

# International Aspects of the New User-Generated Content Exception in the Copyright Act

October 17, 2013 by [David Bowden](#)

On October 10, Osgoode Hall Law School hosted a symposium on User Generated Content under Canadian Copyright Law. The final panel of the day featured IP Osgoode Advisory Board member [Barry Sookman](#) and [Prof. Joost Blom](#), who each gave a talk on the broader international context of the UGC exception created by recent amendments to the *Copyright Act*. Both speakers suggested the exception will face limits and restrictions at an international level.

The panel addressed the international aspects of UGC in two different ways: both through public international law obligations imposed on Canada as a result of international treaties, and through addressing private international law issues concerning liability and potential defences to infringement in different jurisdictions.

## **Sookman: Is the UGC Exception in Conformity with International Treaty Standards?**

Barry Sookman's talk focused on whether or not the UGC exception complies with international obligations, in particular the *Berne Convention* (and the provisions of *Berne* incorporated into the WTO's *TRIPs Agreement*).

Sookman has previously mentioned that the *Copyright Modernization Act* could run afoul of Canada's international obligations by creating "an unprecedented breadth" of new exceptions. His presentation during Thursday's panel elaborated upon how the UGC exception could fail to satisfy the "three step test" for permissible exceptions to copyright protection provided for in [Article 9\(2\) of Berne](#): where the exception applies only in "certain special cases", does "not conflict with normal exploitation of the work", and does not "unreasonably prejudice the legitimate interests of the author".

Sookman argued that the UGC exception, which applies to all works and subject matter so long as it is used in a non-commercial context does not qualify as a "special case", nor is it "certain" when it would apply. Moreover, the provision that addresses economic impact (at [s 29.21\(1\)\(d\)](#)) uses the terminology "does not have a substantial adverse effect", rather than "does not conflict with the normal exploitation of the work" – which raises questions about whether the provision creates a higher burden for rights holders than expressed under the *Berne Convention*.

Finally, Sookman took issue with the fact that [s 29.21\(1\)\(d\)](#) seems to allow users to unreasonably prejudice the interests of the author, as the provision does not clearly allow authors to exercise their moral rights in the context of UGC. In comments which echoed the concerns of Marian Hebb, a panelist from earlier in the day, Sookman pointed out that the exception may not allow an author to prevent certain uses of her works for non-financial reasons – including prejudice to her honour or reputation.

## **Blom: Private International Law and the UGC Exception**

Prof. Joost Blom of the UBC Faculty of Law rounded out the panel by talking about the UGC exception in the context of the Conflict of Law rules. Prof. Blom's discussion of IP liability and jurisdiction seems particularly important given the global operation of the market for copyright-protected subject matter and a [recent decision](#) by the European Court of Justice (to see the IPilogue's coverage of this decision, click [here](#)).

Blom began his presentation by outlining the three fundamental questions posed by private international law:

1. Jurisdiction (Where can a proceeding can be initiated?)
2. Choice of Law (Under what rules is a proceeding decided?)
3. Foreign Judgments (Will a judgment in a proceeding be enforced in another jurisdiction?)

Blom indicated that although IP rights are territorially defined, much infringing activity takes place either abroad or on the Internet (the nature of which can make the question of where an infringement has occurred very difficult to determine). In previous infringement proceedings involving the Internet, the Supreme Court has held that a plaintiff must establish a “[real and substantial connection](#)” between the actionable wrong and Canada before a Canadian court may assume jurisdiction over a proceeding. However, as mentioned by Prof. Blom, this terminology is not specific enough to allow Canadian users to adequately assess their risks before reproducing or communicating their personal UGC.

Prof. Blom provided a powerful example of the potential international liability of creators of UGC, even given the recent amendments to the *Copyright Act*. Imagine a group of UBC students use five popular songs in a “flash mob” demonstration on campus. The flash mob is recorded, and the subsequent recording is uploaded on YouTube.

In this scenario, the student group has potentially infringed on three different exclusive rights: the right of reproduction, the right of performance and the right of communicating the work to the public. The first two acts occur in Canada, but the third could occur anywhere in the world – and although the UGC exception could exempt the student group from liability in Canada, it would be ineffective against a proceeding brought under any other jurisdiction (such as the USA).

Prof. Blom’s presentation, therefore, served as a strong reminder that in the digital age, a domestic exception to copyright infringement only provides limited protection when the new work is provided on the Internet.

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