WHY CANADIAN COPYRIGHT LAW IS ALREADY STRONGER AND BETTER THAN THAT OF THE USA - AND WHY THE USA SHOULD LOOK IN THE MIRROR RATHER THAN AT ITS "SPECIAL 301" WATCH LIST

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Canada is Under Pressure from the USA

Canada is presumably about to engage in another round of copyright reform. Canada is under considerable pressure in this effort, mostly from the US Government and various lobbyists[2] acting forcefully on behalf of mainly American interests, to implement and ratify the 1996 WIPO treaties by enacting a version of the DMCA, which some are calling a "CDMCA."

This prospect has generated much controversy, with the result that the expected introduction of a new bill in early December of 2007 has been put on hold until further notice. Any uncertainty is greatly compounded by the politics and logistics of a minority government. Moreover, copyright has the potential to actually become an election issue and could be an interesting factor in any federal election, particularly in a number of close ridings where there are large university and college populations.[3]

The rhetoric has been strong. The American Ambassador to Canada, David Wilkins, was quoted by Deirdre McMurdy on Nov. 16, 2007 in The Ottawa Citizen as saying that "Canada is known for having the weakest copyright protection in the G8."[4] That is not only risible and even ridiculous. It is simply false and misleading.

For starters, the G8 includes Russia. Enough said.

Specific Examples of How Canadian Laws are Already Stronger and Better than American

More to the point, Canadian copyright law is actually much stronger than U.S.

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[2] The most visibly active copyright lobbyist organization in Canada is the Canadian Recording Industry Association ("CRIA"),the Canadian counterpart of the RIAA, which speaks mainly for the big four multinational record companies. CRIA has lost much if not most of its independent Canadian membership. Many leading Canadian artists have formed a coalition called the Canadian Music Creators Coalition, which is opposed to litigation against their own fans. These artists include Feist, Broken Social Scene, Sarah McLachlan, Bare Naked Ladies and many more.

[3] http://www.michaelgeist.ca/content/view/2666/125/

[4] http://www.canada.com/ottawacitizen/news/story.html?id=f05596b7-28b6-4065-a80a-0c902ec38213&p=1

copyright law in the many ways, some of which are worth quite a lot of money[5] to the USA. It is worth noting as well that, for most of the last century, most copyright royalties in Canada have been flowing to American corporate interests. Here are some examples of Canada's already stronger and better regime:

1. Broadcasters pay more for copyright royalties than their counterparts in the USA, much of it for rights that don't even exist in the USA - for example the "ephemeral right." Now, about $50-million a year more over and above is being demanded by the record labels[6] for this right in addition to amounts now collected by composers, authors and publishers. The US provides an outright exemption in 17 USC §112 for the "ephemeral right."

2. Canadians pay large amounts to SOCAN[7] and NRCC[8] for performances in countless bars, restaurants, retail stores, and other small area business establishments. The U.S. notoriously exempts these establishments, contrary to a WTO "Section 110" ruling which the U.S. continues to flout. The U.S. is by far the leading adjudicated current violator of international copyright law.

3. Canada has "neighbouring rights." The U.S. doesn't. This translates into very big payments for record producers and performers. For example, the Copyright Board estimates that these rights generated about $15.9 million a year from traditional analog commercial radio alone in 2005.[9]

4. Canadian movie theatres have to pay SOCAN for exhibiting films. While these rights are normally bought out and cleared for Hollywood productions in the USA, and there is no further requirement to pay ASCAP, BMI or SESAC, Canadian law has thus permitted SOCAN to collect from theatres in Canada for showing the same films. SOCAN collected $881,000 for theatrical exhibition of

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[5] Any Canadian figures can be multiplied by a factor of 10 or even more, especially in view of the effective current parity of the currencies, to be seen in comparison to corresponding American figures.

[6] http://cab-acr.ca/english/media/news/07/nr_nov0407.shtm

[7] Canada's only performing rights organization for composers and authors.

[8] Neighbouring Rights Collective of Canada, which represents collectives dealing with record producers and performers.

[9] http://cb-cda.gc.ca/decisions/m20080222-b.pdf p. 32

films in 2005.

5. Canada has a rich blank media levy scheme that has generated more than $200 million overall to date and at last report almost $40 million a year, most of which goes to the U.S. The U.S. has nothing comparable.

6. Canadian educator pay far more relatively than in the U.S. We pay far more for reprographic rights than in the U.S., with far fewer exceptions for educators in our legislation. The U.S. counterpart to Access Copyright has only a little over three times Access's income while normal ratios would suggest that it should have at least 10 times the amount. Canadian educators are subject to statutory minimum damages. American ones are not if they reasonably believe that they are engaging in fair use. We have no distance educational exceptions. The U.S. does. Canada has no specific reference to "teaching (including multiple copies for classroom use)", as is found in 17 U.S.C. §107.

7. Canada has moral rights for all types of works. The U.S. doesn't, with the limited exception of visual arts works. Any possible pretence that the USA provides moral rights generally through other means was put to rest by the U.S. Supreme Court in the 2003 ***Dastar*** decision.[10]

8. Canada seriously respects the right of independent creators to own their copyright. The U.S. walks all over this with its broad "work for hire" doctrine that favours large corporations.[11]

9. Canada long ago got rid of most of its compulsory licences, including the mechanical license for sound recordings. The U.S. still has this and many more, while it continues to preach to other countries against compulsory licenses.

10. Canada has about 36 copyright collectives, many of which have received substantial direct and indirect government subsidies. The U.S. has only about five, with no government largesse.[12]

11. Canada has a full-time Copyright Board with four full time members plus an

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[10] ***Dastar Corp. v. Twentieth Century Foxfilm Corp.***), 540 U.S. 806 (2003)

[11] http://www.copyright.gov/circs/circ09.pdf

[12] ASCAP, BMI, SESEAC, Copyright Clearance Center and Soundexchange.

appellate Judge as Chairman and several full time professional and administrative support staff. The Board has enormous policy and, effectively, law making powers. No other comparable country comes close to having such a permanent, specialized full time and powerful copyright tribunal.

12. Canada has no parody right/exception for users. The U.S. does.[13]

13. Canada has no time shifting exception that would clearly allow for legal use of PVRs such as the TIVO in Canada. The U.S. has had this since the 1984 Betamax decision from U.S. Supreme Court.[14]

14. Canada has crown copyright, which leads to all kinds of unnecessary costs and complications for those ranging from advanced researchers to fishermen, who should be able to depend on mapping and GPS information from the government and not some privatized for profit party. Canada privatizes its government copyright for profit, which cannot happen in the USA.

15. Canadian provinces enjoy no Crown immunity and already pay exorbitant amounts for educational uses of copyright, much of which revenue flows to the USA. U.S. states have state sovereign immunity for copyright infringement, arguably in contravention of the Berne Convention.

Historically, Canada has provided overall far greater protection to American works and American citizens than *vice versa*. In 1923, an historic bilateral agreement between Canada and the USA ensured that each country gave the same treatment to nationals from the other country as it did to its own. This meant that Canada provided much better protection to Americans than *vice versa*, because Canada, even then, had a life plus 50 year term with no formalities and much stronger rights in many other respects.

Even today, Americans reap the benefit of Canada's earlier recognition of the life plus 50 term and the sacred Berne Convention principle of no formalities. For example, early works by Irving Berlin and others that have long since entered the public domain in the USA will still generate royalties in Canada for a long time to

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[13] ***Campbell v. Acuff-Rose Music***, 510 U.S. 569 (1994)

[14] ***Sony Corp. of America v. Universal City Studios, Inc.***, 464 U.S. 417 (1984)

come.[15] This is also the case with films, since many classic Hollywood films that are now in the public domain in the USA will be protected in Canada for the life of the creator or joint lives of the creators (whoever they may be[16]) plus 50 years.

The IIPA "Special 301" Report

The latest attempted incursion into Canadian copyright sovereignty comes from the International Intellectual Property Alliance ("IIPA"),[17] which promoted Canada this year into the highest echelon of its hit list by recommending that Canada be on the "priority watch list". Canada now joins the ranks of Argentina, Chile, Costa Rica, Egypt, India, Mexico, People's Republic of China, Peru, Russia, Saudi Arabia, Thailand, and Ukraine.

Canadians frankly do not get very excited about the "Special 301" list. A senior Canadian official told a Parliamentary Committee last year that:

> *In regard to the watch list, Canada does not recognize the 301 watch list process. It basically lacks reliable and objective analysis. It's driven entirely by U.S. industry. We have repeatedly raised this issue of the lack of objective analysis in the 301 watch list process with our U.S. counterparts.*
>
> *I also recognize that the U.S. industry likes to compare anyone they have a problem with, concerning their IPR regime, to China and the other big violators, but we're not on the same scale. This is not the same thing. If you aren't on the watch list in some way, shape, or form, you may not be of importance. Most countries with significant commercial dealings are on the watch list.* [18]

The IIPA notes this year that "Only two of America's top 10 trading partners (China and South Korea) surpass Canada's record of appearing continuously on a Special 301

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15 G.F. Henderson, ***Canadian Copyright Law in the Context of American-canadian Relations***, (1977) 35 C.P.R. (2d) 67

16 This is the source of much uncertainty in Canadian law.

17 http://www.iipa.com/

18 House of Commons, Standing Committee on Public Safety and National Security, No. 35, 1st Session, 39th Parliament (March 27, 2007), at 1150 (testimony of Nancy Segal).

list every year since 1995." That puts Canada in very good company in economic terms. We must be important.

Criticism of the U.S. "Special 301" approach is coming not just from the Canadian government and from distinguished Canadians such as Prof. Michael Geist[19] but from such respected U.S. expert commentators such as Bill Patry.[20] Mr. Patry has pointed out that, if Israel can stand up to the USA on "Special 301", surely Canada which is much larger and much less vulnerable should be able to do so:

> *Of course, even large countries like Canada have been threatened: the U.S. is reported to have told Canada that the U.S. won't do anything Canada wants in other areas unless Canada adheres to the WIPO treaties in the exact form that the U.S. has, and that such implementation is the highest priority in U.S.-Canada relations. That's ridiculous bluster. I hope that the example of Israel, a much smaller and very vulnerable nation, standing up to the IIPA inspires the Canadians in drafting their anticipated copyright reform legislation. And one thing that might strengthen Canadian resolve is the experience of Israel with the migration of the watch list into an evolving wish list.*[21]

Also, Canadians are becoming increasingly aware of America's own problematic shortcomings in copyright protection. In addition to the usual sovereignty sentiments, Canadians are well aware of the many ironies implicit in the maximum that folks in live glass houses ought not throw stones.

For example, in the areas I have identified above, the USA is not only weaker protection but in some cases is arguably in contravention of well established international law to which it is actually bound. These include:

- Lack of moral rights protection: Even thought the USA cleverly managed to

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[19] Michael Geist Blog, ***Responding to the IIPA's "Inaccuracies and Hyperbole"*** Monday March 17, 2008 http://www.michaelgeist.ca/content/view/2765/125/

[20] W. Patry, ***No One Likes a Bully: The IIPA and Canada,*** February 23, 2008 http://williampatry.blogspot.com/2008/02/no-one-likes-bully-iipa-and-canada.html

[21] http://williampatry.blogspot.com/2008/03/israel-fights-back-purim-story.html

immunize itself from the dispute settlement mechanism in TRIPs on this front, it does not look good that the USA flouts this basic provision of the Berne Convention which is so important to the European and other civilian countries and to Canada, which has deep roots in both common and civil law.

- State sovereign immunity: There is arguably a strong case that the very broad exemption confirmed by the U.S. Supreme Court[22] goes well beyond any exception contemplated by the Berne Convention. Whether or not it is causing any "damage" may be open to argument, but it is quite clear that American educational institutions pay far less per capita for reproduction rights than their Canadian counterparts, perhaps because of the implicit right the state operated institutions have not to pay anything.
- The S. 110 I ("Irish Music") matter: This is an adjudicated violation of a major aspect of the Berne Convention as incorporated in TRIPS. As long as this is unresolved and the USA pays only less than token compensation in consequence, it will have difficulty in credibly criticizing alleged substantive deficiencies in copyright regimes elsewhere, especially where there is no binding international law to support the allegation..
- Depending on how things turn out in certain of the RIAA cases now working their way through the district courts[23] and in the Jammie Thomas appeal, it may turn out that the USA doesn't even have a "making available" right, which was a cornerstone of the 1996 WIPO treaties. This is because, *inter alia*, the plain language of § 106(3) limits the distribution right to the dissemination of tangible material objects.[24]

On the other hand, I know of no area in which current Canadian copyright law has been credibly alleged to violate existing international law to which Canada is bound. CRIA has made certain treaty based allegations that would not be justiciable in a Canadian court concerning the broad scope of the exemption from liability resulting or potentially resulting from the private copying levy regime. This is actually fraught with irony because CRIA was probably the main proponent of this regime in its

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22 ***Seminole Tribe of Florida v. Florida***, 517 U.S. 44 (1996). See Robert W. Clarida, ***Sovereign Immunity - It's Everybody's Problem***, December 2000 http://www.legallanguage.com/lawarticles/Clarida009.html

23 ***Atlantic v. Howell*** (District of Arizona) and ***Elektra v. Barker*** (SDNY)

24 R. A. Reese, ***The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over 'RAM Copies'***, University of Illinois Law Review, Vol. 2001, No. 1, 2001

present form. Interestingly, CRIA recently supported my client[25] and certain manufacturers such as Apple who successfully argued in January of this year that the Copyright Board could not extend the levy regime to iPod type and other digital audio recorder devices.[26] Politics and even the law sometimes make strange bedfellows.

Morever, anecdotal experience suggests that enforcement activity in the USA is much weaker than in Canada in key respects. One has never seen flagrant sellers of pirated and counterfeit goods operating openly on the streets of major cities in Canada, as one has seen here in New York, not just on Canal street but openly in midtown.

Moreover, Canada recently added anti-camcording provisions to its ***Criminal Code***, beefing up the previously existing offense provisions in the Copyright Act.[27] At least one arrest has been made under these news provisions, and resulted in an enthusiastic press release by a Government of Canada Minister.[28]

Canada's laws seem to be capable of dealing with serious commercial scale pirate activity at both a civil and criminal level. There have been countless civil seizures ("Anton Piller orders") and large damage awards.[29] On the criminal front and in the sound recording business, there was a recent high profile "bust" in which about 200,000 allegedly pirated CDs and DVDs were seized. This raid coincided quite nicely with Canada Music Week.[30] According to the Hollywood Reporter:

> *The raid by 10 officers followed a yearlong investigation into Audiomaxxx and its pirate operation.*

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[25] The Retail Council of Canada, which represents the major retailers.

[26] ***Apple Canada and Retail Council of Canada v. Canadian Private Copying Collective***, 2008 FCA 9, http://decisions.fca-caf.gc.ca/en/2008/2008fca9/2008fca9.html

[27] Bill C-59 was given Royal Assent on June 22, 2007. http://www2.parl.gc.ca/content/hoc/Bills/391/Government/C-59/C-59_4/C-59_4.PDF

[28] http://www.marketwire.com/mw/release.do?id=812183

[29] E.g. ***Microsoft v. Cerrelli*** et al 2006 FC 1509 http://decisions.fct-cf.gc.ca/en/2006/2006fc1509/2006fc1509.html

[30] http://www.cmw.net/cmw2008/conference_speakers.asp

"We sincerely thank the RCMP officers who have worked so hard to bring Audiomaxxx to heel, and to the federal prosecutors who have worked closely with them," CRIA president Graham Henderson said. [31]

Curiously, CRIA has retracted[32] its initial press release about this event dated March 6, 2007 and has instead issued a statement dated March 7, 2008 indicating that:

In the same media release, it was also reported that Raj Singh Ramgotra was among those arrested. CRIA cannot confirm the identities of any of those arrested and therefore retracts its statement to the effect that Mr. Ramgotra was arrested. CRIA regrets the error.[33]

Meanwhile, the Government's Minister of Public Safety issued an enthusiastic and unretracted press release about the event.[34] Canada's government seems to be very eager to issue press releases about its enforcement efforts, though the connection to "public safety" is somewhat less than obvious in this instance. Nobody has ever died from exposure to allegedly pirated reggae music, as far as I know.

The Israeli Approach to Section "Special 301"

In certain obvious respects, Israel is perhaps more dependent than any other country on the USA. This fact, however, has not stopped Israel from drawing a line in the sand

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[31] Etan Blessing, ***Mounties bust Canadian CD, DVD counterfeiter***, Hollywood Reporter, March 8,2008 http://www.hollywoodreporter.com/hr/content_display/international/news/e3i669ba7401585bee06e32d16311170635

[32] ***CRIA's big cock-up - Today on the Scroll: Canada's beleaguered music biz lobby boasted of a bust last Thursday… so why did they issue a retraction the day after?*** Marc Weisblott EYE Weekly http://www.eyeweekly.com/city/scrollingeye/article/20372 See also Jon Newton, ***Huge CRIA audiomaxxx.com screw up***, http://p2pnet.net/story/15197

[33] http://cria.ca/news.php

[34] http://www.publicsafety.gc.ca/media/nr/2008/nr20080307-eng.aspx

on “Special 301" with a bold and detailed recent response.[35] The Israeli response does not challenge the legitimacy of the USTR/IIPA approach as much as it dissects it point by point. Notably, Israel points out with respect to the IIPA and RIAA obsession with TPMs:

> *Israel is not a member of either the WIPO Copyright Treaty (WCT) or the WIPO Performances and Phonogram Treaty (WPPT), the only multilateral instruments which obligate implementation of TPM. Hence, Israel is under no obligation to introduce TPM and use of the Special 301 process to sanction countries for not implementing aspects of treaties to which they have no obligation seems rather unjust.*[36]
>
> …
>
> ***Accordingly, can the non-membership in a voluntary treaty be the basis for invocation of the Trade Act, and placement on a watch list? If so, then why doesn't IIPA recommend non-ratifying countries such as Switzerland, Norway, Iceland, Denmark, Finland, France and Austria for watch list status?***
>
> (Emphasis added)

The latter point is a particularly good point. There is no conceivable basis for the USA to legally impose or demand sanctions for a country’s failure to ratify a implement or ratify treaty in respect of which it has no legal obligation. If and when the next round of WTO talks moves forward, the USA is free to attempt to make ratification of the 1996 WIPO treaties a requirement. But that is pure conjecture at this point.

There is one notable inaccuracy in the Israeli report that touches on Canada, though it does not detract from the overall thrust. It refers to Canada as an example of “developed and OECD countries (such as Canada, Australia, EU members) which do not have statutory damages for copyright infringements at all.”[37] This, of course, is not true. Canada was one of the first countries to adopt the flawed American approach to statutory minimum damages, which was surely not meant to deprive families of their life savings because somebody may have allegedly downloaded and perhaps inadvertently potentially shared some songs, an activity that has resulted in litigation against children and even dead grandmothers by the RIAA. Israel has a

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[35] http://www.justice.gov.il/NR/rdonlyres/8D2F1766-8611-4734-8EAA-891CB4182BEF/18762/2008Special301Submission.pdf

[36] Ibid. Page 16.

[37] Ibid. Page 20

clever solution to this problem, which is to allow a hefty upper limit of about USD $28,000 for statutory damages without proof of actual damages, but no minimum and other safeguards as well to protect against the Jammie Thomas type of travesty.

Some, such as Michael Geist, would like to see Canada react to the IIPA and the USTR as aggressively and explicitly as Israel. He suggests that "Given those views, why doesn't the Canadian government (or many other governments for that matter) follow the Israeli lead by standing up for its national interests?"[38] This may not be a bad idea, as long as it does not imply any particular legitimacy to the "Special 301" process.

The Legitimacy of "Special 301"

The continued legitimacy of American effort involving "Special 301" should not be taken for granted. The legitimacy of certain aspects of sections 301 to 310 of the US Trade Act of 1974 has already been looked at by the WTO. The USA managed to survive the dispute brought by EU with several third parties including Canada involved, but only on the basis of certain undertakings provided by the US that it would not proceed to impose sanctions on a unilateral basis and would only do so within the mechanisms established by the WTO. The WTO noted that:

> *The panel stated therefore that should those undertakings be repudiated or in any other way removed, its findings of conformity would no longer be warranted. The DSB adopted the panel report at its meeting on 27 January 2000.*[39]

What the IIPA et al Want Canada To Do

The IIPA has added to the litany of complaints from Ambassador Wilkins and CRIA to the effect that Canada is behind other countries in terms of its failure to date to

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[38] Michael Geist Blog, ***Responding to the IIPA's "Inaccuracies and Hyperbole"*** Monday March 17, 2008 http://www.michaelgeist.ca/content/view/2765/125/

[39] (1999) WTO Dispute DS 152 – Sections 301–310 of the Trade Act 1974 WTO DS 152 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm See also the WTO One Page summary at http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds152sum_e.pdf

implement and ratify the 1996 WIPO treaties. The general wish list for what the IIPA wants Canada to do in 2008 is this:

In terms of substance:

- *Enact legislation bringing Canada into full compliance with the Copyright Treaty [WCT] and WIPO Performances and Phonograms*
- *Create strong legal incentives for Internet Service Providers (owners in combatting online piracy*
- *Amend the Copyright Act to clarify the scope of the private recordings*
- *Amend the Copyright Act to clarify liability for those who knowingly contribute to infringement (such as illicit file-sharing services)*

In terms of enforcement:

- *Make legislative, regulatory or administrative changes necessary to empower customs officials to make ex officio seizures of counterfeit and pirate product at the border without a court order*
- *Increase resources devoted to anti-piracy enforcement both at the border and within Canada*
- *Direct the Royal Canadian Mounted Police (RCMP), Canadian Border Services Agency (CBSA), and Crown prosecutors to give high priority to intellectual property rights enforcement, including against retail piracy and imports of pirated products, and to seek deterrent penalties against those convicted of these crimes*

I have some brief comments on some of these issues.

Canada's "Obligations" under the 1996 WIPO Treaties

As I wrote in my blog on February 11, 2008, if and when there is a new copyright bill introduced before a possibly imminent election, there will be much talk about the 1996 WIPO treaties.

I make no comment on whether or not Canada should ultimately ratify the 1996 WIPO treaties. This is a complex legal, economic and political issue, and I am frankly rather agnostic about it at this time.

The decision to ratify should be taken with fully informed analysis on what is actually required to achieve compliance with these treaties, a subject upon which learned minds profoundly disagree at the moment. Ratification of these treaties may well be

a good thing for Canada if there is a way of doing so that is good for Canada. I will venture, however, to say that the maximalist formulations for compliance being suggested in some quarters are neither required, nor are they in Canada's best interests. Moreover, since Canada already provides stronger and better protection than the USA in many material respects, there is no reason whatsoever for the WIPO treaties to become the tail wagging the dog of Canadian copyright reform - which everyone agrees is long overdue. Users in particular have a strong case to make that reform is overdue

And, in the meantime, let's be accurate about just what Canada's current "obligations" are regarding these treaties. The Hon. Jim Prentice, himself a lawyer and the lead Minister on this file, seems to be aware that he is walking a tightrope here. In his recent speech in Calgary, he made reference in the subsequent Q. and A. to the WIPO treaties and to "certain obligations to bring our law into conformity with, in a general sense, with the treaties that were signed…."

Signing a treaty is to ratification about the same as dating, or maybe at most "going steady", is to marriage. The latter does not necessarily follow from the former, and the influences on the relationship during the initial (i.e. signature) phase are, just as in person to person relationships, often defined more by influences other than legal "obligations." Let's just leave it at that.

But, there's no need to take my word for this. Here is a learned comment on the effect of treaty signature in respect of international treaties:

> ***The effect of signature is not, of course, to bind the signatory State*** *but simply represents an acknowledgment of its intention to enact a law based on the Convention and, in due course, to ratify the Convention.* ***It is only the ratification of the Convention by an existing member State which has signed the Convention, or accession to the Convention by a new member State, which creates an international legal obligation.***
>
> (emphasis added)

This is not the statement of a radical "anti-copyright" person. It actually comes straight from WIPO itself.[40] Coming from WIPO, that is about as strong a statement as one can find from a credible institutional source, and is not inconsistent with my

[40] See this document at §5.580. www.wipo.int/about-ip/en/iprm/doc/ch5.doc

simple dating analogy.

Others see the effect of signature as even less. Prof. J. Craig Barker puts it as follows:

> *The effect of signature is not, as one might expect, to bind a state to the terms of a treaty. There is usually a further stage of ratification required before a state party can be said to be fully bound. Nevertheless, the signature of a state to a treaty is not without effect. A state that has signed, but not yet ratified, a treaty is bound not to do anything contrary to the objects and purposes of that treaty prior to ratification or withdrawal of signature. However, a state is not bound to follow the terms of a treaty in their entirety until ratification.*
>
> (emphasis added)

The point is very simple. Canada may or may not choose to ratify the 1996 WIPO treaties. That is for the elected Government of the day to decide, and to be accountable for according to domestic law, accepted procedure, practice, and ultimately, politics.

However, Canada has not yet ratified these treaties. We have only signed them. Certain politicians may or may not have made certain statements and promises to certain lobbyists and ambassadors. But that is not the same thing as an "international legal obligation" in respect to the 1996 WIPO treaties. Let us be precise with our language here and not use language too loosely. There is too much at stake.

Finally, it does not help the cause of the USTR, IIPA, CRIA, and other lobbying forces that our distinguished friend Bruce Lehman, the architect of the 1996 WIPO Treaties and the DMCA, has publicly indicated that "I don't think it [DMCA] has achieved the objectives we necessarily intended."[41] This is how Prof. Michael Geist summarized Mr. Lehman's comments at a symposium last March 23, 2007 at McGill University:

> *Moreover, Lehman says that we are entering the "post-copyright" era for music, suggesting that a new form of patronage will emerge with support coming from industries that require music (webcasters, satellite radio) and government funding. While he says that teens have lost respect for copyright, he lays much of the blame at the feet of the recording industry for their*

[41] http://video.google.com/videoplay?docid=4162208056624446466&hl=en

failure to adapt to the online marketplace in the mid-1990s.

In a later afternoon discussion, Lehman went further, urging Canada to think outside the box on future copyright reform. While emphasizing the need to adhere to international copyright law (ie. Berne), he suggested that Canada was well placed to experiment with new approaches. He was not impressed with Bill C-60, seemingly because he does not believe that it went far enough in reshaping digital copyright issues. Given ongoing pressure from the U.S., I'm sceptical about Canada's ability to chart a new course on copyright, yet if the architect of the DMCA is willing to admit that change is needed, then surely our elected officials should take notice.[42]

What Would Canada Need to do to Ratify the WIPO Treaties?

The irony of much of the debate is that Canada arguably need not do a lot in terms of implementation to ratify the WIPO Treaties. The problem for the IIPA and those who are driving it is that it is demanding a lot more than is necessary in order to implement and ratify these treaties. If these interests persist in this approach, Canada may not get around to ratification. If these interests really want to have Canada on the list of ratifying countries - which so afar is largely a coalition of the billing rather than the willing - they need to be realistic about what the treaties actually require.

In terms of the major issues that the US based lobbyists such as CRIA would like to see taken care of, there are some interesting developments.

Making Available Right

First, there is strong argument now that Canada already has a "making available" right in place, at least for "works", i.e. musical compositions. This is reinforced by the recent Federal Court of Appeal decision that confirmed that the digital delivery of a ring tone directly to the computer or cell phone of a member of the public upon request constitutes a "communication to the public by telecommunication."[43] The cell phone providers are seeking leave to appeal this decision (cf. certiorari) to

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[42] http://www.michaelgeist.ca/content/view/1826/125/

[43] ***Canadian Wireless Telecommunications Association et al v. Society of Composers, Authors and Music Publishers of Canada***, 2008 FCA 6.

Canada's Supreme Court.[44] This situation is pregnant with irony, and interesting potential conflicts within the music industry. If the cell phone providers succeed in getting leave and ultimately overturing the decisions below, there will be, at the very least:

- a significant domino effect at the Copyright Board on numerous other pending and already decided tariff decisions
- a much harder, and perhaps impossible task for CRIA to argue that P2P file sharing is illegal in Canada, absent a major change in legislation - which cannot be taken for granted. CRIA has attempted to sue alleged downloaders and file sharers in Canada in the past, but without success.[45]

TPMs and Anticircumvention

The issue likely to be of most concern to the general public in Canada concerns technical protection measures ("TPMs") and the excessive manner of protection for such measures demanded by the pro CDMCA lobbyists.

First, it is quite clear that the WIPO treaties do not require any measures directed at devices as such, in contrast to behaviour. The drafters of the treaty could have said otherwise, but they did not. And not for lack of consideration. They were more than aware of what they were doing on this point.

The folly of directing legislation that targets devices is easy to illustrate. If DMCA type legislation had been in place in 1980, we would likely be living in a world without VCRs and without personal computes. It's really that simple.

Many Canadians would prefer protection from TPMs and DRM rather than for them. There may be a compromise provided that the legislation does not target devices as such, or at least deals only devices the primary purpose of which is illegal circumvention. And it will be very important if a compromise is to be reached that circumvention be permitted for any purpose that is legal, such as fair dealing, access to public domain works, backup, time, space and format shifting purposes (whether these are permitted by way of fair dealing or other specific exceptions).

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[44] http://cases-dossiers.scc-csc.gc.ca/information/cms/docket_e.asp?32516

[45] ***BMG Canada Inc. v. John Doe***, [2004] F.C.J. No. 525 (QL), [2004] 3 F.C.R. 241; app'l dismissed, [2005] F.C.J. No. 858 (C.A) (QL). See: ***An Overview of the BMG Case***, http://www.moffatco.com/pages/publications/BMG%20Case%20-%20E-Commerce.pdf

ISP Liability

Many Canadians have little patience with the notion of “notice and takedown.” There is nothing in the WIPO treaties that requires this. We have a longstanding, adequate and effective voluntary “notice and notice” system that seems to work quite well. This should be protected by legislation, and not undone by it.

The Canadian Position Generally

As everyone is aware, copyright has become a very political issue in Canada - partly as a result of the very efforts of lobbying organization such as CRIA. I dealt with this in my Fordham presentation last year. This is yet another illustration of “be careful what you wish for.”

New coalitions are forming, one of which is particularly important. This is a coalition known as the Business Coalition for Balanced Copyright, which includes some notable blue chip members such as the Canadian Association of Broadcasters (CAB) (cf. NAB), Canadian Association of Internet Providers, a division of CATAlliance (CAIP), Canadian Wireless and Telecommunications Association (CWTA), Computer and Communications Industry Association (CCIA), Retail Council of Canada (RCC), Google, Yahoo! Canada, and several of Canada’s largest communications companies.

In Conclusion – Watch Lists, Wish Lists and Whither WIPO?

Those who advocate for a CDMCA in Canada fail to understand certain elementary things about Canadian law and politics. Canada remains a sovereign country next door to the USA precisely because it does not like being dictated to by American interests. It may and often, though not always, does come around eventually to accommodating the USA - but usually in Canada’s own time and in Canada’s own way.

There are many ways to implement and ratify the 1996 WIPO treaties, but Canadians should only accept a way that is beneficial to Canada. We should take into account the advice of knowledgeable American experts. When influential Americans such as Bruce Lehman, the architect of the WIPO treaties and the DMCA tell us to learn from American mistakes, we ought to listen. Another example is Bill Patry, who tells us that the USA is being a bully and we should stand up and fight back.

Canada has always provided strong protection for creators and corporate copyright interests, and in very many important ways has done so for much longer and for much more principled reasons than the USA. This has provided and will continue to provide great financial benefit to the USA. And it actually does serve to benefit real creators

to some extent, which is one of the main things that copyright law is supposed to be about - in case anybody has forgotten.

Canadians are increasingly awakening to the ironies arising from weaknesses in American copyright law and the ironies of the demands being driven by American interests. The “born again” extreme American vision of copyright law is being considered in context by a country that has, for at least 85 years, provided far greater protection to American nationals and their creations than vice versa.

If there were a mechanism in the ***United States Trade Act of 1974*** to put the USA on the priority watch list, it would surely needs to be invoked. As I have shown, the USA has far more to worry about than Canada in terms of the inadequacies of its copyright regime. There is no need for Canada to defend itself or even to be defensive about alleged weakness in its copyright regime. If anything, Canada’s regime is too weak in its protection of users’ right, particularly in respect of fair dealing issues and exceptions that are available in the USA.

The fact that the USA has chosen to implement the 1996 WIPO treaties in an excessive and counterproductive way does not for a moment entitle it to demand that other countries join in its folly. The USA is itself being watched by the WTO[46] on the “Special 301" issue and is vulnerable if it actually acts unilaterally. Meanwhile, if it continues to preach too loosely and profusely, it will continue to loose credibility - which may be even a more serious consequence.

Just a few days ago, EU Ambassador John Bruton, Head of the European Commission Delegation to the United States, reminded the USA that it needs to get the American house in order:

> *"At a time when there is increasingly impressive cooperation between the EU and the U.S. in combating intellectual property infringements, it is high time for America to resolve our outstanding IPR disagreements."*
>
> *"As the stakes continue to grow in the intellectual property arena, the U.S. should not weaken its voice in the debate by ignoring treaty obligations and WTO decisions. American delay on fixing the 'Irish Music' and 'Havana Club' cases diminish the arguments that both the U.S. and EU countries have against China and other countries that continue to tolerate widespread intellectual*

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[46] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm

property rights infringement." [47]

The USA does much good in the IP world and there is much to admire in its IP regime. But there is also more than a little inconsistency and even hypocrisy in American positions at times and the USA is in danger of becoming the country that everyone loves to hate in IP. Therefore, it may be fitting for America to step back from its overwrought “Special 301" regime and take some time out to step in front of and look straight into the mirror.

Howard Knopf
Ottawa Canada and New York, USA
Mar 26, 2008

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[47] http://www.businesswire.com/portal/site/google/?ndmViewId=news_view&newsId=20080319006105&newsLang=en