Entertainment & Media Law Signal Heenan Blaikie

Bill C-32 Commentary: We Should Avoid Omnibus Copyright Reform

February 1, 2011 by Bob Tarantino

[The good folks at *The Hill Times* were generous enough to publish the following op-ed of mine in their January 24, 2011 edition.]

Copyright is contentious, in some cases intractably so, but the way in which we approach copyright reform is making matters worse.

As Sara Bannerman notes in her essay in *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (edited by Michael Geist), in 1923 copyright was referred to as "the most controversial subject that has ever been before the Parliament of Canada" – so the fact that that copyright reform generates heated, sometimes vicious, rhetoric is nothing new. Unfortunately, the methods we use to reform copyright are likewise not new, and so a cycle of failed efforts at reform perpetuates itself. Bill C-32 (*The Copyright Modernization Act*), currently before legislative committee, represents the third attempt in the last ten years to achieve comprehensive reform – and that is precisely the problem.

Recent copyright reform efforts, like Bill C-60, Bill C-61 and particularly the current Bill C-32, read as if they are striving to solve every conceivable copyright concern in one fell swoop. To nobody's surprise, they fail to achieve that goal. Bill C-32 covers at least thirteen different major aspects of the copyright regime – from photography to internet service provider liability to so-called "format shifting" – any one of which is fertile enough ground for virtually ceaseless lobbying, debate and fine-tuning. Other than the fact that they all fall under the general heading of "copyright", there is little which binds the various matter together. Copyright, and those Canadians who are affected by it, would be far better served if Parliament avoided efforts at omnibus legislative reform and opted instead for piece-meal "fixes" of discrete problems.

As an example, why should updating our legislation to allow for the ability to record and watch a television program without the prospect of incurring liability for copyright infringement (something which has been an issue since the advent of the VCR a generation ago) be contingent on also revising the scope of various educational institution exceptions? It would of course be wonderful if we could "solve" all the outstanding copyright problems at once, but yoking multiple individual problems together, particularly the much-more controversial with the much-less controversial, merely jeopardizes any advancement on any front. Issues on which there is relatively broad consensus (such as format- and time-shifting) get packaged with issues which seem set to dissolve into wars of attrition (such as technological protection measures or "digital locks").

And, of course, the comprehensive reform approach virtually inevitably overlooks a few issues of concern. The matter of Crown copyright remains unaddressed by Bill C-32, as does the open question of the identity of the "author" of a motion picture. These may be minor affairs in the grand sweep of the copyright debate, but the adoption of a "once per decade" approach to copyright reform

means that live issues overlooked now will not be addressed for many years. Brute political calculus rules the copyright reform agenda – instead of legislating to get efficient and practical reforms, we get legislation which seeks to give just enough marginal benefit to every possible stakeholder that they are willing to overlook the negative aspects of other parts of the bill.

Omnibus legislation poses at least two dangers. First, given a surplus of information and deficits of time and attention, not all elements of the legislation may receive the scrutiny which is warranted, allowing unanticipated problems or infelicities of drafting to “sneak through”; second, good elements can be outweighed or “crowded out” because of bad elements. Positive amendments may be lost because the negative amendments are so deleterious that we cannot in good conscience pass the legislation simply in order to obtain the good parts.

We would be better served by discrete, targeted amendments to the Copyright Act, introduced in a timely fashion and which can each be assessed on their own merits. Repeated failed attempts at omnibus amendments serve the interests of few, except lobbyists and lawyers. Just as the music industry has seen fit to “unbundle” its offerings, moving from selling entire albums to individual tracks, so too should copyright reform be approached in a way which allows for incremental improvements. Otherwise we remain the unwitting victims of an “all or nothing” approach which advance the interests of none.
