

COPYRIGHT REFORM IN CANADA: COPYMIGHT OR COPYFIGHT

Presentation given to IP attorneys and paralegals in St. Louis, Missouri on November 14, 2008.

Copyright, the Internet and Digital Technologies

- Digital information and communication issues which the current *Copyright Act* does not address, and the need for reform:
 - *Security*: encryption technologies: TMP's (Technology Protection Measures); RMI (Rights Management Information); circumvention devices;
 - *Shifting*: Format shifting and time shifting
 - *Sampling*: Digital Sampling
 - *Sharing*: Peer to Peer file sharing
 - *Servers*: The role of intermediaries: ISP's (Internet Service Providers) Tracker (indexing and linking sites), blogs.
 - *Streaming*: music on demand; simulcasting; webcasting; podcasting, bit torrents

The Previous Round of Copyright Reform in Canada

- Carried out over two main phases - Phase I ending in 1988 and Phase II ending in 1997. The following five major outcomes are the result of this phased process:
 - compensation right for *cable retransmission* and a clarification of the scope and strength of *moral rights*;
 - *introduction of rights for performers*, sound recording makers and broadcasters in public communication or performance.
 - Stronger recognition of *collective administration* and the *Copyright Board* became a full time administrative tribunal; collective administration for the new rights for performers, sound recording makers and broadcasters.
 - The Phase II amendments provided *non profit institutions* such as schools, libraries, archives and museums with new exceptions. Some of these exceptions *only apply* if no collective is able to license the uses in question.
 - Phase II created a regime for compensating rights holders for the unauthorized *copying of sound recordings for private use*. This regime consists of a levy payable in respect of certain types of media used for such copying. The amount of the levy is set by the Copyright Board and, administered by the Canadian Private Copying Collective
- These reforms carried out in part to meet obligations under international treaties : NAFTA, and Agreement on TRIPS Trade-related aspects of intellectual property

The Challenge of Digital Technologies and the Internet

- 1994- Dec. IHAC (Information Highway Advisory Council created by the Minister of Industry; an important conclusion was that the *Copyright Act* applies in the digital environment; digitization is only a different format. The council was concerned that bulleting board operators might be caught in the copyright net.
- 1996- *WIPO Treaties (WCT WIPO Copyright Treaty; WPPT WIPO Performances and Phonograms Treaty)*
- **1998-** The US enacts the DMCA the *Digital Millennium Copyright Act*
- 1999- The Copyright Board decides that it would certify the proposed *Tariff 22* (known as “the internet tariff”) whereby ISP’s would pay royalties to a copyright collective for the communication of musical works over digital networks. (This decision was appealed to the Federal Court of Appeal and then to the Supreme Court which held in favour of the right to collect a tariff in 2004.)
- After hearings by the Board, the Tariff was set in two parts in 2007 and 2008. The first part of that tariff was issued on October 18, 2007 and dealt exclusively with online music services. The second part issued a few weeks ago on October 24, 2008, sets rates for other music uses over the Internet such as the websites of radio and television stations as well as other sites that use musical works as part of their Internet activities.
- Fact Sheet on the Tariff 22 <http://www.cb-cda.gc.ca/decisions/iifs200810240062008-e.pdf>

The Consultation Paper on Digital Copyright Issues

- **2001**, June 22- two Canadian government departments jointly issued (Industry Canada + Canadian Heritage) (40 pages)
- Recommendations are in the context of previous initiatives towards Connecting Canadians and the Canadian presence (culturally) around the globe;
- Concerned with fundamental questions:
 - Do the new ICT’s (information and communication technologies) upset the balance between the stakeholders: rights holders, intermediaries and users?
 - Fair dealing: exhaustive: private study, research, criticism, review, newspaper summary
 - Given the rate and unpredictability of ICT evolution, would legislative intervention restore a balance that has been upset, would it impede the emergence of new models of creation and dissemination of content, and what is the cost/benefit calculus of the restore/impede effects?
- Set of Core Principles:
 - The framework must promote Canadian values;
 - The rules should be clear and allow easy, transparent access and use
 - The proposals should promote the competitiveness of Canadian businesses doing business electronically (corollary: do not do everything at once).

- The framework needs to be cast in a global context
 - Treaties provide for national treatment of residents of member states
 - Single regime of protection may not be practical
 - Conflict of laws provides major challenge
- The framework should be technologically neutral (rather than reactive legislation which responds to particular challenges: (fibre optic cables, wireless: microwave, satellite))
- Proposals : 1. Making Available
 - Background
 - “Making available right” emerged during negotiations leading to the conclusion of the *WIPO Treaties*. The communication right in the Berne Convention did not apply to the transmission of all categories of works e.g. literary (including computer) and visual works.
 - “on demand” communications are not covered by the Berne or by the Rome Convention; The WPPT includes this right regarding performance and sound recording
 - So, the WCT (in art. 8) extends communication right to all categories and to making available to the public (access on demand).
 - Other jurisdictions
 - Europe: the EU copyright directive requires member states to provide the MA right;
 - Australia: The copyright act was amended in spring 2001 to provide a MA right
 - Proposal
 - Performers and sound recording makers would be provided with an exclusive right to authorize on-demand communication (meeting the WPPT requirements)
 - The proposal would not cover streaming other than on-demand.
- Proposals: 2. Legal Protection of Technological Measures.
- Proposals: 3 Legal Protection of Rights Management Information
- Proposals: 4 Liability of Network Intermediaries, e.g. ISP’s
 - Background
 - 2000- a tariff proposal in relation to reproduction was made by SODRAC, an acronym for the French language Collective for the reproduction rights of authors, composers and publishers of Canada. They propose that ISP’s pay a royalty for all reproductions of the SODRAC repertoire.

- The Paper dislikes this proposal because “packet switching”, and caching require reproduction and the proposal’s adoption would put Canada out of step with the rest of the world.
- Other jurisdictions
 - The US (DMCA), the EU, Australia and Japan adopt a **notice and take-down** system. Safe harbour unless, the ISP fails to remove the material after receiving a notice.
 - The US safe harbour also requires: registration; termination of the accounts of repeat offenders; a notice to subscribers of this policy; a policy of not interfering with TPMs.
- Proposal:
 - A complaints-driven notice and takedown approach be adopted
 - This be limited to the intermediary function related to hosting and caching, not pure transmission
 - The liability of the ISP would be limited for harm resulting from blocking access to a site in a proper notice

Bill C-61 – Act to Amend the Copyright Act

➤ Safe Harbour for intermediaries

- ISPs would be exempt from copyright liability in relation to their activities as intermediaries, namely, their activities as mere conduits for information, their caching activities, their hosting activities, and their information location activities.

➤ Notice and Notice regime

- A "notice and notice" regime in relation to the hosting and file sharing activities of an ISP's subscribers would be provided for. That is, when an ISP receives notice from a rights holder that one of its subscribers is allegedly hosting or sharing infringing material, the ISP would be required to forward the notice to the subscriber. Blocking access to such material would be required only when ordered by a court. Upon receipt of a notice, ISPs would also be required to keep a record of relevant information for a specified time. Rights holders would have the legal means to compel ISPs to comply with the regime. The Government would have the power to prescribe the form that must be used in giving notices and to set fees that may be required to be paid by rights holders to ISPs for processing such notices.

Professor Michael Geist: Copyfighter

- Bill C-61 adopts the piecemeal approach to flexible fair dealing by including time shifting and format shifting (though puzzlingly no parody exception). This approach is less than ideal since the new exceptions are subject to host of limitations and a broader fair dealing provision would be fairer to creators, users, and business.

- Bill C-61 does not modernize the backup copy provision. The ability to format shift content such as movies is limited to videocassettes.
- Bill C-61 bans devices that can be used to circumvent a TPM. The limited exceptions are so narrowly drafted that the ability to use them is open to question.
- Canada is one of the only countries in the world to have a statutory damages provision within its copyright legislation. It creates the prospect of massive liability - up to \$20,000 per infringement - without any evidence of actual loss. This system may have been designed for commercial-scale infringement, but its primary use today is found in the U.S. where statutory damages led to the massive liability for one peer-to-peer file sharing defendant and leaves many defendants with little option but settlement. Bill C-61 does include the \$500 personal download damage award which moves the law in the general direction of statutory damages reform. However, given the limitations on this new provision, the prospect of massive liability for individual Canadians remains.

➤ **Globe and Mail editorial August 2008**

- Fair dealing: Braque and Picasso did it with collage; digital sampling should be allowed. It should not be prevented by "moral rights; difference between a shopping centre in 1982 putting ribbons on Michael Snow gees and artists doing sampling.

➤ **CRIA v. Gary Fung (excerpts from Globe and Mail Nov. 6, 2008)**

- Mr. Fung is the Canadian owner of Isohunt.com, one of the most popular torrent search engines on the Internet, which is used by thousands of Web surfers looking to download music, movies and computer games. Isohunt indexes BitTorrent files, a technology commonly used to quickly transfer various media files, many of which are copyrighted.
- After receiving letters from the Canadian Recording Industry Association last May, which insisted he remove all links to copyrighted material, Mr. Fung is launching a pre-emptive strike and is asking the Supreme Court of British Columbia to rule on whether his website violates the Copyright Act of Canada.
- According to Mr. Fung's petition to the court, letters he received from the record companies that make up CRIA argue that Isohunt is responsible for "causing, authorizing, and contributing to a staggering amount of illegal music uploading, downloading and file sharing."
- However, the 25-year-old native of Richmond, B.C., argues that he is merely an indexer, similar to a search engine such as those operated by Google Inc. or Yahoo Inc., and that he only provides links to files. He neither provides the software which can illegally duplicate copyrighted files, nor does he host any of the files on the company's servers, he says.
- Although there are many so-called torrent tracker sites such as Isohunt in existence, torrent files can also be found through such mainstream search engines as Google.

- Isohunt, which links to about 1.5 million files, has a takedown policy which states that it will remove links to any files if it is contacted by the copyright owner, a process similar to that employed by the popular video-sharing website YouTube.
- Isohunt is among the Top 200 most popular sites on the Web and one of the most popular Canadian-based sites in the world, ranked No. 197 globally, according to the Web traffic tracking company Alexa.com.
- And more than 25 per cent of Isohunt's users are based in the U.S., where Mr. Fung is facing another lawsuit in a California district court brought by the movie studio Columbia Pictures Industries Inc. According to documents filed by Columbia in that case, more than 95 per cent of Isohunt's visitors are using the site to infringe copyrights.

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