Entertainment & Media Law Signal

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2011 Top Canadian Entertainment and Media Law Stories

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2011 is not yet over, but in proud maintenance of our tradition, we offer our humble thoughts on this year's most noteworthy Canadian entertainment and media law stories (a special shout-out to my partner Stephen Zolf for his co-authorship of this list). Without further ado, and in no particular order:

- **Bill C-11**

Just like in 2010, copyright reform occupied a lot of bandwidth this past year: Bill C-11 (The Copyright Modernization Act) was the successor to Bill C-32 (The Copyright Modernization Act), which died on the order paper when the Canadian Parliament was prorogued for the May 2011 election. Since not a letter was altered as between the two bills, and since the outpouring of commentary on the bill was largely the same in content as that on the old bill, we will simply reiterate what we said last year: if passed in its current form, Bill C-11 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-11 is collected here.)

- **Terms of Trade**

In the world of Canadian television production, there is little that was bigger news than the April announcement by the Canadian Media Production Association (CMPA) and five of Canada's largest private broadcasters that they had entered into a "Terms of Trade agreement" (TTA). The TTA will have a significant and continuing impact on the way in which the Canadian television industry conducts the business of commissioning and licensing new television productions. (Signal coverage on the Terms of Trade is collected here.)

- **Crookes v Newton**

The Supreme Court of Canada's decision in Crookes v. Newton 2011 SCC 47 drew a very "bright line" test in holding that a hyperlink to defamatory content does not constitute publication of the defamation and can only constitute publication if the creator of the hyperlink actually repeats the libel. Commentators dove into the decision in an effort to parse out the implications of the three sets of concurring decisions - and also to read the entrails about whether the decision would have any impact on future decisions regarding hyperlinking to websites which contain copyright infringing material. (Signal coverage on Crookes v Newton is collected here.)

- **Turmel v CBC (Dragon's Den)**

For Canadian entertainment lawyers, sometimes even the most seemingly trivial decisions have profound importance: in 2011, in the case of Turmel v CBC (Dragon's Den), the Ontario Superior

Court of Justice (subsequently affirmed by the Ontario Court of Appeal, with leave to appeal denied by the Supreme Court of Canada) confirmed the enforceability of "depiction releases" signed by participants in television shows. The plaintiff had objected to what he viewed as the denigrating manner in which he was portrayed on the TV show Dragon's Den - the court held his suit was barred by the release he had signed. (Signal coverage on Turmel v CBC (Dragon's Den) is here.)

- **CBSC's "Money for Nothing" Decision**

In a year replete with interesting decisions from the Canadian Broadcast Standards Council (CBSC), the ongoing "Money for Nothing" drama was surely the most eye-catching. In January 2011, the CBSC publicly released its decision holding that radio broadcasts of the Dire Straits' song "Money for Nothing" which included use of the word "f****t" were in contravention of Clause 2 of the CAB Code of Ethics, and Clauses 2, 7 and 9 of the CAB Equitable Portrayal Code. Following a storm of public criticism, the CRTC (the federal telecommunications regulator) asked the CBSC to reconsider its decision (which was particularly odd since the CRTC has no actual authority over the CBSC). In August 2011, an "ad hoc national panel" of the CBSC released a "revised" decision in the matter: using "the other f-word" in radio broadcasts is, in general, inappropriate and a violation of the Code of Ethics and the Equitable Portrayal Code, however, in the context of this song, the use of the word "f****t" was acceptable (because it was in furtherance of the artistic device of portraying the intolerant individual from whose perspective the lyrics of the song are being sung). (Signal coverage of the whole "Money for Nothing" saga is here.)

- **CRTC responds to increased vertical integration**

The CRTC approved the acquisition by BCE Inc. of CTVglobemedia in March of 2011. In response to this and several previous major media transactions over the last five years (including Quebecor Media Inc.'s acquisition of TVA, the transfer of five Citytv stations to Rogers Media Inc., and the 2010 acquisition by Shaw Communications Inc. of the assets of Canwest Global), the CRTC issued its vertical integration policy in September 2011. Among the CRTC's key determinations is that companies who are vertically integrated (owning both television programming services and broadcasting distribution operations) will henceforth be prohibited from offering program broadcast on television, including hockey games and other live events, on an exclusive basis to their mobile or Internet subscribers. These programs must be made available to competitors under fair and reasonable terms. Only those programs produced specifically for an Internet portal or a mobile device (e.g., behind-the-scenes video clips) may be offered to Internet or mobile customers exclusively. The CRTC also implemented measures to ensure that independent distributors and broadcasters are treated fairly by large vertically integrated companies. In a tilt to consumers, the CRTC encouraged television broadcasting distributors to give customers more flexibility in choosing programming packages (the large vertically integrated companies must submit a report to the CRTC by April 1, 2012, detailing the steps they have undertaken to respond to consumer demands). And significantly, the CRTC established a code of conduct to govern the commercial relationship between broadcast distributors, programming services and new media content providers to prevent anti-competitive behaviour (it is noteworthy that in a subsequent amendment to the policy, the CRTC "clarified" that

the Code of Conduct is not mandatory on vertically integrated companies but rather "prescriptive" in nature, accordingly modifying the anti-competitive prohibition in the Code from "shall not" to "should not").

- **CRTC will not regulate "over-the-top" (OTT) providers**

In its "Results of the fact-finding exercise on the over-the-top programming services", the CRTC determined that itwill not "at this time" consider a general review of its New Media Exemption Order which currently exempts OTT providers such as Netflix and other new media undertakings from CRTC regulatory obligations. According to the CRTC, there was no evidence before it to conclude that OTT is having a negative impact on the ability of the broadcasting system to achieve "legislative policy objectives" or that OTT has harmed the traditional broadcast system. The CRTC has, for now, rejected proposals to lessen the regulatory obligations of licensed traditional broadcasters in response to the entry of OTT providers. One cautionary note: the CRTC acknowledged that OTT providers have reshaped the broadcasting landscape in a very short time and, therefore, it will maintain a watching brief on OTT and conduct another fact-finding exercise in May 2012 "to determine if the scenarios put forth by parties with respect to potential regulatory impacts and opportunities have materialized."

- **CRTC rejects UBB at the wholesale level**

In a November 2011 Decision, the CRTC effectively foreclosed the practice of large telephone and cable companies adopting usage-based billing ("UBB") as a means of managing traffic on their networks when they provide broadband access to wholesale independent ISP customers. UBB was applied by the telcos and cabelcos when the independent ISPs' individual retail customers exceeded monthly download caps. Pursuant to the CRTC's ruling, the sale of wholesale bandwidth to independent ISPs will now be effected on a monthly basis in which independent ISPs will have to determine in advance the amount they need to serve their retail customers and then manage network capacity until they are able to purchase more. Alternatively, large companies can continue to charge independent ISPs a flat monthly fee for wholesale access, regardless of how much bandwidth their customers use.

- **CRTC backs off on amending the "false and misleading news" prohibition on broadcasters**

In a May 2011 ruling, the CRTC determined that it would not proceed with proposed amendments to its regulations that currently prohibit a broadcaster from broadcasting programs that contain false or misleading news. The impetus for the amendments was the Parliamentary Standing Joint Committee for the Scrutiny of Regulations (SJC) which expressed concerns that the existing false or misleading news provisions might not be in keeping with the freedom of expression provision under section 2(b) of the Charter and the ruling of the Supreme Court of Canada in R. v. Zundel. To address these concerns, the CRTC had proposed (see here and here) to amend the relevant provisions such that the prohibition would be narrowed to "news that the licensee knows is false or misleading and that

endangers or is likely to endanger the lives, health or safety of the public." After significant controversy and public comment that the proposed amendments would effectively remove scrutiny over programming standards on controversial services such as Fox News, the CRTC backed off and decided that "the public interest requires the continuation of the prohibition as currently enacted, to ensure that the programming originated by broadcasting undertakings be of a high standard, as required under the Broadcasting Act. At the same time, though, the CRTC noted that it would be guided by the statutory mandate that the Act "shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings". The CRTC also stated that, in light of the protections afforded by section 2(b) of the Charter and the objectives set out in the Act, in order to take action on a complaint relating to the breach of the false or misleading news provisions, such contravention must constitute the "the most flagrant excess".
