

**ISSUES ARISING IN LITIGATION IN THE FIELD OF COPYRIGHT AND
RELATED RIGHTS**

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"My lord, I have been told that it may amount to unfair competition to patent the copyright on the design of any trademark to make it confidential! How true is that?"

1. INTRODUCTION

The above anecdote may sound comical, but it is an indication that the lay litigant is completely at a loss when it comes to intellectual property (IP) rights. There is the need to explain that copyrights, patents, industrial designs, trademarks, unfair competition and confidentiality law each protects different things, albeit with the possibility of overlaps. For instance, while computer software programs may be protected by both copyright law, and patent law.

The word 'copyright' means more than the author's exercise of control over copies or copying of intellectual creations. The development of copyright law was a tailored response to the invention of the printing press, which allowed multiple copies of written works to be reproduced on a mass scale. This played a crucial role in the coining of this word. In Ghana, copyright law provides protection for enjoyment of bundle of rights, which prevents the unauthorized use or exploitation of creative works. These rights accruing to creators of copyrighted materials are economic rights and moral rightsⁱ. While economic rights protection enables the author to reap the pecuniary benefits of creative endeavors, the moral rights protection ensures that the author can control how the public views the author through her creationⁱⁱ.

This paper looks at issues arising in litigation in copyright law. It explores current developments in copyright litigation as part of a broader framework of intellectual property law enforcement in Ghana and beyond. It examines some fundamental

principles of copyright law and how they have been advanced in Ghana other jurisdictions through a corpus of copyright jurisprudence.

COPYRIGHT PROTECTION

Copyright protection is primarily a creature of statuteⁱⁱⁱ. It is granted to every person who creates an original work which is expressed in a fixed medium. Copyright protection is automatic under Article 5 (2) of the Berne Convention which provides that "*the enjoyment and exercise of these rights (copyright) shall not be subject to any formality.*" For evidentiary purposes, some jurisdictions such as Ghana provide an optional opportunity for copyright holders to obtain registration^{iv}. The fixation requirement for copyright means that the work must be embodied in a tangible medium sufficiently stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration^v. For example, a poem written on a sandy beach which ocean waves wash away would not be eligible for copyright protection because it can be perceived for a transitory duration^{vi}.

IDEA/EXPRESSION DICHOTOMY

A foundational principle is that copyright law does not protect the idea or concept behind a work, but the form or expression of it. This permits ideas, facts and concepts as the building blocks of creativity, to remain free for all to use. Thus a work identical to an earlier copyrighted work created independently does not infringe the rights of the first copyright holder. The Canadian case of *Delrina Corporation v. Triolet Systems Inc* provides a classic statement of this principle: "*Copyright does not subsist in any arrangement, system, scheme, method of doing a particular thing, procedure, process, concept, principle, or discovery, but only in an author's expression of them*"^{vii}. In US parlance, "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described. Explained, illustrated, or embodied in such work"^{viii}.

The result is that copyright protection assures creators of intellectual products the right to their original expression, and also encourages others to build freely upon ideas and information conveyed by the work. One commentator argues that the idea/expression dichotomy constitutes an inherent limitation that is designed to promote the dissemination of new works and to ensure the preservation of public interest^{ix}.

REQUIREMENT OF ORIGINALITY

A requirement which is *sine qua non*^x for copyright protection is *originality* of the copyrighted work. Originality is a seemingly simple concept that in practice yields erratic results. Judicial reasoning and activism have been used to ground the development of this requirement of originality in copyright jurisprudence.

The word "original" in copyright law is a term of art. It is not dependent on novelty as in patent, newness or artistic merit of the work. It simply means that the work must originate from the author or creator and not copied. The famous dictum of Peterson J. in the case of *University of London Press Ltd. V. University Tutorial Press Ltd.* sums it up:

[T]he "word" original does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought... The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author^{xi}.

Originality is one criterion used to distinguish protectable from non-protectable subject matter^{xii}. In practice, the courts in the US, Canada and the UK seem to apply different standards or evaluation to 'originality'^{xiii}.

DETERMINING THE REQUIREMENT OF ORIGINALITY

A. The United States

The US judicial interpretation of the originality requirement is based on a school of thought which asserts that for a work to receive copyright protection, a threshold of

creativity must be met. Skill, labor and judgment are not sufficient; the work must also exhibit creative spark to qualify for copyright protection^{xiv}. In *Feist Publications Inc. v. Rural Telephone Service Co*^{xv}, the U.S Supreme court held, inter alia, that “to qualify for copyright protection, a work must be original to the author - means only that the work was independently created by the author, as opposed to copied from other works, and that it possesses at least some minimal degree of creativity...”^{xvi}

The creativity requirement, therefore, subsumes the not-copied requirement.^{xvii} The Feist Case concerned whether copyright subsisted in portions of the telephone directory of the Respondent Company, which comprised compilation of facts and data. Even though the Court acknowledged the significant investment of skill, labor and judgment used in creating the telephone directory, it held that no copyright existed in the directory, because it lacked the requisite degree of creativity. Mazeh puts the ratio thus:” *the Feist case holds that in American law, skill, labor and judgment are not sufficient to qualify a work as original. ...it was held that creativity is an essential requirement for the American interpretation on the notion of originality.*”^{xviii}

The “spark of originality” standard has been criticized as too high, since a creativity standard implies that something must be novel or non-obvious - concepts more properly associated with patent law than copyright law.^{xix} The US approach has found favor with courts in other jurisdiction, such as in Germany^{xx} and Italy,^{xxi} albeit with variations.

B. *The United Kingdom*

The UK courts follow the traditional Commonwealth criteria^{xxii} based on the involvement of skill, labor and judgment simpliciter in determining whether a work satisfies the requirement of originality. They have found that a work that originates from an author and is more than a mere copy of another work is sufficient to ground copyright.^{xxiii} Thus, the UK courts usually apply a very low threshold test of originality. This has been referred to as the “*sweat of the brow*” approach as against the “*spark of originality*” approach in the US. To this effect, authors of the copyright works in the UK have only to demonstrate that they expended a significant effort in creating the work. The “*sweat of the brow*” approach has also been criticized as too low a standard since it shifts the balance of copyright protection in favor of authors, and fails to allow copyright to protect the public’s interest in maximizing the production and dissemination of intellectual

works^{xxiv}. It is my respectful opinion that this criticism is misguided; the reason being that when the law grants copyright protection on the basis of the “*sweat of the brow*” standard, there are elaborate provisions dealing with fair dealing or permitted uses that allow the protected work to be enjoyed by the public. It is for this reason that copyright law refuses to provide monopolistic protection.

C. Canada

Until recently, Canadian courts, favored the traditional Commonwealth criteria. In 1997, there was a shift in approach by the Canadian Federal Court of Appeal in the case of *Tele-Direct (Publication) Inc. v. American Business Information Inc.*^{xxv} It did not gain root to replace the Commonwealth criteria with the American one. In a subsequent decision by the same Court of Appeal in *CCH Canadian Ltd v. The Law Society of Upper Canada*,^{xxvi} the Court gave a narrow interpretation of the *Tele-Direct* decision so as to revert to the traditional Commonwealth approach of determining originality based on skill, labor and judgment simpliciter.

The Court, relying on *Bishop v. Stevens*^{xxvii} criticized the trial judge’s holding that “*for a work to receive copyright protection it must exhibit imagination of creative spark*”. This, to the Court, was tantamount to judicial usurpation of the functions of parliament. It therefore, restored the approach that a work is original of the creator if it demonstrates the involvement of skill, labor and judgment.

The *CCH Case*^{xxviii} traveled to the Supreme Court of Canada which gave a perceptive analysis of the standard of originality. The Court had to decide, inter alia, whether the head notes, case summary, topical index and compilation of reported judicial decisions are original works in which copyright subsists. The Court took the middle position between the “*spark of originality*” approach and the “*sweat of the brow*” approach. The Court held that “*[a]n original work...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 produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.*”^{xxix} The Supreme Court further noted that “[w]hile creative works

will by definition be "original" and covered by copyright, creativity is not required to make a work 'original'.^{xxx} Thus, from Canadian jurisprudence, the US requirement of creativity is superfluous for a work to be original. In my view, the Canadian position is closer to the UK position and fairly balances the two competing interests in the copyright system: the public interest and the private interest.

iv. Ghana

In Ghana, the closest attempt at stating the standard of originality required under our copyright law is in the judgment of Brobbey J. (as he then was) in *Ellis v. Donkor & Anor.*^{xxxii} In this case the plaintiff, who claimed to have created piano music by substituting the vocals in five existing songs and personally added one song called "Aketesia", sued the Defendants for inter alia, damages for copyright infringement and perpetual injunction. In dismissing the plaintiff's action, the learned judge had to determine whether the work in question is original as to be eligible for copyright protection. The learned judge held that merely taking someone else's original music and substituting the vocals with one instrument such as the piano did not sufficiently amount to an independent creation which was original in character. The learned judge stated that "in order for a musical work to constitute derivative work under PNDCL 110, it should on analysis and comparison be conspicuously different from the original work and should reveal originality or innovation by the musician in adapting the original work."^{xxxiii}

It is respectfully submitted that the learned judge erred by equating originality in copyright with innovation. As stated earlier, innovativeness is a standard used in patent law and not in copyright laws. Perhaps, the American "creative spark" standard of originality as enunciated in the *Feist Case* influenced the learned judge's reasoning. This obviously subjected the plaintiff in the Donkor case to a higher standard than that required under the copyright law. Indeed, section 2(4) of the then Copyright Law, which is on all fours with section 1(4) of the current Copyright Act, defines a work as original if it is the product of the independent effort of the author – a definition which appears to resonate more with the Commonwealth standard of originality than the American standard. The high American standard is the result of their constitutional history when the US Constitution declared as far back as 1787 that "[the Congress shall have power...to

promote the progress of Science and useful Arts, by securing for limited times to authors... the exclusive right to their ...writings.^{xxxiii}

Notwithstanding the learned judge's position on the standard of originality required under our law in the Donkor Case, it is my respectful opinion that the outcome of the case would not have changed because of the evidence of payment of money to the plaintiff to perform the musical work for the Defendants, in which case the Defendants were entitled to the copyright in the work^{xxxiv}.

Most of the traditional copyright principles and concepts including those that we have alluded to in this paper were designed primarily for paper-oriented society and proved very suitable for real world situations. But, we have now moved into the virtual world of the internet and digitization. This poses acute challenges for traditional concepts in copyright law. It is not an exaggeration to state that patching copyright law to deal with internet technology is as difficult as trying to apply real estate law to the allocation of broadcasting spectrum.^{xxxv} Next is a discussion of these challenges and how judges in other jurisdictions are taking steps to deal with the situation.

JURISDICTIONAL CHALLENGE

Copyright law has territorial application. The principle of geographical application of copyright law is the core foundation of copyright regimes in members of the WTO, Berne Convention or the UCC. Copyright holders may proceed to a country where infringement is taking place to assert their rights based on its copyright law. Thus, courts can assume jurisdiction when the infringer and the infringement are both in the court's jurisdiction.^{xxxvi} This principle of territory holds that a state has not got competence to prescribe legal rules to govern activities that occur outside its national borders.^{xxxvii} This jurisdictional rule was fashioned to handle situations where the perpetrator of an infringing act is physically present in the forum of the suit.

CYBERSPACE

When right to a copyrighted work on the internet is infringed in many countries, the question arises: Which country has jurisdiction? Is it where where the infringer is based,

where the infringed copies are stored on a server, or where the infringed files are accessed from? According to traditional conflict of law rules, each of the states involved can assert jurisdiction based on *lex loci delicti* (the law of the place where the tort or crime was committed), *lex fori* (the law of the forum), or *lex domicilii* (the law of domicile) etc. However, since there are no borders in cyberspace, the infringement would become a *delicti in transit*^{xxxviii}.

Jurisdictional rules were meant to deal with situations in which infringers engaged in physical reproduction or communication of the work without consent. The advent of the internet makes the application of this physically-based rule virtually unworkable. As Takach puts it, the internet has no physical boundaries; its communities are virtual rather than physical in nature.^{xxxix} When one is on the internet, one is everywhere simultaneously.^{xl} How does the territorial application rule effectively apply to the internet with no boundaries especially as it allows borders to be crossed with ease and speed without wiping away borders?

The consensus is that traditional territorial protection for copyright is not sufficient to protect copyright, since the internet makes it difficult to tie infringers to one place.^{xli} The Supreme Court of Canada's decision in *Society of Composers', Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*^{xlii} brings to the fore the jurisdictional difficulties respecting the liability of Internet Service Providers (ISPs) in the transmission of copyrighted works across different territorial borders. The Supreme Court rejected the Copyright Board's decision that no copyright liability attaches to ISPs unless the communication originates from a server located in Canada. It held that to assert jurisdiction over communications between international participants, there must be a "real and substantial connection" to Canada. The Court noted that the relevant factors to be taken into consideration would include "*the sites of the content provider, the host server, the intermediaries and the end user.*"^{xliii} It further noted that each case should be determined on its own facts, and the weight to give to any of the factors depends on the circumstances and the nature of the case. Lebel J. in his dissenting opinion criticized the "*real and substantial connection test*" (endorsed by the majority) as

likely to run contrary to the territoriality principle under copyright law. In his view, following that test could grant jurisdiction to every court in any internet related copyright dispute.^{xliv} This will turn the courts into an octopus, stretching its tentacles here and there to grasp jurisdictions not meant for them.

CHOICE OF LAW RULES

Traditionally, each state enforces its own copyright law. However, activities on the internet, because of the multiple locations of infringers, make it difficult to identify which state's law should apply even if the most convenient forum to sue for the enforcement of copyright is determined. Thus, in the unlikely event of the copyright owner detecting the infringer, the choice of law question looms. A lawyer litigating a copyright infringement case has to consider not just the forum to pursue the case (jurisdiction), but the applicable state's law (choice-of-law)^{xlv}.

The Yahoo! type of cases^{xlvi} raise the choice-of-law challenge presented by the internet technology. In the Yahoo! Case (France), an action was brought in France against Yahoo! Inc. for posting at its web site an auction featuring Nazi memorabilia which was accessible to French residents. This violated French law, although it was lawful under the US law. The French judge, Jean-Jacques Gomez, asserted jurisdiction and applied French law to order Yahoo! to ensure that French residents do not access the content on the site; failing which a daily fine of \$13,000 would be payable for non-compliance. Yahoo! contested the validity of the French order in a California court. US District Court Judge Fogel declared the French order unenforceable in the US, because it violates Yahoo! Inc.'s First Amendment rights. The French tribunal proposes, the US Court disposes.

Two schools of thought have evolved to sustain the debate on choice of law issues at the dawn of the cyberspace. One camp views cyberspace as transcending the sphere of traditional governmental power; accordingly, its regulation is ineffective and undesirable. The opposite camp emphasizes that even virtual events and transactions have anchors in real space; thus cyberspace should be regulated by governments. The latter school appears to be dominant and reflected in most governmental practices.^{xlvii} As for which one is desirable for the Ghanaian situation, the courts will have to decide.

RECOVERY OF EVIDENCE

The next daunting challenge confronting lawyer and client alike is how to amass evidence to substantiate the claim of copyright infringement against the defendant under an adversarial system when proof in civil law requires preponderance of probabilities. Policing and enforcement of copyright is the sole responsibility of the copyright holder, although the State may prosecute an offender when the work is pirated on a commercial scale. The situation in the U.S is that parties and their technical experts have sometimes been granted access to adverse parties' computer systems to search for relevant electronic records. In *Re: Ford Motor Company*, the US court held that to justify the grant of such an order, the applicant must establish a likelihood of retrieving relevant records and that there is no less instructive manner of obtaining the information^{xlviii}.

CHALLENGE TO EXISTING REMEDIES

A copyright holder or any person having an interest in copyrighted work may institute a civil action for infringement. Civil remedy such as damages, account of profits etc are aimed at "curing" the loss suffered from infringement though a court may also grant pre-emptive protection such as injunction to prevent the infringement of copyright. Because the award of damages to a copyright owner depends on the nature of the infringement, the plaintiff has to lead evidence to guide the court to make a just and proper order.^{xlix} The question arises: where is the evidence when the infringement occurs online? Would punitive damages be appropriate because infringement occurred online? This is an indication of the difficulty presented by internet technology to judges in awarding fair and just relief. This difficulty is no different when it comes to ordering the infringer to account for profits associated with the infringement. The internet makes it difficult for a copyright holder to obtain receipts to prove the revenues derived from the infringement to establish a claim of profits as an alternative to damages, although the defendant may well have made profits from selling the infringing copies by the click of a mouse.

There is always a danger that on commencement of a suit, the infringer will attempt to thwart the efforts of the copyright holder by destroying vital compromising evidence. Phillips, Durie and Karet capture this problem in these words: "*The prevalence of piracy*

*all over the world has led to recognition by the courts that the normal procedures whereby a copyright owner can seize infringing copies and equipment for making when only after the proceedings have begun does not adequately protect his interests. What has been found to happen in practice is that as soon as a writ is served on an alleged infringer, the stocks of infringing copies disappear together with the equipment used for making them.”¹ Because of this a pre-emptive relief in the nature of “Anton Piller order” was developed by the English Court of appeal in the case of *Anton Piller KG v. Manufacturing Processes Ltd and Others*.¹¹ In this case, the plaintiffs made an ex-parte¹¹¹ application to restrain the defendants, inter alia, from infringing their copyright and for an order to enter the defendants’ premises to inspect documents and remove them. The Court in granting the application held that in most exceptional circumstances, it would grant an order for the applicant to take custody of vital materials in possession of the defendant which might be destroyed or disposed of to defeat the ends of justice.*

This pre-trial relief proved effective in recovering documents and other tangible evidence prior to any court hearing. But now, there is a unique challenge with the ephemeral nature of electronic data transmitted over the Net. An alleged infringer, whose anonymity may make an injunction ineffective, may after pirating a digital copyrighted work, use a self-styled code to secure it from detection, rendering an Anton Piller order pointless. In my view, where a court decides to order a disclosure of the online pirated materials, orders such as Anton Piller orders under section 47(2) of Act 690 must be granted with special conditions such as the appointment of an expert to decode suspected encryptions and investigate the source of the internet service to ascertain deleted files.

CONCLUSION

This paper has indicated that some concepts and principles meant for the real world situations of copyright litigation, which could pose a challenge when the infringement originates from the virtual world of the internet. Judges are expected to find answers to all issues arising out of copyright dispute. The paper has shown that other jurisdictions are making momentous strides by attempting to deal with the problems of the cyberspace. It is hoped that the courts in Ghana will soon have reported decisions on this area.

ⁱ see sections 5 & 6 of the Copyright Act , 2005(Act 690). Protection is also offered for derivative rights under section 1(g) of Act 690 and in some other jurisdictions for neighboring rights.

ⁱⁱ see Eric Schlater, 'The Intellectual Property Renaissance in Cyberspace: why Copyright Law could be Unimportant on the internet' available at <http://www.law.Berkeley.edu/journals/btlj/articles/vol12/Schlater/htm/reader.html>(last date accessed:30/04/07).

ⁱⁱⁱsee Compo Company Ltd v. blue Crest Music Inc.et al(1980) 1SCR357, at 372-373.

^{iv} see section 39 of Act 690.

^v see Ned Snow, "the Tivo Question: does Skipping Commercials Violate Copyright Law? (2005) 56 Syracuse Law Review 27 at 38.

^{vi} Snow, *ibid*, citing Melville Nimmer & David Nimmer; *Nimmer on Copyright*

^{vii} (1993), 47 C.P.R. (3d) 1 at 44. See also section 2 of Act 690.

^{viii} Copyright Act, 1976, s.102(b). See also Article 2 of the WIPO Copyright Treaty, which provides that "[c]opyright protection extends to expressions and not ideas, procedures, methods of operation or mathematical concepts as such. Article 9(2) of the TRIPS Agreement also has the same wording, save the addition of "shall".

^{ix} Lucie M.C.R. Gibault, *Copyright Limitations an Contracts: A Analysis of the Contractual Overridability of Limitations on Copyrright* (The Hague London, Boston: Kluwer Law International, 2002), at 15 [Gibault]

^x See Sheldon Halpern, *Copyright Law: Protection of Original Expression* (Durham, North Carolina: Carolina Aademic Press, 2002), at 19. See also **Feist Publications, Inc. v. Rural Telephone Service Co, Inc**, 499 US 340, at 345-347: the US Supreme Court noted that "the sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author...[But] facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery"

^{xi} (1916) 2 Ch. 601 at page 608-609. see also *Victoria Park Racing & Recreation Grounds Co. v. Taylor*(1937), 58 C.L.R. 479, 43 A.L.R 597(Australia H.C)

^{xii} Guibault, *supra* note 9, at 15.

^{xiii} see Yo'av Mazeh, "Canadian Originality and The Tension Between the Commonwealth and the American Standards for Copyright Protection: the Myth of Tele-direct©2003), 161.P.J. 561.598.

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- ^{xiv} see Maze, *ibid* at 564. see also Micheal Rustard and Cyrus Daftary, *E-Business Legal Handbook*(NY: Aspen Law & Business, 2001) at 97.
- ^{xv} 113. Ed.2d.358, 499 U.S 340 (U.S S.C).
- ^{xvi} *ibid*.at 362(emphasis added)
- ^{xvii} Abraham Drassinower, “ *A right-based View of the Idea/Expression Dichotomy in Copyright Law*” (2003) 16 *Can.J.L.& J.3*,at 7.
- ^{xviii} Maze, *supra* note 14, at 571(emphasis added).
- ^{xix} see *CCH Canadian Ltd. V. Law Society of Upper Canada* (2004) IS.C.R. 339 (S.C), per McLachlin C.J, at 356.
- ^{xx} Gerhard Schricker, “Farewell to the ‘Level of Creativity’ in German Law?” (1995) 26 *IIC* 4
- ^{xxi} Copyright Act, 1941 (Italy) at article 1.
- ^{xxii} see *Interlego A.G. v. Tyco Industries Inc.*, [1989] A.C.217 (Hong Kong P.C), per curiam; *Walter v. Lane*,[1900] A. C. 539 (U.K.,H.L.) per curiam; *Desktop v. Telstra*, [2002] FCAFC 112 (Australia Fed Ct) , per curiam; *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All ER 465 (UK,H.L.) per curiam
- ^{xxiii} *University of London Press Ltd v. University Tutorial Press Ltd.*(1916) 2 Ch.601, Peterson J.
- ^{xxiv} see *CCH Canadian Ltd. V. Law Society of Upper Canada*(2004) IS.C.R. 339(S.C), per McLachlin CJ at 256.
- ^{xxv} 76 C.P.R. (3d) 296; [1998] 2F.C.22 (FCA), per Decary J.A
- ^{xxvi} 2002), FCA 187, Per Linden J.A (CCH Case)
- ^{xxvii} 1990] 2 S.C.R, 467 at p.447, per curiam.
- ^{xxviii} *CCH Canadian Ltd. v. Law Society of Upper Canada* (2004) I. S. C. R. 339 (S.C.), per McLachlin CJ.
- ^{xxix} *Ibid*.352, per McLachlin CJ.(emphasis added).
- ^{xxx} *Ibid*.
- ^{xxxi} (1993-94) 2 GLR 17
- ^{xxxii} See *ibid* holding 2. Emphasis supplied.
- ^{xxxiii} Article 1 S8, cl 8, Constitution of the United States of America
- ^{xxxiv} See *Ellis v. Donkor* case, holding 5

^{xxxv} See John Perry Barlow "Selling Wine Without Bottles: The Economy of Mind on the Global Net", in P. Bernt Hugenholtz (ed.), *The Future of Copyright in a Digital Environment* (The Hague, London, Boston: Kluwer Law International, 1996) 169-187.

^{xxxvi} George Takach, *Computer Law* (Toronto: Irwin Law, 2003), at 648.

^{xxxvii} Paul Goldstein, *International Copyright* (NY:Oxford University Press,2001),at 63

^{xxxviii} see P. Eve Athanasekou,"*Copyright in Cyberspace*", available at <http://www.bileta.acuk/98papers/athenas.html> (Last visited:30/04/07)

^{xxxix} Takach, supra note 35. See also D.R Johnson and D. Post, "Law and Borders: the rise of law in Cyberspace" (1996), 48 Stan.L.R.1367, where the authors argue concerning new laws emerging to counteract the effects of the internet: "while these electronic communications play havoc with geographic boundaries, a new boundary made up of screens and passwords that separate the virtual world from the "real world" of atoms emerges. This new boundary defines a distinct Cyber-space that needs and creates its own legal institutions..." David Post, "How shall the Net Be Governed?", available at <http://www.cli.org/Dpost/governance.html> (Last visited:28/04/2007).

^{xl} ACLU, 117 S. Ct. 2329, at 2334 - 2335

^{xli} Alex Colangelo, "Copyright infringement in the Internet Era: the Challenge of MP3s" (2002), 39 Alberta L. Rev. 891, at 894.

^{xlii} [2004] SCC 45 (SOCAN Case), per Binnie J.

^{xliii} Ibid, at para. 61 per Binnie J.

^{xliv} Ibid, at para. 152

^{xlv} Hao-Nhien Q. Vu, 'Choose or lose: choice-of-law Issues in Cyberspace Remain Unresolved'(1997), Los Angeles Daily Journal, May 22, at 7, available at <http://kicon.com/nhien/choice.htm> (last accessed:31/04/2007)

^{xlvi} *LICRA & UEJF v. Yahoo! Inc. T.G.I.*, available at

<http://www.lapres.net/yahen.html>(France), Gomez J., cf *Yahoo! Inc. v. LICRA*, 169 F. Supp.2d.1181 (N.D.Cal.2001), Fogel J.([hereinafter called the Yahoo! Case(s)])

^{xlvii} Matthias Reimann, "Introduction: The Yahoo! Case and Conflict of Laws in the Cyberage " (2003), Mich. J. Int'l L. 24(3)663-696 at 664.

^{xlviii} Suit No 03-10440 (US 11th Cir.,2003)

^{xlix} *Slumber-Magic Co. Ltd v. Sleep-King Adjustable Bed Co* (1984), 3 C.P.R. (3d) 81 (B.C.S.C.)

ⁱ Jeremy Phillips, Robyn Durie & Ian Karet, *Whale on Copyright* 5th ed. (London: Sweet & Maxwell, 1997), at 99.

ⁱⁱ [1976] 1 Ch. Div. 55, per curiam. Followed in the Canadian Federal Court of Appeal's decision in *Nintendo of America Inc. v. Coinex Video Games Inc.* (1982), 69 C.P.R.(2d) 122, per Heald J, it is instructive to note that Anton Pillar Order can be granted against infringers who have not been identified at the time of the granting of the order. Such orders are called "rolling Anton Pillar Orders" or "John Doe Orders." They are executed against such infringers as and when the applicant becomes aware of their existence. The case of *Nike Canada Ltd v. Jane Doe* (2000), 1 C.P.R. (4th) 289 (F.C.T.D.), Reed J. at para 4, sets out the distinction between Anton Pillar Orders and John Doe Orders: "*There are two types of Anton Pillar Orders. In one the identity of the defendant or defendants (or at least of the main defendant or defendants) is unknown at the time the order is granted. There is evidence before the Court of particular acts of copyright...infringement, that it is alleged the defendants are committing. In the other type of Anton Pillar Order, the identity of the defendants is not known at the time the order is granted; proceeding is commenced against John and Jane Doe. Also, particulars of the alleged infringing activity of the 'as yet to be identified' defendants are not known. A general statement is made in the affidavit filed to support the issuance of the Anton Pillar order that the plaintiff is suffering irreparable harm because of the manufacture and sale of counterfeit merchandise, that is, merchandise that infringes the plaintiff's copyright... The second type of Anton Pillar orders is known as 'rolling' Anton Pillar Order.*" For detailed discussion, see Daniel S. Drapeau and Jonathan J. Culllen, "*Anton Pillar Orders and the Federal court of Canada: Everything the Practitioner Would Want to Know*" (2004), 17(3) I.P.J. 301-499.

ⁱⁱⁱ Anton Pillar Orders are obtained ex parte as a "*surprise, so that the defendant should not have advance knowledge of the application or the order and so have the opportunity of destroying or disposing of relevant materials or documents*", *Indian Manufacturing Ltd. V. Lo* (1998).75 C.P.R (3d) 338, at 342(F.C.A.), per Stone J.A.

