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Five Years After Its Modernisation: Canadian Copyright Law Poised for Its Review

1. Introduction

More than 15 years after the WIPO treaties¹, the Canadian *Copyright Act*² was amended to reflect the impact of digitisation and the Internet on the use of works and other protected subject-matters. The apparent tardiness in implementing the new norms dictated by the treaties is not due to inaction over the years since then. In 1997, that is just one year after these treaties, Phase 2 of the revision process of the *Copyright Act* was adopted by Parliament³. Given the time frame, the issue of the implementation of the recent treaties had been raised; but the additional work that such an exercise entailed was perceived as too demanding to be done at that point in time without compromising the efforts that had already been deployed to achieve the completion of the pending revision. In the following ten years, three bills to implement the WIPO treaties were introduced in the House of Commons⁴, but it was with the fourth attempt that the statute was amended by the *Copyright Modernisation Act* in 2012⁵.

The *Copyright Modernisation Act* provided more than an opportunity to implement the WIPO treaties. Just as their implementation in the European Union through the Information Society directive led to a catalogue of exceptions⁶, one of the prominent features of the 2012 amendments is the introduction of many new exceptions in addition to the reformulation of some existing ones that needed to be adapted to the digital environment. The overall effect of the amending process is a *Copyright Act* that is not entirely redrafted, but that is infused with a renewed understanding of its purpose. The breadth of the changes was considered so important that Parliament included a mandatory parliamentary review every five years⁷. The current year thus provides the appropriate opportunity to reflect on the impact that these amendments have had on the development

¹ WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

² R.S.C. 1985, c. C-42 (hereinafter *Copyright Act*).

³ *Act to Amend the Copyright Act*, S.C. 1997, c. 24.

⁴ House of Commons of Canada, Bill C-60, *Act to Amend the Copyright Act*, 38th Legislature, 1st Session, 53–54 Elizabeth II, 2004–2005, First reading: 20 June 2005; House of Commons of Canada, Bill C-61, *Act to Amend the Copyright Act*, 39th Legislature, 2nd Session, 56–57 Elizabeth II, 2007–2008, First reading: 12 June 2008; House of Commons of Canada, Bill C-32, *Act to Amend the Copyright Act*, 40th Legislature, 3rd Session, 59 Elizabeth II, 2010, Second reading: 5 November 2010.

⁵ S.C. 2012, c. 20.

⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, Art. 5.

⁷ *Copyright Act*, s. 92.

of Canadian copyright law. Because it takes time for litigious cases to make their way through the judicial system, it is essentially in the very recent years that a body of case law on the interpretation of the Canadian *Copyright Act* since its 2012 amendment has started to emerge. In the construction that Canadian courts have given to the new rights and exceptions (2) and to the provisions that deal with the more technical aspects that flow from the use of the Internet as a communication medium (3), it should be possible to discern more precisely the copyright environment in which protected works and other subject-matters circulate in Canada today.

2. Rights and Exceptions

A relatively late implementation of the WIPO treaties does not mean that the copyright exploitation of works and other subject-matters in the digital environment takes place in a legal vacuum. The existing right “to communicate to the public by telecommunication”⁸ had been identified as a vector for the communication of works early in the process of adapting the law to the Internet⁹. It may even be that the smooth evolution of this right into the sphere of Internet communications in Canada partly explains the apparent lack of urgency in responding fully to the requirements of the international instruments. Be that as it may, it remained necessary to introduce new rights that specifically target behaviour that is associated with the use of the Internet (2.1), just as the exercise of implementing the 1996 treaties was an invitation to revisit the copyright exceptions (2.2). What will complicate the situation is the fact that the Supreme Court of Canada, also in 2012, rendered six decisions in copyright cases¹⁰ that, even though they were based on the law as it stood before the amendments, expressed or reiterated interpretation cannons that may affect the meaning of the new provisions.

2.1. Rights

The implementation of international copyright obligations in Canada has usually been achieved in a minimalist fashion¹¹. The same approach was adopted in 2012. This does not mean, however, that the interpretation issues that these amendments raise are necessarily simple.

Since Canadian law had already identified the right “to communicate to the public by telecommunication” as the appropriate right to govern Internet communications¹²,

⁸ *Copyright Act*, s. 3 (1) (f).

⁹ The first official confirmation came in a decision rendered by the Copyright Board of Canada, *SOCAN v. Canadian Association of Internet Providers*, [1999] C.B.D. No 5, that was upheld by the Supreme Court of Canada in *SOCAN v. Canadian Association of Internet Providers*, 2004 SCC 45.

¹⁰ *Entertainment Software Alliance v. SOCAN*, 2012 SCC 34; *Rogers Communications Inc. v. SOCAN*, 2012 SCC 35; *SOCAN v. Bell Canada*, 2012 SCC 36; *Alberta (Education) v. Access Copyright*, 2012 SCC 37; *Re: Sound v. Motion Picture Theatre Association of Canada*, 2012 SCC 38; *Reference re Broadcasting Regulatory Policy 2010–167 and Broadcasting Order CRTC 2010–168*, 2012 SCC 68.

¹¹ On the history of Canada’s relationship with the Berne Convention, see S. Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism 1842–1971*, Vancouver, UBC Press, 2013.

¹² *Supra*, note 9.

the main question that remained was to resolve what to do with the making available right of the WIPO treaties. The decision was to consider it as a form of communication to the public by telecommunication:

For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public¹³.

Parliament was therefore confirming the conclusion to which interested parties had come with respect to the extension of the right to communicate to the public by telecommunication to the diffusion of works over the Internet. The application of this new understanding of the right to communicate to the public by telecommunication has been studied in two recent cases where the fact patterns turn on two different types of behaviour.

The first judgement stems from an application for an interlocutory injunction against purveyors of set-top boxes that can be connected to standard television equipment so users can view and download programs that are streamed from unauthorised sites¹⁴. Because the decision is rendered in an interlocutory context, the judge could not go deeply into the merits of the case. Nevertheless, because she had to determine if there was a serious issue to be tried, Justice Tremblay-Lamer was in a position to provide some inkling of what the courts are likely to consider in the *Copyright Act*, as it reads today, as elements that govern such situations. She includes among the possible bases for the action undertaken by the plaintiffs, in addition to the right to fix and reproduce broadcast signals, the right to communicate to the public by telecommunication that specifically includes the making available right¹⁵. She also makes the point of refusing to apply in this context the common carrier exception that shields from liability entities that merely provide “means of telecommunication necessary for another person to so communicate the work [...] to the public”¹⁶. It remains to be seen to what extent a provision that is conceptually linked to an ephemeral activity, communication, is relevant to an activity that centres on the sale of tangible products.

An activity that clearly belongs to the Internet environment is that of framing what appears on the screens of third parties so that what can be seen by a member of the public seems to emanate directly from the entity that operates the website that the person is consulting. The framing issue was at the heart of a judgement rendered by the Superior Court of Justice of Ontario in a case opposing Trader Corporation and CarGurus, Inc.¹⁷ Both companies are digital marketplaces that advertise vehicles sold by various dealers.

¹³ *Copyright Act*, s. 2.4(1.1).

¹⁴ *Bell Canada v. ITVBox.net*, 2016 FC 612, appeal dismissed in *Mtlfreetv.com v. Bell Canada*, 2017 FCA 55.

¹⁵ *Bell Canada v. ITVBox.net...*, ¶ 21.

¹⁶ *Bell Canada v. ITVBox.net...*, ¶ 22. The common carrier exemption is in s. 2.4(1)(b) of the *Copyright Act*. See *infra* the text accompanying note 53.

¹⁷ *Trader Corporation v. CarGurus Inc.*, 2017 ONSC 1841.

To that end, photographs of the vehicles are shown on the websites. More than 150,000 photographs over of which Trader Corporation held copyright had been framed by CarGurus, Inc. The judge did not write extensively to explain that framing was a form of making available. After quoting the provision that stipulates that the making available of a work is included in the right to communicate a work to the public by telecommunication, he goes on to state that:

When CarGurus displayed the photo on its website, it was making it available to the public by telecommunication (in a way that allowed a member of the public to have access to it from the place and at a time individually chosen by that member), regardless of whether the photo was actually stored on CarGurus' server or on a third party's server¹⁸.

Consequently, the posting of screen elements that belong to a third party and that are framed so as to appear to come from the owner of the website who resorts to such a practice infringes the copyright of the third party over such elements.

If the interpretation of the right to communicate to the public by telecommunication is a necessary step in the adaptation of copyright law to the internet environment, other rights may also have an important role to play in that process. Of special significance in Canada is the relevance of the concepts of authorisation and inducement as autonomous rights of action. The structure of section 3(1) of the *Copyright Act* is such that the legislator has provided for the existence of a right to authorise any of the protected acts set out in that provision as distinct rights that come within the ambit of the copyright owners' rights¹⁹. Thus, in addition to the right to communicate to the public by telecommunication, there exists a right to authorise the communication to the public by telecommunication just as there is a right to authorise the reproduction of a work on top of a right to reproduce a work. Canadian copyright law does not know of the US concepts of contributory infringement and vicarious liability. It has come to be understood that the right to authorise more or less stands as their equivalent. The difficulty with this position is that it has always been very difficult to successfully apply the right to authorise in situations where the "primary" rights would not be properly relevant²⁰.

It is in this context that the legislator has introduced in 2012 a provision designed to curb the enabling of copyright infringement:

It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service²¹.

¹⁸ *Trader Corporation v. CarGurus Inc.*, ¶ 33.

¹⁹ After an introductory paragraph and a list of ten rights in ten sub-paragraphs, the section reads "and to authorize any such acts." *Copyright Act*, s. 3(1).

²⁰ On this issue, see Y. Gendreau, *Authorisation Revisited*, (2001) 48 J. Copr. Soc'y U.S.A. 341.

²¹ *Copyright Act*, s. 27(2.3).

This enabling right thus represents an interesting development in the attempt to govern behaviours that may impact the use of protected works.

However, it is not this right that was at the heart of the decision by the Federal Court, upheld by the Federal Court of Appeal, in a case that was opposing major Canadian telecommunications media to sellers of “set-top boxes”²², i.e. “electronic devices that can be connected to any standard television set in order to provide additional functionalities to that television, on which they have previously installed and configured a set of applications”²³. In a decision on a motion for an interlocutory injunction, the judge does not refer to the enabling right, but instead to the concepts of inducement and authorisation²⁴. Because the decision is rendered in an interlocutory procedure, the judge cannot examine fully how these concepts apply to the facts of the case; she can only conclude, as she did, that they raise an issue to be determined on the merits at trial. Nevertheless, one can note that the reference to inducement is not warranted by any provision of the statute. One may wonder if the term of inducement is meant as a synonym of enablement. Yet, judges are normally wont to use exact terminology and, since she refers to it on more than one occasion, one can only believe that it was a deliberate choice on her part. If she was indeed alluding to section 27(2.3) of the *Act*, she may have been labouring under a false assumption: section 27(2.3) relies on the provision of a *service* to enable acts of infringement and not on the offering of technical equipment that may bring about such results. This is why it is easier to believe that the reference to inducement is intended to be to a notion that is different from that of enablement.

Could it be that the mention of authorisation in the same breath is meant to provide a more solid statutory grounding for the decision? Given the difficulty to interpret the right of authorisation in a manner such as to allow copyright owners to rely on it successfully, one can only look forward to the decision on the merits to see if some life can indeed be instilled into it.

The near future is thus rife with opportunities to detect new circumstances in which copyright rights can be relevant. It should not necessarily mean, however, that copyright owners will automatically be able to enforce their rights. Exceptions play a very large role in the definition of the copyright monopoly in the age of the Internet.

2.2. Exceptions

Because the Internet provides unprecedented opportunities to disseminate content, the wish to extend to it the application of copyright rules has been matched – not to say, in some circles, exceeded – by the call for exceptions that would facilitate access to copyright protected content. Canadian copyright law has provided a very fertile environment in which to respond favourably to this trend. The year 2012, when the *Copyright Modernisation Act* was adopted, was also one in which the Supreme Court of Canada rendered

²² *Supra*, note 14.

²³ *Bell Canada v. ITVBox.net...*, ¶ 5.

²⁴ *Bell Canada v. ITVBox.net...*, ¶ 23–24.

five decisions in one day, decisions that reflect an approach to copyright law that is most favourable to the users of works²⁵. Two of them dealt specifically with the recognition of copyright exceptions: *SOCAN v. Bell Canada* was about fair dealing for the purpose of research²⁶ and *Alberta (Education) v. Access Copyright* pertained to fair dealing for private study²⁷. Theoretical foundations that favour the users of works had started to be laid 10 years earlier by the same court in the case of *Théberge v. Galerie d'Art du Petit-Champlain inc.*²⁸ when it stated that:

The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them²⁹.

This approach in contexts where an exception may be relevant was further developed by the Court two years later in *CCH Canadian Ltd. v. Law Society of Upper Canada*:

the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver has explained: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation"³⁰.

The vision of the Supreme Court of Canada at the time was shared by Parliament when it adopted the *Copyright Modernisation Act*: many exceptions, most of which were called for by the digital environment, were introduced³¹. Some of the old standing exceptions, of course, continue to be relevant in that context. To wit, three recent cases involved the exception of fair dealing for the purpose of research when works are used over the Internet. They will be briefly examined before what appears to be the first decision about the best known new exception: the exception for the use of non-commercial user-generated content over the Internet.

²⁵ See the first five decisions in, *supra*, note 10.

²⁶ *Copyright Act*, s. 29.

²⁷ *Copyright Act*, s. 29.

²⁸ *Théberge v. Galerie d'art du Petit-Champlain inc.*, 2002 SCC 34.

²⁹ *Théberge v. Galerie d'art du Petit-Champlain Inc.*, ¶ 31.

³⁰ 2004 SCC 13, ¶ 48 (references omitted).

³¹ For a general overview of these exceptions, see: Y. Gendreau, *Les exceptions au droit d'auteur: vers une clarification des enjeux?*, (2016) 28 Cahiers de propriété intellectuelle 455.

The plaintiff in two of the fair dealing cases was a small news company, Blacklock's Reporter, that offered individual and institutional subscriptions for access to its news bulletins which were protected by a pay wall. Titles and teasers would be visible by all, but the full articles would only be available to the subscribers. Defendants in both cases made use of copies that had been legitimately obtained and claimed that they had done so in order to check the accuracy of the stories. Fair dealing for the purpose of research formed the basis of their defences. In the first case, the court found that, even if the original intention of the users had been so, "nothing came of it. Their stated objective therefore is disingenuous"³². In the second one, however, the article had been circulated among six persons who concluded that no further action was necessary; their use was thus considered akin to reading, an activity that has never been considered part of the copyright monopoly³³. The credibility of the defendants' versions made all the difference, and the decisions show that courts are willing to probe the situations beyond the assertions made by the users.

Fair dealing for the purpose of research was also at stake in the *CarGurus* case. Because the Supreme Court, in the *CCH Canadian* decision³⁴, had said that the purpose of an exception must be examined from the perspective of the user or consumer, the company that had framed the plaintiff's photographs argued that the users of their website visited it in order to look up information about vehicles. The court was willing to give a broad interpretation to the term "research" to include this type of use, just as the Supreme Court of Canada had done in *SOCAN v. Bell Canada* in 2012³⁵, but it added that the defendant's own purpose should be considered and that this "purpose was strictly a commercial one"³⁶. It also amounted to an unfair use because the photographs, which appeared exactly as they were on the original site, were displayed until the vehicles were no longer listed. The defendant could have taken its own photographs of the vehicles, just as the plaintiff had done for the photographs over which it held copyrights. Instead, it was free riding on the plaintiff's rights and was competing "squarely with Trader in the Canadian digital marketplace arena"³⁷.

Facts are obviously key to understanding the reasoning of the courts. However, the willingness of the court in the *CarGurus* case to take into consideration the behaviour of the person who decides to make use of the works marks a step in the interpretation of exceptions that may – or may not – lead to a new understanding of the relationship between rights and exceptions since the Supreme Court's decision in *CCH Canadian*. To track its development, cases that do not involve digital uses will be as informative as those that do.

Fair dealing for the purpose of research seems to be one of the exceptions most favoured by the defendants who are sued for copyright infringement. It was also raised

³² *Blacklock's Reporter v. Canadian Vintners Association*, Ontario Superior Court of Justice-Ottawa Small Claims Court, Court File No. 14-SC-00130509-0000, 16 October 2015, 2015 CanLII 65885, ¶ 51.

³³ *Blacklock's Reporter v. Canada (Attorney General)*, 2016 FC 1255, ¶ 36.

³⁴ *Supra*, note 30.

³⁵ *Supra*, note 10.

³⁶ *Supra*, note 17, ¶ 38.

³⁷ *Supra*, note 17, ¶ 39.

in the application for an injunction by the Vancouver Aquarium Marine Science Centre against an individual and his film company who had included, in a video entitled “Vancouver Aquarium Uncovered”, 15 images or segments protected by copyright belonging to the applicant³⁸. The defendants’ video had been posted on YouTube and Vimeo, as well as on their own website. It was also screened on several occasions in British Columbia; members of the public who had attended the screenings at the Vancouver Public Library had paid \$10 for it. The defendants also raised the defence of fair dealing for education to justify their actions³⁹. The judge recognised that these defences formed a fair question to be tried.

The more interesting aspect of this decision, however, stems from the fact that the defendants also relied on the exception for non-commercial user-generated content to exonerate themselves from liability⁴⁰. In this first reported decision on the UGC exception, the context prevented the judge from examining the argument in detail. She did, though, comment on the commercial dimension of the defendants’ activities:

With regard to the issue of commercial purpose, the plaintiff submits that there is evidence to the contrary. The meaning of “commercial” is broader than the absence of making a profit to date, as is attested to by Mr. Charbonneau in his affidavit. The video was shown to audiences who paid an admission fee of \$10 each for the viewing. Further, the Indiegogo fundraising campaign, accessible through the website, also sold such things as early access to the film and a listing in the credits. This issue, which arises within s. 29.21, is relevant to the four items filmed at the aquarium by other individuals⁴¹.

The absence of a commercial purpose is indeed one of the conditions for the successful application of the UGC exception:

It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if
(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes; (...)⁴²

There are other conditions that must be respected for the UGC exception to apply. Yet, these judicial comments may indicate that judges evaluate these conditions with care

³⁸ *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2016 BCSC 625.

³⁹ The purpose of “education” was added to the other purposes of the fair dealing exception in the 2012 amendments. It is in section 29 of the *Act*, the same provision as the one for fair dealing for the purpose of research.

⁴⁰ *Copyright Act*, s. 29.21.

⁴¹ *Vancouver Aquarium*, *supra*, note 38, ¶ 23.

⁴² *Copyright Act*, s. 29.21(1)(a).

and will not be easily distracted from the text of the law in their appraisal of the situation. The UGC exception is unique to Canada. Hong Kong had toyed with the idea of introducing it in its copyright law⁴³. A report from the European Union refers to it⁴⁴. No doubt that, before they adopt it, other legislators may want to keep an eye on its interpretation by Canadian courts in order to understand better its dynamics and the role it can play in the framework of copyright law.

The UGC exception would not have existed without the Internet as a communication medium, and the Internet provides a – relatively – new environment in which to assess the scope of many other exceptions. These interpretations will nourish the application of these exceptions in non-Internet contexts. If an adaptation of copyright law was deemed necessary in the field of rights and exceptions in order to make copyright law relevant in today's technological world, some other – more technical – aspects of the law would require an update as well.

3. Technical Aspects

The WIPO copyright treaties set an example for legislators who want to adapt their copyright regime to the realities of the Internet. In addition to formulating a copyright right to govern the use of protected works and other related subject-matters and recalling the necessity to comply with the three-step test when exceptions are recognised, these treaties innovated with the creation of requirements with respect to technical protection measures (TPM)⁴⁵ and rights management information (RMI)⁴⁶. Any country that wants to implement these treaties must therefore ensure that its rules incorporate the obligations that flow from these provisions. However, a country may find it necessary to devise additional rules that are tailored to the working of the Internet. Consequently, new rules that stem from the specificities of the Internet round off the prescriptions of the Internet treaties (3.1). Be that as it may, it is of particular interest to observe that some general legal mechanisms, especially in the area of procedure, are being challenged by the desire to ensure that the copyright rights be truly respected in practice (3.2). The copyright response to the use of works on the Internet cannot only be found in copyright statutes.

3.1. Technical Rules Specific to the Internet

The technical rules derived from the Internet treaties were the object of much attention by the Canadian legislator. While this care is true of all countries that choose to implement these treaties, the fact that it has taken more than 15 years for Parliament to adopt the necessary amendments means that it had had the time to observe what

⁴³ See: P. K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, (2014) 26 *Intellectual Property Journal*, 175.

⁴⁴ Directorate General Internal Market and Services, Directorate D – Intellectual Property, D1 – Copyright, *Report on the responses to the Public Consultation on the Review of EU Copyright Rules*, July 2014, p. 68.

⁴⁵ WCT, Art. 11; WPPT, Art. 18.

⁴⁶ WCT, Art. 12; WPPT, Art. 19.

other countries had been doing. Some provisions have indeed been drafted in light of such foreign experience. The few court cases that address these new Canadian rules will be discussed after examining two decisions that turn upon the legal regime for technical protection measures.

The video game industry is a very lucrative one and those who head it take active steps to protect it from piracy. In the case of *Nintendo of America Inc. v. King*⁴⁷, the well-known video game company applied for a declaration of liability on the part of the defendants who had allegedly circumvented measures that Nintendo had used to protect and control access to their games. It was claimed that the defendants had also offered devices to achieve that end as well as services to help customers use their products. The case therefore fell squarely within the scope of the Canadian provisions on TPM. These provisions include an interoperability exception⁴⁸, and the respondent was arguing that its products and activities were designed to work with homebrew software, i.e. software that is considered legal. The evidence, however, showed that no such software existed for the games at stake. Moreover, the fact that the defendant's software could be used legally did not prevent that, in the circumstances, it was in reality designed to circumvent the mechanisms that Nintendo had put in place to protect its products. The court adopted the position put forward by the applicant:

Second, although homebrew software may be available on the internet and users of the Respondent's devices *could* theoretically be using them for homebrew, the scale of such activities is dwarfed by the market for illicit and infringing activities (Applicant's Record, pp. 157–158, 294). Indeed, most of the websites purporting to make homebrew software available also offer (in far greater quantities) unauthorized copies of the Applicant's copyrighted games⁴⁹.

After a very minute study of the facts of the case in light of the statutory provisions, the court concluded that the defendant had breached the plaintiff's copyrights and awarded \$11,760,000 in statutory damages as well as \$1 million in punitive damages. During the oral hearings, a settlement agreement had been reached by Nintendo with the individual respondent. The corporate respondent had filed no evidence and did not cross-examine the applicant. As a multinational enterprise that is aware of the precedential value of such cases around the world, Nintendo made a particular request to the court:

Counsel for the Applicant agreed to supply a final consolidated written argument stating the terms that the Applicant would prefer to be the substance of the final determination of the litigation, to be served and filed on Counsel for the corporate Respondent to allow a potential reply.

⁴⁷ 2017 FC 246.

⁴⁸ *Copyright Act*, s. 41.12.

⁴⁹ *Nintendo of America, supra*, note 47, ¶ 121.

The argument was prepared, served, and filed, and by letter dated December 19, 2016, Counsel for the corporate Respondent replied “kindly be advised that the Respondent will not be filing additional representations...”.

In the result, to fairly and appropriately acknowledge the precise, clear, well supported, and effectively uncontested final argument prepared by Counsel for the Applicant, with which I fully agree, I find that the Applicant is entitled to have the final argument, as stated below, as my reasons for decision in the present litigation⁵⁰.

It is difficult to imagine a more resounding victory for a copyright owner. This is all the more so because it occurs at the beginning of judicial interpretations of these new provisions; it does not come after a series of conflicting decisions where a preference for one or the other lines of reasoning is stated. Moreover, it looks like the lengthy and detailed provisions of the *Act* may be considered intimidating to some plaintiffs: in the decision that put an end to the conflict between *Bell Canada* and *ITVBox.net* nearly a year before the *Nintendo* decision⁵¹, the plaintiffs preferred to rely on the more traditional causes of action that are inducement and authorisation, even though the TPM provisions could have been relevant. In one of the Blacklock’s decisions, reference is made to these provisions, but the court does not delve into them in any detail⁵². No doubt that this *Nintendo* decision will dissuade copyright pirates of video games in Canada – and maybe in other countries as well – from embarking on such activities.

“Para-copyright” protection for technical protection measures is mandated by the 1996 WIPO copyright treaties, but other technical issues can also be very important to segments of the Internet industry. A new class of stakeholders has emerged that is wary of potential liabilities, i.e. liabilities that would need to be internalised as operating costs: the Internet service providers. One of their concerns can be dealt with on the basis of an existing legal mechanism, but another one has led to the creation of a new one.

The common carrier exemption is a well-known component of the copyright regimes that address the issue of the retransmission of works. It shields from liability the

person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter⁵³.

Internet entities that provide search engines whose results may direct users to infringing material are obviously keen to come within its scope. The *Copyright Act* indeed treats them better than other Internet service providers because it establishes that only

⁵⁰ *Nintendo of America...*, ¶ 11–13.

⁵¹ *Supra*, note 14.

⁵² *Blacklock’s Reporter v. Canada*, *supra*, note 33, ¶ 37.

⁵³ *Copyright Act*, S. 2.4(1)(b).

injunctions against them may be sought⁵⁴; they can thus avoid court orders that would require them to pay monetary compensation. Of course, several conditions must be met in order to be able to avail themselves of this status⁵⁵. The respondent in the *CarGurus* case, who had framed elements from other car dealers' websites, tried to avail itself of this status in order to avoid liability that would result in the payment of some compensation. The court did not accept this qualification of the respondent's activities:

In this case, CarGurus was not acting as an intermediary to facilitate the user's navigation to the location of online information. The evidence is that from the date of the launch in May 2015 until September 2015, CarGurus only had a basic plan for Dealers, in which the vehicle listings did not contain the name of the Dealer, its address, its Internet address, or any hyperlink to any part of the Dealer's website. While *CarGurus* may have located information about a vehicle and provided it to the user through its website, it did not enable the *user* to find this information where it was located on the Internet (i.e. the Dealer's webpage for that vehicle listing). If the user was interested in a particular vehicle, the user was required to contact CarGurus, which in turn acted as a liaison between the user and the Dealer⁵⁶.

The safe harbour provision for search engines thus works like the common carrier exemption for retransmitting entities. Strict compliance with its conditions is required and courts will not be side-tracked in their analysis of the situations⁵⁷. If this type of safe harbour provision is no entire novelty in a copyright statute, the same cannot be said of another mechanism that entirely owes its existence to the Internet: the "notice and takedown" regime.

The original notice and takedown regime was created by the US *Digital Millennium Copyright Act* of 1998 when that country implemented the 1996 WIPO copyright treaties⁵⁸. Many Canadian observers were critical of its working⁵⁹ and there developed a spin-off equivalent: the "notice and notice" approach⁶⁰. Instead of requiring service providers to take down allegedly infringing material put up on websites by third parties, the "notice and notice" approach merely imposes on such service providers the obligation to forward to the third parties the notice of alleged infringement. It also requires the service provider to:

⁵⁴ *Copyright Act*, s. 41.27.

⁵⁵ *Copyright Act*, s. 41.27.

⁵⁶ *Trader Corporation*, *supra*, note 17, ¶ 49.

⁵⁷ The spirit of the common carrier exemption can also be detected in the concepts of inducement and authorisation as they were presented in the *Bell Canada* case where the judge specifically refers to section 2.4 (1)(b) of the *Act* to state that the various activities surrounding the sale of the preloaded set-top boxes went beyond the sale of mere "means of telecommunication". *Bell Canada v. ITVBox.net*, *supra*, note 14, ¶ 22.

⁵⁸ *Copyright Act* of 1976, 17 U.S.C. § 512.

⁵⁹ For example, see: G.R. Hagen, *Modernizing ISP Copyright Liability* [in]: M. Geist, (ed.), *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda*, Toronto, Irwin Law, 2010, p. 361.

⁶⁰ *Copyright Act*, ss. 41.25–41.27.

retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement⁶¹.

The service providers thus act as buffers between copyright owners and potential infringers and play an important role in the protection of their clients' privacy. It is this version of the notice system that was included in the scheme of the Canadian *Copyright Act*. It is a system that the Canadian government seems very keen to preserve since it was specifically maintained for it during the negotiations of the Trans-Pacific Partnership⁶².

The working of the notice and notice system was examined in a decision by the Federal Court⁶³ that was partly reversed by the Federal Court of Appeal⁶⁴. Because the statutory scheme presupposes the existence of records maintained by the service providers so they can communicate to copyright owners the identities of alleged infringers⁶⁵, the applicants, Voltage Pictures, LLC and other film producers, wanted to obtain the necessary information from Rogers Communications to introduce an action against the suspected infringers. Rogers Communications was willing to provide the information, but wanted to be compensated for the investment and time spent to respond to the request. The *Copyright Act* does contemplate that fees may be charged, but refers to this possibility in a provision that regulates the maximum fee that may be imposed:

The Minister may, by regulation, fix the maximum fee that a person may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection⁶⁶.

Since no regulation had been adopted, the court came to the conclusion that no fee could be required on the basis of the statutory regime: the default position was that the service was free⁶⁷. However, the obligation that is imposed on service providers pertains to the creation and maintenance of records, so that the fees that can eventually meet the regulatory requirements are not the fees associated with the *disclosure* of the information⁶⁸.

⁶¹ *Copyright Act*, s. 41.26(1)(b).

⁶² See Annex 18-E of the Trans-Pacific Partnership (TPP) Agreement, available at <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf>. Even if the recent US decision not to implement this agreement means that it is unlikely to see it coming into force in the present form, the TPP stands as an example of the prevailing acceptable level of protection of the negotiating parties towards the issues it addresses.

⁶³ *Voltage Pictures, LLC v. Doe*, 2016 FC 881.

⁶⁴ *Voltage Pictures, LLC v. Doe*, 2017 FCA 97.

⁶⁵ *Copyright Act*, s. 41.26(1)(b).

⁶⁶ *Copyright Act*, s. 41.26(2).

⁶⁷ *Voltage Pictures*, *supra*, note 64, ¶ 48.

⁶⁸ *Voltage Pictures*..., ¶ 55–64.

Here, the case takes an unexpected turn because of the reliance on a common law remedy that works very much like the system that was created with the notice and notice provisions. In a 1973 decision, the House of Lords in England issued an order that became known as the *Norwich* order⁶⁹. It allows parties “to obtain a pre-litigation order against a third party compelling disclosure of identifying information and documents”⁷⁰. The rules of the Federal Court recognise that such an order may be sought, but this recognition does not mean that they are easy to obtain:

One must show a valid, *bona fide* or reasonable claim, the involvement of a third party in the impugned acts, necessity in the sense that the third party is the only practical source of the information, and desirability in the sense that the interests of justice favour the obtaining of disclosure from the third party⁷¹.

Norwich orders can also involve the payment of a fee on the part of the applicant to the service provider, and it is up to the service provider “to adduce the evidence necessary to prove its actual, reasonable and necessary costs that can and should be compensated”⁷². In first instance, the Federal Court had settled on a fee of \$100, plus tax, per hour for its services. The Federal Court of Appeal considered that this was too high a fee, but did not impose a precise amount. Instead, guidance as to what the fee should be can be detected from several observations that the Court made. It did refer to the only evidence that had been adduced and which mentioned a cost that was “at most” \$0.50 per IP address in 2012, a time since when service providers were supposed to have improved their system⁷³. It also stated that “[t]he actual, reasonable and necessary costs of delivery or electronic transmission of the records by the internet service provider are likely to be negligible”⁷⁴. The Federal Court of Appeal also took the time to elaborate on the philosophical stance taken by the Supreme Court of Canada about the need to achieve “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”⁷⁵:

The overall aim, then, is to ensure that in the age of the internet, the balance between legitimate access to works and a just reward for creators is maintained. The internet must not become a collection of safe houses from which pirates, with impunity, can pilfer the products of others’ dedication, creativity and industry. Allow that, and the incentive to create works would decline or the price for proper users to access works would increase, or both. Parliament’s objectives would crumble. All the laudable aims of the *Copyright Act* – protecting creators’ and makers’ rights, fostering the fair dissemination

⁶⁹ *Norwich Pharmacal Co. v. Customs & Excise Commissioners* (1973), [1974] A.C. 133.

⁷⁰ *Voltage Pictures...*, ¶ 16.

⁷¹ *Voltage Pictures...*, ¶ 18.

⁷² *Voltage Pictures...*, ¶ 75.

⁷³ *Voltage Pictures...*, ¶ 76.

⁷⁴ *Voltage Pictures...*, ¶ 63.

⁷⁵ *Voltage Pictures...*, ¶ 25.

of ideas and legitimate access to those ideas, promoting learning, advancing culture, encouraging innovation, competitiveness and investment, and enhancing the economy, wealth and employment – would be nullified. Thus, to the extent it can, the legislative regime must be interpreted to allow copyright owners to protect and vindicate their rights as quickly, easily and efficiently as possible while ensuring fair treatment of all⁷⁶.

Such pronouncements have been rather rare. The reiterations of the balance mantra from the Supreme Court by all the lower courts – which must naturally apply its dicta – have usually been designed to support the curbing of the copyright owners' rights in various circumstances⁷⁷. However, even without such statements, it is fair to say that the decisions pertaining to the new provisions in the *Act* that have been handed down since 2012 do not as a whole reflect a necessarily hostile attitude towards copyright owners. Quite the contrary. Of course, not every possible litigation situation has been brought before the courts and it is impossible to know of the actual experience of copyright law on a day-to-day basis.

Much work still needs to be done in order to explore all the potential of the *Copyright Act* to regulate the use of works and other subject matters in the digital world. It will continue to be necessary to monitor court decisions that interpret the *Copyright Act*. However, the past five years have also demonstrated that general rules related to procedural issues have become more relevant to copyright owners.

3.2. Procedural Rules Not Specific to the Internet

The Canadian *Copyright Act* does not exist in a procedural vacuum. Copyright owners, just like any other citizens, who decide to resort to judicial proceedings can make use of all the general procedural rules that are available to any litigant. In recent years, observers of the Canadian copyright scene have been watching not only how the *Copyright Act* is faring in the courts, but also how rights holders are increasingly willing to look outside the *Act* to identify means that can help them vindicate their rights in a more meaningful manner. In many of these situations, it is the borderless environment that the Internet creates which spurs them to give an international dimension to their proceedings. Their positioning may be seen to go against the grain of the traditional litigation precepts that generally remain enclosed within the established boundaries of nation states. However, before examining these incursions into foreign territories by copyright rights holders, it is worth reflecting on the way some of them, including some who are used to their mass presence being channelled into collective management organisations, are beginning

⁷⁶ *Voltage Pictures...*, ¶ 26–27.

⁷⁷ It is very obvious in the decisions of the Copyright Board, which must establish tariffs for the use of works and other subject-matters that are paid to collective societies. The emphasis on a balance that translates itself in an expansion of the exceptions has led to reductions of varying importance in the tariffs that have been issued, especially since 2012. For example, see: *Statement of Royalties to be Collected By Access Copyright for the Reprographic Reproduction, in Canada, of Works in its Repertoire [Provincial and Territorial Governments – 2005–2014]*, 22 May 2015, <http://cb-cda.gc.ca/decisions/2015/DEC-2015-03-22.pdf>.

to show a marked interest for another type of structure that is meant to correspond to the needs of large groups whose members share common concerns.

The underpinnings of class actions are very similar to those that explain the existence of collective management organisations: “l’union fait la force”. When they join such organisations, authors and other copyright holders seek to improve their bargaining position, especially in situations where an action taken on an individual basis inevitably means that they are locked into an inferiority position. This proves to be particularly true when the amount at stake in individually itemised transactions is considered low and would not eventually justify the reliance on legal services in order to obtain it. The same considerations justify the existence of class actions: plaintiffs for whom the value of their compensation is relatively low would most probably never even envisage the possibility of bringing their tortfeasor to court. Collective management and class actions are acknowledged empowerment tools.

Given the similarities between these institutions, it was not without some surprise that observers have been following a class action proceeding that is headed by a Québec collective society, Copibec, against a university based in Québec City. The background to this action helps to explain why this case is so important in our Internet age. One of the 2012 decisions by the Supreme Court of Canada had pitted the reprographic right society of English Canada, Access Copyright, against the provincial departments of education who are responsible, among other things, for the financing of educational institutions⁷⁸. Even if the decision was based on the law as it stood before the 2012 amendments, the interpretation of the fair dealing exception that it gave continues to resonate today. Since that decision, the vast majority of universities in English Canada have refused to enter into agreements with Access Copyright to compensate for the photocopies and other reprographic uses of copyright protected material that are made in their institutions. Copibec is the sister society of Access Copyright in Québec. Contrary to Access Copyright, it has been able to sign agreements with all the Québec universities except Laval University, which had decided to take the same stance as its English Canada counterparts. It therefore decided to spearhead a class action against Laval University together with a representative of a foreign collecting society, two representatives of authors – a local one and a foreign one – as well as two representative publishers – a local one and a foreign one. In first instance, the Superior Court of Québec did not certify the class and was thus telling the parties that the case could not move forward⁷⁹. Its decision was appealed to the Québec Court of Appeal and was overturned⁸⁰. The case can therefore proceed, but it may take some time before judgement is rendered.

At first glance, this class action does not look like an Internet case. Yet, the high prevalence of digital copies in educational institutions at all levels has a direct impact on the perception and assessment of the copying activities that take place in their midst.

⁷⁸ *Alberta (Education) v. Access Copyright*, *supra*, note 10.

⁷⁹ *Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval*, 2016 QCCS 900.

⁸⁰ *Société québécoise de gestion collective des droits de reproduction (Copibec) v. Université Laval*, 2017 QCCA 199.

Because digital technology has entered their world, exceptions to copyright rights in these institutions were the object of special attention in the 2012 amendments⁸¹. Some of them have been designed to operate in specific digital environments⁸². The decision on the merits in this case ought to be among the first ones to interpret the fair dealing exception in an education context after the 2012 amendments and in light of the decisions by the Supreme Court of Canada rendered that year on the basis of the law as it stood before the *Copyright Modernisation Act*. It will not be the first decision on this issue, however. In reaction to the resistance that universities in English Canada have shown towards the wish by Access Copyright to monetise the copying that takes place in their institutions, Access Copyright has launched a lawsuit against a Toronto university, York University, that directly challenges the university's interpretation of fair dealing⁸³. The decision by the Federal Court of Canada has been rendered this summer and found in favour of Access Copyright.

The label of "class action" is not limited to the standard cases where one plaintiff, who represents a class of plaintiffs, sues one entity. The Internet environment has bred a class action of a different sort: the "reverse class-action". The *Voltage Pictures* case⁸⁴ partakes in this phenomenon when it seeks to obtain identity information from a service provider about a large number of potential infringers whom it would thereafter bring to court. Indeed, the title page of the Federal Court decision identifies it as a case of "proposed class proceeding" and obviously has no qualm about it⁸⁵.

The positive attitude of the courts towards right owners, who seek to enforce their rights in a world where digital technology can give them the impression that they are trying to grasp multitudes of small fleeting clouds that know no border, extends to a willingness not to be intimidated by the extraterritorial dimensions of their decisions. This has recently manifested itself in two different sets of circumstances.

The first type of fact pattern is found in an unusual judgement from the Small Claims Division of the Court of Québec. A song composed by a Montréal artist had been taken down from YouTube and SoundCloud for two months on the basis of a notice and takedown request issued in the United States pursuant to US copyright law. It was put back on these sites after the plaintiff succeeded in proving that he was no infringer. He thereafter decided to sue the three music publishers who had made the request, because he claimed that their unwarranted gesture had caused him moral and material damages. He grounded his action on the Québec *Charter of Human Rights and Freedoms*⁸⁶, as well as on provisions in the Canadian *Copyright Act* on moral rights⁸⁷ and general remedies⁸⁸. In a default judgement, the court awarded him \$5000 in compensatory damages and \$1000

⁸¹ The best known one was the addition of the purpose of "education" to the list of contexts in which the fair dealing defence may be raised: *Copyright Act*, s. 29. See also *Copyright Act*, ss. 29.4–30.04.

⁸² For example, the exception for the free use of "publicly available material" (i.e. on the Internet) in various situations: *Copyright Act*, s. 30.04.

⁸³ *Canadian Copyright Licensing Agency v. York University*, 2017 FC 669.

⁸⁴ *Supra*, notes 63 and 64.

⁸⁵ *Supra*, note 63.

⁸⁶ R.S.Q., ch. C-12.

⁸⁷ *Copyright Act*, ss. 28.1 and 28.2.

⁸⁸ *Copyright Act*, s. 34.

from each of the three defendants as punitive damages⁸⁹. It is not known to what extent he is able to enforce the judgement against the defendants. One must acknowledge, of course, that a default judgement from a Small Claims Court does not carry a lot of weight. However, from the perspective of copyright owners who may find themselves in the same situation, it sends a signal that some courts are willing to entertain cases that have very strong international connotations when the facts relate to the functioning of the Internet.

The other issue to highlight, this time from a growing body of case law, is known in Canada as the “worldwide injunction”. It refers to an order by the court to comply with different conditions to be met not only by Canadian defendants, but also by other persons who are in similar positions elsewhere in the world and who may not even be party to the action. The best known example of such worldwide injunctions is the *Equustek* case. The Supreme Court of British Columbia had issued an interlocutory worldwide injunction against Google, who was not a party to the action, because their search engine was bringing up hyperlinks to the website of the original defendants who could be infringing the trademark rights owned by Equustek⁹⁰. The injunction was upheld both by the Court of Appeal of British Columbia⁹¹ and the Supreme Court of Canada⁹². The majority opinion noted approvingly the similar decisions in other countries to which the Court of Appeal had referred in support of its decision⁹³. It was also willing to recognise the international nature of Google’s operations:

The Internet has no borders – its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates – globally.[...]

In the absence of an evidentiary foundation, and given Google’s right to seek a rectifying order, it hardly seems equitable to deny Equustek the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible. We are dealing with the Internet after all, and the balance of convenience test has to take full account of its inevitable extraterritorial reach when injunctive relief is being sought against an entity like Google⁹⁴.

Moreover, there have been other Canadian decisions that concluded with similar orders. After much tergiversations, the court in the *Vancouver Aquarium* case ordered “any person to remove any version of the offending video containing any of the other 15 segments from any public location within seven days of receiving notice out this order”⁹⁵. In a privacy case, where Canadian citizens were complaining about a Romanian website that was publishing court decisions without removing sensitive private information, such

⁸⁹ *Whyte Potter-Mäl v. Topdawg Entertainment Inc.*, 2016 QCCQ 11725.

⁹⁰ *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063.

⁹¹ *Equustek Solutions Inc. v. Google Inc.*, 2015 BCCA 265.

⁹² *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34.

⁹³ *Google Inc. v. Equustek Solutions Inc.*..., ¶ 39.

⁹⁴ *Google Inc. v. Equustek Solutions Inc.*..., ¶ 41 and 47.

⁹⁵ *Vancouver Aquarium Marine Science Centre v. Charbonneau*, *supra*, note 38, ¶ 82.

as can be found in cases of divorce proceedings, personal bankruptcies, or immigration, the Federal Court accepted that the Canadian *Personal Information Protection and Electronic Documents Act*, known as PIPEDA⁹⁶, applied to the situation and that the foreign defendants can be compelled to comply with its requirements and to pay damages because the effects of their behaviour were felt in Canada⁹⁷. There are others as well, but it is safe to say that, for the near future, they will be eclipsed by this recent pronouncement of the Supreme Court.

Procedural considerations such as those that have been mentioned here do not flow from provisions found in the *Copyright Act*, even if they contribute to its application in a meaningful manner. Unlike issues related to the definition of rights and exceptions or to those that have been specifically conceived because of the technology on which rests the functioning of the Internet, they will not be included in this year's parliamentary review of the *Copyright Act*. They may however lurk in the background of the representations that will be made during that process. Even if the full impact of the *Equustek* decision may not be immediately known because it is too recent, all stakeholders – including the government – may already feel it necessary to include in their reflections an additional layer of considerations flowing from this decision, which may affect their perspectives. The government's decision to delay the review till the end of 2012, rather than to hold hearings earlier in the year, may mean that it is now faced with an even greater challenge than anticipated.

Summary

Ysolde Gendreau, *Five Years After Its Modernisation: Canadian Copyright Law Poised for Its Review*

When Canada implemented the WIPO treaties in 2012, it mandated a parliamentary review to be done every five years. As the end of 2017 approaches, this paper looks at a number of court decisions that interpret provisions that were specifically included at the time to govern Internet uses of works. Because they directly affect the working of copyright law in the country, this paper also looks at some procedural developments that have taken place in response to the growing awareness of the international dimensions of copyright regulation.

Keywords: *copyright, Canada, internet, digital technology, copyright revision, WIPO treaties, international dimensions*

⁹⁶ S.C. 2000, c. 5.

⁹⁷ *T. (A.) v. Globe24h.com*, 2017 FC 114.

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