Results Could Affect U.S. Publishers

CANADIANS RE-EXAMINE COPYRIGHT LAW

BY JEFFREY L. GRAUBART

While most of the world was watching the Winter Olympic Games in Calgary, Alberta, earlier this year, the music-publishing community would have been well advised to keep its eyes on the Canadian seat of government in Ottawa. Taking place there were two events that may have a significant impact on international copyright law.

First, sweeping revisions of the Canadian Copyright Act were passed by the House of Commons; passage by the Senate, while not assured, looks increasingly likely.

Second, the Canadian Federal Court of Appeal in November decided an important case regarding synchronization rights in musical works. This ruling could have important implications for the recording and re-use of musical performances by U.S. as well as Canadian television producers.

Let's first take a look at the court decision. In Michael Bishop and the Canadian Musical Reproduction Rights Agency Ltd. vs. Tele-Metropole, the Court of Appeal held that recording of a musical work for purposes of television production without prior authorization from the copyright owner was actionable infringement of the copyright. This was true, the court held, *even if the television producer has a valid license from the applicable performing rights society.* The court recognized that under the existing Canadian Copyright Act, the right to perform the work in public—and the right of the author to record the work—are "two distinct prerogatives of the author."

The court also held that the infringing user's *motives* for its actions (the convenience of the producer or the production quality of the recording, for example) were not relevant. "The question here is not whether the appellant acted in good faith and honesty, but whether it performed an action without Bishop's consent which only he had the right to perform."

The ruling has a wide range of applications to Canadian broadcasters and independent television producers. Not only will it affect tape-delayed broadcasts containing copyrighted music but also news-magazine excerpts from earlier broadcasts and use of previously performed music in sporting events. No longer does a performing rights license cover these uses; broadcasters now have to take a sync license to air any prerecorded performance.

The implications of the court's decision on U.S. copyright law should not be ignored. U.S. music publishers should take a close look at how a similar holding by an American court would affect the rights of U.S. copyright holders.

Although the issue has not yet been decided in the U.S., it was raised by a music publisher in Angel Music Inc. vs. ABC Sports Inc. Considered in 1986 in a Manhattan federal court, the suit was ultimately settled by the parties. Nevertheless, in rejecting the parties' cross-motions for summary judgment, the court made these significant points:

- The meaning of a broadcaster's "right to perform" a composition and to record the composition for the making of regularly scheduled network broadcasts, as set forth in the BMI-ABC license, has yet to be determined.
- Also still at issue is the "incidental" right to record, allegedly embodied in BMI's performing rights license.
- Angel Music would have to prove at trial that ABC's interpretation of "incidental recording rights," as contained in the BMI-ABC license, is preempted by the U.S. Copyright Act so as to "invade the scope of copyright law or violate its policies."

It has been suggested by Angel Music's counsel that the case is significant because it involves the "one-time-use" exemption that allows networks to videotape broadcasts containing music performances and air them once without paying a separate sync license fee. He also has said that the suit "pits BMI against the Harry Fox Agency in what amounts to a turf contest over the right to represent music publishers in licensing performance and synchronization rights."

While the latter suggestion seems farfetched, the former does invite close scrutiny of these practices by U.S. music publishers, the Harry Fox Agency, and the performing rights societies—if such an examination is not already in progress. Although the issues were not settled in the Angel suit, they may be raised again in future litigation by other parties.

Meanwhile, the proposed amendments to the Canadian Copyright Act, which has not been revised since 1924, include a noteworthy feature that will have a direct impact on Canadian publishers, including affiliates of U.S. firms, if the revisions are adopted. Under the proposed changes, the compulsory license provision of the existing law (which sets the mechanical royalty rate) would be repealed and would be replaced by a new system for licensing mechanical rights.

The new system would require individual music publishers to negotiate mechanical rates with record companies or other users. Alternatively, they could authorize organizations such as CMRRA or SODRAC (a Quebec society) to negotiate mechanical pacts on their behalf.

In the event that publishers or their agencies were unable to reach an agreement with music users on mechanical rights, the matter would be referred to the Copyright Board, a governmental tribunal that would be established for this and similar purposes.

It has not yet been determined whether the new mechanical rates will be calculated on a flat-fee-per-track or a percentage basis.

In Canada, both judicial and legislative bodies are engaged in modifying the applicable laws that affect U.S. as well as Canadian music publishers. If the proponents of change have their way in Parliament, the revised Copyright Act will establish a new mechanical royalty system that will materially affect U.S. publishers' income and U.S. labels' cost of doing business in Canada.

The court decision on sync licensing of TV music could also have a direct impact on the U.S. music business by influencing the evolution of legal thinking in this area. U.S. courts and conscientious members of the music-publishing fraternity face the challenge from our northern neighbor to recognize and correct present failings of our current copyright system. In so doing, they can help provide a fairer return to music creators and their representatives, the music publishers, for the unique talent being made available to the public

'The court ruling has a wide range of applications to TV producers'

Jeffrey L. Graubart is a member of the California, New York, and Illinois bars and is counsel to the Los Angeles law firm of Cohen and Luckenbacher.