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HOUSE OF COMMONS INDU COMMITTEE  
S. 92 Statutory Review of the Copyright Act Review  
BRIEF  
December 10, 2018

1. Introduction

The following is based upon my presentation<sup>1</sup> on November 28, 2018 to the House of Commons INDU Committee for its s. 92 Statutory Review of the Copyright Act Review. I may take the liberty of seeking to provide further detail, modification, or clarification in the next weeks or months on some of the more technical aspects of this brief.

2. We need to clarify that copyright board tariffs are not mandatory for users

The elephant in the room is the issue of whether Copyright Board tariffs are mandatory. They are not. I successfully argued that case in the Supreme Court of Canada (“SCC”) three years ago<sup>2</sup> – but most of the copyright establishment is in denial or actively resisting. A tariff that sets the maximum for a train ticket from Ottawa to Toronto is fine – and we used to have such tariffs before deregulation. But travellers were always free to take the plane, bus, their own car, a limousine, their bicycle or use any other legal and likely unregulated means.

There is intense litigation ongoing between Access Copyright and York University – now in the appellate stage and other litigation in the Federal Court involving school boards. Unfortunately, York failed in the trial court to address the issue of whether final approved tariffs are mandatory.<sup>3</sup> Hopefully, the FCA and maybe the SCC if necessary will get this right in due course. But we can’t be sure, and the other side is lobbying you heavily on this issue, including

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<sup>1</sup> In my own capacity and not on behalf of any client interest.

<sup>2</sup> [\*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.\*](#), [2015] 3 SCR 615, 2015 SCC 57. See paras. 101 – 113. The factum presented to the SCC as prepared by myself, Prof. Ariel Katz and Prof. David Lametti, as he then was, is available [here](#).

<sup>3</sup> See Ariel Katz, [\*Access Copyright v. York University: An Anatomy of a Predictable But Avoidable Loss\*](#), July 26, 2017 blog,

with such devious and disingenuous suggestions as imposing a statutory minimum damages regime of 3 – 10 the tariff amount on the totally inappropriate basis of symmetry with the SOCAN regime – which is the way it is for good reasons that go back more than 80 years but would be totally inappropriate for tariffs outside the performing rights regime.

I urge you to codify and clarify what the SCC has said in 2015, consistently in turn with previous SCC and other jurisprudence going back decades – that Copyright Board tariffs are mandatory only for collectives but optional for users, who remain free to choose how they can best legally clear their copyright needs.

My suggestion is that Parliament use the well know legislative drafting technique of stating “for greater certainty”. This phrase already occurs 14 times in the *Copyright Act*, including for example s. 13(7). which states:

(7) *For greater certainty, it is deemed always to have been the law that a grant of an exclusive licence in a copyright constitutes the grant of an interest in the copyright by licence.*  
*R.S., 1985, c. C-42, s. 13; 1997, c. 24, s. 10; 2012, c. 20, s. 7.*  
 (highlight added)

I am suggesting that Parliament should now declare that:

*For greater certainty, it is deemed always to have been the law that when the Copyright Board approves or certifies a tariff, whether interim or final, the collective to which that tariff applies cannot demand higher royalties or demand more onerous related terms and conditions than those approved by the Board, but the duty to pay such royalties and comply with their related terms and condition applies only to a user who has paid or offered to pay the royalties under such a tariff. A user who has not offered to pay such royalties may nonetheless be liable for copyright infringement.*  
 (highlight added)

### 3. We need to keep current fair dealing purposes in s. 29 and include the words “such as”

The SCC had already included the concept of education in fair dealing before the 2012 amendment kicked in. For 42 years, The USA has allowed for fair use “for purposes **such as** criticism, comment, news reporting, teaching (including multiple copies for classroom use)”. (emphasis and highlight added). I ask you to ignore siren calls urging you to delete the word “education” from s. 29 and urge you to add the two little words “such as”. This works in the USA and will work here too.

### 4. We Need to Ensure that fair dealing rights cannot be overridden by contract

The SCC has said in *Royal Trust v. Potash*, [1986] 2 SCR 351, 1986 CanLII 34 (SCC) that consumers cannot lose their statutory rights by contracting out or waiver in the case of, for example, paying off a mortgage after 5 years. We need to clarify and codify a similar principle that fair dealing rights and other important exceptions cannot be lost by contracting out or by waiver.

### 5. We need to explicitly make technical protection measures (“TPM”) provisions subject to fair dealing

We need to clarify “for greater certainty” that users’ fair dealing rights apply to circumvention of technical protection measures – at least for fair dealing purposes in s. 29 and for many if not all of other exceptions provided in the legislation as appropriate. This could be done by inserting a new section 41.1(5) (based upon current numbering) along the following lines:

*For greater certainty, it is deemed always to have been the law that s. 41.1(1) does not apply to any acts permitted by sections 29, 29.1 and 29.2.<sup>4</sup>*

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<sup>4</sup> The Committee may wish to recommend inclusion in the suggested provision of some or all of the additional “users’ rights” provisions included in ss. 29.21 to 30.04 of the current legislation.

## 6. We need mitigation for the nation

We need to mitigate the damage done by copyright term extension under both the Harper government (as deeply buried in an omnibus budget bill) and by this Government in the USMCA. These concessions could cost Canada hundreds of millions a year – and must be given now to the EU and all our other WTO TRIPs treaty partners because of the most favoured nation and national treatment principles to which Canada is bound. One small but useful mitigation measure might be the imposition of renewal requirements and fees for those extra years of protection that are NOT required by the Berne Convention.<sup>5</sup>

## 7. We need to look carefully at enforcement issues.

I know you are under immense pressure from some very well-funded and powerful lobbyists and lawyers on website blocking. I am not convinced that we need any new legislation on this issue, but I am looking into it carefully and may perhaps write about this issue further in another forum, and, if so, will provide you a copy of whatever I may publish. In the meantime, you should be looking at the existing (not the controversial proposed) provisions in s. 115A of the Australian *Copyright Act* and UK case law.

The existing provision in [s. 115A of the Australian Copyright Act](#) has been considered by the Federal Court of Australia in *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434<sup>6</sup>.

The Committee may also wish to look at recent UK jurisprudence concerning website blocking, which is based upon s. 97A of the *Copyright, Designs and Patents Act* 1988 of the UK.<sup>7</sup>

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<sup>5</sup> Gangjee, Dev S., *Copyright Formalities: A Return to Registration?* (July 30, 2016). In R Gibling and K Weatherall (eds), *What if We Could Reimagine Copyright?* (ANU Press, 2017) 213.. Available at SSRN: <https://ssrn.com/abstract=2923897>

<sup>6</sup> <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca1434>

<sup>7</sup> [The Football Association Premier League Ltd v British Telecommunications Plc & Ors](#) [2017] EWHC 480 (Ch) (13 March 2017); [Union Des Associations Européennes De Football v British Telecommunications Plc & Ors](#) [2017] EWHC 3414 (Ch) 9 (21 December 2017); [The Football Association Premier League Ltd v British Telecommunications Plc & Ors](#) [2018] EWHC 1828 (Ch) (18 July 2018); [Matchroom Boxing Ltd & Anor v British Telecommunications Plc & Ors](#) [2018] EWHC 2443 (Ch) (20 September 2018)

The Australian and UK jurisprudence are important reference points because they feature the involvement of superior court common law judges using statutes that ultimately derive from the same legislative DNA as Canada's *Copyright Act*, namely the UK *Copyright Act* of 1911. This jurisprudence shows evident concern for the rule of law and natural justice, which was plainly lacking in FairPlay's proposal to the CRTC that was rightly rejected on jurisdictional grounds. The injunctions are limited in scope and duration. They show concern for such issues as they "primary purpose" of the website(s) in question.

It is far from clear that Canada needs special legislation to address website blocking. The controversial decision of the SCC in [Google Inc. v. Equustek Solutions Inc.](#), [2017] 1 SCR 824, 2017 SCC 34 if anything already goes further than necessary to protect IP owners, including copyright owners and confirms the jurisdiction of superior courts to issue worldwide deindexing orders. This case was launched by a presumably relatively small business. The litigants pursuing worldwide website blocking orders and the backers of FairPlay are in many cases very large vertically integrated corporations that can well afford to litigate in the normal manner with full regard for due process and the rule of law. Sweeping injunctions – especially those with an extraterritorial reach – are very exceptional and must not be dispensed routinely and certainly never by an administrative tribunal (including the Copyright Board) or anyone other than a superior court judge.

Parliament may need to somehow address the issue of mass litigation against thousands of ordinary Canadians who happen to "associated with an IP address that is the subject of a notice under s. 41.26(1)(a)" and who are alleged to have infringed a movie that could be streamed or downloaded for a few dollars.<sup>8</sup> This litigation is not "akin to a parking ticket".<sup>9</sup> There are systematic efforts to extract "settlements" of thousands of dollars from terrified internet account holders who may never have heard of BitTorrent until they get that dreaded registered mail letter. These efforts may succeed in many cases because access to justice is very difficult in these circumstances. If the government would only do its job on the notice and notice regulations, that

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<sup>8</sup> See [Rogers Communications Inc. v. Voltage Pictures, LLC](#), 2018 SCC 38 paras. 35, 41.

<sup>9</sup> See also Howard Knopf, *Voltage Pictures and the Massive Mass Litigation Mess in Canada*, October 19, 2018 blog, <http://excesscopyright.blogspot.com/2018/10/voltage-pictures-and-mass-litigation.html>

might be a good start.

#### 8. We need to repeal the blank media levy scheme

We need to get rid of the zombie-like levy scheme Part VIII of the *Copyright Act* and stop listening to the big three multinational record companies who continually conjure new kinds of taxes on digital devices, ISPs, internet users, the cloud, and whatever else looks lucrative. Even the USA doesn't entertain such fantasies.

#### 9. We need to stop this five years review ritual

We have had two major and two medium scale revisions to Canadian law in the last 100 years a few more focused ones in between. There is no need for periodic copyright policy review. It is lucrative for lobbyists and lawyers but is a waste of time – including Parliament's time. Reacting reflexively and prematurely to new technology is usually very dangerous. If we had listened to the whining of the film industry in the early 80's, the VCR would have become illegal and Hollywood as we know it might have committed economic suicide. Who of us of a certain age can forget the words of Jack Valenti, the famous Hollywood lobbyist, who told Congress "I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone."

Particular issues can be addressed as needed, which is the way most other countries cope with copyright.

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