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LEGISLATING AGAINST COPYRIGHT INFRINGEMENT ACROSS BORDERS: AN EXAMINATION OF CANADA'S EFFORTS TO KEEP PACE WITH TECHNOLOGY

Julie DeWeese*

THE innovations and creations of individuals in a given society are a valuable and integral aspect of the society.¹ In an effort to protect these innovations and creations, societies have either applied principles of common law or have statutorily implemented copyright, trademark, and patent protection.² Because the main case in this note deals with copyright law, the focus of the note will be solely on copyright law. On an international scale, treaties like the World Intellectual Property Organization (WIPO) Copyright Treaty and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement have been implemented to enforce copyright protections in an age where the Internet makes it easy to download works without paying royalties to the creators.³ In the 2004 case, *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers*, the Supreme Court of Canada considered who should pay royalties to musicians and composers when their copyrighted music is downloaded in Canada from an Internet server located outside the country.⁴ The Court held that Internet service providers (ISPs) are not users under Canada's Copyright Act, and therefore, do not have to pay royalties for illegally downloaded music.⁵ While the Supreme Court of Canada made a valid attempt to

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1. *WIPO National Seminar on Copyright, Related Rights, and Collective Management.*, WORLD INTELL. PROPERTY ORG. (WIPO), 2 (Mar. 2, 2005), WIPO Doc. WIPO/CR/KRT/05/4.
2. *Overview: The TRIPS Agreement*, WORLD TRADE ORG. (WTO), http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar. 2, 2011).
3. Amanda M. Witt, *Burned in the USA: Should the Music Industry Utilize Its American Strategy of Suing Users to Combat Online Piracy in Europe?*, 11 COLUM. J. EUR. L. 375, 376 (2005); *Overview: The TRIPS Agreement*, *supra* note 2; *Summary: WIPO Copyright Treaty (WCT) (1996)*, WIPO, http://www.wipo.int/treaties/en/ip/wct/summary_wct.html (last visited Mar. 2, 2010).
4. *Soc'y of Composers, Authors & Music Publishers of Can. v. Can. Ass'n of Internet Providers*, [2004] 2 S.C.R. 427, ¶ 1 (Can.).
5. *Id.* ¶¶ 131-32.

enforce copyright protection for the works of its citizens, the Court failed to carefully consider the WIPO Copyright Treaty and the TRIPS Agreement, both of which should be reconsidered by their respective organizations due to rapidly changing technology.

This article will analyze *Society of Composers* and will compare the ruling of the case with the provisions of two treaties to which Canada is a signatory, along with statutes and cases from other countries. The following section will contain a brief overview of the primary case and the issues that arose under it. Section II will discuss the legal and historical context for the case and how the case relates to treaties signed by Canada. Section III will analyze how the holding of this case fits into today's legal context with a specific focus on the treaties. Finally, section IV will discuss the implications of the case and how the law has changed since the case was published.

I. THE PRIMARY CASE: *SOCIETY OF COMPOSERS,
AUTHORS & MUSIC PUBLISHERS OF CANADA V.
CANADIAN ASSOCIATION OF
INTERNET PROVIDERS*

Advocates of strict copyright laws have gone so far as to blame ISPs for the continuous violations of copyright laws by their users.⁶ The Society of Composers, Authors, and Music Publishers of Canada (SOCAN) is one such advocate. As the appellants in *Society of Composers*, SOCAN argued that royalties should be imposed against ISPs who allow users to violate copyright laws.⁷ Applying section 2.4(1)(b) of Canada's Copyright Act, the Supreme Court of Canada found that Internet intermediaries, also known as ISPs, are not "users" as defined under the act, and therefore, are not liable to pay royalties to the artists.⁸

Before *Society of Composers* went to the Supreme Court of Canada, however, it started out as a proposal by SOCAN for a tariff that would have required a license and a royalty fee for musical works owned by SOCAN to be communicated to the public via telecommunication.⁹ The Copyright Board of Canada, an administrative body that has the authority to hold hearings without the presence of a legally trained member, heard SOCAN's tariff proposal.¹⁰ While the Copyright Board usually deals with general application of copyright laws, the decisions of which cannot be appealed, where there are issues regarding questions of law, a Canadian court may have appellate jurisdiction.¹¹

SOCAN, which was formed under the Copyright Act to represent both Canadian and foreign music composers, authors, and publishers, brought

6. *Id.* ¶¶ 14-15.

7. *Id.*

8. *Id.* ¶¶ 131-32.

9. *Id.* ¶ 12.

10. *Id.* ¶¶ 12, 49 (noting that while a legally trained member is not required, the Chair of the Board must be either a current or former judge).

11. *Id.* ¶ 49.

before the Copyright Board a proposal for the imposition of Tariff 22 on Internet telecommunications.¹² In doing so, SOCAN referred to certain provisions of the Copyright Act to argue that licenses and royalties were due to the artists based on the provisions and definitions of the statute.¹³ Section 2.4(1) of the Copyright Act in part states that persons who communicate copyrighted works via telecommunication to the public are liable for their transmissions.¹⁴ “Public” refers partly to “persons who occupy apartments, hotel rooms or dwelling units situated in the same building.”¹⁵ “Communication to the public,” is defined under the statute as a work or subject matter meant to be received by those persons who comprise the public.¹⁶ But Justice Binnie, writing for the Supreme Court of Canada, defined communication in its ordinary sense, as “to impart or transmit.”¹⁷ Finally, section 2 of the Copyright Act defines “telecommunication” as “any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system.”¹⁸

Opponents of Tariff 22 were Canadian ISPs who supplied Internet access to users who uploaded the copyrighted content and to end users who viewed the content.¹⁹ They argued that they were not communicating the protected music, as defined under the statute.²⁰ Despite the fact that the ISPs may not have transmitted the entire work, the Copyright Board found that they did transmit some part of the work, and therefore, were found to have communicated under the statute.²¹

To better understand the issues presented by the parties, one must first understand how the Internet facilitates communication between the content provider and the end user. Where ISPs are involved, content providers must pay a fee to store their files on a host server, provided by the ISP, from which content is transmitted to end users.²² Any musical work, for example, posted on a host server can then be accessed by an individual anywhere in the world so long as that individual has service from an ISP.²³

12. *Id.* ¶¶ 11-12.

13. *Id.* ¶ 12.

14. Canada Copyright Act, R.S.C., 1985, c. C-42, § 2.4.

15. *Id.*

16. *Id.*

17. *Soc’y of Composers*, 2 S.C.R. 427, ¶ 46 (citing SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 463 (5th ed. 2002)).

18. R.S.C., c. C-42, § 2.

19. *Soc’y of Composers*, 2 S.C.R. 427, ¶ 16.

20. *Id.* ¶ 22; R.S.C., c. C-42 (Section 2.4(1) of the Copyright Act provides: “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 . . .”).

21. *Soc’y of Composers*, 2 S.C.R. 427, ¶ 22.

22. *Id.* ¶ 18.

23. *Id.*

Initially, SOCAN wanted to impose royalties against not only ISPs, but also against what the Court called "Backbone Service Providers," or those companies that provide the infrastructure necessary to support Internet service such as fiber optic cable and telephone lines.²⁴ But they later singled out ISPs because of the providers' abilities to control the content of a particular website.²⁵ SOCAN was particularly concerned with "caching" being conducted by the ISPs and argued the cache copies that had been retransmitted violated the Copyright Act.²⁶ Caching is the process of making a temporary copy, or "cache copy," of a website's content when it is visited by an end user.²⁷ The cache copy is then retained for the next user to view, ultimately enhancing the speed at which the subsequent end user receives the information and reducing the costs incurred by the ISP.²⁸ Although cache copies are not permanent, the ISP has discretion in deciding when to terminate a particular cache.²⁹

After consideration of the issues before it, the Copyright Board held that ISPs, acting in their ordinary course of business rather than as content providers, could not be forced to pay a royalty under the Copyright Act because their activities did not constitute communications under the act, and thus did not violate copyright protections.³⁰ But the Copyright Board also held that where the ISPs did provide content to be accessed by other users, such as music stored on servers located in Canada, those service providers would have to pay a royalty.³¹ The Copyright Board further held that mere knowledge of an infringement was not enough to impose a royalty on a service provider; rather, a royalty would be imposed on the provider if it granted a content provider permission to infringe a copyright.³² Finally, the Copyright Board found that caching was a practical necessity because it related to the quality of service provided by the ISP and reduced the provider's costs.³³

Finding little satisfaction from the holding of the Copyright Board, SOCAN appealed the decision to the Canadian Federal Court of Appeals on the grounds that it involved legal questions.³⁴ Upon review, the appellate court found that an application of the real and substantial connection test was proper to determine whether a certain communication had any real and substantial connection to Canada or the ISP.³⁵ The real and substantial connection test is a type of balancing test that looks at weighing factors such as the locations of the ISPs, the content providers, the ultimate

24. *Id.* ¶¶ 14-15.

25. *Id.* ¶ 19.

26. *Id.* ¶¶ 23-24.

27. *Id.* ¶ 23.

28. *Id.*

29. *Id.*

30. *Id.* ¶ 28.

31. *Id.*

32. *Id.* ¶ 33.

33. *Id.* ¶ 38.

34. *Id.* ¶ 35.

35. *Id.* ¶ 36.

users of the content, and the host server.³⁶

Under Canada's real and substantial connection test, the appellate court unanimously found that the Copyright Board erred as a matter of law when it failed to consider factors such as the locations of the end users, content providers, and host servers.³⁷ Further, the court concluded that caching, even in the context of improving service, violated the Copyright Act and was not a practical necessity as the Copyright Board had found.³⁸ The case was then appealed by the ISPs to the Supreme Court of Canada.

This issue of how to protect copyrighted works has become increasingly important in the purview of global economics, especially with advancements in technology and increasing globalization.³⁹ And while solutions to upholding copyright owners' rights abound, there is still the problem of how to enforce these rights on an international level.⁴⁰ Treaties like the Berne Convention, the WIPO Copyright Treaty, and the TRIPS Agreement attempt to solve this issue.⁴¹ Yet these international agreements have failed to account for the rapidly enhancing technology and have left countries in a stalemate over copyright protection and enforcement.⁴² *Society of Composers* illustrates the need to amend existing treaties to take into account recent technological innovations and the increasingly globalized market.

For a better understanding of the issues in this case, consider the following hypothetical. John is a content provider who has purchased storage space on a host server that is operated by XYZ Co., an ISP with its principal place of business in the United States. As part of their agreement, John agrees not to post illegal content such as copyrighted materials for which he has not paid royalties, but he knows that XYZ Co. does not monitor the content that is posted. John subsequently posts a copyrighted song written and performed by Group X to his website and makes the song available for others to download without paying a fee. John lives in the United States, but people all over the world can access his website and download the song he has posted. Group X is a band that holds copyrights to all of its songs in several countries, including Canada and the United States. Assume now that Jane, a woman living in Canada and a fan of Group X, comes across John's site and decides to download

36. *Id.* ¶¶ 60-61.

37. *Id.* ¶ 37.

38. *Id.* ¶ 38.

39. See, e.g., Heather Nehila, Note, *International Copyright Law: Is it Music to American Ears?*, 16 TEMP. INT'L & COMP. L.J. 199, 220 (2002).

40. *Id.* at 215 (noting that jurisdiction and choice-of-law issues have hindered the United States' efforts to combat copyright violations).

41. WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. No. 105-17; Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Apr. 15, 1994, 1994 WL 171191 [hereinafter TRIPS Agreement]; Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, S. TREATY DOC. No. 99-27 [hereinafter Berne Convention].

42. Nehila, *supra* note 39, at 216.

the posted song. Although the song is copyrighted in both countries, neither John nor Jane paid royalties to use the song. This situation is exactly why SOCAN wanted to impose a tariff against the ISPs—because it was easier for them to pursue royalties from a company than from individuals. But copyright laws vary between nations and sometimes countries do not even apply the minimum standards required by current treaties, as seen in Part III of this case note.⁴³

II. LEGAL BACKGROUND: INTERNATIONAL COPYRIGHT TREATIES, PRECEDENT, AND THE SUPREME COURT OF CANADA

The English common law began recognizing copyrights shortly after the invention of the printing press.⁴⁴ Since then, copyright laws have evolved with changing technology.⁴⁵ But despite society's best efforts to curb infringement of these rights, technology remains one step ahead, giving people access to copyrighted material and leaving the creators with little to no return for their work.⁴⁶ In this age, sharing via the Internet is becoming more pervasive in societies with the infrastructure to support such a system.⁴⁷ This proliferation of readily available technology and connection to the Internet has created myriad copyright issues for artists, companies, and countries attempting to regulate intellectual property rights both on domestic and international levels.⁴⁸

The most recent international enactment of copyright protection is the WIPO Copyright Treaty, enacted in December 1996.⁴⁹ The first convention to consider issues of copyright protection was the Berne Convention, to which Canada became a signatory in 1928.⁵⁰ Since then, the Berne Convention has undergone several amendments and has been adapted into both the WIPO Copyright Treaty and the TRIPS Agreement.⁵¹ Canada is a signatory to both of these treaties, but has not enacted either of

43. *Id.*

44. WIPO, *INTRODUCTION TO INTELLECTUAL PROPERTY THEORY AND PRACTICE* 23 (1997).

45. *Id.* at 25.

46. *See, e.g.*, Nehila, *supra* note 39, at 199-200 (discussing the impact of MP3 technology on copyright infringement in the digital music arena).

47. *Soc'y of Composers*, 2 S.C.R. 427, ¶ 129 (“The internet makes it possible for large numbers of people to rapidly copy protected materials worldwide . . . [D]evelopments have led some to hypothesize that copyright law is dead because technology is so far ahead of the law that enforcement is impossible, and should not even be attempted.”) (quoting Matthew V. Pietsch, *International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement*, 24 *HASTINGS COMM. & ENT. L.J.* 273, 278 (2002)).

48. Nehila, *supra* note 39, at 220.

49. *Id.* at 201.

50. Berne Convention, *supra* note 41; *Contracting Parties to the Berne Convention*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Nov. 7, 2010).

51. WIPO Copyright Treaty, *supra* note 41; TRIPS Agreement, *supra* note 41.

them.⁵²

Like the U.S. Congress, the Parliament of Canada has the ability to enact laws that can be enforced on citizens of foreign countries.⁵³ But as the Court in *Society of Composers* notes, courts do not presume that Parliament writes laws in this way, especially where there is no provision giving extraterritorial effect.⁵⁴ The fact that the court will not read extraterritorial effect into a statute, such as the Copyright Act, is significant to the outcome of *Society of Composers*.⁵⁵ Further, “the real and substantial connection test” applied by the appeals court in this case was first adopted by the Supreme Court of Canada in its decision in *Morguard Investments Ltd. v. De Savoye* to rein in the extraterritorial jurisdiction.⁵⁶ *Morguard* involved a mortgage default claim, in which one party resided in Alberta and the other had moved to British Columbia after defaulting.⁵⁷ Although the case dealt with two parties in different provinces, the Court noted that it adapted its holding from a rule recognizing judgments in foreign countries where they concern Canadian citizens.⁵⁸ More recent cases out of the Supreme Court of Canada have reaffirmed the “real and substantial connection test,” noting that the test reflects the realities of territorial limits and realizes respect for the laws of other nations.⁵⁹

The Court in *Society of Composers* held that the case should be remanded back to the Copyright Board to decide whether Tariff 22 should be enacted in accordance with the Court’s opinion.⁶⁰ The Court found that an ISP is not liable for royalties to copyright holders as long as it is acting merely as a “conduit” for communications.⁶¹ Further, the Court extended the decision of the Copyright Board by holding that ISPs do not authorize their users to violate copyright laws even when they know that their users might commit such violations.⁶² Basing its holding on the legislative policy of the Copyright Act, the Court noted that an ISP cannot possibly monitor all of the content users post each day.⁶³ Using the “real and substantial connection test,” the Court found that the test was more than sufficient to justify bringing claims against those providers outside the country, especially because Canada has a public interest in the infor-

52. *Soc’y of Composers*, 2 S.C.R. 427, ¶ 65; *Contracting Parties to WIPO Copyright Treaty–Canada*, WIPO, http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1505C (last visited Mar. 2, 2010); *Understanding the WTO: Members and Observers*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 2, 2010).

53. *Soc’y of Composers*, 2 S.C.R. 427, ¶ 54.

54. *Id.*

55. *Id.* ¶ 57.

56. *Id.* ¶ 60.

57. *Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, ¶ 2 (Can.).

58. *Id.* ¶ 22.

59. *Soc’y of Composers*, 2 S.C.R. 427, ¶ 60 (citing *Tolofson v. Jensen*, [1994] 3 S.C.R. 102, 104).

60. *Id.* ¶ 133.

61. *Id.* ¶ 101.

62. *Id.* ¶¶ 101, 103.

63. *Id.* ¶ 101 (the court cites evidence that one Internet service provider in general delivers “11 million transmissions a day.”).

mation that enters and exits the country.⁶⁴ Finally, the Court held that caching is protected under the Copyright Act because the main purpose of caching is to streamline service, not to violate copyright.⁶⁵

Although the Court had plenty of its own authority on which to rely, a good deal of the Court's analysis also considered the decisions of other countries regarding copyright law.⁶⁶ Among the statutes cited by the Court were the E-Commerce Directive of the European Commission and the Australian Copyright Amendment (Digital Agenda) Act 2000.⁶⁷ Notably, the Court cited the E-Commerce Directive for the proposition that either the country in which the transmission is received or the country from which the transmission is sent can take jurisdiction of the communication as long as there is a connection to its territory and the country, as a matter of national policy, chooses to take jurisdiction.⁶⁸ Australia, also a signatory to the WIPO Copyright Treaty, permits Australian copyright holders to impose royalties on communications sent and received inside and outside Australia.⁶⁹ The Court also made note of a case concerning copyright protection between the United States and France in which the United States refused to grant an injunction mandated by a French court that had ordered a U.S. company to block its French users from access to an auction because of the harm that would have been suffered in the place of reception, France.⁷⁰ Although in that case, the U.S. federal court refused to grant the injunction based on the First Amendment of the U.S. Constitution, not on jurisdictional justifications.⁷¹

The Supreme Court of Canada analyzed the laws of other countries to ensure that it could in fact claim jurisdiction over copyright conflicts originating both in Canada and in other countries.⁷² The Court found that several nations were willing to take jurisdiction outside their own countries and that Canada would also be justified in doing so.⁷³ Surprisingly, the only treaty mentioned by Justice Binnie is the WIPO Copyright Treaty, to which he noted Canada is a signatory, but not a party.⁷⁴ He cited the treaty for the proposition that multiple royalties cannot be imposed on one work in different countries that are parties to the treaty.⁷⁵

64. *Id.* ¶¶ 60-62. Justice Binnie is careful to point out that while Canada can apply the Copyright Act to Internet transactions occurring on an international level, the country is still mindful of the laws of foreign countries also involved. *Id.* ¶ 60.

65. *Id.* ¶ 116.

66. *Id.* ¶¶ 64, 69, 70, 73, 75.

67. *Id.* ¶¶ 66, 73.

68. *Id.* ¶ 68.

69. *Id.* ¶¶ 73-74.

70. *Id.* ¶ 75 (citing *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001)).

71. *Id.*

72. *Id.* ¶¶ 76-78.

73. *Id.* ¶ 76.

74. *Id.* ¶ 65; see also *Contracting Parties to the WIPO Copyright Treaty*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 (last visited Nov. 6, 2010) (showing that Canada remains a signatory of the treaty but is currently not a party).

75. *Soc'y of Composers*, 2 S.C.R. 427, ¶ 65.

Nevertheless, the Supreme Court of Canada asserted its ability to take jurisdiction over foreign matters via the “real and substantial connection test” and Justice Binnie reemphasized that when Canada is the country where the communication is transmitted or received, the Court’s ability to claim jurisdiction is in accordance with international copyright guidelines.⁷⁶

After ensuring that its legislation was in line with the predominant international legislation on copyright protection, the Supreme Court of Canada then turned to the specific language of the Copyright Act and the intent of Parliament in its enactment.⁷⁷ The Court started with the actual language of the statute and found that the burden of proof was on the copyright holder seeking to assert his or her right against another who had communicated that right by telecommunication.⁷⁸ On its appeal, SOCAN took issue with section 2.4(1)(b) of the Copyright Act and argued that the Act’s exemption for ISPs should be narrowly construed.⁷⁹ But the Court disagreed and stated that ISPs would be shielded from liability as long as they did not participate in acts that dealt with the content of the communication.⁸⁰ In a parliamentary report, a sub-committee expressed the need for the Copyright Act to incorporate a broader definition of telecommunication, which it later adopted as an amendment to the Act, reflected in section 3(1)(f).⁸¹ Along with this amendment, the sub-committee commented that ISPs who were merely intermediaries should not be held liable under the broadened definition.⁸² The comment served as a reminder to Canadian courts that the nature of the intermediaries’ actions would continue to be important in the copyright context.⁸³

The Supreme Court of Canada also compared the wording of the Copyright Act to the statutes of other countries to determine that the language was consistent with and met the obligations of the WIPO Copyright Treaty.⁸⁴ The Court again cited to the European E-Commerce Directive, which states that operating a network of communication is merely technical and passive, which implies the operator has neither knowledge nor control of the information being communicated.⁸⁵ And, as the Court noted towards the end of its opinion, Parliament enacted the Copyright Act to distinguish those who infringe copyrights to avoid paying for works from those who merely provide the Internet infrastructure and, therefore, unavoidably impact the nation’s economics with contin-

76. *Id.* ¶ 63.

77. *See generally id.* ¶¶ 89-91.

78. *Id.* ¶ 83 (quoting R.S.C., c. C-42).

79. *Id.* ¶ 88.

80. *Id.* ¶ 92.

81. *Id.* ¶ 90.

82. *Id.*

83. *Id.*

84. *Id.* ¶ 97.

85. *Id.* ¶ 98.

ued expansion and development.⁸⁶

In sharp contrast to the majority opinion is Justice LeBel's dissent. He agreed with the Copyright Board that the legal standard required the host server to be located in Canada but that he would not have applied the real and substantial connection test.⁸⁷ While Justice LeBel agreed that Canada does have the authority to give extraterritorial effect to legislation, he looked directly to the Copyright Act to find that it does not expressly or implicitly give extraterritoriality.⁸⁸ To reinforce his position that the real and substantial connection test did not apply in this case, Justice LeBel distinguished cases like *Morguard* and relied on treaties to which Canada is a signatory.⁸⁹ Although Canada is only a signatory to the WIPO Copyright Treaty and the TRIPS Agreement, Justice LeBel dispelled the notion of the majority that the treaties could not be considered as interpretive aids.⁹⁰ After all, Canada has an interest in following international copyright practice.⁹¹ Justice LeBel's further problems with the majority's approach were that it could result in awarding more royalties than necessary and its possibility of invading the privacy of end users.⁹²

III. PRACTICAL ANALYSIS & IMPLICATION—REVISING COPYRIGHT LAW ON AN INTERNATIONAL LEVEL

Today, countries have the guidelines of the WIPO Copyright Treaty and the TRIPS Agreement on which to base their copyright laws.⁹³ And while several nations have proven that they can adapt and apply treaty mandates to their own jurisprudence, there still remain several issues with copyright protection.⁹⁴ The first issue is that copyright infringement is still being committed on an international level and possibly at a greater rate due to advancements in technology over the past decade.⁹⁵ This is further exacerbated by the fact that worldwide Internet usage has risen from about ten percent of the world's population in 2002 to more than a quarter in 2009.⁹⁶

86. *Id.* ¶ 131.

87. *Id.* ¶ 134.

88. *Id.* ¶¶ 143-44.

89. *Id.* ¶¶ 147-48.

90. *Id.* ¶ 149.

91. *Id.* (noting that treaties like the WIPO Copyright Treaty bring domestic copyright laws from different countries into harmonization with one another).

92. *Id.* at ¶¶ 152-53.

93. *Overview: The TRIPS Agreement*, *supra* note 2; *Summary: WIPO Copyright Treaty (WCT) (1996)*, *supra* note 3.

94. *See, e.g., Soc'y of Composers*, 2 S.C.R. 427, ¶¶ 97-98.

95. Witt, *supra* note 3, at 377 (noting that initial copyright laws dealt with print media and have not been modified to a great enough extent to take into account new technologies, thereby creating copyright issues).

96. *The Internet and the Development of the Digital Society*, WIPO, http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap1.html (last visited Oct. 7, 2010); *The World in 2009: ICT Facts and Figures*, INT'L TELECOMM. UNION, http://www.itu.int/ITU-D/ict/material/Telecom09_flyer.pdf (last visited Mar. 2, 2011).

The second issue is enforcement. Copyright holders are no longer just worried about individuals illegally downloading files; they now also have to worry about whether certain countries are fulfilling the obligations imposed on them by treaties like the TRIPS Agreement.⁹⁷ More recently, a panel of the World Trade Organization (WTO) was called to resolve a dispute over copyright laws brought by the United States against China.⁹⁸ The United States argued that China's copyright laws did not comply with the terms of the TRIPS Agreement because it denied copyright protection to works that China considered illegal.⁹⁹ Although the panel recognized China's right to prohibit certain works, it found that China's denial of copyright protection for the works at issue was inconsistent with the Berne Convention, which was incorporated under the TRIPS Agreement.¹⁰⁰ China was then asked to revise its copyright laws to conform to the provisions the country had agreed to under the TRIPS Agreement when it became a member.¹⁰¹

The United States is particularly concerned with copyright protection for its artists, especially as copyright industries generated sales of \$89 billion in 2002.¹⁰² In a document distributed by the U.S. Copyright Office, the United States makes light of the fact that there is no international copyright law, but rather that protection is given by individual nations' laws.¹⁰³ But the United States must also take the extra step of ensuring that the copyright protection it grants does not violate its own First Amendment.¹⁰⁴

In a recent decision out of the Tenth Circuit Court of Appeals, the court held that section 514 of the Copyright Act did not violate the First Amendment right to free speech.¹⁰⁵ At issue in that case was whether works removed from the public domain to have their copyrights restored violated the First Amendment rights of a group of plaintiffs who relied on those once public works to make a living.¹⁰⁶ The Tenth Circuit looked at congressional hearings and determined three things: (1) failing to restore the copyrights would put the United States in violation of the Berne Convention and TRIPS Agreement, (2) not restoring the copyrights would harm American artists' copyrights abroad, and (3) other countries would

97. See, e.g., Panel Report, *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 17, WT/DS362, (Jan. 26, 2009), available at 2009 WL 192579 [hereinafter Panel Report].

98. *Id.* at 17.

99. *Id.* at 16-17.

100. *Id.* at 32.

101. *Id.* at 133.

102. Press Release, Int'l Intell. Prop. Alliance, IIPA's New Economic Study Reveals the Copyright Industries Remain a Critical Driving Force in the U.S. Economy (July 20, 2009), available at <http://www.iipa.com/pdf/IIPACopyrightIndustriesReport2003-2007PressRelease.pdf>.

103. U.S. COPYRIGHT OFFICE, COPYRIGHT BASICS 6 (2008), available at <http://www.copyright.gov/circs/circ1.pdf>.

104. See *Golan v. Holder*, 609 F.3d 1076, 1080 (10th Cir. 2010).

105. *Id.* at 1095.

106. *Id.* at 1081-82.

follow the United States' lead in this area.¹⁰⁷

While Canada has established a legal test for determining when it will enforce its copyright laws, there is still substantial variation within the international community.¹⁰⁸ Some countries, like Hungary and China, have implemented strict punishments for copyright infringement on both the criminal and civil levels.¹⁰⁹ At the other extreme, other countries, like Australia and Greece, have been more lenient in both implementing and enforcing copyright infringement penalties.¹¹⁰ Yet all of these countries have something in common; they are all at least signatories, if not parties, to the TRIPS Agreement and the WIPO Copyright Treaty.¹¹¹

As previously mentioned, the respective intergovernmental organizations have procedures for ensuring that copyright laws are enforced according to the provisions of the treaties, which provide the minimum standards to be met.¹¹² The majority in *Society of Composers* mentions the WIPO Copyright Treaty, but does not fully analyze the treaty because of the fact that Canada is only a signatory.¹¹³ Further, the Court applies a domestic law with no extraterritorial effects to a situation that could have foreign consequences, which could be problematic for the country later.

So far, no challenges to the holding in *Society of Composers* have come through the Canadian court system. But recent cases like *Public Performance of Musical Works, Re* reaffirm the standard of correctness that the Court used in reviewing *Society of Composers*.¹¹⁴ As a side note, Canada enacted proposed Tariff 22, but it was only effective until 2006 and only applied on an interim basis until 2007.¹¹⁵ The final language adopted in the tariff was consistent with the holding of *Society of Composers* in that it did not single out liability for ISPs; rather, the tariff applied to online music services.¹¹⁶

IV. CONCLUSION

While courts around the world continue to attempt to protect copyrights, the simple fact is that technology has out-paced copyright law. Those who hold copyrights need to be aware of the issues they face in enforcing their rights, particularly when dealing with countries that do not effectively implement the treaties to which they are parties. In this

107. *Id.* at 1086-87.

108. *See, e.g.*, Nehila, *supra* note 39, at 219-20.

109. *Id.* at 219.

110. *Id.* at 219-20.

111. *Understanding the WTO: Members and Observers, supra* note 52.

112. *See, e.g.*, Panel Report, *supra* note 97, at 12.

113. *Soc'y of Composers*, 2 S.C.R. 427, ¶ 65.

114. *Public Performance of Musical Works, Re*, [2010] F.C.R. 348, ¶ 8 (Can.).

115. Statement of Royalties to be Collected by the Society of Composers, Authors, and Music Publishers of Canada (SOCAN) for the Communication to the Public by Telecommunication, in Canada, of Musical or Dramatico-Musical Works for the Years 1996 to 2006, C. Gaz., 22A, 1 (Can.), available at <http://www.socan.ca/pdf/en/liccs/Tariff22AGAZ.pdf>.

116. *Id.* at 1-2.

digital age, copyright holders have to take the initiative and lobby for stronger protection of their rights on both national and international levels, or they risk losing royalties on property rights to which they are entitled. Furthermore, while countries like Canada have made policies that attempt to deal with copyright protection issues, these countries cannot go it alone. *Society of Composers* may benefit Canada, but as the dissent pointed out, treaties need to be followed even if they are used merely for interpretive purposes.

