

## ENTERTAINMENT SECTION

### Changes in Canadian Copyright Law

By Jeffrey L. Graubart

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The music publishing community recently had its eyes focused on Canada where two extraordinary events are having significant impact on the state of international copyright law:

- New, sweeping revisions to the Canadian Copyright Act,<sup>1</sup> and
- A recent unanimous Canadian Federal Court of Appeal decision with respect to synchronization rights in musical works.

In its decision in *Michael Bishop and CMRRA v. Tele-Metropole*<sup>2</sup> announced in November, the Court held that recording of a musical work for purposes of TV production by Canadian broadcasters and independent television producers, without prior authorization from the copyright owner of such work, was actionable infringement of the copyright of the copyright owner. This was true, the court held, *even if the television producer had a valid license from the applicable performing rights society*, because the court recognized that under the existing Canadian Copyright Act, that 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."<sup>3</sup>

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."<sup>4</sup>

The implications of the court's decision on U.S. copyright law should not be ignored, and responsible members of the U.S. music publishing community should take a close look at how a similar holding by a U.S. court would affect the rights of American copyright owners.

Although this issue has not yet been decided in the United States, it has been raised by a music publisher in *Angel Music Inc. v. ABC Sports Inc.*, a case considered in 1986 by the U.S. District Court for the Southern District of New York,<sup>3</sup> but ultimately settled by the parties. In the action, plaintiff Angel Music charged — in addition to its claim of copyright infringement against ABC Sports — that the Harry Fox Agency Inc. had breached its fiduciary duty to its member publishers by “failing to enforce their synchronization rights.”

The court declined to hear that issue, stating it was not a subject to which it had jurisdiction to hear in connection with Angel Music's claim against ABC Sports.<sup>4</sup> Angel's action against ABC Sports was permitted to proceed to trial, but in connection with that claim, the court declared that the holding by the trial court in the *Bishop* case in Canada in 1985 (to the same effect as the 1987 decision in *Bishop* by the Canadian Federal Court of Appeal) would not be determinative of Angel Music's rights in the United States because of an additional factor present in *Angel* — i.e. the ambiguous language in Angel Music's grant of rights to BMI and BMI's reciprocal grant of the same rights to ABC to permit performance of the work in question, not an issue present in the *Bishop* decision.<sup>5</sup>

The U.S. court in *Angel Music*, in rejecting the parties' cross-motions for summary judgment, made the following significant points:

- That still at issue was (1) the meaning of “right to perform” the composition, and, as incident to the performing right, to record the composition for the making of regularly scheduled network broadcasts, as set forth in the BMI-ABC license, and (2) the scope of this “incidental” right to record.<sup>6</sup>

- Although in a prior U.S. case, *Jackson v. Stone and Simon Publishing Inc.*,<sup>7</sup> the court had “engaged in a brief discussion of ‘broadcast rights’ and held that the BMI license to broadcast included the right to make tapes for delayed broadcast”<sup>8</sup> that conclusion by the *Jackson* court “did not address the ‘new use’ issue of Angel Music's claims.”<sup>9</sup>

- Further factual development was necessary to determine whether ABC's construction of the Angel-BMI license and the BMI-ABC license “is contrary to the intent of the parties and to the widely accepted industry separation of ‘performance rights’ licenses from ‘recording rights’ licenses.”<sup>10</sup>

- Angel Music would have to prove at trial that ABC's interpretation of “incidental recording rights” as contained in BMI-ABC license is preempted by the U.S. Copyright Act as to “invade the scope of copyright law or violate its policies.”<sup>11</sup>

It has been suggested by plaintiff's counsel in *Angel Music* that the *Angel Music* case is significant because:

- “It seeks to require television products to pay for the synchronization use of all background including the so-called one time use...”<sup>12</sup> and

- “It 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.”<sup>13</sup>

While the latter suggestion seems extreme, the former does mandate immediate close examination 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.

One noteworthy feature of the new proposed amendments to the Canadian Copyright Act of significance to the music publishing community is that the compulsory license provision of the existing Act (now setting the mechanical rate) is to be repealed<sup>14</sup> and replaced by a new system for licensing mechanical rights.<sup>15</sup>

The new licensing system would work as follows:

- By the use of licensing “schemes,”<sup>16</sup> i.e. proposals for rate setting, organizations other than the performing rights societies and the users of the subject copyrighted works may agree to various royalty rates. In the event they are unable to reach an agreement between them after attempted negotiation, the matter may be referred to the Copyright Board, a governmental tribunal established for such and similar purposes.<sup>17</sup>

- Alternatively, individual music publishers may negotiate with the record companies and other users with respect to subject compositions.

It has not yet been determined whether the new mechanical rates will be calculated on a percent rate or on a percentage rate in formulating the individual licensing “schemes.”<sup>18</sup>

U.S. law, and its Canadian counterpart, share a common parent. As we can see by their actions, the Canadian courts and legislative bodies are actively acting to modify the applicable law as it affects the members of the U.S. music publishing community.

Like its failure to date to adopt the logic of the recent progressive advances of the English courts in the music publishing area<sup>19</sup> U.S. courts and conscientious members of the music publishing fraternity also face the challenge from our northern neighbor to recognize and correct present failings of our present system, and in so doing, provide for payment to creators and their representatives, the music publishers, a fair return for the unique talent being made available to the public.

## Canadian Law

- (1) Bill C-60 Can. House of Commons, Second Session, Thirty-third Parliament, 25-26 Elizabeth II (1986-87).
- (2) No. A-441-85 (Fed. Ct. of Appeal Canada, November 5, 1987).
- (3) *Id.* at 4.
- (4) *Id.*
- (5) *Angel Music v. ABC Sports Inc.*, 631 F. Supp. 429 (S.D.N.Y., 1986).
- (6) *Angel Music v. ABC Sports Inc.*, 608 F. Supp. 764 (S.D.N.Y., 1986).
- (7) *Angel Music v. ABC Sports Inc.*, 631 F. Supp. at 435.
- (8) *Id.* at 432.
- (9) 188 U.S.P.Q. 564 (E.D. Mich. 1974).
- (10) *Angel Music Inc.*, *supra*, at 433.
- (11) *Id.*
- (12) *Id.*
- (13) *Id.* at 435.
- (14) Dickerson, "Walkin' with Mr. Lee" Is Big Hit in Federal Court, *New York Law Journal*, May 2, 1986, at 6.
- (15) *Id.*
- (16) Bill C-60, *supra*, Sec. 7.
- (17) *Id.* at Sec. 50.1, et seq.
- (18) *Id.* at Sec. 50.1(b)
- (19) *Id.* at Sec. 48.
- (20) Address by Paul M. Berry, Esq., Association of Independent Music Publishers, Los Angeles, California (December 9, 1987).
- (21) Graubart, The Validity of the Songwriter/Music Publisher Agreement 20 Beverly Hills B.J. 201 (Fall, 1986).

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