

# Bill C-61: Welcome to the Labyrinth of Locks, Levies and Litigation

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

CIPPIC PRESENTATION

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# Bill C61: Milestone or Millstone?

- Selective Recent History:
  - 1976 USA
  - 1988 Canada Bill C-60
  - 1993 WTO implementation
  - 1993 C-8 - re Copyright Board - defeated in Senate
  - 1994 Netscape browser
  - 1996 WIPO Treaties
  - 1997 Canada Bill C-32 + Amendment
  - 1998 Napster online 1999
  - 2002 iCrave/Jump amendment (s. 31)
  - 2003 Bill C-36 Lucy Maud (failed attempt)
  - 2004 SCC decision in CCH v LSUC
  - 2004 BMG decision in Federal Court
  - Conservative Party Policy Declaration March 19, 2005
  - Liberal's Bill C-60 June 20, 2005 (died on order paper)
  - 2008 "iPod tax" decision in Federal Court of Appeal

# March 19, 2005

## **§35. Copyright Legislation**

- *i) The Conservative Party believes that the objectives of copyright legislation should be:*
  - *a) to create opportunities for Canadian creators to enjoy the fruits of their labour to the greatest possible extent;*
  - *b) to ensure that the rights of Canadian creators are adequately protected by law;*
  - *c) that these rights are balanced with the opportunity for the public to use copyrighted works for teaching, researching and lifelong learning;*
  - *d) to continue to allow an individual to make copies of sound recordings of musical works for that person's personal and individual use; and*
  - *e) that enforcement is applied fairly and in accordance with international standards.*
- *ii) The Conservative Party believes that reasonable access to copyright works is a critical necessity for learning and teaching for Canadian students and teachers, and that access to copyrighted materials enriches life long learning and is an essential component of an innovative economy.*
- *iii) A Conservative Government will give consideration to educational public policy goals within the copyright framework. A Conservative Government will work with industry to increase awareness and develop a public education campaign to better inform users and creators on the copyright laws in Canada.*
- *iv) A Conservative Government will eliminate the levy on blank recording materials.*

# GOOD NEWS

- We have a bill.
- We have a process.
- We have several months to expose the flaws and to make constructive suggestions

# The Bad News

- Bills usually get worse for consumers and users in Committee
- e.g. Bill C-32 in 1996-1997

# Government Summary of Bill C-61

## SUMMARY

This enactment amends the *Copyright Act* in order to

- (a) update the rights and protections of copyright owners to better address the Internet, in line with international standards;
- (b) clarify the liability of Internet service providers;
- (c) permit certain uses for educational and research purposes of Internet and other digital technologies to facilitate technology-enhanced learning, interlibrary loans, the delivery of educational material and access to publicly available material on the Internet;
- (d) permit certain uses of copyright material for private purposes; and
- (e) amend provisions of the Act relating to photographs to give photographers the same rights as other creators.

# Preamble

Whereas the *Copyright Act* is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy;

Whereas advancements in and convergence of the information and communications technologies that link communities around the world present opportunities and challenges that are global in scope for the creation and use of copyright works or other subject-matter;

Whereas in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms;

Whereas such norms are reflected in the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, adopted in Geneva in 1996; (??? - Ask Bruce Lehman about this)

## Preamble Cont'd

Whereas such norms are not wholly reflected in the *Copyright Act*;

Whereas the exclusive rights in the *Copyright Act* provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on these rights exist to further enhance users' access to copyright works or other subject-matter; ??? (What about users' "rights" as enunciated by the SCC?)

Whereas the Government of Canada is committed to enhancing the protection of copyright works or other subject-matter, including through the recognition of technological measures, in a manner that promotes culture and innovation, competition and investment in the Canadian economy; Is CDN Government proud of its lock down policy?

And whereas Canada's ability to participate in a knowledge economy driven by innovation and network connectivity is fostered by encouraging the use of digital technologies for research and education; ??? By removing rights already recognized by the SCC

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

# False and Misleading Claims

- Preambles are problematic
- This bill does not live up to its preamble
- The bill gives incredibly trivial “new” rights to users and then, effectively, takes them away
- The cap on damages will do nothing to immunize children and dead grandmothers who engage, even inadvertently, in “making available” from devastating damage claims
- The bill would put Canadian educators, teachers and students at an even worse disadvantage compared to the USA
- The bill enables significant term extension, which hardly enables “access”
- While it may be “made in Canada”, it is a seriously “made worse in Canada” version of American law

# Examples of Winners and Losers (in my humble opinion)

## Winners are:

- US Government
- CRIA (RIAA) CMPDA (MPAA)
- MPAA (CMPDA)
- ACTRA
- AF of M
- Access Copyright & CMEC, AUCC, CTF and CARL
- ISPs (re notice and notice)
- Freelance photographers

## Losers are:

- CMEC, AUCC, CTF and CARL
- Consumers
- Teachers
- Students
- Researchers
- Scholars
- Librarians
- Creators of all kinds (musicians, visual arts, writers, etc.) (Canadian Music Creators Coalition, Appropriation Art, etc.)
- Gamers
- Businesses who use the Internet for research
- ISPs (re expected new tariffs on general use of publicly available material on the internet by non-educators)

# Section 3

- Most important section of the Act?
- What does the new 3(1)(i) mean? (cf. also s. 15(1.1)(e) and 18(1.1) (b))
- This is the “distribution” right required by treaties - but we already have it
- Perhaps meant to cover Harry Potter book embargoes, etc.?
- Could this undo *Théberge* and/or *Kraft*?
- Can exhaustion be vitiated by “licensing” rather than sale?
- Why is this section necessary?

# The \$500 Cap issue - good or bad news?

- Clause 30 of Bill
- Multiple plaintiffs?
- Note reference to “a” copyright owner
- Each song normally has three copyright owners
- How many plaintiffs can sue simultaneously and can they each get \$500?
- Charter issue for subsequent defendants?
- Elimination of judicial discretion to lower below \$200
- Possibility of cookie cutter \$500 plus costs suits
- Downloaders of music generally aren’t even liable now
- But the music industry in particular will likely sue for “uploading” - or “making available” and seek up to \$20,000 per each work, performer’s performance and sound recording.
- Each song “made available” could result in liability of up to \$60,000

# Other Bad News

- s. 23 - up to 99 year term for sound recordings and performers' performances
- s. 29.21 - Truly trivial exceptions for legacy products (book, newspaper, periodical or videocassette) that are vitiated by normal practice -- cf. "dry erase board" - why?

# Bad news cont'd

- Virtually all new user's rights can be (and will be) vitiated by contract
- Right to make private copies of music is unclear:
  - What does “governed by Part VIII” mean? (s. 29.22(3))
  - Would copying on a PC hard drive now be legal?
- S. 29.23(5) Network personal video recording right denied. Copy can be kept “no longer than necessary” for time shifting.

# Bad news cont'd

- S. 31.1(5) - does this mean the provider of digital memory (ISP) must take down something found to be infringing under foreign law?

# Educational Issues

- Restrictions on “lessons” dissemination to registered students only s. 30(3)
- The “book burning” (Sam Trosow) aspect s. 30(5)
- What about MIT online experiment?
- Micro managing digital copies and new gifts to Access Copyright s. 30.02

# Education cont'd

- The exception for educational use of publicly available material s.30.04
- Vitiating by s. 30.04(4) notices and TPMs
- Will be unable to use material from The Economist, New York Times, etc. - even for clear fair dealing
- Where will the notice be placed? Will they be “no fishing” notices (Trosow)
- Why would educators ignore and potentially interfere with:
  - Implied license
  - CCH v LSUC ruling of SCC
  - The common law of what is “public”?
- Why would educational establishment go along with this?
- This is much worse than the present state of the law
- *Cui bono?*
- *A contrario?*
- Why would AUCC, CMEC, CTF, and CARL want these provisions?
- Access Copyright gains and everyone else loses
- Who is looking out for public interest here?
- Consistent with approach to exceptions in 1997 legislation and with Lucy Maud Bill C-36
- Can CAUT, CFS, CLA etc. stop it?

# Photography Issues

- New life + 50 and assimilation with author's rights will make use of historical photographs much more complicated
- Provisions are at least partially retrospective
- Copyright Board will want more staff for processing “unlocatable” requests
- Expect a new collective
- Pay through the nose for wedding, graduation, child and death announcement pictures
- Serious problems for historians, publishers, newspapers, archivists, etc.

# TPMs s. 41

- Will prevent the making of backup copies of expensive games and other content
- Will override all manner of fair dealing exceptions
- Will stop insubstantial copying
- Will stop use of regionally coded material
- Will create exceptions for blind, deaf etc. but still make it difficult or impossible to provide the services or tools to do so (s.41.16)

*42 (3.1) Every person, except a person who is acting on behalf of a library, archive or museum or an educational institution, is guilty of an offence who knowingly and for commercial purposes contravenes section 41.1 and is liable (a) on conviction on indictment, to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding five years or to both; or (b) on summary conviction, to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding six months or to both.*

- Liberal Party references to “police state” and RCMP/taser cartoons not so surprising
- Can’t bypass TPMs to prevent privacy breach by the copyright owner itself (new s. 41.14)

# Contract

- Deference to contracts is extremely harmful
- Contracts will be unilateral adhesion contracts with unilaterally evolving terms
- The world of content owners, distributors, ISPs, etc. is increasingly converged and conflicted
- There is no interest from the Competition Bureau in oversight

# Fair Dealing?

- The end of fair dealing?
- TPMs, anticircumvention and contractual restrictions will eliminate fair dealing as we know it
- “Mashup” and “appropriation art” will be illegal
- No parody right
- Canada will have extremely repressive regime

# Making Available

- How is this implemented?
  - s. 15(1.1)(d) & 18(1.1)(a)
- Will we see litigation on whether or not actual distribution must be proven?
- Does “allow” in s. 18 vitiate need to prove distribution?
- Totally unfair to inadvertent file sharers

# National Treatment Issues

- Private Copying
- US possible broadcast right for regular radio

# Three Step Test Issues

- WPPT and levies - must we narrow our exceptions and/or pay out more?

# Announced Forthcoming Consultation on Levies

- Will the CPCC try to levy iPods?
- Will the songwriters try to levy ISPs?
- Are levies necessary or desirable with a super TPM/DRM system?
- Should levies enable “unauthorized” downloading?
- National treatment issues
- Three step test issues
- No levies in USA, UK and Australia

# Could Canada Do Better?

- Yes - ask Israel and New Zealand
- Ask Bruce Lehman

# Net Effect of Bill C-61 if Enacted As Is

- Lots of law suits against individuals
- Lock down of consumer electronics and content
- Several new tariffs at the Copyright Board involving educators and neighbouring rights
- Enormous waste of taxpayer dollars in education sector and windfall for Access Copyright
- Cutback of common law and judicially recognized users rights re:
  - Implied right
  - Fair dealing
- Significant erosion of Supreme Court of Canada jurisprudence re CCH, and maybe Théberge and Kraft
- Deference to unilaterally imposed contracts, without any effective recourse from Competition Bureau
- The most repressive, regressive, expensive, and access inhibiting regime in the G-8 and beyond

# Retrospectivity

- For photographs still protected
- For unpublished sound recordings and performers' performances
- We still can't figure out what to do with retrospective neighbouring rights provisions enacted in 1997 and the millions collected since then

# A Prelude to ACTA?

- Will this bill be ACTA (Anti Counterfeiting Trade Agreement) ready?
- Could ACTA implementation bill simply refer to the *Copyright Act* and allow border officials to inspect devices and media for compliance?

# Some overall political issues

- Role of Liberals and who speaks for them
- Divisions within educational sector
- Divisions within music sector
- Be careful what you wish for...

# Canada “Insulted Again”?

*Once chapter 12 is implemented into domestic law, it is U.S. corporate copyright interests that will shape what consumer goods can be used in your country and how citizens of your country will be able to access and use lawfully acquired copies of works. No legislature that is amending its copyright law should do so without understanding the momentous delegation of power they are handing to U.S. corporate interests.*

*This is not a piracy issue, it is nothing remotely resembling piracy. It is Orwellian to claim otherwise. The designation of Canada as a scofflaw because it hasn't implemented chapter 12 of title 17 is not only an abuse of language, but also a direct attack on the sovereignty of another country to determine what is in the public interest of its own citizens. Canada has more than adequate laws against real piracy, and as Howard Knopf had pointed out, its laws are more generous toward authors than is U.S. law. No legislature in the world should abdicate its responsibility to protect the public interest by vesting the private sector with the powers granted in chapter 12 of title 17. But Canadian abdication is exactly what is being proposed by U.S. interests, the false justification being that Canada is a pirate haven because it hasn't implemented the U.S. DMCA.*

Bill Patry, leading American Treatise Author, May 16, 2008

[www.williampatry.blogspot.com](http://www.williampatry.blogspot.com)

# Leblanc's Comments

*Following through on its 2007 throne speech, the Conservative government introduced Bill C-61 on June 12, 2008 in the House of Commons with the intent to bring Canada's existing copyright laws up to speed with the realities of the digital era.*

*Bill C-61, however, is not ever going to see the light of day.*

*Copyright legislation is so contentious in its nature, that for any minority government it is difficult to find a balance that will have a chance of adoption by all parties.*

...

*While Prentice has given a handful of new rights to Canadian consumers, each is subject to limitations, and undermined by the DRM provisions.*

*Taken in whole, the amendments stop woefully short of bringing Canada's existing copyright laws up to speed with the realities of the digital era.*

*Nor would the copyright legislation create a predictable legal environment that would make the creation and distribution of content to consumers more likely or more possible.*

*Nor will the legal framework created by the amendments bring Canadian copyright in line with intellectual property laws in the United States, the United Kingdom or Europe.*

*Of course, no one is going to sue anyone for \$500 for illegally downloading copyrighted material, but the Canadian government has taken the view that the ability to sue should act as a deterrent for those considering sharing files illegally.*

*Stop laughing.*

*And CRIA has no intention of launching a barrage of lawsuits, in a manner the Recording Industry Association of America (RIAA) has in the United States, as a result of the new legislation. Nor are Canadian artists interested in suing music fans,*

*We're a mobile society, addicted to technology. Digital utopianism as advocated on countless blog sites, and no doubt advocated by many of the 45,000 Canadians on Michael Geist's Fair Copyright for Canada Facebook group, clings to an implausible belief that the internet should be an endless free lunch.*

*However, this proposed legislation suggests only that the Conservative minority government doesn't really know what to do about updating Canadian copyright.*

*Only that they want to do something.*

# On Other Fronts

- CBC changes at Radio Two

# We applaud the new CBC Radio 2.

Industry leaders, musicians, singers and songwriters endorse a broader reflection of Canadian music excellence on CBC Radio 2.

## FROM THE INDUSTRY

Randy Lennox, President & CEO,  
Universal Music Canada

Deane Cameron, President,  
EMI Music Canada

Steve Kane, President,  
Warner Music Canada

Neil Foster, co-President,  
Sony BMG Canada

Shane Carter, co-President,  
Sony BMG Canada

Heather Ostertag, President & CEO,  
FACTOR

Don Quarles, Executive Director,  
Songwriters Association of Canada

Geoff Kulawick, President,  
True North Records

Terry McBride, CEO,  
Nettwerk Music Group

## MUSICIANS

Kiran Ahluwalia  
Jann Arden

Barney Bentall  
Arlene Bishop  
Jully Black

Blackie & the Rodeo Kings  
Broken Social Scene

Jim Bryson  
Buck 65

Jane Bunnett  
Jesse Cook

Tom Cochrane  
Bruce Cockburn

Jim Cuddy  
Luke Doucet

Kathleen Edwards  
Kelly Lee Evans

Stephen Fearing  
East Village Opera Company

Feist  
Christine Fellows

Rick Fines

Grand Analog

Great Big Sea  
Gregory Hoskins

Molly Johnson  
Marc Jordan

Carolyn Mark  
Matt Mays

Danny Michel  
No Luck Club

Blair Packham  
Michael Philip Wojewoda

Joel Plaskett  
Rheostatics

Serena Ryder  
Ron Sexsmith

Jamie Shields  
Sloan

Andy Stochansky  
The Acorn

Nathan Wiley  
Hawksley Workman

## The Facts

- Classical music on CBC Radio 2 will remain the single most played genre (35 hours per week) on the network.

- More new music - 30,000 new songs get recorded every year in Canada, less than 250 (0.8%) get regular airplay on commercial radio.

- CBC Radio 2 presents live recorded concerts from every genre and every part of Canada, 7 days a week. That's over 750 concerts recorded in the past year.

CBC. Canada lives here.



# Beyond Copyright

- The future of levies
- Other examples of “alternative compensation”:
  - Mandatory Flat fee/tax on ISP subscribers
  - Noank Media
  - EFF voluntary scheme
- Paracopyright - TPM and DRM

# ©urrently and Presently,

- levies +
  - litigation +
  - TPMs +
  - DRMs +
  - statutory damages +
  - Contractual restrictions +
  - Overlapping Copyright Board tariffs
  - Minus competition oversight
- =

Utopia or Dystopia?

# SUGGESTIONS FOR IMPROVING THE SYSTEM

- Parker Commission of 1935
- Ilsley Commission 1957
- Economic Council 1971
- We are long overdue for another copyright Commission
- Mandate to include:
  - The appropriate scope of collective administration in Canada
  - Whether the legislation permits too many collectives and tariffs
  - Role of collectives in Canada
  - All aspects of the Copyright Board
  - Whether there is a better way to set tariffs in Canada
- Should be led by a senior sitting or retired judge who is given sufficient resources and mandate to
  - Undertake first class research
  - Hold open hearings
  - Recommend legislation, regulation and new machinery

# Role of Public Servants

- Public servants are no longer the primary source of public policy
- It is not easy to draft a law to implement confused and conflicting, and inconsistent policy dictated by politicians and devised by special interest groups
- Public servants deserve understanding, thanks and respect

# Notes of Nostalgia

- Look at the UK Copyright Act of 1911 and the Canadian Copyright Act of 1921
- US legislation of 1909 and 1976
- Featured elegant, general language and technological neutrality to a great extent
- Done at a times of great technological change
- We must stop engrafting special interest sections devised by lobbyists

# Thank you for your attention.

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[www.excesscopyright.blogspot.com](http://www.excesscopyright.blogspot.com)

