March 11th, 2008

A Note on Integrity in Treaty-Making & Copyright Law

By Greg Hagen

In the William Howard Lecture delivered at the University of Calgary on February 8th, 2008, Jim Prentice, Minister of Industry of the Government of Canada, spoke about the virtue of integrity in regulating greenhouse gases. He noted that "[i]t takes integrity to strike the right balance and to draw the lines that will eventually become law which our industries will comply with." Prentice is also the lead Minister responsible for copyright. So, while Prentice used environmental legislation to illustrate his point about striking the right balance, it was not lost on the audience that the integrity of legislators and the legislative process is also relevant to striking the right balance between copyrights and other values.

Concerns about the integrity of the ongoing copyright reform process have been fuelled by the fact that some legislators have been funded by interested parties, that there has been a barrage of misleading statements made by lobbyists which may have an undue influence on politicians uneducated in intellectual property subtleties and that consultation with business and the public is either out of date or has been ineffective. The process has become so discredited in the eyes of some commentators that there have been calls for a Royal Commission on copyright. This recommendation is entirely justified in the circumstances.

Prentice's lecture raised new doubts about the integrity of the copyright reform process. One doubt relates to the fact that the Canadian Government intends to amend the existing Copyright Act for the purpose of making it conform to the norms embodied in the so-called "Internet Treaties." These Treaties, the WIPO Copyright Treaty and WIPO Performers and Phonograms Treaty, were signed by Canada in 1997 and mandate increased rights for copyright owners. Most controversially, the Internet Treaties require that remedies be provided against those who circumvent digital locks that protect rights under the Copyright Act. Unfortunately, Prentice, who is a lawyer and ought to know the law in this area, has added to public confusion by wrongly claiming that "[we] have certain obligations under those Treaties to bring our law into conformity, in a general sense, with the Treaties that were signed." As a number of commentators have pointed out, until the Internet Treaties are ratified, they are not binding on Canada. Article 18 of the Vienna Convention on the Law of Treaties merely requires that a signatory "…refrain from acts which would defeat the object and purpose of a treaty…." The Government's misconception on this point appears to have led it to believe that it need not even examine whether digital locks and anti-circumvention provisions are the best means to achieve

the ends of the Internet Treaties, including "maintain[ing] a balance between the rights of authors and the larger public interest, particularly education, research and access to information…."

Another doubt concerns the role of Parliament in relation to the Internet Treaties. From 1926-66 it was the practice of the Government of Canada to submit all important treaties to Parliament for approval prior to ratification. This practice, which applied only to the small number of treaties which were concluded by ratification, gradually lapsed as a general practice. On January 25, 2008, though, Maxime Bernier, Minister of Foreign Affairs and International Trade, announced a new policy concerning the making of treaties which gives the House of Commons – but not the Senate – a greater role in treaty-making. Prior to the introduction of this new procedure, treaty-making generally consisted of three steps: first, the executive signs the treaty; second, legislation is passed if necessary to conform to the norms of the treaty; and third, the treaty is ratified. Subject to rare exceptions, the new procedure requires the Government of Canada to table international treaties in the House of Commons 21 days prior to taking any steps to ratify the treaty. Consequently, "[w]hen treaties require legislative amendment, the government is committed to delaying the legislation until this 21-sitting-day period has passed." It follows, as was pointed out immediately by Michael Geist, that this new step requires Canada to table the Internet Treaties prior to the introduction of legislation amending the Copyright Act.

Notwithstanding the Government's commitment to the new treaty-making procedure on January 25th, just two weeks later Prentice repudiated the procedure – though not putting the Government's position in those terms – in the context of the Internet Treaties, thereby confirming earlier suspicions. Prentice was asked whether the Government of Canada would follow the new treaty-making procedure in relation to the Internet Treaties. He responded that "Foreign Affairs will follow the [three step] process I have described. Before an international treaty is ratified by Parliament, it will be introduced in the form of a proposed law….It will be in front of Canadians [21 days] before it is ratified." This answer appears designed to deliberately mislead, since it gives the impression that the Government of Canada will follow the new treaty-making procedure, but by failing to table the WIPO Internet Treaties prior to the introduction of amending legislation, it would be in violation of that procedure. It is also an evasive response to the question posed, since it talks about what the Department of Foreign Affairs and International Trade will do rather than whether the Department of Industry will refrain from introducing amending legislation until 21 days after the Internet Treaties are tabled.

Prentice could have taken the position that it is not necessary to table a treaty in the case of copyright legislation rather than to misleadingly imply that the new treat-making procedure would be followed. Indeed, while no explicit exceptions to the new treaty-making procedure were set out by the Department of Foreign Affairs and International Trade, since the policy is, in effect, a modification of the U.K. Ponsonby rule, it is understood that alternatives to it may exist in special cases. According to the U.K. Foreign & Commonwealth Office, one alternative is, in fact, that of passing a bill. However, according to the Government of Canada, the use of such alternative procedures is limited to "very exceptional cases" and exceptions in the U.K. have been rare. The mere fact a bill will be introduced to implement a treaty does not make it a very exceptional case. Moreover, given the controversy surrounding copyright reform in Canada both

substantively and procedurally, there would not seem to be grounds for an exception from the new treaty-making procedure and for precluding discussion and debate of the Internet Treaties in the House of Commons. If the Government does not intend to follow its own treaty-making procedure, it should give adequate reasons for departing from it rather than pretending that it will follow it. So far, adequate reasons have not been given, if they even exist. So much for integrity.