

# CANADIAN COPYRIGHT UPDATE

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(views are personal and not necessarily those of my firm or clients)



# What I will cover?

This is NOT a “year in review”, which is available elsewhere. Rather, in my ten minutes, a few recent important developments, namely:

- Canada’s Copyright Board at the Cross Roads
- A pending Supreme Court of Canada case re:
  - technological neutrality
  - whether tariffs can be “mandatory”
- A recent decision from the Supreme Court of Canada on what constitutes “substantial similarity” and the role of expert evidence in copyright infringement cases
- The Status of Copyright “Trolling” in Canada – the Aronovitch decision re costs of taking the position to take “no position”
- Notice and notice, Bill S-4 & Privacy
- Bill C-8: Anti-counterfeiting legislation

# Copyright Board

- The Parker Report of 1935 re “sound pictures” and “broadcasting”
- *Plus ça change...*
- Today, it takes 4 years for a hearing and 2+ years to decision, which is often reversed
- Decisions are almost always significantly retroactive
- Cases can cost > \$1 million to launch or even defend
- Canada has largest tribunal of its kind anywhere in world
- 16 FTEs + up to five full time members & budget of \$3.5 million
- Still, the Board wants more resources and has an longstanding campaign to achieve this goal

# What is the Problem?

- The Board does not require an applicant to state the basic facts or legal basis of a proposed tariff at the outset
- Board considers itself above and removed from the normal rules of evidence, e.g. hearsay
- Board sees no need to qualify “experts” – who are often “perennial” and far from independent and whose testimony should simply be excluded
- Board permits serious abuse of interrogatory process
- Counsel not always apparently intent on minimizing costs and delays
- Small Board bar and needless culture of complexity
- Little effort at pro-active case management by Board
- Board is resistant to imposition by Government of regulations that would improve its procedures and shorten timelines, reduce costs to parties, and reduce the budget of the Board itself
- Board is unique amongst comparable tribunals in Canada with absence of externally imposed procedural regulations and/or rules
- Its cases are rarely legally or factually complex but cost the taxpayers usually more than \$1 million for adjuration, not to mention costs to parties
- Competition authority is to date disinterested
- Regulatory capture?

# e.g. Recent Re:Sound “Fitness” Tariff (2008-2012) “Are We There Yet?”

- Tariff was filed June 2, 2007
- Board Hearing April 27 to May 11, 2010
- Board Decision July 6, 2012
- Judicial Review Application Filed August 7, 2012
- Hearing by Federal Court of Appeal (“FCA”) November 19, 2013
- Decision by Federal Court of Appeal February 24, 2014
- Parties File Settlement March 21, 2014
- Board approves settlement agreement with minor adjustment March 27, 2015
- Naturally, it’s retroactive.

# What is the Solution?

- Benjamin Franklin: “If you want something done, ask a busy person”
- Current Working Group suggestions may only make things worse
- Very short term:
  - The right new Chair who can hit the ground running in terms of expertise and experience in copyright & administrative law + preferably competition, communications &/or other related areas
- Medium term:
  - Regulations pursuant to already enacted authority to deal with steps of a proceeding, timelines, discovery/interrogatories, “experts”, rendering of decisions, etc.
  - Possibly even costs of objectors and interveners, though this may require legislation

# The Pending SCC Case

- *Canadian Broadcasting Corporation v. SODRAC*  
SCC#35918
- Concerning
  - technological neutrality
  - Mandatory Tariff Theory
- Mandatory Tariff Theory says that one infringing copy of one work in the repertoire of a collective triggers liability for entire tariff retroactively and in future – i.e. potentially millions
- Why this cannot be so
- Where this now stands at the Copyright Board, the lower courts and the Supreme Court of Canada

# Substantial Similarity According to the Supreme Court of Canada

- The curious and important case of *Cinar v. Robinson* [2013] 3 S.C.R. 1168 – 19 years to justice
- Notable that this appeal from a Quebec case was written by the Chief Justice, who also penned the *CCH v LSUC* decision – the “Magna Carta” of Canadian copyright law
- The notion of “cumulative” and “holistic”
- The “dissection” approach of US “abstraction-filtration-comparison” approach ill-suited to types of works that don’t lend themselves to a “reductive analysis”
- Cf. Lord Hoffman in *Designers Guild*:  
*Generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author's skill and labour, tends to lie in the detail with which the basic idea is presented. **Copyright law protects foxes better than hedgehogs**. In this case, however, the elements which the judge found to have been copied went well beyond the banal and I think that the judge was amply justified in deciding that they formed a substantial part of the originality of the work. (emphasis added)*
- *The role of experts*
- Damages basis – cf. defamation



# Copyright Trolling in Canada

- The high cost of taking “no position”
- The role of an ISP
- Why only 6% of costs of \$346,000 in allegedly entitled costs were awarded
- Only \$4,500 of >\$178,00 legal costs awarded
- The gathering perfect storm of “notice and notice” & Bill S-4 and the problematic message sent by #TekSavvy
- Will the Courts still have any role?
- Is there recourse for individuals whose privacy rights are trampled?

# Notice & Notice & Bill S-4

- The dangers to privacy
- The massive delivery of speculative invoice demands being slipped into notices
- Why are ISPs not standing up for their customers?
- Bill S-4 would allow “disclosure without consent to another organization - for example, from one business to another - in order to investigate a breach of an agreement or a contravention (or anticipated contravention) of a federal or provincial law where it is reasonable to expect that obtaining the consent from the individual for the disclosure would compromise the investigation (new section 7(3)(d.1)).” according to Legislative Summary
- What’s next?

# Bill C-8 and More Fog about Grey Marketing

My offer to assist the Parliamentary Committee in 2013 that was refused:

*Here are the main points I would address, if invited. I would need some lead time to prepare a proper brief:*

- 1. The numerous references apparently intended not to interfere with the free flow of **parallel imports** are inconsistent and present potentially serious drafting problems that require further study. The bill should propose appropriate declaratory language for both the **Copyright Act** and **Trade-marks Act** that makes it absolutely clear that, with the exception of the sui generis book importation scheme now found in s. 27.1 of the **Copyright Act**, neither of these acts shall in any way restrict the importation, distribution or sale of any product, whether tangible or digital, that has been manufactured or first put on the market anywhere in the world with authorization*
- 2. It would be **mistaken and harmful to criminalize routine copyright and trade-mark infringement activity** and there is no need to add additional criminal sanctions, much less wiretap enablement provisions or any provisions that would authorize the warrantless search of travelers to determine whether they have infringing items in their baggage or on their electronic devices. Past experience shows the potential for abuse of such provisions both by the state and by the private sector. See [R. v. Laurier Office Mart Inc.](#), 1995 CanLII 7322 (ON SC)*
- 3. The Bill should contain no provisions that are not essential for the purpose of combatting counterfeit or pirated products. In particular, such provisions as those that would fundamentally change the definition of trade-mark and would allow an examiner to be able to block a registration on the basis that “the trade-mark is not distinctive” should be removed from the Bill. Such changes to the **Trade-marks Act** would upset a careful balance and practices that have worked well since 1954, and are totally inessential and irrelevant to the purpose of combatting counterfeiting.*
- 4. The Committee should resist expected attempts to have Bill deal with transshipment (aka “in-transit shipments”). Customs officers cannot possibly be expected to understand enough about international law to decide what shipments should or should not go forward. There is ample evidence of harmful interference with legitimate shipments of drugs that were mistakenly interfered with even in such a “liberal” jurisdiction as [The Netherlands](#). See **New EU Customs Regulation Might Allow Wrongful Seizures Of Generic Drugs In Transit, NGOs Say**, Intellectual Property Watch, October 17, 2013 <http://bit.ly/HAqqDe>; **ACTA: Risks of Third Party Enforcement for Access to Medicines** American University College of Law, 10-01-2010 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1001&context=research>*

# Conclusion



*"Did Yogi Berra ever say anything besides  
'It ain't over till it's over'?"*