

## Copyright Liability for Electronic Postings

By Chris Bennett and Jeannine Tse

You see a great article in Lawyers Weekly. It's probably about IP or tech law. You decide to share it with a friend. One way to share it would be to send your friend your copy of Lawyers Weekly. Another option would be to send your friend an electronic copy of the article via email or by posting it on your blog. What are the potential copyright liabilities here, and how do they apply to the broader issue of copying/distributing electronic articles in general?

### **Liability for the Sender**

If you decided to go with option number one, then there would be no potential copyright liability because you didn't copy anything. However, if you decided to go with option number two, then you would probably have infringed the copyright in the article. It wouldn't matter if you scanned the article or if you re-typed it; in both cases, you made a copy (or a "substantial" copy) of the article.

Now let's assume you're the recipient of the scanned article, and you decide to redistribute it via email or by posting it online. You didn't make the copy you received by email, so are you safe? Probably not. The *Copyright Act* doesn't just prohibit you from copying the article; it also prohibits you from communicating the article to the public by telecommunication.

But wait! You're a lawyer, and you noticed the qualification in that last sentence: you're only prohibited from communicating the article to the public. So perhaps the answer here is to post the article on an online forum that is restricted to a small number of people, such as your family members? Or maybe to your family and friends? Or maybe to members of the forum, even if you don't know who the members are?

In fact, none of these solutions is safe. The Copyright Board has concluded that copyright is infringed in each of these instances. And it doesn't matter how successful you are in communicating the work publicly, as long as you intended the posting to be accessed by some segment of the public.

There are, of course, some limited exceptions to copyright infringement. For example, you might be able to claim the "fair dealing" exception if the purpose of your activities was research, criticism or review; however, you must identify the source and author of the work, and you must copy no more than necessary for this purpose. The exception is very limited, and other restrictions apply to it.

### **The Message Recipient**

Getting back to your original email, what are the liabilities for the recipient who opens the attachment and views the article? Probably none: simply opening and reading the article doesn't infringe the copyright in it. However, if your recipient saves a copy of the article, or if distributes it further as described above, then your recipient could be liable for copyright infringement too.

### **The Internet Service Provider**

The transmission of a communication and content over the internet requires the help of various intermediaries, one of which is the internet service provider (ISP). Sometimes ISPs make copies of communications and content as part of their transmission services. Are you exposing them to potential liability too?

The Supreme Court of Canada in a 2004 decision determined that as long as internet service providers act only as intermediaries and restrict their services to simply transmitting your message for you, and they have no control over or knowledge of the content that is being transmitted, the ISPs are protected from copyright liability.

This protection was continued in the proposed amendments to the *Copyright Act*. However, in an effort to strengthen the remedies and protection available to copyright owners, the proposed amendments required ISPs to participate in a “notice and notice” regime. The basis of this regime was that once a copyright owner notified an internet service provider that one of the ISP’s subscribers had infringed the owner’s copyright, the ISP would be required to forward that notice to the subscriber. These proposed amendments have not been passed.

**Solution**

As a sender of information, the safest approach from a copyright perspective is to either: (a) get consent to make the copy, or (b) find an electronic version of the article in an unrestricted, public, online forum (posted by the copyright owner, of course) and link to it.

--

Chris Bennett is the head of Davis LLP’s Trade-marks, Technology and Video Game Law Groups.  
Jeannine Tse is an articulated student at Davis LLP.