

Chapter 5

The Shrinking Information Commons and Private Control of Public Goods: The Commercialization of the Internet

- 5.1 The Promise of the Internet for Access to Information
- 5.2 Roadblocks on the Information Highway
- 5.3 The Impact of Canadian Government Information Policy

We have seen that, although access to law-related information is important, there are a number of factors that inhibit access to information. These factors include the complexity of the legal system in Canada, the nature of the relatively small commercial market for law-related information, and the impact of Crown copyright on retarding access to governmental law-related information. However, the Internet has had a dramatic impact on many aspects of modern life, including access to information. As a relatively inexpensive and ubiquitous medium, the Internet shows great promise to improve access to law-related information – it is relatively cheap for publishers to publish information online; publishing is instantaneous; and it is also interactive, allowing the user to easily link to other material. The Internet also shows great promise for developing countries with less well-developed infrastructures for print-based law-related materials; as such, it equally shows great promise in Canada to overcome some of the inhibiting factors discussed above. Despite the promises that new technologies and the Internet bring to accessing information, there are a number of factors that act as roadblocks or bottlenecks on the Information Highway. After a discussion of the promise of the Internet, I will briefly review some of these roadblocks, which relate in part to the

“commodification” of information, and which have the potential to shrink the public domain. A number of roadblocks include the impact of a digital divide resulting in some sectors of society not being able to take effective advantage of these technological developments; the trend towards intellectual property “overprotection”; contractual licensing terms and technology protections that result in digital lockdown; privacy concerns arising from the ubiquitous nature of the Internet itself and the ease by which persons can access information; and, finally, the ephemeral nature of the Internet itself, which results in online information not always being available in the same location due to changes in web addresses (and although this is not a “roadblock” per se, it does result in impeded access). In the final section of this chapter, I discuss how Canadian governmental information policies have compounded the issues beyond merely the claim to Crown copyright but also to other factors that act as retardants, including policies for “cost recovery” or “revenue generation” and other factors.

5.1 The Promise of the Internet for Access to Information

To begin, though, is an overview of some of the possibilities that the Internet offers as a means of “sharing” information. At first blush, the ability to easily share information on the Internet may seem to challenge the viability of copyright protection itself since information on the Internet can be reproduced and broadcast at a very inexpensive and fast rate. In contrast, a print-based medium gave legal publishers a more stable print environment that they could more easily control; it was a regime where rampant copying was kept to a minimum due to the cost of reproducing print materials:

When information was embedded only in analog media, the friction of geography and the physical containers of creativity (paper, celluloid, audio tape) helped maintain a stable equilibrium. Copyright owners could earn a fair, enforceable reward for creativity and the public enjoyed stipulated rights of access, use, and reproduction of works. Marketplace arrangements and copyright law kept the interests of creators, media companies, and the public more or less in alignment, or at least stable.¹

To the extent that control over a body of information is part of the definition of a profession,² the traditional print-based environment of law-related materials helped to reinforce the monopoly held by the legal profession over legal materials and created barriers for many laypersons (e.g., geographical barriers due to distance from law libraries or practical barriers due to the difficulty in using print materials). The complexity of the legal system and the relative difficulty of using print-related law materials contribute to a *de facto* control by the legal profession over this information:

Access to legal information in the print environment requires specialized training in research methods. Many feel that the legal profession's complex storage and retrieval techniques make lay people too dependent upon lawyers; the antidote consists of books and manuals that attempt to summarize various legal procedures in simple English. With print, in other words, the only practical means for reducing informational distance between citizen and the law is to create an alternative genre of literature that explains procedures and concepts in simpler language and that avoids traditional legal materials almost entirely.³

With digital technologies, however, there is some promise that the barriers between citizens and law-related information will be lessened, bringing the law directly to the people:

The new information technologies . . . do make it possible to break down information distances in ways that were not possible or economical with print. In an electronic information environment, there will be a different distance between legal and nonlegal information than there is in a print culture, and there will also be a different distances between those who have controlled legal information in the past (the legal profession), and those who have not (clients and citizens).⁴

¹ David Bollier, "Why We Must Talk About the Information Commons" (2004) 96 Law Libr. J. 267 at 271.

² Katsh, *supra*, Introduction, note 8 at 83.

³ *Ibid.* at 83.

⁴ *Ibid.* at 84.

The ability to share information is one of the aspects of the Internet that make it a valuable “information commons.” Bollier identifies a number of features of the Internet that make it so:

- **openness and feedback** (the idea that the Internet – as an information commons – is largely democratic and invites sharing);
- **shared decisionmaking** (due to the “bottom-up” nature of the Internet and a lack of a central controlling mechanism);
- **diversity** (in that openness allows for diverse opinions which can lead to innovation);
- **social equity** (that a commons, by its very nature, is meant to “democratize social benefits”) and,
- **sociability** (that the Internet has the possibility of creating interactions between people that would not take place in person).⁵

In many developing countries, print-based law materials are not always readily or easily available (due primarily to cost and the lack of reliable publishing), something that negatively impacts access:

In some countries, the lack of a comprehensive and timely system for publishing laws has important consequences for the rule of law. Where the absence of private-sector law publishing is compounded by outdated and poor-quality official publication, knowledge of the law can depend largely upon personal contacts and proximity to the capital city, even for lawyers and judges. Where even judges cannot get access to current legal materials, it is unrealistic to expect lawyers or their clients to have an understanding of their applicable legal rights. Many developing countries lack the academic resources to produce legal textbooks – which play an important role in distilling, explaining, and commenting upon official law – even for judges.⁶

⁵ *Supra* note 1 at 275.

⁶ Michael R. Anderson, “Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs” Institute of Development Studies Working Paper Series, Working Paper 178 (February 2003) at 19. Available online: <<http://www.ids.ac.uk/ids/law/lawwps.html>>.

The Internet opens up opportunities for those governments and nonprofit organizations within those countries to make law-related materials available online for free (or low cost). In Uzbekistan, for example, the Open Library for Legal Information project, sponsored by the government and the Soros Foundation, has created a series of Public Centres for Legal Information in various regional libraries throughout the country that provide free and equal access to the laws of Uzbekistan for all citizens, including those from distant and disadvantaged communities,⁷ something that would not have been possible in the absence of the Internet and technological developments. Likewise, in East Africa, despite that region being influenced by the English common law, the production of print case law reporters is spotty at best; where law libraries do exist in that region, their collections of books are often woefully out-of-date.⁸ However, several Internet-related projects in this region have sought to bring technological solutions to “bypass” generations of inadequate print-based materials to take advantage of CD-ROM and Internet technology to provide law-related information to lawyers in those regions.⁹ Public interest groups within those regions use an even more basic form of technology – the radio – to provide public legal information to citizens who do not have access to computers.¹⁰

Canada, by way of contrast, as a developed country, has a relatively sophisticated technological infrastructure, with a large number of homes having access to the Internet

⁷ Maria S. Stalbovskaia, “The Practice and Perspective of Free Access to the Legal Information of Citizens of the Republic of Uzbekistan” (2002) 34 *Intl. Inform. & Libr. Rev.* 201.

⁸ Dennis Aganyo Onwonga, “LawNet Initiative: A Case for the East African Legal Information Institute” (2003) (1) *JILT*. Available online: <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_1/onwonga/>. See also Canadian Bar Association, International Development Program, “CBA East African Legal Research Training Sessions” (February 7 to 22, 2000). Available online: <<http://www.cba.org/cba/idp/Reports/EastAfricaQuicklaw2000.asp>>.

⁹ Onwonga, *ibid.*

¹⁰ Gary Cleveland, “Packet Radio: Applications for Libraries in Developing Countries” in *UDT Series on Data Communication Technologies and Standards for Libraries on IFLANET, Report #5* (1993). Available online: <<http://www.ifla.org/VI/5/reports/rep5/rep5.htm>>.

and with free Internet being available in most public libraries. For example, Statistics Canada reports that an “estimated 7.9 million (64%) of the 12.3 million Canadian households had at least one member who used the Internet regularly in 2003, either from home, work, school, a public library or another location.”¹¹ The Canadian government in fact has been quite bullish on supporting an information society, identifying in 2001 the goal of “making broadband access widely available to citizens, businesses, public institutions and to all communities in Canada by 2004.”¹² But the promise has not yet been fully realized,¹³ and although Canada has much better Internet access than many countries in the world, there is still some way to go and a number of “roadblocks” still remain on the Information Highway.

5.2 Roadblocks on the Information Highway

Even though Internet technology holds much promise to improve access and even comprehension of law-related materials, there are a number of legal and practical impediments that act as “roadblocks” or “bottlenecks” on the Internet with the potential to impede or retard access. The first potential hurdle is the “digital divide” that results in a large number of people not having the technology or skills to access online information. And with “digital drift” – the move away by many publishers from publishing in print to publishing online – the digital divide is a potentially serious impediment for some people to access information. Another impediment that has the effect of potentially “shrinking” or “enclosing” the public

¹¹ Statistics Canada, “Household Internet Use Survey – 2003” in *The Daily* (8 July 2004). Available online: <<http://www.statcan.ca/Daily/English/040708/d040708a.htm>>.

¹² Government of Canada, “Speech from the Throne – 2001” (37th Parl., 1st Sess., 30 January 2001). Available online: <<http://www.parl.gc.ca/information/about/process/info/throne/index.asp>>.

¹³ Heather Scoffield, “Tobin’s Plan Loses in Budget” *The Globe and Mail* (October 13, 2001) A1.

domain – an effect felt particularly in an online environment – are current copyright laws and proposed amendments to copyright law that would broaden or extend copyright protections to owners of copyrighted information. Closely related to this is the trend by owners of online copyrighted information to not rely solely on copyright laws for protection of their information but to use contractual licensing terms and technological protections measures to control access to their information. As such a ubiquitous medium, the Internet also raises new privacy issues; in the context of access to information, this impact is felt regarding access to personal information that may appear in court judgments. Finally, as briefly mentioned, the danger that law-related information on the Internet is not as stable as law-related information in print raises a risk of the inability to easily access information that is no longer online.

5.2.1 Digital divide

It is important to understand that lowering the barriers to Internet access is helpful to everyone in the context of gaining easier access to information. An argument can be made that every individual should have the right to access information - regardless of disability, economic situation, or geographic location. Without this realization there will be no consistent progress in the effort to provide global access.¹⁴

Despite there being a relatively high level of Internet use and availability in Canada, a “digital divide” or gap still remains, something which results in lower income families having less access to these new technologies. Data from Statistics Canada in

¹⁴ The Internet Society, Christine Maxwell, ed., “Global Trends that will Impact Universal Access to Information Resources” – Submission to UNESCO at 2.1 (15 July 2000). Available online: <<http://www.isoc.org/isoc/unesco-paper.shtml>>.

Unveiling the Digital Divide,¹⁵ for example, suggest that income levels continue to be an important factor in the digital divide, with lower income families having less access:

Clearly, penetration increases across incomes, but it also increases substantially by the level of education, the presence of children and urban areas within each level of income. This is true whether home-use or use from any location is concerned. The latter is considerably higher, indicative of the importance of alternative access points (work, school, library, community resources).¹⁶

Matters involving legal research are often personal in nature and to the extent that home-use of the Internet is less prevalent for lower income families, this results in having to use publicly available Internet access points, which might not always been conducive for legal research on personally sensitive issues:

Where people access cyberspace is important to our examination of the implications for legal services. Legal matters often require both privacy, as discussed above, and convenience (physical proximity and timely availability). Computer access at work may not be useful if the employee needs to conduct either legal research or seek advice, particularly considering the fact that 63 percent of companies monitor employees' computer use. If schools or libraries are very distant, closed after normal business hours, or severely limit computer time, access to legal services at these places may be impossible, and when convenient, communication using school or library (i.e. government) machines can hardly be considered private. Thus, access to the Internet at home is very important, so we will define the digital divide as the gap between those who have access to the Internet at home and those who do not.¹⁷

In the United States, the statistics appear to mirror those in Canada with Internet penetration being the lowest in states dominated by Native Americans and poor rural populations.¹⁸ To the extent that aboriginal people fall disproportionately into lower income brackets in Canada,¹⁹ they are also negatively impacted by the digital divide,

¹⁵ George Sciadas, *Unveiling the Digital Divide* (Ottawa: Statistics Canada, 2002), Available online: <<http://www.statcan.ca/english/research/56F0004MIE/56F0004MIE2002007.pdf>>.

¹⁶ *Ibid.* at 6.

¹⁷ Mark Lloyd, *supra*, Introduction, note 2 at 525.

¹⁸ *Ibid.*

¹⁹ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 5 – “Renewal: A Twenty-Year Commitment” (Royal Commission on Aboriginal Peoples: Ottawa, 1996) at 24.

lagging behind other Canadians in being able to access information online, with the divide being strongest for remote and Northern Aboriginal communities.²⁰ The digital divide also negatively impacts children from lesser developed countries where home Internet access remains significantly divided along race and income lines with lesser developed countries being less likely to also provide Internet access for children in schools.²¹ Regarding children, Canada is a signatory to the United Nations *Convention on the Rights of the Child*²² and has ratified the Convention on December 13, 1991. Article 17 of the Convention in fact imposes positive obligations on governments to “ensure that the child has access to information and material from a diversity of national and international sources.”²³

Costs are a related factor affecting access to online law-related information, particularly for the value-added information provided by the “for profit” private legal publishers, resulting in the reality that many laypersons will not have access to these sources of “commercial” online law-related information. Moreover, law libraries will often have difficulty in trying to license these online commercial databases on behalf of the public (referred to as “walk in traffic” in the library industry):

Commercial online services are expensive and the costs are borne much more easily by large firms than by small. Commercial databases, search tools and compilations are also very expensive and, as noted earlier, can only continue to exist in a firm’s collection so long as the ongoing licence fees are paid. As publishers move away from print versions to CD-ROM versions of certain materials, the cost burden becomes even more severe for libraries and smaller law firms.²⁴

²⁰ Aboriginal Canada Portal, *2003 Report on Aboriginal Community Connectivity Infrastructure* (5 May 2004). Available online: <<http://www.aboriginalcanada.gc.ca/acp/site.nsf/en/ao28080.html>>.

²¹ Susanna Frederick Fischer, *supra*, Chapter 1, note 2 at 479.

²² 28 May 1990, Can T.S. 1992 No. 3 (entered into force 2 September 1990).

²³ See Margaret Ann Wilkinson and Lynne (E.F.) McKechnie, “Implementing the Information Rights of Canadian Children (2003) 20 C.F.L.Q. 429 at 449.

²⁴ Teresa Scassa, “The Best Things in Law are Free? Towards Quality Free Public Access to Primary Legal Materials in Canada” (2000) 23 Dal. L.J. 301 at 328.

But costs alone are not the only potential “divide” to accessing information online; if the information being accessed is designed poorly, that information may be inaccessible for that reason as well:

Global access itself is not enough. Cost of access has to come down to where not just the elite in emerging nations can afford to get on the Internet. The issues of inaccessible design should be addressed. Once the access is available then the content should be usable by all. Access to the Internet without the ability to use the content is a hollow shell. Access to the Internet without the ability to use the features or participate in e-commerce is nothing more than lip service to the idea of universal access.²⁵

In addition, it appears that disabled persons are more likely to be negatively impacted by the digital divide when online information is published without taking into account the challenges that blind, deaf or movement-impaired persons might encounter when using the Internet:

The benefits of addressing the problems of inaccessible design extend to include all people, including the community of people with disabilities. (About 10% of the world’s population are disabled, with a disproportionate amount falling into the poor population in emerging economies). It is imperative that there be some way to insure that people with disabilities in the developing world are not separated from everyone else. There must not be even more of a Digital Divide opened between people with disabilities and the efforts to provide Internet access to all in emerging economies. Once it is understood that accessible design is always in synch with low technology solutions, then big steps can be made to help everyone gain access to the information society.²⁶

The barriers that disabled persons may face when trying to access online law-related information can related to both hardware issues (the need for computers with special features) and software issues (the way in which online information is designed and coded):

²⁵ *Supra* note 14 at 2.1.

²⁶ *Ibid.*

While experiencing the general problems of finance and training, the disabled are also faced with further, specific barriers to accessibility. Even if a person can access the necessary hardware and software to go online, this may prove fruitless if the required websites are not designed with a view to being universally accessible. Certain screen readers (software which allows the blind or partially sighted user to hear the content of a website and to be guided through the navigation of the site) cannot process information presented entirely graphically, for example, via an image map which does not contain the necessary 'alt' tags (tags embedded in the HTML of a site which show text relevant to the image when the cursor hovers over it). Another very frequently employed way of presenting information on a website, the Portable Document Format (PDF) presents specific problems with access. Difficulties can be encountered by those using screen readers if, as one example among many, the PDF contains solely text that has been scanned into the file which has not been converted into 'real text,' readable by screen reading technology.²⁷

One example, however, where the needs of disabled persons have been taken into account in the design of a website for law-related information is the Ontario government's e-Laws website containing Ontario statutes and regulations for free.²⁸ The site has been designed "to improve accessibility for people with disabilities who use alternative software and other adaptive technologies to access the Internet."²⁹

Another challenge is that information online often lacks the context that is there when using print resources. An online database of full-text court decisions that is only searchable by keyword provides no up front "clues" as to what sort of cases might be in the database. This forces the user to be knowledgeable in the search terms being used; it also forces the user to be able to accurately interpret the search results, something which may not always be easy to do:

Electronic sources of information, at least at present, contain little to suggest a framework or organizational structure for law. This is not surprising since, as will be described later, the task of organizing material in cyberspace is as often the

²⁷ Catherine Russell, *supra*, Chapter 1, note 2 at 239.

²⁸ See Queen's Printer for Ontario, "E-Laws: Ontario Statutes and Regulations." Available online: <<http://www.e-laws.gov.on.ca>>.

²⁹ Government of Ontario, "Ministry of Consumer and Business Services: 2003-04 Accessibility Plan." Available online: <<http://www.cbs.gov.on.ca/mcbs/english/ODAPlan2004.htm>>.

job of the user as it is of the supplier of information. Today's electronic services often fill the screen with information and data but provide no visual feedback to the user that compares to that conveyed by the spatial configuration of the print library. The electronic sources tell the user how many "hits" there have been, how many sources of information contain a certain word or concept, but almost nothing else.³⁰

5.2.2 Risk of IP "overprotection"

Although many would argue that the continued extension of intellectual property protection will aid innovation and act as further incentives for creators to create new products, others have argued that these trends are "overprotection" and actually harm the public good by shrinking the public domain and in fact hinder innovation. While the motivation of copyright owners (typically large corporations) to protect their investments is understandable, the impact of these protections filters down to impact all types of copyrightable works, including those relating to law-related information:

Content gatekeepers, for their part, are seeing their traditional business models and market dominance challenged by new ways of doing business (and gift-economy alternatives). Most are eager to eliminate or limit alternative channels for creating, distributing, and using content. They want to re-enthroned a strict market regime for content and domesticate the free-for-all unleashed by the Internet and other digital technologies.

The proprietary world of centrally distributed content has a well-developed language and ideology to express its commercial interests in this new world: copyright, patent, and trademark law. And for the most part, these legal regimes generate important benefits for the public: investment in innovation, productivity, and economic growth. But it is also true that user, creator, and noncommercial constituencies have interests that intellectual property law increasingly does not foster or protect. Intellectual property legal regimes often constrict the flow of information by making markets less open and competitive. They often limit the legal rights and economic power of creators while bolstering those of giant content distributors. They can hinder individuals from freely creating and sharing their works outside of the marketplace.³¹

³⁰ Katsh, *supra*, Introduction, note 8 at 70.

³¹ *Supra* note 1 at 272.

Some of the major trends towards intellectual property protection are occurring in the United States. It remains to be seen whether these protections will extend to Canada, but given the overall trend towards international harmonization of intellectual property laws and the political pressure that the American government may be able to put on the Canadian government, it is not entirely clear that Canada would escape these trends. In the United States, for example, the *Sonny Bono Copyright Term Extension Act* (“CTEA”)³² and the *Digital Millennium Copyright Act (DMCA)*³³ are two recent, controversial legislative amendments that extend the protection of copyright owners. CTEA, for example, extends the term of copyright protection from “life of the author plus 50 years” to “life of the author plus 70 years.” This has resulted in works that otherwise would have entered the public domain from remaining under copyright protection:

Public access and use of content are being privatized and commercialized in other ways. In 1998, Congress passed the Sonny Bono Copyright Term Extension Act and added twenty years to the copyright protection of works produced after 1923. Tens of thousands of works such as *The Great Gatsby*, the film *The Jazz Singer*, and works by Robert Frost and Sherwood Anderson will remain in private hands and not enter the public domain until 2019. The Act is a clear case of corporate welfare for major corporations and amounts to a tax on the public and authors who want to use the public domain to create new works.³⁴

The DMCA, likewise, extends protection to owners of software content by forbidding any circumvention of copyright protection systems in that “No person shall manufacture, import, offer to the public provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a

³² Pub. L. 105-298 (27 October 1998).

³³ Pub. L. 105-304 (28 October 1998).

³⁴ *Supra* note 1 at 278.

work protected under this title.”³⁵ The effect of such legislative amendments is to restrict the free flow of information in favour of protecting content owners, many of whom are large corporations or publishers:

By allowing content owners to lock up digital text, the DMCA effectively eliminates the public’s fair-use rights, which have historically allowed people to quote and reuse works in other venues. It also overrides the first-sale doctrine, the legal rule that allows people to share the books or videotapes they buy with whomever they want. By strictly controlling the flow of works in society to serve private commercial ends, the DMCA is a direct affront to the First Amendment. The law prevents citizens from freely sharing and quoting works except in the manner prescribed by the copyright owner. It also allows large copyright industries to stifle competition and innovation and prevent the widest possible distribution of creative works, which is, of course, the very purpose of the Constitution’s copyright law – to advance and diffuse knowledge.³⁶

In the Canadian context, the recent “Interim Report on Copyright Reform - Report of the Standing Committee on Canadian Heritage” (the “Bulte Report”) acknowledged that “the Internet represents the most significant new medium to reach and teach Canadians of all ages at home and abroad, copyright legislation should facilitate new Internet opportunities for culture, education and innovation.”³⁷ However, the Report recommended an extensive collective licensing regime for online distance educational materials and electronic interlibrary loans, a regime that would greatly add to the bureaucracy of copyright administration. In response to this, the Canadian Internet Policy and Public Interest Clinic has advocated that the Canadian government not take additional steps that would limit the flow of electronic information:

Research in Canada is currently inhibited by a prohibition against libraries providing patrons with a digital copy of material obtained electronically from another library via inter-library loan. Instead, the library must make a single print copy of the material for the patron. The rule is meant to prevent unauthorized distribution of the material by library patrons. It has the effect of putting

³⁵ Section 1201(b), *supra* note 33.

³⁶ *Supra* note 1 at 277.

³⁷ *Ibid.*

Canadian researchers at a disadvantage to those in other jurisdictions where electronic delivery of copyrighted material is permitted.

Libraries should be permitted to deliver electronic copies of electronic materials to library patrons, without having to pay for the right to do so. Libraries should not have to pay for the right to distribute electronic copies of materials to patrons that they are permitted to distribute in hard-copy form for free. Increasing the cost of access to library materials by Canadians is not in the public interest.³⁸

Fortunately, it appears that the Canadian government is backing away from much of the Bulte Report to take a more balanced approach to digital copyright.³⁹ However, it does appear that the Canadian government is still considering some form of technological protection measures (i.e., protection against anticircumvention devices), something which could have the effect of giving copyright owners complete “digital lockdown” on their products, even those products containing public domain information. This trend is alarming and risks locking down digital content and denying legitimate access to materials that are “locked” by a technological protection measure. Professor Geist has been particularly critical of this trend and is concerned about the negative impact that technological protection measures would have if implemented in Canada:

The experience with technological protection measure legal protection in the United States, which enacted anti-circumvention legislation as part of the Digital Millennium Copyright Act (DMCA) in 1998, demonstrates the detrimental impact of this policy approach — Americans have experienced numerous instances of abuse that implicate free speech, security, user rights under copyright, and fair competition

From a traditional copyright perspective, anti-circumvention legislation, acting in concert with technological protection measures, has steadily eviscerated fair use

³⁸ See Canadian Internet Policy and the Public Interest Clinic, “CIPPIC/PIAC Response to the May 2004 Standing Committee on Canadian Heritage *Interim Report on Copyright Reform*” (June 21, 2004) at 5-6. Available online: <http://www.cippic.ca/en/news/documents/Response_to_Bulte_Report_FINAL.pdf>. However, on June 20, 2005, the federal government introduced Bill C-60, *An Act to Amend the Copyright Act* that would add to the existing *Copyright Act* in newly created sections 34.01 and 34.02 provisions to prohibit removal or alteration of rights management information or circumvention of technological protection measures.

³⁹ Canadian Heritage, *Copyright Policy – Copyright Reform Process: “Government Statement on Proposals for Copyright Reform - March 2005”* (March 24, 2005). Available online: <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/index_e.cfm>.

rights such as the right to copy portions of work for research or study purposes, since the blunt instrument of technology can be used to prevent all copying, even that which copyright law currently permits. They also have the potential to limit the size of the public domain, since in the future work may enter public domain as its copyright expires, yet that content may be practically inaccessible as it sits locked behind a technological protection measure.

...

In fact, the time has come for all Canadians to speak out and to tell the responsible ministers along with their local MPs what is increasingly self-evident. Canada does not need protection for technological protection measures. In order to maintain our personal privacy, a vibrant security research community, a competitive marketplace, and a fair copyright balance, we need protection *from* them.⁴⁰

The risk is that “the unrestricted use of technological protection measures (let alone the legal protection of them) could cause cultural and scientific knowledge to be locked away forever, as technologies for accessing the protected data become obsolete.”⁴¹

5.2.3 Contractual and licensing restrictions

In situations where intellectual property laws may be inadequate to protect publishers of online information, these publishers increasingly resort to using other mechanisms to control access to and use of their information. These mechanisms, based in contract law, include the requirement for users to register and pay fees to access their databases and to agree to license terms restricting on how information may be accessed and used. As Samuelson suggests, the commercial online environment can in fact be seen to pose more restrictions on access than a traditional print environment where the patron could ordinarily walk into the library (for free) and pull off any book from the shelf and read or copy it (within the limits of fair dealing):

⁴⁰ Michael Geist, ““TPM’s: A Perfect Storm for Consumers” *Toronto Star* (31 January 2005). Available online: <http://www.michaelgeist.ca/resc/html_bkup/jan312005.html>.

⁴¹ *Supra* note 38 at 2.

Besides, in some respects, public access to legal information may be more restrictive in the electronic environment than before. The major commercial legal databases restrict the classes of people who can access them (e.g., students of a subscribing law school). In addition, these services charge relatively high prices to individual users. Many print law libraries, by contrast, have long been open to the public for free. And print libraries have live librarians to aid user searches, whereas electronic databases do not.⁴²

For most commercial law-related databases online, the user is required to have agreed to the terms of what are typically quite stringent provisions:

A preferred industry strategy seeks to lock up content through click-through licenses (for Web pages) and shrink-wrap licenses (for software). Even though contract law requires a meeting of the minds on the terms for any contract, these click-wrap contracts are typically inequitable, one-sided deals that are deemed to be “accepted” if a consumer opens the shrink-wrap cellophane of a software box or clicks through an opening home page. The contracts may coerce users into fairly extreme agreements, such as prohibiting users from sharing the software, requiring legal complaints to be filed in the company’s court district rather than the consumer’s, and preventing the user from criticizing the software in print.⁴³

Paragraph 1.1(c) of the LexisNexis Quicklaw Academic Services license agreement,⁴⁴ for example, requires the user to delete from their hard drive downloaded material within 90 days of downloading it. Paragraph 1.4 restricts the downloading, printing or use of text of public domain material on the same terms as the text of its own copyrighted material:

[LexisNexis Canada] makes no claim to ownership of Copyright in text that is in the public domain or is subject to Crown Copyright, but you agree nevertheless not to download, print or use such materials except in accordance with the terms and conditions set forth herein.

⁴² Pamela Samuelson, “The Quest for Enabling Metaphors for Law and Lawyering in the Information Age” (1996) 94 Mich. L. Rev. 2029 at 2055.

⁴³ *Supra* note 1 at 278.

⁴⁴ LexisNexis Quicklaw Academic Services License Agreement (6 October 2004) (database: ERD). Available on Quicklaw: <<http://ql.quicklaw.com>>.

As already mentioned, the impact of the trend towards contractual licensing protection and control will negatively impact public law libraries due to the practical difficulty in public law libraries being able to license these products for “walk in traffic”:

Public libraries and universities are likely to be the first to experience the harmful effects of this controlled, pay-per-use universe of information generation and distribution. These institutions are rightly celebrated for providing the raw knowledge resources for authors to browse and experiment, excerpt and modify, and create anew. But if more of these resources are strictly commodified and made available according to ability-to-pay principles, then the traditional practices of authorship will be seriously compromised and the very character of American life would change radically.⁴⁵

Katsh repeatedly suggests that new technologies and the digitization of law-related information will “open up the door” for the average person to better access law-related information:

WESTLAW, for example, now allows legal information to be obtained by asking questions in ordinary English into a microphone attached to the computer. Further questions can be asked in response to what the computer displays on the screen. This is different from the kind of interaction that lawyers formerly experienced in a law library, and, indeed, *it opens up possibilities for nonlawyers to obtain information in ways not previously possible.*⁴⁶ [emphasis added]

However, he does not address the fact that the average person will not easily be able to obtain access to private (and expensive) databases of this information. Although data does not appear to be easily available on the percentage of licensed users of Westlaw who are nonlawyers, it is questionable whether there would every be widespread use of these commercial databases by nonlawyers due to their cost and – despite Katsh’s claim for ease of use – due to the training needed to effectively use the databases and interpret search results. Samuelson seems to share these doubts on this point:

⁴⁵ *Supra* note 1 at 280.

⁴⁶ Katsh, *supra*, Introduction, note 8 at 17 *et seq.*

Katsh is surely right that digital networked environments have enhanced public access to legal information, and that this trend will likely continue. He also may be right that lawyers whose work largely involves finding information in books for their clients may be put out of work as these materials go on-line. Most lawyers, however, need not worry. Digital technologies will not significantly reduce the information distance between ordinary people and the law as much as Katsh predicts. People hire lawyers because they believe the lawyers will know how to extract the right needle from the right haystack of legal information. This ability requires more than knowing how to use the West key number system; it also requires a set of conceptual, analytic, and judgment skills that lawyers learn through complex pattern-matching exercises in law school and law practice. Few ordinary people possess these skills.⁴⁷

5.2.4 Privacy restrictions

The very “openness” of the Internet has raised an issue of privacy involving access to court decisions and information found in court files, including docket information and pleadings. The issue arises most commonly in family law litigation where the interests of child are often involved. When decisions are posted on free websites such as the court decisions database of the Canadian Legal Information Institute (CanLII), the ease of access and keyword searching means that any person with Internet access can access the information, whereas in a “print-based” environment, restrictions are often placed by the court registry that family law court files can only be accessed by the parties or their lawyers in order to protect confidential information and information that may impact on children. In a print-based environment, the physical necessity of often having to attend at the courthouse to inspect a court file often meant that most court files would not be regularly searched. As courts move to publish their decisions online or to make them available to others to publish, care must be taken that personal or confidential

⁴⁷ *Supra* note 42 at 2054-55.

information is not included with those decisions, especially when the online versions of the decisions are much more accessible and also searchable by keyword:

The limited nature of “traditional” forms of access can be illustrated by one of the surprising consequences of “freeing” the law as discovered by both AustLII and LII. The availability of searchable online databases of primary legal materials has given rise to new privacy concerns that did not exist when the same materials were available on library shelves or in commercial online databases. The concerns arise because of the possibility of searches by surname. While names are currently reduced to initials in published versions of some family and young offender cases, the widespread free distribution of materials online could expose individuals to widespread public view. The response of both AustLII and LII to this issue has been to shift the burden to government and the courts to ensure that appropriate levels of citizen privacy are maintained.⁴⁸

In the past, commercial online publishers would take on the task of redacting confidential information from online judgments in their databases; however, an organization such as CanLII does not have the funds to undertake such work:

In Canada, family law, young offenders and disciplinary related matters generally entail some restrictions as to the publication of judgments. Therefore, an additional editorial task pertained to the management of privacy issues. In the past, commercial publishers performed the de-identification work needed to make these judgment files suitable for publication in reports. CanLII, however, did not have the resources to ensure such de-identification activity.

In order to cope with the problem, CanLII representatives first established agreements with the courts to provide for only sending publishable decisions to CanLII. However, mistakes sometimes occur. As a result, CanLII staff briefly inspects judgment files related to family matters. If a judgement cannot be published in the form in which it comes to CanLII, the originating court is notified and the court itself must decide what must be done. So far, CanLII has avoided taking on the task of editing judgments to remove identifying information.⁴⁹

As such, one of the big issues is whether courts themselves will take on the task of redacting sensitive information or whether it will be up to the online publishers (CanLII

⁴⁸ *Supra* note 24 at 326-27. See also the discussion paper prepared on behalf of the Judges’ Technology Advisory Committee for the Canadian Judicial Council on Open Courts, *Electronic Access to Court Records, and Privacy* (May 2003). Available online: <<http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf>>.

⁴⁹ Poulin, *supra* Chapter 4, note 144.

or Quicklaw, for example).⁵⁰ The Law Society of Upper Canada has suggested a model policy that would provide different levels of access to online court documents for different types of users (litigants, lawyers, the media, etc.).⁵¹ Another issue raised by the Law Society is the need for any policy to take into the account of the needs of the increasing number of *pro se* litigants who may be less aware of some of the privacy issues and who may be unable to easily redact such information from online court documents if the model is to put some onus of the litigant or lawyer to do the redactions.⁵² Given the past cooperation between the courts, the Bar, academia and the publishers in Canada on agreeing on a neutral form of citation for online court decisions,⁵³ there is some hope to think that agreement can also be reached on a policy that will balance the competing interests of protecting private information in online court documents at the same time as ensuring effective access for all members of the public to those documents. In fact, as of March 2005, the Judges' Technology Advisory Committee has issued a report that has two major recommendations that should improve access to Canadian case law for the average citizen at the same time as resolving privacy concerns:

The sub-committee recommends that the ultimate responsibility to ensure that reasons for judgment comply with publication bans and non-disclosure provisions should rest with the judge drafting the decision

Although the sub-committee was not able to come to a unanimous view on this question, it recommends that courts be encouraged to post all of their written judgments on their own court websites or make them available to other publicly

⁵⁰ See, for example, Canadian Bar Association: *Submission on the Discussion Paper: Open Courts, Electronic Access to Court Records, and Privacy* (May 2004) at 11. Available online: <<http://www.cba.org/CBA/submissions/pdf/04-13-eng.pdf>>.

⁵¹ Law Society of Upper Canada. *Task Force On Electronic Access To Court Records* (27 November 2003) at para. 3. Available online: <http://www.lsuc.on.ca/news/pdf/convnov03_reprt_convocation_open_courts.pdf>.

⁵² *Ibid.* at para. 12.

⁵³ See Canadian Citation Committee, "A Neutral Citation Standard for Case Law." Available online: <http://www.lexum.umontreal.ca/ccr-ccr/neutral/index_en.html>.

accessible sites such as the site hosted by CANLII. While there may be privacy concerns associated with doing so, a majority of the sub-committee holds the view that these concerns are outweighed by the benefits of facilitating open access to the decisions of the court and that any adverse impacts on the privacy of justice system participants can be significantly reduced by following the guidelines set out in [this] protocol.⁵⁴

The protocols developed by this Committee address three levels of protection that courts would follow when redacting information. These protocols include not using personal data identifiers (such as social insurance numbers) in judgments, omitting personal information that would violate a statutory or common law restriction on publication, and omitting other personal information where dissemination over the Internet could harm innocent persons or subvert the course of justice.⁵⁵

5.2.5 Lack of permanency of online information

Although not a “roadblock” per se, the impermanent nature of information on the Internet has the effect of being a roadblock if the information has been removed or not permanently archived online. The difficulties caused by the impermanence of the Internet have been well-documented. One recent study has shown that of 123 academic conference articles published on the Internet between 1995 and 2003, 46% of citations to web-based sources in those articles could no longer be located, which accounted for 22% of all citations in the papers.⁵⁶ Likewise, a study by Bar-Ilan and Peritz suggests that close to 40% of web-based citations in articles from 1998, 1999 and 2002 on the topic of

⁵⁴ Judges’ Technology Advisory Committee, Canadian Judicial Council “Use of Personal Information in Judgements and Recommended Protocol” ¶ 9, 13 (March 2005). Available online: <http://www.cjc-ccm.gc.ca/cmslib/general/PIJ_Protocol_E.pdf>.

⁵⁵ *Ibid.* ¶ 21 *et seq.*

⁵⁶ Carmine Sellitto, “The Impact of Impermanent Web-Located Citations: A Study of 123 Scholarly Conference Publications” (2005) 56 *J. of the Amer. Society for Inf. Sci. & Tech.* 695.

“informetrics” disappeared over time.⁵⁷ Similar results were achieved when 3,941 URLs in nine print-based guides on the Internet (e.g., *The Guide to Internet Job Searching*) were examined two to three years after the books were published in print. In that study, only 61% of filename-based URLs were still active.⁵⁸ When web pages have a half life of only two years on average, the problem of linkrot means that a lot of information on public websites may well not be there several years in the future.⁵⁹

One ironic example of linkrot in the Canadian legal context is the disappearance of two major government-sponsored reports on the promising role that the Internet will play in Canadian economic and cultural survival. Neither of the well known “IHAC” reports – *Connection, Community, Content: The Challenge of the Information Highway*⁶⁰ and *Preparing Canada for a Digital World*⁶¹ – are online anymore; their URLs are dead⁶² and even a recent government online report from October 2002 still provides a (broken) link to the document.⁶³ Another recent example relates to disappearing Ontario government press releases and backgrounder papers, rightly identified by the President of the Toronto Association of Law Libraries as alarming due to its negative impact on legal

⁵⁷ Judit Bar-Ilan and Bluma C. Peritz, “Evolution, Continuity, and Disappearance of Documents on a Specific Topic on the Web: A Longitudinal Study of ‘Informetrics’” (2004) 55 J. of the Amer. Society for Inf. Sci. & Tech. 980 at 986, 988.

⁵⁸ Joel D. Kitchens and Pixey Anne Mosley, “Error 404: or, What is the Shelf-life of Printed Internet Guides?” (2000) 24 Libr. Collections, Acquisitions, and Tech. Serv. 467 at 471.

⁵⁹ Wallace Koehler, “Keeping the Web Garden Weeded: Managing the Elusive URL” (2000) 8 Searcher 43.

⁶⁰ Industry Canada, Information Highway Advisory Council, *Connection, Community, Content: The Challenge of the Information Highway* (Ottawa: Minister of Supply and Services Canada, 1995).

⁶¹ Industry Canada, Information Highway Advisory Council, *Preparing Canada for a Digital World* (Ottawa: Industry Canada, 1999).

⁶² The first report is listed in major search engines as being available at <http://strategis.ic.gc.ca/SSG/ih01070e.html> (but is not); the second report is listed in major search engines as being available at <http://strategis.ic.gc.ca/SSG/ih01650e.html> (but is not). Repeated searches were conducted to try to locate the reports online, to no avail.

⁶³ See Chapter 1(d) of the online version of Industry Canada’s “Section 92” report under the *Copyright Act* entitled “Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act” (October 2002) at notes 13 and 14. Available online at: <<http://strategis.ic.gc.ca/SSI/rp/section92eng.pdf>>.

research and the public's right to access government information.⁶⁴ Likewise, when Prime Minister Chretien resigned, his website was “zapped” from cyberspace and “vanished moments after he resigned.”⁶⁵ Compare this to the situation in the United States, where government agencies have been assigned the task of specifically archiving government pages:

An order from the National Archives and Records Administration that all federal agencies make digital snapshots of their Web pages had information officers across the government scrambling in the waning hours of the Clinton administration.

On Jan. 12, Deputy Archivist of the United States Lewis Bellardo sent a memo ordering agencies to hand over electronic records showing what their publicly available Web site pages looked like before the transition of power to President Bush.

The move is part of an ongoing effort at NARA to preserve for posterity the online presence of every presidential administration from Clinton onward. As Bush's team prepared to take office on the eve of the inauguration, Webmasters at NARA readied the transition of the Clinton version of the White House Web site to NARA's site, where it will now reside for anyone who still wishes to visit it.⁶⁶

However, the commitment to archiving this information apparently has resulted in President Bush avoiding the use of email for correspondence for fear that his emails would eventually be in the public domain.⁶⁷

Although the Internet has a number of obvious advantages for the improvement of providing access to law-related information, there are a number of factors that impede easy access, factors relating to the digital divide, trends in the extension of intellectual

⁶⁴ Email from Danielle Levesque, President, Toronto Association of Law Libraries (TALL) to the TALL-L Listserv (11 December 2003). Email on file with the author. The issues raised in the email made it into the Hansard records on April 16, 2004 when the Chair of the Management Board of Cabinet (the Honourable Gerry Phillips) was pressured by the opposition to commit to restore any public information that had been removed.

⁶⁵ Kim Lunman, “Chretien Resigns: There were Tears” (13 December 2003) *The Globe & Mail*.

⁶⁶ Shane Harris, “Agencies Scramble to Save Web Sites for Posterity” (22 January 2001) Govexec.com. Available online: <<http://www.govexec.com/dailyfed/0101/012201h1.htm>>.

⁶⁷ Lester Haines, “George Bush Fears Email Privacy Breach” (15 April 2005) *The Register*. Available online: <http://www.theregister.co.uk/2005/04/15/bush_private_email/>.

property protection that may restrict the flow of information online, contractual licensing terms, privacy issues and online information disappearing and becoming inaccessible as a result. Further uncertainty arises due to often incoherent or inconsistent government information policies.

5.3 Government Information Policy

*In a knowledge-based society, information is a public resource and essential for collective learning. If Canada is to thrive and compete, government information must be made available as widely and easily as possible, through a variety of channels. Technology provides powerful and cost-effective ways to disseminate a great deal of this information.*⁶⁸

Opaqueness, ambiguity and contradiction are some of the terms that can be used to define Canadian governmental information policy related to access to government information under the federal *Access to Information Act*. That there is a “significant deficit in information management in the federal government”⁶⁹ is not too surprising given this opaqueness, ambiguity and contradiction:

It is also evident that federal information policy has been neither a consistent nor a considered process. Instead of weaving a tightly woven fabric of policy, the federal government has fabricated a patchwork of sometimes related initiatives and, more often, unrelated or clashing statements or actions.⁷⁰

A 2002 Access to Information Review Task Force identified a number of factors⁷¹ that have led to this deficit in information management by the Canadian federal government, including a drastic increase in the volume of information being produced by the government, the transition from a paper-based system to an electronic records system

⁶⁸ Government of Canada, Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Government of Canada, 2002) at 3.

⁶⁹ *Ibid.* at 141-42.

⁷⁰ Bruce Morton, “Canadian Federal Government Policy and Canada’s Electronic Information Industry” (1995) 12 Gov’t Info. Q. 251 at 258.

⁷¹ *Supra* note 68 at 141-42.

before a system for managing electronic records had been developed, cutbacks in government operations that impacted information management, a decentralization of management to individual public servants who lacked training or understanding of policies, and a reduction in resources devoted to information management:

The “information management deficit” in government is seriously hindering the ability of government institutions to provide proper access to the records under their control. In general, paper records are no longer well organized, and an effective approach to the management of electronic records is not yet available. The Canadian Historical Association, the Association of Canadian Archivists, the Canadian Library Association and the Professional Institute of the Public Service of Canada all advocated urgent action in this area – both to improve current access, and to ensure the long-term preservation of, and access to, valuable historical records. Public servants have themselves observed that they lack the support, training, guidance and tools they need if they are to be expected to document their activities properly, and manage the records they create or control.⁷²

Admittedly, information management is not a high-profile election issue for most political parties. This lack of “sexiness,” combined with changes in government over time and general cost control issues facing most governments, may also contribute to the lack of a coherent, well known Canadian governmental information policy. Nonetheless, information policies greatly impact on access to law-related information. The focus that follows will therefore be on information policies that most directly affect law-related information.

There are several legislative and administrative rules that govern information policy in Canada:

Information management in the federal government is currently governed by several information laws and policies. These include the *National Archives of Canada Act*, the *National Library Act*, the *Access to Information Act*, the *Privacy*

⁷² *Ibid.*

Act, the Policy on the Management of Government Information Holdings, the Government Security Policy, and the Government Communications Policy, as well as the policies on access to information and privacy and data protection. For the most part, public servants are not aware of these laws and policies, which are the responsibility of different institutions.⁷³

Current government policy of information management is to “deliver programs, services, and information cost-effectively and consistent with the needs of Canadians.”⁷⁴ As can be seen “cost-effectiveness” is a core component of the government’s information policy. In order to deliver these programs, the policy calls on government institutions to:

- ensure the quality, consistency and availability of information across delivery channels to respect Canadians’ official language of choice and their preferred means of accessing information and of communicating with government;
- organize information to provide clarity, context, and convenient access to relevant, comprehensive, and timely information and services;
- re-use and share information to the greatest extent possible, in accordance with legal and policy obligations and in a manner that protects personal information and the privacy of individuals;
- document decisions and decision-making processes;
- preserve the integrity of information, particularly when it is used in collaborative endeavours with other federal government institutions, other governments, or non-governmental organizations;
- ensure the appropriate security, protection, and disposition of information.⁷⁵

The foregoing *Policy on the Management of Government Information* incorporates other Treasury Board policies, including the *Cost Recovery Policy* which adopts a “user fee” philosophy for the provision of government services. The cost recovery policy has several aims:

⁷³ *Ibid.*

⁷⁴ Treasury Board of Canada Secretariat, *Policy on the Management of Government Information* (1 May 2003). Available online: <http://www.tbs-sct.gc.ca/pubs_pol/ciopubs/TB_GIH/mgih-grdg1_e.asp>.

⁷⁵ *Ibid.*

- to promote the efficient allocation of resources (i.e., to eliminate the excess demand that often exists with “free goods,” by subjecting programs to a market test of supply and demand).
- to promote an equitable approach to financing government programs, mandatory or otherwise, by fairly charging clients or beneficiaries who benefit from services beyond those enjoyed by the general public. This may allow a greater share of general tax dollars to be devoted to activities that benefit the general taxpayer, or to reduce the debt. It may also facilitate improvements in the delivery of specific cost-recovered services.
- to earn a fair return for the Canadian public for access to, or exploitation of, publicly-owned or controlled resources.⁷⁶

Much of the thinking behind cost recovery stems from the mid 1980's with the election of the Mulroney Conservative government. In the early 1980's, with the introduction of the *Access to Information Act* in 1983, the Canadian government was adopting a philosophy of *access* in regard to its information policy.⁷⁷ However, following a change in government with the election of the Mulroney Conservatives, there was a marked shift in policy to a *market* philosophy where Canadian government information policy began to be determined by cost recovery and revenue generation.⁷⁸ There were two major trends that influenced the market philosophy: “the development of the view of government information as a commodity . . . and the Conservative government espousal of a need for government fiscal restraint with a corresponding need for revenue generation.”⁷⁹ Nilsen's study showed, for example, that the price of Statistics Canada documents rose 438% between 1982 and 1983.⁸⁰ She was suspicious that the costs were not for the cost of production only (as was intended by the government) but also included the government's

⁷⁶ Treasury Board of Canada Secretary, *Cost Recovery Policy* (16 April 1997). Available online: http://www.tbs-sct.gc.ca/pubs_pol/opepubs/tb_h/feeinfoe.asp.

⁷⁷ Kirsti Nielsen, *The Impact of Information Policy: Measuring the Effects of the Commercialization of Canadian Government Statistics* (Westport, Conn: Ablex Publishing, 2001) at 55.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at 59.

⁸⁰ *Ibid.* at 195.

cost of dissemination.⁸¹ Morton in fact suggests that price increases at Statistics Canada were in fact even larger:

Because of Crown copyright, there has always been the potential for monopolistic behavior by the federal government or one of its constituent agencies. Mandated to recover costs of database operations, Statistics Canada, in 1987, reduced by about 60 percent the number of computer-readable products available from the 1986 census as compared with the previous census. The cost of the 1986 products rose 1,500 to 9,000 percent and other Statistics Canada products from 100 to 500 percent, during the same time period.⁸²

Ronald McMahon of the Saskatchewan Bureau of Statistics in fact has called for Statistics Canada to “discontinue the practice of cost recovery for goods and services that have been generated in the pursuit of its taxpayer funded activities.”⁸³

A risk of the government seeing its information as a “corporate resource”⁸⁴ is that information without market value will be ignored.⁸⁵ Another consequence is that governments may attempt to restrict access to its information in order to realize the greatest possible revenue by restricting the supply of information:

Public information is valuable, both economically and as a raw material of democratic government. Public and private sector publishers long have earned a return by selling public information. The prospect of selling some public information and a reluctance to have other public information widely known tempts governments and their contractors to restrict access.⁸⁶

⁸¹ *Ibid.* at 78.

⁸² *Supra* note 70 at 257.

⁸³ Ronald C. McMahon, “Cost Recovery and Statistics Canada” (1996) 2 *Government Information in Canada*. Available online: <<http://www.usask.ca/library/gic/v2n4/mcmahon/mcmahon.html>>.

⁸⁴ Bruce Morton and Steven D. Zink, “The Dissemination and Accessibility of Canadian Government Information” (1992) 19 *Gov’t Publ. Rev.* 385.

⁸⁵ *Ibid.* at 388.

⁸⁶ Henry H. Perrit, “Sources of Rights to Access Public Information” (1995) 4 *Wm. & Mary Bill Rts. J.* 179.

A policy of implementing user charges also act as a potential impediment for members of the public to access government information and may be a sufficient tipping point that results in individuals deciding to not bother trying to access government information:

If citizens are to make informed electoral choices and government is to be transparent and held accountable then the information upon which government makes its decisions needs to be available and accessible to citizens. Federal information user charges inhibit the ability to make government action transparent to public scrutiny and limits the ability of citizens to hold government accountable.⁸⁷

One main underlying problem with the deficit in information management by the federal government is that “Canadian government departments are simply not oriented to thinking about disseminating information.”⁸⁸ This has resulted in the government publishing “only what the departments need for internal purposes or what presents the case of the government on a particular issue in the best possible light” with products of government publishing appearing “to be less directed to making available information that might have a broader general interest to the citizenry.”⁸⁹

One consequence of a confusing information policy is that if information is poorly managed, it will be harder for users to access this information:

The problem of accessibility lies in the fact that even if government information is available, it may not be accessible to the public [P]otential and real diminished accessibility of government information has raised considerable concern. These concerns focus around broad issues of democracy and rights, as well as specific benefits of access to government information to society as a whole.

. . .

⁸⁷ Harry Hillman Chartrand, “Rusty Nail on the Information Highway: User Charges and Canadian Federal Government Information” (1997) 3 *Government Information in Canada*. Available online: <<http://www.usask.ca/library/gic/v3n4/chartrand/chartrand.html>>.

⁸⁸ *Ibid.* at 395. See also Perritt and Lhulier, *supra*, Chapter 1, note 69 at 900.

⁸⁹ *Ibid.*

Accessibility may be limited by poor bibliographic control, controlled or limited dissemination, high prices, unfriendly formats, and other factors. If electronic technology is the only medium used to make information available, it might restrict access for some while, at the same time, improving it for others.⁹⁰

At the provincial government level, the situation varies from province to province but access to provincial government documents continues to suffer from incomplete bibliographic control, particularly for historical publications.⁹¹ But the difficulties governments have in providing a complete or thorough inventory or catalogue of their publications is only one factor that affects access to the information. There must also be an effective distribution system.⁹² For law-related information, one important way in which the federal government disseminates information is through the Depository Services Program (“DSP”), established in 1927, by “supplying these materials to a network of more than 790 libraries in Canada and to another 147 institutions around the world holding collections of Canadian government publications.”⁹³ Depository libraries are required to make this part of their collection available to all patrons and on interlibrary loan. Many of the materials provided under the program include law-related information such as legislation, bills and government reports. However, one key problem with the program is that it is not mandatory for government departments to provide their publications to the DSP. At the provincial level, distribution systems for provincial government documents vary from province to province with some provinces, like Ontario and Québec, providing their documents to depository libraries, with other provinces, such as Nova Scotia, Newfoundland and Manitoba providing only (sometimes incomplete)

⁹⁰ *Supra* note 77 at 49-50.

⁹¹ Edith Jarvi, *Access to Canadian Government Publications in Canadian Academic and Public Libraries* (Ottawa: Canadian Library Association, 1976) at 5.

⁹² *Ibid.* at 11.

⁹³ Government of Canada, “Depository Services Program – Introducing the DSP” (18 January 2005). Available online: <<http://dsp-psd.pwgsc.gc.ca/Info/profile-e.html>>.

centralized centres for distributing their documents.⁹⁴ Thus, at the provincial level, access to provincial government documents is much more difficult:

Extreme decentralization of provincial government publishing systems has rendered it extremely difficult, almost impossible, to locate, obtain, and eventually utilize the information generated by and for provincial public authorities. These difficulties apply whether the would-be user is an interested citizen, a public official, or an academic. They threaten, not simply the scholarly study of provincial affairs, but also the fabric of political life at the middle level of Canadian government.⁹⁵

The Pross Study of provincial government documents, conducted in 1969, identified the following five problems with the organization of provincial government documents:

1. The need for a clear definition of a provincial government publication.
2. The haphazard nature of government structures for processing and distributing publications.
3. The absence of adequate procedures for the “discovery” of publications.
4. The lack of an effective depository system.
5. The deficient library procedures for handling documents, including inadequate arrangements for reporting and locating documents and failure to devise systems for the retrieval of the information they contain.⁹⁶

Since the time of that study, however, improvements have been made with over 40% of libraries indicating significant changes had occurred in their collecting of provincial publications, including developments in “current and retrospective bibliographical control, retrospective microfilming projects” and the availability of a commercial product called *ProFile* that indexes and provides access to provincial government documents

⁹⁴ *Supra* note 91 at 12-13.

⁹⁵ A. Paul Pross and Catherine A. Pross, *Government Publishing in the Canadian Provinces: A Prescriptive Study* (Toronto: University of Toronto Press, 1972) at 1.

⁹⁶ *Ibid.* at 140.

although “[r]etrospective collections beyond the university’s own province appeared to have improved little.”⁹⁷

As for law-related information such as statutes, regulations, bills and Hansard debates, the federal government and most provincial governments have started to publish this information on their individual websites.⁹⁸ The CanLII website also provides centralized access to Canadian federal and provincial legislation. However, with the exception of the province of Alberta,⁹⁹ this online legislation is usually only recent or only the current version of the legislation, with there being little or no historical, archived versions of legislation. As earlier mentioned, none of the online versions of this legislation is considered “official,” with each of the websites providing a disclaimer against using the information as an official source.

Conclusions

Thus, while the Internet continues to play an important role in the dissemination of law-related information, it is not necessarily a total panacea and improvements still can be made in the way that law-related information is made available in Canada. The advantages that the Internet brings to the publication and dissemination of law-related information are its interactive nature and the ability to share information quickly and inexpensively. The relatively de-centralized nature of the Internet also reduces the ability

⁹⁷ *Supra* note 91 at 26.

⁹⁸ For a nice online, clickable “chart” of links to Canadian federal and provincial legislation, see Bora Laskin Law Library, “Finding Canadian Legislation.” Available online: <<http://www.law-lib.utoronto.ca/resources/locate/canleg.htm>>.

⁹⁹ The Alberta Heritage Digitization Project’s Retrospective Law Collection is described, *supra*, Chapter 3, note 70.

for governments to easily censor or control information. As a publishing medium, the Internet is also very fast – current Supreme Court of Canada decisions are now available for free on the Court’s website within minutes of them being released by the Court.

However, there are a number of roadblocks that will continue to impede access to law-related information on the Internet. Some of these roadblocks include the concern that not all members of society have access to the Internet or are comfortable using it. In addition, despite the de-centralized nature of the Internet, the trend towards increased intellectual property protection for publishers and creators – including technological protection measures – may impede access to certain types of law-related information on the Internet that are covered by intellectual property laws. And where intellectual property laws fall short (such as in database protection, for example), publishers are controlling access to their online publications through subscription agreements and password controls, something which will segment all but legal professionals from accessing this information. Privacy issues are also another concern where personal information in online court judgments might become easily searchable unless steps are taken to protect or redact that information (and fortunately, it appears that protocols are being developed by the Canadian Judicial Council to provide such protection). In addition, the impermanent nature of information on the Internet raises concerns over the ability for publishers of online information to archive their information so that it is available in the future.

Finally, although the Canadian federal government (in particular) has developed a number of important Internet initiatives, overall, government information policies in

Canada are inconsistent and the way in which governments manage their information raises concern over the ability of persons to be able to effectively search and retrieve all types of government information.

Before discussing in the next and final chapter the roles that various stakeholders can play in making law-related information more accessible, I will first review the 1975 Friedland study on access to law with an eye to seeing what improvements have been made over the last thirty years and what the impact of the Internet has been on access to law-related information in Canada in the digital age.