



ISP COPYRIGHT LIABILITY IN CANADA

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Intellectual Property Law & Technology Program



Overview



- Introduction
- ISP liability in Canada
 - 1. Common Law**
 - 2. Copyright Modernization Act (2012)**
 - 3. Notice and Notice Enforcement System: The Unique Canadian Approach**
- Unanswered questions
- Conclusion

Introduction

- Canadian Copyright law is said to balance author's (owner's) rights and the public interest
(*Théberge*, 2002 SCC)
- Therefore, the public benefit is scrutinized in Canadian Copyright case law and legislation



1. Case Law

- “The dissemination of the arts and intellect through the Internet is one of the great innovations of the digital age.” (CAIP, 2004 SCC at ¶40)
- If an intermediary is acting in a capacity as a mere data conduit providing services necessary for others no liability (CAIP, 2004 SCC)
 - Are ISPs liable for
 - Infringing by Telecommunication
 - Authorizing Infringement



Case Law

CAIP and Telecommunication

s. 3(1)(f): A copyright owner has the sole right to communicate their literary, dramatic, musical or artistic work to the public by telecommunication

BUT...

Common Carrier Exemption

s. 2.4(1)(b): where a person simply provides the means of telecommunication necessary for others to communicate a work, **the supplier does not communicate the work to the public**

Case Law

CAIP and Authorizing Infringement

- A person does not authorize by purely providing the equipment that could be used to infringe copyright (*CCH v LSUC*, 2004 SCC)
- To authorize ISP must **approve, sanction, or exercise control over the act** (*CAIP*, 2004 SCC)

Codifying ISP Practices

- The *Copyright Modernization Act* (2012) enacted provisions reiterating ISP liability consistent with the common law
 - These provisions clarify and expand on the ISP exemptions
- The Act also formalizes the Notice and Notice system explaining ISPs obligations when hosting infringing material
 - The Act codifies the customary practice ISPs engaged in prior to enactment

2. Copyright Modernization Act (2012)

- Bringing Canada into the digital age
 - Key function is to explicitly address ISP liability
 - Codifies current practices and elaborates on schemes
 - Recognizes the need to bring Canada at a par with other countries/WIPO
- Addresses
 - Exemptions from primary infringement
 - Telecommunication, reproduction, caching, hosting
 - Secondary liability via enablement
 - Notice and Notice system



ISP Exemptions

Telecommunication & Reproduction (s. 31.1(1))

- If an ISP provides the means the ISP is not liable *solely by providing those means*
 - This is broader than s. 2.4(1)(b)

Caching (s. 31.1(2))

- The creations of cache copies or other acts that improve the efficiency do not *by virtue of that act alone* constitute infringement

Hosting (s. 31.1(4),(5))

- Unless notified by court of competent jurisdiction, *by virtue of that act alone*, hosting does not constitute infringement

ISP Secondary Liability

Enablement Clause (s. 27.23)

- When a person, by means of the Internet, provides a service primarily to enable acts of infringement → liability

Ex:

- General search engine → no liability
- Bit torrent file locator enabling unlawful download → liability

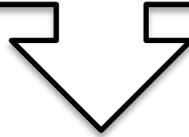
3. Notice and Notice System (ss 41.25-41.27)

Owner finds online infringement and sends notice to ISP

ISP receives notice, forwards notice to subscriber *as soon as feasibly possible*, and retains record

Alleged infringer either removes/does not remove illicit content

ISP receives notice, forwards notice to subscriber as soon as feasibly possible, and retains record



As long as intermediary forwards notice they should escape liability: **no need to remove work**

- If fail to perform duty, can be liable for statutory damages between \$5,000-\$10,000 (s. 41.26(3))

Alleged infringer either removes/does not remove illicit content

Direct, alleged infringer's liability follows s. 3(1)



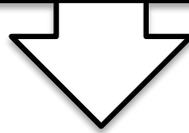
Notice and Take Down System

Owner find online infringement and sends notice to ISP

ISP receives notice, removes content, and informs alleged infringer

Alleged infringer can challenge removal saying \neq infringing and request it to be put online again

ISP receives notice, removes content, and informs alleged infringer



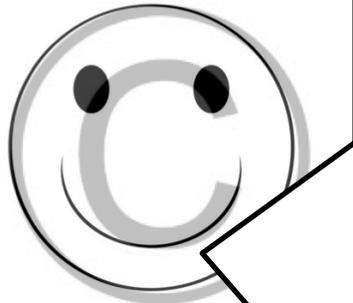
- If ISPs fail to remove can be found liable for indirect infringement
 - US: vicarious or contributory infringement for ISP
 - China: joint liability with the direct infringer

Alleged infringer can challenge removal saying \neq infringing and request it to be put online again

- Unlike in Canada the material is deemed to be infringing upon notice



Stakeholder's on Notice and Notice



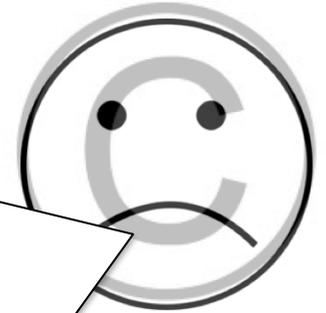
- Encourages effective dissemination of liability
- Costly (time and money) for ISPs to implement technology to address infringement
- Does not remove the burden of removing infringing content

“[W]e balance the interests of copyright holders with the interests of consumers. We do not believe that a regime that places the responsibility for reporting and tracking down violators onto the shoulders of the rights holders. Rights holders have neither the ability nor the resources to police the Web... [But ISPs] have very significant resources with which they can combat piracy... So the balance that the government is seeking between the rights of artists and the needs of the users is still a long way off.”

- Jean-Christian Céré (General Manager, Société professionnelle des auteurs et des compositeurs du Québec)

“[The notice and notice regime] does nothing to dissuade persistent offenders. They will not put a stop to their illegal activities, knowing that they will incur no sanction from ISPs. The regime puts the responsibility for reporting and tracking down violators onto the shoulders of the rights holders. Rights holders have neither the ability nor the resources to police the Web... [But ISPs] have very significant resources with which they can combat piracy... So the balance that the government is seeking between the rights of artists and the needs of the users is still a long way off.”

- Jean-Christian Céré (General Manager, Société professionnelle des auteurs et des compositeurs du Québec)



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Unanswered Questions



- (a) Are the ISP exemptions (s. 31.1) much broader than the Common Carrier Exemption?
- (b) Does Enabling Infringement replace the notion of Authorizing Infringement with respect to ISP activity?
- (c) Does the Notice and Notice system properly balance concerns of all parties in the public interest?

What Can We Learn From Canada

- The **Notice and Notice** model is unique to Canada & represents a codification of existing ISP practices
 - This model protects ISPs from potential liability while allowing owners to initiate actions to protect their proprietary rights
 - This model is seen to advance the public interest as it does not presume material is infringing therefore providing public benefits of access to works

Conclusion

- ISPs are efficient and effective mechanisms providing a necessary service
- ISPs escape liability unless directly enabling infringement or by exceeding their capacity as mere data conduits





THANK YOU

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