2010 Top Ten Canadian Entertainment and Media Law Stories

December 15, 2010 by Bob Tarantino

In proud defiance of the fact that 2010 is not yet over, we offer our humble thoughts on this year's most noteworthy entertainment and media law events (and we define those two areas of practice in fairly broad strokes). Without further ado, and in no particular order:

- **Bill C-32**

How to summarize? The introduction of Bill C-32 (*The Copyright Modernization Act*), the third attempt in the last decade at large-scale reform of the *Copyright Act* (Canada), has resulted in a tsunami of commentary, debate and political action - and it hasn't even yet been passed, so we can only imagine what's going to happen once we start getting actual court decisions on the thing. If passed in its current form, Bill C-32 would have significant impact on creators (such as the new photograph provisions), owners (such as the new TPM protections) and users (such as the expansion of fair dealing or the user-generated content provision) - basically everybody who affects or is affected by copyrighted works. (Signal coverage on Bill C-32 is collected here.)

- **Launch of Canada Media Fund**

On April 1, 2010, the Canada Media Fund (CMF) was launched - combining the operations and mandates of the former Canadian Television Fund and the Canada New Media Fund, the CMF has an annual budget of $350 million and provides funds to "assist in the creation of successful, innovative Canadian content and applications". Making funds available through an Experimental Stream and a Convergent Stream, the creation of the CMF, with its attendant publication of new guidelines for qualifying for funding, has meant that producers and their lawyers are both spending time learning to navigate the new system - with the commendably pro-active support of the CMF itself, which has taken pains to reach out to the industry and facilitate the adjustment to the new regime. (Signal coverage on the CMF is collected here.)

- **Journalist-Source Privilege in Canada - *R v National Post* and *Globe and Mail v Canada***

In these two "companion" decisions, the Supreme Court of Canada confirmed that, whether in civil or criminal trials, whether in Civil Code- or common law-Canada, while Canadian law does not recognize a class-based journalist-source privilege, and nor does the Charter guarantee of press freedom entail such a privilege, there is a common law (and, in Quebec, civil law) basis for recognizing a case-by-case journalist-source privilege. (Signal coverage of the decisions is collected here.)

- **Online Previews of Music are Fair Dealing in Canada**

In *SOCAN v Bell Canada et al*, the Federal Court of Appeal confirmed that online previews of music (like, say, the 30-second clip you listen to before deciding whether to purchase a song) constitute "fair

dealing" for the purposes of "research" - and so no royalty is payable to the owners of the publishing rights in those songs. The decision confirmed that not only is "fair dealing" going to be given expansive interpretation by the courts, but the concept is in some cases evidently even more broad than the US "fair use" defence (in the US online previews do *not* constitute "fair use"). (Signal coverage of the decision is here.)

- **Federal Court of Appeal Eliminates Prospect of ISP Cultural Funding Levy**

Canadian television broadcasters are required by the terms of their CRTC licenses to contribute money to various initiatives which fund the development and production of Canadian content programming. A coalition of Canadian cultural groups sought to extend that funding obligation to Canadian internet service providers - in July 2010, the Federal Court of Appeal held that ISPs who provide only "content neutral" access are not "broadcasting" within the meaning of the *Broadcasting Act* (Canada), and so are exempt from any requirements under the Act to contribute to cultural funding initiatives. (Signal coverage of the decision is here.)

- **Copyright Board Issues Decision and Reasons for Commercial Radio Tariffs**

The Copyright Board's July 9, 2010 decision and July 10, 2010 tariff spell out why and how much money commercial radio stations will be paying to SOCAN, Re:Sound, CSI, AVLA/SOPROQ and ArtistI as a license fee for the years 2008-2012 (with some qualifications, since not all of the tariffs cover the entire four year period) for the right to reproduce and communicate to the public the musical tracks (including the compositions, the recordings and the performances embodied therein) which form the bulk of programming for most commercial radio stations. The Board's decision was itself notable for a number of reasons - not least the $13 million per year increase in total estimated royalties. (Signal coverage of the decision is here.)

- **Documentary Organization of Canada Issues Fair Dealing Guidelines**

For documentary filmmakers, few aspects of copyright law are as baffling, frustrating and, potentially, useful as the "fair dealing" provisions of the *Copyright Act* (Canada). The need to obtain permission for the inclusion of copyrighted materials in their films (amplified by the need to obtain errors and omissions insurance coverage) often leads to delays and additional expenses - both of which can be lethal to a project. In May 2010, DOC (the Documentary Organization of Canada) published Copyright and Fair Dealing - Guidelines for Documentary Filmmakers. As I have argued, the Guidelines "will hopefully serve as a welcome first step in the ongoing process of clarifying and simplifying how Canada's copyright laws can, and should, interface with day-to-day film and television production activities". (Signal coverage on the DOC Guidelines is collected here.)

- **CRTC Issues New Television Policy**

In March 2010 the CRTC re-jiggered (note: not a technical term) its policies covering English-language privately-owned television, issuing Broadcasting Regulatory Policy CRTC 2010-167.

The new Policy introduces a “group-based licensing approach” which effectively permits corporate groups with multiple broadcasting services to pool some of their Canadian programming obligations. Notably, the new Policy gives significant flexibility for the large ownership groups to allocate their required Canadian program expenditure requirements across all of their over-the-air stations, specialty channels and pay TV services. The new TV Policy also introduced a market-based solution to allow private local television stations to negotiate with cable and satellite companies to establish a fair value for the distribution of their programs (also known as “fee for carriage”). To settle the question of whether the CRTC has the authority to implement such a negotiation regime, the CRTC initiated a reference to the Federal Court of Appeal seeking clarification on its jurisdiction under the *Broadcasting Act*. The TV Policy also triggered a series of proceedings relating to the transition to digital television for consumers. Local television stations in major markets, as well as provincial and territorial capital cities, must complete the switchover to digital by August 31, 2011 in “mandatory markets” and in markets where a station broadcasts above channel 52 (which will be reallocated to other digital uses). (Signal coverage of the new policies is here.)

- **Shaw Completes Acquisition of Canwest; CRTC Launches Consultation on "Vertical Integration"**

Shaw Communications' acquisition of control of CanWest Global Communications Inc., thereby creating one of the country's largest media conglomerates, will reverberate into next year: at the same as it approved Shaw's acquisition, the CRTC announced a public review process to assess whether CRTC policies need modification in light of what they described as a “growing trend of industry consolidation and vertical integration taking place in the Canadian broadcasting industry”. (Signal coverage of the acquisition and the CRTC announcement is here.)

- ***Grant v Torstar* - Defence of Communication on Matters of Public Interest**

Sure, this is a bit of a fudge, since the Supreme Court of Canada's decision in *Grant v Torstar* was issued in 2009, but it's our blog and we'll include what we want - and the decision was issued on December 22, 2009, nine days before the commencement of 2010, so it's close enough (we're lawyers, not accountants). The decision was important enough to warrant attention in 2010 - the Court introduced a new defence to defamation claims: responsible communication in the public interest. A significant relaxation of the strict liability contours of the tort, the new defence heralds a new approach to defamation by Canadian courts, allowing journalists and, of critical importance, other members of the public, to avail themselves of a defence which seeks to effect a new balance between freedom of expression and the protection of reputation. (The Signal did not cover the decision, since we were born after it came out, so check out coverage by The Court and the Defamation Law Blog.)
