing a particular subject."[234] Perhaps a case might be made for a user who downloads a documentary film for the purpose of study, but in any other circumstances I do not think it would be possible. Additionally, McLachlin C.J.C., in analyzing whether a use is fair under the six factors,[235] states in regard to the character of the dealing factor that "if multiple copies of works are being widely distributed, this will tend to be unfair."[236] Considering the wide multiplication of copies involved when using BitTorrent, I

[231] *Supra* note 47at para. 51.

[232] *Ibid* at para. 54.

[233] Barry Sookman & Steven Mason, *Copyright: Cases and Commentary on the Canadian and International Law* (Toronto: Carswell, 2009).

[234] Vaver, *supra* note 66 at 195, citing *British Columbia (AG) v. Messier* (1984) 8 D.L.R. 4th 306 (B.C.S.C.) at 309-10.

[235] See *supra* note 69.

[236] *Supra* note 47 at para. 55.

am confident in the standard BitTorrent situation fair dealing would not be a defence.

I am not denying there may be certain rare situations where fair dealing could potentially apply to a user of BitTorrent. As mentioned, perhaps a documentary film might apply for the private study exception. Criticism may also be a valid point of argument for a downloader. What if a BitTorrent user writes a blog that discusses a particular television show? The file-sharer reviews episodes of the show on a weekly basis and writes critical analysis.[237] Could this be considered fair dealing for the purposes of criticism? Generally, however, bloggers who do this do not give the appropriate credit for the source material, as is required under s. 29.1 of the *Act*. Should they choose to do so, of course it would be up to a court to analyze the six factors and draw its conclusions. There are many factors that might favour a blogger in these circumstances. For example, under the character of the dealing factor, McLachlin C.J.C. suggests that "if the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness.[238] Thus if a user were to delete the file from his computer after it has been used for the purposes of the criticism, and before it is disseminated to others through BitTorrent, this will help to make a finding of fair dealing. Space does not permit a full analysis of each of the six factors for

[237] While there are certainly thousands of blogs like this, I can provide my own example in this case. I write a blog entitled *True Blood… or Hockey?* online: <http://truebloodhockey.wordpress.com/> which recaps, reviews, and analyses the HBO series *True Blood*. While I do subscribe to HBO, I have on occasion downloaded episodes using BitTorrent for the purposes of critically writing about the show on the blog.

[238] *Supra* note 47 at para. 55.

every situation where the user is not simply downloading for his own entertainment, but it is conceivable that fair dealing might apply.

Another circumstance where fair dealing may be a consideration is the case where a BitTorrent user downloads material and then creates a mashup using the source material. Mashups can be made from video or audio (when they are often called remixes). A video mashup is "the combination of multiple sources of video—which usually have no relation with each other—into a derivative work, often lampooning its component sources or another text."[239] Recently, the U.S. Copyright office issued a ruling that allows the circumventing of Digital Rights Management (DRM) for the purpose of making video mashups,[240] lending credence to the notion that mashups are fair use[241] under American law.[242] In Canada, there have been no reported cases on mashups and copyright infringement;[243] a court would take a case by case approach as in the U.S., analyzing the six factors as with any other fair dealing case. Of note, Bill C-32 adds a specific fair dealing exception for what are generally considered

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[239] Definition of vide mashup online: Wikipedia <http://en.wikipedia.org/wiki/Mashup_%28video%29>.

[240] *Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works* (26 July 2010) online: U.S. Copyright Office <http://www.copyright.gov/1201/> [*U.S. Copyright Exemptions 2010*].

[241] See *supra* note 133 for more about the U.S. concept of fair use vs. the Canadian concept of fair dealing.

[242] Mashups tend to be looked at on case by case basis to determine if they are fair use in the United States; there is no hard and fast rule. See e.g. Branwen Buckley, "SueTube: Web 2.0 and Copyright Infringement" (2008) 31 Colum. J.L. & Arts 235.

[243] Quicklaw search under all jurisdictions conducted 6 July 2010 for "mashup and copyright" and "remix and copyright."

mashups.[244] I believe this is an indication a court, even under current law, would consider mashups to be fair dealing.

So there may be certain circumstances where fair dealing could apply: the individual user who downloads for criticism or to create a mashup may find some protection with a fair dealing defence. Of course, it would depend on the nature of the work and all the other fair dealing factors analyzed on a case by case basis, yet I believe fair dealing most certainly could apply. Finally, I should point out that if any of the fair dealing exceptions were to apply, it would apply only to the *downloading* side of the BitTorrent equation. As soon as a user was to disseminate works to other BitTorrent users, i.e. uploading the file he just downloaded, I do not believe he would be able to avail himself of the fair dealing exemption.

4.1.3 Substantial copying?

So far my analysis as it regards BitTorrent users has focused on some rather complex issues – advance notions of authorization, balancing of user rights, and the defences of private copying and fair dealing. Perhaps it is time to take a

[244] S.21 of Bill C-32 would modify s. 29 of the *Act* to read "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright" (underlining in original, showing the updates). The parody or satire could be used to allow for mashups, but more specifically, Bill C-32 creates a new s. 29.21 of the Act which specifically targets non commercial user-generated content, where it will not be infringement for an "individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work." See Michael Geist "Long-awaited copyright reform plan flawed but flexible" (2 June 2010) online: The Star <http://www.thestar.com/business/media/article/818180--geist-long-awaited-copyright-reform-plan-flawed-but-flexible>. This is discussed further in section 5.1, *infra*.

step back, to some very basic concepts of copyright and see how they apply in the BitTorrent situation. As copyright expert David Lametti once said, "copyright is about copying."[245] In other terms, as Binnie J. used the heading in *Théberge*, there is a "*General Principle that Breach of Copyright Requires Copying*."[246] There is something to be said for the straightforward application of the *Act* to complex situations, and analyzing the requirements for the basic rights under s. 3 of the *Act*. S. 3 specifies that copyright "means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever." Is this occurring in BitTorrent? Is actual copying taking place?

I would first like to examine the requirement of reproducing the work or a *substantial part thereof*. There may be an argument to be made that the way BitTorrent operates, there is not a "substantial part" being copied. The internet is a packet switched network.[247] This means that anything that is transferred over the internet, even the smallest piece of data, is broken down into smaller pieces of data called *packets*. These packets travel over the internet, perhaps even taking different "routes" before arriving at their final destination, where they are reassembled into the original piece of data. Recall the way BitTorrent works – a user downloading a particular file does not download (or perhaps I should say, copy) the entire file from one particular location, i.e. another peer; the file is

[245] From a lecture given to the McGill University course *The Treble Cliff*, January 2009. Video available online at <http://vimeo.com/8638864>. Quote at the 8:50 mark.

[246] *Supra* note 6 at the heading above para. 42.

[247] See *supra* note 45.

broken up into blocks (which can number in the thousands) prior to the copying occurring.[248] Thus the original file is broken up twice, first into blocks at the user level, then into packets. So perhaps the BitTorrent downloader is not copying a substantial part of a work and at the most basic level copyright is not being infringed.

This issue was partially addressed in the *Tariff-22 case*. In the lower courts, the ISPs had argued that there was no liability because the packets from the songs that were being downloaded were actually incomplete copies of the music.[249] Thus, the musical works were not communicated as such, and so no infringement was possible. The Copyright Board rejected this argument, saying that breaking down the work into packets was necessary considering the technical exigencies of the internet. The Board wrote:

> While some intermediaries may not be transmitting the entire work or a substantial part of a work, all of the packets required to communicate the work are transmitted from the server on which the work is located to the end user. Consequently, the work is communicated.[250]

After the Copyright Board made this finding, the ISPs dropped this argument moving forward, so it remains as a principle that the packet argument in that situation is a non-starter. Yet take a closer look at the Copyright Board's

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[248] These blocks can be anywhere from 2 kb to several Mb. Generally, however, 256 kb is considered average (see Kolja Eger & Ulrich Killar, "Scalability of the BitTorrent Application" online: Universität Würzburg <http://www3.informatik.uni-wuerzburg.de/euroview/2005/presentations/kolja.eger.pdf>). Television or movie files can be 500 to 1000 Mb or more. If we take 750 Mb, this works out to 3000 blocks of 256 kb.

[249] *Supra* note 10 at para 22.

[250] Cited at *ibid*.

pronouncement. The Board states the packets are required to communicate the work *from the server on which the work is located*. In a pre-BitTorrent P2P situation, there is no server, so perhaps there is an argument against this principle. Again, I believe this is a non-starter as the Copyright Board could easily substitute the word "peer" for "server" and come to the same conclusion.

The next logical step is to ask, but what about BitTorrent? In the BitTorrent situation, there are *thousands* of peers that are the source (or more specifically, sources) of the single file. Perhaps this is enough to consider that there is not a "substantial" part that is being copied, if it is only one part of several thousand that is being copied at any particular time. As it turns out, there is little to support this argument. The fact is, courts have held that it is the *quality* of the substantial part that should be examined; the quantity itself is not determinative in any way.[251] Furthermore, this is something that should be decided on a case by case basis. One of the factors used to determine the substantial part is "the extent to which the defendant's use adversely affects the plaintiff's activities and diminishes the value of the plaintiff's copyright"[252] By all of these factors, looking at the BitTorrent process as a whole, I believe it would be impossible to claim that there is not reproduction of a substantial part, no matter how small the blocks, for the following reasons. Each of the blocks copied is integral to the final file. While each one may be relatively small, the copyrighted file could not exist without that block, and that is true for each of the blocks; each of the blocks on

[251] *U & R Tax Services Ltd. v. H & R Block Canada Inc.*, (1995) 62 C.P.R. (3d) 257 (F.C.T.D.).

[252] *Ibid* at para 35.

their own is useless. That speaks to the quality of the substantial part. Furthermore, there is no question the downloading or uploading via BitTorrent would diminish the value of the copyright owner, by the amount of lost royalties. Given the need to look at the facts on a case by case basis, I am convinced a court would look at in this way – of the importance of each block to the overall file and its effect on the value of the copyright. In addition, it would be easy for a court to make a parallel between the conclusion drawn by the Copyright Board regarding packets and the BitTorrent blocks, and conclude that the blocks argument is irrelevant. Finally, from a downloader's perspective, one always ends up with the entire copy anyway; individual blocks are useless, so in essence, there is always a complete reproduction of the work. While this technical argument about copying BitTorrent blocks may be a novel one, it is most likely destined to fail.

4.1.4 Multiplication of copies in any material form whatever

The next basic principle of copyright law that needs to be addressed from the standpoint of the user concerns the dual requirements of "multiplication" and "in any material form whatever." Recall Binnie J's comments from *Théberge* – "'reproduction' is usually defined as the act of producing additional or new copies of the work in any material form."[253] The initial reaction of a file-sharing supporter may be to argue that a file on a computer is not, in fact, a material form. Computer files on a hard drive might be considered without form in the traditional sense – the data is just a series of electrical circuits, a series of on/off switches that

[253] *Supra* note 6 at para. 42 (emphasis in original).

are transformed into images and/or sound. The file can easily be deleted and replaced with another file, as if it had never existed at all. There is no real "material form" per se. This argument can be easily defeated. As stated above in my discussion on fixation, the Copyright Board has proclaimed that, "'(m)aterial form' insofar as copyright infringement is conceivably broader in scope since the case law recognizes digital temporary incidental copies as acts of reproduction."[254] The Board also cites *Napster II* to show how the right of reproduction was violated. If the computer files in *Napster II* and "digital temporary incidental copies" are of a material form, not to mention all the other cases discussing P2P files in this paper, there is no question that files shared via BitTorrent would be in a material form as well. Finally, whether the file started out as a DVD or CD or television broadcast before ending up as a digital file is irrelevant. The *Act* specifies any form *whatever*, and this has been interpreted to mean that the new medium may be different from the original.[255]

As for the multiplication of copies, I stated in section 4.1.1 *supra* that the multiplication (or more specifically, lack thereof) was dispositive for the majority in *Théberge*. There is no question that multiplication is a requirement; there is also no question that BitTorrent creates a multiplication of copies. Every act of downloading using BitTorrent creates an additional copy; in this way it is analogous to a photocopier. Popular files multiply quickly; one original copy can

[254] *Commercial Radio Tariff 2010*, *supra* note 169 at para. 131.

[255] See *Théberge supra* note 6 at para. 148. While this was written in the dissent, that principle is not debated.

turn into thousands within just a few days.[256] Multiplication of copies is most certainly satisfied as a condition of copyright infringement.

In general, the basic conditions for the subsistence of copyright under s. 3 – the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever – are satisfied for files shared through BitTorrent. Given the operation of s. 27, with the exceptional situations that I have described, there is certainly a torrent of copyright infringement by BitTorrent users.

4.2 BitTorrent Facilitators – ISPs

The case for ISPs not infringing would appear to be more straightforward. Given the Court's decision and language in the *Tariff-22 case* that ISPs are not liable for infringement by their users, it is only a matter of deciding whether the same reasoning should apply with regard to BitTorrent as it did to the client-server model of that case. On its face, the language would seem to apply to BitTorrent in the same way. The ISPs are simply "acting as a conduit" with regard to BitTorrent as they were for the MP3's being downloaded in the *Tariff-22 case* facts. The ISPs are simply providing the means of communication as per s. 2.4(1)(b) of the *Act* as they had in the *Tariff-22 case*. The internet today is still providing massive amounts of non-copyrighted material to end users via ISPs.

[256] While there is no reliable method to actually count the total number of copies created of a particular file, the number of peers is at least a good indication of how many copies are being made *at any given time*. So for example, as of this writing I am viewing the number of seeds for the most recent episode of HBO's True Blood which was originally uploaded by someone two days ago; the number of peers is currently 16,356. See online: monova.org <http://www.monova.org/details/3792667/TRUE.BLOOD.S03E03.HDTV.XVID-NOTV.html>, accessed 1 July, 2010 (the number of peers will change over time).

The holding in *AFACT*, where ISPs were not liable for BitTorrent users' infringement, would certainly lend support to ISPs not being liable under current law for their customers' BitTorrent activities.

With that said, however, there are certain factors concerning ISPs which, when matched with some of the language in the *Tariff-22 case*, might at least give a court pause for thought before applying the *Tariff-22 case* holding to a BitTorrent situation. These factors were not present during the facts of that case, but they are now. The first of these factors is *throttling* on the part of the ISPs. Throttling, also referred to as bandwidth throttling, is generally the act of reducing the flow of data from a server or across transmission lines. For ISPs it "can be used to limit users' speeds across certain applications (such as BitTorrent), or limit upload speeds,"[257] and therefore can go by another name, "traffic shaping" (a term preferred by the ISPs). Throttling has been implemented in recent years by several major Canadian ISPs including Bell, Cogeco, and Shaw Communications.[258] In a CRTC decision, Bell Canada admitted that it "is engaged in traffic shaping on its network, which consists of slowing down the transfer rates of all peer-to-peer

[257] Wikipedia definition of bandwidth throttling, online: Wikipedia <http://en.wikipedia.org/wiki/Bandwidth_throttling>.

[258] Nate Anderson, "How Canadian ISPs throttle the Internet" (21 January 2009) online: Arts Technica <http://arstechnica.com/business/news/2009/01/how-canadian-isps-throttle-the-internet.ars>, summarizing a review made of Canadian ISP submissions made to the Canadian Radio-television and Telecommunications Commission ("CRTC") regarding their throttling practices. See Canadian Radio-television and Telecommunications Commission, *Public Notice CRTC 2008-19 - Review of the Internet traffic management practices of Internet service providers*, 20 November 2008, online: CRTC <http://www.crtc.gc.ca/PartVII/eng/2008/8646/c12_200815400.htm>.

(P2P) file-sharing applications during peak periods."[259] In this decision, Bell Canada specifically stated that it was P2P networks including BitTorrent that were responsible for network traffic, and thus they had no choice but to throttle traffic to improve the network overall,[260] and the CRTC found that Bell was specifically throttling the file-sharing applications.[261] The CRTC considers the matter of throttling so important it has established a policy to regulate the practice.[262]

I have stressed the importance of throttling for one reason – as the ISPs like Bell are throttling and acknowledging that the reason for doing so is P2P (including BitTorrent), this could be considered a tacit recognition, or even an explicit one, that a significant number of their users are using BitTorrent. Furthermore, the CRTC found that Bell was throttling the P2P applications, so Bell is able to determine the nature of the traffic, and thus certainly know that their customers are using BitTorrent. This has implications for the authorization thread of discussion from the *Tariff-22 case*. The Court approvingly cites the Copyright Board's conclusions regarding ISP liability for infringement:

> Even knowledge by an ISP that its facilities **may** be employed for infringing purposes does not make the ISP liable for authorizing the

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[259] *Telecom Decision CRTC 2008-108 - The Canadian Association of Internet Providers' application regarding Bell Canada's traffic shaping of its wholesale Gateway Access Service*, 20 November 2008, online: CRTC <http://www.crtc.gc.ca/eng/archive/2008/dt2008-108.htm> at para. 6.

[260] *Ibid* at paras. 15 ff.

[261] *Ibid* at para. 56.

[262] Canadian Radio-television and Telecommunications Commission, *Telecom Regulatory Policy CRTC 2009-657 - Review of the Internet traffic management practices of Internet service providers*, 21 October 2009, online: CRTC <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>.

> infringement if it does not purport to grant to the person committing the infringement a license or permission to infringe. An intermediary would have to sanction, approve or countenance more than the mere use of equipment that may be used for infringement.[263] (my emphasis)

Could a court potentially take the corollary point of view – that knowledge by an ISP that its facilities were **in fact** being employed for infringing purposes and this would make them liable for authorizing the infringement? I believe that is a reasonable position for a court to take. There is no doubt that an ISP must recognize that the overwhelming majority of P2P traffic is being used to infringe copyright; it is reasonable to believe they would, and they likely have read some of the studies I have previously cited.[264] If they are throttling their networks because of P2P, if they are actually throttling the P2P applications as the CRTC found, it would appear that they are sanctioning, approving, or countenancing the activity. Lebel J. adds to the possibility when he writes, after citing the Copyright Board above, that "I would point out that copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral."[265] By acknowledging the throttling as a result of P2P activity and the throttling of the P2P applications, this may no longer make the ISPs "content neutral."

There is additional evidence that the ISPs are sanctioning, approving, or countenancing infringing P2P activity. On several ISP websites, the amount of data transfer required for entertainment files is advertised. For example, on the

[263] *Supra* note 10 at para. 124.

[264] *Supra* note 209.

[265] *Supra* note 10 at para. 124.

web page advertising ISP Vidéotron's high-speed internet package, after specifying that the package includes a total data transfer of 30 Gb per month, it trumpets the fact that this is "the equivalent of 6 000 MP3 songs… or 42 movies."[266] It also trumpets the fact that an MP3 can be downloaded in 6 seconds, and a movie in 15 minutes. What exactly does Vidéotron believe is the source of these songs and movies? Legal sources? I am doubtful. This is another admission of their knowledge of the use of P2P and BitTorrent to download infringing content by their customers.

It may not only be the authorization argument that is influenced by the throttling and advertising evidence; it may be the s. 2.4(1)(b) protection as well. In drawing conclusions regarding the protection, LeBel J. writes that in regard to a communicators of works, "the attributes of such a 'conduit'… include a lack of actual knowledge of the infringing contents."[267] Well, again, from the evidence, it would appear that the ISPs do in fact have knowledge of the infringing contents of the transmissions.

With the possibility of ISPs being liable considering the knowledge they have of their users' activities, it is valuable to see how this played out in *AFACT*. There, the ISP, iiNet, acknowledged in its briefs that it knew a portion of its traffic was being used for BitTorrent, and it also knew that copyright owners'

[266] *High Speed Access / Cable Internet Access*, online: Vidéotron <http://www.videotron.com/service/internet-services/internet-access/high-speed-internet>.

[267] The *Tariff-22 case*, *supra* note 10 at para. 101.

alleged considerable BitTorrent material was likely to infringe copyright.[268] At the same time, it claimed it "did not, and does not, support the BitTorrent protocol or any BitTorrent software except for use in a non-infringing manner."[269] The Court found that iiNet's customers infringed copyright through BitTorrent and iiNet did nothing to stop them, yet it also found that iiNet could not be shown to have "sanctioned, approved, or countenanced" the infringement,[270] using the exact same language as in Canadian jurisprudence.[271] The Court found that numerous public statements made by iiNet and its officers showed they felt infringement was wrong. However, the Court also stated that "these public statements would count for nothing if it was apparent that in reality the respondent tacitly approved of copyright infringement,"[272] evidence of which it could not find in this case. The case had no mention of throttling practices by iiNet or advertising evidence such as I have described; this may have made a difference in the Court's reasoning.[273]

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[268] *Supra* note 156 at para. 24.

[269] *Ibid* at para. 25.

[270] *Ibid* at para. 501.

[271] While the same language is used, in *AFACT* "countenance" was seen as something *less* than approve (see *ibid* at para. 500), while in *CCH* McLachlin C.J.C. stated that the strongest meaning of countenance should be used, something virtually the same as approve or sanction (see *supra* note 47 at para. 38).

[272] *Supra* note 156 at para. 503.

[273] In a very interesting post-script, during the *AFACT* appeal the studios claimed that iiNet was in fact advertising to its users to encourage downloading. One particular user, who had seeded 40 files, was contacted by iiNet under its notice policy and was told he should upgrade his package to get more bandwidth and "get more of the stuff you love." See Josh Taylor, "iiNet plugged into users, piracy: AFACT" (2 August 2010) online: ZDNet Australia <http://www.zdnet.com.au/iinet-plugged-into-users-piracy-afact-339304942.htm>. There is no mention of why this evidence was not presented at trial.

As a result of a reading of *AFACT* together with the facts at hand, it would appear that what would be dispositive would be if the ISP could be shown to "tacitly approve" of the infringement; this would allow them to rise above being a mere conduit and actually be seen to authorize infringement. The throttling and advertising evidence would help to do that, though this could be counteracted by evidence of the ISP actively opposing infringing activities, for example making public statements or having explicit policies regarding their customers' infringing activities. I would therefore conclude that there is certainly a legal possibility that an ISP could be held liable for the activities of its customers using BitTorrent, though it would require that a court make a certain specific set of findings of fact.

4.3 BitTorrent Facilitators – Torrent Search Engines

I now turn to the last of our three actors, the BitTorrent search engines. As a preliminary matter, recall that there are two distinct functions for "BitTorrent websites." They may function as search engines for torrent files, as hosts for trackers, or both. In this section, I am restricting my analysis to those that function as search engines only.[274] The reason for this is that it will have more importance

[274] I believe that considering the *Grokster* holding and the authorization thread in the copyright cases specifically *CCH*, a site that functions to host trackers and promoted itself as such would most likely be found liable for infringement. There would be factually-based evidentiary questions on a case by case basis, especially as it regards the advertising and business models of the tracker hosts, their actions (or lack thereof) with regard to infringers using their sites, and their statements and positions regarding infringement. This was the Pirate Bay's downfall – it continually touted how it was committed to allowing users to infringe copyright, and went so far as to publicly mock the cease and desist letters it received. See Boyd-Farrell, *supra* note 147 at 85.

in Canada, considering the Canadian presence of isoHunt, which functions as a search engine only, and its ongoing litigation on both sides of the border.

Of course the logical place to begin the discussion is the *Fung* case. Recall the Court's conclusion – "evidence of Defendants' intent to induce infringement is overwhelming and beyond reasonable dispute."[275] Some of the statements made by the Court to reach this conclusion are in error in my opinion. Most egregiously, the Court did not recognize the difference between a BitTorrent search engine and Napster and Grokster, who were providing the *means of infringement*. isoHunt may facilitate infringement by helping users find torrent files, but this is a function that can be accomplished *by any search engine*. This is a common line of defence that Gary Fung repeatedly touts in the media,[276] but it is true. The most popular search engine, Google, can be used to find torrent files by simply adding the modifier filetype:torrent at the beginning of a search query.[277] Gary Fung did not invent and control BitTorrent the way that Napster and Grokster did their respective technologies – he merely provides an add-on service to the technology. Also in error in my opinion was the Court's using the taxonomy of data as evidence of inducing infringement. isoHunt organizes "top downloads" and browseable categories, but these are designed merely to facilitate users finding

[275] *Supra* note 148.

[276] See e.g. *supra* note 111.

[277] See "Google – Filetype:torrent" (23 November 2005) online: Torrent Freak <http://torrentfreak.com/google-filetypetorrent/>. As an example, the search query "filetype:torrent true blood" returns 56,400 results (as of 15 July 2010) and most of the links are to tracker sites, in the same manner isoHunt links to them.

what they are looking for. Finally, as mentioned above, the Court's statements that Fung implemented technical features to facilitate infringement – the technical feature was allowing users to find torrent files, which is the whole point of the site – demonstrate the Court's lack of understanding of BitTorrent technology and isoHunt's place in it. Despite these criticisms, there is still ample evidence that Fung was inducing users to infringe copyright, notably his comments in the forums giving instructions about how to download first-run movies (which he undoubtedly knew infringed copyright) and his posting that he agreed with those who called isoHunt thieves.[278]

Does this holding have any implication for Canadian law? Until a Court adopts the *Grokster* inducement standard of secondary liability the answer would be no. Of course there is no question that a court could decide to import the inducement standard considering how often Canadian courts look to their American counterparts, but given that that standard was imported from American patent law, this may be a stretch. If there is no inducing, in a Canadian court we would be left with authorization, which is similar to inducing in some ways. While the plain meaning of the words induce and authorize are different, the evidence used to demonstrate them is similar – knowledge of the infringing activities and evidence of acts that facilitate copyright infringement. However, with that said, the relative standards for the "acts" are different. As the *Grokster* Court said with regard to inducing infringement, there is a need to show "clear

[278] Some have argued that Fung's comments were taken out of context. See e.g. Mike Masnick, "IsoHunt Loses Big; Court Says: You Induce, You Lose" (23 December 2009) online: techdirt <http://www.techdirt.com/articles/20091223/1924027493.shtml>.

expression or other affirmative steps."[279] Compare this to what McLachlin C.J.C. said in *CCH*, that authorization "can be inferred from acts that are less than direct and positive, including a significant degree of indifference."[280] Instead of positive acts, the lack of action to prevent copyright infringement may qualify. As Curtis J. summarizes in the Canadian *isoHunt* ruling: "authorizing raises two factual issues: knowledge and whether remedial action has been taken to prevent copying of copyright material without the holder's consent."[281]

So where does that leave isoHunt and other torrent search engines? Let us take Curtis J.'s two criteria for authorization in turn. First, I have no doubt that a torrent search engine has knowledge of its users' infringement. There was enough evidence in *Fung* to show isoHunt had knowledge, and undoubtedly these search engine operators are well-versed in what kinds of files are being shared through BitTorrent and the legal ramifications thereof. With regard to the second factor, there is evidence to show that isoHunt and other search engines do in fact take remedial action to prevent copying of copyrighted material. I refer here to the practice of notice and takedown, mandated by the DMCA to benefit from the safe harbor provisions for internet intermediaries.[282] isoHunt, for example, contains an extensive copyright notice,[283] which specifies "(i)t is our policy to respond to

[279] See *supra* note 142 and accompanying quote.

[280] *Supra* note 47 at para. 38.

[281] *Supra* note 114.

[282] 17 U.S.C. § 512(c)(3) for the notification provision.

[283] *isoHunt Digital Millennium Copyright Act page*, online: isoHunt <http://isohunt.com/dmca-copyright.php>.

clear notices of alleged copyright infringement" and their response to such a notice may include "removing or disabling access to material claimed to be the subject of infringing activity and/or terminating subscribers." While these statements and potential removal action are made in response to American legislation, I feel they would be evidence to a Canadian court that isoHunt (or other search engines that have the same type of policy) would be taking remedial action to prevent the copying of copyrighted material, as per Curtis J.'s standard, and could not be seen to have authorized the infringement.

There is additional evidence to suggest that a BitTorrent search engine is not authorizing infringement, stemming from the reasoning of the *Tariff-22 case*. While I spent considerable effort above showing how the case may no longer apply to ISPs, this was based on new evidence of the ISPs knowledge and actions since the decision; some of the principles would still be applicable to a BitTorrent search engine. Binnie J. specifically mentions that an ISP could be liable if it "has notice that a content provider has posted infringing material on its system and fails to take remedial action."[284] Thus, given that isoHunt has a notice and takedown policy, we can infer this as a shield against liability. Whether it is an absolute shield would be for a court to decide, yet it certainly represents a significant step toward refuting authorization and making torrent search engines not liable for their users' infringement.

[284] *Supra* note 10 at para. 124. See also para. 127: "I agree that notice of infringing content, and a failure to respond by 'taking it down' may in some circumstances lead to a finding of 'authorization'."

5.0 WOULD THERE BE A TORRENT OF INFRINGEMENT UNDER BILL C-32?

5.1 Introduction to Bill C-32: Third Time's a Charm?

On June 20, 2005, the Liberal government introduced Bill C-60 in order to update the *Act* to "implement the provisions of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, (and) to clarify the liability of network service providers."[285] The bill ultimately died when the minority Liberal government was defeated by a November 2005 non-confidence motion.[286] On June 12, 2008, the Conservative government introduced Bill C-61 in order to amend the *Act* "to (a) update the rights and protections of copyright owners to better address the Internet, in line with international standards; (and) (b) clarify the liability of Internet service providers."[287] It died on the order paper when an election was called.[288] On June 2, 2010, the Conservative government tried again, introducing Bill C-32 to amend the *Act* in order to "(a) update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards; (and) (b) clarify Internet service providers' liability and make the enabling of online copyright

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[285] *Supra* note 14, summary.

[286] "Bill C-60" online: Centre for Innovation and Policy <http://www.innovationlaw.org/archives/projects/dcr/reform/c60.htm>; "In-depth: the 38th Parliament" online: CBC News <http://www.cbc.ca/news/background/parliament38/index.html>.

[287] *Supra* note 15, summary points (a) and (b).

[288] Peter Nowak, "Conservatives pledge to reintroduce copyright reform" (7 October 2008) online: CBC News <http://www.cbc.ca/technology/story/2008/10/07/tech-conservatives.html>.

infringement itself an infringement of copyright."[289] There is definitely a pattern to these bills, reflected in their introductory purposes – modernization of the *Act* to reflect modern technologies, especially the internet, and to bring Canadian copyright law in line with international standards and treaties.[290] After two failed efforts, will the third time be a charm? Or will it be three strikes and you're out?

It is undoubtedly too early to tell. Some IP experts have suggested that even if Bill C-32 makes it through Parliament, it will not be in its current form, and thus "'third time lucky' probably doesn't apply."[291] On the other hand, Michael Geist, noted critic of the Conservative government's efforts at reform, called the bill "flawed but flexible,"[292] and said Bill C-32 is a marked improvement over Bill C-61.[293] In the months that have passed since its introduction, there has been a fair amount of criticism, most of which has focused on the technological protection measures (TPMs) provisions of the bill,[294] more

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[289] *Supra* note 16, summary points (a) and (b).

[290] While a scholarly work on the purposes of Bill C-32 has yet to be published in a legal journal, see Chan *supra* note 48 for a discussion of the purposes behind Bill C-60 and Bill C-61.

[291] Jenna Wilson & Sangeetha Punniyamoorthy, "Copyright bill disturbs rights balance between creators and users" (6 August 2010) online: The Lawyers Weekly <http://www.lawyersweekly.ca/index.php?section=article&volume=30&number=12&article=2>.

[292] Michael Geist, "The Canadian Copyright Bill: Flawed But Fixable" (2 June 2010) online: Michael Geist <http://www.michaelgeist.ca/content/view/5080/135/> ["Flawed but Flexible"].

[293] Steven Chase, "Tory bill cracks down on copyright pirates" (2 June 2010) online: The Globe and Mail <http://www.theglobeandmail.com/news/technology/tory-bill-cracks-down-on-copyright-pirates/article1589815/>.

[294] Cl. 47 creating new ss. 41 ff. of the *Act*.

commonly known as digital locks.[295] The criticism has generally focused on the fact that the provision that imputes copyright infringement for the mere act of circumventing TPMs[296] appears to trump all the other user rights granted by the new provisions,[297] upsetting the balance between copyright owners and user rights.[298] The *U.S. Copyright Exemptions 2010*[299] have only heightened this criticism, because they allowed the circumvention of TPMs under certain circumstances,[300] demonstrating the more flexible approach in the United States; this has led the government to announce it will review those provisions.[301]

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[295] James Gannon, "Bill C-32 – User Exceptions and Digital Locks" (17 June 2010) online: James Gannon's IP Blog: <http://jamesgannon.ca/2010/06/17/bill-c-32-user-exceptions-and-digital-locks/>; Michael Geist, "Setting the Record Straight: 32 Questions and Answers on C-32's Digital Lock Provisions" (June 2010) PDF available online: Michael Geist <http://www.michaelgeist.ca/component/option,com_docman/task,doc_download/gid,32/>. See also Wilson & Punniyamoorthy, *supra* note 291.

[296] The new s. 41.1 of the *Act* created by cl. 47 of Bill C-32.

[297] This is explicit in some cases. See e.g. cl. 22 which creates a new s. 29.22(1)(c) which reads in part, "it is not infringement… in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure". See also cl. 22 creating the new ss. 29.23(1)(b) and 29.24(1)(c) which have similar language. See also Geist, "Flawed but Flexible" *supra* note 292: "anytime a digital lock is used… the lock trumps virtually all other rights." For a contrary point of view where the author argues that the TPM circumvention prohibition does not necessarily trump all the user rights, most importantly the fair dealing exceptions, see James Gannon, "Top 5 Myths About the New Copyright Bill and Digital Locks" (3 June 2010) online: James Gannon's IP Blog <http://jamesgannon.ca/2010/06/03/top-5-myths-about-the-new-copyright-bill-and-digital-locks/>.

[298] Michael Geist, "Fixing Bill C-32: Proposed Amendments to the Digital Lock Provisions" (15 June 2010) online: Michael Geist <http://www.michaelgeist.ca/content/view/5117/125/>; see also Wilson & Punniyamoorthy, *supra* note 291.

[299] *Supra* note 240.

[300] Michael Geist, "Geist: U.S. move to pick digital locks leaves Canadians locked out" (2 August 2010) online: The Star <http://www.thestar.com/news/sciencetech/technology/lawbytes/article/842063--geist-u-s-move-to-pick-digital-locks-leaves-canadians-locked-out>; Howard Knopf, "Exit Strategy for Digital

Beyond the contentious TPM provisions, the bill contains a wide variety of updates to the *Act*. The government has touted the benefits of the provisions to consumers,[302] and has gone out of its way to describe it as "balanced."[303] The bill creates exemptions for the ordinary activities of consumers such as time-shifting of television programs,[304] backing up of legally purchased software or other licensed works,[305] and so-called "format shifting,"[306] for example copying a legally-purchased CD onto an iPod. In addition to these consumer provisions, the bill contains additional exemptions for educational purposes,[307] extending the performers' performance rights[308] and the moral rights therein,[309] a mandatory

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Locks Dilemma of Canada's Bill C-32" (29 July 2010) online: Excess Copyright <http://excesscopyright.blogspot.com/2010/07/exit-strategy-for-digital-locks.html>.

[301] Peter Nowak, "Copyright reform bill to get review" (26 July 2010) online: CBC News <http://www.cbc.ca/technology/story/2010/07/26/copyright-ruling-regulators.html>.

[302] "What the New *Copyright Modernization Act* Means for Consumers" online: Government of Canada <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01186.html>.

[303] See Graham Reynolds, "How Balanced is Bill C-32?" (9 June 2010) online: The Mark <http://www.themarknews.com/articles/1667-how-balanced-is-bill-c-32>. See also the title of the Government informational website on the bill:"**Balanced** Copyright" (my emphasis) online: <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/home>.

[304] Cl. 22 creating a new s. 29.23.

[305] Cl. 22 creating a new s. 29.24.

[306] Cl. 22 creating a new s. 29.22.

[307] Cl. 23 amending s. 29.4 of the *Act* and cl. 27 creating the new ss. 30.01ff. These are specific exemptions, but the bill would also add "education" to the enumerated list of fair dealing purposes (cl. 21 amending s. 29).

[308] Cl. 9 creating a new s. 15(1.1).

[309] Cl. 9 creating a new s. 17.1.

review of the *Act* every five years,[310] a strict limit on damages for non-commercial infringement,[311] and a host of other tweaks and updates.[312]

There are these provisions and a lot more to digest in Bill C-32, yet it is time to turn my focus to the specific issue of BitTorrent and how the proposed amendments to the *Act* will impact on the BitTorrent actors and their potential liability for copyright infringement.

5.2 BitTorrent File-sharers

A wide range of provisions in the bill will apply to BitTorrent file-sharers. Bill C-32 has clarified certain elements of copyright law that will undoubtedly

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[310] Cl. 58 creating a new s. 92.

[311] Cl. 46 creating a new s. 38.1(b). The limit (a maximum of $5,000 for *all* infringement, irrespective of the number of individual infringements), would appear to be a reaction to some of the outrageous awards against individual file-sharers such as Joel Tenenbaum, who used Kazaa to download copyrighted songs dating back to 1999; in 2009 a jury awarded the record companies $675,000 for a mere 30 songs, which was reduced to $67,500 in July of 2010, though the record companies are appealing the award reduction. See *Sony BMG Music Entertainment v. Tenenbaum*, 2010 U.S. Dist. LEXIS 68642 (Mass Dist. Ct.); "Filesharer Joel Tenenbaum has fine reduced by 90%" (12 July 2010) online: The Guardian<http://www.guardian.co.uk/music/2010/jul/12/filesharer-joel-tenenbaum>; Mark Hefflinger, "RIAA Appeals 90% Reduction of Damages in File-Sharing Case" (22 July 2010) online: digitalmediawire <http://www.dmwmedia.com/news/2010/07/22/riaa-appeals-90-reduction-damages-filesharing-case>. This is suggested by the Government's own FAQ's on the bill – see "Will the bill allow record labels to sue individuals and groups for large amounts, like in the U.S.?" online: Government of Canada <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html#us>.

[312] For a good summary of the major updates to the Act under Bill C-32, see Peter E.J. Wells *et al*, "Bill C-32 – The Copyright Modernization Act" (June 2010) online: Lang Michener LLP <http://www.langmichener.ca/index.cfm?fuseaction=Content.ContentDetail&ID=11088>; also see Barry Sookman, "Some thoughts on Bill-C-32: An Act to Modernize Canada's copyright laws" (3 June 2010) online: Barry Sookman <http://www.barrysookman.com/2010/06/03/some-thoughts-on-bill-c-32-an-act-to-modernize-canada%E2%80%99s-copyright-laws/> ["Some Thoughts"].

make the downloading of copyrighted material infringement. Several of my earlier threads of discussion with regard to BitTorrent users under current copyright law would be clarified under the new provisions.

As a preliminary matter, Bill C-32 clarifies that "communication to the public by telecommunication" – as defined in s. 2.4 of the *Act* and discussed in many of the internet cases above notably the *Tariff-22 case* – in fact includes the internet. Clause 3 of Bill C-32 would add a new s. 2.4(1.1) to the Act which would read:

> For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

While certainly generic in its wording, the qualifier "from a place and at a time individually chosen by a member of the public" most certainly means the internet.[313] This definition will have implications for a number of rights that have been specified in the bill which include the phrase "to the public by telecommunication," not to mention the existing provisions, particularly the basic copyright of s. 3(1)(f) of the *Act*, the right to communicate literary, dramatic, musical or artistic work to the public by telecommunication (discussed specifically below).

[313] This language is the identical language used in art. 8 of the WCT (see *supra* note 225), under the heading "right of communication to the public," which has been interpreted to mean the internet; see e.g. Hagen & Engfield, *supra* note 102.

One of the specific rights granted by the bill which incorporates telecommunication to the public that will impact BitTorrent users is the new "making available" right[314] for sound recordings. Cl. 18 would create a new s. 18(1.1) which would read as follows (in part):

> (…) a sound recording maker's copyright in the sound recording also includes the sole right to do the following acts in relation to the **sound recording** or any substantial part of it and to authorize any of those acts:
>
> (a) to **make it available** to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public and to communicate it to the public by telecommunication in that way(…) (my emphasis)

The same "make it available" language is used for another type of sound recording, one made from a performer's performance.[315] Given the general nature of the language as it pertains to the internet, there is no question that this would apply to P2P networks in general and BitTorrent in particular. There are two specific points to be made about this new provision, as highlighted by the bolded phrases. First, it is limited to sound recordings, so we are left to wonder if movies and television shows are similarly protected (I will return to this in a moment). Second, it is clear that this right is the so-called "making available" right that I was discussing in section 4.1.1, *supra*, under the *BMG (TD)* discussion. As I concluded at that time, I believe that *BMG (TD)* stood for the proposition that if the making available right was part of Canadian law, sharing files via BitTorrent

[314] By "new" right I of course mean new *in Canada*, as this right is one of the importations into Canadian copyright law from the WIPO treaties (see supra note 213 and accompanying text).

[315] Cl. 9 creating a new s. 15(1.1)(d).

would be infringement. Well, at least in the case of sound recordings, here is that right. The simple act of having musical files on your hard drive available for others to download would certainly be infringement under Bill C-32, even without any sort of positive act as described in *BMG (TD)*.

We are still left to wonder if the making available right is present in Bill C-32 for other works. While not explicitly proposed as it is for sound recordings, the combination of the proposed s. 2.4(1.1) and the existing s. 3(1)(f) does in fact grant that right. Recall the language of s. 3(1)(f) – the right to "communicate the work to the public" is the exclusive right of the copyright holder, and the "work" includes any literary, dramatic, musical or artistic work. The proposed s. 2.4(1.1) specifies that "communication of a work… to the public by telecommunication includes making it available…" Therefore it would be primary infringement under s. 27 of the *Act* for anyone other than the rights-holder to make a work available, which as discussed in section 4.1, *supra*, I believe is the case for BitTorrent. The conclusion with regard to the operation of the proposed s. 2.4(1.1) and the existing s. 3(1)(f) has been made by others in the context of Bill C-60,[316] which also proposed a new s. 2.4(1.1) containing similar language.[317] The language of the proposed s. 2.4(1.1) would appear to settle the debate as to whether the

[316] Hagen & Engfield, *supra* note 102.

[317] The proposed s. 2.4(1.1) of Bill C-60 read: "a person who makes a work or other subject-matter available to the public in a way that allows members of the public to access it through telecommunication from a place and at a time individually chosen by them communicates it to the public by telecommunication."

communication right includes making available under current copyright law,[318] although some authors are not so sure, arguing that making available may be a right in and of itself.[319] Notwithstanding any academic debate, under Bill C-32 the making available right would be part of Canadian law, and BitTorrent users would be liable for infringement.

Having established that BitTorrent file-sharers would be liable under Bill C-32's making available provisions, the next question to ask is could they benefit from any of the new exceptions? Recall that the bill has new exceptions for mashups, backing up, and format-shifting, all of which may be relevant in a BitTorrent situation. The short answer is that file-sharers could not benefit from the new exceptions, as each of these exceptions comes with a pre-condition that the original copy *must be a non-infringing copy*, which is most likely not the case for a file downloaded via BitTorrent. The language of the pre-condition varies slightly from provision to provision, yet the effect is the same. For example, the format-shifting exception (officially called "reproduction for private purposes") in the proposed s. 29.22, requires that "the copy of the work or other subject-matter from which the reproduction is made is not an infringing copy"; and the so-called "YouTube exception"[320] (officially called "non-commercial user-generated content") of the proposed s. 29.21 requires that the creator of the mashup "had

[318] See *supra* notes 214 and 215 and accompanying text.

[319] Fewer, *supra* note 216. However, Fewer was writing in the context of Bill C-60, and the language of Bill C-32 may have made a difference to him, as it explicitly states "communication… includes making it available", which Bill C-60's language did not (see *supra* note 317).

[320] See e.g. Wells *et al*, *supra* note 312.

reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright." With these pre-conditions in place, it would be difficult to argue that any of these exceptions might apply, as most of the files downloaded via BitTorrent would most likely be infringing, considering the proposed making available right. Of course, there will always be cases where legitimate, non-infringing works are distributed via BitTorrent, for example works in the public domain, or works which the copyright holders have allowed to be distributed. In these cases as there is no primary infringement of the making available right, the exceptions could apply, assuming all the other conditions for each of these exceptions[321] are met.

Finally, there is a case to be made that the expansion of the fair dealing exemption might be beneficial to BitTorrent users. With the new categories of education, satire, and parody, a BitTorrent user who downloads files and claims fair dealing may find additional situations where fair dealing could apply. As discussed in section 4.1.1 *supra*, a finding of fair dealing would require a court's analysis of the six factors as outlined in *CCH* for a determination of fair dealing to be made.[322] Fair dealing as per s. 29 of the *Act* (both the current and proposed sections) does not have any of the pre-conditions of the new exemptions just

[321] For example the format-shifting exception requires the reproduction to be for private use, the YouTube exception requires it be for non-commercial use, etc. Of course it usually assumes that no TPM was circumvented.

[322] While the categories of fair dealing have expanded, the actual analysis of what is "fair" would not change under Bill C-32. This was recently confirmed by the Federal Court of Appeal in *Alberta (Education) v. Access Copyright*, 2010 FCA 198 [sometimes referred to as the *K-12 case*]. See Michael Geist "Federal Court Ruling Shows Fair Dealing Fears Greatly Exaggerated" (28 July 2010) online: Michael Geist <http://www.michaelgeist.ca/content/view/5232/125/>.

discussed, so the original source material need not necessarily be a "clean," non-infringing copy. As under current law, the exception would apply to the act of downloading only. As soon as the file is uploaded, it is made available, and is therefore infringing based on the new made available right.

All in all, it is clear that the new making available right proposed by Bill C-32 is a virtually insurmountable hurdle for BitTorrent file-sharers and findings of infringement are likely. Whether the copyright holders would find it worthwhile to pursue individual file-sharers considering the proposed cap on damages for individuals[323] is another question entirely.

5.3 BitTorrent Facilitators – ISPs, Torrent Search Engines, and Trackers

Unlike my discussion regarding liability under current law, for the purpose of analyzing liability for infringement under Bill C-32 it is necessary to examine all of the facilitators together. The bill has several provisions that are interrelated, covering each of these three actors in different ways, depending on the circumstances, as well as certain provisions that are identical for all the facilitators. Furthermore, unlike my focus on BitTorrent search engines to the exclusion of trackers in my analysis regarding liability under current law, under Bill C-32 there is possibly a relationship between the two types of BitTorrent websites which makes it virtually impossible to discuss one without the other. It is not clear that the drafters were able to distinguish a regular search engine like Google from a torrent search engine like isoHunt, or a torrent search engine from

[323] See *supra* note 311.

a tracker. This makes it imperative to discuss all of the BitTorrent facilitators together.

Bill C-32 is very clear in its providing a safe haven for ISPs when acting in their capacity as a conduit, codifying those elements of the *Tariff-22 case*. As the government states in regards to ISPs under the bill:

> This bill provides legal clarity for ISPs and will encourage the continued growth of Internet services in Canada. The bill will clarify that ISPs and search engines are exempt from liability when they act strictly as intermediaries in communication, caching and hosting activities.[324]

The proposed s. 31.1(1)[325] is the provision that will accomplish this goal. Under the heading "network services," it reads as follows:

> A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

This is clearly targeted at ISPs, and the qualifier "solely by reason of providing those means" would be the equivalent of the "conduit" qualifier of the *Tariff-22 case*. Under this provision, the ISPs would have an exemption from liability for their customers who are infringing copyright via BitTorrent.

However, with that said, recall my analysis under section 4.1.2 *supra*. In that section, I argued that the ISPs were not necessarily exempt from liability under the *Tariff-22 case* holding considering the evidence of throttling and

[324] "How does this bill affect the status of Internet Service Providers (ISPs)?" online: Government of Canada <http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html#status>.

[325] Created by cl. 35.

advertising. There is no reason to believe that this analysis would change with the Bill C-32 amendments, as the exemption from liability of the proposed s. 31(1) merely codifies what was said in the *Tariff-22 case*. In fact, there may be additional support for this argument in the new provisions, specifically the new secondary liability of the proposed s. 27(2.3),[326] to which I will return in a moment.

Before we discuss that liability, I would like to discuss the exemption from liability for search engines. That Bill C-32 offers the same exemption to search engines as to ISPs is a common statement among authors[327] and the government.[328] Yet I would argue that this is not necessarily so clear considering the manner in which the bill is drafted. The proposed s. 31.1(1) refers to network services, and this does not necessarily include search engines by my reading. Search engines are explicitly termed "information location tools" (ILTs) under the new provisions,[329] and the bill would create new sections of the *Act* under the heading "Provisions Respecting Providers of Network Services or Information Location Tools."[330] The exemption from liability in the proposed s. 31.1(1) falls

[326] Created by cl. 18.

[327] See eg. Sookman, "Some Thoughts" *supra* note 312; Amanda Carpenter, "Bill C-32: Clarifying the Roles and Responsibilities of Internet Service Providers and Search Engines" (15 June 2010) online: IP Osgoode <http://www.iposgoode.ca/2010/06/bill-c-32-clarifying-the-roles-and-responsibilities-of-internet-service-providers-and-search-engines/>.

[328] See *supra* note 324 and accompanying quote.

[329] Cl. 47 creating the new s. 41.27(5) which defines information location tool as "any instrument through which one can locate information that is available by means of the Internet or any other digital network."

[330] See cl. 47.

under the heading of simply "network services"; the absence of ILTs in that heading suggests that s. 31.1(1) would not necessarily apply, considering there is another heading which explicitly lists both.

However, the new provisions for "Providers of Network Services and ILTs" are the so-called "notice and notice" provisions,[331] which would in effect grant the ILTs the same exemption as the Providers of Network Services. Notice and notice is a procedure whereby a copyright owner can send a notice to an intermediary (either an ISP or website hosting company) whose customers he believes are infringing his copyright. The intermediary then would pass on the notice to its customers.[332] This is in contrast to the "notice and takedown" model as seen in the U.S. DMCA,[333] under which after the intermediary receives the notice from the copyright holder, the intermediary must "take it down," i.e. remove it or block access to it.[334] These notifications are the corollary to the exemption for intermediaries – in exchange for the exemption from liability for infringement, they are required to submit and adhere to the notice and notice scheme. At least the first part of the notice and notice scheme (i.e. receiving the

[331] Cl. 47 creating the new ss. 41.25 and 41.26.

[332] For a detailed discussion of notice and notice, see Sheryl N. Hamilton, "Made in Canada: A Unique Approach to Internet Service Provider Liability and Copyright Infringement" in Michael Geist, ed., In the Public Interest: The Future of Canadian Copyright Law (Toronto: Irwin Law, 2005) 285. While it was written in regard to Bill C-60, the notice and notice provisions are virtually identical to those in Bill C-32.

[333] See *supra* note 282.

[334] Hamilton, *supra* note 332.

notice from the copyright holder) in Bill C-32 explicitly does apply to ILTs.[335] After receiving a notice, the ILT would not be liable for damages, and the copyright owner could only find injunctive relief,[336] as long as the ILT respects five conditions.[337] I believe that the inclusion of ILTs in the first half of the notice regime and the limitation of relief to injunction is the exemption of liability in effect, even though it is not explicit as it is for ISPs.

The next question is whether the ILT exemption applies only to general search engines such as Google, or could it also be applied to torrent-specific search engines such as isoHunt, given the wording in the definition of ILTs.[338] I would argue that the generality of the definition makes the ILT so broad as to encompass any search engine, including BitTorrent search engines. The definition specifies "*any* instrument" (my emphasis) used to locate "information that is available by means of the internet," where information is not defined or limited in any way. I have no doubt that a torrent file (the object of a BitTorrent search engine) would qualify as information under this definition; recall that the torrent file is *not* the media file itself, but information about the media file.

To strengthen that determination, it is time to introduce the new secondary liability of the proposed s. 27(2.3), which would read as follows:

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[335] Cl. 47 creating a new s. 41.25(1)(c)

[336] Cl. 47 creating a new s. 41.27(1).

[337] Cl. 47 creating a new s. 41.27(2).

[338] See *supra* note 329.

> It is an infringement of copyright for a person to provide, by means of the Internet or another digital network, a service that the person knows or should have known is **designed primarily to enable acts of copyright infringement** if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service. (my emphasis)

The target of this provision certainly appears to be BitTorrent trackers,[339] as they are undoubtedly services designed primarily to enable acts of copyright infringement over the internet. But is it broader than that? Could it include BitTorrent search engines?[340] Could it even apply to general search engines or ISPs?

As strange as it may sound, it could apply to *all* the BitTorrent facilitators, up to and including ISPs. The legislator has made that clear by explicitly stating that the exemptions from liability for ISPs and ILTs would not apply in cases of secondary infringement under the proposed s. 27(2.3). For ISP's, the proposed s. 31.1(2) states that "subsection (1) does not apply in respect of a service provided by the person if the provision of that service constitutes an infringement of copyright under subsection 27(2.3)"; and for ILTs, the proposed s. 41.27(4) states that "subsection (1) does not apply to the provision of the information location tool if the provision of that tool constitutes an infringement of copyright under subsection 27(2.3)." The legislator would not have specified that the exemptions

[339] Stuart Freen, "Bill C-32: Cracking Down on Bit Torrent Trackers" (9 June 2010) online: IP Osgoode <http://www.iposgoode.ca/2010/06/bill-c-32-cracking-down-on-bit-torrent-trackers/>.

[340] Sookman states that the provision targets "pirate services such as illegal peer-to-peer file sharing sites." See "Some Thoughts" *supra* note 312. It is unclear whether he meant trackers, torrent search engines, or both; or even if he appreciates the distinction between the two as I've explained it in this paper.

from liability would not apply where there was the new secondary infringement had he not envisioned a case where that secondary liability might apply in certain situations.

Returning to the question of whether the exemption for ILTs would apply to BitTorrent search engines, I believe that if the s. 27(2.3) liability were to apply in some circumstances relating to ILTs [as per the s. 41.27(4) exception], in cases where it did *not* apply the ILT exemption *would* apply,[341] and that would include the case of a BitTorrent search engine. The next logical question to ask therefore is, under what circumstances does the s. 27(2.3) liability apply? When has someone operated a service "designed primarily to enable acts of copyright infringement"? Fortunately, the legislator has provided a series of six factors in the proposed s. 27(2.4) to assist a court in making a determination as to whether a person is liable for infringement under the section. The legislator has specified that the court does not need to examine all the factors ("the court *may* consider"), although it is unclear whether this list is exhaustive or if the court could add additional factors in its analysis. Even if a court were to add factors other than the ones specified by the legislator, the enumerated ones would certainly bear more

[341] Sookman phrases this differently but with roughly the same general point: "ILT exceptions are not applicable to sites that are primarily designed to enable acts of copyright infringement such as illegitimate P2P file sharing services"; "Some Thoughts" *supra* note 312. I do not agree, however, with the way he phrases it, because the phrase "such as" makes it appear as if there is a presumption of infringement on the part of "P2P file sharing services," whereas I believe a court would have to make that determination on a case by case basis.

weight. The six factors echo discussions of the courts in many of the cases I have examined in this paper, particularly *Grokster*[342] and the *Tariff-22 case*.

Considering the importance of the six factors in determining liability for infringement for each of the BitTorrent facilitators, I would now like to examine each in turn and make a few specific comments with regard to how each one might impact a determination of secondary infringement. The six factors are labeled (a) through (f) in the bill.

(a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;

This factor has always been one of the most important in the jurisprudence; it was at the heart of *Grokster*. What distinguishes it significantly is the "implicitly" qualifier. In *Grokster*, there had to be evidence of "clear expression or other affirmative steps"; implicitly marketing or promoting appears to be something considerably less than that. In *Fung* for example, the court took the listing of Top 20 movies and statements such as "if you're curious try this" as evidence of inducing; this is more like "implicitly" promoting.

What is most interesting about the "implicit" qualifier is how it would seem to fit the ISP evidence I presented above regarding advertising download speeds and quantity of files that can be downloaded with certain internet access packages. At first glance this would lend credence to the notion that ISPs could be found to be infringing under s. 27(2.3). Yet I am dubious any major ISP would be found liable, because a plain reading of s. 27(2.3) would indicate that its *sine qua*

[342] Freen, *supra* note 339.

non condition is that the service must be *designed primarily* to enable infringement. A BitTorrent tracker is designed primarily to enable infringement; an ISP provides a service that is designed primarily to access the internet. At the same time, I can imagine that a small start-up company offering internet service particularly targeted to BitTorrent users and advertising itself as such might satisfy this factor.

(b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;

What immediately strikes me regarding this factor is the lack of imputed knowledge; it would appear only actual knowledge would satisfy. The legislator could easily have drafted it as "the person knew or should have known that..."; by drafting it as he has, the legislator has made a conscious choice. Recall that the Court in *BGM (CA)* noted that von Finckenstein J. had ignored the fact that the secondary infringement of s. 27(2) included "should have known" language. While that language in that circumstance was in the context of knowledge of the work as infringing copyright and not simply a factor in determining whether a service enables copyright, the difference is still noteworthy.

The next element that jumps out of this factor is the fact that it is not just enabling infringement that is at issue, it is "a significant number of acts" of infringement. Without having any idea what constitutes a "significant number," it would at least rule out what I would term incidental infringement, just a few acts that occurred in the larger scheme of some non-infringing uses of the service. This relates to the next factor.

(c) whether the service has significant uses other than to enable acts of copyright infringement;

This factor looks like it comes straight out of *Sony* or *CCH*; in *Sony* the Betamax had "substantial noninfringing uses," and I do not see any real difference between substantial and significant.[343] I believe that this factor would be the most important in distinguishing a general search engine from a torrent search engine. There is no question that Google has significant uses other than enabling infringement; I am not sure that isoHunt does. As for a BitTorrent tracker, it almost certainly does not have significant noninfringing uses. Yes, you can exchange large files that are not copyrighted facilitated by a BitTorrent tracker, yet in reality, as I've already discussed above, virtually all of the files exchanged over BitTorrent do have copyright protection.

In comparing trackers and BitTorrent search engines, this would be a good time to pause and examine one of the most interesting choices of words in these factors, and also included in the wording of the proposed s. 27(2.3): **enable**. The new liability talks of services that *enable* infringement - but what does it mean to enable infringement? The current *Act* does not speak of enabling in any way. The notion of to "authorize" as discussed in *CCH* is not the same; recall McLachlin C.J.C. defined it as "sanction, approve, or countenance." Enable would appear to require some sort of action to make the thing happen. Black's Law Dictionary defines enable as "to give the power to do something."[344] I think the most apt

[343] Roget's Thesaurus II lists them as synonyms. "Substantial" online: Roget's Thesaurus <http://education.yahoo.com/reference/thesaurus/entry/substantial>.

[344] *Black's Law Dictionary*, abridged 6th ed. (St. Paul: West Group, 1991) at 364.

definition in the copyright and BitTorrent context would be "to make possible, practical, or easy,"[345] although I recognize to "make possible" and "make easy" are certainly two different things.

Depending on the definition that may be adopted, I believe it is the notion of enabling that might distinguish a torrent search engine from a tracker. A tracker, under any definition, would appear to enable infringement; a BitTorrent search engine's enabling potential may be more of a questionable proposition. Yes, perhaps a BitTorrent search engine makes infringing copyright *easier*, but I do not believe it makes it *possible*, or "gives it the power" to infringe. A search engine may help you find the torrent file, but without the actual tracker the power to infringe does not exist.

(d) the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;

For a torrent search engine, the action that could be taken to limit infringement would be to remove links to trackers for files that infringe copyright. isoHunt, for example, already does this based on the notice and takedown provisions of the DMCA; and yet it would certainly benefit more from this factor if it were to preemptively remove the links without notice, though this may raise freedom of speech issues. For an ISP, the only action that it could possibly take (in its capacity as a BitTorrent facilitator) would be to suspend the accounts of its infringing customers. In *iiNet*, the Court found that in fact the ISP had knowledge

[345] *Definition of "enable"*, online: Merriam-Webster <http://www.merriam-webster.com/dictionary/enable>, second definition.

of its users' infringement and had the power to suspend their accounts but did not take that drastic step. However this was far from determinative and I believe that for an ISP, a Canadian court would look at this factor similarly. At the same time, it is difficult to reconcile this factor and its stress on "action taken" with the fact that the bill proposes a notice and notice scheme instead of notice and takedown; this may lead to this factor being read down.

(e) any benefits the person received as a result of enabling the acts of copyright infringement;

(f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

I have grouped these last two factors together because I see them as two sides of the same coin. Even though "benefits" used in factor (e) is a generic term, I find it hard to believe that a court would impute any meaning to it other than economic benefits, or even if it did, economic benefits would likely be the most important. Grokster's entire business model was premised on making money from facilitating infringement and this was an important factor in the Court's decision. These economic factors reflect the balance of Canadian copyright law; where services are making money from copyright infringement, they are reducing the just rewards for the creator of the work. Given the importance of economic rights in copyright law I can understand why the legislator provided two separate factors in this regard.

So where does analysis of these six factors leave us with regard to the liability for infringement by the BitTorrent facilitators? Unfortunately, no clear answer presents itself. As Bill C-32 proposes a list of factors to determine liability

for this new concept of "enabling" infringement, each determination will have to be made on a case by case basis. With that said, however, I am comfortable concluding that the *probability* of a facilitator being liable under the new s. 27(2.3) secondary infringement is highest for BitTorrent trackers, less for BitTorrent search engines, and little probability of liability for ISPs.

6.0 CONCLUSION

With BitTorrent, Bram Cohen created the ultimate method for exchanging large files over the internet. File-sharers discovered they could quickly and easily find and share just about anything through the new technology, and BitTorrent became the de facto standard for exchanging movies, television shows, and music. Copyright holders, for their part, were faced with a possible torrent of copyright infringement. Was it theft, pure and simple? Or could users justify their actions by saying that they were simply lending a copy to a friend? And did file-sharing facilitators, both torrent search engines and ISPs, share in the responsibility for their users' potential infringement? Unfortunately, Canadian law, both the *Act* and jurisprudence, are woefully behind the times and provide no insight into BitTorrent, and it's only a matter of time before the question of copyright infringement via BitTorrent makes its way to a Canadian courtroom.

A thorough analysis of current copyright law has allowed me to project into this future courtroom and draw certain conclusions about the liability of the BitTorrent actors. Despite the pronouncements of von Finckenstein J. in the *BMG* bombshell that P2P file-sharing was not an infringing activity, file-sharers are out

of luck; von Finckenstein J.'s pronouncements do not hold up to scrutiny. BitTorrent file-sharers are displaying a sufficient degree of indifference which would qualify their actions as authorization under the reasoning of *CCH*; and the s. 80 private copying exemption should not apply to BitTorrent the way von Finckenstein J. says it does. Furthermore, there are additional arguments which would indicate that BitTorrent file-sharers are liable for copyright infringement. Specifically, BitTorrent downloads reduce the "just rewards of the creator" half of the copyright equation as elucidated in *Théberge*. Novel arguments for a defence of BitTorrent file-sharing based on refuting the requirements for copyright under the *Act* and jurisprudence – "substantial copying," "multiplication of copies," and "in any material form whatsoever" – are destined to fail. The only defence that may find application is a fair dealing defence for criticism or making a mashup, and then only under very specific circumstances.

File-sharing facilitators do not necessarily have clean hands with BitTorrent. While it may be easy to believe that ISPs have a shield from liability based on the *Tariff-22 case*, the facts of throttling of P2P traffic and the ISPs' advertising practices (which were not present at the time of the case) lend credence to the notion that the ISPs tacitly approve of their customers' infringement via BitTorrent. This would move ISPs from being a "mere conduit" (which grants them immunity) to an entity that could be seen to be authorizing infringement as per *CCH*. While torrent search engines have been found liable for their users' infringement in the United States, this was based on the inducement standard which is not present in Canada. The closest analogous concept in Canada

is authorization, and under that standard a torrent search engine could find a shield against liability based on actions they take to remove links to copyrighted material.

Bill C-32 picks up on its Bill C-60 and Bill C-61 predecessors' attempts to modernize the *Act* for the digital age, and has a range of provisions that would have an impact on copyright liability for BitTorrent file-sharers and facilitators. The case for liability against file-sharers will be strengthened with the incorporation of the making available right, already present in international copyright treaties, into Canadian copyright law. At the same time, users may find additional situations in which fair dealing may apply for materials downloaded through BitTorrent. While Bill C-32 provides a specific exemption for ISPs, it is a qualified exemption and the same evidence used under current law might provide an opening for ISPs to be held liable, though the chances are slim. The chances of a BitTorrent search engine being liable for its users' infringement are higher, and they are even higher for a BitTorrent tracker, based on what would be a new secondary infringement in the *Act*, that of "enabling" infringement.

BitTorrent traffic has taken over the internet, and a torrent of copyright infringement is upon us. The government has reacted by proposing legislation to protect copyright holders while attempting to balance the interests of users. Only time will tell if it is successful.

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