Entertainment & Media Law Signal

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Bill C-32 Commentary: Parts of Bill C-32 Are Complex - And That's Okay

December 1, 2010 by Bob Tarantino

The good folks at *The Hill Times* were nice enough to publish an op-ed of mine about Bill C-32 earlier this week. The core of the argument is this: because of the competing nature of the interests which it seeks to balance, some parts of copyright law are inevitably going to be complicated - and complexity which leads to certainty is better than a quixotic attempt at "simplicity" which will only lead to disputes and further litigation. The full text of the op-ed is available after the jump, below.

Bill C-32 (*The Copyright Modernization Act*) and the changes it will make to Canadian copyright laws may be described as many things – "simple" is not one of them. That, however, is not necessarily a criticism of the Bill. Parts of Bill C-32 are complex – and that's a good thing. When it comes to copyright, sometimes complex is better than than simple – because what looks like "simplicity" is really just a recipe for endless litigation.

There are two kinds of complexity: complexity which produces an unclear result and complexity which produces a clear result. The former is to be avoided, while the latter is, when the situation calls for it, not to be feared and even to be sought after. Copyright law is becoming irreducibly complex because of a number of factors, primarily the relentless advance of digital technology and the resulting ability of individuals to use copyrighted works in ways previously unimagined. Such changes exert pressure on the copyright regime because they increase tension at the interfaces of rights, owners and users.

We should distinguish complexity from confusion – something which is complex can actually avoid confusion and promote greater clarity. Copyright law offers many examples of this: Part VIII of the Copyright Act (which sets out the "private copying levy" for blank audio recording media) is complicated but leads to a clear result – while the provisions are spread out over ten relatively detailed sections of the Act there is comparatively little uncertainty as to the application and administration of the levy. Compare that to the "fair dealing" provisions of the Copyright Act, which take up three short sections but have spawned a library's worth of court decisions and commentary – and even lawyers will hedge on a definitive answer about how to apply "fair dealing" in many circumstances. The Documentary Organization of Canada (DOC) recently tried to provide its members with "simple language" guidelines on how to navigate "fair dealing" law. The result was a twenty-page document with more than eighty footnotes – and the fair dealing sections of the Copyright Act total less than 150 words. Apparent simplicity results not in clarity, but in virtually endless confusion. This is hardly DOC's fault – it's just that copyright is complicated.

Copyright law is complicated because it is a mechanism which seeks to accomplish a number of inherently competing goals: providing incentives and rewards to creators, ensuring that citizens have a robust ability to make use of creative works, and seeking clarity in a world of rapidly changing technology.

While the Copyright Act is replete with baroque curlicues which serve little apparent purpose and whose elimination would serve to make Canadian copyright law more comprehensible, it is not the case that every aspect of copyright law needs to be simple. Counter-intuitively, complexity in copyright law is not a bad thing, but in some cases is a goal to strive towards – if, that is, the complexity results in certainty. Detailed approaches to matters such as fair dealing or exceptions to infringement can be more productive than open-ended or principles-based approaches because a detailed approach can facilitate definitive answers. Where no clear answer is available, that is a recipe for confusion and, eventually, litigation. Over-simplification in the legislation will merely lead to confusion and arguments in court – which would fatten the wallets of lawyers, but leave no one else any farther ahead.

If we have a copyright law which says “Do whatever is fair”, it will be simple but incomprehensible and open to dispute – and a lot of lawyers are going to get rich. If instead we have a law which says “Do whatever is fair, and when we say ‘fair’ we mean you have to satisfy the following ten-point test…”, it will be more complicated, but ultimately will be more certain and fewer disputes are likely to arise.

When complexity is unnecessary to accomplish a goal, then the complexity is superfluous and should be jettisoned. But when complexity is simply a reflection of the complex nature of the underlying issues being addressed, then it should not be avoided in a misguided attempt to simplify beyond the point of utility. Sometimes complex issues require complex answers – copyright reform is one of those times.
