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INTERPRETATION & THE INTERNET

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Almost twenty years have passed since the advent of the Internet. The revolutionary nature of the technology is no longer in doubt. It has transformed the way we communicate, recreate, carry on business, and conduct our affairs. Despite the Internet's "differentness," courts have proven adept at adapting extant law to the features and demands of this new technology. In this paper, I propose in some detail the manner in which courts should interpret law and (just as importantly) Internet facts in connection with broadly stated legal rules. My basic argument is that courts must appreciate both the totality of facts presented by the Internet activity as well as the purpose behind the legal rule to ensure an appropriate determination of whether an activity falls within or outside of a rule.

In Part 1, I highlight the differences between the Internet and other technologies which might, depending on the legal issue, justify the exclusion of the Internet from established rules on the basis of analogical reasoning. However, where we might expect the Internet differences to be so great as to justify exclusion from an extant rule, courts may create separate (or tiered) meanings of the same rule in connection with real space, on the one hand, and the Internet, on the other.[1] I then examine the way in which interpreters may perceive Internet facts. At the most general level, the Internet presents interpreters with external (or technical) and internal (or functional) perspectives. While courts often adopt one perspective or the other, it is critical that they consider both so that all affected interests are considered. Once that happens, courts can then determine whether, and how, to calibrate the inherent (and possibly affected) interests that make up the purpose of a rule.

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1. I refer to this as separate meanings of the same rule, rather than a formulation of a new rule, because there is adherence to the general purpose behind the rule in both applications.

In Part 2, I discuss two dominant approaches to legal interpretation – literalism and purposivism. I briefly discuss these approaches and illustrate how the choice of interpretive approach can have a determinative impact on the outcome of a case. Moreover, I argue that courts must take a purposive approach to legal interpretation as the best guard against inappropriate applications of a rule to a new technology.

In Part 3, I bring together all of these tools of analysis to propose a methodology for the manner in which courts should approach interpretation of the law and the Internet. The paper concludes with an illustration of this method in *SOCAN v. Canadian Association of Internet Providers*.[2]

1. THE INTERNET FACTS

At the most general level, the "Internet is a worldwide network of interconnected computers."[3] Computers are able to communicate with each other (or in the technical sense, send and receive packets of data) instantaneously by means of a common protocol in which each computer has a unique Internet protocol address. Individuals are able to create, store and access information through user-friendly software. Digitization, which has accompanied the Internet, permits the conversion and storage of mass amounts of data. This digitized information may be easily communicated and accessed through high bandwidth distribution.[4] Through user-friendly software applications, people around the world are able to communicate with each other for all kinds of purposes immediately and on a massive scale.[5] This very basic explanation of the workings of the Internet offers a small flavor of the revolutionary nature of this technology.

The question Internet scholars have debated over the past two decades is how should (can?) the law cope with the challenges of these radical technological advances. In this section, I introduce the reader to two dimensions of this question in connection with legal issues involving the Internet: (1) whether (and when) we should analogize with real space objects; and (2) the manner in which we should perceive the Internet when faced with legal issues. As we will see, a purposive approach to legal interpretation demands that interpreters consider both perspec-

2. *See* SOCAN v. Canadian Association of Internet Providers, [2002] FCA 166 (Can.).

3. SOCAN (Re Tariff 22 Internet), [1999] 1 C.P.R. (4th 417, 425 (Copyright Bd.).

4. *Id.*

5. For interesting discussions of the social implications of the Internet *see* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT (2008).

tives of the Internet facts; equally, it suggests we must be wary of analogical reasoning.

1.1 Analogy

An old debate in the field of Internet law is whether or not cyberspace is a unique *space* which defies both analogy to real space objects and (relatedly) amenability to legal regulation. The *unexceptionalists*, in this debate, decried that the Internet was just another in a long history of technological innovations that would find itself entirely amenable to legal regulation according to traditional legal doctrine.[6] We do not need to create new law to address the Internet context any more than legal doctrine needed to be redrafted or reinvented to accommodate the telegram or the telephone. The *exceptionalists*, on the other hand, viewed the Internet as a radical departure from heretofore technological phenomenon such that legal regulation would not even be possible.[7] They pointed to a number of meaningful differences of the Internet compared with real space and conventional technologies including the following:

- Internet communications consist of data in multiple places at once, and not in one "real space" place;
- Bandwidth is effectively infinite compared with the physical limitations of real space;
- Lack of proximity in cyberspace between cause and effects compared with real space;
- Information is non-exhaustible and non-rivalrous as compared with physical property and places;
- Instantaneous transmission of perfect reproductions at zero marginal cost;
- The ease and massive scale of transmission of information;

6. See *e.g.* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199, 1218 (1998). It is feasible and legitimate for real space law to regulate online behavior. The challenge lies in applying traditional legal doctrine to the novel Internet context, but this is manageable.

7. See *e.g.* David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996) (arguing that the paradigm for legal regulation in the real world does not fit with cyberspace: drawing on the above features, they argued that the effects of Internet communications are global such that states lack power or legitimacy to regulate them). "The rise of the global computer network is destroying the link between geographical location and (1) the *power* of local governments to assert control over online behavior; (2) the *effects* of online behavior on individuals or things; (3) the *legitimacy* of a local sovereign's efforts to regulate global phenomena; and (4) the ability of physical location to give *notice* of which sets of rules apply." *Id.* (emphasis added). Instead, Internet behavior must be addressed through means that are unique to the features of the technology, *e.g.* online communities or passwords. *Id. See also*, David G. Post, *Against 'Against Cyberanarchy*, 17 Berkeley Tech. L.J. 1365 (2002); Mark Lemley, *Place and Cyberspace*, 91 Calif. L. Rev. 521 (2003).

- Information can cross international borders without detection.

The basic argument was that the cumulative effect of these differences makes legal regulation difficult if not impossible under legal rules as we know them.

There has been a general acceptance and recognition by legislatures and courts that, while the Internet is different, it does have real world effects that require legal regulation - child pornography, defamation, and copyright infringement being some popular examples. Moreover, this regulation could, under common law and statutory rules, be effected, but an important insight from this debate remains and should be emphasized. While the Internet may be just another technology or medium in terms of its real space effects for some legal questions, it also can be materially different for other legal questions. As Post eloquently explained:

> Asking whether real space and cyberspace transactions are identical to or different from one another is like asking whether life on earth is identical to or different from life in the ocean. The answer is that it is, and it must be, simultaneously, both; it depends entirely on the questions you are asking.[8]

In other words, it depends on the nature and purpose of the inquiry as to whether real space and virtual space are sufficiently the same. While some features of the Internet may superficially appear the same, as compared with older technologies, these similarities may in fact mask material differences. For example, as Post contemplates, large scale dissemination through the Internet invites consideration as to whether "differences in degree [can] sometimes become differences in kind; quantitative changes can become qualitative changes."[9]

In cases where there is precedent interpreting a rule, courts may assume a kind of functional equivalence between the Internet and other relevant technologies and have proceeded to analogize Internet facts with real space precedent. My point in this part of the paper is to suggest that analogical reasoning on its own is an inappropriate way to correlate Internet facts with precedent interpretation of a rule. Rather, courts must be attuned to the purpose behind the rule prior to assessing whether the Internet facts are, in all relevant material respects, sufficiently similar. Moreover, new technologies, like the Internet, may affect interests (as revealed through a holistic appreciation of the facts) that were not in play when a prior interpretation was laid down. In those circumstances, courts may need to interpret the rule differently so as to accommodate newly affected interests. As we will see, taking into ac-

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8. Post, *Against 'Against Cyberanarchy*,' *supra* note 8, at 1366 (arguing, at least with respect to jurisdictional issues, the Internet continued to pose problems that could not be "adequately resolved by applying 'settled principles' and 'traditional legal tools' developed for analogous problems in realspace").

9. *Id*. at 1378.

count the Internet differences as well as newly affected interests may lead courts to accommodate the Internet through a separate meaning of a rule as compared with its real space application.

1.2 Perspective

The Internet may be conceptualized in different ways.[10] For example, a technical understanding might consider the Internet to be a series of electronic impulses that transfer packets of data between a network of computers by means of a common protocol.[11] In functional terms, one may look beyond those technical features to how individuals experience the technology, such as the content provided to end users or as a new technological means of accomplishing certain familiar ends. Timothy Wu has argued for a certain kind of functional analysis, that is, that legal analysis of the Internet must center on the particular software application in question.[12] In other words, it is how a particular application functions for the user that may have legal consequences. Some, like multi-player video games, will rarely have real space effects, while other applications function as a more efficient means to accomplish real world goals, such as purchasing a concert ticket online.[13]

Orin Kerr conceptualizes the technical/functional dichotomy differently. We can only apply the law once we are apprised of the facts, and the facts really depend on whether an external or internal perspective is taken.[14] The external perspective looks at the Internet in a technical sense, *i.e*. as a physical network and "we apply law to the Internet by applying the law to the electronic transactions underlying the network's operation."[15] The internal perspective views the Internet as a "window to a virtual world that is roughly analogous to the physical world of real

10. Timothy Wu, *Application-Centered Internet Analysis*, 85 Va. L. R. 1163, 1193 (1999) (suggesting that we should not understand the Internet as a moonlight).

11. An example of this is the dissection of the Internet into layers, for *e.g*. content; application; operational and physical layers. *See* Craig McTaggart, *A Layered Approach to Internet Legal Analysis*, 48 McGill L.J. 571, 573 (2003) (defining these layers as follows: content layer as the "data available by means of the Internet and transactions enabled by the Internet"; application layer as "software applications that make Internet connections available and that enable Internet transactions"; operational layer as "the centralized resources and functions, standards and protocols, and Internet Service Provider (ISP) functions essential to Internet operations"; and physical layer as "the computer equipment and telecommunications networks over which the Internet operates." Each layer and sub-layer is unique in its technical features, involves different actors, and is differently amenable to legal regulation); *See also*, Lawrence B. Solum & Mary Chung, *The Layers Principle: Internet Architecture and the Law,* 79 Notre Dame L. Rev. 815 (2004).

12. Timothy Wu, *Application-Centered Internet Analysis*, 85 Va. L. R. 1163, 1169 (1999).

13. *Id.*

14. Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 Geo. L.J. 357 (2003).

15. *Id.* at 361.

space."[16] Thus, we try to "map the physical world of realspace onto the virtual world of cyberspace."[17] Kerr provides the vivid example of the MP3.com case.[18] In that case, the external perspective instructs that the copying of music files onto servers and to computers as a space shift for consumers who had already nonetheless purchased the CD, would be viewed as copyright infringement, *i.e*. technically a new copy of the copyrighted work is made.[19] However, the fact that the music had already been purchased may, through an internal perspective, be more suggestive of a legitimate, non-infringing activity.[20] Kerr further suggests that legal doctrine may (though not always) indicate which perspective interpreters should be attuned to.[21] However, Brett Frischmann argues that courts should resist adopting a *choice* of perspective.[22] Rather, each perspective of the Internet facts should be considered, otherwise courts may only appreciate "a partial view of the underlying facts."[23] When that happens, misleading analogies with realspace may emerge that mask other legal issues that would be revealed under a fuller and robust appreciation of the facts. Frischmann thus prescribes the following methodology:

> First, we should recognize both perspectives provide valid and accurate renditions of the underlying facts; second, we must carefully examine the set of interests at stake in a given dispute; and third, we must engage in a principled application of relevant legal doctrines designed to address such interests.[24]

Frischmann's argument has intuitive appeal. Why look at the Internet in exclusively external (technical) or internal (functional) terms when adopting either perspective alone may ignore legal rights and interests that emerge from a holistic appreciation of the facts? Such inter-

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16. *Id.* at 359-60.

17. *Id.* at 361.

18. *Id.* at 378-79. In 2000, MP3.com began offering internet users a service that allowed them to access their compact disc (CD) collections from anywhere in the world via the Internet. To enjoy the service, users needed to register and establish that they owned a particular collection of CDs. . .. Registered users could then log on to mymp3.com and request specific songs. . .The owners of MP3.com provided this service by buying tens of thousands of copyrighted compact discs, and then copying them onto MP3.com's servers. Whenever a registered user would request a particular song, MP3.com's servers would run off a copy of the song from their servers and distribute it directly to the user over the Internet").

19. *Id.* at 379.

20. *Id.*

21. *Id.*

22. Brett M. Frischmann, *The Prospect of Reconciling Internet and Cyberspace*, 35 LOY. U. CHI. L.J. 205 (2003).

23. *Id.* at 207.

24. *Id.* at 208.

ests may need to be accommodated under a purposive interpretation of a rule.

1.3 Interpreting the Internet Facts

Legal interpreters are confronted with two perspectives of the facts when they encounter the Internet. While it may be tempting to adopt one or the other of an internal or external perspective, interpreters should be mindful of both to ensure that all possible interests are taken into account. These interests, in turn, may be of a kind that warrant protection or accommodation through a purposive interpretation of a rule, as will be discussed. Moreover, interpreters should be wary of analogical arguments divorced from a holistic appreciation of the facts and a purposive interpretation of the rule.

2. APPROACHES TO LEGAL INTERPRETATION

Legal rules are often interpreted according to either literal or purposive approaches.[25] Literalism, whether in connection with common law rules or statutes, will look to the "plain" or "ordinary" meaning of words isolated from all other considerations except, perhaps, precedent. New technologies may fall within a rule's ambit, if the activity fits within, for example, the constituent elements of the legal cause of action. Whether such technology can be classified under a specific rule again depends on whether the activity fits with the ordinary wording or is analogically consistent with older technologies as laid down in precedent interpretations of a rule (or both). Purposivism places emphasis on the purpose behind the rule. Identifying the purpose of the rule ensures that literal wording is not absurdly, or even inappropriately, applied to new fact situations. In this paper, both approaches are understood in a dynamic sense, *i.e*. as being able to evolve in meaning and not limited to that which is known at the time of the rule's creation.

25. At the most general level, there are three different approaches to statutory interpretation: intentionalism, textualism and purposivism. *See e.g.*, Linda G. Jellum and David Charles Hricik, Modern Statutory Interpretation: Problems, Theories and Lawyering Strategies (2006). Intentionalists are concerned with the legislative intent behind a statute or statutory provision. This typically involves a process of uncovering legislative history (*e.g.* legislative debates and committee reports) in an attempt to find general or specific clues about the intent behind a provision. Many problems inhere to this approach. For immediate purposes, it should be obvious that legislative history will be of little assistance in the face of new technologies that were not foreseen at the time of drafting. Intentionalism of a different kind may attach to inferences drawn by courts in connection with language or provisions that were or were not included in the statute.

2.1 Literalism

Literalists concern themselves exclusively with the text of the statute (or the elements of a cause of action) believing that the words of the rule have a literal meaning within which facts, as found by a court, fit or do not fit. Sometimes, courts will look to prior case law to analogize the new fact situations with the prior rationales. In doing so, the court highlights the material similarities (and corresponding insignificant differences) that justify the inclusion of the new fact configuration under the rule or, alternatively, the material differences that justify its exclusion. In the Internet context, the analogy usually pertains to other telecommunications technologies such as the telephone or television.

There are two main, and related, criticisms of the literal approach. First, there is an assumption that words have singular and definite meanings or, alternatively, that there is an intention behind the choice of language that a word is to be understood according to a particular connotation. However, the precise meaning and connotation of language is rarely obvious, all the more so when the purpose behind a rule is not considered. Second, a literal approach suggests that language is to be interpreted without consideration of the rationale – the purposes, the values, or interests balanced – behind the rule. Stated differently, literalists may examine whether the new technology is sufficiently similar to known phenomenon in its physical qualities rather than considering what justified the need for the common law rule or statutory provision, and whether that justification applies to the new technology.[26] Rather than blind analogical reasoning or a strictly literal interpretation, courts should ask "[w]hat are the guiding presumptions underlying the line of precedent? What balances did the precedent seek to strike? Are those guiding premises still valid in this new context? Might applying the precedent actually upset the balance rather than maintain them?"[27] By

26. *See e.g.* David Friedman, *Does Technology Require New Law*, 25 Harv. J. L. & Pub. Pol'y 71 (2001) ("Technological change affects the law . . . by altering the underlying facts that justify legal rules and. . .by changing the underlying facts implicitly assumed by the law, making existing legal concepts and categories obsolete, even meaningless"). This point is conceptualized, in a more prescriptive light, in Arthur Cockfield and Jason Pridmore, *A Synthetic Theory of Law and Technology*, 8 Minn. J. L. Sci. & Tech. 475, 476 (2007) where the authors propose a two part analytical framework: "1. Applying traditional legal doctrine, consider whether technological change threatens traditional interests that the law seeks to protect; and 2. After determining that the legal interests are threatened by changes in technology, legal analysis should adopt a more contextual approach that is less deferential to traditional doctrinal approaches."

27. Cyberlaw: Problems of Policy and Jurisprudence in the Information Age 22 (Patricia L. Belia et al. eds., 2007) (". . .we must think about how metaphors and analogies are used in legal decisions and then evaluate the degree to which those metaphors and analogies illuminate or distort the legal issues in dispute.") *Id.* at 23.

asking these questions, courts will help guard against inappropriate applications of a rule to the new activity.

The indeterminacy of language, particularly when it is separated from a purposive inquiry, is demonstrated by the following example. Suppose there is a pre-Internet bylaw prohibiting the "offering of adult entertainment to the public" in residential areas.[28] If pornographic movies are filmed within a private dwelling in that area for publication on the Internet, is this bylaw contravened? Accepting, for the sake of argument, that this constitutes adult entertainment, is this an *offering* to the public? A standard instance of this rule, in real space terms, is a strip club where members of the public would actually attend the premises. However, is it arguable that changing the medium of delivery to the public through the Internet, without changing the content, still falls within the meaning of "offering"? This language is ambiguous on these facts and can only be resolved through a purposive inquiry of the rule: is it to avoid local residents from visiting such an establishment or to prevent an undesirable element from entering the neighborhood? If the purpose aligns more with the former, then the activity falls outside the rule, since the private dwelling would not be physically accessible to local residents. If the latter is the mischief to be remedied, then it does not matter much whether adult entertainment takes the form of strip club or the regular shooting of pornographic movies in a private dwelling since both will attract an undesirable element into the neighborhood.

While language needs purpose to ensure accurate meaning and application, this in no way denigrates the importance of remaining faithful to the conceptual content used to formulate a rule. Consider, for example, whether the posting of copyright protected files on a peer-to-peer network using BitTorrent software amounts to copyright infringement for an uploader under Section 3 of Canada's Copyright Act.[29] BitTorrent software permits a person to download files from multiple computers, each of which has uploaded the file onto a peer-to-peer network.[30] The

28. This example is roughly based on the case of *Voyeur Dorm v. City of Tampa*, 265 F.3d 1232 (11th Cir. 2001) in which the court held that since members of the public could not actually attend the premises, adult entertainment was not being "offered." *Id.* Rather the "offering" was via the Internet. *Id.*

29. This example is based on *isoHunt Web Technologies, Inc. v. EMI Group Canada, Inc.*, [2009] B.C.J. 2745 (Can.). This case, which has yet to go to trial, will address the issue of whether isohunt's use of bittorent technology infringes the right of a copyright holder to telecommunicate her work to the public and to authorize such an act. For a discussion of this issue, *see* Graham Reynolds, *Pirate Bay on English Bay? BitTorrent File Sharing and Copyright Infringement in the Supreme Court of British Columbia*, 43 U. B.C. L. REV. 193 (2010).

30. isoHunt Web Technologies, Inc. v. EMI Group Canada, Inc., [2009] B.C.J. 2745 (Can.). For an explanation of the BitTorrent protocol, *see* Reynolds, *supra* note 30, at 195-96 (footnotes omitted):

telecommunication of the work, in other words, is not facilitated from a single point but comes from many different sources and it is impossible to determine from where each part originates. Section 3 gives a copyright holder the right to telecommunicate her work, or a substantial part thereof, to the public.[31] It is established law that file uploading in these circumstances is enough to constitute telecommunication to the public, and that substantial takings is both a qualitative and quantitative inquiry.[32] The remaining question is whether a single uploader to a peer-to-peer network using BitTorrent technology might be liable for telecommunicating a "substantial part" of a work to the public.

It is possible that a court could make an inference of copyright infringement, and justify the result on the basis of advancing the purpose of copyright protection, *e.g*. to maintain incentive to create by evolving copyrights to embrace new technologies.[33] However, the language of Section 3 would not support such a reading. A substantial taking of a work is both qualitative and quantitative determination. This invites a

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> The third phase of P2P file sharing is characterized by use of the BitTorrent protocol. In the BitTorrent protocol, files are cut up 'into many smaller pieces that get uploaded and downloaded between a 'swarm' of many users at the same time.' A person who wishes to download a file using BitTorrent first inputs the name of the file that they would like to download into a search engine. . ..The search engine returns links to torrent files that match the search terms. A torrent file contains various pieces of data which a prospective downloader must possess in order to download a file from other users. The user utilizes a BitTorrent client to access the data contained within the torrent file. This data includes the location of one or more trackers. A tracker is software that introduces users to each other to enable uploading or downloading of a BitTorrent file. The client software then proceeds to make contact with the tracker in the attempt to determine whether anyone is participating in a 'swarm' with respect to the file in question. If a relevant swarm exists, the client software joins the group of peers and proceeds to download the file. The BitTorrent protocol allows individuals to distribute large files to a wide audience for minimal cost. . .it gives individuals who otherwise would not be able to distribute their files widely due to excessive bandwidth costs the ability to share their work with the world. The BitTorrent protocol has been used by various large, established content owners, such as the CBC, Warner Brothers, 20th Century Fox, and MTV, as a way to distribute their works. In addition to facilitating the authorized distribution of content, however, BitTorrent also facilitates the unauthorized distribution of large files such as entire albums, e-books, movies, or software." Reynolds, *supra* note 30, at 195-96 (footnotes omitted).

31. Copyright Act, R.S.C. 1985, c. C-42 §3. The telecommunication right appears in Section 3(1) (f) as the right to "communicate the work to the public by telecommunication." *Id.* This includes a work or "any substantial par thereof" as stated in the chapeau to Section 3. *Id.* Canada has not yet implemented the "making available" right under Article 8 of *WIPO* Treaty.

32. See *e.g.* Re SOCAN Statement of Royalties, Ringtones, [2006] 52 C.P.R. (4th) 375 (Copyright Bd.).

33. As to the purpose of copyright, see *infra* note 38 and accompanying text. Moreover, it is established law that Section 3 rights under Copyright Act are media neutral, *i.e.* they are to be applied to new technologies as they emerge. Robertson v. Thomson Corp., [2006] S.C.C. 43 (Can.).

consideration of both perspectives of the Internet facts, *i.e*. has the heart of essence of a work been communicated in internal (functional) terms *and* how much of the file has actually been transferred from a given computer in external (technical) terms. Given the current state of BitTorrent technology, it is impossible (or at least not feasible) to make either determination with respect to any given download. In other words, we cannot determine which parts of a work are transmitted from any given computer (for a qualitative functional determination) or whether a majority of the file emanates from a particular computer (for a quantitative technical determination). It is therefore not convincing to make a holding of copyright infringement in these circumstances since to do so would ignore the conceptual content of the language.

2.2 Purposivism

Purposivism is a more robust approach to legal interpretation. It acknowledges that language gives rise to different possible meanings or at least uncertainty at the fringes as to whether an activity or thing falls under the rule.[34] Purposivism rejects sole recourse to the meaning of the language but instead focuses on the *purpose* behind a statutory or common law rule.[35] A particular interpretation of the language of a rule, according to this approach, should further the purpose(s) that lie behind the creation of the rule. [36]

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34. With respect to the latter, HLA Hart referred to this phenomenon as penumbral meaning. *See* H.L.A. Hart, The Concept of Law 126-27 (2d ed. 1994). According to him, there are standard instances which fall within the core meaning of the rule; conversely, there are cases which are at the fringes, in which case interpreters need to determine whether that activity is sufficiently similar in material respects with the core rules to be included. *Id.* Lon L. Fuller conceptualized the interpretation of statutory rules differently. Lon L. Fuller, The Morality of Law 84 (1964); Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 664 (1957); Lon L. Fuller, Anatomy of the Law 59 (1968). He rejected the idea of standard instances but understood meaning in an abstract sense, i.e. as identifying some significance in human affairs to be regulated by the rule. *Id.* The concrete manifestations of that rule are to be determined at the point of application by considering the purpose of the rule and whether a particular interpretation is consistent with practices and attitudes in society. *Id.*

35. In the statutory interpretation context, this approach is best captured in the Driedger principle which is often referenced by Canadian courts: ". . .the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." *See* Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes 1 (4th ed. 2002).

36. Courts do not always do what they say they are doing, or even seem to do. In other words, a court may say it is using a purposive approach or ostensibly seem to apply a purposive approach, when really they are using a literal or intentionalist approach; or, vice versa. *See e.g.,* ebay, Inc. v. Bidder's Edge, 100 F. Supp. 2d 1058 (N.D. Cal. 2000). A California district court was faced with the issue of whether interference with a web server amounted to a tort of trespass to chattels. *Id.* eBay's user agreement prohibited "any

Purpose refers to the reason behind a rule, and may operate at a high level of abstraction.[37] Thus, to return to the "offering of adult entertainment to the public" example above, the general purpose of this bylaw appears to be to protect public morals in (certain) residential neighborhoods. This interpretation of the purpose, however, is too abstract to resolve the interpretive ambiguity in any definite sense. If we define the purpose more exactly, however, we can successfully resolve the controversy; but as we define the purpose more exactly, more interpretive discretion is exercised. Thus, most, if not all, would agree on the public morals purpose of the law though there may be disagreement on

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robot, spider, other automatic device, or manual process to monitor or copy [its] web pages or the content contained therein without [. . .] prior expressed written permission." *Id*. at 1060. Bidder's Edge crawled eBay's web site consuming 1.11 – 1.53% of the total load of the former's server. *Id.* at 1064. According to California law, a trespass to chattels "lies where an intentional interference with the possession of personal property has proximately caused injury." *Id.* at 1069 (quoting Thrifty-Tel v. Bezenek*,* 46 Cal.App.4th 1559, 1566 (1996)). Precedent established that electronic signals (*i.e.* telephone lines) were "sufficiently tangible" to fall within the tort. *Id.* at 1069. Ipso facto, eBay's computer system was therefore sufficiently tangible as well. *Id.* at 1069. To maintain an action in trespass, the plaintiff had to "establish (1) defendant intentionally and without authorization interfered with the plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to the plaintiff." *Id.* at 1069-1070. On point (1), the court held that eBay's servers were private property upon which public access was conditioned on certain terms, of which Bidder's Edge was well aware. *Id.* at 1070. Moreover, the nature of the unauthorized interference need not be substantial to maintain the cause of action. *Id.* at 1070. On point (2), the court held that the defendant had "diminished the quality or value of eBay's computer systems" by consuming a portion of the plaintiff's "bandwidth and server capacity." *Id.* at 1071. The cause of action being presumptively maintained, eBay was granted a preliminary injunction against Bidder's Edge. *Id.* at 1072. On the surface, this case appears to be based on a non-purposive analysis of trespass to chattels doctrine. However, a closer reading of the case reveals that the court was very much concerned with balancing the interests that underlie the doctrine of trespass to chattels in this particular internet context. On three occasions in the judgment, the court makes reference to the fact that this kind of activity, unabated, may lead to serious and disruptive consequences for sites like eBay. For example, the court states that if were to find in favor of Bidder's Edge, "it would likely encourage other auction aggregators to crawl the eBay site, potentially to the point of denying effective access to eBay's customers." *Id.* at 1071. *See also id.* at 1066 (stating similar concerns). Thus, while the court appears to employ a literal approach, and to blindly analogize with telephone lines, its main concern is to achieve the right balance between property holder rights and access rights in this particular context. In an age of infinite bandwidth, for example, we might expect for this court to have calibrated the interests completely differently such as to allow for this kind of activity. In a very real sense, then, this is a purposive interpretation but without being acknowledged as such.

37. The "object of the Act" refers to its purpose, *i.e.* legislation is presumed to have a discoverable purpose, which should be furthered, or at least not defeated, by a given interpretation. Purpose goes to both the Act as a whole and the specific provision. *See* SULLIVAN, *supra* note 36, at 195-98. The purpose of an Act may be stated in the preamble though, more typically, it is divined through judicial interpretation.

which specific purpose or intention underlies the rule – *i.e.* to prevent physical attendance at such premises versus keeping an undesirable element out of the neighborhood. In the absence of any context to reveal the more specific purpose informing the meaning of this language, interpreters are left to exercise their own judgment. Courts should resolve this kind of interpretive ambiguity by balancing the interests involved the best that it can, *i.e.* the interest in protecting public morals versus the freedom to pursue otherwise legitimate business activities.[38] Put another way, at what point (and including which activities) should legitimate activities give way to a concern for public morals? There are no right or wrong answers to such a question, but only more or less persuasive interpretations as revealed by an interpreter's ability to communicate her reasoning based on all the facts and applicable law.

The purpose of a rule or statue may be refined and elaborated through application. As such, the rule is capable of embracing new technologies, given sufficiently open-ended language. As well, the purpose of a rule may accommodate new interests that are revealed from a full appreciation of the facts in novel cases, including those precipitated by new technologies. Therefore, we can imagine that an Internet service provider (ISP) that provides a host server for the defendant in the above example might, in a literal sense, be "offering" adult entertainment to the public in that it plays a role in transmitting the content over the Internet. If we consider the inherent interests underlying this rule, (legitimate business activities versus public morals), a resolution does not easily emerge. However, if we consider interests that might be affected if we were to hold ISPs liable (the chilling effect on internet communications or, alternatively, the high cost of monitoring content to ensure compliance with local laws), a convincing interpretation emerges, *i.e.* we should not hold ISPs liable under such a rule.

While purposes may take into account external interests and thus become refined over time, we should not expect the initial object of a statute or rule to fundamentally change. Let's consider another example. In *United States v. Drew*, the defendant was prosecuted under a provision of the Computer Fraud and Abuse Act (CFAA)[39] for registering a

38. Hart argued that the apparent purpose behind a rule may be modified by new interests that need to be accommodated by the rule. *See* HART, *supra* note 35, at 129. Fuller advanced that the purpose of a statute is not static but through interpretation, courts engage in a process of redefining and clarifying the ends themselves. *See* Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, *supra* note 36 at 668.

39. U.S. v. Drew, 259 F.R.D. 449 (C.D. Cal. 2009); 18 U.S.C.A. § 1030 (2008). First passed prior to the advent of the Internet in 1984, the purpose of the CFAA was to curtail hacking and computer crime. Technically, as the court found, Lori Drew was in violation of the literal wording of the CFAA, *i.e.* "intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains . . . information from any protected computer if the conduct involved an interstate or foreign communication." *Drew*, 259

false identity on MySpace in violation of that website's terms of service.[40] The fake identity created by the defendant contributed to a teenager's suicide.[41] The language of the provision under which Drew was charged was broad enough to include this kind of activity.[42] However, the CFAA was passed in 1984, prior to the advent of the Internet, and the purpose of the legislation was to prevent computer hacking, *i.e.* to prevent computer crimes such as gaining access to another's computer to tamper with information or transmit a virus.[43] In other words, the target of the legislation – or the mischief to be remedied – was computer crimes and not relatively innocent activities such as creating false identities on social networking sites.

Nonetheless, the language of the statute is not circumscribed as such, but rather employs a broadly worded provision:

> Whoever. . .intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains. . .information from any protected computer if the conduct involved an interstate or foreign communication. . ." (emphasis added)[44]

The court spends considerable time pondering the broad scope of the underlined language.[45] Ultimately, the court determines that an intentional breach of the terms of service (which prohibited this activity and conditioned access to MySpace) could "potentially constitute accessing the MySpace computer/server without authorization and/or excess of authorization under the statute."[46] In other words, the activity in question fell within the literal terms of the statute and thus the defendant was

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F.R.D. at 452-55. In other words, by registering a false profile and other activities, Lori Drew violated MySpace's terms of service thus exceeding authorized access. *Id.* The court found that, while there may be technical violation of these terms, the provision in question was unconstitutional as being "void for vagueness." *Id.* at 467. In this part of the analysis, the court suggests that a broad range of innocent uses of the internet would become criminal offences, *e.g*. the lonely heart who posts inaccurate data about their age on a dating website. *Id.* at 466.

40. *Id.* at 452.

41. *Id.* at 468.

42. *Id*.

43. CHRISTINE D. GALBRAITH, *Access Denied: Improper Use of the Computer Fraud and Abuse Act to Control Information on Publicly Accessible Internet Website* (2004) 3 MD. L. REV. 315.

44. 18 U.S.C. § 1030 (2006) (amended 2008).

45. The term "exceeds authorized access", for example is defined as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter. . ." U.S. v. Drew, 259 F.R.D. 449, 456 (C.D. Cal. 2009). The other language in the provision was not in issue as precedent established that Internet communications was an "interstate and foreign communication" and a protected computer was defined a computer use for such a kind of communication.

46. *Id.* at 461.

potentially guilty.[47]

The court did not consider the purpose of the provision which should have narrowed the application of the overly broad language to the mischief that it was intended to address, *i.e.* computer hacking. While it is true that statutes may evolve in meaning and application to embrace new technologies and activities and accordingly new interests may be accommodated within the purpose of the rule, this does not justify application of a rule for wholly different purpose. In other words, interpretation of a rule, while open to modification and refinement, must at least remain *anchored* in its original purpose. Violating the terms of service on a social networking site is, in no sense, compatible with a purpose of criminalizing and deterring computer hacking. A purposive analysis, therefore, ensures an appropriate application of wording which in a literal sense could apply to unforeseen activities unconnected with the original purpose of the rule.

3. METHODOLOGY AND AN ILLUSTRATION

In this final section, I outline a methodology for interpreting the law in the face of Internet facts. I then summarize *SOCAN v. Canadian Internet Service Providers* as exemplary of two aspects of this methodology: first, that a purposive interpretation of a rule may turn on an accommodation of interests external to the rule; and second, that material differences between real space and the internet may be accommodated through separate applications of a rule.

3.1 METHODOLOGY

The formalist tradition instructs that we interpret law and then apply the facts to it. The Internet cases I have discussed show that legal interpretation is not unidirectional. Rather, only tentative understandings of fact and law can be achieved at first blush in the difficult cases. Broadly stated rules (even in light of its purpose) leave much discretion to a decision maker as to what may or may not fit within a rule. Similarly, the Internet facts are often sufficiently ambiguous or complex to create a great deal of uncertainty as to whether the activity in question fits within the rule or not. A decision maker must carefully scrutinize what "significance in human affairs"[48] underlies a purposive reading of the rule and measure that against her own interpretation and understanding of the Internet activity. This must be a mutually constitutive

47. *Id.* The defendant was found not guilty given the court's ultimate holding that the law was too broad and was thus void for vagueness. *Id.*

48. Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, supra note 35, at 631.

and bidirectional exercise through which the interpretation of the rule and the facts are mutually constituted.

With that caveat, I will nonetheless outline, in rather linear terms, a methodology for approaching the interpretation of law in the face of Internet facts. For reasons discussed throughout this paper and elsewhere,[49] a purposive approach to legal interpretation helps to give both life and relevance to the threadbare expressions of language as applied to human affairs. Purpose should be understood as the reason for a rule; and the factual context of the dispute will often invite considerations of a more specific reason or purpose behind the rule. At a general level, the purpose is about balancing opposed social interests, but it can also be modified through interpretation to take into account new interests that emerge in novel cases. However, an interpretation should never be effected which loses sight of, or is unduly disruptive to, the rule's original purpose. In the quest to find purposive meaning, furthermore, an interpreter must not abandon adherence to the conceptual content of a rule.

A court's appreciation of the facts is as important as its approach to legal interpretation. Internet technology underscores this point. There are different ways at looking at an Internet activity: an internal/functional perspective, as well as an external/ technical perspective. Courts should be wary of legal issues that seem to invite consideration of just one of these perspectives. Rather, an interpreter should consider both perspectives, and the context in which those facts operate, to determine if there are affected interests or important differences that need to be accommodated under the interpretation of a rule. Affected interests should be accommodated provided a high threshold of impact is discernible, and the inherent interests of a rule are not unduly prejudiced. Moreover, courts should be equally wary of precedent interpretations and analogies with real space technologies. These prior interpretations may calibrate interests in a way that is inappropriate to the Internet context. Moreover, superficial similarities between the Internet and other technologies may not withstand careful scrutiny when a holistic account of the facts is considered. When differences of kind or degree become apparent, it may still be possible to accommodate the Internet under a separate meaning consistent with the rule's purpose.

3.2 Illustration: SOCAN v. Canadian Association of Internet Service Providers

In *SOCAN v. Canadian Association of Internet Providers*,[50] the performing rights collective society proposed a tariff on Internet service

49. Cameron Hutchison "Which Kraft of Statutory Interpretation: A Supreme Court of Canada Trilogy on Intellectual Property Law," 46:1 Alta L. Rev. 1 (2008).

50. CCH Candian Limited v. Law Society of Upper Canada, [2004] SCC 44 (Can.).

providers (ISP) in connection with infringing music downloads on the Internet. One of the issues was whether ISPs are entitled to the safe harbor of Section 2.4(1)(b) when they engage in caching, *i.e*. copying downloaded files onto ISP servers as a means of lowering cost and enhancing the speed of the Internet.[51] Section 2.4(1)(b) protects a person against Section 3(1)(f) infringement when their "only act" is to provide "the means of telecommunication necessary for another person to communicate the work [to the public]. . ." The suggestion by SOCAN was the practice of creating cache copies undertaken by ISPs was not absolutely "necessary" to facilitate Internet communication and thus took this ISP function outside the safe harbor.

The purpose of the *Copyright Act* is as follows:

> The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).[52]

The Supreme Court of Canada held that the safe harbor is not a narrow exception but should be read, like other limitations on rights under the Copyright Act, as "an important element of the balance struck by the statutory copyright scheme."[53] Accordingly, "necessary" in this provision is defined broadly as a means of telecommunication "reasonably useful and proper to achieve the benefits of enhanced economy and efficiency."[54] Were a more stringent definition of necessary applied, according to the court, advances in telecommunication would be inhibited as the argument could always be made that old technology could have been used to achieve the same ends.[55] The practice of caching is thus held to be "necessary," falling within the safe harbor at least where the ISP is acting as a content neutral "conduit":[56]

> In the Board's view, the means 'necessary' under s. 2.4(1)(b) were means that were content neutral and were necessary to maximize the

51. *Id.* at para. 23.

52. Theberge v. Galerie d'Art du Petit Champlain Inc*.,* [2002], SCC 34 at para. 30 (Can.). This purpose reveals a balance between incentive (or just rewards) to create and access to those creations.

53. *Id.* at para. 89. Further the Supreme Court states that the Internet promotes the purposes of copyright, in that the "capacity of the Internet to disseminate 'works of the arts and intellect' is one of the great innovations of the information age. Its use should be facilitated rather than discouraged, but should not be done unfairly at the expense of those who created the works of art and intellect in the first place." *Id.*

54. *Id.* at para. 91.

55. *Id.* at para. 113.

56. That is, the ISP lacks actual knowledge of the infringing contents and can not, in the normal course of affairs, be expected to know given the technical and financial infeasibility of monitoring the prodigious amount of material moving on the internet. *Id.* at para. 101.

> economy and cost-effectiveness of the Internet 'conduit'. That interpretation, it seems to me, best promotes 'the public interest in the encouragement and dissemination of works of the arts and intellect'. . .without depriving copyright owners of their legitimate entitlement. The creation of a 'cache' copy, after all, is a serendipitous consequence of improvements in Internet technology, is content neutral, and in light of s. 2.4(1)(b) of the Act ought not to have any *legal* bearing on the communication between the content provider and the end user.[57]

There are a number of revealing observations that must be made about this interpretation. First, the rule in question invites an external perspective of the facts, *i.e.* what are the "means. . .necessary?" The court however is not concerned only with a technical appreciation of the Internet, but as Frischmann argues should be the case, takes stock of the Internet facts holistically. Indeed, one of those facts is a consideration of the functional nature of the transaction suggestive of an internal perspective, *i.e.* why should caching have any *legal bearing* on the *communication between content provider and end user*? More pressing about these facts is whether the interest of Internet economy and efficiency can and should be accommodated through the language of the rule and the purpose that rule serves. In the court's judgment, this is a compelling interest extrinsic to purposes of copyright protection that needs to be accommodated under the rule's interpretation, if possible.

Second, the language of the provision is broad enough to accommodate this interest since, as the Federal Court of Appeal acknowledged, there are two interpretations of the word "necessary" in this context: indispensible, on the one hand, and reasonably useful on the other.[58] There is nothing in the context of the Act to point to either interpretation, and thus, the court can exercise its judgment to accommodate the important interest of low cost, efficient Internet services if it is not too disruptive to the balance of interests underlying copyright. Thus, and thirdly, the question becomes whether the interests behind the rule can accommodate the Internet interest in a way that strikes an appropriate balance. The court finds that it can, and calibrates the rule by not imposing liability under the safe harbor on these facts (thus heeding the interests of promoting dissemination of copyrighted works, and internet economy and efficiency) but with the important caveat that the activity

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57. Theberge v. Galerie d'Art du Petit Champlain Inc., [2002], SCC 34 at para. 115 (Can.).

58. *See* SOCAN v. Canadian Association of Internet Providers [2002] FCA 166, para. 128 (Can.). The interpretive ambiguity in this case concerns the word "necessary." *Id.* The Federal Court of Appeal rightly noted that the word "necessary" may mean either (a) that which is "indispensible" or "essential" or (b) "reasonably useful" or "of greater or lesser benefit or consequence." *Id.* Mr. Justice Evans ruled that there was nothing in the context of the provision, including policy considerations, which suggested a meaning consistent with the second less familiar definition. *See Id.* at para. 132.

must be content neutral (a limitation favoring copyright holders). In effect, the court interprets this case in a manner consistent with the methodology advanced in this paper: a purposive analysis of the law together with a holistic appreciation of the Internet facts.

A second issue in *SOCAN* concerned the interpretation of the authorization right under Section 3 of the Copyright Act.[59] The Supreme Court of Canada analyzed this right in another 2004 case, *CCH Canadian Limited v. Law Society of Upper Canada*.[60] In both cases, "authorize" was defined as "sanction, approve and countenance."[61] Also, both cases emphasized that this right will not be infringed by merely offering the use of technology that can be used to facilitate infringement. There is presumption, in other words, that "a person who authorizes an activity does so only so far as it is in accordance with the law."[62] But the similarity between the holdings in the two cases ends there.

In *CCH*, the court dealt with a library that provided photocopiers for patron use. Authorization, in the library photocopier context, does not occur unless "a certain relationship or degree of control existed between the alleged authorizer and the person who committed the copyright infringement."[63] The court refined this meaning later in the judgment:

> Even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement. The Law Society and the Great Library patrons are not in a master-servant or employer-employee relationship such that [the library] can be said to exercise control the patrons who might commit infringement.[64]

The issue is thus defined as one of control, though no further guidance is given as to what constitutes a relationship of control, e.g. does an ISP have a relationship of control over a customer?

The issue in *SOCAN* was whether ISPs authorize copyright infringement by providing Internet connectivity to facilitate peer-to-peer music downloading. Again, the court presumes the offering of technology, in and of itself, does not constitute authorizing infringement. However, the

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59. Copyright Act, R.S.C. 1985, c. C-42 §3. Section 3(1) states: "For the purposes of this Act, 'copyright,' in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right [various rights are listed] and to *authorize* any such acts." (emphasis added).

60. CCH Canadian Limited v. Law Society of Upper Canada, [2004] SCC 48 (Can.).

61. *See e.g. id.* at para. 38.

62. *Id.*

63. *Id.*

64. CCH Canadian Limited v. Law Society of Upper Canada, [2004] SCC 48, para. 45 (Can.)

court continues in obiter that "copyright liability may well attach if the activities of the Internet service provider cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system and fails to take remedial action."[65] In other words, the court suggests a failure to take down copyright infringing material from the host server, when an ISP is notified of the infringement, may constitute authorization. Here, knowledge is the critical component though control (the right and ability to take it down) is implied.

From these cases we see two separate meanings for the language "to authorize" in Section 3. In cyberspace, this section is triggered by ISP inaction when it has *knowledge* of infringement while, in real space, the question is whether there is certain relationship of *control* between the infringer and the technology provider. A different application of the rule is applied to the Internet as a means of accommodating a material difference (the difficulty of monitoring massive amounts of information by ISPs) that implicated an external interest (low cost internet services). Both manifestations of this authorization rule are nonetheless consistent with the general purpose of the rule: to establish liability of third parties who are indifferent to infringement when it is reasonably within their means to do something about it.[66]

4. CONCLUSION

When broadly stated rules are created by courts or legislatures, they are intended to address a range of subject matter in furtherance of some purpose. Moreover, the ambit of the rule, and even its purpose, is constantly evolving as courts deal with new and often unforeseen fact situations. My goal in this paper has been to instill a measure of coherence to the development of law in the face of the unique challenges presented by Internet technology. The methodology I prescribe is not automatic or foolproof, but rather suggests a mode of inquiry into the interpretation of rules and facts. Human judgment will always have a significant role to play as judges wrestle with these issues. Still, this methodology imposes

65. *Id.* at para. 124.

66. A separate application of the rule is legitimate when the activity engages the purpose behind the rule and is supported by the language of the rule in question. Indeed, there are many instances in the law when the application of rule depends heavily on context, e.g. consider fair use and fair dealing analysis under the US and Canadian copyright law. As well, consider the manner in which courts have struggled to adapt trade-marks law, which is strictly territorial in nature, to the internet, a global means of communication. *See e.g*, the active and passive website distinction in Zippo Mfg. Co. v. Zippo DOT Com, 952 F. Supp. 1119 (W.D. Pa. 1997). While arguably this is a new rule (as opposed to a separate application) the purpose is the same: to maintain the principle of territoriality to trade-marks law.

some limits on judicial discretion and, perhaps as importantly, suggests that courts at least ask the right questions, even if we might not always agree with their answers.