

**Global IT Law  
Intermediaries  
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# Final Paper

- Any topic (pre-approve) or answer one of the five course related questions
- Questions to be posted online on January 15, 2017
- Minimum 2,000 words, no maximum
- Submission Deadline: January 31, 2017 (23:59 Israeli time)
- Email submission directly to me: [mgeist@pobox.com](mailto:mgeist@pobox.com) (will confirm receipt)
- Late submissions:
  - Within 24 hours late: 3 points deducted
  - 24-48 hours late: 6 points deducted
  - More than 48 hours late: Not accepted

Subscriber information (privacy)

Copyright

Network traffic (neutrality)

Copyright

# U.S. Intermediaries

- CDA Section 230

*“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”*

# U.S. Intermediaries

- DMCA

A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
- (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
- (5) the material is transmitted through the system or network without modification of its content.

# U.S. Intermediaries

- DMCA

if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3)

# U.S. Intermediaries

- DMCA

A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

**(A)**

**(i)** does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

**(ii)** in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

**(iii)** upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

**(B)** does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

**(C)** upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.



# U.S. Intermediaries

- DMCA

To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
- (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
- (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

# Intermediary - Copyright

- SOCAN v. CAIP

- Tariff 22 - starts in 1996 as music download tariff
- Targets ISPs for activity on their networks
- Caching

## Section 2.4 (1)

*For the purposes of communication to the public by telecommunication,  
(b) 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;*

# Intermediary - Copyright

*“I conclude that the Copyright Act, as a matter of legislative policy established by Parliament, does not impose liability for infringement on intermediaries who supply software and hardware to facilitate use of the Internet. The attributes of such a “conduit”, as found by the Board, include a lack of actual knowledge of the infringing contents, and the impracticality (both technical and economic) of monitoring the vast amount of material moving through the Internet, which is prodigious.”*

# Notice & Notice

- Copyright holder can send notice:
  - a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant
  - (b) identify the work or other subject-matter to which the claimed infringement relates;
  - (c) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;
  - (d) specify the location data for the electronic location to which the claimed infringement relates;
  - (e) specify the infringement that is claimed;
  - (f) specify the date and time of the commission of the claimed infringement; and
  - (g) contain any other information that may be prescribed by regulation.

# Notice & Notice

- Once receive valid notice, ISP will:
  - Forward notification to subscriber (or explain why can't forward it to claimant)
  - Retain records for six months
  - If proceedings launched within six months, retain for a year
- Fee for service can be set by government (if no fee set, no fee)
- Damages for ISP - \$5,000 to \$10,000

# Digital Copyright Innovations

# Enabler Provision

- “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.”
- Factors:
  - Express or implicit marketing
  - Knowledge
  - Uses other than copyright infringement
  - Ability to limit copyright infringement
  - Benefits to person
  - Viability of service without copyright infringement

# User Exceptions

- Format shifting (reproduction for private purposes)
  - Authorized copy
  - Don't give it away
  - No circumvention
  - Use for private purposes
  - Not a copy to CD (private copying levy)
- Time shifting
  - Legally acquire program
  - No circumvention
  - One copy
  - Only keep for “reasonable” period of time
  - Don't give it away
  - Private purposes
  - Does not apply to on-demand services



# User Exceptions

- Backup Copies
  - Solely for backup purposes
  - Not an infringing copy
  - No circumvention
  - Don't give it away
  - Must destroy if don't own or license source copy
- Non-commercial User Generated Content
  - Use new work to create new work AND authorize intermediary to disseminate if:
    - Non-commercial purposes
    - Attribution if possible
    - Source not infringing copyright
    - No substantial adverse effect (including financial) on exploitation of existing work

# Intermediary Case Study

Mike Zuck is a wealthy Silicon Valley entrepreneur who owns the majority of shares in a popular social media service. While he is excited by the success of the site, he says he has a bigger dream. “I’m thrilled that we’ve connected a billion people through my website. But what if we could bring Internet access to a billion people that don’t currently have it. Now that would be cool.”

Zuck targets several countries for his idea including Brazil, India, and Indonesia. His idea is simple: convince a local wireless provider to give free Internet access. The free service will be different from its paid service. The free version be a slimmed down, basic version with access to Zuck’s site and few other sites that he alone will determine. Subscribers who want access to the entire Internet will need to pay for the service.

Zuck finds partners in each country. In Brazil, the service generates objections from an app developer who is angry that his app won’t work on the free service. In India, a competing social media service is angry that it is blocked on the free service. In Indonesia, there is anger over the alteration of approved sites so that they use less data.

# Intermediary Case Study

The telecom regulators in all three countries have come together to discuss the situation and look to you for advice:

1. Do you think the services are lawful in each country?
2. Should the services be lawful? Is there anything wrong with offering a free, slimmed down service that increases Internet access?
3. What changes, if any, should be made to the service?

# Net Neutrality

# Net Neutrality

- Definitions
- US experience
- Canadian experience
- Israel experience
- India
- Looking Ahead

# Definitions

## Save the Internet Coalition

“Network Neutrality — or "Net Neutrality" for short — is the guiding principle that preserves the free and open Internet. Put simply, Net Neutrality means no discrimination. **Net Neutrality prevents Internet providers from speeding up or slowing down Web content based on its source, ownership or destination.**”

# Definitions

## Telecom Policy Review Panel

"The Telecommunications Act should be amended to confirm **the right of Canadian consumers to access publicly available Internet applications and content of their choice by means of all public telecommunications networks providing access to the Internet**. This amendment should

- (a) authorize the CRTC to administer and enforce these consumer access rights,
- (b) take into account any reasonable technical constraints and efficiency considerations related to providing such access, and
- (c) be subject to legal constraints on such access, such as those established in criminal, copyright and broadcasting laws."

# Definitions

- Discrimination - treating equivalent content or applications in a different manner (often due to economic considerations)
- Transparency - consumer awareness about the service they are buying, what content may be altered
- Protection against limited competition in the market - potential for abuse due to limited consumer choice
- Maintaining a level playing field



# U.S. Experience

- 2003 – Tim Wu coins net neutrality term
- 2004 – FCC Commish principles:
  - Freedom to access content.
  - Freedom to run applications.
  - Freedom to attach devices.
  - Freedom to obtain service plan information
- 2005 – Madison River case – block VoIP

# U.S. Experience

- 2008 – First decision over Comcast blocking BitTorrent
- 2009 – FCC seeks to expand to non-discrimination and transparency
- 2010 – Courts block FCC power

# U.S. Experience

- 2010 – Open Internet Order
  - Transparency: Consumers and innovators have a right to know the basic performance characteristics of their Internet access and how their network is being managed;
  - No Blocking: This includes a right to send and receive lawful traffic, prohibits the blocking of lawful content, apps, services and the connection of non-harmful devices to the network;
  - Level Playing Field: Consumers and innovators have a right to a level playing field. This means a ban on unreasonable content discrimination. There is no approval for so-called "pay for priority" arrangements involving fast lanes for some companies but not others;
  - Network Management: This is an allowance for broadband providers to engage in reasonable network management. These rules don't forbid providers from offering subscribers tiers of services or charging based on bandwidth consumed;
  - Mobile: The provisions adopted today do not apply as strongly to mobile devices, though some provisions do apply. Of those that do are the broadly applicable rules requiring transparency for mobile broadband providers and prohibiting them from blocking websites and certain competitive applications;
  - Vigilance: The order creates an Open Internet Advisory Committee to assist the Commission in monitoring the state of Internet openness and the effects of the rules.

# U.S. Experience

- 2014 – Court narrows enforcement of Open Internet Order
- 2015 – New FCC support for net neutrality
- 2016 – Donald Trump elected president

# Canadian Experience

- Actual cases -
  - Telus (Voices for Change)
  - Shaw (VoIP surcharge)
  - Rogers (traffic shaping)
  - Bell, Videotron (support for new fees)
- Corporate Rhetoric - Videotron

*“If the movie studio were to mail a DVD . . . they would expect to pay postage or courier fees. Why should they not expect a transmission tariff?”*

- Robert Depatie, Videotron

# Canadian Experience

- CAIP v. Bell
  - CAIP files complaint after Bell begins “throttling” traffic at the wholesale level
  - Bell argues no violation of Canadian law, necessary to manage network
  - CRTC sides with Bell but calls for broader hearing on “Internet Traffic Management Practices”

# Canadian Experience

- ITMP Hearing
  - Most exhaustive hearing on traffic management in Canada - presentations from all perspectives
    - ISPs - different approaches
    - Consumer groups - call for “Oakes” like test
  - CRTC releases decision in October 2009

# Canadian Experience

- Guidelines for Reviewing Traffic Management
  - Consumer can complain or CRTC investigate cases of discrimination
  - If evidence, ISP must:
    - demonstrate that the ITMP is designed to address the need and achieve the purpose and effect in question, and nothing else;
    - establish that the ITMP results in discrimination or preference as little as reasonably possible;
    - demonstrate that any harm to a secondary ISP, end-user, or any other person is as little as reasonably possible; and
    - explain why, in the case of a technical ITMP, network investment or economic approaches alone would not reasonably address the need and effectively achieve the same purpose as the ITMP.



# Canadian Experience

- Guidelines for Reviewing Traffic Management
  - Other considerations:
    - Economic over technical
    - traffic management that degrades or prefers one application over another may warrant investigation under section 27(2) of the Act
    - Throttling of time sensitive traffic with noticeable impact requires prior approval
    - Deep packet inspection: "not to use for other purposes personal information collected for the purposes of traffic management and not to disclose such information."

# Canadian Experience

- ISP Traffic Management Disclosure Requirements:
  - why there are being introduced
  - who is affected
  - when it will occur
  - what Internet traffic is subject to the traffic management
  - how it will affect an Internet user's experience, including specific impact on speed

## Internet Traffic Management Practices

Teksavvy Solutions Inc. ("Teksavvy") does not employ technical Internet traffic management practices ("ITMPs") to manage the use of bandwidth on its network. However, some underlying carriers from which TekSavvy must purchase high-speed access services in order to provide its high-speed Internet access services to its customers do employ ITMPs. In such cases, those underlying carriers' ITMPs are unavoidably flowed through to TekSavvy's high-speed Internet access services.

In order to find out which, if any, ITMPs apply to the services you obtain from TekSavvy, you must first identify the underlying carrier that provides the wholesale high-speed service that TekSavvy uses to provide its high-speed Internet access service to you. There is a simple way of doing this.

First, determine whether you obtain your high-speed Internet access service from TekSavvy using DSL technology (i.e., over a telephone line) or cable (i.e., over the type of cable used by a cable company to deliver its TV signals). If you obtain DSL service, then the underlying provider is the incumbent telephone company that provides telephone service in your neighbourhood (i.e., one of Bell Canada, Bell Aliant, Telus, SaskTel or MTS Allstream). If you obtain cable service, then the underlying provider is the cable company that provides cable TV service in your neighbourhood (i.e., one of Rogers, Cogeco, Shaw or Videotron).

Once you have identified the applicable underlying carrier, go to the section below related to that carrier for a description of the ITMPs, if any, applied by that carrier and flowed through to the high-speed Internet access service that TekSavvy provides to you.

# Canadian Enforcement

- 2011 ATIP reveals many complaints:
  - Rogers – throttling of World of Warcraft
  - Barrett Xplore
    - Preference for own voice service
    - Insufficient disclosure
- 2012 – Rogers faces threats of action, backs down
- 2014 – complaint over undue preference on Bell mobile TV, ruling against Bell

# Canadian Enforcement

- 2015 – complaint against Videotron over music service (zero rating)
- 2016 – regulator announces new consultation

# Israel Experience

- Communications Law (Bezeq & Transmissions)

*No Licensee and no person who engages in trading in Terminal Equipment which is mobile radio telephone equipment (in this section – M.R.T. Terminal Equipment) shall cause the restriction or blockage of the following, on his own or through another person, including by way of setting tariffs:*

*(1) the possibility open to the subscriber to use any service or application provided over the internet;*

- Subject to “reasonable and fair management”, other government approvals
- Anti-trust concerns