RECENT COPYRIGHT ACTIVITY AND INACTIVITY IN CANADA

15TH ANNUAL FORDHAM CONFERENCE ON INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY

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1. INTRODUCTION. 1

2. MAJOR LITIGATION. 1
   a. Kraft v. Euro Excellence. 1
   b. Robertson v. Thomson Corp. 2

3. CANADIAN POLITICS. 4
   a. The Federal Election. 4
   b. The Bulte Affair. 6

4. THE NEXT BILL? 7
   a. To what extent will the Canadian government adopt DMCA type approach with respect to DRM and TPMs. 7
   b. Will the bill have a notice and notice provision, or a notice and takedown provision?. 8
   c. Will the Government listen to the demands from the a consortium of provincial education ministers for a special exception for educational usage of the internet?. 8
   d. Will the bill deal with much needed broadening of fair dealing exceptions, such as the inexcusable and inexplicable absence of a satire and parody exception?. 9
   e. Will the bill repeal the private copying levy scheme?. 10

2. THE PROCESS FOR THE NEXT BILL. 11

3. COPYRIGHT BOARD ACTIVITIES. 14

4. THE CAPTAIN COPYRIGHT AFFAIR 18

5. CONCLUSIONS AND PREDICTIONS. 20

1. INTRODUCTION

Not much was resolved in Canadian copyright over the last year or so. What did happen was positive on the whole. Overall, it was not dramatic. And what didn't happen was very important. And much of it could happen later this year. Last year may well have been the lull before the storm, or the eye of the hurricane. Here's the year in review, beginning in December of 2005 and spilling over up to the current time in 2007 and looking beyond. This is a selective and personalized view of the period in question.[1]

2. MAJOR LITIGATION

a. Kraft v. Euro Excellence[2]

On December 19, 2005 the Federal Court of Appeal upheld a trial level decision that held that legitimate Toblerone chocolate bars could not be imported from Europe by a parallel importer without overlaying or covering up the copyrighted picture of a mountain.[3] The related Kraft companies in Europe and Canada had arranged for Kraft Canada to get an exclusive license in certain parts of the art work on the packaging of chocolate bars - such as the mountain on the Toblerone package.. The "cover up" remedy devised by the Trial Judge and upheld by the Federal Court of Appeal would result in the effective ban of a wide range of parallel imports, where the copyrighted elements comprise significant or essential parts of the packaging. The products would often be unsaleable after the "cover up." Indeed, several prominent commentators have so confirmed, including Kraft's own law firm. To suggest otherwise is just plain wrong. These law firms were quick to hold this decision out a means to "thwart" parallel importation by using copyright law to achieve what the Canadian courts - including the Supreme Court of Canada - have clearly held cannot be done using trade-marks law

We argued that the provision of the ***Copyright Act*** relied upon by the Kraft plaintiffs was never meant to apply to product packaging. Indeed, Kraft has cited no Canadian case law dealing with s. 27(2)(e) or its predecessors that has dealt with anything other than books and sound recordings.

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[1] These views are strictly my own. Some of this material is taken from my own blog at www.excesscopyright.blogspot.com or elsewhere as noted.

[2] The author became involved in this case as counsel for the intervener Retail Council of Canada, which supported the Appellant but for some different reasons than those advanced by the Appellant in the Courts below.

[3] ***Euro Excellence Inc. v. Kraft Canada Inc. et al,*** 2005 FCA 427

Leave to appeal was sought and obtained from the Supreme Court of Canada on May 18, 2006. Oral argument took place on January 16, 2007 - just over a year from the date of decision appealed from. This is Canada's closest counterpart to the US Supreme Court's ***Quality King***[4] case - but concerns foreign made legitimate parallel imports - not domestic goods that were shipped out of the country and were then reimported. The Canadian case covers an even wider and more common fact situation than Quality King. There was much discussion of Australian and English law.

The intervener that I represented put forward some important common law doctrines that had not been dealt with below, such as the hypothetical maker doctrine and the doctrine that a copyright owner cannot infringe its own copyright. The basic question that we put to the Supreme Court was this:

> *Can copyright law be used to "thwart" the importation and distribution of genuine consumer goods not themselves protected by copyright and which are legally manufactured and packaged abroad ("parallel imports") on the basis of a "strategy" to arrange for an exclusive license in certain artistic elements of the packaging for such goods to be given to a Canadian entity?*

The Supreme Court oral hearing was through, probing and interesting for many reasons. For example, at the hearing, the Court asked several questions about certain aspects that were not canvassed in great detail in the written arguments. These included whether there was copyright misuse in the sense that Judge Posner had articulated up in the 7th Circuit ***Wiredata***[5] decision. There were also questions about whether there should be some sort of incidental use exception. Both of these are interesting and important issues. All eyes are now focussed on the Court. If the decision below is upheld, it will be a drastic change, in my view, to Canadian law and will surely result in a massive call for legislative correction. If the appeal succeeds, we will resume what most believe to be the status quo before the decisions below but all eyes will be on the reasoning. All nine of the Justices had penetrating questions. It would not surprise me if there is more than one opinion. The Supreme Court of Canada has recently heard several IP cases in which it has chosen to deliver broad and important messages and guidance for the future. The Canadian Supreme Court delivers its decisions on average about six months after the oral hearing.

b. Robertson v. Thomson Corp.[6]

In 1995, the Plaintiff, Heather Robertson, contributed two articles to the Globe and Mail,

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[4] ***Quality King v. L'Anza***, (1998) 523 U.S. 135, 118 S.Ct. 1125

[5] ***Assessment Technologies of Wi, Llc v. Wiredata, Inc.,*** (2003) 350 F.3d 640

[6] **Robertson v. Thomson Corp., 2006 SCC 43**. My comments in this paper are a portion of my submission appearing in full in EIPR.

Canada's leading national newspaper. She was a freelancer, and not a permanent employee. She subsequently discovered that her articles were incorporated into online databases and a CD ROM product. She claimed that she had never given permission nor received payment for these subsequent electronic uses. She started a class action on behalf of freelancers and full time employees of the Globe and Mail. Following what began as a motion for partial summary judgement and an injunction, the Supreme Court of Canada ("SCC") rendered a split (5/4), complex and nuanced decision on October 12, 2006 in ***Robertson v. Thomson Corp., 2006 SCC 43.*** This was the Canadian counterpart to the American ***Tasini***[7] case. The issue is whether a free lance journalist who had originally agreed to publication of her work as a traditional "newspaper" article has the exclusive right to permit reproduction of it as part of an online database or in a CD ROM product.

The SCC held, essentially, that the collective work resulting from the newspaper's editorial efforts in assembling its daily edition had to yield to the individual right of each freelance author because the essence of the "newspaper" as a whole was lost when the individual articles are put into an electronic database where works are accessed and read one at a time and

> *decontextualized to the point that they are no longer presented in a manner that maintains their intimate connection with the rest of that newspaper... These products are more akin to databases of individual articles rather than reproductions of the Globe. Thus, in our view, the originality of the freelance articles is reproduced; the originality of the newspapers is not.* (para. 41).

Regarding the particular CD ROM version of the database, the majority found that:

> *The user of the CD-ROM is presented with a collection of daily newspapers which can be viewed separately. When viewing an article on CD-ROM after searching for a particular edition, the other articles from that day's edition appear in the frame on the right hand side of the screen. To pass muster, a reproduction does not need to be a replica or a photographic copy. But it does need to remain faithful to the essence of the original work. And, in our view, the CD-ROM does so by offering users, essentially, a compendium of daily newspaper editions. (Para. 52)*

The majority found that the full time employees of the Globe and Mail had no entitlement to be part of the class action, since they had made no attempt to exercise whatever rights they might have had under the particular provisions of s. 13(3) of the Canadian ***Copyright Act*** that allow newspapers to use their work but allows the employee to restrain further publication unless it is in a "newspaper, magazine or similar periodical". (Para. 62, 63).

The majority also found that there could, in principle, have been an implied license to the newspaper to do what it did, and that any such license need not have been in writing - since only

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[7] ***New York Times Co. v. Tasini***, 533 U.S. 483 (2001)

exclusive licenses need to be in writing. This could be of considerable practical importance to the future of this particular litigation, as the Court noted:

> *If it is determined that freelance authors have in fact impliedly licensed the Globe the right to republish their articles in the electronic databases, this decision will, of course, be of less practical significance. Parties are, have been, and will continue to be, free to alter by contract the rights established by the Copyright Act.* (Para. 58)

The minority found that the conversion and reproduction of all the articles in a newspaper in a database would "would clearly constitute an electronic reproduction of "any substantial part [of that day's newspaper] in any material form whatever", which is something that the owner of the collective work or compilation, i.e. the newspaper, is entitled to do. (Para. 86).

This was a close case and both sets of reasons are strong and compelling. Moreover, there may be many more questions than answers at the end of the day.

In particular, both the majority and minority were concerned with media neutrality. This is a careful and important judgment by both majority and minority. Both sides have much to be happy about. Ms. Robertson clearly won this battle, but the war is far from over. It may be a long time before she and her class action colleagues see any money. Depending on how the implied license issue plays out, there may not be any money to see. And new contracts will govern the future in any case. It may even prove to be a Pyrrhic victory.

3. CANADIAN POLITICS

a. The Federal Election

On January 23, 2006, there was a Federal Election. The Liberal Government lost - slipping from minority government status to opposition status. It had introduced a copyright reform bill known as Bill C-60 that never proceeded to hearings, That bill was somewhat rushed in production and rough around the edges. For example, it arguably would have created liability for search engines, when its intention was probably to shelter them. But the Bill stopped well short of the American vision of WIPO treaty implementation - particularly with respect to DRM and TPM provisions. It featured a notice and notice regime, and not a notice and takedown regime as the American government would prefer. It would have allowed circumvention for any purpose that would otherwise have been legal.[8] It also stopped short of giving users some of the exceptions that some users wanted to see - particularly certain educational interests. It left the private copying scheme intact. It was somewhat flawed and incomplete but a fairly balanced bill. Many of its faults could have resolved in Committee.

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[8] Except, in turn, for private copying - which is dealt with in Part VIII of Canada's ***Copyright Act.***

It should be noted that the Liberal Party has always depended for its success on keeping a political distance from the USA. This distance is sometimes more apparent than real, as under the recent Chrétien and Martin governments. But at times it has been quite dramatically real - as under the Trudeau government in the 60's and 70's when Canada adopted its controversial compulsory licensing regime for pharmaceuticals.

The Conservative Party became "Canada's New Government" (as it calls itself) - but only with a minority. Their March 19, 2005 Policy Declaration included an explicit promise to eliminate the controversial levies on blank media and to continue to legalize private copying. The text of their platform on copyright is as follows:

> ***35. Copyright Legislation***
> *I) The Conservative Party believes that the objectives of copyright legislation should be:*
> *a) to create opportunities for Canadian creators to enjoy the fruits of their labour to the greatest possible extent;*
> *b) to ensure that the rights of Canadian creators are adequately protected by law;*
> *c) that these rights are balanced with the opportunity for the public to use copyrighted works for teaching, researching and lifelong learning;*
> *d) to continue to allow an individual to make copies of sound recordings of musical works for that person's personal and individual use; and*
> *e) that enforcement is applied fairly and in accordance with international standards.*
> *ii) The Conservative Party believes that reasonable access to copyright works is a critical necessity for learning and teaching for Canadian students and teachers, and that access to copyrighted materials enriches life long learning and is an essential component of an innovative economy.*
> *iii) A Conservative Government will give consideration to educational public policy goals within the copyright framework. A Conservative Government will work with industry to increase awareness and develop a public education campaign to better inform users and creators on the copyright laws in Canada.*
> *iv) A Conservative Government will eliminate the levy on blank recording materials.*[9]

Despite an explicit promise by one of the responsible Ministers for a copyright bill last year, there was no bill introduced - and there still has been no bill introduced. The lobbying continues unabated. In particular, the American recording industry through its Canadian representative - the Canadian Recording Industry Association ("CRIA") has brought massive pressure on Ottawa to reverse the Liberal policies and probably key aspects of the Conservative policy declaration.

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[9] http://www.conservative.ca/media/20050319-POLICY%20DECLARATION.pdf

The American motion picture industry - through the Canadian Motion Picture Distributors Association ("CMPDA") (counterpart to the MPAA) - has its own high power campaign underway for standalone anti-camcording legislation, preferably, in its view, in the Criminal Code. It seems that the CMPDA has little desire to hitch its wagon to the main copyright train that can't get out of the station.

b. The Bulte Affair

Copyright has become ultra political in Canada. Even a decade ago, Bill C-32 was widely regarded as the most heavily lobbied piece of legislation in the history of Canada.

In the January 23, 2006 election, a prominent member of Parliament who clearly had ambitions to be the next Minister of Canadian Heritage held a fundraising event on the eve of the election. She was a favourite of the content industry and would have had significant power over copyright reform if she and her party had been reelected. But she lost her seat in downtown Toronto, which had been considered a safe Liberal stronghold. She went from a comfy 3,000 vote lead to a decisive 3,000 vote loss.

Most observers agree that the reason she lost her seat is because of her solicitous support of certain content owner lobbying groups - most particularly CRIA - and the strange fund raising event that CRIA and others orchestrated for her on the eve of the election. The bloggers got hold of this. Rhetoric escalated. Litigation was threatened - but, of course, never materialized - against Prof. Michael Geist who led the charge.

Even if Mme Bulte and her party had been elected, there would have been much trouble. She was already too much in the perceived thrall and influence of the American entertainment industry to have been an effective Canadian Minister. The so-called 2004 "Bulte Report" of the Parliamentary Committee that she chaired had been widely and soundly criticized for its excessive and apparently predetermined conclusions that played straight into the hands of the usual lobbying suspects.

Her legacy may prove to be that copyright law in Canada is no longer an arcane little fiefdom for litigation lawyers and lobbyists who can go about their work in quiet obscurity. It is a public interest area - and woe to any politician or government that gets too close to corporate - especially international corporate - interests without a sense of balance. The "Bulte Effect" will likely endure and grow. The bloggers are now effective and engaged in Canada - and the bloggers are generally anything but copyright maximalists. In fact, one of the world's most successful and widely read bloggers - who happens to be a Canadian - is all over the copyright issue in Canada. That is Cory Doctorow - a founder of www.boingboing.net and a successful author in his own right. His blog is one of the world's most popular websites. Here is a recent example of his attention to his home country.[10]

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[10] http://www.boingboing.net/2007/03/30/canadas_copyright_cz.html

The Bulte Affair also showed that the bloggers' work on copyright can quickly get into the main stream media, which is what all politicians dread. With the Bulte fundraising episode, this took only a few days.

4. THE NEXT BILL?

Nobody knows when this will be introduced - or if anyone knows, nobody is saying. I would not be surprised if it were to come before the summer and indeed, quite soon. That does not mean it will go anywhere - but there is a lot of pressure to produce something sometime soon.

The win-win scenario would be to introduce a bill soon - but not to proceed with it. Unless the bill is brilliant and balanced at the outset, there is very little chance that the bill could get through the committee process - at least a properly devised and conscientious committee process along the lines I suggest below - in time for the election expected some time in the next year. If the bill is introduced, everyone can study it, debate it and lobby to their heart's content until the timing is right for proper consideration and passage of a good and balanced bill that keeps all reasonably deserving interests reasonably happy.

Most of the pressure up to now for revision in Canada has come from the American music industry. With the Canadian music industry - pushed by the Canadian Indies - having a great time outperforming the rest of the world, there should be little sense of urgency because the sky is definitely not falling.[11]

The main issues that could be or, at least, should be in play are these:

a. To what extent will the Canadian government adopt DMCA type approach with respect to DRM and TPMs?

On this point, I won't say much because it has already been said many times over. Suffice it to say that the most important players in independent Canadian recording industry, some of Canada's biggest stars such as the very articulate Steve Page of Bare Naked Ladies, Steve Jobs, Apple/EMI, Canada's most successful online music provider (Puretracks), several European Governments and last and certainly not least our friend Bruce Lehman - architect of the DMCA and WIPO treaties - have all come out and resiled from this approach. If any thing has become clear, it is that what the world needs now is protection from and not for DRM and TPMs. Hopefully, Canada will stand its ground on this issue - because time is on the side of the critics of mandatory protection for DRM and TPMs. I discuss this in greater detail in my other paper for this conference on Online Music.

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[11] http://excesscopyright.blogspot.com/2007/01/sky-isnt-falling.html

b. Will the bill have a notice and notice provision, or a notice and takedown provision?

The *de facto* “notice and notice” regime has worked well in Canada. The *de jure* “notice and take down” scheme in the USA has not worked out very well. It leads to countless examples of chilling effects, where perfectly legal material gets forced down with great regularity. This is well documented at the excellent website www.chillingeffects.org

Of course, it is ironic that the ***Viacom v. YouTube*** litigation between two giants could expose all of the policy *quid pro quos* that were allegedly made in the notice and takedown regime in the USA, which Viacom now seems to find inadequate and seeks to effectively undo through litigation.

It would be unfortunate if Canada were to dive into this quagmire when the current system seems to work rather well.

c. Will the Government listen to the demands from the a consortium of provincial education ministers[12] for a special exception for educational usage of the internet?

I have discussed this extensively on my blog, and others have taken up the issue and agree with me. This is what I had to say about it back on September 8, 2006:

The educational exception for use of “publicly available Internet materials” is the copyright “cause célèbre” of the Council of Ministers of Education, Canada (CMEC). First of all, it is completely unnecessary. We have a March 4, 2004 Supreme Court of Canada decision (CCH v. LSUC) that extends the reach of fair dealing much further than CMEC has apparently recognized. The current 2005 edition of the CMEC flagship copyright publication, Copyright Matters!, written by CMEC's Counsel, is devoid of any reference to or even apparent consideration of that landmark decision. And we have a deeply developed doctrine of “implied license” in intellectual property law that says that a user is entitled to use a product (in this case, publicly available internet materials) in the manner intended - which clearly means browsing, downloading, saving, cutting, pasting, printing and everything else we have all been doing for years in our offices, homes, classrooms, libraries etc. whenever somebody posts something interesting. That’s the way the internet works, and everyone who freely decides to post material without technical restriction knows it and probably intends it to work that way. If they don’t want their work to be used in this way, they can lock it up behind a pay wall or simply not post it. It would be very surprising if a Canadian court were to rule otherwise in respect of most of the uses that most of us – including educators, students, librarians and archivists – make of “publicly available Internet materials”.

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[12] Led by the Council of Ministers of Education, Canada (“CMEC”) http://cmec.ca/copyright/indexe.stm

Whatever may be the rationale for CMEC's proposal, its potential effect is all too clear to those who see beyond the apparently "user friendly" rhetoric and the laudable goal of enhancing education and reducing costs and risks in the classroom. However, the proposal, if enacted, would almost certainly create a strong "a contrario" implication that everyone other than those in the educational community must now "pay" to use publicly available material - and Michael Geist reports that Access Copyright (a.k.a. "Excess Copyright") is apparently trying to get Canadian Heritage to actually subsidize its work on a scheme that would help to pull this off. This initiative reminds one in many ways of the non-transparent back room activity at Canadian Heritage that led to the unsuccessful attempt to elongate the copyright term in posthumous works by up to 34 years. That was the Lucy Maud Montgomery Bill as it came to be called. When properly understood, that bill was defeated and I'm proud to have led that charge. It was another unnecessary solution in search of a problem - and the solution would have been a major blow to the public domain and benefit to publishers and, thus, Access Copyright. Once again, the educational internet exception is a gratuitous and unnecessary initiative that will benefit Access Copyright - by sacrificing a relatively small amount of potential revenue from the educational community in order to confirm Access's "entitlement" to a potentially huge amount of revenue from the rest of Canadians outside of the CMEC umbrella.

CMEC may well have good intentions. And the Ministers no doubt genuinely believe that this is a "user friendly" initiative. But, in copyright law as in anything else, "The best laid schemes o' mice an' men gang aft aglay." And to use another cliché, "the road to hell is paved with good intentions."

If the educators need any more legislated certainty, which is very doubtful, there are far more proven and precise formulations to give them what they want without collateral damaging consequences to the rest of Canadians. One could begin in no better place than the American legislation, which among other things, expressly recognizes that "multiple copies for classroom use" can be "fair".

d. Will the bill deal with much needed broadening of fair dealing exceptions, such as the inexcusable and inexplicable absence of a satire and parody exception?

Canada has some very unfortunate case law that holds that copyright law will generally trump any defence based on parody or satire. Parody and satire are techniques as old as literature itself that can be used effectively by many creators in all artistic genres. However, by its nature, parody necessarily involves an element of copying of the work being parodied. Canadian courts have consistently and regrettably refused to recognize a "parody" defence to copyright infringement.[13] This is in stark contrast to the law in the

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[13] ***Productions Avanti Ciné-Vidéo Inc. v. Favreau et al.*** 1 C.P.R. (4th) 129 Reversing 79 C.P.R. (3d) 385; *Cie Générale des Établissements*

USA where the American Supreme Court has found a blatantly commercial and even offensive (to many) parody of the well known song "Pretty Woman" to be a non-infringing fair use, on the basis that the parody was a "transformative" use for the purpose of criticism or comment, and that the transformative element was sufficient to supersede the commercial intentions of the parodists. This is particularly a problem for documentary film makers[14] and composers.

In fact, it is said that the only serious opposition to a satire and parody exception in Canada comes from a certain Canadian music collective. Why would Canadians deny themselves a time honoured right of free expression recognized by the Supreme Court of the United States? If it's true that one entity (representing largely American interests who operate with a parody exception in the USA) is standing in the way of such a fundamental artistic freedom in Canada, that is inexcusable. The joke that Canada lacks a sense of humour is wearing thin. This is really becoming a very serious embarrassment to Canada and a real problem for Canadian creators.

e. Will the bill repeal the private copying levy scheme?

It should - especially if Canada's New Government wants to honour its policy declaration of March 19, 2005. This would also clear the decks for WIPO ratification by eliminating the acknowledged issue that the national treatment requirements of the WPPT would result in a doubling of the value of the levies and the potential outflow of hundreds of millions of dollars. I've noted many times that the scheme is completely self-contained in Part VIII of the ***Copyright Act***, so it's not hard to repeal it. Some minor adjustment would be needed to the statutory remedies provisions so that wrath of the RIAA through its Canadian counterpart does not descend on thousands of victims in the form of law suits based on statutory damages - which should be eliminated for personal non-commercial or educational activity. In any event, as noted above, Canada's new government promised "*to continue to allow an individual to make copies of sound recordings of musical works for that person's personal and individual use*."

Michelin-Michelin & Cie v. C.A.W.-Canada et al. 71 C.P.R. (3d) 348. The Michelin decision has been criticized with respect to its denial of freedom of expression and its refusal to allow constitutionally entrenched charter rights to trump non-entrenched rights under the *Copyright Act*. See J. Bailey***, Deflating the Michelin Man***, chapter 5 of M. Geist, ed. ***In the Public Interest***, Toronto, Irwin Law, 2005, p. 140 ff.

[14] See H. Knopf, ***The Copyright Clearance Culture and Canadian Documentarians***, 2006, http://www.docorg.ca/pdf/Dec3-06-%20HPK%20White%20Paper%20Final%20November%2022%202006.pdf

2. THE PROCESS FOR THE NEXT BILL

Once again, I've discussed this on my blog on November 20, 2006.[15]

If there is a copyright bill, and if it gets as far as committee hearings, it is imperative that it be considered by a balanced committee that represents the mandate of both of the sponsoring departments. The Heritage Committee alone cannot be entrusted alone with this task. Even with Mme Bulte gone, the institutional structure militates against both actual and apparent balance in the hands of that Committee alone. Even before Bulte, that Committee often gave the appearance of imbalance and of being too prone to influence by the Department of Canadian Heritage and the usual lobbying suspects. Indeed, the appearance probably reflected the reality. Clifford Lincoln may have appeared more balanced than Mme Bulte, but the result too often left much to be desired.

The effective low point of copyright committee proceedings was back in the C-32 days in 1996-1997. The Bill that went into committee was a bad one - especially for the educators and broadcasters. But at least there were a few exceptions for users. When it came out of committee, it had exceptions to the exceptions that vitiated the exceptions. It was a dark day for users. And the process was not pretty.

There are two structural improvements that would go a long way to ensuring both the appearance and reality of balanced and transparent committee hearings. They are cumulative and not alternative.

1. There should be a "special joint committee" that brings together all or at least the most knowledgeable and interested members of the Heritage and Industry committees. This would mirror the joint responsibility of the two Ministers and Departments. Such a Committee would have joint chairs. There is ample precedent for this approach.

2. There must be two or even three outside expert counsel to advise the Committee. Bill C-32 had only one outside counsel. For many reasons, the resulting product was a disaster for users. Likewise with the so-called "Bulte Report" in 2004. Fortunately, the Bulte Report had no immediate legal effect, though we may well see its influence infecting the forthcoming bill. In fairness to the counsel involved, we will never know for sure what transpired behind the scenes and whether the results were more because of or in spite of their work. This is simply too much responsibility to put on one person's shoulders, given the polarization of policy views on copyright and even of expert opinions on legal copyright matters. For example, there is a great cacophony of divergent "expert" opinion on whether downloading P2P music files to a PC hard drive is legal. Another example is

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[15] http://excesscopyright.blogspot.com/2006/11/parliamentary-committees-and-copyright.html

whether CCH v. LSUC protects, as fair dealing, much of the activity in the educational system that currently results in passive, massive and arguably greatly excessive payments of millions a year to Access Copyright and much of the internet related activity that CMEC is lobbying about. Whatever Committee considers this bill should have access to frank discussion of the range of opinions. That can only come from hearing all sides - not only from witnesses but from its own expert counsel.

Frankly, I cannot think of any one person who is sufficiently knowledgeable, balanced, experienced, expert in both the common law and "droit d'auteur" perspectives, and who would generally be perceived to be both actually and apparently sufficiently neutral and independent to do the job of committee counsel on their own.

It is no answer for the Government or Parliament to say that it will cost too much to have two or three counsel. How does the Department of Canadian Heritage justify 20 FTEs (full time employees) more or less to work on copyright policy? I suspect that this is probably more than any other government anywhere - and certainly far more than Industry Canada. Presumably, Heritage got the FTEs because copyright is important and because, as many believe, "copyright matters." Well, if copyright matters, then the money will somehow be found and find its way into the right budget. There's a huge surplus out there, and it just got bigger with the recent cuts.

What is needed amongst the suggested two and preferably three special committee counsel is a real and perceived balance between common and civil law approaches, and between creators', owners', and users' rights and interests. That is why there ideally should be three people. There should be one person who would have the confidence of creators, owners and collectives on the one hand and another who would have the confidence of users. We would likely need a third person to sit in the middle to facilitate communication and consensus. That person might be a sufficiently experienced, knowledgeable and neutral academic, or, if such a person could not be found, perhaps a retired judge with some good IP decisions under his or her belt. The committee counsel must have the experience and stature to be able to provide frank advice and guidance to committee members, and not simply serve as a passive research or drafting resource. Any relevant client or consulting interests regarding policy matters should be fully disclosed, not only to the committee but to the public.

It will not be easy to implement these suggestions. There are a lot of vested interests who would love to replay Bill C-32 and go back to the Heritage Committee (and not a joint committee) and see it with only one outside expert counsel, as in 1996-1997. But we cannot allow that to happen.

I have not forgotten about the official languages problem. That's another issue and it may require a ruling from the Federal Court of Appeal and maybe even the Supreme Court of Canada. I'm working on that. However, whatever committee handles the copyright bill

can temporarily solve the problem by agreeing, as many committees do, to accept written material in either official language and not demanding it in both - but unfortunately this has not been the practice of the Heritage Committee under the previous government. This is a real issue for less well financed interest groups (i.e. most user groups) who cannot afford the cost of translating essential documentation, which in many cases will exceed the cost of preparing or collecting it - even assuming there is time, which there invariably is not. Although this is a huge legal and political problem, it is not a structural one. It is simply a question of the committee following what many more expert than myself in official languages believe to be the law of Canada. As I've said before and will have to say again, "either" means "one or the other." It does not mean "both".

BOTTOM LINE

If there is to be a bill, we must have the best possible committee structure with the best and most balanced advice available.

We must take the time to get this right. Currently, there are two lobby groups dominating and pushing the agenda. The one that appears to be in the most desperate hurry is CRIA, which has little or no connection with Canadian interests. The other most vociferous demandeur is CMEC, whose approach to copyright matters as reflected in Copyright Matters! is similar to that of Access Copyright as reflected in Captain Copyright, concerning which comparison Michael essentially agrees with me. Ironically, CRIA and CanCopy (the former name for Access Copyright) were the two big winners in Bill C-32.

With all of these difficulties ahead, and the very real likelihood that the bill as expected cannot get through any committee process - fair and balanced or otherwise - before the next election, my judicial copyright commission project begins to look better and better.

Even if there is a majority government after the next election, it may well wish to take the decisive step of calling for and properly constituting a judicially led commission. The current governance model of delegating arguably far too much law making power to the Copyright Board and leaving the ongoing development to be sorted out between two competing departments is not only far from ideal. In too many ways, it isn't even working.

Perhaps an independent and fully transparent judicial commission can come up with a better way. How should this be set up? We'll go into that another day.

Ministers may wish to take note.

3. COPYRIGHT BOARD ACTIVITIES

The Copyright Board rendered several decisions 2006. The most noticed and probably most important concerned Ringtones, which I discuss at some length in my other paper at this year's Fordham conference. There was also a lengthy and economically important decision concerning an inaugural tariff for background music payable to the neighbouring rights collective.[16]

There was a very interesting interim decision[17] concerning commercial radio - which requires some background explanation.[18]

On October 14, 2005 the Copyright Board gave SOCAN and NRCC an increase in the tariff payable by commercial radio stations amounting to about 30% by the Board's own estimate. The hearing had taken place in May, 2004 - about 18 months earlier.

The Canadian Association of Broadcasters ("CAB") - which was largely responsible for the establishment of the predecessor the Board to deal with the predecessor of SOCAN about 70 years ago - was very upset, calling the decision "aberrant and unreasonable" and referring, controversially, to the Board as "renegade".

After only one week of deliberation, the Federal Court of Appeal ("FCA") on October 19, 2006 granted, with costs, a judicial review application by the CAB on the basis of "the inadequacies of the Board's reasons respecting the quantification of the royalty increases attributable to both the historical undervaluation of music, and the greater efficiencies achieved by the industry through its use of music".

The FCA declined to reverse the Board on its alleged failure to take into account the "cumulative royalty burden" resulting from the "proliferation in the number of rights holders to be compensated". This additional burden - of course - flows from the decision of Parliament in 1997 to recognize neighbouring rights.

The decision was written by Mr. Justice John Evans, who is not a only a judge of the Federal Court of Appeal but is the co-author of the leading Canadian treatise on administrative law. He said:

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[16] http://cb-cda.gc.ca/decisions/m20061020-b.pdf

[17] http://cb-cda.gc.ca/decisions/m20061124-b.pdf

[18] http://excesscopyright.blogspot.com/2006/10/cab-gets-socan-nrcc-radio-increase.html

[16] The Board is entitled to the greatest deference in the exercise of its discretion to set a rate and, accordingly, the discretionary decisions lying at the heart of its expertise are reviewable only for patent unreasonableness. However. it must explain the basis of its decisions in a manner that enables the Court on Judicial review to determine on the basis of the reasons, read in context, whether the decision was rationally supportable. When an administrative tribunal's decision is reviewable on a standard of reasonableness, its reasons are the central focus of a judicial review: Law Society at New Brunswick v. Ryan, [2003] 1 S.C.R. 247, 2003 see 20, at paras. 48-9, 54-55.

[17] In my view it was not sufficient in the circumstances of this case for the Board to justify its quantification of the undervaluation by merely referring to the evidence taken as a whole. It is not enough to say in effect: "We are the experts. This is the figure: trust us." The Board's reasons on this issue served neither to facilitate a meaningful judicial review, nor to provide future guidance for regulatees.
(Emphasis added)

This appears to be a victory - for at least the time being - for the CAB. But the really interesting question is what effect this could have on the Board itself. The Board already takes considerable time - often well over a year - to render its reasons, which are invariably carefully written and which hitherto been considered close to "bullet proof" in terms of appellate deference to rate calculation, review of the evidence and the other matters in which the Board is presumed to have great expertise. Traditionally, the FCA has refused to get involved in such issues unless there is "patent unreasonableness" in the decision.

Now, however, it seems that Board must now explain in greater detail how it gets to its bottom line. And in some respects, more detailed reasoning may open up even more possibilities for judicial review. Merely referring to the often voluminous evidence filed before it is no longer going to be sufficient.

The new regime set forth by Justice Evans may also lead to the need for the Board to evaluate more critically and analyse the quality of the evidence it relies upon, and why it is being relied upon. Evidence at the Board is often less than convincing. It is sometimes hearsay by any measure and is sometimes submitted by persons whose independence as experts could be readily challengeable in a court of law because they have a close ties with the collective that retains them to testify before the Board.

Below the tip of this iceberg is the fact that Parliament has chosen to largely delegate - some might say "abdicate" - a lot of power to the Board to not only determine terms, conditions and rates of tariffs but to effectively make law from square one. This is in stark contrast to many royalty issues in the USA, which are spelled out in often gruesome detail.

At the other end of the spectrum from broad law making, the Board routinely rules on procedural matters such interrogatory disputes (the Board's somewhat analogous procedure to discoveries -

except that there is no oral examination). There are often significant disputes as to what is relevant or too burdensome. Almost invariably, the Board provides no or at most extremely brief reasons for its procedural rulings.

Justice Evan's decision will create a dilemma for the Board. There is already criticism that Board often takes over a year to render a decision. And the lead up to the hearing is often a couple of years. And in recent years, the Board's panels have usually consisted of only three of its five members. The Chair of the Board, Mr. Justice Vancise, recently acknowledged in a Toronto speech that there are substantial delays. He said:

> *I am not at all happy with the time it takes to render a final decision. I have tried to address the issue and I can assure you it will be resolved. If the Supreme Court of Canada can render a decision within six months of a hearing, there is no reason why this Board cannot do the same. My goal is to see that this occurs.*

The Judge certainly and commendably seems to be trying to help to move things along. Indeed, as I point out in my other paper, the recent CSI online music tariff decision took only about six months from the hearing to render.

Of course, it's not easy to compare statistics here. It's an interesting question as to whether the Supreme Court of Canada is an appropriate proxy for a benchmark for pendency of Board decisions. But that is a subject for discussion elsewhere. The immediate question is whether the need for more detailed decisions could result in even longer delays in the release of decisions at the Copyright Board. Hopefully, the rather detailed CSI decision would suggest that the answer is no.

It will be interesting to see what the Board will do about this particular CAB decision. Will the Board change the result - or will it reiterate its previous decision - but with more "adequate" reasoning?

The interim decision rendered on November 24, 2006 was necessary pending a re-examination by the Board, which is scheduled for June 26, 2007. The Board has made it very clear that the rates can only go up:

> *The reasons for which CAB conceded before the Federal Court of Appeal that the three increases could be made may be irrelevant here. The consequences of these concessions, however, are clear. The only matter that remains to be reconsidered by a panel of the Board is how much more radio stations will pay.*[19]

There were also a couple of relatively predictable judicial review decisions involving the Board. Ironically, CRIA of all parties took it upon itself to withdraw representation on behalf of its

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[19] http://cb-cda.gc.ca/decisions/m20061124-b.pdf p. 7.

Canadian independent members in the CSI Online music file, ostensibly because of the burdensome interrogatory process. CRIA said:

> *"When it became clear that the interrogatory process was too onerous to involve its smaller members, CRIA withdrew on their behalf."*

The Board ordered CRIA to send the following notice to its indie members:

> *"CRIA recently opted to change the scope of its representation of its members' interests in the forthcoming proceedings before the Copyright Board dealing with CSI' s proposed tariff for the reproduction of musical works by online music services. Subsequently, the Board ordered CRIA to advise you of the following:*
> *1) In these proceedings CRIA has chosen to act only on behalf of (name of each member that CRIA represents).*
> *2) As a result, CRIA will not be allowed to advance any argument or lead any evidence that relates to your situation in particular, or to the situation of any other member of CRIA that CRIA does not represent in these proceedings generally."*

CRIA went to the Federal Court of Appeal but the Court upheld the Board's commendable attempt, under the circumstances, to ensure that the Indies were being thoroughly informed about how their interests were being dealt with at the Board. It will be interesting to see if the Board more extensively uses its confirmed powers under this section and more generally to be more proactive in the public interest or the interests of members of collectives.[20] As I mention in my other Fordham paper this year, most of the Indies have now left CRIA and formed the Canadian Music Creators Coalition.[21]

In another interesting brief decision from the Federal Court of Appeal involving Access Copyright and CMEC[22], the Court ruled that the objectors (hundreds of them for reasons which are far from apparent), did not have to answer particular interrogatories relating to a particular exception in the legislation and that the Copyright Board itself, not having made a final ruling on the point, could deal with later by the Board or on judicial review following the Board's decision. Hopefully, this will empower the Board to allow objectors to refuse to answer dubious interrogatories more often. However, it could have the opposite effect by confirming that the Board's normally cursory or even mon-existent reasons for compelling interrogatory answers are even more bullet proof now from a judicial review standpoint.

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[20] http://excesscopyright.blogspot.com/2006/10/cria-rebuffed-from-bench_30.html

[21] www.musiccreators.ca

[22] 2006 FCA 108. The actual style of cause is possibly longest in Canadian jurisprudence, listing - for unapparent reasons - it would seem almost every school district in the country.

Another Board decision received little attention but involved much effort on the Board's part. The Board took upon itself the challenge of shedding light on the meaning of what is "substantial" in the context of the use of an excerpt of literary work in a documentary film. The issue arose in the context of the Board's mandate to issue licenses, when asked and if appropriate, where the copyright owner cannot be located. After ten months of deliberation, the Board issued a 25 page split decision about the quotation in a film of eight excerpts comprising 325 words out of a 342 page book on WWII published in 1954 by Vantage Press, which is a vanity press.[23] The recitation of the words comprised just over about five minutes of one 45 minute episode of a six part series. All five members of the Board were involved in this decision, which is a rarity if not a unique event. Three of the Board members thought the excerpts comprised a substantial part of the book. Two of the Board members disagreed. There was also a split on a procedural issue, which is whether the license can be given retroactively after the fact. That applicant finally did get its license retroactively - but only for five years. Unfortunately, the exercise will leave documentarians even more confused and uncertain than before over this important issue. There was some brief consideration of case law, some of which in turn is highly problematic. [24] In fairness to the Board, it must be pointed out that this was not an adversarial proceeding and the Board may not have had the benefit of entirely satisfactory research.[25]

4. THE CAPTAIN COPYRIGHT AFFAIR

A lot of blog time, including my own, was devoted to Access Copyright's ill advised and ill-fated attempt to launch its Captain Copyright campaign into Canadian K-12 schools. Access Copyright is roughly the equivalent of the American Copyright Clearance Center. This caped crusader was determined to educate kids - beginning in kindergarten - with the Access Copyright point of view. After looking at the Captain's website, lots of folks quite decisively and correctly, in my view, characterized this not as education but as propaganda. It was full of not only doubtful and biassed propositions but outright errors about copyright law - and what kids can and can't do legally. Naturally, all of the problematic assertions favoured Access Copyright's point of view and the overall proposition that almost everything needs permission and an Access Copyright license will solve the world's problems, Some aspects of the exercise were simply comical - such

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[23] Re Breakthough Films, Copyright Board, March 6, 2006. http://cb-cda.gc.ca/unlocatable/156r-b.pdf

[24] i.e. the Federal Court of Appeal's unfortunate decision in *Édutile Inc. v. Automobile Protection Association (APA)*, [2000] 4 F.C. 195, which conferred copyright on the two column layout of a chart of used car prices.

[25] See H. Knopf, ***The Copyright Clearance Culture and Canadian Documentaries:*** http://www.docorg.ca/pdf/Dec3-06-%20HPK%20White%20Paper%20Final%20November%2022%202006.pdf p. 9, 23.

as the Intellectual Property Notice and Disclaimer – which contains the following gem, amongst many others:

> *Links from Other Websites*
> ...
> *Permission is expressly granted to any person who wishes to place a link in his or her own website to www.accesscopyright.ca or any of its pages with the following exception:* ***permission to link is explicitly withheld from any website the contents of which may, in the opinion of the Access Copyright, be damaging or cause harm to the reputation of, Access Copyright. In the event we contact you and request the link be removed, you agree to comply with that request promptly****. If you link to or otherwise include www.captaincopyright.ca on your website, please let us know and create any link to our home page only.*
> *(emphasis added)*

For a time, Access Copyright tried to defend this ludicrous linking policy and actually retained a law firm for further advice.

But, in any event, Captain Copyright got taken down in fairly short order by Access Copyright. A blue ribbon committee was supposed to rehabilitate him and bring him back. But, for whatever reason, Access Copyright recently euthanised the Captain and his eulogy can be viewed at:

www.captaincopyright.ca

In all seriousness, mistakes do happen and I seriously do commend Access Copyright for fairly quickly effectively admitting to a serious blunder. This is rare in the copyright world. If only the RIAA were as responsive, the music industry might get on with its life and the copyright world would be a better place.

What are the lessons to be learned? First and most immediate is that Canada is different than other countries and that copyright “education” campaigns as used with some - though not much - subtlety in the USA and no subtlety whatsoever in Singapore and Hong Kong will backfire badly in Canada. The second lesson is that blogs matter. Canadian blogs took down the Honourable Sarmite Bulte, M.P. in the last election. And they also took down Captain Copyright. The activities of collectives, whether on the lobbying front or the propaganda front, are increasingly under scrutiny.

Will the collectives become even less transparent as result? That is a danger - and some of their website seem to be going in this direction. However, there are checks and balances that should hopefully keep some light shining on their activity - including the power of the Copyright Board - if it chooses - to ensure a degree of transparency, efficiency and member democracy. If this doesn’t happen, legislation may be necessary.

There are about three dozen collectives in Canada pulling in close to a half billion dollars a year by my estimation. They do this through government conferred monopolies that allow them to set tariffs that are enforceable by law. If that doesn't require some transparency, I really don't know what does.

Another Access Copyright ("AC") initiative started out with some excitement and promise. This involved a collaboration with Creative Commons on a public domain registry. Some notable people and organizations were involved, especially Creative Commons ("CC") - both in the USA and Canada. I always wondered what was in this partnership for the CC organizations, since AC has no obvious particular expertise or comprehensive database of death dates to contribute to this effort. AC does have oodles of money - but I don't know why a Wiki-based project would need to cost a lot of money. CC would appear to have much more to contribute than AC. On the other hand, the halo effect of a partnership with Larry Lessig, CC, etc. for Access Copyright was quite obvious. Anyway, I and others have waited to see what might materialize. So far, I'm not aware of any more specifics or publicly announced deliverables, or even a timetable. I'm confident that the project was conceived in good faith and with much enthusiasm, and would serve a useful purpose if it ever materializes. But so far, it appears to remain at the announcement stage. If it doesn't show any signs of progress soon, it may begin to enter the realms of vapour ware.[26]

5. CONCLUSIONS AND PREDICTIONS

My simplified and essentially positive conclusions about last year or so in Canada are these;

a. The Supreme Court rendered a helpful decision in ***Thomson v. Robertson*** and heard and gave careful consideration to the appeal of the Kraft decision.

b. The election brought in a Government that has made very good copyright promises - and the absence of any bill to date at least means that they have, at least, not yet explicitly broken these promises.

c. The election and the bloggers showed that Canadian politicians must look first to the public interest if they wish to be elected. Getting too close to corporate lobbyists - especially those not representing Canadian interests - can have fatal political consequences in Canada.

d. There was no bill. But no bill is much better than a bad bill - especially a passed and enacted bad bill.

e. The Copyright Board has hopefully begun to render its decisions quicker and will hopefully play a more active role itself in ensuring that hearings are conducted fairly and that the public interest and artists' interests are more adequately protected.

f. A powerful collective made a big blunder - but effectively admitted it and relatively quickly corrected it.

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[26] http://excesscopyright.blogspot.com/2007/01/public-domain-registry-mclean-delivers.html

What should we watch for in the next year or so?[27]

a. There will be a decision by the Supreme Court of Canada in the Kraft decision - possibly by the summer.
b. The next bill - if and when it comes - will be subject to intense scrutiny. The backroom deal days are likely over. Even if the politicians are willing to do deals, the bloggers are not willing to ignore such deals, especially if they don't smell good. Given the current minority government situation in Canada, and strong possibility of another one to follow, there is a better chance of the public interest being protected. Introduction of bill before an election - but without referring it to committee - would be highly desirable for all concerned.
c. The Copyright Board will hear two very important new cases:
    i. One involves the resumption on April 17, 2007 of SOCAN's still ongoing attempt to collect money for use of music on the internet. This has been going on since 1995 and has already been to the Supreme Court of Canada once. There are still a number of unresolved legal issues and the internet is a very different place that it was in 1995. Overall questions will involve how many times and to how many collectives and how much must Canadians pay for the same thing - including Canadians who don't use or consume music on or from the internet in any way at all.
    ii. The other main hearing will start on June 12, 2007. It is Access Copyright's attempt to impose a $12 per year fee on every kid in K-12 in Canada. This will be opposed by CMEC, even though that organization shares similar views on many copyright matters with Access Copyright. A big question to watch is the extent to which the 2004 Supreme Court of Canada decision in ***CCH v. LSUC*** that empowers a users' right to engage in research and otherwise opens the horizons of fair dealing will be utilized by CMEC, which has so far shown no cognizance of it in its flagship publication, ***Copyright Matters!***[28]
    iii. The re-examination of the controversial commercial radio tariff will take place on June 26, 2007.
    iv. A potentially interesting hearing about background music will take place on January 22, 2008.
d. Speaking of Access Copyright, the current round of post secondary Access Copyright licenses expires this year. It's interesting timing, considering what is

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27 http://excesscopyright.blogspot.com/2007/01/what-to-look-for-in-2007-in-canadian.html

28 http://cmec.ca/copyright/matters/indexe.stm

happening at the Board on the K-12 front. Let's see if the AUCC[29] will try to use the CCH v. LSUC decision to significantly reduce the amounts payable and to use the savings to better purposes, such as putting more books in libraries and increasing the amount of information available to Canadian teachers, researchers and students, rather paying more and more times over for less material and less access. Let's see whether CAUT[30] does anything.

e. There is a vacancy at the Copyright Board. The appointment process has changed in at least one way. The vacancy was advertised on the Board's web site. As far as I know, it has not been filled. It seems to be taking a very long time to fill.

f. The Federal Court of Appeal will hear a judicial review application on the ringtones tariff. It will be interesting to see how the Court reacts to the objectors attempt to raise the issue of "communication by telecommunication" for the first time and if so, what the Court will do with it and what might be the impact on other major files.

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[29] http://www.aucc.ca/

[30] http://www.caut.ca/