

**Survival, Revival, Reunion: From Platform Media
to Mobility Interactive Screen 0.5/Money and Law
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The views expressed below are those of the author Ravi Shukla and do not reflect the views of any organization he is associated with.

In the aftermath of the earliest stages of the digital information revolution it is apparent that the implementation of these technologies will often greatly disrupt the pre-existing state of affairs. As the impact of innovative information technology is greatly amplified by the “network of networks” we now term the Internet this awareness has in turn led many who seek to have input into the direction of future developments to seek to influence the characteristics of the key mechanisms via which that content distribution channel functions and evolves. Consequently there are currently a number of “tug-of-war” type confrontations taking place in various arenas between groups of Internet actors with opposing agendas. The material below contains some information and views on two key confrontations.

Recent developments in Canadian Copyright Law

In one such arena groups representing the entertainment industry are pitted against groups representing both content users and the technology companies whose products and services are being used by such users. They are involved in a spirited battle over the extent to which intellectual property laws and, in particular, national copyright laws will present a barrier to the disruption of existing business models¹ (although admittedly patents are playing an ever increasingly important role in the software industry most notably in the US). As a consequence of this, here in Canada there was, by relative standards, a great deal of copyright related jurisprudence developed by the Supreme Court of Canada during the three year period from 2002 to 2004². In doing so, the Supreme Court justices have now placed their strong imprimatur on the *Canadian Copyright Act*³ (the “Act”).

In particular, in March 2004, the Supreme Court released its decision in the seminal case of *Law Society of Upper Canada v. CCH Canadian Limited*. The facts of the case do not at first glance reveal a strong connection to on-line issues. The Law Society maintains and operates the Great Library at Osgoode Hall in Toronto, a reference and research library. The Great Library provides a request based photocopy service for Law Society members, judiciary and authorized researchers. Under this service, legal materials are reproduced by Great Library staff and

¹ This is not a strategy which is unique to the present times. Copyright litigation was used (albeit ultimately unsuccessfully) by those opposed to the development of the Canadian cable television industry *Canadian Admiral Corp. v Rediffusion Inc.*, [1954] Ex. C.R. 382.

² (a) *Theberge v. Galerie d'Art du Petit Champlain Inc.* (2002), 17 C.P.R. (4th) 161, <http://www.canlii.org/ca/cas/scc/2002/2002scc34.html> (b) *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, <http://www.canlii.org/ca/cas/scc/2004/2004scc13.html>, (c) *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427 <http://www.canlii.org/ca/cas/scc/2004/2004scc45.html>

³ R.S.C. 1985 c. C-42, as amended.

delivered in person, by mail or by facsimile transmission to requestors. The Law Society also maintains self service photocopiers in the Great Library for use by its patrons.

The publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in specific works and a declaration that the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these works as well as any other works that they publish.

The Law Society defended the action on the basis that a copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff or one of its patrons on a self-service copier, for the purpose of research.

The Supreme Court of Canada held (unanimously) that the Law Society does not infringe copyright when a single copy of the above noted materials is made by its staff in accordance with its access policy. In addition, in a finding that has already affected digital copyright issues, the Law Society was held to not authorize copyright infringement by maintaining a photocopier in its Library together with a posted notice warning that it will not be responsible for any copies made in infringement of copyright.

While much of the commentary concerning the decision in the Law Society case has focused upon the Court's strong "pro-user" statements, a significant result of the decision is that the standard of originality under the Act (a threshold issue which a would be owner of copyright in Canada must meet) is somewhat lower than its counterpart under the *US Copyright Act*. As a result, the head notes, case summaries, topical index and compilation of reported of judicial decisions were all held to be original works in which copyright subsists. In the Court's view, an "original" work under the Act is one that originates from an author and is not copied from another work. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to reproduce the work must not be so trivial that it could be characterized as a purely mechanical exercise. Consequently, while creative works will be "original" and covered by copyright, *creativity on the part of the author is not a requirement for the work to attract copyright protection in Canada*. The Supreme Court's explicit adoption of what has arguably been the state of the law in Canada for some time will have an impact on the ongoing discussion about database protection issues in Canada as arguably the need to enact specific database protection legislation has been reduced.

Perhaps the most notable aspect of the decision however, is the Court's characterization of the exceptions to infringement of copyright specified under the Act as an integral part of the Act rather than mere technical defences. In keeping with this view, the Court held that the fair dealing exception, like other exceptions prescribed by the Act is a *user's right* as opposed to an exception to be interpreted restrictively. The Court expressly adopted the views of a Canadian academic, Professor Vaver that in adjudicating a copyright based dispute "both owner rights and user rights should therefore be given a fair and balanced reading that befits remedial legislation"⁴.

⁴ Supra, at note 1(b), paragraph 48.

In order to access the fair dealing exception, a defendant must prove that the dealing was: (i) for the purpose of either research or private study; and (ii) fair. Following on with the requirement discussed above that user rights should be given a fair and balanced as opposed to narrow reading, the Court held that the notion of “research” must be given a large and liberal interpretation in order to ensure that user’s rights are not unduly constrained. Consequently, “research” is not limited to non-commercial or private context with the result that lawyers carrying on the business of law for profit were held to be conducting “research” within the meaning of the fair dealing exception. On the issue of whether the dealing for the purpose of research was fair, the Court found that the Law Society’s dealings with the publishers’ works through its custom photocopy service were fair as its access policy placed appropriate limits on the type of copying that the Law Society would do. If a request did not appear to be for the purpose of research, criticism, review or private study, the copy would not be made. If a question arose as to whether the stated purpose was legitimate, the reference librarian would review the matter.

As mentioned, the Court also held that when it provided self-service photocopiers the Law Society did not “authorize” infringement by merely sanctioning the use of equipment that could be used to infringe copyright. *In Canada, Courts are to presume that a person who authorizes an activity does so only so far as it is in accordance with the law.* This presumption may be rebutted if it is shown at a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement. The Court held that in this particular case, there was no evidence that the copiers had been used in a manner that was not consistent with copyright law and the Law Society’s posting of a notice warning that it will not be responsible for any infringement of copyright arising from copies made was not found to constitute an express acknowledgement that the copiers would certainly be used in an illegal manner. The Court went on to note that even if there had been evidence of the copiers having been used to infringe copyright, the Law Society lacked sufficient control over the Great Library’s patrons to warrant the conclusion that it *sanctioned, approved or countenanced* the infringement.

Shortly after the issuing of the Supreme Court’s decision in the Law Society case, the Federal Court ruled against a motion which, if granted, would have allowed the music industry to begin suing individuals who make music available online via peer to peer file sharing networks⁵. The “John Doe” type lawsuits were commenced by a number of record companies which are members of the Canadian Recording Industry Association and their approach was adopted in light of the fact that the identity of the 29 music swappers alleged to have infringed copyright was not known. (the plaintiffs had identified the Internet protocol addresses that they claimed had been used by these 29 individuals). In refusing the plaintiff’s preliminary motion against a number of Internet Service Providers to have the court order the ISPs to match those IP addresses to the users and provide their names and addresses from the subscription records, the Court pointed to the Supreme Court’s adoption of an authorization standard which provides that the mere setting up of facilities that allow copying does not amount to authorizing infringement and concluded that there was no real difference between a library that places a photocopy machine in

⁵ *BMG Canada Inc. v. John Doe* (2004), 239 D.L.R. (4th) 726 (F.C.)
<http://www.canlii.org/ca/cas/fct/2004/2004fc488.html>

room full of copyrighted material and a computer user that places a personal copy on a shared directory linked to a P2P service.

Not surprisingly, the decision of Mr. Justice Von Finkenstein was appealed and in May 2005 the Federal Court of Appeal released its decision in the case⁶. While the Federal Court of Appeal upheld the decision below with respect to denial of the order; it largely confined its decision to issues relating to the sufficiency of the factual information presented in support of the motion, noting that much of the crucial evidence submitted by the plaintiffs was hearsay which raised the risk that innocent persons might have their privacy invaded and also be named as defendants where it was not warranted.

On the issue of privacy Sexton J.A. (for the unanimous court) noted that such rights are significant and must be protected. In striking a balance between privacy interests and public interest, he noted that intellectual property laws are designed to ensure that ideas are expressed and developed instead of remaining dormant and that in the context of the Internet that technology must not be allowed to obliterate property rights which society has deemed important. On this view, although privacy concerns must also be considered, they must yield to public concerns for the protection of intellectual property rights in situations where infringement threatens to erode those rights. Thus in his view, where there is a *bona fide* claim that unknown persons are infringing copyright, the balance lies towards disclosure, as long as any invasion of privacy is kept to a minimum.

Insofar as the motion judge's suggestions that Canadian copyright law legalized copying sharing activities, Sexton J. A. noted that such conclusions about the law should not have been made at such an early stage of the proceedings and he noted in particular: (i) that Mr. Justice Von Finkenstein (a) did not appear to consider whether all the requirements for the application of the exemption relating to personal use contained in ss. 80(1) of the Act was satisfied, (b) failed to consider whether the users' act of copying the songs on to their shared directory could constitute "authorization" because it invited and permitted other persons with Internet access to have the musical works communicated to them and copied by them; and (c) seemed to suggest a requirement for a positive act in order to find that there had been "distribution" of the musical works under the Act, where such a positive act is not clearly required by the legislation; and (ii) the insufficiency of the analysis given to the possibility of secondary infringement⁷. Sexton J. A. also made it clear that the motion judge's findings with respect to copyright law should not be considered in any further litigation on the issue.

⁶ *BMG Canada Inc. v. Doe* 2005 FCA 193 (CanLII), <http://www.canlii.org/ca/cas/fca/2005/2005fca193.html>

⁶ (2) It is an infringement of copyright for any person to: (a) sell or rent out, (b) distribute to such an extent as to affect prejudicially the owner of the copyright, (c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public, (d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or (e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

Notwithstanding the markedly different approach to the copyright issues taken by the Federal Court of Appeal in the case, the motion judge's widely publicized finding that making music files available for copying on a peer to peer file sharing system might not give rise to liability for infringement under existing Canadian copyright law still figured prominently in the decision of the U.S. Trade Representative to maintain Canada retention on its watch list and to conduct an out of cycle review to monitor Canada's "progress" on intellectual property rights issues during the upcoming year.⁸ In general, the reasons cited by the USTR this year focused on two issues – first, the non-implementation of the WIPO Internet Treaties⁹ and the perceived need for further protection of owner/creator rights under Canadian copyright law and second, border enforcement. In a notable related US development in late June 2005 the US Supreme Court released its highly anticipated decision in the case of *MGM v. Grokster*¹⁰. In a unanimous decision the USSC sent the case back to the lower court, which had ruled in favor of file-sharing services Grokster Ltd. and StreamCast Networks Inc. on the grounds that the companies couldn't be sued. The Supreme Court justices said there was enough evidence of unlawful intent for the case to go to trial: "We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by the clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties ... [t]here is substantial evidence in MGM's favor on all elements of inducement," Justice David H. Souter wrote for the court. Notwithstanding the victory achieved by the entertainment industry against the 2 defendants, by emphasizing the importance of the evidence of unlawful intent that was present in the case the Supreme Court justices arguably left the heart of the so-called "Betamax" doctrine largely intact. Pursuant to that doctrine even though a technology - such as a VCR - might be used to infringe copyright, it could still be legally sold if it also permitted substantial non-infringing uses.

In March of 2005 the Government of Canada had announced its intention to introduce legislation to amend the Act and to thereby, among other things, implement provisions found in the WIPO Internet Treaties (the Government had indicated it would further delay further formal ratification of those treaties) and on June 20, 2005 Bill C-60 was introduced into Parliament for first reading¹¹. Significantly, Section 2 of the Bill would add a "making available" right via the inclusion of the following provision: "A person who makes work or other subject matter available to the public in a way that allows members of the public to access it through telecommunications from a place and at a time individually chosen by them, communicates it to the public by telecommunication.". There had been a concern on the part of some that the enactment of a new making available right will pave the way for a slew of new lawsuits against

⁸http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf.

⁹ The WIPO Internet Treaties established novel forms of intellectual property rights associated with copyright protected works and with sound recordings and performances protected under neighbouring rights. These rights include: (i) new rights to prevent the circumvention of effective technological protection measures, (ii) rights to prevent the tampering with rights management information, and (iii) the creation of a new "making available" right. The Canadian government signed both of the WIPO Internet Treaties in 1996; however, the treaties do not enter into force in Canada until the government ratifies them.

¹⁰ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* (04-480) 380 F.3d 1154,
[http://64.233.167.104/search?q=cache:QW-](http://64.233.167.104/search?q=cache:QW-MDoKoVIEJ:a257.g.akamaitech.net/7/257/2422/27jun20051200/www.supremecourtus.gov/opinions/04pdf/04-480.pdf+grokster+decision&hl=en)

[MDoKoVIEJ:a257.g.akamaitech.net/7/257/2422/27jun20051200/www.supremecourtus.gov/opinions/04pdf/04-480.pdf+grokster+decision&hl=en](http://64.233.167.104/search?q=cache:QW-MDoKoVIEJ:a257.g.akamaitech.net/7/257/2422/27jun20051200/www.supremecourtus.gov/opinions/04pdf/04-480.pdf+grokster+decision&hl=en).

¹¹http://www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.PDF .

individual music file sharers and the above- noted language suggests that the Government does not intend to require that a plaintiff introduce evidence of an intention on the part of the defendant to infringe copyright and instead intends to introduce a strict liability offence. Therefore on the present wording of the Bill it appears that an individual will attract liability for copyright infringement even if he or she unknowingly and without a positive act makes a copyrighted work available.¹² . Ironically, by overreaching via his analysis of the ambit of the exception to infringement provided by s. 80(1) of the Act Mr. Justice Von Finkenstein inadvertently appears to have set into motion a series of events which will lead to the opposite outcome to the one he appears to have desired¹³ .

The Bill would also amend Section 27 of the Act to make it copyright infringement for someone to sell, rent, distribute, communicate to the public by telecommunication or perform in public a work that the person “knows or ought to have known” was made as a copy for private use under subsection 80(1) of the Act.

Proposed new Section 31.1 would create specific exemptions for operators of network services. The amendments would clarify that persons who perform “acts relating to the telecommunication that render it more efficient”, including caching, would not infringe copyright. Further, ISPs who provide space on their servers to clients will not be liable by virtue of that act alone for copyright infringement relating to stored work unless there is a court decision which finds that those works infringe copyright.

Similarly, proposed Section 40.1 would establish a “notice and notice” system (as opposed to a US style “notice and takedown” system) whereby owners of copyright and works will be able to serve a notice of claiming infringement on an ISP or to a party providing “information location tools” and the person receiving such notice must forward it immediately to the alleged infringer and must retain, from the time of receipt of the notice, records that will allow the identity of the person to whom the electronic location belongs to be determined. Maximum statutory damages are fixed for failure to comply with these obligations of \$5,000 for failing to serve a notice and \$10,000 for failing to keep records.

¹² Interestingly and contrary to the premise underlying such lawsuits, a recent British survey suggests that computer-literate music fans who illegally share tracks over the Internet also spend four and a half times as much on digital music as those who do not <http://www.guardian.co.uk/arts/news/story/0,11711,1536886,00.html>. Similarly , in another UK music downloading related development when BBC Radio 3 offered listeners free downloads of symphonies more than a million people participated with the result that record-company executives are now considering using free downloads as a method to tempt new classical buyers in the future <http://enjoyment.independent.co.uk/music/features/article304771.ece>. Nevertheless, The European Union is considering anti-piracy legislation that would be even stricter than that in the US. A directive being pushed by the European Commission would, among other things, criminalize “attempting, aiding or abetting and inciting” acts of copyright infringement. The EU parliament will take up the proposal later this year http://www.wired.com/news/politics/0,1283,68418,00.html?tw=wn_tophead_1.

¹³ On a somewhat related point the Supreme Court has very recently dismissed an appeal of last December’s Federal Court decision to quash a levy that had been charged for the popular digital music players. The Canadian Private Copying Collective, a non-profit agency that collects tariffs on behalf of musical artists and record companies, had been pursuing the appeal arguing that since many people use these new devices to make illegal copies of songs, a levy should be collected for musical artists: <http://www.cbc.ca/story/arts/national/2005/07/28/Arts/ipodlevy050728.html>.

Proposed new Section 34.01 would give copyright owners a full range of remedies against anyone who without the consent of the copyright owner, knowingly removes or alters any rights of management information in electronic form that is attached to or embodied in any material form in the work, performance or sound recording at issue. These remedies are available where the person removing or altering the rights management information “knows or ought to know that the removal or alternation will facilitate or conceal any infringement of the owners of copyright.” Further remedies are available against anyone who deals with any material form of a work where they know or ought to know that the rights management information has been removed or altered. Proposed Section 34.02 would also give copyright owners and moral rights holders remedies against anyone who, without their consent, circumvents, removes or in anyway renders ineffective a technological measure protecting any material form of the work for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it (unlike the U.S. anti-circumvention provisions found in the Digital Millennium Copyright Act which do not require that there be an objective of infringing copyright)¹⁴. Significantly though, circumvention for the purpose of making a private copy under Section 80(1) of the Act would not be permitted.

Internet Governance

The past decade or so of rapid growth in the size and diversity of the Internet community has coincided with a period during which the economies of many nation states have become more highly linked and the Internet now functions as one of the key catalysts for globalization processes. With the Internet appearing to more and more take on the character of a global public resource have come calls to include the newly widened community of Internet stakeholders in new mechanisms for the governance of key Internet functions such mechanisms to be within the jurisdiction of the UN. This move on the part of some national governments to have the UN be the ultimate body responsible for control over Internet governance issues is being opposed, most notably by the US government. At its heart – this debate is about control over core functionality and policy making processes for the Internet and the outcome of this process will have important consequences for the public.

Currently the Internet Corporation for Assigned Names and Numbers (“ICANN”), a California based non-profit corporation, is charged with administering the allocation of the IP address base and managing the Internet domain name system and the route server system functions. The origins of ICANN date back to 1998 when the U.S. Department of Commerce released two policy documents calling for the creation of the corporate entity that eventually became ICANN. These documents provided an early conceptual sketch of the principles and proposed organizational structure on which the corporate entity would be built and, among other things, the authors suggested that a board of directors be constituted that would balance the interests of

¹⁴ The Central American Free Trade Agreement included a win for American lobbyists for tougher copyright laws. Once it takes effect, CAFTA will require Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua to mirror the Digital Millennium Copyright Act’s broad prohibition on bypassing copy-protection technology <http://mediachannel.org/blog/node/461>. As an example of how broadly the provisions of the DMCA are being interpreted by some lawyers it is noted that a Mr. Jose Avila has furnished his entire apartment using sturdy FedEx boxes and posted the results online at fedexfurniture.com. The company’s lawyers have apparently sent him demand letters to take down the site, arguing, among other things, a violation of the DMCA <http://www.wired.com/news/culture/0,1284,68492,00.html>

specific stakeholders with those of Internet users. In early October 1998, ICANN submitted its proposal to become the corporation envisioned in what are now known as the Department of Commerce “green and white papers” and at present much of the way that ICANN functions is set out in a Memorandum of Understanding between ICANN and the U.S. Department of Commerce.¹⁵

It is fair to say that from the vantage point of the present time, approximately seven years after the time of inception, many feel that ICANN has failed to meet expectations. Most notably its failure to comply with the promise to incorporate a near majority of Board members to represent the interest of the online public has caused considerable concern. For its part, the U.S. government has repeatedly determined that ICANN did not achieve the necessary milestones for the handover of the root server system functions. In response to the growing dissatisfaction with ICANN, a Geneva based United Nations Agency, the International Telecommunications Union (“ITU”) has been positioned as a replacement for ICANN and this is one of the issues being discussed within the ambit of the World Summit on the Information Society (“WSIS”) which will be holding its summit in Tunisia later this year (the UN Agency that takes the lead in organizing the WSIS is in fact the ITU).

The two sides of the Internet governance debate are therefore now comprised on the one hand of United States (supported by several other countries including Canada) and the developing world and some European countries on the other side. The international side has set out its new vision for Internet governance in its proposal developed by the WSIS’s Working Group on Internet Governance¹⁶. Just prior to the release of that report, the U.S. Assistant Commerce Secretary issued a policy statement of its own and in it, the U.S. government reversed its longstanding position by indicating that it no longer intended to transfer control over the root servers to ICANN but instead would be maintaining its “historical role in authorizing changes to the authoritative root zone file”. The announcement which came just a few days before an ICANN meeting in Luxembourg can be seen as an indication that the Bush administration intends to keep ICANN on a “short leash”, but it was also widely perceived as a snub to the WSIS process¹⁷.

This high profile rejection of the proposed role for United Nations suggests that we are now witnessing stages of an international showdown – one possible outcome of which could be that national governments will negotiate with the U.S. for control of their national domains i.e. a carving out of country code domains from the ICANN mandate while maintaining the status quo for other Internet governance matters. A much more problematic outcome will arise if instead national governments decide to create an alternate or fragmented root. Such an alternative approach would mean that a new top level domain would not be approved by ICANN and would give rise to the chaotic situation in which two computers would find different websites at the same address. While the likely outcome of the current impasse in the discussions is that both sides will identify an acceptable compromise position the possibility that the fragmentation scenario will arise can no longer be dismissed.

¹⁵ <http://www.icann.org/general/icann-mou-25nov98.htm>.

¹⁶ An English language copy of the report of the ITU Working Group on Internet Governance can be found at <http://www.itu.int/wsis/wgic/docs/wgig-report.doc>

¹⁷ The U.S. government did acknowledge that ICANN was the appropriate technical manager of the Internet and that each national government had a legitimate interest in the management of their country code top level domains.