COMMENTS OF
AOL TIME WARNER INC. ON THE
CONSULTATION PAPER ON DIGITAL COPYRIGHT ISSUES

(SEPTEMBER 15, 2001)

Contact Person: Shira Perlmutter
Vice President & Associate General Counsel
Intellectual Property Policy
AOL Time Warner Inc.

A. INTRODUCTION

1.0 Introduction to AOL Time Warner

1.1 AOL Time Warner Inc. ("AOL Time Warner") is pleased to submit comments on the Canadian Government's *Consultation Paper on Digital Copyright Issues* ("Consultation Paper"). We have been guided in the preparation of these comments by a News Release dated June 22, 2001 issued by the Departments of Industry and Canadian Heritage and other documents attached thereto including the consultation papers.

1.2 AOL Time Warner is the world's first Internet-powered media and communications company. AOL Time Warner's brands touch consumers more than 2.5 billion times each month. Together, the company has approximately 130 million subscription relationships through AOL, HBO, Time Inc. and Time Warner Cable. AOL has surpassed 30 million members around the world with more than 375,000 members served by AOL Canada. ICQ has a global network of more than 85 million registrants with over 4 million in Canada. Time Inc. reaches 268 million magazine readers, with 3,074,000 Canadians over the age of 12, while CNN is available to a global audience of one billion people including 6.7 million Canadian households.

1.3 AOL Time Warner operates six businesses and is organized around its core growth drivers – subscription services, advertising and commerce, and content – to maximize the value of the company's unique combination of brands and other assets and to drive the next wave of growth that will transform the landscape of media and communications. The six businesses and the respective companies are:

(i) interactive services and properties – America Online
(ii) networks – Turner Broadcasting, Home Box Office
(iii) publishing – Time Inc., Time Warner Trade Publishing
(iv) filmed entertainment – Warner Bros., New Line Cinema

(v) music – Warner Music Group
(vi) cable systems – Time Warner Cable.

These companies pioneered the newsmagazine, talking pictures, photojournalism, cable programming, the DVD, broadband delivery of the Internet, video on demand, instant messaging and interactive services. AOL Time Warner is committed to innovation and speed to market and will use interactivity to transform its industries and create dynamic new opportunities for its customers, employees, partners and shareholders.

1.5 Should the Departments require more information about AOL Time Warner they are invited to visit the company Webster at www.aoltimewarner.com.

2.0 Introduction to AOL Canada Inc.

2.1 AOL Canada Inc. is a strategic alliance between AOL Inc. and Royal Bank of Canada. The company operates two interactive online services tailored to the Canadian marketplace, AOL Canada™ and CompuServe® as well as several leading Internet brands including AOL.CA™, AOL Canada Search™ and AOL Instant Messaging™. AOL Canada relies upon and works with more than 80 Canadian content and e-commerce partners to offer Canadian consumers and families value, ease-of-use and convenience through state-of-the-art features. AOL Canada members have access to all of AOL's International services, plus fast and reliable access to the Internet.

2.2 AOL Canada is supportive of public education in the field of Internet literacy. AOL Canada is a sponsor of the Media Awareness Network, a national non-profit organization promoting and supporting media education in Canadian homes, schools and communities. Indeed, AOL Canada is the first Internet online service to contribute to SchoolNet GrassRoots, a Government of Canada program that funds

the creation of online learning resources by students in kindergarten through grade 12.

3.0 Introduction to Time Warner Inc. in Canada

3.1 In Canada, Time Warner Inc. has interests in various affiliates that carry on business in the fields of film and television distribution, home video distribution, recorded music (including domestic A&R), music publishing, magazine publishing and distribution, and licensed products distribution. In addition, Time Warner Inc. indirectly has an interest in Columbia House Canada, a record club, together with Sony Music Canada along with CDnow, Inc., an online retailer of music.

3.2 Time Warner Inc. is engaged in the following businesses in Canada:

- Warner Bros. Canada Inc. (distribution of film products for theatrical and television exhibition)
- Warner Home Video (Canada) Ltd. (distribution, sale, purchase, lease and exploitation of all kinds of motion pictures by means of video systems)
- Warner Music Canada Ltd. (recorded music business)
- Warner/Chappell Music Canada Limited (music publishing)
- Time Canada Ltd. (publishing TIME magazine in Canada
- Warner Publisher Services (Canada) Inc. (distributes magazines and paperback books through wholesalers or directly to news-stands, supermarkets and general variety stores)
- Warner Bros. Distributing (Canada) Inc. (television production in certain Canadian provinces)
- Warner Bros. Entertainment Inc. (licensing of film for theatrical and television exhibition)
- Time Warner Merchandising Canada Inc. (provides contract services re: licensing agreements for the use of Time Warner intellectual property)

4.0 Process

4.1 AOL Time Warner looks forward to reviewing the comments of other stakeholders concerning the Government's copyright consultation papers and would welcome the opportunity to participate in the consultation meetings which the Departments have indicated will occur later this year.

B. COMMENTS

1.0 Introduction

1.1 AOL Time Warner appreciates the opportunity to submit comments on the Departments' thoughtful and comprehensive Consultation Paper on Digital Copyright issues. We support prompt ratification and implementation of the 1996 WIPO Treaties, including adoption of a "making available" right for producers and performers of sound recordings and effective anti-circumvention and copyright management information measures. We also support prompt enactment of limitations on service provider liability for the online infringements of third parties. We agree with the Departments' view that it is not necessary to address all questions related to the digital environment at once (p. 13); we also agree that the issues addressed in the current proposals are the most critical at this time.

2.0 WIPO Treaty Issues

General Observations

2.1 AOL Time Warner believes it is critical for Canada to ratify and implement the 1996 WIPO Treaties as soon as possible. Canada was a leading player in the negotiations that led up to the conclusion of these treaties, substantially influenced their content, and was one of their first signatories. It would be fitting for Canada also to be among the early ratifiers, demonstrating to the world its position as a

leader in the promotion of intellectual property and the development of e-commerce.

2.2 The WIPO Treaties embody the consensus of more than 100 countries around the world as to the appropriate treatment of copyright and related rights in the digital environment. Consensus was possible because the negotiations produced compromise provisions that have been widely hailed as fair and reasonable. As delegates recognized, the framework of international copyright law did not require radical restructuring, but rather certain adjustments, clarifications and additions, in order to ensure that copyright would continue to thrive in cyberspace.

2.3 Time is of the essence. Works are already circulating on the Internet, many without the authorization of the rights holders. Every day Canadian authors, publishers, producers and performers are losing the ability to control and negotiate for the use of their creations, and every day Canadian content is being kept from dissemination on digital networks because of a lack of protection adequate to respond to the new technological uses. This lack is not limited to Canadian territory, but impacts the rights of Canadians in countries around the world, where national treatment may not be granted without treaty commitments. As recognized in the Government's Consultation Paper (p. 31), "[b]ecoming a competitive player in the digital economy implies a need to ensure that the copyright framework is aligned to the global realities in a timely, ongoing fashion."

2.4 AOL Time Warner's specific recommendations on how the WIPO Treaties should be implemented are set out below, and can be summarized as follows: (a) that a "making available" right be added to the law for producers of sound recordings and performers whose performances are fixed in sound recordings; (b) that legal protection against the circumvention of technological protection measures be added to the law, whether contained within the Copyright Act or linked to it; (c) that such protection extend to the manufacture of and trafficking in circumvention

devices and services, as well as the act of circumvention; (d) that concerns about a worst-case scenario of an adverse impact on legitimate uses be addressed through the provision of a government review mechanism; (e) that any exceptions or limitations should be specific and carefully circumscribed, aimed at conduct rather than devices; and (f) that legal protection should be provided for the integrity of rights management information, defined to include all items listed in the WIPO Treaties.

Specific Proposals

- **"Making Available" Right**

2.5 AOL Time Warner supports the addition of a "making available" right for producers of sound recordings and performers whose performances are fixed in sound recordings, as required by the WPPT.

2.6 The "making available" right is likely to be the most important right in the digital networked environment. It is fast becoming the central form of dissemination, corresponding to the reproduction right of the age of printing and the communication right of the age of broadcasting. Indeed, it was included in the WPPT in response to persuasive arguments that on-demand transmissions would serve as a substitute for the distribution of physical copies. Canadian law already provides this right for authors; other right holders should similarly be given the ability to control this valuable means of exploitation.

2.7 The provision of this new right should not affect in any substantial way the balances among the various copyright interests. In essence, it would do no more than extend an existing right of control into a new technological format. The result should be comparable to the situation today where various copyright interests all enjoy the right of reproduction, and works are ordinarily able to be licensed through collective or individual negotiation without distribution being held up by a single

rights owner. In fact, the *failure* to provide the "making available" right to performers and producers of sound recordings might itself be more likely to disturb the existing balance among rights holders (since authors will have this right as well as the existing right of reproduction).

2.8 The new right could be made subject to exceptions and limitations as needed and appropriate. The most obvious and comprehensive exception would be some form of fair dealing. The doctrine of exhaustion should not, however, be applied, since "making available" does not involve the mere distribution of a tangible copy or restraints on the alienation of physical property (see discussion in the recent DMCA Section 104 Report of the U.S. Copyright Office, at pp. 78-101).

2.9 Finally, we do not believe that existing rights provide a comparable measure of control. The reproduction right in particular is insufficient for a number of reasons. First, its scope as applied to digital networked transmissions has not yet been definitively established in Canada, especially as regards to streaming. It should also be noted that technology may change over time, with the result that fewer reproductions may be made in the course of such transmissions. Second, there is a question as to who is making which reproduction: the transmitter or the user? Finally, a "making available" right focuses more squarely on the element of commercial value in a network transmission, rather than relying on partial and incidental reproductions that may be made solely as a by-product.

- **Legal Protection of Technological Measures**

2.10 Legal protection of technological measures is necessary for the development of thriving, legitimate online markets for protected works and performances. Without greater assurance that their technological protections cannot be easily circumvented, right holders will not make their valuable creative products widely available in a broad range of formats and delivery options Legal protection for

technology therefore furthers the interests not only of right holders but also of consumers, distributors and service providers. It also follows in the tradition of laws in Canada and many other countries that prohibit the descrambling of scrambled broadcast signals and the purveyance of unauthorized descrambling devices, also with the goal of making possible a wider range of delivery options for content.

2.11 It was in recognition of this need that countries around the world agreed to the anti-circumvention provisions contained in the WIPO Treaties. The international implications of implementing these provisions are also clear. Canadian content would be given the benefit of such protection in all countries that are party to the treaties. Moreover, in the absence of such protection, Canada could inadvertently play the role of a haven for the manufacture and sale of hacking devices.

2.12 The immediate threat to the development of e-commerce and to the continued viability of copyright markets calls for prompt legislative intervention. The arguments for delay, in contrast, are based on legitimate but speculative concerns about negative consequences that could come to pass in a worst-case scenario. If works are available only in digital form; if all are encrypted; and if the encryption technologies do not build in appropriate access for lawful purposes, then the result could be to "imped[e] legitimate uses," (Consultation Paper, p. 24) and affect the policy balance in the Copyright Act. In a rational marketplace, it is improbable that this will happen. The vast majority of right holders are interested in maximizing the availability of their works, in a form that will meet widespread consumer acceptance, not locking them behind digital walls.

2.13 One way to meet this concern, however, is to provide a government entity with the power to step in to prevent such a negative outcome. Such techniques have been adopted by two of Canada's major trading partners, the United States and the European Community (providing, respectively, a triennial agency rule-making

to determine any adverse impact on lawful uses of works, and the authorization of government intervention if right holders do not make works reasonably available for such uses). Establishing a mechanism for ongoing government adjustment and review has several benefits. First, it allows the government to act today to provide the legal framework that is essential to the development of copyright in the digital environment. Second, it makes it possible to repair or forestall any harm that could arise from a prohibition on circumvention. Third, it will shape the ways in which the private sector develops and deploys the technology (to avoid any need for government intervention). Finally, it permits flexible responses to a rapidly evolving technology and marketplace. We believe this approach has much to commend it, and is the best one developed to date.

2.14 It is critical for the legislation to prohibit the manufacture and trafficking in circumvention devices and services, as well as the act of circumvention. It is the widespread availability of such devices and services, which make it possible for the average consumer to circumvent, that will cause the greatest harm to legitimate markets. As noted in the Consultation Paper, the same conclusion has been reached in the United States, the E.U., Australia and Japan. Failure to address this problem would fall short of the treaty obligation to provide "adequate legal protection and effective legal remedies against . . . circumvention." Moreover, it would relegate right holders to the sole remedy of locating and suing individuals who circumvent, rather than those in the business of making widespread circumvention possible.

2.15 We do not believe that such protection would create a new or inappropriate right of access. In the traditional analogue environment, physical limitations have as a practical matter made it possible for right holders to prevent unauthorized access to their works. For example, consumers could not look at books without authorized access to bookstores or libraries; they could not watch movies in theatres without purchasing a ticket. The use of technological protection measures represents a means of recreating the effect that physical limitations had in the past. Just as the

physical limitations were backed by legal sanctions, such as laws against trespass or breaking and entering, the technological protections need similar backing if they are to be effective.

2.16 The Consultation Paper (p. 21) poses the question: “[W]hat factors should be considered determinative in deciding whether circumvention and/or related activities (such as the manufacture or distribution of circumvention devices) ought to be dealt with in the context of the Copyright Act, as opposed to other legislation?” While we believe that the prohibition on circumvention should be connected to, and should reference, the protection of copyright rights, it is not essential that it be part of the Copyright Act. In the United States, for example, it is codified in the same Chapter of the U.S. Code, but is not a section of the Copyright Act itself. It is seen as a technological adjunct to copyright protection, rather than as an element of the structure of rights and exceptions that comprise copyright law.

2.17 The Consultation Paper also asks in which respects anti-circumvention provisions should be subject to exceptions or limitations. Exceptions and limitations may be applied to further important policy objectives, such as the exceptions in the U.S. DMCA for reverse engineering and security testing. It is important, however, that any such exceptions be specific and carefully circumscribed, so that they do not undermine the effectiveness of the prohibition. In particular, they should be aimed at conduct rather than the manufacture or distribution of devices. Nor should the exceptions and limitations to copyright protection itself be applied to the prohibition on circumvention, since doing so could effectively negate the prohibition by enabling the widespread distribution of circumvention devices or services, which can be used for illegal as well as legal purposes. In particular, the private copying regime should not be extended to impact on protection for technological measures; the developing market for on-demand services could be stifled if copies could not be provided to individuals online for a fee. The continued viability of the important

balance in the law that such copyright exceptions represent should be safeguarded instead through the government oversight approach we recommend above.

2.18 As to whether there are non-copyright issues that need to be taken into account, we note only that the U.S. DMCA provides narrowly focused exemptions to permit circumvention to protect certain privacy interests and to permit law enforcement activities and parental supervision of minors. General privacy concerns are ordinarily not implicated by anti-circumvention technologies, and may be better addressed through specifically targeted privacy laws.

- **Legal Protection of Rights Management Information**

2.19 As recognized by the departments, the integrity of rights management information is also a critical component in the development of efficient online markets. AOL Time Warner recommends that all elements in the definition of "rights management information" in the WIPO Treaties be protected under Canadian law (Option A of the Consultation Paper, p. 24). In order for the protection to be meaningful, the information should include all items relevant and necessary to a user's decision as to whether and how to obtain authorization for the desired use. Among them would be the identity of the right holder, and essential terms and conditions such as cost and limitations on the manner of use.

2.20 The fact that information may cease to be accurate over time should not affect this conclusion. The best guarantee of accuracy is the right holders' interest in ensuring effective licensing and payment, as well as reliable communication with their audiences. Moreover, the digital environment enhances the ability to provide constantly updated information, through the use of dynamic databases of identifying codes, which can be provided to users through references or links. In order to allay any concern, however, the legislation could make clear that the alteration of rights management information in good faith for the sole purpose of

correcting inaccuracies would not be prohibited. (The treaties require that the prohibition extend only to acts performed "knowing, or . . . with reasonable grounds to know, that [the act] will induce, enable, facilitate or conceal an infringement.")

2.21 Nor do we believe it is necessary or advisable to limit protection because certain terms and conditions may be invalid in Canada as contrary to public policy. The protection of rights management information simply guarantees that consumers are told what they were intended to be told by the providers of the content; it does not provide a government seal of approval for the information itself. We would have no objection to a provision specifying that the law does not imply the legal validity of the information.

2.22 As to the possibility that some technologies may serve a dual purpose, reflecting rights management information and also protecting against infringement, we do not believe that this creates any need for the provisions concerning rights management information to take into account provisions regarding technological measures. The two different provisions have separate goals, protect distinct interests, and prohibit different types of conduct. If remedies proved to be cumulative or superfluous in any particular case, the court could adjust them as appropriate.

2.23 Finally, AOL Time Warner does not see any non-copyright issues that pose particular problems for provisions protecting the integrity of rights management information. Such provisions do not apply to information about users, but only to information voluntarily provided by right holders about their own ownership and terms of use. They do not require anyone to supply any information at all, but merely protect against its unauthorized deletion or alteration.

3.0 Service Provider Intermediary Liability

3.1 AOL Time Warner supports adopting new limitations on service provider liability for online copyright infringement in conjunction with implementation of the WIPO Treaties, in order to achieve a balanced solution that protects rights online without imposing inappropriate liability on service providers for acts initiated by third parties. In light of the global nature of Internet communications, it is vital for countries around the world to adopt rules in this area that are at least compatible. As the Consultation Paper recognizes (p.28), both the United States and the European Union have adopted such service provider liability limitations. Their approaches are compatible, although the U.S. model, codified at 17 U.S.C. § 512, is preferable in our view. Because it is more comprehensive, covering more service provider functions and establishing a notice and take down procedure, it provides greater certainty and predictability for both copyright owners and service providers.

General Observations

3.2 The *Copyright Act* should be amended to add limitations on intermediary liability for a variety of online service provider functions. Applying the ordinary standards of direct strict liability or secondary liability to service providers for the infringements of third parties on the Internet is not realistic in light of the specific characteristics of Internet communications. These include, in particular, the automatic dissemination and copying of third party material that is inherent in the technology of certain service provider functions; the massive volume of communications that are posted to and traverse the Internet; and the fact that Internet sites that a service provider hosts or links to typically change without notice to the service provider. All these factors make the problem of liability for the infringements of third parties on the Internet very different from the liability of a book store owner or dance hall operator for an infringement that occurs on its

premises. This leaves the service provider open to an uncertain and unpredictable application of the law, as well as potentially ruinous financial exposure.

3.3 The Consultation Paper recognizes the reality (at p.29) that it is not feasible for service providers to actively monitor the large volume of third party communications on their systems or networks. In addition, direct monitoring of private communications may be undesirable from a user privacy perspective. Finally, service providers are less well situated than copyright owners to know the facts as to any particular use or work, such as whether the use is authorized or otherwise lawful, and whether the work has fallen into the public domain. It is therefore unreasonable and potentially detrimental to the growth of the Internet to require service providers to police their networks for the copyright infringements of third parties.

3.4 To summarize our views: AOL Time Warner recommends (a) that new service provider liability limitations be added to the law now; (b) that they be structured as limitations on remedies rather than exemptions, and be subject to appropriate qualifying conditions; (c) that they apply to particular functions, rather than to particular entities; (d) that a notice and take down procedure be incorporated in the law, along with a good Samaritan defence for good-faith take downs, for certain of these functions; (e) that a "red flag" knowledge standard also be sufficient to trigger a take down obligation; and (f) that a procedure be adopted to assist right holders in obtaining information from service providers to identify primary infringers. Each of these elements is discussed more fully below.

Safe Harbor Approach

3.5 Even without monitoring or policing, service providers can assist in preventing online piracy by taking actions that deter and remove online copyright infringement on their systems or networks. The liability limitation framework can

and should include incentives for them to do so, through the provision of safe harbors. If a service provider's conduct meets the conditions of eligibility for the safe harbor, then it should not be liable for any monetary relief with regard to the infringement, and injunctive relief should be limited in various respects.

- **Notice and Take Down**

3.6 The most important of the safe harbor conditions, applicable only in the case of infringing material residing on the service provider's system or network or the provision of information location tools, should be compliance with a notice and take down regime. In AOL Time Warner's experience, both as a copyright owner and a service provider, notice and take down works well in providing copyright owners with a method of quickly stopping online infringements without placing unreasonable burdens on service providers.

3.7 It is particularly important in the area of copyright infringement to have a pre-judicial notice and take down procedure, instead of waiting for a court order to trigger the take down obligation (as would be possible under current law). The near-instantaneous nature of Internet communications, the high quality of digital copies and the ease with which users can make and transmit such copies, all make it urgent to remove infringing material online quickly. In the time it takes to prepare a lawsuit and obtain a court order, it may be too late to prevent substantial harm, as multiple unauthorized copies may already have been widely disseminated.

3.8 Whenever the service provider receives valid notice from the copyright owner or its agent, or otherwise becomes aware of facts or circumstances from which infringing activity is apparent, it should be obliged to take down the content in question expeditiously in order to qualify for the safe harbor. The exact time period may vary based on circumstances, and therefore cannot be fixed in legislation, but in order for the notice and take down procedure to have value, the response must be prompt.

3.9 As the Consultation Paper proposes (p.30), all take downs carried out by the service provider in good faith should be subject to "good Samaritan" protection from liability, in order to avoid fear of liability creating a disincentive to take down infringing material.

- **Terminating the Accounts of Repeat Infringers**

3.10 Second, to be eligible for the safe harbor, all service providers should be required to inform subscribers of, and to reasonably implement, a policy that provides for the termination of the accounts of repeat infringers in appropriate circumstances. Service providers can, and should, deter infringement by informing subscribers of their responsibility to obey copyright laws. Subscribers should know that they face a realistic threat of losing access if they repeatedly and flagrantly infringe copyright. In these situations, the notice and take down system is inadequate to deal with recurring infringement, and further action is necessary.

- **Technical Protection Measures**

3.11 Ultimately, technology holds the greatest promise to address the problem of online infringement. Accordingly, a further safe harbor condition should be that service providers accommodate and not interfere with standard technologies for identifying and protecting copyrighted works, if they have been agreed to by a broad consensus of copyright owners and service providers in an open, fair process. To invoke this condition, these standards must be available on reasonable and non-discriminatory terms, and must not impose substantial costs on service providers or substantial burdens on their systems or networks.

- **Designating an Agent to Receive Notices**

3.12 Having a central point of contact at the service provider for receipt of notices of infringement facilitates efficient and expeditious responses, benefiting both content owners and service providers. To be eligible for the notice and take down protection, a service provider should be required to publicly designate an agent to

receive notices of infringement. Conversely, notices from copyright owners and their agents should be sent to this designated agent.

- **Locating Primary Infringers**

3.13 The law should also establish a procedure to assist right holders in obtaining from service providers information in the service provider's possession sufficient to identify the alleged primary infringer, such as the availability of a subpoena or similar order without the need to initiate legal action. This is necessary given the fact that under the proposed limitations on liability, remedies against service providers for infringement will be limited, and copyright owners should be able to contact the primarily responsible party. This procedure for obtaining limited contact information would not undermine basic privacy rights recognized under Canadian law.

Comments Regarding the Departments' Proposal

3.14 AOL Time Warner generally agrees with and supports the Departments' proposal, but recommends the following changes.

- **Notice**

3.15 Notice from the copyright owner or its agent should not be the only means of obtaining knowledge sufficient to trigger a take down obligation in order to benefit from the safe harbor. Instead, as provided in both U.S. and E.U. law, if a service provider knows of the infringement or becomes aware of other "facts or circumstances from which infringing activity is apparent" (a "red flag" standard), it should be required to take down the infringing material expeditiously. It is important, especially in light of international treaty obligations, to preserve the copyright owner's option to obtain legal remedies without complying with formalities. However, the notice process has significant benefits, as a means of clearly establishing the requisite knowledge and giving service providers

meaningful indicia of reliability. Accordingly, the law should provide strong incentives to use notice—notably, the relative speed with which the infringing material can be removed from the Internet, and the ability to ensure the availability of monetary relief if the service provider is unresponsive.

- **Removing or Disabling Access**

3.16 We agree with the Consultation Paper (p.30) that the take down safe harbor condition should apply only to content that resides on the service provider's system or network. For purposes of clarity, use of the term "block access" in the proposal, which suggests an obligation to prevent users from searching the Web for sites on other provider's networks, should be rephrased as "remove or disable access to material on its system or network."

- **Form of Notice**

3.17 Because service providers and content owners sometimes need to communicate with one another regarding a notice of infringement, proper notice should not only clearly identify the claimant, but should also provide contact information for the complaining party (Consultation Paper, p. 30). In addition, it should contain sufficient indicia of reliability, such as a statement of accuracy and authorization made under penalty of law. There should not be any requirement of further corroboration for the notice to be effective.

- **Designating Agents**

3.18 The liability limitation should require service providers to designate, on their own web sites and a web site operated by the Copyright Policy Branch or other appropriate Government agency, the name and contact information for a designated agent who will receive infringement notices on their behalf. If a service provider designates an agent, then notices of infringement should go to that person in order to trigger the take down obligation. Failure to designate an agent would mean that the notice and take down safe harbor does not apply.

- **Caching Conditions**

3.19 There should also be a safe harbor for caching of material provided by and for third parties, not subject to notice and take down. The safe harbor should, however, be subject to certain conditions in order to safeguard right holders' legitimate interests. To qualify, the caching must be carried out through an automatic technical process. Moreover, the service provider should be required to respect access conditions and "do not cache"/refresh/reload commands imposed by the originating site, as well as not interfering with technology used at the originating site to return information.

- **Knowing Material Misrepresentations in Notices**

3.20 Mischief makers and business competitors may on occasion abuse the notice process, with damaging results. In order to deter such conduct, parties who are injured by it, including the true copyright owner and the service provider as well as the subscriber, should be given a legal claim against anyone who submits a notice of infringement knowing that it contains false, material information.

- **Safe Harbors Should Limit Remedies, Not Provide Complete Immunity**

3.21 A critical element of an appropriate balance of interests in this area is protecting service providers from potentially crippling monetary liability as Internet "deep pockets," while assuring right holders the continued ability to get infringements stopped. The law should therefore distinguish between monetary and injunctive remedies (as has been done in the U.S. and E.U.). Service providers who meet the safe harbor conditions should be protected from all monetary relief for the infringements in question. However, injunctive relief should remain available, to the extent the service provider is found liable and can reasonably and meaningfully assist in preventing the infringement.

3.22 This relief should be limited to ensure that it is appropriate and not unfairly burdensome to the service provider, who has acted responsibly by complying with the safe harbor conditions. Such limitations should include: (a) for infringements residing on the service provider's system or network, limiting injunctions to measures that are the least burdensome among other comparably effective forms of relief; and (b) for infringements based on conduit functions, limiting injunctions to orders to terminate specified subscriber accounts or to take reasonable steps specified in the court order to block access to a specific online site, if such relief is not burdensome and would be effective in preventing access. Because of the technical complexity of service provider responses, ex parte injunctions should only be available if they have no material effect on the operation of the service provider's communications network.

- **Peer-to-Peer File Transmission**

3.23 Finally, we note that the important issue of peer-to-peer infringement was not addressed in either the U.S. or E.U. measures because at the time of their adoption, this technology was not yet viewed as a significant source of copyright infringement. The Departments should leave room to adopt solutions tailored to this problem.

Answers to the Departments' Specific Questions

- **Current Law**

3.24 The current provisions of the Copyright Act do not adequately address the technological and business realities involved in the provision of online services. The risk of strict liability for service providers for all infringements carried out through their services, and the risk that secondary liability may apply in uncertain ways, call for prompt clarification through the adoption of a liability limitation.

- **Adequacy of Private Agreements for Notice and Take Down**

3.25 In our view, private agreements can be beneficial, but legal recognition of a notice and take down procedure is important. First, notice and take down agreements are necessarily limited in coverage to the parties to the particular agreement, raising the danger of incomplete coverage and inconsistent standards within Canada. Service providers and copyright owners are so numerous and diverse that private agreements alone cannot provide a comprehensive solution or regularized practice. It would be preferable to establish uniform standards by law, with all stakeholders participating in the same system, with uniform expectations. Moreover, the good Samaritan defence that is essential to protect the service provider from economic risks based on a good-faith take down cannot be provided by private agreement. Private agreements could nevertheless play an important role in supplementing or even varying the law as between the parties (for example, by providing a notice and take down procedure that goes beyond the requirements of legislation).

- **Other Intermediary Functions**

3.26 The Consultation Paper asks what functions are being performed by service providers that ought to be considered in developing a liability framework. This question appears to assume that status as a service provider should be a determinative factor in deciding whether a party is covered by the liability limitation. AOL Time Warner believes that, consistent with both U.S. and E.U. law, it is important that Canada's service provider liability limitations adopt a *function-based*, rather than a *status-based* approach, and apply regardless of whether the system or network in question is controlled or operated by the service provider or on its behalf by another entity. Different entities engage in different activities at different times; what is relevant is the nature of the particular act at issue, not who performs it.

3.27 Liability limitations are important for a range of Internet communications functions, whether they are performed directly by a service provider or on its behalf:

- conduit transmission functions, including temporary intermediate storage, such as storage of e-mail in a mail server;

- automatic caching of content in order to make it accessible to other users who request the same content;

- storage of content on a computer server at the direction of a user, for example, through hosting a customer's web site, or a chat room or online forum where users may post content; and

- providing an information location tool, such as a hyperlink to another site or directory or index of online content.

- **Collective Management and Compulsory Licenses**

3.28 A notice and take down system should not affect the framework in Canada for the collective management of copyright. Collecting societies, as agents for copyright owners, would be qualified to serve notices and obtain the benefits of the system. AOL Time Warner does not see any current need or justification for imposing a new compulsory license for service provider activities.

- **Restricting the Reproduction Right Examination to ISP Liability**

3.29 There is an immediate need to address the application of the reproduction right (as well as other rights) to service providers at this point in time, given the lack of clarity and ongoing risk of liability for their daily business activities. In the course of these activities, billions of reproductions may be made automatically during a single day. Service providers should be given reasonable protection against such liability as soon as possible, regardless of the technicalities of which right is implicated to what extent by which of their functions. Other issues regarding the scope and application of the reproduction right in relation to Internet-based communications may merit further consideration, but need not be addressed simultaneously. See, for example, the DMCA Section 104 Report of the U.S.

Copyright Office (August 2001) (recommending fair use treatment or new exemption for buffer copies of music made in the course of authorized streaming).