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Copyright Law

Industry Canada Report – Cost of ISP Voluntary Compliance to Protect Copyright

INDUSTRY CANADA HAS PRODUCED A REPORT ASSESSING the economic impact of the voluntary "Notice and Notice" system used to allow copyright holders to help protect their intellectual property rights in material posted on the Web. Under the system the Canadian Recording Industry Association (CRIA) notifies in writing a Canadian Association of Internet Providers (CAIP) or Canadian Cable Telecommunications Association (CCTA) member ISP of the presence of material over which copyright is claimed, and the ISP in turn notifies the customer, and then confirms having done so to CRIA. The study, conducted by way of survey of a selection of providers, was intended to assess the cost of this voluntary system to large and small Canadian ISPs. Although the survey only included 12% of all ISPs in Canada, it included all large ISPs and therefore represented more than 80% of the subscribers.

The Report concluded that the current voluntary system does not have a significant impact on smaller ISPs, but is significant and growing over time for larger ones. The average cost per notice was estimated at $11.76 for large ISPs and $5.20 for small ISPs. Large ISPs also, unsurprisingly, dealt with more requests: just under 4500 per month on average for large ISPS but only 18 per month for small ISPs. The overall cost of following the current voluntary practice was estimated at $460,000 per month, approximately 90% of which was associated with large ISPs.

The study also considered the possible economic impact of moving to a mandatory scheme through the *Copyright Act*, and the ways in which costs might be redistributed under such a change.

Comment on the issues raised in this item at the IT.Can blog

CRIA HAS RELEASED A STUDY WHICH PROVIDES DATA gathered from a survey of music consumers relating to their listening and downloading practices.

Criminal Law

Distribution of Child Pornography over the Web

In *R. v. Walsh* the accused was unsuccessful in applying to set aside his guilty plea to charges of possessing child pornography and distributing it over the Internet, though his plea against sentence was successful. The Court held that there was no basis to conclude that the accused's counsel had forced him to plead guilty, and so his guilty plea stood. The sentence of two years imprisonment followed by three years probation was excessive, however and was reduced to time served.

The facts of the case were quite dissimilar to most distributing child pornography charges. The accused, while on a trip, had taken sexually explicit pictures of his girlfriend at her suggestion. As his girlfriend was only 16 years old, these photographs met the Criminal Code definition of child pornography. When she broke up with him two months later, out of revenge he produced a collage of the pictures which was an imitation of the Mastercard "Priceless" advertisements. The accused scanned the collage into his computer and e-mailed it to a friend who had been on the trip when the pictures were taken. He saved the collage to the "My Documents" folder on his computer, which was also the default folder he used to download files to and from the Internet, in particular through the peer-to-peer file sharing

programs Kazaa and Sexter. The folder was only accessible to others when the accused was logged in to those sites, and the accused had contacted the websites to prevent download of the file when he realised that it was accessible to others. Crown counsel and the sentencing judge, however, had spoken of the facts as the accused "posting the collage to the Internet". In any case the collage was eventually passed by email to many friends and acquaintances of the former girlfriend, eventually being sent to her, and also by some third party, in a fit of anger, to the former girlfriend's father. The collage came to the attention of the police when a printed copy was placed in the former girlfriend's school locker and she took it to the principal.

The Court of Appeal held that there was no basis to interfere with the conviction, either based on the argument that the trial judge should have recognized that the accused was denying "posting" the collage to the Internet, or on the basis of ineffective representation of counsel. The accused had admitted to making the collage and emailing it to a friend, which in the circumstances was sufficient to constitute distributing child pornography. They did find the sentence harsh and excessive, however, and reduced it to the eight months the accused had already served.

Defamation

In *WeGo Kayaking Ltd. v. Sewid*, Metzger J. of the B.C. Supreme Court ruled on an internet defamation case. The plaintiffs operated adventure travel companies whose business included kayak tours off the coast of British Columbia. The defendant operated a tour and water taxi business in the same area.

The dispute focussed on website content titled "Kayak Companies Review" (the Review) that appeared on a website which advertised the services of the defendant. The Review listed "good" and "bad" kayak companies, and indicated that "bad" companies were ones which "have done things to try and make First Nations become token Indians who are only needed as items of attraction or convenience." (at para 5). The plaintiffs' companies were listed under "bad". The name of the defendant appeared at the bottom of the Review.

Metzger J. noted that the two parties were in competition with each other, and that the clients for which they competed tended to use the internet as a source for information about sea kayak operations. He also noted that internet bookings for the plaintiff companies dropped dramatically from the time of the appearance of the review. He found that the content in the Review was defamatory, and granted an injunction as well as damages. In calculating damages, Metzger J. noted that the fact of Internet publication, and the ensuing wide dissemination, was a factor.

Domain Names

In *RGIS Inventory Specialists v. AccuTrak Inventory*, a three person panel considered a dispute over the domain name rgis.ca. The Complainant RGIS is an inventory service provider, founded in 1958, and has grown to be the world's largest company in this field. The complainant is the registered owner of the Canadian trademarks RGIS and word and design marks for RGIS INVENTORY SPECIALISTS. The trademarks have been used by RGIS in Canada since the mid 1980s, and were registered in 1988, 1989 and 1990 respectively. The registrant is a competitor company offering similar services in North America. It registered the domain name rgis.ca in May of 2001. The domain name resolves to a site offering competing services. After receiving a cease and desist letter from the complainant, the registrant caused the domain name to resolve to a website for the New Mexico Resource Organization located at rgis.unm.edu. The panel noted that the New Mexico Resource Organization, which also goes by the acronym RGIS (for Resource Geographic Information System), was in no way involved with this change.

Elizabeth Cuddihy, writing for the panel, noted that the domain name rgis.ca was confusingly similar with the RGIS trademark. She also found it confusingly similar to RGIS INVENTORY SPECIALISTS in that "it incorporates the whole of the distinctive element of these marks, namely, RGIS". (at p. 5)

The facts relating to the directing of the rgis.ca domain name to a competitor's web site clearly supported a finding of bad faith registration. Cuddihy noted, however, that there were additional factors supporting a finding of bad faith registration. After

receiving the demand letter, the registrant had amended its registrant information to falsify the contact information. Cuddihy noted: "A Registrant's provision of false contact information can support a finding of bad faith, as can the failure to respond to a complainant's transfer request, especially when positive actions are taken after issuance of such demand." (at p. 8, citations omitted) The panel also found that the registrant had no legitimate interest in the domain name. Cuddihy noted that: "being a competitor of the Complainant, [the Registrant] must have known that the use of the Complainant's trademark in the domain name would misdirect Internet users towards a competitor's website." (at p. 8) The Panel ordered the transfer of the domain name registration to the complainant.

Human Rights

Canadian Human Rights Tribunal Ruling – Communicating Hate Messages Over the Internet

The Canadian Human Rights Tribunal in *Warman and Canadian Human Rights Commission v. Alexan Kulbashian, James Scott Richardson, Tri-city Skins.com, Canadian Ethnic Cleansing Team, and Affordable Space.com* has made orders requiring various of the defendants to cease and desist from communicating hate messages against identifiable groups over the Internet, and ordering the payment of cash penalties for their actions

Kulbashian and Richardson had been involved in producing tri-cityskins.com, a website that contained material that was racist in nature against Blacks, Jews, and Muslims, among others. Similar material was found on the website of Canadian Ethnic Cleansing Team (wpcect.com). In addition Richardson produced an online newsletter entitled the Vinland Voice. The Vinland Voice contained similar material to the tri-cityskins.com website. It was not difficult for the Tribunal to conclude that the material was likely to expose identifiable groups to hatred or contempt, and therefore that the material violated the *Canadian Human Rights Act*. In addition it was uncontroversial that posting the material on the Internet constituted a communication for the purposes of s. 13 of the *Act*. To constitute a discriminatory practice, it was necessary that the communication occur repeatedly, which the Tribunal held was established by the ability of those visiting the site to receive successive instalments of the hate messages on an ongoing basis over several months. Further, since the messages could be viewed at any time by anyone, they were being communicated repeatedly.

The more difficult issue in the case was the factual one of connecting Kulbashian and Richardson to the contents of the websites. The complainant Warman testified that he had conducted a "who-is" search through register.com, and had determined that, although much of the information registered was clearly fictitious, both tri-cityskins.com and wpcect.com had as a domain server Affordable-Space.com. The administrative contact's address for both websites and for the domain server was the same address in Toronto. The complainant then did further web searches, including a Google search on Alexan Kulbashian, which produced information connecting Kulbashian to Affordable-Space.com, including Kulbashian's online resume in which Kulbashian listed his association with the server.

More complicated was the evidence connecting Richardson to the hate messages. The police had seized Richardson's home computer and made a mirror image of its hard drive. One directory consisted of the logs of Internet relay chats in which the computer user had participated. Reviewing these records suggested that Richardson used the online pseudonym "WPCanada": for example at one point when WPCanada was signing off another participant had posted "waves at James and says buh bye", while at other times participants had posed questions to "James" when addressing WPCanada. In addition WPCanada had sometimes connected himself with the Vinland Voice, for example by stating that he had just finished up the Voice on a day preceding the posting of a long newsletter. WPCanada also showed a connection in some comments to the Canadian Ethnic Cleansing Team website, including advance knowledge of material that would be appearing on it.

Relying on this and other information about IP addresses, the Tribunal concluded that James Richardson was WPCanada, and therefore was actively involved in editing and producing the Vinland Voice newsletter, and publishing the objectionable material which appeared there.

A final issue with regard to Kulbashian related to s. 13(1) of the *Act*, which provides that an owner or operator of a telecommunication undertaking through which hate messages are communicated is not in breach of the Act by reason only that its facilities were used by other persons for the transmission of the material. However, the Tribunal held that this section did not benefit Kulbashian. He knew exactly the kind of material that the websites he hosted were posting and encouraged the use of his server for the communication of these hate messages. His involvement was not "by reason only" that he was the owner of the server. Accordingly the Tribunal found both Kulbashian and Richardson to have violated the *Act*.

Comment on the issues raised in this case at the IT.Can blog 

Legal Practice

In reviewing a bill for legal services submitted in respect of an order for costs in *Biggin v. Maloney*, Campbell J. of the Ontario Superior Court of Justice observed: "Although some case-law research was necessary, and although Mr. Hopkins did indeed produce several relevant and persuasive cases… I cannot understand how Mr. Hopkins could invest 10 ½ hours obtaining and reading the essence of those cases. Surely in this electronic age, Mr. Hopkins would perform the same task that I, or any other legally trained person, would and "click" the word "mobility" into the Quicklaw website. His computer would then have given him the relevant case-law." (at para 10)

Privacy

Bill 20, the *Freedom of Information and Protection of Privacy Amendment Act, 2006* has been introduced into the Alberta Legislature. The Bill is intended to prevent, *inter alia*, disclosures of personal information pursuant to the *U.S. Patriot Act*. For example, s. 92 of Alberta's FOIPOP legislation would be amended to include the following clause: "A person must not wilfully disclose personal information to which this Act applies pursuant to a subpoena, warrant or order issued or made by a court, person or body having no jurisdiction in Alberta to compel the production of information or pursuant to a rule of court that is not binding in Alberta", and substantial penalties are provided for breach of the provision.

Solicitor-Client Privilege

In *Dublin v. Montessori Jewish Day School of Toronto*, Master Albert dealt with the issue of whether an email communication that was inadvertently provided by the defendants in an action to the plaintiffs was protected by solicitor-client privilege. The email had originally been sent by the Chair of the defendant School Board to her lawyer for the purpose of seeking legal advice. While the email was clearly protected by solicitor-client privilege, an issue arose as to whether this privilege had been waived. The email, which had been mistakenly included as Tab 72 in a book of productions, had been printed from the email account of "Bruce". The argument was that because the contents of the email had not been kept confidential, when it was produced in the document brief, privilege was waived.

The Master noted that the Chair's husband was named Bruce. He ruled that "The fact that an email from Ms. Nashman to Mr. Steinberg was printed from her husband's account does not mean that it was read by him any more than letter mail addressed to her and placed in the home's mail slot would be opened by Bruce. There was insufficient evidence to find that Bruce read the email." (at para 22).

Telecommunications Law

The Telecommunications Policy Review Panel, which was established by the Minister of Industry on April 11, 2005, to conduct a review of Canada's telecommunications framework has produced its Final Report 2006. The panel's mandate including reporting and making recommendations on "how to implement an efficient, fair, functional and forward-looking regulatory framework that serves Canadian consumers and businesses, and that can adapt to a changing technological landscape". The panel was also asked to make recommendations regarding the access of Canadians to modern telecommunications services and the promotion of advanced telecommunication systems across all sectors.

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Teresa Scassa, Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca.

Disclaimer: The IT.Can Newsletter is intended to provide readers with notice of certain new developments and issues of legal significance. It is not intended to be a complete statement of the law, nor is it intended to provide legal advice. No person should act or rely upon the information in the IT.Can Newsletter without seeking specific legal advice.

Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec les professeurs Teresa Scassa, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca

Avertissement : Le Bulletin IT.Can vise à informer les lecteurs au sujet de récents développements et de certaines questions à portée juridique. Il ne se veut pas un exposé complet de la loi et n'est pas destiné à donner des conseils juridiques. Nul ne devrait donner suite ou se fier aux renseignements figurant dans le Bulletin IT.Can sans avoir consulté au préalable un conseiller juridique.