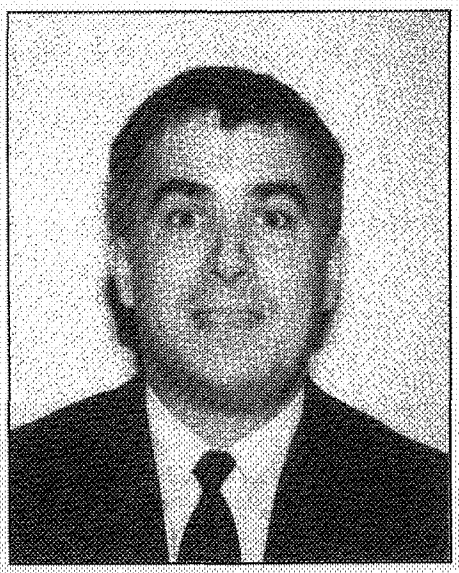
LEGAL ISSUES IN USING THE INTERNET FOR LAW-RELATED WORK AND RESEARCH[1]

By Ted Tjaden[2]



Abstract

Malgré le fait que l'Internet offre de nombreuses possibilités, il y a certaines questions juridiques que les juristes et les bibliothécaires de droit ne peuvent ignorer. Les trois principales sont: (i) l'utilisation du courrier électronique et les problèmes de confidentialité et du privilège du secret professional (les grandes lignes pour réduire les problèmes potentiels sont identifiées); (ii) l'utilisation de groupes de discussion et le risque potentiel de diffamation et (iii) l'utilisation de l'Internet pour effectuer de la recherche juridique et les divers problèmes reliés au droit d'auteur qui sont apparus depuis l'avènement de cette nouvelle technologie.

The Internet is rapidly becoming a new and potentially vast resource for lawyers and law librarians. Two key Internet applications for legal professionals will be in communications and legal research.[1] On the communications side, there is the opportunity for fast and inexpensive transmission of letters, memos and other law related documents (by e-mail). There are also discussion groups that allow for the exchange of information on specific areas of law among interested groups (through discussion groups). On the legal research side, there is the opportunity for world-wide access to legislation, case law, general legal information and other law-related resources (legal research). With these new opportunities, however, is the potential for legal problems.

This paper discusses in general terms the legal issues facing those who use the Internet for law-related work — as to e-mail, there is the issue of keeping communications confidential; as to discussion groups, there is potential legal liability of group members or the service provider for defamatory material that is broadcast to the group; and as to legal research, there is the issue of copyright and the limits on how users can use information found on the Internet. Since the primary focus of this paper is the Internet, an attempt will be made to use as references materials found on the Internet. Included at the end of this paper is a selected bibliography of Internet sites related to issues of confidentiality, defamation and copyright on the Internet.

E-mail and Confidentiality

Both lawyers and law librarians can use the Internet to transmit letters, memos and other law-related documents, such as draft agreements or research memos. These transmissions can be effected locally or internationally, quickly and at a reasonable cost. Thus, a lawyer or law librarian, using the Internet, could send a document across the country to a client for review. Or perhaps a lawyer could be sending a memo over the "Intranet" (a local network established over phone lines) to his or her partner within the same firm but in a different city. The speed and inexpensive nature of communicating in this way will certainly be attractive to many legal professionals. There are, however, two potential problems of using e-mail: (1) e-mail transmissions on the Internet are not necessarily secure from eavesdropping by third parties (known as hackers); and (2) because it is quick and easy to send e-mail messages, there is the risk of inadvertent transmissions or sending information to the wrong address.

The issue then facing legal professionals when they use e-mail for law-related work is the risk of breaching confidential-

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ity obligations imposed on them. In Ontario, for example, the obligation for lawyers to not divulge the secrets of a client arises from Rule 4 of the Professional Conduct Handbook.[2] For librarians in Canada, there is an obligation imposed by the Code of Ethics of the Canadian Library Association (CLA) for members to "protect the privacy and dignity of library users and staff".[3] For lawyers, a breach of this duty would likely result in the communication losing its solicitor-client privilege, thereby making the contents of the e-mail communication admissible in a court of law against the client's interest. This could expose the lawyer to both professional sanctions and legal liability. For law librarians, a breach of this duty could presumably result in sanctions and loss of employment. In addition, if the law librarian were sending information to a lawyer, the content of which was covered by a privilege between that lawyer and his or her client, the solicitor-client privilege might be waived if the communication were to be intercepted or disclosed.

The case law governing waiver of solicitor-client privilege is not entirely consistent (Dodd and Bennett 1995). The British approach to waiver of solicitor-client privilege has been quite strict — in most cases, if a privileged communication is intercepted or otherwise disclosed, the privilege will be lost and the communication will be held admissible against the interest of the client: see *Calcraft* v. *Guest*, [1898] 1 Q.B. 759. While *Calcraft* v. *Guest* has been followed by several Canadian provinces (sometimes with great hesitation),[4] the Federal Court of Canada in *Double-E, Inc.* v. *Positive Action Tool Western Ltd.*, [1989] 1 F.C. 163 (F.C.T.D.) rejected the harshness of *Calcraft* v. *Guest* and held that disclosure of solicitor-client communications (disclosed inadvertently in a photocopy) did not waive the privilege. Dodd and Bennett (1995, 369) discuss the call of the authors of *Solicitor-Client Privilege in Canadian Law* (Manes and Silver 1993) for a principled approach that would retain the privilege in cases where communications are disclosed when "the parties intended that their communications be kept confidential" and "the parties took reasonable steps to ensure that the communication be kept confidential" (Manes and Silver 1993, 81).

In Canada, there appears to have been no reported cases involving the disclosure of an e-mail message and whether this involved a waiver of the solicitor-client privilege.[5] In *U.S.* v. *Keystone Sanitation Company, Inc. et. al.*, 885 F. Supp. 627 (D. Pa. 1994), however, the court ruled that when an e-mail message from one lawyer to another in the same firm was later inadvertently disclosed the solicitor-client privilege was lost regarding the content of the e-mail message and the attorney billings statement relating to that matter. Given the apparent trend in Canada towards protecting solicitor-client privilege,[6] it may be that this U.S. decision will not have much judicial influence on Canadian courts, but that remains to be seen.

What then are legal professionals to do regarding e-mail messages? There are several steps that could be taken to minimize problems:

1) be careful — the lawyer or law librarian must use a sufficiently high standard of care when communicating law-related information over the Internet. This would involve using an up-to-date address book to minimize the chances of messages being sent to the wrong address, keeping archival copies of all e-mail transmissions,[7] and training staff in proper e-mail techniques and policies.
2) give notice of the confidential nature of the transmission - legal professionals should consider placing a notice at the start of e-mail messages that the contents are privileged or confidential or both. The concern now over e-mail transmissions is similar to the concern when fax machines first started being used by lawyers and law librarians. One thing that has arisen in the use of fax machines is a confidentiality notice on the first page of the fax putting the recipient on notice that the message contains privileged and confidential material. In British Columbia, there is a rule in their *Professional Conduct Handbook* that requires a lawyer to return unread and uncopied all documents coming into their possession that appear to be meant for the opposing side (Dodd and Bennett 1995, 369). Even though there appears to be no corresponding rule in Ontario or in the Canadian Bar Association *Code of Professional Conduct*, notice would establish the intention of the party to keep the communication confidential.
3) obtain informed consent from the client — as part of any retainer agreement or request for library services, the client or patron should be informed of the risk of e-mail being intercepted or misdirected. While this may not necessarily protect the privilege in cases of disclosure, it might lessen the liability of the legal professional in cases of inadvertent disclosure.
4) encryption - legal professionals should investigate the possibility of encrypting e-mail messages to minimize or prevent hackers from eavesdropping. If a decision is made to not encrypt e-mail messages because encryption technology is too expensive or unworkable, at least an argument can be made that reasonable steps were taken (and rejected for valid reasons).

Ultimately, it may be necessary to avoid using e-mail in cases where information is highly sensitive and, if disclosed, would result in embarrassment or liability out of proportion with the benefit to be obtained by using e-mail in the first place. As e-mail gains popularity and acceptance in the legal community, it may be, however, that the issues raised here will be of less concern, much in the way that they have become with fax machine transmissions.

Discussion Groups and Defamation

One of the key features of the Internet is the possibility for people to participate in on-going discussion groups with other people who share the same interests.[8] For lawyers, as an example, there is the Forum on Censorship and Intellectual Freedom Issues in Canada (at "ifreedom@snoopy.ucis.dal.ca") aimed at lawyers interested in censorship and intellectual freedom issues. For law librarians, there is the discussion group of the Canadian Academic Law Libraries (at "CALL-L@unb.ca"). Typically, any member of these discussion groups can post a question or raise an issue of mutual interest that can then invite responses from any other members of the group.

Any such responses are then usually posted for other members of the group to see and respond to in turn.

One problem that seems inevitable with this arrangement is the potential for someone to broadcast defamatory statements, either inadvertently (without realizing their comments were going to a group of people), in haste (especially with the immediacy of typing a response and pressing the "send" button) or intentionally (thereby raising the issue of the legal liability of the person or persons who have set up the discussion group or established the on-line service). This potential for defamation is increased by the very nature of discussion groups in professional circles, which often encourage frank and open discussions of issues that affect that particular profession, whether it be, for example, the pricing policies of legal publishers or the opinions of other members of the group.

There appears to be no reported decisions from Canadian courts regarding the liability of a person or the owner of a discussion group (the "systems operator") nor is there much Canadian literature on point.[9] In Australia, one case involved judgment being granted against the defendant in the unreported decision of *Rindos* v. *Hardwick* for defamatory remarks about the plaintiff that were published to a discussion group.[10] In this case, however, the case went undefended and $40,000 (Australian) was awarded in damages. In the United States, on the other hand, there is both case law and literature on point.[11] While it is clear that the person who posts a defamatory message can be found liable for defamation, the issue is whether the systems operator should also be found liable. The U.S. case law suggests that if the systems operator is acting more as a distributor of the message than as a publisher of it, then liability for defamatory messages is less likely to be found, especially where the systems operator (as distributor) did not know or had no reason to know that something defamatory was distributed: see *Cubby* v. *Compuserve*, 776 F. Supp. 135 (S.D.N.Y. 1991) and (Bass 1995). The law is still developing in this area and will need further refinement as new cases are litigated. The trend in the early U.S. cases appears to suggest a policy of "ignorance is best", that a systems operator should not actively screen messages being posted to a discussion group for fear of being deemed to know that a certain message was defamatory. In other words, the systems operator should concentrate on being a distributor, not a publisher. While it is clear that an individual who publishes defamatory remarks over a discussion group could be liable for damages, it is less clear how directly the decision of *Cubby* v. *Compuserve* will apply in Canadian courts to impose liability on a systems operator.

The solution for lawyers or law librarians participating in discussion groups seems obvious in theory but perhaps difficult in practise — be careful of what you say when you respond to the discussion group and be aware of whether you are responding to the group as a whole or to an individual only. As for the service provider, it seems that liability would attach only in cases where the service provider actively participated in the spread of the defamation and knew or ought to have known about it. However, as distributors of information it may be necessary to monitor this area of the law and take a decision to either adopt a "hands off" policy or to screen all messages.

Legal Research on the Internet and Copyright Law

In addition to using the Internet for e-mail and for discussion groups, lawyers and law librarians have the opportunity to expand how and where they obtain law-related information. To date, there are many types of legal information from many jurisdiction available on the Internet. Not only must lawyers and law librarians be concerned about the quality and reliability of information that is available on-line, however, they must be concerned with copyright infringement. Issues of copyright and the Internet are heightened by several key factors: it is easy to access and download information on the Internet, information can be obtained from sources in different jurisdictions that have different copyright laws, and it will usually be difficult for a creator to enforce his or her copyright in material that is placed on the Internet.

To date, there appear to be two basic but competing philosophies over the use of information on the Internet. On the one hand, there are those who believe that information should flow freely, to be shared by all. This "open" view, which has been advocated by people like John Perry Barlow (co-founder of the Electronic Frontier Foundation), is consistent in part with the way in which the Internet historically developed, through research scientists and other academics sharing and communicating information over public networks. On the other hand, however, there are those who believe that the effective dissemination of information will only happen if there are adequate copyright laws to protect creators and encourage people to publish their work.

To be sure, the speed of the grassroots growth of the Internet has forced these two views to the forefront. In Canada, our copyright legislation — which speaks of the antiquated notion of perforated rolls as a form of sound recording — has shown itself to be remarkably flexible, being interpreted in such a way as to extend protection to computer software, for example, even before computer software was specifically defined in the legislation (Harris 1995, 14).

In Canada, the Information Highway Advisory Council (IHAC) has made recommendations that seek a balance between the needs of creators and the needs of users. The Copyright SubCommittee of IHAC in its Final Report has said that "the current *Copyright Act* provides sufficient protection for new and existing works, including multimedia works, that are created or distributed in a digital medium" and that "for the most part, the current copyright legislative and policy framework is sufficiently flexible to provide the means of effectively enforcing copyright on the information highway and, at the same time, providing users with reasonable access to protected works" (Information Highway Advisory Council 1995). Another key point in this report, however, is the recommendation of IHAC that "the act of browsing a work in a digital environment should be considered an act of reproduction" (Information Highway Advisory Council 1995). This approach would appear to benefit creators and put limits on how users browse information on the Internet. Apparently in response to the position of IHAC on browsing, the executive council of the CLA issued a copyright position statement on November 5, 1995, in which it called for amendments to the *Copyright Act* to

define "browsing" and to allow a right to browse all works on the Internet except for those cases where the copyright owner has placed a notice on the work saying that the work may not be browsed without consent or in those cases where the user knows the works has been placed on the Internet without the consent of the copyright owner. It is still unclear at this time what recommendations of IHAC, if any, will be included in any amendments to the *Copyright Act*.

While there appears to be no decided Canadian cases involving copyright infringement on the Internet, there is a body of case law in the United States involving copyright infringement.[12] The analysis of the copyright issues in these early cases does not appear to differ greatly from the analysis of copyright issues in cases involving more traditional forms of copyright infringement (photocopying from books or journals, for example). What is evident from these cases, however, is the likelihood of increased litigation due to the ease of copying material from the Internet.

Despite the relative newness of the Internet, and despite the ever-increasing volume of law-related materials that can be found on it, the uncertainty over copyright and the difficulty in preventing infringement and enforcing copyright has limited major legal publishers from publishing their paper publications on-line. It may be that advances in technology will provide incentives to allow mainstream print publications to be published on the Internet. Advances would be needed in protecting works from being downloaded without consent and in creating an easy, cheap and reliable method of users being able to pay for material that they find on the Internet. Since the production costs of publishing on-line will generally be cheaper than publishing the same work in print, there may be some incentive for these changes to be brought around fairly quickly, which should only enhance the opportunity of useful legal research being conducted on the Internet.

Conclusions

It seems inevitable that lawyers and law librarians will become entangled with the World Wide Web as its popularity spreads among the general public. In the early infancy of the Internet, courts and other legal professionals will have to grapple with legal issues such as confidentiality, defamation and copyright. For now, since not all of the legal ramifications of using the Internet for law-related work are known, it is important for lawyers and law librarians to at least be aware of these issues as they arise.

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ENDNOTES

[1] Another key Internet application for legal professionals — not discussed here because of lack of space — will be using the Internet to provide information to existing and prospective clients. For a law firm, this would usually involve creating an electronic site or "home page" of firm information, lawyer profiles, firm pamphlets and publications, e-mail addresses and so on. For law librarians, this would usually involve creating a home page of information about the law library, links to law-related sites, and so on. In either situation, legal problems exist, such as possible trademark or copyright infringement.

[2] Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1995). Rule 4 states that "The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so."

[3] Canadian Library Association, *Code of Ethics*, June 1976, paragraph 4. In the September 1994 issue of *feliciter*, Richard Ellis discusses in detail his proposal for a revised Code of Ethics. The proposal maintains a duty on the individual librarian to be "responsible for maintaining the privacy of the practitioner/client relationship": see Richard Ellis, "Responsible Practise: A Review of CLA's Code of Ethics," *feliciter* (Sept 94): 42. Article III of the ALA Code of Ethics has a similar admonition: "We protect each library user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted." Taken from on-line:gopher://gopher.ala.org:70/00/a/agophii/ethics.txt

[4] see *Somerville Belkin Industries Ltd.* v. *Blocklesly Transport*, (1985) 65 B.C.L.R. 260, [1985] 6 W.W.R. 85, 5 C.P.C. (2d) 239; *Vancouver Hockey Club Ltd.* v. *National Hockey League*, (1988) 44 D.L.R. (4th) 139 (B.C.S.C.); *Xerox* v. *IBM Ltd.*, [1978] 1 F.C. 513, (1978) 15 N.R. 11, (1978) 32 C.P.R. (2d) 205; *Strass* v. *Goldsack*, [1975] 6 W.W.R. 155, (1975) 58 D.L.R. (3d) 397 (Alta. C.A.). In *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385, Lamer, J. of the Supreme Court of Canada described the solicitor-client privilege as a fundamental right, suggesting that any conflict "should be resolved in favour of protecting . . . confidentiality".

[5] A search on QUICK-LAW conducted on the Canada-wide judgments database ("CJ") under "e-mail or electronic /1 mail" brought 46 hits. Of these hits, none were related to disclosure of a lawyer's confidential e-mail message. A more refined search, combining the previous search with "waiver" or "disclosure" brought 0 hits.

[6] See note 4 above regarding the judicial attitude of the Supreme Court of Canada in *Descoteaux* v. *Mierzwinski*, supra.

[7] It is prudent to archive e-mail messages that are sent as well as those that are received, if only to establish a record of what transpired at a later date. If the e-mail messages are relevant in the context of litigation, the e-mail messages would be subject to the discovery of documents, subject to a claim of privilege. For law librarians, an archive of e-mail messages sent and received might be used for billing purposes or access at a later date to search for points of law already researched.

[8] One of the most thorough lists of law-related discussion groups is *Law Lists*, found on the Internet at "http://lawnext.uchicago.edu.70/00/.internetfiles/lawlist"

[9] The closest decision on point in QUICK-LAW appears to be *Blaber* v. *University of Victoria*, (1995) 123 D.L.R. (4th) 255 (B.C.S.C.). This case deals with a student's request for judicial review of the University's decision to revoke his student computer access as a result of threatening statements he made over the university computer bulletin board about another female student. The petition was dismissed on the basis that the University's actions in this case were not subject to judicial review. Regarding Canadian periodicals on this topic, see Sansom (1995) in the Selected Print and Internet Bibliography under the section Defamation and the Internet.

[10] For a discussion of this case, see Arnold-Moore (1994) in the Selected Print and Internet Bibliography under the section for Defamation and the Internet. Arnold-Moore cites this case as *Rindos* v. *Hardwick*, Unreported Judgment 940164, Delivered March 31, 1994, Supreme Court of Western Australia, Ipp, J.

[11] Some of the literature is set out in the Selected Print and Internet Bibliography at the end of this paper under the section Copyright and the Internet.

[12] See *Religious Technology Center et. al.* v. *Netcom On-Line Computer Services, Inc.*, 907 F. Supp. 1361 (D. Cal., 1995) where the service provider was found not liable for copyright infringement when it unknowingly transmitted unauthorized copies of a copyrighted work by posting it to a BBS (and had no reason to suspect the work was copyrighted). Compare this to *Stratton Oakmont, Inc.* v. *Prodigy services Co.*, WL 323710 (N.Y. Sup, 1995) where Prodigy was held liable for copyright infringement as a "publisher" since it held itself out as controlling the content of published works and used special software to screen messages. See also *Playboy Enterprises, Inc.* v. *Frena et. al.*, 839 F. Supp. 1552 (M.D. Fla, 1993) where it was held that the BBS operator infringed Playboy's copyright by distributing copyrighted photos, even where the BBS operator did not know that such photos had been uploaded by subscribers.