

## Why Canada Needs Parody Parity and Comedy Comity – Copyright Control of Canadian Humour

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## 1. INTRODUCTION: WHY CANADA NEEDS A SATIRE AND PARODY RIGHT

Stephen Leacock (1869-1944) was one of the greatest of all Canadians. In his renowned and iconic *Sunshine Sketches of a Little Town*,<sup>1</sup> he immortalized the town of Orillia, Ontario and made it better known as Mariposa throughout the world. He made us think and laugh a lot. In addition to being a brilliant humourist, he was also a great scholar and educator, as well as a very serious economist and political scientist. Thoughts of him as a quintessential Canadian and his vast and polymathic work were the catalysts for my recent thinking about why Canada so notably continues to hold onto and indeed entrench copyright constraints against the right to engage in satire and parody, especially when such a right exists in Australia, France, the USA and is allowed as a matter of policy in the EU.

This occasion for cogitation happened because I recently was honoured with an invitation to speak about copyright and the general theme of user generated content at the fabled Couchiching Conference,<sup>2</sup> held each of the last 77 years near Orillia. As all who come to the Couchiching Conference do, I thought of its many fabled ghosts, including Leacock, who spoke there in 1933 in its second year of existence when the theme of the conference was “The Depression and the Way Out.” That was probably not a very humorous talk. This year’s theme in 2008 was “*The Power of Knowledge: The New Global Currency*”, which occasionally led to some lighter moments.

It turns out that Leacock, shortly before his death, voiced some considerable scepticism about copyright law, replete with his usual humour:

In writing this book I have endeavoured to avoid as far as possible all reference to authors and books of the immediate hour...  
A further reason for avoiding citation of living authors is found

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1. A recent critical edition edited by Carl Spodoni was published by Broadview Literary Texts in 2002.
  2. Organized by the Couchiching Institute on Public Affairs. See <[www.couch.ca](http://www.couch.ca)>.

in the growing difficulties which surround literary quotation today. In these complicated days of movie and radio production copyrights are so jealously guarded that not even a fragment must be borrowed. There is no longer the free and careless quotation that was once as open to all as was the old-time apple orchard to the passer-by. One can only borrow with impunity now from those whose rest can no longer be broken by it.<sup>3</sup>

Leacock was best known, of course, as a brilliant satirist and parodist and was one of Canada's and the world's finest writers. Indeed, I invoked his good name in 2003 when, along with Jack Granatstein and others, we fought and won the battle against what I called "*The Mouse in the House*",<sup>4</sup> an unfortunate but fortunately unsuccessful legislative attempt by the heirs of Lucy Maud Montgomery (LMM" 1874-1942), who was a contemporary of Leacock, to extend the copyright term in unpublished works of those who died before 1949 by up to 34 years. Prof. Granatstein, the great and prolific Canadian historian, was rightly concerned that the bill, if passed, would have tied up and rendered inaccessible – at least by way of publication – unpublished works by such great and/or important Canadians as Leacock and:

- R.B. Bennett (1870-1947), Prime Minister of Canada during the depression, who died a Viscount in his bathtub living in splendid upper class retirement in England
- Sir Robert Borden (1854-1937), Prime Minister of Canada from 1911 to 1920 through the Great War and opponent of Laurier on reciprocity with the USA, Canada's perennial issue
- Sir Wilfrid Laurier (1841-1919), legendary Prime Minister of Canada. Any of his unpublished works would have been protected until 2024 if first published before the end of 2003, had the bill passed; and
- Archibald Stansfeld Belaney (a.k.a. Grey Owl) (1888-1938) writer, conservationist and wannabe aboriginal.

No good reason was ever put forward for this attempted incursion into the public domain. A consultant's report was "published" early in 2003, and even those who knew about it were given only a

3. S. LEACOCK, *How To Write*, (New York: Dodd, Mead, 1943), p. v.

4. Howard KNOPF, "Mouse in the House", July 7, 2003, *National Post*.

few days to comment. This report was devoid of sufficient detail, and totally lacked any international comparative analysis as required by the issues. The proposed legislation was something of a “stealth” provision, as is sometimes seen in the USA, that was hidden away in an otherwise dull but useful “machinery of government” bill intended to effect the merger of Canada’s National Library and National Archives.<sup>5</sup> It was, apparently, yet another instance of the attempted use of copyright as a tool of control, in this case over the publication of LMM’s unpublished papers. If this bill had passed with its copyright provisions intact, it would also have set the stage for a subsequent massive term extension, such as took place in the USA in 1998, to life plus 70 years from the current life plus 50 years.

Consistent with Leacock’s legacy, I suggested at the 2008 Couching Conference that Canada should have a right of satire and parody consistent with Australia, France, the USA and the direction in which the UK is going and the EU permits. That should not be too much to ask.

However, it is indeed too much in the view of some Canadian copyright owners, particularly a rearguard segment of those in the already reactionary and often regressive music industry, who believe that such uses ought to be licensed, i.e. controlled, which would normally mean prohibited. This desire for control seems to transcend the merely venal possibility of licensing revenues, which would be modest at best. It seems to be more about control in the more absolute sense of the outright denial of permission. Too many amongst the corporate copyright owners in the music sector and those who run their collectives have a limited sense of humour or history when it comes to satire or parody involving the works they own or control, which they regard as their “property”, even if they did not in any way actually create them.<sup>6</sup> Actual artists and creators are much more tolerant of satire and parody, and many actively seek an explicit legislated right to be able to engage in it.<sup>7</sup>

However, before I make my case for a satire and parody right in Canada, it is necessary to set forth a brief and simplified history of the concept of copyright as an instrument of control in order to

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5. Bill C-36, *An Act to establish the Library and Archives of Canada, to amend the Copyright Act and to amend certain Acts in consequence*, given first reading May 8, 2003 in Canada’s 37th Parliament – 2nd Session.

6. Weird Al Yankovic is an exception, who has enjoyed a successful career in parodying the songs of others, apparently with permission of the copyright owners.

7. See <<http://www.appropriationart.ca>>.

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understand why this issue is not only important *per se* but is a metaphor for a much larger struggle that is being played out at the highest levels of jurisprudence, legislation, and international law.

## 2. THE PROBLEM OF CORPORATE COPYRIGHT CONTROL

The origins of modern copyright law have a great deal to do with corporate and state control. About 80 years after Caxton brought the printing press to England, Philip and Mary (Tudor) in 1557 granted a royal charter (i.e. a monopoly) to the Stationer's Company, which proved to be profitable to the book publishers and sellers and useful to the monarch in controlling what was printed.<sup>8</sup>

The booksellers then managed over the years through a Star Chamber decree and the Licensing Act of 1662, all obtained with payment to the Attorney General, to procure a powerful censorship mechanism that suited the English Crown quite well.<sup>9</sup> But all good things must, supposedly, end and legally sanctioned censorship supposedly ended in England in 1694. The booksellers, however, did not go gently into the dark night of the public domain. They lobbied long and hard in the name of authors, a disingenuous tactic that has persisted to this day amongst many corporate content owners who pay their individual creators as little as possible, wrest copyright ownership away from them whenever possible, and persist in the denial of moral rights to most creators in the USA. Fortunately, among the new generation of book publishers and record producers, some see beyond this model and take a more enlightened point of view.

The 1709 English *Statute of Anne* is the progenitor of copyright law in all common law countries. The late scholar Ray Patterson regarded it as having transformed the previous monopoly and censorship regime into a trade regulation concept.<sup>10</sup> It was something a setback for the booksellers, who proceeded to litigate for decades in the Battle of the Booksellers to determine whether they had truly lost their prized perpetual copyright. And the booksellers were adept in ensuring that the rights of authors could be assigned to the publishers, a key feature that has been important every since. Even today, authors and composers, who are often forced to assign their

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8. L. Ray PATTERSON and Stanley W. LINDBERGH, *The Nature of Copyright*, (University of Georgia Press, 1991), pp. 19-20. (hereinafter "Patterson").

9. PATTERSON, p. 25-26.

10. *Ibid.*, p. 28.

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rights to publishers, record companies, or others typically earn only about a 10 % royalty from the sales of their work.

The internet promises to change this corporate control model, and even to eliminate the traditional role of publishers, record companies and others who stand between creators and consumers and who absorb most of the payments made by users of copyright. This perhaps explains why the sound recording industry, having failed to respond to the opportunity of the internet, now seems determined to keep it under control and even cause it to regress by means of litigation against its customers and legislation aimed at controlling and even preventing significant technological innovation.

The *Statute of Anne* was a truly monumental exercise in the now immensely overworked word “balance”. It sought to provide a limited term of protection of 14 years available only to the author and only if the author was alive at the end of the first 14 year term<sup>11</sup> in exchange for the proposition that the protected work would then enter into the public domain. It sought to end the corrupt and inefficient practice of monarchical monopoly dispensation. And, interestingly enough, the precedent of copyright law lagging behind technology was established because Gutenberg’s first working printing press had appeared almost three centuries earlier around 1439.<sup>12</sup> Somehow the world had survived in the meantime and saw the flourishing of the Renaissance, William Shakespeare (1564-1616), and many other immensely important creators who thrived during a high water mark in Western culture without the benefit of statutory copyright protection.

After Gutenberg, copying and communication technology was relatively stagnant until the later part of the 18th and the 19th century, which saw the advent of lithography, and later photography, the telegraph and the player piano.

Flash forward 300 or so years from the *Statute of Anne* and the story is not so very different. Corporate copyright owners are still trying to control creators and consumers and to limit the impact and potential of new technology. Consider these well documented developments:

1. The computer software industry succeeded in its campaign in the late 1970s and early 1980s to have computer software trea-

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11. *Ibid.*, p. 29.

12. Magnus MAGNUSSON, *Chambers Biographical Dictionary*, (Edinburgh, 1990), p. 642.

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ted as a literary work under copyright law. The result has been the creation of immense wealth but also continued concern about antitrust issues and the control of extraordinarily promising technology by a very few corporate interests using the immensely powerful legal tool of copyright. Strong copyright law can be justified if it can be tempered with strong antitrust law, where appropriate. However, most antitrust authorities have come to believe that it will be very rare that an IP owner can do any wrong. The pace of innovation in the software industry seems to have noticeably slowed.

2. We have seen multinational record companies sue a 12 year-old child living in subsidized housing, a dead grandmother and about 40,000 others in the USA (and obtaining “settlements” of several thousand dollars each in countless cases) for the common place activity of downloading and “making available” music from the internet. This continues to happen, even though independent studies have demonstrated that such activity is, if anything, benign or even positive for the record companies.<sup>13</sup>
3. We have seen the Disney empire, which sprung to immense success on the backs of the Brothers Grimm and other great predecessor creators, use copyright law by manipulation, litigation and ultimately their own heavily lobbied copyright term extension legislation in the form of the *American Copyright Term Extension Act (CTEA) of 1998* to control and prevent anyone else from following in the Disney model of exploiting and building upon earlier and arguably much greater creativity.
4. We have seen attempts to use copyright law to stop competition in the aftermarket for replacement tail pipes for automobiles, and in the market for generic replacement printer toner cartridges and generic replacement garage door openers.
5. We have seen copyright law used to impose regional coding in the motion picture industry, which has the effect of preventing North American access to perfectly legal commercially produced DVDs containing culturally diverse content from China, India, Europe and other regions outside of “Region 1”.

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13. B. ANDERSEN and M. FRENZ, *The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada*, (Industry



6. We have seen attempts to use copyright law to stop free trade in legitimate products ranging from shampoo to chocolate bars, as will be discussed below.

These excesses are about to be greatly compounded if Canada proceeds to enact the pending Bill C-61. This bill would include provisions such as the following:

1. Professors would be obliged to destroy their online “lessons” 30 days after a course is finished.
2. Librarians would be obliged to function as digital copyright cops against the interest of the clientèle they are supposed to serve, and would be stripped of much of the freedom awarded to them in 2004 by the Supreme Court of Canada to serve their clientèle’s “research” requirements.
3. Educators would be obliged to pay for any use of freely available material on the internet that is marked in such a manner as “all rights reserved” and others outside of the educational tent may have to pay for using “publicly available material” on the internet.
4. Ordinary citizens would be prevented from viewing perfectly legitimate and paid-for videos from abroad due to the large liability created for the circumvention of regional coding and other “technical measures”. It would become illegal to transfer bought and paid-for movies and music to iPods and other similar devices if a technical measure or a unilaterally imposed contractual provision stands in the way. It would be illegal to unlock a cell phone, a practice that has been made legal in the USA.
5. Many Canadians engaged in perfectly ordinary activity involving the use of legitimately acquired content on legitimately acquired devices would face immense liability for statutory minimum damages of up to \$20,000 for each infringed work, where the consumer violates a copyright owners’ unilaterally imposed contractual controls and restraints in the form of technical measures.

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Canada, 2007); available at <[http://strategis.ic.gc.ca/epic/site/ippd-dppi.nsf/en/h\\_ip01456e.html](http://strategis.ic.gc.ca/epic/site/ippd-dppi.nsf/en/h_ip01456e.html)>.

See also F. OBERHOLZER and L. STRUMPF, *The Effect of File Sharing on Record Sales An Empirical Analysis*. 2004 available at <[http://www.unc.edu/~cigar/papers/FileSharing\\_March2004.pdf](http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf)> and updated at (February 2007), 115 “Journal of Political Economy”, pp. 1-42.

6. Canadians would face a regime under which fair dealing rights and even access to the public domain could be restricted by copyright owners' unilaterally imposed contractual controls and restraints in the form of technical measures.

### **3. KEY COURT CASES CONCERNING COPYRIGHT CONTROL**

The modern history of copyright is replete with examples of attempts to use copyright law to control economic or cultural activity in a manner that is arguably unnecessary or even counterproductive to the essential purpose of copyright, which is perhaps best summarized in the United Constitution in Article 1, clause 8:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Common law courts have almost always sought to avoid conclusions that promote restraint of trade and have ruled against overly zealous efforts at control. But this ongoing war is getting more and more intense and complex. Here are some of these key recent cases:

#### **3.1 *Sony v. Universal 1984***

In this landmark case decided by the United States Supreme Court in 1984<sup>14</sup>, the motion picture industry attempted to enjoin Sony from selling its brilliant new video tape recorder called the Betamax that enabled consumers to "Watch Whatever, Whenever". In a landmark 5/4 decision, the US Supreme Court ruled that there is no basis to impose liability on the provider of technology simply because that provider has constructive knowledge that its customers might use the equipment to make unauthorized copies of copyrighted material. The sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial non-infringing uses.<sup>15</sup> Moreover, the Court ruled that the unauthorized home time-shifting of respondents' programs is legitimate fair use.<sup>16</sup> And as

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14. *Sony Corporation v. Universal City Studios*, 104 S.Ct. 774 (SCOTUS).

15. *Ibid.*, pp. 785-788.

16. *Ibid.*, pp. 789-795.

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Justice Stevens indicated about copyright law and thoroughly documented in an important footnote:

*This protection has never accorded the copyright owner complete control over all possible uses of his work.*<sup>17</sup> [Emphasis added.]

Two years earlier, the late Jack Valenti had famously testified to Congress that:

I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.

The VCR avalanche, I told you about that. Now, what about the VCR owners. Now, from here on out, Mr. Chairman, I am going to be speaking about a survey done by the Media Statistics Inc., which is a prestigious firm out of Silver Spring, Md. We, meaning the MPAA, did not commission this survey. We bought it after it was done when we heard about it. So, this was not a case – we have commissioned a lot of things, but this is not one of them.

Now, I want to tell you about it because I think it is absolutely fascinating. This survey was taken in October 1981. It is the newest and freshest data available. Here is what it says. Median income of a VCR owner is between \$35,000 and \$50,000 a year. Not a lot of what we call today the truly needy are buying these machines. One-third of all the owners have incomes of more than \$50,000. Now, here is the next one: 87 percent, 86.8 percent of all these owners erase or skip commercials. I have here, Mr. Chairman, if you are not aware of how this works – this is Panasonic. This is a little remote control device that you use on machines. It has on here channel, rewind, stop, fast forward, pause, fast advance, slow, up, down, and visual search, either going left or right.

Now, let me tell you what Sony says about this thing. These are not my words. They are right straight from McCann Erickson, whom you will hear from tomorrow, who is the advertising agency for Sony and here is what they say. They advertise a variable beta scan feature that lets you adjust the speed at

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17. *Ibid.*, p. 784 and FN 13.

which you can view the tape from 5 times up to 20 times the normal speed.

Now, what does that mean, Mr. Chairman? It means that when you are playing back a recording, which you made 2 days or whenever – you are playing it back. You are sitting in your home in your easy chair and here comes the commercial and it is right in the middle of a Clint Eastwood film and you don't want to be interrupted. So, what do you do? You pop this beta scan and a 1-minute commercial disappears in 2 seconds.<sup>18</sup>

Hollywood tried – and failed at the time – to control technology itself, not to mention what users could do with it in private, non-commercial, and non-harmful ways in their own homes. The intense irony of Valenti's absurd arguments was that the VCR actually served to save Hollywood by creating an enormous market that Hollywood was incapable of grasping or exploiting at the time without some tough love from the courts and legislatures. It will be recalled that the video rental and sell-through market – utilizing Betamax and then VHS technology – was first exploited by purveyors of pornography, who understood the technology and its potentially positive economic significance far better than Valenti and his Hollywood friends who preferred to stick with past business models.

As *The Economist* pointed out a decade ago:

Adult entertainment is often in the vanguard of new technology. As Ian Watt points out in his book, "The Rise of the Novel", one reason for the novel's early popularity was the freedom to use erotic content that would not be acceptable on stage. Similarly, it was porn that started the video-rental business, and porn that popularised the Internet.<sup>19</sup>

The Luddite proclivities of the film and sound recording industries have arguably continued unabated, with attempts to stop rather than embrace and exploit controversial but potentially positive technologies, such as file sharing. The incumbent and most successful business interests were, as is often the case, the last to understand the new technology.

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18. Available at <<http://cryptome.org/hrcw-hear.htm>>.

19. *Vivid imagination*; Nov 19th 1998, "The Economist" print edition.

### 3.2 **Armstrong v. British Leyland 1986**

In 1986, the British House of Lords had to decide whether a consumer has the “Aright to repair” an automobile by means of buying an unauthorized copy of a tail pipe, in which the manufacturer, British Leyland (“BL”), asserted copyright rights.<sup>20</sup> BL clearly sought to control the aftermarket for car parts and to prevent the owner of a car with a rusted tail pipe from replacing it other than on BL’s own terms. What this possibly could have to do with the traditional bailiwick of copyright law serving to promote progress in the literary, dramatic, artistic and musical works was not clear.

As Lord Bridge of Harwich stated:

I can see no reason to doubt that any owner of a BL car might exercise his right to repair the car, whenever the exhaust pipe needs replacement, by producing an exact copy of the original pipe in his own workshop or by instructing the local blacksmith to do the same. But in practical terms, of course, if the owner’s right to repair is limited to these activities in a world of mass-produced goods, it is quite valueless. What the owner needs, if his right to repair is to be of value to him, is the freedom to acquire a previously manufactured replacement exhaust system in an unrestricted market. Here then we come to the heart of the issue, where there appears to be a clear conflict of legal rights, the car owner’s right to repair on the one hand, the copyright owner’s right, on the other hand, to use his copyright in such a way as to maintain a monopoly in the supply of spare parts. It may be a novel, but seems to me to be an unavoidable, issue for the law to decide which of the two rights should prevail over the other.<sup>21</sup>

As Lord Templeman said:

The car sold by BL can only be kept in repair by the replacement of the exhaust pipe which is not the subject of a patent. In these circumstances, in my opinion, BL are not entitled to assert the copyright in their drawing of an exhaust pipe in order to defeat the right of the purchaser to repair his car. The exploitation of copyright law for purposes which were not

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20. *British Leyland Motor Corpn. Ltd. v. Armstrong Patents Co. Ltd.*, [1986] AC 577 (H.L.).

21. *Ibid.*, p. 626.

intended has gone far enough. I see no reason to confer on a manufacturer the right in effect to dictate the terms on which an article sold by him is to be kept in repair and working order.<sup>22</sup>

This important decision has been partially undone by the 1988 UK legislation, concerning which the redoubtable scholar and jurist Sir Hugh Laddie said:

The [UK] Act of 1911 was a timid little creature. It contained a mere 37 sections. Some believe it was the best Copyright Act we ever had. The 1956 Act was a formidable affair. It contained 57 Sections. It held sway during a period in which copyright legislation burgeoned. But the 1988 Act puts all of this to shame. It contains over 300 sections, about 280 of which relate to copyright and its new offspring, design right. The increase in size cannot be attributed merely to a trend toward verbosity in modern legislation, although there certainly is some of that present in the 1988 Act. To a large extent, it reflects the spread and creation of new copyright-type rights...

You can libel a dead author to your heart's content, but if you want to honour him by publishing a commemorative edition of his letters, 50, 60 or 69 years after his death, you will infringe copyright, you shall have to pay exemplary damages and... you may be prosecuted (from an address on the death of Steven Stewart, Q.C.).<sup>23</sup>

### 3.3 *Feist v. Rural Telephone 1991*

In this 1991 decision of the US Supreme Court, Justice Sandra Day O'Connor considered the meaning the words "to promote the Progress of Science and useful Arts" in Art. I, cl. 8 of the US Constitution in the context of whether directory listings in the white pages of a telephone book were entitled to copyright protection. The case was about the control of purely factual information. Justice O'Connor ruled that:

Rural's selection of listings could not be more obvious: it publishes the most basic information – name, town, and telephone

22. *Ibid.*, p. 644.

23. Mr. Justice LADDIE, *Copyright: Over Strength, Over-Regulated, Over-Rated?*, [1996] EIPR 253.

number – about each person who applies to it for telephone service. This is “selection” of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.<sup>24</sup>

This, of course, did not stop certain American and European database owners from trying to “policy shop” a database treaty at WIPO, which finally was shot down in 1996 in that forum. However, the EU was persuaded to enact a database directive, with some ensuing embarrassing and inconvenient results in the case law having to do with protection of facts about race horses, etc.

### 3.4 Acuff Rose 1994

In 1994, the US Supreme Court ruled that a crude and rather lewd parody by 2 Live Crew of the pretty Roy Orbison song *Pretty Woman* was not copyright infringement because the parody was a transformative “fair use”<sup>25</sup> and hence, a defence to any allegation of infringement. Even with all of the subsequent difficulties experienced by the sound recording industry and that industry’s paranoia about the internet, nobody has ever credibly suggested that the US Supreme Court’s decision enabling a parody right has caused any economic harm to the music business.

It may be noted that satire and parody have become staples of American political discourse in recent years. Examples include the Obama campaigns’ use of the iconic Apple “1984” commercial and the JibJab parodies from the 2004 and 2008 US presidential campaigns.<sup>26</sup>

### 3.5 Quality King 1998

In 1998, Justice Stevens of the US Supreme Court ruled that copyright law could not be used to control the parallel importation of perfectly legitimate (i.e. genuine and non-counterfeit) bottles of shampoo that had been exported from the USA and were being re-imported contrary to the wishes of the copyright owner in the

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24. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) at p. 362.

25. *Luther R. Campbell v. Acuff-Rose Music*, 510 U.S. 569 at 594.

26. <<http://sendables.jibjab.com>>.

label of the product.<sup>27</sup> Justice Ginsburg agreed, but went on to specify that “we do not today resolve cases in which the allegedly infringing imports were manufactured abroad”.

The unresolved cases mentioned by Justice Ginsburg came before the Supreme Court of Canada almost a decade later, as we shall see.

There is a very long history of copyright owners attempting to use copyright law as an instrument of trade control with respect to legitimate products, which in many cases are themselves completely devoid of any element that would merit copyright protection.

### 3.6 Théberge 2002

This decision from the Supreme Court of Canada in 2002 involved some rather unusual facts relating to a process of lifting the ink off a poster and depositing it in turn on canvass to simulate the look of a painting. There were no additional copies made at the end of the day. Only the nature of the copies was changed. The copies were on canvas rather than on paper. In allowing this technique, Justice Binnie held that:

*Excessive control* by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.<sup>28</sup>

[...]

*But in what way has the legitimate economic interest of the copyright holder been infringed?* The process began with a single poster and ended with a single poster.<sup>29</sup>

[...]

It seems to me that the respondent is pursuing a form of “droit de destination” in this case. But, under our Copyright Act, the

27. *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135 (1998).

28. *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34 par. 32.

29. *Ibid.*, par. 38.



“right of destination” as such does not exist. Generally, *the copyright holder does not by virtue of his or her economic rights retain any control over the subsequent uses made of authorized copies of his work by third party purchasers. Where in specified situations the Act gives the copyright holder some power to control or benefit from subsequent uses of authorized copies of his work, the relevant provisions are narrowly framed to apply only to very specific forms of reproduction, as in the case of sound recordings (s. 15(1)) or computer programs (s. 3(1)(h)). If a general right to control subsequent usage existed, it would not have been necessary to make specific provision in these cases.*<sup>30</sup> [Emphasis added.]

Clearly, the Supreme Court of Canada takes a dim view of any inherent absolute right of “control” on the part of copyright owners.

### 3.7 CCH v. LSUC 2004

In a landmark decision from 2004, Chief Justice McLachlin, writing for a unanimous Supreme Court, ruled that:

[...] a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law.<sup>31</sup>

This decision also involved the issue of whether a law library was entitled to make copies of works, even whole works, on behalf of its patrons, even commercial patrons for “research” purposes:

First, there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. As noted, a person does not authorize copyright infringement by authorizing the mere use of equipment (such as photocopiers) that could be used to infringe copyright. In fact, courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law.

[...]

30. *Ibid.*, par. 65.

31. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, par. 38.

Finally, even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement. The Law Society and Great Library patrons are not in a master-servant or employer-employee relationship such that the Law Society can be said to exercise control over the patrons who might commit infringement: see, for example, *De Tervagne*, supra. Nor does the Law Society exercise control over which works the patrons choose to copy, the patron's purposes for copying or the photocopiers themselves.<sup>32</sup>

### 3.8 *Euro-Excellence v. Kraft*

We finally come to the landmark 2007 *Kraft* decision of the Supreme Court of Canada in a case involving the right of an entrepreneur to import perfectly legitimate Toblerone chocolate bars put on the market with the consent of the manufacturer in Europe but imported into Canada contrary to the wishes of the exclusive licensee of a small part of the material on the packaging of these chocolate bars. The Canadian exclusive licensee wanted to control the parallel importation of food products, based upon copyright in a portion of the packaging.<sup>33</sup>

The prevailing opinion of the Court was written by Justice Rothstein, and essentially adopted a very technical argument put forward by this author on behalf of the intervener Retail Council of Canada to the effect that (in simplified terms) the hypothetical maker in Canada of the chocolate bar packaging, namely the actual maker which was Kraft Europe, could not infringe its own copyright, which it had licensed in Canada and hence still owned. This was the argument necessary and sufficient to win the case. The intervention was necessary because neither the argument nor the relevant case law had been put forward by any of the parties in the Courts below.

Naturally, I agree with the reasons of Justice Rothstein, and his two colleagues, who were additionally joined in concurring and brief but potentially very important additional reasons by Justice Fish, which are discussed below. Moreover, further interesting and potentially important reasons come from now retired Justice Bastarache and two colleagues who concurred with the result flow-

32. *Ibid.*, par. 43, 45.

33. *Euro-Excellence Inc. v. Kraft Canada Inc.*, 2007 SCC 37.

ing from Justice Rothstein's reasons, but for very different reasoning, some of which he and Justice Rothstein disagreed upon in unusually frank terms. Hopefully, the debate that frames this disagreement will lead to a more informed discourse on copyright policy and law both in Canada and abroad.

Justice Bastarache indicated that:

This interpretation of s. 27(2) *respects copyright's insistence that only legitimate economic interests receive copyright protection*. To allow s. 27(2) to protect all interests of manufacturers and distributors of consumer goods would upset the copyright balance. *Far from ensuring a "just reward" for creators of copyrighted works, it would allow a copyright to be leveraged far beyond the use intended by Parliament, allowing rights to be artificially enlarged into protection over consumer goods. This undue expansion of copyright would certainly be a failure to give heed to Binnie J.'s insistence, at para. 31 of Théberge, that the law give due weight to the limited nature of the rights of a copyright holder.*<sup>34</sup> [Emphasis added.]

Justice Bastarache also added the potentially very important possibility that the doctrine of copyright abuse or misuse may be applicable in Canada.<sup>35</sup> This is a doctrine that has been invoked by the legendary Judge Posner in the USA.<sup>36</sup>

Justice Fish, in concurring with Justice Rothstein, added the following important *obiter dicta*:

Without so deciding, I *express grave doubt whether the law governing the protection of intellectual property rights in Canada can be transformed in this way into an instrument of trade control not contemplated by the Copyright Act.*<sup>37</sup> [Emphasis added].

Many aspects of the reasoning of Justices Rothstein, Fish and Bastarache are potentially complementary and I hope that a future court will find a way to harmonize them.

34. 2007 SCC 37 at par. 88.

35. 2007 SCC 37 at par. 98.

36. *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640 (2003).

37. 2007 SCC 37 at par. 56.

In any event, the issues of what constitutes a “legitimate economic interest”, “control” and abuse or misuse of copyright rights are clearly on the radar screen of the Supreme Court of Canada. With the recent early retirement of Justice Bastarache and the uncertainty of the viewpoint of his successor, who has not yet been named at the time of writing this paper, it is even more difficult than usual to predict how the Supreme Court of Canada will rule in future copyright cases.

#### 4. COPYRIGHT, CATCH UP AND TECHNOLOGY

Copyright law has, until very recently, played catch up with technology – often lagging far behind. The 1709 *Statute of Anne* took almost three centuries to catch up with the printing press. The 1886 *Berne Convention* took almost a century to catch up lithography – but not even photography and certainly not with telegraphy. Curiously enough, the *Berne Convention* went from a glint in someone’s eye to fruition in only three years, relying on the then high tech means of steam ships and telegraphs. Today, it is ironic that, with the internet and e-mail, multilateral IP treaty development seems to be essentially dead in the water.

In fact, it is only in the last decade or so that some national and international law makers have taken the position that copyright law should be ahead of the curve and anticipate and control future developments. This, I submit, is a monumentally mistaken posture that will, with great certainty, result in the stifling of many aspects of progress and innovation and frustrate the great promise that arose with the advent of personal computers and the internet. In fact, the beginning of the dark age of the internet is now at hand as anyone who has observed the throttling of the internet and the bloated and disabling DRM<sup>38</sup> and TPM<sup>39</sup> technology behind Windows Vista can attest.

Lessig has pointed out that the architecture of the internet will surely allow for greater control by IP owners, and has questioned how this will affect all kinds of liberty:

When costs of control fall, however, liberty is threatened. That threat requires a choice: do we allow the erosion of an earlier

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38. Digital rights management.

39. Technical protection measures.

liberty, or do we erect other limits to re-create that original liberty?

The law of intellectual property is the first example of this general point. As the architecture of the Internet changes, it will allow for a greater protection of intellectual property than real-space architectures allowed; this greater protection will force a choice on us that we do not need to make in real space. Should the architecture allow perfect control over intellectual property, or should we build into the architecture an incompleteness that guarantees a certain aspect of public use or a certain space for individual freedom?<sup>40</sup>

Even Bruce Lehman, the architect of the 1996 WIPO Treaties and the American *Digital Millennium Copyright Act*, the “DMCA” has now admitted that “I don’t think it [DMCA] has achieved the objectives we necessarily intended.”<sup>41</sup>

## 5. SATIRE AND PARODY IN CANADA

With this background about copyright and control, copyright owners have often resisted the art of satire and parody, which are ancient and honoured traditions in our culture. The two concepts sometimes overlap, but there is an inherent difference. The following excerpts from the landmark American Supreme Court’s 1994 decision in the “Pretty Woman” case explain this difference:

For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works... Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.<sup>42</sup>

Satire has been defined as a work “in which prevalent follies or vices are assailed with ridicule,” 14 Oxford English Dictionary

40. L. LESSIG, *Code Version 2.0* (New York, Basic Books, 2006), p. 196.

41. <<http://www.michaelgeist.ca/content/view/2444/196>>.

42. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 at p. 580-581.

[...] or are “attacked through irony, derision, or wit,” American Heritage Dictionary [...]<sup>43</sup>

Parody always involves some element of copying. Satire may or may not do so. Both practices should be allowed under copyright law, when the use or dealing is “fair”.

The main problem for those who espouse the need for a right to engage in satire and parody in Canada is a long line of cases leading up to a 1996 judgment of Justice Teitelbaum in the Federal Court, widely known as the Michelin decision.<sup>44</sup> In this case, the Court held that the unauthorized depiction of “Bibendum”, better known as the “Michelin Man” stomping on a unionized worker constituted copyright infringement, and that Canadian law did not allow for a fair dealing defence based upon parody. He ruled that:

Under the *Copyright Act*, “criticism” is not synonymous with parody.<sup>45</sup>

and that:

The Defendants fall short because American case law permitting parody as criticism under the American doctrine of “fair use” is not applicable nor terribly persuasive in the Canadian context of a different legal regime and a longstanding trend to deny parody as an exception. As well, *exceptions to copyright infringement should be strictly interpreted*. I am not prepared to read in parody as a form of criticism and thus create a new exception under Section 27(2)(a.1).<sup>46</sup> [Emphasis added]

Justice Teitelbaum rejected arguments based upon freedom of expression pursuant to the *Charter of Rights and Freedoms*, and rejected the application of the then recent American Supreme Court decision in the “Pretty Woman” case. In 1994, the US Supreme Court had ruled that a crude and rather lewd parody by 2 Live Crew of the wholesome Roy Orbison song “Pretty Woman” was not copyright infringement because the parody was a transformative “fair use”<sup>47</sup>

43. *Ibid.*, p. 581.

44. *Cie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada et al.* 71 C.P.R. (3d) 348.

45. 71 C.P.R. (3d) 348 at 378.

46. 71 C.P.R. (3d) 348 at 379.

47. *Luther R. Campbell v. Acuff-Rose Music*, 510 U.S. 569 at 594.

and hence, a defence to any allegation of infringement. No appeal was taken from the *Michelin* decision.

Some believe that Justice Teitelbaum's decision is no longer good law. Prof. D'Agostino of Osgoode Hall Law School has done a very thorough analysis of the implications of the *CCH* case on fair dealing in Canada. With respect to the state of the law in Canada on parody, which she analyses in considerable detail, she concludes that:

Before *CCH* many scholars posited that parodies would be infringing in Canada. Post *CCH*'s liberal interpretation of the enumerated grounds, it could be argued that "criticism" could now encompass parody. *Michelin no longer seems good law*. Indeed, parody in the US is not an automatic. Parody still requires analysis of each of the four factors as well as some use of the target to be fair. This can now also be the case in Canada and would likely not require any legislative intervention.<sup>48</sup> [Emphasis added.]

She is, of course, referring to the landmark 2004 Supreme Court of Canada's decision in *CCH v. LSUC*, in which Chief Justice McLachlin, writing for the Court, stated that fair dealing exceptions, such as that provided for research must be given "large and liberal interpretation in order to ensure that users' rights are not unduly constrained"<sup>49</sup> and that:

In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the Copyright Act, namely research, private study, *criticism*, review or news reporting: see ss. 29, 29.1 and 29.2 of the Copyright Act. As discussed, *these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights*.<sup>50</sup> [Emphasis added.]

With Justice Teitelbaum's sweeping (though by no means new at the time) pronouncement that "exceptions to copyright infringement should be strictly interpreted" now clearly in doubt and the doctrine of "users' rights" thoroughly established (though subject to

48. G. D'AGOSTINO, *Fair Dealing After CCH*, Department of Canadian Heritage, June, 2007, at p. 41 (footnote omitted) <[http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/cch-2007/CCH-2007\\_e.pdf](http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/cch-2007/CCH-2007_e.pdf)>.

49. *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at par. 51.

50. 2004 SCC 13 at par. 51.

attack in the current Government's Bill C-61), there is indeed reason to believe that the *Michelin* decision may no longer be followed.

Indeed, Prof. D'Agostino may be even more right than she could have known when she arrived at that conclusion in 2007 because the Supreme Court of Canada now seems to be determined to invoke the *Charter* value of "freedom of expression" in the context of the "fair comment" defence in a defamation action. There is a potentially useful analogy between the law of defamation and copyright here. A person's right to their reputation and a commentator's right to engage in fair comment about that person is conceptually similar to a copyright owner's right to control reproduction of a work and the public's right to comment on or build upon the work in the course of fair dealing consisting of satire or parody. As Justice Binnie stated in the very recent decision involving Rafe Mair:

The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get "spiked", the Media Coalition contends, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of legitimate public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.<sup>51</sup>

One might hope that the Supreme Court of Canada would take a similar view if a satire or parody case were to find its way there. However, unless and until the *Michelin* decision is declared to be no longer good law, at least at the Federal Court of Appeal level, there will continue to be a real and severe chill on parody in Canada. An academic analysis that says that the *Michelin* decision may no longer be good law is insufficient to meet the due diligence requirements

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51. *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, par. 15.



as perceived by publishers, broadcasters, insurers and others in today's climate of corporate copyright control and chill.

I strongly disagree with Prof. D'Agostino's position that we do not need legislative intervention in this instance. It is primarily the responsibility of Parliament, and not individual litigants, to take the necessary steps to provide clear and predictable laws in Canada. The current Bill C-61, for example, would provide a dream list of new, overreaching and unnecessary rights for content owners. Unfortunately, there are no highly paid lobbyists fighting for creators and users who strongly need a satire and parody right in Canada. When Parliament proceeds with copyright revision, a satire and parody right should be included. It would even be justifiable on its own, if a larger package does not proceed in the near future.

Test case litigation is not an answer in this situation. There are major costs risks in seeking a ruling from the Federal Court of Appeal or another appellate court that parody is now included in fair dealing and is therefore a user's right in Canada. While there is reason to hope that this would be the result of such litigation, one cannot count on this being the case. There were serious splits on copyright doctrine that were exposed in the Supreme Court's *Kraft* decision in 2007. Moreover, the recent retirement of Justice Bastarache and the imminent appointment of new Justice on the Supreme Court thereby ensure even more post-*Kraft* unpredictability if the case were to get that far. Furthermore, well and thoroughly fought copyright litigation is quite rare in Canada and there is no guarantee that the "right" case will arise in the foreseeable future. In terms of how it may arise, it may not be necessary to wait for a lawsuit to be launched by an aggrieved rights holder, since pre-emptive litigation is now possible in principle.<sup>52</sup> However, pre-emptive copyright litigation is rare, risky and expensive. In any event, resolution of the parody issues in the Canadian courts at an appellate level will take several years from whenever a test case is started.

The answer is to use the window of opportunity provided in Bill C-61 to simply amend s. 29 of the *Copyright Act* to include satire and parody, in a similar manner to what the Australians have recently done. Section 41(A) of the Australian *Copyright Act* as recently amended in 2006 now provides that:

A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical

52. *Research In Motion v. Atari*, 61 C.P.R. (4th) 193 (Ont. Superior Court of Justice).

work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.<sup>53</sup>

In Canada, it would probably be a good idea to add the words “or moral rights” after the word “copyright”, since infringement of copyright and moral rights are treated somewhat differently in the legislation.<sup>54</sup> This would be a very simple amendment to s. 29, which has conveniently been opened up by Bill C-61, so such an amendment would be perfectly in order if the Bill ever gets to Committee in its present form.

## 6. OTHER JURISDICTIONS

As noted, the parody right is well ensconced by the Supreme Court of the USA in that jurisdiction. In the ensuing 12 years, nobody has seriously suggested that this has been a bad decision that requires legislative amendment.

France, a jurisdiction that takes copyright and moral rights very seriously, has long had a parody right, subject to the proviso that the parodist “observes the rules of the genre.”<sup>55</sup>

According to the recent and respected Gowers Review, “The Information Society Directive specifically allows for caricature, parody or pastiche”. The Review recommends such an exception should be introduced into UK law<sup>56</sup>.

Finally, as indicated above, Australia has recently in 2006 explicitly recognized both satire and parody as fair dealing exceptions.

It should go without saying that any fair dealing exception for satire and parody would be subject to judicial scrutiny to ensure that it is indeed “fair dealing” and not simply wholesale copying with no added value by way of critical or otherwise transformative value. This should be sufficient to mollify any potential Canadian critics.

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53. Australia, *Copyright Act 1968 as Amended*, s. 41A.

54. See ss. 27 and 28 of the *Copyright Act*.

55. According to *Copinger & Skone-James on Copyright*, K. Garnett *et al.*, London, Sweet & Maxwell, 1999, p. 502 who advise that the French provision is found in Intellectual Property Code, (Legislative Part) 92-597, 1992, Art. L 122-125.

56. Citing Article 5(3)(k) of Directive 2001/29/EC. See the *Gowers Review of Intellectual Property*, UK, HMSO, 2006, p. 68.

However, resistance can be expected from those that insist upon excessive control in the name of copyright. Fortunately, we have an institution in Canada called Parliament that will hopefully do its job in this instance.

## **7. CONCLUSION**

It would be most unfortunate if Canada were to be one of the only major countries in which the right of satire and parody are actually forbidden by copyright law because a small number of corporate interests insist upon an excessive amount of control that can stifle freedom of expression and creativity. That is why this issue is both important on its own and is a significant metaphor for a much larger struggle, which entails the proverbial question of how much control is necessary for copyright law to serve its purpose. In the case of satire and parody, Canadian law needs to be amended to allow fair dealing by way of satire or parody. This would bring Canada in line with the leading jurisdictions to which we usually compare ourselves. The use of copyright law in Canada to control humour is unacceptable. I have no doubt that the ghost of Stephen Leacock would agree.

...L'INTENTION DU LÉGISLATEUR...

