THE IMPORTATION PROVISIONS OF THE CANADIAN COPYRIGHT ACT

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During the past two years, the Canadian publishing industry has raised a number of interesting questions regarding the importation provisions of the Copyright Act.[1] As the Act is now being revised, this appears to be an opportune time to examine its provisions to determine, firstly, whether the present provisions are adequate to meet the purposes of the industry; secondly, whether the protection afforded to the industry should be strengthened; or, thirdly, whether even lesser protection should be advocated in light of consumer interests. These questions, however, can only be answered by taking into account associated questions which deal with more primary, and hence more important, matters, such as the territoriality of copyright and the doctrine of exhaustion.

The adequacy of the present importation provisions was questioned by Canadian publishers when McClelland and Stewart Limited found itself faced with the following situation. Coles Book Stores were importing copies of an American edition of a popular book by a Canadian author and putting the copies on sale in Canada. On December 6, 1974, McClelland and Stewart obtained an *ex parte* injunction in the Supreme Court of Ontario restraining Coles from any further importation. On December 10, 1974, two similar actions were commenced in the Federal Court, Trial Division. In the latter two actions motions were brought for an interlocutory injunction to restrain Coles from further importation and sale of the allegedly offending copies until trial. In all three actions it was alleged that the Canadian copyright had been infringed under section 17(4), the copies not having been made in Canada by the owner of the Canadian copyright.

Section 17(4)(d) of the Copyright Act provides that it is an infringement to import into Canada and sell copies of a work which, to the importer's knowledge, would infringe copyright if made in Canada. In order to obtain the injunctions, the plaintiff had to make out a prima facie case that it would suffer irreparable damage if the defendant were not enjoined. On December 13, 1974, Weatherston J. of the Ontario High Court dismissed a motion[2] to continue the interim injunction granted on December 6, 1974. The applications to the Federal Court were also dismissed.[3] Both courts felt that damages could adequately compensate any injury suffered by the plaintiff. In the Supreme Court of Ontario, the fact that the plaintiff had

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* Of the Board of Editors, 1975-76.

[1] R.S.C. 1970, c. C-30, ss. 17, 27, 28.

[2] 7 O.R. (2d) 426, 21 C.P.R. (2d) 226, 55 D.L.R. (3d) 362 (H.C. 1974).

[3] 21 C.P.R. (2d) 270.

delayed in bringing the application was instrumental in the dismissal; in the Federal Court, some doubt was expressed as to the legal status of the plaintiff. [4] Coles had also raised the defence that the United States could be considered to be a country from which it is not illegal to import the works in question, pursuant to sections 28(3)(d) and 4(3). Both courts felt that this might constitute a complete defence and hence should be argued at trial. [5] McClelland and Stewart chose not to pursue its remedies under the Copyright Act and instead conducted a national media campaign directed toward persuading the federal government to revise the Copyright Act and to erect an absolute importation barrier. [6]

McClelland and Stewart alleged that the preliminary ruling of the courts operated to the great detriment of the publishing industry in that it permitted the "dumping" of books in Canada. To determine whether this is so, it is necessary to examine the present provisions of the Act in order to determine whether McClelland and Stewart did in fact have adequate remedies under the present Act which would provide the relief sought.

Section 17(4)(d) provides that it is an infringement to import into Canada and sell copies of a work which, if made in Canada, would have infringed copyright. The words "if it had been made within Canada" have been interpreted to mean "if it had been made within Canada by the person who made it". [7]

Section 17(4)(d) reads as follows:

> (4) Copyright in a work shall also be deemed to be infringed by any person who
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> (d) imports for sale or hire into Canada any work that to his knowledge infringes copyright or would infringe copyright if it had been made within Canada.

Sections 27 and 28(1) provide an additional procedure whereby the importation of copyright material into Canada may be banned by the giving of a notice, in the case of section 27, in writing, to the Department of National Revenue. The effect of this is to stop the importation at the border through the Customs Officials. Section 27 gives this right to the copyright owner. Section 28 provides to licensees, as distinct from copyright owners, the same general right but only as regards books which they are licensed to reproduce in Canada. The section does not, however, provide a procedure

[4] Regarding this point, it was unclear whether McClelland and Stewart was the licensee of the author or merely an agent with no legal status to commence the action. The determination of this issue depends upon a construction of the contractual arrangement between the author and the publisher.

[5] For an analysis of the defence, see Keyes, *A Letter From Canada*, [1975] REVIEW OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION: COPYRIGHT 190, at 194-96.

[6] *See, e.g.*, The Citizen (Ottawa), March 5, 1975, at 6; The Ottawa Journal, October 27, 1975, at 21. For the government's response, see The Toronto Star, April 1, 1975, at B-5.

[7] Clarke, Irwin and Co. v. C. Cole and Co., [1960] O.R. 117, 33 C.P.R. 173, 22 D.L.R. (2d) 183 (H.C.).

for the giving of notice, nor does it provide for notice itself. The relevant sections read as follows:

> 27. Copies made out of Canada of any work in which copyright subsists that if made in Canada would infringe copyright and as to which the owner of the copyright gives notice in writing to the Department of National Revenue that he is desirous that such copies should not be so imported into Canada, shall not be so imported, and shall be deemed to be included in Schedule C of the Customs Tariff, and that Schedule applies accordingly.
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> 28.(1) Where the owner of the copyright has by licence or otherwise granted the right to reproduce any book in Canada, or where a licence to reproduce such book has been granted under this Act, it shall not be lawful except as provided in subsection (3) to import into Canada copies of such book, and such copies shall be deemed to be included in Schedule C to the Customs Tariff, and that Schedule applies accordingly.

Sections 27 and 28(1) are not in essence substantive "remedies" in respect of infringement by importation, but are administrative procedures which prevent such infringement. In essence, this is a supplementary administrative solution since the activation of the customs apparatus creates an absolute ban on the importation of specified material. It is to be noted that under section 27 the owner of the copyright can invoke this procedure with regard to any work, but section 28(1), which deals with licensees, extends only to books. The rationale behind this discriminatory policy reflects attitudes prevailing at the time the statute was enacted. The main reason for the discrimination between the owner and his licensee appears to be an attempt by Canada to find an answer to the United States manufacturing clause, which requires United States nationals or domiciliaries to have their English language books printed in the United States in order to qualify for American copyright protection. [8]

Section 28(1) provides to licensees and to those interests taking advantage of the compulsory licence provisions in sections 14-16 the same prohibitory privilege that owners have under section 27. It is interesting to note that sections 14-16 have never been used.

Since the relevant Canadian interests have not taken advantage of these provisions, it is difficult to see any public policy reason why other copyright interests, in addition to book publishers, should not be protected in a manner similar to section 28(1). On a practical basis, it would seem virtually impossible for National Revenue to meet the duty imposed on it by sections 27 and 28, since it is doubtful whether that agency has the necessary personnel to do so. A further question arises as to whether officials charged with this task are qualified to distinguish between legal and offending copies. [9] In addition, should this procedure be invoked by all those entitled to it, the

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[8] 17 U.S.C. §§ 16 *ff.* (1970).

[9] *See* ROYAL COMMISSION ON PATENTS, COPYRIGHT, TRADE MARKS AND INDUSTRIAL DESIGNS, REPORT ON COPYRIGHT 90-91 (Ilsley, Chairman, 1957), quoting COPINGER AND SKONE-JAMES ON COPYRIGHT (8th ed. 1948).

amount of material that National Revenue would be required to examine in order to make a determination would be very large. In practice, sections 27 and 28 have not until recently been used to prevent importation, and, indeed, have seen only very limited use since 1953. This is a result of the Varcoe ruling,[10] which stated that a notice pursuant to section 27 also prohibited the agent of the copyright owner from importing. However, during 1975, in response to the demands of the publishing industry, the Department of National Revenue agreed to apply the sections at the instance of interested owners and licensees.

The Copyright Act has been the subject of academic discussion since 1954 when the Ilsley Commission was asked to consider intellectual property rights and make recommendations for revision of the existing legislation.

The Commission reported in 1957,[11] and, with regard to the importation provisions of sections 27 and 28, the Commissioners were unable to agree on any one solution. The Commission recommended the retention of the general infringement prohibition of section 17(1) but advocated that subsection (4) be replaced by an elaborate scheme incorporating many of the provisions contained in the present sections 28 and 17(4).[12] The Commission stated that if the recommended provisions were adopted and sections 27 and 28 repealed, a right to import for private use would be clear. It was the Commission's belief that the limited forms of importation provided would not severely prejudice the copyright owner. This recommendation was justified on the ground that the practice of importation for private use has gone on for a long time under the present Act.

The general issue of exceptions to the importation provisions is a subject which is not within the scope of this paper. Those exceptions discussed are only a few among a great many advocated by various groups and they are mentioned only for the sake of completeness. What is of concern here is what may be termed an exception from the general importation prohibition, which the publishing industry itself has requested, *viz.* that the industry itself should be granted the right to obtain sole importer status under the Act. As regards sections 27 and 28, the Commissioners were not agreed on the issue of whether there should be any special procedure (such as that presently found in those sections) for protection against the importation of offending copies.[13] The recommendations of the Commissioners varied from a view that sections 27 and 28 should be repealed and nothing substituted for it to the view that a system of constructive notice should be created.

The Economic Council of Canada was instructed in 1966 to advise the

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[10] Department of Justice opinion, March 12, 1953, rendered by F. P. Varcoe, then Deputy Attorney General of Canada. Reproduced in the REPORT ON COPYRIGHT, *supra* note 9, at 91-92. In 1954, there were over 5,000 titles in Schedule C of the Customs Tariff; on July 9, 1976, there were 12.

[11] *Supra* note 9.

[12] *Id.* at 51.

[13] *Id.* at 93-94.

government regarding the revision of intellectual and industrial property legislation. The Council reported in 1971,[14] and its recommendations regarding the importation provisions of the Copyright Act appear to have as their ultimate objective the lowering of the price of foreign books for Canadian consumers. The Council's primary concern was not with the price of books in general but with the price of foreign books imported into Canada and sold in the domestic market. To help bring down the price of foreign books, the Economic Council recommended that copyright as an import-restricting device should be "removed".[15] The Council took the position that sections 27 and 28 of the Act in fact serve as an import-restricting device since, with respect to works protected by copyright in Canada and in another country, they prevent the purchase and subsequent importation into Canada. The Council stated that Canadian copyright law should "not deny to anyone the right to purchase works protected by Canadian copyright in other countries where they also enjoy copyright protection, and to import these works into Canada".[16] The Council's argument is that sections 27 and 28 are being used to prevent foreign books from being imported, with the consequence that Canadian prices for foreign books are being driven up by a monopoly market.

Prior to 1953, the Copyright Act may have been used by agents as a means of restricting importation, but it does not appear that the Act has been used in such a manner to any extent since 1953. The reason for the abrupt halt in 1953 of the use of section 27 was the Varcoe ruling.[17] This opinion stated that a notice filed pursuant to section 27 created an absolute ban on importation of the specified work, extending even to the copyright owner and his agent. Consequently, it appears that the price differential between foreign and domestic books, at least since 1953, has not been a result of the particular importation provisions of the Copyright Act. If the Copyright Act has not been used to prevent importation, it is difficult to see how the Act can affect the prices of foreign books. The Council stated that Canada's geography and the correlative extensive network of retail book outlets contributed to higher distribution costs, but it concluded that the price differential could not be justified on that ground alone. The importation provisions received what many consider unjustifiable blame for the discrepancy in prices. In light of the foregoing, it is difficult to interpret what the Council meant when it stated that "owners of Canadian copyright must take certain positive actions in order to invoke some of the import-restricting effects of the two clauses and that such actions have been relatively rare in recent years. But the mere threat of the invocation of section 27 *probably* has some import-deterring effect".[18]

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[14] ECONOMIC COUNCIL OF CANADA, REPORT ON INTELLECTUAL AND INDUSTRIAL PROPERTY (Smith, Chairman, 1971).

[15] *Id.* at 155.

[16] *Id.* at 154.

[17] *Supra* note 10.

[18] *Supra* note 14 at 154-55 (emphasis added).

The "threat" of invoking section 27 is rather empty, given the Varcoe ruling which renders importation impossible by anyone. The emptiness is illustrated by the many complaints made by the Canadian publishing industry as to the so-called practice of "buying around". The Council suggested that the removal of the importation barrier would enhance and ensure competition within the Canadian market with the result of reducing prices for the Canadian consumer. The effect of the Canadian market being flooded with foreign reprints at lower prices will benefit the consumer, but what are the long term effects of such a policy? If Canadian publishers had their books printed outside Canada because it was less expensive to do so and then imported them into Canada, Canadian printers could well find themselves in a difficult position trying to compete with foreign printers. Publishing houses may also find it impossible to compete with the large English and U.S. publishers, who would also be taking advantage of low-cost centres. They too might find themselves out of business. Moreover, many other nations have import restrictions in their copyright law, and Canadian publishers are thus subject to double jeopardy. They would face fierce competition in their own market and be excluded from many foreign markets.

It cannot be denied that the statutory creation of exclusive rights has competition aspects; to do so would be an exercise in polemics. The question which those responsible for any new importation provisions must ask themselves is whether it is the function of copyright law to control, encourage or promote competition, and, if it is, whether the Economic Council's recommendations will in fact remedy the situation and at what costs to those whose rights the Copyright Act is intended to protect. Copyright does not enhance competition; on the contrary, it is the grant of an exclusive right which in its very essence is a negative right, preventing the appropriation of one person's property by another. It is not, therefore, the function of copyright to reduce the price of foreign books, even if that were possible.

It is relatively easy to criticize another's analysis of a particular problem. It is more difficult to formulate one's own analysis. In the remainder of this article, I shall examine the present provisions of the Act in the light of the recommendations made by the Ilsley Commisison and the Economic Council. The question posed is whether the importation sections should be, firstly, strengthened, to give greater protection to Canadian publishers; secondly, weakened, as the Economic Council recommended; or thirdly, maintained as they are, being adequate to meet Canadian needs. The next section will analyze the present provisions of the Act.

Adequate Protection

McClelland and Stewart Limited, one of the largest Canadian publishers, expressed dissatisfaction with the importation provisions of the present Act when they were unable to obtain injunctions restraining importation from the United States. The reasons for the refusal have already been discussed. [19] However, the question of whether the plaintiff had adequate remedies

[19] See text accompanying notes 4 and 5 *supra*.

under the present Act requires some further examination. The same issue that arose in the *McClelland* case was litigated one year later (with regard to sound recordings) in *Fly By Nite Music Co. v. Record Wherehouse Ltd.* (sic).[20] There the plaintiff had been assigned the Canadian copyright in certain sound recordings. The defendant lawfully purchased from an American wholesaler a quantity of the same recordings. The defendant then imported these recordings into Canada and sold them. The plaintiff brought an action alleging, among other things, that the importation and sale infringed the plaintiff's copyright under section 17(4). The court held that the plaintiff's copyright had in fact been infringed and the defence that the recordings were lawfully made and purchased outside Canada was, in fact, no defence to an action for infringement under section 17(4).

On the basis of this ruling of the Federal Court, it seems that had McClelland and Stewart pursued the issue to trial, their action would have been successful. The defence raised by Coles, that the United States should be considered a country that had adhered to the Berne Convention under section 4(3), and was consequently a country from which it was lawful to import under section 28(3)(d), is another issue entirely. In *Simon & Schuster Inc. v. Coles Book Stores Ltd.*,[21] on facts analogous to the McClelland case, Weatherston J. held that the defence of permissible importation from the United States by virtue of sections 28(3)(d) and 4(3) was not available. The defendant who imported the copies was held to have contravened sections 17(4)(a) and (d) in selling the books. The general purport of the rulings in the *Fly By Nite* and the *Simon & Schuster* cases clearly extends to the McClelland situation and serves to illustrate the point that the remedies under the present section 17(4) are indeed adequate. As to why McClelland did not pursue the matter, one can only speculate.

Thus, an assignee of copyright in Canada may bring an infringement action under section 17(4) where copyright has been infringed by the importing of protected material, even if that material has been lawfully made in its country of origin. But doubt has been expressed as to whether a licensee can bring an action in his own name under section 17(4).[22] It is hoped that this uncertainty will be cleared up in the revision of the Act.

The impact of the present importation sections on the territorial basis of copyright is minimal. The present Act, in section 12(4), permits the copyright owner to divide up his markets without restriction. It is interesting to note that the question of division within the domestic Canadian market has never been litigated. Under the present Act the owner has not only the right to divide up his markets, but also the right to protect that division through contractual terms in an assignment or licence agreement

[20] [1975] F.C. 386, C.P.R. (2d) 263 (T.D.).

[21] 9 O.R. (2d) 718, C.P.R. (2d) 43, 61 D.L.R. (3d) 590 (H.C. 1975).

[22] Ashton-Potter Ltd. v. White Rose Nurseries Ltd., [1972] F.C. 689, at 695, 7 C.P.R. (2d) 29, at 35 (T.D.).

and through court proceedings with the civil and summary remedies provided in sections 20 to 26.

Greater Protection

The position taken by the Canadian publishing industry is that the present importation provisions in the Act should be strengthened so as to solve existing problems and to create an absolute importation barrier for everyone *except* the copyright owner and his agent. This position was advocated in the industry's representations to the Ilsley Commission, to the Economic Council and most recently to the Department of Consumer and Corporate Affairs. The purport of the amendment is to provide to agents in Canada the right which the Varcoe ruling allegedly took away, that is, the sole right to import into Canada copies of books for which they are the sole agents. It seems that this prohibition would also apply to importation from Berne Convention countries. Such an amendment would alleviate all of the major complaints of the industry—buying around, agency and "dumping".

"Buying around" occurs when Canadian representatives of foreign publishers, acting as exclusive selling agents, distribute and retail the books of those foreign publishers within Canada. Canadian buyers of foreign books purchase the required copies abroad, or even in Canada, from someone other than the agent. The agent complains that this practice not only circumvents him, but also leaves him without a remedy because he cannot invoke section 27, given the Varcoe ruling, since the agent himself would also be barred from importing. To remedy this situation, publisher's agents have urged an amendment to the Act so as to give exclusive agents sole importer status. To support this view, Canadian publishers, as exclusive agents, argue that the profitable agency aspect of their industry makes possible their publication of works of Canadian authors, on which they experience a lower profit ratio. The Canadian publishers claim that their profit is made in the agency business and that this profit is reinvested in the publishing of Canadian titles. [23]

Sections 27 and 28 were the subject of vigorous representations to the Ilsley Commission and no doubt were also discussed with the advisory group presently drafting the copyright working paper. [24] In effect, what the publishing industry is advocating is a conditional prohibition, the condition being that the importation should be done by the copyright owner or his exclusive agent. The Ilsley Commission rejected this, saying it was not the function of copyright to protect these agents. The Economic Council also rejected the proposal, but on the ground that the effect would be to raise the price of foreign books. The main complainants here are the agents of foreign publishers, not authors. The Copyright Act is designed to protect the rights of

[23] REPORT ON INTELLECTUAL AND INDUSTRIAL PROPERTY, *supra* note 14, at 154-55. REPORT ON COPYRIGHT, *supra* note 9, at 91.

[24] The Department of Consumer and Corporate Affairs established a planning group in 1971 to review the Economic Council's report and make recommendations for new legislation.

authors and those rights seem to be adequately protected under the present section 17(4). If the author wishes to have the importation stopped, he, and perhaps his exclusive licensee, [25] may bring an infringement action under section 17. The publishing industry is requesting both a right to import and the right to stop others from importing. To give such a remedy would be to give Canadian publishers control of the Canadian market from manufacturing to final retailing. With such a monopoly, prices of foreign books would most certainly rise; the selling price would become what the market will bear, leaving the Canadian consumer with no alternative means of access to foreign publications. If it is not the function of copyright law to protect agents but rather authors, then what is sought to be protected is authors' rights, and that is adequately done under the present section 17(4).

Sections 27 and 28 should be repealed because, for the reasons cited above, the sole agent should not be restored to the position he enjoyed before the Varcoe ruling; because the remedy afforded by the present section 17(4) is adequate; and because the Department of National Revenue is not in a position to administer the supplementary procedure provided. It is questionable whether National Revenue should be engaged in protecting private rights, especially when one considers the discriminatory nature of protecting only the rights of the owners of copyright in books. Although it is recognized that the maintenance of a healthy Canadian publishing industry is a desirable objective, this should not be achieved at public expense.

If a decision should be made to strengthen protection of the industry, the territorial basis of copyright would not be altered. Authors would retain the right to divide up markets and thereby maximize returns. This territoriality is necessary for the maintenance of copyright as it now exists as regards authors; but as regards agents it is only an incident of the exclusive right granted to the former. The territorial basis of copyright will be discussed later in connection with the doctrine of exhaustion.

The second problem of which the industry complains is "dumping". This occurs in a strict sense when an article is sold in a country at a price lower than that which can be obtained for it in the country where it was originally produced. For example, a book might sell for $12.00 in the United States, but because of a remainder in the run of the publisher, a surplus is created which cannot be distributed within the American market. What often happens is that the remainder is purchased by an importer like Coles, who then sells it in Canada for a price slightly higher than that charged in the United States, but less than the current Canadian price. Technically, this is not dumping, because to "dump", the importer must sell at a price lower than the price charged in the country of origin.

It is true that those revising the Copyright Act must consider the extent to which the Act can be used to meet the objections of the publishing industry as regards dumping. But it is indeed possible that this problem has

[25] *See* Ashton-Potter Ltd. v. White Rose Nurseries Ltd., *supra* note 22, at 695, 7 C.P.R. (2d) at 35.

already been dealt with by the Anti-Dumping Act.[26] The tribunal established under that statute has the necessary authority and power to take appropriate action to prevent dumping in Canada. In the McClelland case, the alleged dumping had not occurred since the books in question were not being sold at a price lower than the American price but only the price being charged by McClelland and Stewart in Canada. This raises the interesting question of whether Canadians should pay the higher prices charged by Canadian houses when the same product may be purchased at a lower price from an American publisher, and, more particularly, whether the Copyright Act should be the vehicle to impose this burden.

The Copyright Act should not be seen as a vehicle to solve these particular problems, because they are not matters affecting the interests of authors in terms of their exclusive rights. Authors have an easy solution to importation problems at least as regards legitimate copies made in another country: in any assignment of copyright they can provide for distribution only within one country. Any importation by a third party may be prevented under section 17(4). On the other hand, if it is considered desirable to assist the publishing industry, such assistance may appropriately be given outside the Copyright Act.

The maintenance of a healthy Canadian publishing industry is unquestionably important, and an entire thesis may be devoted to the subject. The argument being made here is only that conventional and readily available avenues to achieve this purpose, such as the Copyright Act, must be examined in light of the above considerations. A solution should not be adopted which does not belong within the proper scope of the Copyright Act simply because the Act seems the most convenient avenue to achieve the desired result.

Weakened Protection

One final question remains to be considered—the effect of weakening the importation restrictions. The Ilsley Commission advocated the repeal of the procedure under sections 27 and 28 and the retention of an amended section 17(4).[27] This leaves as the only remedy the commencement of a court action under section 17, which is admittedly expensive. The Economic Council appears to have gone further still by apparently advocating the adoption of the doctrine of exhaustion, which was recommended by them in the case of patents and trade marks.[28] The rationale for imposing the doctrine of exhaustion on the owners of industrial property rights is to prevent the rights from being used as a unilateral tariff barrier to support a price differential within territorial markets. The basis of this doctrine is

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[26] R.S.C. 1970, c. A-15.

[27] REPORT ON COPYRIGHT, *supra* note 9, at 51.

[28] Copyright can be distinguished from patents and trademarks because it protects intellectual, as opposed to industrial, property. Industrial property rights control the use and circulation of actual physical objects which are valued in content rather than form. Copyright, on the other hand, applies to intellectual matter only and cannot be said to affect an individual's environment or physical state.

that once the owner of an intellectual property right, such as copyright, puts an article protected by that right on the market, he has used the right up, and it is said to be "exhausted". The purchaser is then free to do what he wishes with those goods, including importing them into another country, without interference from the original owner of the right. [29]

This doctrine strikes at the very root of the territoriality of copyright, which is the copyright owner's right to divide up his market among various countries. Perhaps an example will best illustrate the implications of exhaustion of those rights. A copyright owner may assign or licence his copyright in both England and Canada. While the book may sell in England for $2.00, its price in Canada is $4.00. Under the doctrine of exhaustion a Canadian distributor may buy his supply in England for $2.00, import it into Canada and undercut the Canadian publisher's price by selling for $3.00. Under exhaustion, the copyright owner's rights have been exhausted once the book has been sold in England and he cannot prevent any importation into the Canadian market.

The general principle is that the author cannot control, follow and impose conditions from the first to the last purchaser. Rather, initial distribution is subject to the author's consent, and subsequent distribution is not subject to copyright. When one examines the effect of marketing practices in the Canadian publishing industry, one is forced to concede that some protection of the industry is necessary, even though one may not support the view that the extensive protection requested and discussed earlier in really justified. It is admitted that the initial effect of exhaustion would be the lowering of prices, since, in our example, the book may be purchased in Canada at less than $4.00. But what are the long-term effects?

A form of exhaustion has been judicially imposed in the European Common Market countries, but it must be noted that the aims of that community include the lowering of tariff barriers between member states. It is clear from a number of decisions of the European Court that absolute protection within national territories threatens the unity of the market. [30] The only judgment of the European Court concerning copyright was in *Deutsche Grammophon*, [31] where the plaintiff had produced records which, under German law, were protected by rights analogous to copyright. The plaintiff sold copies of the records to a wholly owned subsidiary in France, to be marketed in that country. Some of these recordings were re-exported to Germany and sold at a price below the plaintiff's maintained retail price by a German firm which the plaintiff had refused to supply. The European

[29] It is to be noted that while the doctrine of exhaustion is imposed within national borders, no country is apparently imposing it in respect to copies made outside its jurisdiction and then permitting importation when there has been an assignment.

[30] Regarding copyright, *see* Deutsche Grammophon Gesellschaft mbH. v. Metro-SB-Gross-Märkte GmbH and Co. K.G., [1971] C.M.L.R. 631; regarding trademarks, *see* Van Zuylen Frères v. Hag A.G., [1974] 2 C.M.L.R. 127; and regarding patents, *see* Centrafarm BV v. Sterling Drugs Inc., [1974] 2 C.M.L.R. 480.

[31] *Supra* note 30.

Community Court on appeal held that the territorial protection of German domestic law was incompatible with the community principle of the free circulation of goods. [32] In Canada, however, the introduction of exhaustion can only affect rights within a national context, since we are not concerned with a trading unit such as the Common Market. [33]

The Economic Council's proposals as to exhaustion in copyright were based on a substantial difference between prices of foreign books in Canada and in their country of origin. As discussed earlier, the price of foreign books in Canada is in no way a function or a result of copyright law. The copyright situation can thus be distinguished from that of patents and trademarks in that no price discrimination is being supported by the Copyright Act. The copyright law presently provides authors with an economic right, the exclusive right to bargain for the use of their works and the power to control the distribution of their work through the division of markets. The central issue, in view of the recommendation regarding exhaustion, is whether creators should be able to continue to divide up their rights as section 12(4) presently enables them to do. Exhaustion would be a severe limitation upon these rights. The territoriality of copyright, with the correlative division of markets, has been the basis of all contracts entered into to permit the orderly exploitation of copyrighted works. The divisibility of copyright is, by its very existence, a basic principle which goes against exhaustion. Exhaustion would limit the ability of the copyright owner to divide his rights territorially.

The general purpose of the Copyright Act is to provide a legal system for the protection of creators and authors in order to permit them to exploit their works in an orderly fashion. That purpose must not be lost sight of: in order to introduce exhaustion, the law must do away with the divisibility of copyright to the extent of reducing the scope of the present territorial provisions. This can only be done with respect to Canada. Thus, Canadian authors could not divide their Canadian copyright, but foreign authors could do so within their own countries or in countries, other than Canada, that permit divisibility. Given exhaustion, any assignment or licence of copyright to a Canadian would be useless in the face of the permitted imports. The Canadian owner will not attempt to publish, print, distribute or

[32] For a similar approach in the case of patents, *see* the Centrafarm case, *supra* note 30, and Ladas, *Exclusive Territorial Licences Under Parallel Patents*, 3 I.I.C. 335 (1972).

[33] This statement is of general application. In patent law, there is a line of jurisprudence which indicates that a person who purchases directly from the patentee has a right to use the articles he has purchased or to resell them in another country where the patentee has a patent. *See, e.g.*, Betts v. Willmott, L.R. 6 Ch. App. 239, 25 L.T. 188 (1871), and Scottish Vacuum Cleaner Co. v. Provincial Cinematograph Theatres Ltd., 32 R.P.C. 253 (Scot. 1915). A similar principle has also been applied in the United States in Curtiss Aeroplane and Motor Corp. v. United Aircraft Engineering Corp., 226 F. 71 (2d Cir. 1920). Whether this aspect of the doctrine of exhaustion will be applied in the copyright field is unclear since the difference between industrial as opposed to intellectual property (discussed *supra* note 28) would be an important consideration in any decision on this point.

manufacture copies of such books in Canada unless he can sell at a price lower than that charged for the imported copies.

Moreover, under the Berne [34] and Universal Copyright Conventions, [35] the author has the benefit of national treatment in each member country and consequently has international copyright. The protection in these sixty-five or more member states is within a reasonably predictable range. With the introduction of exhaustion in Canada, it would be logical for an author to supply the Canadian market himself or, if the sixty-five countries introduced exhaustion, he could seek out the lowest cost centre of production and supply all markets by exacting the highest possible price in each. It seems that the introduction of exhaustion so as to repeal the principle of territoriality of copyright would in the end raise rather than lower prices. Since the monopoly of the copyright owner would be strengthened, the effect could well be even greater international price discrimination, and that at the expense of the publishing industry. It is not proposed as an alternative that the copyright law be used to support Canadian publishers; but neither should it be used to further interfere with their rights or the rights of the copyright owner.

Conclusion

The present section 17(4) appears to provide adequate remedies for authors and their publishers against the importation of offending copies. The administrative remedies of sections 27 and 28 provide an additional procedure for similar protection. The cases cited illustrate that the remedies exist and need only be pursued. However, the Supreme Court of Canada has yet to rule on the point. Whether these importation provisions will be strengthened through the grant of the right to attain sole importer status under the Act, or weakened through the introduction of exhaustion, remains to be seen. If the latter occurs, the interference with authors' rights as they presently exist will be far reaching. Not only will the author's right to divide up his territorial markets be reduced, but the traditional form of economic exploitation of copyright will be correspondingly altered, leaving the Canadian consumer not in a better but a worse position. Alternatively, if the importation bar is strengthened, as the publishing industry has suggested, the consumer may be equally exploited. With our present emphasis on consumer protection and a national indentity, in which the publishing industry must play an important role, many await the revision of the Copyright Act with more questions than answers. This paper has only raised a few questions among a great many with which copyright law is expected to deal. It is hoped that before any decision is reached, all the ramifications of the importation sections will be carefully analyzed and all competing interests will be weighed.

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[34] (1886, as revised).
[35] (Geneva 1952).