

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
Clinique d'Intérêt Public et de Politique d'Internet du Canada Samuelson-Glushko

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2010 CIPPIC Summer Interns



Left to right: Colleen Hannigan, Alexis Bowie, Rachel Gold, Kent Mewhort, Anca Sattler, Jennifer Barrigar (Google Policy Fellow) & Byrone Pascoe

Visit our website: <http://cippic.ca>
Contact us at cippic@uottawa.ca

Announcements //

LFO Public Interest Articling Fellow

CIPPIC was the grateful recipient of funding for an articling student from the Law Foundation of Ontario. Thanks to the LFO, CIPPIC is able to announce that Kent Mewhort will be joining us as our 2011-2012 Public Interest Articling Fellow. Kent comes to us as a recent graduate of our Summer Internship program.

Google Policy Fellowships

CIPPIC joined several organizations throughout North America as host to a Google Policy Fellow. Jennifer Barrigar joined our summer internship program as our 2010 Google Policy Fellow and worked with us on various privacy issues. In 2011, we were pleased to welcome Jen Simpson as our Google Policy Fellow. Jen joined our summer interns and worked on a variety of issues, including a comprehensive analysis of the CRTC's new media and over the top video delivery framework.

Administrative Support

CIPPIC benefited from two exceptional administrative assistants in 2009-2011. Jennifer Jean joined us for 2010, followed by Serge Normand!

Website Redesign

In 2011, CIPPIC was very pleased to launch its new website format! Special thanks to Kent Mewhort, Macy Siu, Anca Sattler & Rachel Gold for volunteering to undertake the re-design efforts!

Our Mission //

Who we are and what we do.

CIPPIC is a public interest legal clinic based at the University of Ottawa's Centre for Law, Technology & Society. CIPPIC operational staff consists of one Director (David Fewer), one Staff Lawyer (Tamir Israel) and one Administrative Assistant. In addition, CIPPIC benefits from the assistance of an articling fellow. CIPPIC was extremely fortunate to have Lori-Ann Wanlin and oline Twiss join us as our 2009-2010 & 2010-2011 LFO Public Interest Articling Fellows, respectively.

CIPPIC's mission is to advocate in the public interest on policy matters arising at the intersection of law and technology. In pursuit of this objective, we seek to participate in a range of debates and proceedings to ensure that the public interest perspective receives due consideration. Our activities regularly take us before the Courts, parliamentary committees, regulatory bodies, and Internet governance fora. We additionally participate in public advocacy and education campaigns and media outreach.

In addition to research grants and cost awards, CIPPIC relies on donations for to maintain its day to day operation. If you wish to support our efforts, please visit: <http://www.cippic.ca/donate> or email us at cippic@uottawa.ca. All donations are tax deductible.

Advocacy & Outreach //

Modernizing Canada's Copyright Regime

The government of Canada made copyright reform a priority in 2010-2011, and this kept us busy! The government hosted an online consultation, as well as in-person meetings across Canada, and CIPPIC participated in both, calling for flexible fair dealing, protection for non-commercial infringers and restraint in any attempt to adopt anti-circumvention protections.

Finally, in the summer of 2010, the government introduced Bill C-32, the *Copyright Modernization Act*. The legislative proposal had some benefits for Internet users, such as a cap on damages for non-commercial infringements, liability limitations for Internet intermediaries and a non-commercial 'remix' exception. However, the Bill contained one major flaw – its anti-circumvention protections were so broad, they provided rights holders with an effective veto over almost any user right, as the simple addition of a digital lock could turn any legitimate act into an infringement.

CIPPIC undertook a number of grassroots initiatives to encourage public discourse around the more problematic elements of this legislative initiative.

Lawful Access & Online Spying

Late in the summer of 2011, the federal government made clear its intention to re-introduce its 'lawful access' legislative mandate. Lawful access is a somewhat innocuous-sounding term for what is essentially a significant expansion of the government's capacity to use electronic surveillance to spy on its citizens.

In anticipation of its impending reintroduction, CIPPIC hosted a meeting of relevant stakeholders and experts on the issue, spearheaded a joint civil society letter to the government setting out the scope of opposition to the proposals, and helped put together a coalition of concerned groups in opposition to the serious privacy concerns raised by the legislative proposals in question.

Fair is Fair Coalition

CIPPIC spearheaded a broad-ranging coalition of Canadian stakeholders in calling on the Federal government to add much needed flexibility to Canada's copyright regime. The Fair is Fair Coalition consisted of over two dozen organizations representing creators, innovators, educators, scholars, students and consumers who called on the

government of Canada to fix fair dealing, copyright law's cardinal user right. As the law stands now, many dealings that are fair, such as parody and time-shifting (recording shows to watch them later: yes, VCRs) do not squarely fall within the scope of this important user right. The coalition asked the government to drop restrictions on categories of dealings that qualify for fair dealing, saying that any fair treatment of content should fall within the scope of the right. After all, what's fair is fair, and should be legal, too.

OECD Adopts Flawed Internet Policy-Making Principles

CIPPIC joined civil society groups from across the world in denouncing a Communiqué setting out Principles for Internet Policy-Making adopted by the OECD. The Communiqué was troubling in its one-sided encouragement of the use of Internet intermediaries for copyright enforcement practices without regard for the countervailing implications for individual activity, freedom of expression & due process. Through its membership in CSISAC, the Civil Society Information Society Advisory Council to the OECD, CIPPIC attempted to improve these principles prior to their adoption.

Anti-Privacy Privacy Bill

CIPPIC helped spearheaded a joint effort between a number of Canadian civil society groups to speak out against Bill C-29, the federal government's attempt to update its commercial privacy regime. The proposals come about five years too late and seem to do more to harm privacy than to protect it. A joint letter sent to relevant parliamentarians set out civil society concerns over broad exceptions that would permit private companies to share customer information with police or with any individual involved in a lawsuit, as well as general disappointment with the limited reach of Bill C-29's long overdue attempt to put in place a data breach notification regime. While breach notification is a much-needed addition to Canadian law, the regime proposed in C-29 falls short of accomplishing the legitimate objectives of such a regime.

OPC Consultation on Privacy Threats Posed by Emerging Technologies

In 2010, the Office of the Privacy Commissioner of Canada undertook a forward-looking consultation on emerging technologies, with a focus on online tracking and cloud computing. CIPPIC provided detailed comments on geo-location privacy concerns and on cross-border problems raised by the move to the cloud. Finally, CIPPIC provided comprehensive input on the OPC's draft report. The input pointed to increasing strain on individual's ability to remain anonymous in online contexts, to the need to replace 'privacy by effort' with a more user-friendly 'privacy by default' approach to interface and service design and to the hazards of identity management systems.

Digital Agenda: A Plan for Canada's Digital Society

CIPPIC staff, summer interns and our Google Policy Fellow put together a submission to Industry Canada's 2010 Public Consultations on the Digital Economy. CIPPIC's submission touched on numerous elements of the digital society, ranging from the need to update public & private sector privacy regimes, the need to address ongoing reliance on Internet intermediaries as investigative tools, to solutions to online file-sharing issues, to the need for caution in adopting online identity management systems. CIPPIC additionally outlined steps the Government should take to ensure quality, access and affordability of online communications and, generally, called on the Government to encourage a digital environment that will be better for all Canadians and will serve as a model for other jurisdictions.

Intellectual Privacy: Canada's Privacy Community Speaks Out Against Copyright Bill

CIPPIC spearheaded an effort by privacy advocates across Canada, which coalesced in a joint submission to the federal government. The submission cautioned policy makers to avoid sacrificing privacy in order to assist rights holders and warns of the privacy dangers posed by the excessive access & use controls envisioned by Canada's copyright reform proposal.

Madrid Declaration

CIPPIC added its name to the growing list of international experts and civil society groups signing the Madrid Privacy Declaration, reaffirming a global commitment to privacy, both as a value and a human right.

CIPPIC Joins Advocates in Calling for Restraint in Olympics Security

CIPPIC signed on to a statement by a number of privacy advocates from across Canada issued in anticipation of the pending Olympic Games in Vancouver, B.C. The statement called for restraint and transparency with respect to escalating security measures being adopted in preparation for this event, and expressed the view that the Olympic games should not leave a legacy of surveillance in host cities.

Litigation //

***Warman v. Fournier*, 2010 ONSC 2126, 100 O.R. (3d) 648, 319 D.L.R. (4th) 268 (Ont. Div. Ct.)**

CIPPIC intervened before the Ontario Divisional Court in this appeal from a court order that would have forced the defendants – the operators of an online discussion forum – to hand over identifying information of a number of their anonymous users. More troubling than the order itself was its underlying reasoning – the lower court held that there is no room for privacy considerations in the discovery process. This approach puts online anonymity at risk, as anyone who initiates a lawsuit against any anonymous individual can force any online intermediary to hand over any relevant identifying information, without any regard to the question of whether the lawsuit is remotely legitimate. This opens the door to misuses of the judicial system, as often the litigant is more interested in identifying an anonymous commenter than in pursuing any legal action.

CIPPIC argued for a screening test to ensure that the litigant seeking to identify anonymous commentators should first demonstrate she intends to pursue the

lawsuit and has a legal and factual basis for doing so. The Divisional Court issued a unanimous decision adopting such safeguards which has been used in future attempts to identify anonymous alleged rights infringers.

***Authors Guild v. Google*, 770 F.Supp.2d 666 (S.D. N.Y. 2011) [Google Book Settlement]**

CIPPIC represented the Canadian Association of University Teachers and a group of independent Canadian authors in a proposed class action settlement in *Authors Guild v. Google*. The lawsuit sought to grant one entity the right to digitize all books, subject to an opt-out and a complex monetization clearance mechanism. While this lawsuit involved primarily U.S.-based parties who had little regard for Canadian authors, the settlement proposal would have transformed the rights of Canadian authors as well, and was objectionable for this purpose alone.

To make matters worse, the settlement would not have been favourable for many Canadian authors. It would have transformed their copyright into a remuneration right. In addition, it included an implicit windfall for orphan or unlocatable works. Under Canadian copyright law, the Copyright Board is granted the power to address the orphan work problem in a flexible manner that does not favour one commercial entity above all others. In addition, granting this unique digitization right to one single commercial entity raises serious privacy concerns.

Thankfully, the New York district court heeded the warnings of CIPPIC and countless other interveners from around the world and rejected the settlement.

***Baker Estate v. Sony BMG Music (Canada) et. al.*, 2011 ONSC 7105**

CIPPIC participated in a legal team serving as class counsel in an action filed on behalf of music artists in Canada. The lawsuit sought damages from music labels for failing to pay license fees owing to class members for the making of mechanical copies of musical works.

Specifically, the defendants in this matter (which included the four largest music labels in the world) exploited musical works of artists in their repertoire without license and without compensation to those artists. While the defendant labels in this matter had made some minimal efforts to address the issue – they even kept ‘pending lists’ tracking instances of unlicensed use – this ‘breach copyright now, pay later’ approach, as Ontario Superior Court Justice termed it, persisted for many years with little motivation to resolve the issue. While the music labels named in the lawsuit admitted no liability in the matter, a settlement for \$50 million was entered and subsequently approved by the Ontario Superior Court of Justice.

Crookes v. Newton

The Supreme Court of Canada granted CIPPIC leave to intervene in this important appeal that will decide whether hyperlinking can amount to defamatory publication. In its intervention, CIPPIC argued that a hyperlink is merely a ‘reference’ to other content and, hence, publishing one should need lead to defamatory liability for linked content. Further, that the hyperlink is critical to the manner in which content is communicated online. Hence, CIPPIC called for the ‘freedom to link’, arguing that the hyperlink is critical to the manner in which content is communicated online. Burdening it with defamatory liability would undermine free expression and render platforms such as Twitter into a source of unmanageable liability for all users.

Regulatory //

Telecom Public Notice CRTC 2008-19, Net Neutrality Comes to Canada

The CRTC released its long-awaited decision in TPN CRTC 2008-19, which examined the nature, scope and legitimacy of traffic management or ‘throttling’ of certain types of traffic by Canadian ISPs.

In the proceeding, CIPPIC argued that ISPs should be prevented from unjustifiably discriminating against

downstream traffic. This type of discrimination undermines one of the greatest features of the Internet – the lack of gatekeepers – by letting ISPs choose which delivery protocols or applications will be the fastest. The BitTorrent protocol offers a perfect example of this, as it is a highly efficient mechanism for transferring large files quickly, and with minimal bandwidth cost to the end user. In its submissions, CIPPIC drew on the expertise of internationally renowned experts in traffic management: David P. Reed, Andrew Odlyzko and Bill St. Arnaud.

The CRTC accepted most of these arguments and put in place a net neutrality framework that limits the conditions under which an ISP can discriminate against specific types of traffic on its network. This framework will help secure an open and neutral Internet for all Canadians.

Access Copyright Post-Secondary Educational Institution Tariff, 2011-2013

CIPPIC represented the Canadian Association of University Teachers (CAUT) and the Canadian Federation of Student (CFS) in opposition to Access Copyright’s proposed Post-Secondary Educational Institution Tariff. The objection raises procedural and substantive concerns, including the lack of due notice and time for response, the need for a distinct hearing on the legal issues raised, and substantive objections to the sweeping breadth of the tariff, which claims compensation for activity not protected by copyright, such as fair dealing and the exchange of hyperlinks in e-mails. In addition, the tariff claimed a difficult to justify %1,300 increase in rate!

Procedurally, the Copyright Board sought to approve the tariff on an interim basis. CIPPIC objected to this, arguing that it would be unfair to presume the tariff even on a preliminary basis, given the lack of underlying justification for several elements of the proposal.

Privacy-Invasive Capacity of Deep Packet Inspection Equipment

As part of the Office of the Privacy Commissioner of Canada's ongoing assessment of five PIPEDA complaints filed by CIPPIC regarding the use of Deep Packet Inspection equipment by Canadian ISPs, CIPPIC filed a comprehensive analysis of the capacities of such equipment and the importance of its proper characterization in regulatory and legal contexts. CIPPIC demonstrated the equipment has the capacity to monitor and control individual conduct at unprecedented levels. With the technical assistance of Dr. David P. Reed, CIPPIC also argued against mis-characterizations of HTTP layer metadata as mere 'header' as opposed to 'packet' information in the context of network traffic.

***CIPPIC v. Facebook*, PIPEDA Case Summary #2008-19: OPC Closes the Book on Facebook Complaint**

The Office of the Privacy Commissioner of Canada closed its two and a half year long investigation into CIPPIC's 2008 complaint against Facebook's privacy practices (OPC Case Summary #2008-008). While the Privacy Commissioner's Report of Finding was issued in early 2009, this was by no means the end of the matter, as Facebook had agreed to a one year implementation process which it argued was necessary to meet its obligations under the Finding.

CIPPIC monitored several elements of Facebook's implementation. This included correspondence to the Office of the Privacy Commissioner of Canada and to Facebook's Counsel indicating its failure to meet its obligations, and a comprehensive legal and technical report analyzing changes made to the site that effectively undermined the essence of Facebook's PIPEDA obligations. Read more at: <http://cippic.ca/Facebook>

Telecom Notice of Consultation CRTC 2009-716: Enhancing Public Interest Participation

CIPPIC participated in a proceeding on the question of public interest costs. A number of incumbent

telecommunications companies had asked the CRTC to impose onerous and heavy-handed limitations into its existing public interest compensation regime. CIPPIC argued that the current system is necessary to ensure robust and informed public interest participation in what is a highly complex regulatory field that requires ongoing expertise. The CRTC agreed, and its ultimate decision in this matter affirmed its current framework with minimal modification.

Telecom Notice of Consultation CRTC 2010-43-2: Wireless Net Neutrality

CIPPIC called on the CRTC to apply its net neutrality framework, which was developed in the context of wireline traffic, to mobile and wireless services. While such services operate under a slightly more competitive environment than wireline Internet services, CIPPIC argued that mobile services were becoming increasingly important to customers and to online innovation. Hence the protections inherent in the net neutrality framework are necessary in the wireless context as well. In Telecom Decision CRTC 2010-445, the CRTC did so.

Telecom Notice of Consultation CRTC 2010-43: Universal Broadband Access

CIPPIC participated in a CRTC proceeding that examined whether to impose an obligation on ISPs to ensure an adequate level of Internet access to all Canadians. A number of ISPs argued that the CRTC lacked the authority to impose this type of obligation in a competitive environment. CIPPIC submitted a comprehensive legal opinion demonstrating that the CRTC has the capacity to put in place such requirements and, moreover, has the obligation to do so where required to by its policy objectives. In its ultimate decision on this matter, the CRTC adopted a 'wait and see' approach, which set benchmarks for ubiquitous broadband access at 5 Mbps downstream / 1 Mbps upstream to be achieved by 2015.

Broadcasting Notice of Consultation CRTC 2010-926: Broadcasting Participation Fund

CIPPIC joined the Public Advocacy Interest Centre in its call for the creation of a Broadcasting Participation Fund as a component of the mandatory tangible benefits package that would result from the merger of Bell Canada and CTVglobemedia. In support of PIAC's call for this fund, CIPPIC pointed to a present and growing need for public interest representation in broadcasting proceedings before the CRTC. The CRTC agreed, and the Canadian Broadcasting Participation Fund was established in Broadcasting Decision CRTC 2011-163.

Parliamentary Testimony //

House Committee on Bill C-32

CIPPIC staff testified before the House of Commons Committee on Bill C-32, Canada's latest Copyright modernization effort. CIPPIC argued in support of flexible fair dealing, limitations on penalties for non-commercial infringement, and a notice-notice system for intermediary liability. CIPPIC argued *against* excessively broad legal protection for anti-circumvention mechanisms which, as proposed in Bill C-32, threatened to undermine any semblance of balance in the copyright regime, as they effectively allow rights holders to override any user right with the mere addition of a digital lock.

E-Spam, Electronic Commerce Protection Act

CIPPIC staff testified before the House Standing Committee on Industry, Science & Technology (INDU) in support of Bill C-29, the Electronic Commerce Protection Act. The ECPA aims to grant users protection against unsolicited commercial electronic messages – spam – and imposes strict penalties for non-compliance. In its testimony, CIPPIC argued against proposals that would re-focus the legislation on narrowly defined 'harms'. Given the prevalence and diversity of 'spam', the best way to define it is to empower individuals to do so

themselves. An unsolicited message is, inherently, 'spam' and therefore the Act should prohibit unwanted messages, and should not seek to impose a restrictive list of presumed 'unwanted' messages.

House All-Party Arts Caucus

CIPPIC staff testified before this committee on options for updating Canada's copyright laws in light of new digital realities. CIPPIC called for more flexible fair dealing, as well as for the exploration of opt-in monetization schemes and voluntary collective licenses for digital content.

Identity Theft

CIPPIC staff testified before the House Standing Committee on Justice and Human Rights (JHR) in support of legislative proposals that would criminalize the possession of certain identity documents commonly associated with identity theft. CIPPIC presented evidence on the ever-growing nature of the identity theft problem, and on shortcomings in the existing legal regime that permitted those caught with identity documents of others to walk free, absent a demonstration of intent to defraud.

In addition, CIPPIC advised JHR that, while this legislation was much needed to assist on the investigative facet of the identity theft problem, its work was far from over. There is a dire need for victim support legislation to help the objects of identity theft recover their identities and prove to would-be creditors that they are not at fault.

Projects & Research //

"Casting an Open Net"

CIPPIC co-authored a chapter in a report on how telecom policy could be calibrated to ensure an open, innovative and neutral Internet. The chapter aimed at presenting and debunking technical and policy critiques of peer-to-peer throttling practices, establishing that the detrimental impact of P2P distribution protocols on

network traffic robustness has been greatly exaggerated. In fact, P2P and particularly the BitTorrent protocol are efficient from a network-usage perspective.

The report additionally examines the justifications for usage-based billing in broadband contexts. It demonstrates that while usage-based billing might appear fair on a 'you pay for what you use' model, this is in fact a misperception. While broadband capacity does, of course, have costs attached to it, it is by no means a rivalrous resource in the traditional sense of the term.

Agents of the State

With generous funding from the Office of the Privacy Commissioner of Canada's Contributions Program, CIPPIC carried out a comprehensive research program exploring the growing and changing role of Internet intermediaries in state surveillance activities. Through the use of ATI/FOI requests, as well as surveys of news sources and experts in the field, the project uncovered uses of publicly available social networking data in government decision-making.

It also documented and analyzed the ways in which intermediaries shape user privacy expectations, and provided normative analysis of the impact of such practices on privacy protections. CIPPIC hosted a roundtable to discuss the findings/issues with representatives from law enforcement, ISPs, the privacy commissioner's office, the department of justice, academics and civil society. Findings were also presented in report format, FAQs, and a podcast canvassing the issues and aimed at broader public awareness.

Staff Presentations //

The Privacy Tipping Point?

Panel: *Computers, Freedom & Privacy 2011: the future is now.*, Closing Plenary, Washington, D.C., June 2, 2011

Tamir Israel, Panelist

CFP2011 the future is now.

Conference: Washington, D.C., June 14-16, 2011

Tamir Israel, Program Committee Member

The Evolving Role of Cyber Surveillance in Public Sector Decision-Making

Multi-Stakeholder Roundtable: June 2, 2011, Ottawa. Held with the generous support of the Office of the Privacy Commissioner's Contribution Program

Tamir Israel, Moderator, Event Organizer

Experiencing Cyber-Surveillance in Everyday Life

Paper Review Workshop: *Cyber-Surveillance in Everyday Life: An International Workshop*, The New Transparency: Surveillance and Social Sorting, Toronto, May 13, 2011

Tamir Israel, Lead Discussant/Paper Reviewer

Advocates' Perspectives on Burning Issues in Cyber-Surveillance

Opening Plenary: *Cyber-Surveillance in Everyday Life: An International Workshop*, The New Transparency: Surveillance and Social Sorting, Toronto, May 13, 2011

Tamir Israel, Panelist

Government 2.0 & Access to Information: Proactive Disclosure & Open Data in Canada

Panel: Leg@IT 5.0, Monreal, April 4, 2011

David Fewer, Panelist

Privacy in System Design & Liability for Software Development

Guest Lectures: CSI 2911 Professional Practice in Computer Science, School of Information Technology & Engineering (SITE), University of Ottawa, January 26, 2011 & February 9, 2011

Tamir Israel, Guest Lecturer

Defamation 2.0: Free Expression & Reputation on the Social Web

Presentation: CIPPIC Discussions Series, University of Ottawa, Faculty of Law, October 2010

Tamir Israel & oline Twiss, Co-Presenters

Copyright: A View from Both Sides

Panel: Centre for Social Innovation, Toronto, September 28, 2010

David Fewer, Panelist

Communicating Responsibly: The Shifting Legal Landscape for Social Media Creators

Presentation: *Podcasters Across Borders*, PAB2010, June 2010, Ottawa

Tamir Israel, Presenter

A Consumer Perspective on Direct to Consumer Genetic Testing Services: Implications of a New Business Model

Presentation: Ottawa, June 29, 2010

David Fewer, Presenter

Digital Ethics

Presentation: *Book Summit 2010*, Toronto, June 18, 2010

David Fewer, Presenter

Findings on Government Contributions to GPL Projects

Presentation: *Drupal Government Showcase: Change Comes to Ottawa*, Ottawa Public Library, Ottawa, June 15, 2010

David Fewer & Kent Mewhort, Presenters

IP & Copyright in the Digital World

Presentation: *Global Internet Governance Academic Network (GigaNet)*, 2010 International Workshop, Montreal, May 2010

Tamir Israel, Presenter

Google Book Settlement: Canadian Authors' Perspective

Presentation: Centre for Innovation Law & Policy, University of Toronto, Faculty of Law, May 28, 2010

David Fewer, Presenter

Privacy in the Age of Facebook

Panel: *mesh2010*, Toronto, May 18, 2010

David Fewer, Panelist

How Far is Fair?

Presentation: Hot Docs, Doc Summit 2010, Toronto, May 7, 2010

David Fewer, Panelist

Lawful Access: Perspectives on Privacy, Police & Provider

Panel: Ontario Bar Association Privacy Section, Ottawa, May 3, 2010

David Fewer, Panelist

Privacy and Domain Names

Panel: Case Western Reserve University, Cleveland, Ohio, November 6, 2009

David Fewer, Panelist

See you next year!
