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Altenburger Ltd legal + tax

Anderson Mōri & Tomotsune

Andic Law Office

Arthur Cox

Blaney McMurtry LLP

Camilleri Preziosi

CIS Risk Consultant Company
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Senior Account Manager
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Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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General Chapters:

1	The Insurance Act 2015 and Other UK Insurance Law Reforms – Jon Turnbull & Michelle Radom, Clyde & Co LLP	1
2	The Economics of Insurance Markets – FCA Call for Inputs in Relation to Big Data in Retail General Insurance – Mat Hughes & Mark Giles, AlixPartners	7
3	Insuring Against a Technological Unknown: Assessing Copyright Infringement and Technological Neutrality – Andrea F. Rush & Brian K. Lau, Blaney McMurtry LLP	13
4	The New Insurance Legal and Regulatory Framework in Mexico: A Year in Retrospect – Leonel Perezniето del Prado & Allan Galileo Olmedo Villegas, Creel, García-Cuéllar, Aiza y Enriquez, S.C.	19

Country Question and Answer Chapters:

5	Albania	ISUFI INTERNATIONAL & Associates: Naim Isufi	22
6	Australia	MinterEllison: Kemsley Brennan & James Stanton	27
7	Canada	McMillan LLP: Carol Lyons & Lindsay Lorimer	34
8	Cayman Islands	Maples and Calder: Abraham Thoppil & Luke Stockdale	43
9	Chile	Vermehren, Puga, Varela & Canales: Nicolás Canales Pastuszyk Von Poetsch	49
10	Colombia	DAC Beachcroft Colombia Abogados SAS: Gabriela Monroy Torres & Camila de la Torre Blanche	54
11	Cyprus	Alexis Theodotou & Co LLC: Alexis Theodotou	60
12	England & Wales	Clyde & Co LLP: Jon Turnbull & Michelle Radom	67
13	Finland	Railas Attorneys Ltd.: Dr. Lauri Railas	76
14	France	Clyde & Co LLP: Yannis Samothrakis & Sophie Grémaud	81
15	Germany	Oppenhoff & Partner Rechtsanwälte Steuerberater mbB: Dr. Peter Etzbach, LL.M.	88
16	Greece	Rokas Law Firm: Alkistis Christofilou & Viktoria Chatzara	94
17	India	Tuli & Co: Neeraj Tuli & Celia Jenkins	101
18	Ireland	Arthur Cox: Elizabeth Bothwell & David O'Donohoe	108
19	Israel	Levitan, Sharon & Co.: Rachel Levitan & Peggy Sharon	115
20	Italy	Studio Legale Giorgetti: Avv. Alessandro P. Giorgetti	121
21	Japan	Anderson Mōri & Tomotsune: Naokuni Fukuda	127
22	Kazakhstan	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	132
23	Malta	Camilleri Preziosi: Malcolm Falzon & Francesca Galea Cavallazzi	137
24	Mexico	Creel, García-Cuéllar, Aiza y Enriquez, S.C.: Leonel Perezniето del Prado & Lilian Fernandez Suarez	144
25	New Zealand	Duncan Cotterill: Aaron Sherriff & Nick Laing	149
26	Romania	CMS: Florentin Giurgea & Horia Draghici	156
27	Russia	CMS: Leonid Zubarev & Sergey Yuryev	162
28	Scotland	Morton Fraser LLP: Jenny Dickson	168
29	South Africa	Clyde & Co: Ernie Van Der Vyver & Johann Spies	174
30	Spain	DAC Beachcroft: José María Álvarez-Cienfuegos & José María Pimentel	179
31	Sweden	Advokatfirman Vinge KB: Fabian Ekeblad & Malin Van den Tempel	185
32	Switzerland	Altenburger Ltd legal + tax: Melissa Gautschi & Julia Jung-Utzinger	192
33	Turkey	Andic Law Office: M. Can Eriş	198
34	Ukraine	CMS Cameron McKenna: Olexander Martynenko & Olga Shenk	203
35	UAE	Hamdan AlShamsi Lawyers & Legal Consultants: Hamdan Al Shamsi	208
36	USA	Crowell & Moring LLP: Ellen MacDonald Farrell & Christa Santos Thorpe	212

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Insuring Against a Technological Unknown: Assessing Copyright Infringement and Technological Neutrality

Blaney McMurtry LLP

Andrea F. Rush



Brian K. Lau



Background

In recent years, much has been written about the prevalence of technology in every aspect of our lives. Technology has wide-reaching implications and has had an unprecedented pace of development. Taking the legal field as an example, many lawyers currently in practice can recall the days when their desks contained little more than a telephone, a pen and a legal pad. Today, most, if not all, lawyers would agree that their practices depend on devices like smartphones, desktops, tablets, email, Skype and the ability to scan and securely distribute electronic documents over the Internet.

The benefits of this technological revolution are readily apparent. The ability to communicate instantaneously and to have remote access to files and their authors has changed the pace of and methods by which business is conducted. The advent of cloud computing has both reduced and increased business' vulnerability to potential loss of catastrophic amounts of data due to natural disasters that affect a physical storage location. Social media provides us with a means to create and, by contrast, to re-create without authorisation, online personalities and to share our lives and the lives of others regardless of geographic limitations.

The benefits and burdens of these new technologies are obvious. There is widespread realisation and acknowledgment that using these new technologies comes with its own novel risks and liabilities. These risks exist regardless of age, vocation or avocation. Media reports of hacker activities and “stolen” information serve as a constant reminder of new exposure and risk.

The loss of confidential information, data breaches or other misuse of new technologies, while giving rise to several exposures, also raises concerns in the field of copyright infringement. How so? Communication to the public of original content, like reproduction of data fixed in any format, may exceed the scope of licences granted by the author(s) or publisher(s) of the expression of that information.

Technology presents the tools, and social media creates the environment which forms increased and accelerated avenues for risks of harm from the exercise of the exclusive rights granted under the Copyright Act, such as communication and reproduction. Social media continues to proliferate in the home and workspace, in our leisure and working schedules. The Internet, as a medium of communication, heightens risks of harm to the person and reputation. The “Internet of Things” presents increased risks of harm to information security and intangible property rights. As predicted decades ago by Professor Nicholas Negroponte, founder of the Massachusetts Institute of Technology's Media Lab, wired technologies such as telephones have become unwired while unwired technologies such as televisions have become wired. Increasingly,

if the origin or reception of a communication contravenes the copyright laws of a specific jurisdiction, the risks of harm and loss flowing therefrom must be assessed in accordance with the laws of that jurisdiction.

As is the trend in most developed nations, Canadian copyright laws and jurisprudence have been adapted and interpreted to keep pace with the emergence and utilisation of new technologies. Legislators, regulators and judges have applied the traditional concepts of copyright protection and copyright infringement to the new uses and platforms of electronic media to determine whether a particular use is permitted and/or in violation of a party's rights.

2015 was a significant year for Canadian decisions in this area. The federal Copyright Board and courts at all levels applied established, existing laws to fact situations involving claims or concerns arising out of emerging technologies. The technologies and the economic models pertaining to the exercise of the specific rights were likely – indeed, largely – unforeseen by the drafters of the Canadian *Copyright Act*. Courts in other jurisdictions may well look to reported Canadian decisions for guidance in grappling with emerging issues in their own jurisdictions. Similarly, decisions of foreign jurisdictions may not be precedential but they often provide useful tools for analyses of Canadian copyright law and related issues, particularly given the emerging global markets.

In Canada, the legislative framework is a hybrid of common law and civil law. Canadian courts have considered the statutes and torts governing copying, collection and communication to the public over the Internet as well as reproduction, use, and sharing of data (including intellectual property, privacy, defamation and consumer protection). Two dominant considerations have emerged when assessing risk:

- (i) The facts of each case are unique, and are of foremost significance in dispute resolution as well as risk assessment. The interests of the parties are balanced by the decision maker over a tapestry of domestic laws, both federal and provincial because treaties are not self-executing in Canada.
- (ii) Interest-based dispute resolution should achieve a balanced, “technologically neutral” result, as directed by the Supreme Court of Canada in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 [SODRAC].

Background information respecting the Copyright Act and the relationship between the Copyright Board and collectives will be helpful to provide context for the analysis that follows. A right set out in copyright law is infringed when something is done without permission from the rights holder to exercise the right – unless a corresponding exception or “user right” is provided in the legislation to offset the creator right. The exclusive rights of copyright (which are to be distinguished from moral rights and neighbouring rights)

are enunciated in section 3 of the Copyright Act. Section 3 states that copyright provides “the sole right to produce or reproduce the work or any substantial part of it”. The sole right includes the right to produce, reproduce, perform or publish and includes the right to authorise the making of other works, translations and adaptations for other media.

The Copyright Board is the regulatory and administrative body created by the Copyright Act that oversees the rate setting proceedings with respect to those rights in literary, artistic, dramatic and musical works and neighbouring rights which are administered on a collective basis. The Copyright Board considers the rates proposed by the collectives which are published for objection (by users) in the Canada Gazette. There is a 60-day limitation period within which to object to the rate set out in a tariff. A proposed tariff will be certified in the format in which it was proposed if there is no objection. The economics of pricing use of literary works for public educational purposes may differ from the proposed pricing structure for use of pre-recorded music in dance and skating rinks, or for reproduction of music in free or trial subscription services for movies, for example. When a dispute occurs between what the users are willing to pay and what rate the collective is seeking to recover on behalf of its members, the Copyright Board considers not just what is a fair rate, but also the legal principles underlying the need to secure a licence at all. The courts share with the Copyright Board that aspect of interpreting the Copyright Act. Litigation occurs in the court system and the judge can award damages for the infringement (i.e. non-payment of royalties in consideration of which authorisation would be extended by the copyright owner for the exercise of a right). Only the courts can make and enforce the orders for infringement, and only the Copyright Board engages in the rate setting process on which collectives depend for the ability to enforce their rights in a court of law.

Collectives, like SOCAN, SODRAC, Access Copyright, Re: Sound and CMRRA organise and administer rights in their “repertoire of works” based on authorisation from their members. Collectives receive authority from their members by way of agreements, to propose royalty rates payable by users, to collect royalties from users (including the right to litigate if necessary), and to distribute the payments they collect to their members. The Copyright Board has the powers of a superior court of record. Board staff include a judge, lawyers and economists with the expertise to hear from creators, users and experts as is necessary to balance stakeholder interests, and to set the rates, terms and conditions under which licences are granted. Once a tariff is certified by the Board it becomes possible for a collective to grant permission and to enforce the licences required by the members of that collective for the use of works within the repertoire of the collective, in respect of those rights which are required by the Copyright Act to be administered on a collective basis. It is to be noted that under the Canadian copyright law, collective licensing through the tariff certification process is required, optional or unavailable, depending on the nature of the right. In every case of enforcement, however, whether rights are administered collectively or not, finding a fair rate for use of new technologies will entail consideration of technological neutrality.

The Supreme Court’s latest consideration of the principle of technological neutrality in *SODRAC*

The Canadian Broadcasting Corporation (CBC) is a public broadcaster that operates as both a producer of original content and as a broadcaster. CBC communicates music to the public, and also reproduces musical works for various types of internal

use. For example, the broadcaster creates copies of work for (1) synchronisation of music with audio visual content, and (2) for inclusion in digital content management systems. The latter activity, i.e. the making of broadcast-incidental copies of material, is used to help prepare for broadcast to meet technical requirements (editing, language, closed captioning) and to show content to teams within CBC prior to broadcast. CBC’s broadcast-incidental copies were the centre of a dispute with the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC).

SODRAC administers the reproduction rights of composers and authors of musical works on a collective basis. Before the Copyright Board, SODRAC argued that CBC would be violating its copyright if it did not obtain permission to make broadcast-incidental copies prior to broadcast. CBC and SODRAC could not come to an agreement regarding the rate that should be paid to cover all copying. In the circumstances, the Board was requested to set the terms and conditions of a licence through the tariff certification process. The Board set a value for the making of broadcast-incidental copies. CBC, however, believed it should be shielded from any obligation to pay for a licence in respect of this type of copying. As such, CBC sought judicial review of the Board’s decision before the Federal Court of Appeal. The Board’s decision was upheld by the appellate court. CBC went further, taking the Federal Court of Appeal decision to the Supreme Court of Canada.

The Supreme Court found that CBC would require a licence, and thus need to pay royalties for the making of broadcast-incidental copies. However, the Supreme Court held that it was incumbent upon the Copyright Board to perform the valuation again. The valuation needed to be re-assessed by the Board. The majority of the Supreme Court held that the Copyright Board had made an error by failing to consider, within its rate-setting assessment, the principle of “technological neutrality”. Technological neutrality should be treated as a critical factor in valuation.

Many consider the *SODRAC* decision to represent a leap forward in defining the approach to rate-setting. The Supreme Court affirmed that:

- (i) Communication to the public over the Internet is a right which can be separately engaged, apart from the reproduction right. Each right requires a licence when engaged separately. In a case where the rights are owned by different parties, obtaining a licence from one rights holder is not enough. Both the rights to communicate and to reproduce must be cleared and licensed. Typically, these types of rights are licensed on a collective basis, available under separate tariffs which are certified by the Copyright Board. The valuation proceedings take place before the Copyright Board for tariffs in respect of which payments should be made for rights which are exercised in Canada: e.g. the copy is made in Canada, or the place of origin or reception of the communication to the public is Canada.
- (ii) When the Copyright Board undertakes to assess how much a user should pay for the right, pursuant to tariff proceedings, the Board must balance the rights of creators and users. The balancing act should take the user right of “fair dealing” and the valuation principle of technological neutrality into account. The Supreme Court focused on the principle of technological neutrality as a critical element in balancing the interests of creators and users, a necessary element to consider what rate should be payable to secure a licence, and thereby avoid a finding of copyright infringement.

Technological neutrality is an emerging concept. In *SODRAC*, the Supreme Court described it as the “recognition that, absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted or applied to favour or discriminate against any particular form of technology”. By defining the principle in this manner, the

Supreme Court stopped short of articulating any limits on how technological neutrality would affect the value of the right, as this valuation exercise is within the jurisdiction of the Board. The result is that while technological neutrality is a relevant consideration when valuing what royalties should be paid to secure permission from a copyright owner, parties on both sides of a dispute can still rely on it in support of their position. Technological neutrality is a principle which, like fairness, is easiest to describe by reference to a specific set of facts. There are no predictive bright lines to assist in defining it. Because a certain percentage of copyright disputes will inevitably lead to litigation, we anticipate that subsequent decisions of both courts and the Board will further develop markers and the boundaries of technological neutrality.

Technological neutrality will likely be raised by those seeking to enhance, as well as those seeking to reduce, recovery in Canada. For example, in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 [*Entertainment Software Association*], the Supreme Court of Canada accepted the user-based submissions that technological neutrality negated the need for a tariff in respect of communication to the public of musical works in videogames transmitted over the Internet. When users download videogames, they are copying copyright-protected content, including music. Should royalties be payable for both reproduction and communication? Not if the communication is no more than an electronic taxi service over the Internet and licences have been secured for copying the musical works within the copies. Would royalties be payable for delivery of a videogame in a store or receiving a copy through the mail? If not, should royalties still be payable for the act of communication merely because the electronic highway is used rather than delivery trucks over regular highways? No royalties were found payable when material was communicated to the public, which was incidental to payment by users for the reproduction of those same musical works as part of videogame downloads. The users were paying for the right to reproduce and download, and the communication right was found to be coterminous (effectively duplicative). The finding is fact-specific.

In *Entertainment Software Association*, technological neutrality was relied on to negate the need for certification. If there is no basis for liability, there is no need for royalties to be payable and therefore no need to certify a tariff. In *SODRAC*, the communication and reproduction rights were not held to be coterminous and effectively duplicative. However, the principle of technological neutrality served to compel reconsideration of the quantum of royalties. Presumably, when the Board reassesses the value of the right to make broadcast incidental copies, the rate will be adjusted, downwards. The Court remitted the matter back to the Copyright Board to re-determine valuation because it failed to apply technological neutrality as a factor in the tariff certification proceeding. The Copyright Board had merely relied on a previous decision concerning the making of analogue copies in the commercial radio context. The Supreme Court, in reviewing the Copyright Board's decision, held that this approach was unreasonable in that it did not consider the principle of technological neutrality.

Insurance coverage implications of SODRAC

SODRAC has widened the door to incorporating technological neutrality as a factor in rate setting. It is an approach to valuation of exposure that cannot yet be clearly applied with precision given existing jurisprudence. How will a business determine whether it needs to set aside a reserve for payment of copyright royalties

without knowing what elements will figure in the Copyright Board's determination of "technological neutrality"?

Further refinement of the principle may arise from the Supreme Court's decision to send the valuation back to the Copyright Board. The courts and the Copyright Board share jurisdiction to determine if a copyright royalty is payable. The Board decides the amount. But, upon review, a court may find that the valuation is not reasonable, in which case the court will send the matter back to the Board. The process for determining the amount of the payment obligation is "complex" if not "uncertain".

Until the role of technological neutrality in the assessment of copyright infringement damages is clarified by administrative and/or judicial decisions, we are left with a significant degree of uncertainty as to the practical effect of the principles, which has now been deemed critical. How will the critical new factor of technological neutrality impact royalty payments? In particular, will it reduce or increase the quantity?

In addition to the uncertainty respecting quantum of damages resulting from *SODRAC*, the application of the technological neutrality principle in regard to liability is also uncertain. In *SODRAC*, CBC unsuccessfully argued that the broadcast-incidental copies produced did not engage the reproduction right. CBC cited technological neutrality in support of this argument. Copyright infringement may occur without the knowledge or intent of the infringing party. Technological neutrality, as a broadly-defined principle, may apply as a basis for or against a finding that the different rights are separately engaged. Technological neutrality is pivotal in resolving disputes and raises issues of mixed fact and law.

Given the never-ending introduction of new technologies, consumers and businesses will need to be sensitive to conduct which may result in imposition of liability for copyright infringement. Furthermore, if liability is found, the policyholder faces uncertainty respecting the amount of damages that is payable. Informed consumers and businesses will look to ensure that they are adequately insured against any potential liability and damages awards that may arise in situations of copyright infringement. Insurers must not simply understand the exposures but be positioned to take advantage of an emerging but evolving business opportunity.

Insurance underwriters must work to ensure that the coverage extended adequately addresses the copyright infringement risks that the specific carrier is willing to insure. Limited copyright infringement coverage can exist in CGL Coverage Grant B. Wording of the specific policy must be reviewed. This said, given typical Section B wording, *SODRAC* raises two questions about the scope of coverage that may be available. The first issue, dependent upon the precise wording, may be whether the language is sufficiently broad to extend coverage to the precise claims asserted against the policyholder. Is there a covered copyright infringement claim given the precise wording? The second issue may be how an underwriter adequately factors the emerging concept of technological neutrality into risk evaluation and premium computation. Interestingly, the risk manager and broker must also consider these issues.

Copyright infringement coverage

Given the increase in copyright infringement claims in Canada as well as the complexity of principles applied to determine rights of recovery, defendants who possess liability insurance coverage will search for coverage from their carriers. The objective will not simply be indemnity should liability be imposed but securing payment of defence costs for the inevitable expensive court process. The first policy target will likely be Insuring Agreement B of the CGL policy. That said, other speciality policies may provide at least

limited if not more extensive coverage. It is beyond the scope of this article to review all potentially responsive policies and coverage issues. Certain potential concerns are briefly referenced below.

CGL (Commercial General Liability) insurance is the most common type of liability insurance that is purchased by businesses. It provides coverage for common types of liabilities that may arise in a policyholder's operations. The coverage provided is separated into several coverage grants that each apply to different types of injury and/or damage.

The CGL Coverage B Insuring Agreement typically provides coverage for "those sums that the insured becomes legally obligated to pay as 'compensatory damages' because of 'personal and advertising injury'".¹ Damages awarded for copyright infringement are mainly compensatory in nature. For example, in *SODRAC*, the Supreme Court approached its damages assessment by considering the value of a licence that would have provided the right to produce the broadcast-incidental copies. The award was clearly to be compensatory to the right holder. As such, the "compensatory damages" requirement is usually satisfied.

Another Section B coverage requirement can also limit policyholders' coverage entitlement. The loss must involve commission of a defined "Personal and advertising injury" offence. The term is defined to include injury arising out of copyright infringement in the insured's "advertisement". Typically the infringement must take place in the advertisement. The latter term is defined broadly and, in short, involves a notice promoting the insured's goods, products or services that are broadcast or published.

While the definition of advertisement is broadly interpreted, the policyholder has the onus of establishing that infringing conduct took place through advertisement and not otherwise. The concern for a policyholder who seeks copyright infringement cover is establishing that infringement occurred within the promotional activity and not otherwise. There can be no cover for infringement that occurs outside of the advertising context.

A typical coverage focal point is whether the impugned conduct occurred outside of promotional or related activity. While the concept is the subject of liberal interpretation, it is a source of contention in many coverage proceedings.

In *SODRAC*, CBC's broadcast-incidental copies were made for the purposes of the main programme that it broadcasted. One could envision an argument that the infringing copies were sufficiently connected to an advertisement. In particular, the broadcast-incidental copies were incorporated into the broadcast copy and were promotional in nature. Further, the purpose of the broadcast-incidental copies was to make the broadcast better, increasing viewership and promoting the CBC brand.

Other Section B issues do arise. CGL Coverage Grant B typically contains an exclusion for the knowing violation of rights of another. The knowledge aspect may not necessarily be present in many cases of copyright infringement. This stated the issue does arise.

In summary, technological neutrality has the potential to result in more findings of copyright infringement. As a result, increased CGL coverage demands based on Section B of the CGL policy can be expected. The outcome will be fact-specific. The nexus to advertisement is the key. Insurers will be aware that courts may be sympathetic. There can be broad interpretation of the language but also the conduct. However, some reasoned nexus will be required.

The principle of technological neutrality and other modifications to Canadian law, as well as international law, will see increased focus on available responsive insurance products. A few potential limitations with the current CGL wording were noted above. The limitations, combined with the growth of the number and value of

copyright claims, will lead to a search for policies which might be viewed as more responsive to these claims. A few potential "responses" are referenced below. Detailed analysis is beyond this paper's scope.

One possible "change" involves modification of the existing CGL form. Some advocate a narrower definition of "advertisement" or elimination of the nexus. Elimination is unlikely as it would transform cover from a CGL to a speciality intellectual property product. Change to a definition is possible, but agreement between policyholders and carrier can be difficult.

An alternative could involve maintaining or even slightly broadening the current CGL Coverage B wording with an adjustment to premiums to more accurately reflect the risk. This approach is problematic presently given growth not simply of claims in the so-called cyber era but the uncertainty surrounding damage evaluation as the above-referenced jurisprudence reflects. Put directly, technological neutrality is a wildcard in terms of both liability and damages assessment.

The CGL policy may not be the insurance "vehicle" best optimised to provide cover for these claims. This policy is traditionally intended to provide coverage of a general nature for commercial business. The policy is responsive to property loss or injury as well as a limited number of other claims (e.g. defamation) said to be the responsibility of a commercial business. Intellectual property liability exposures may be better addressed by other insurance products.

Copyright infringement is a specific risk that only certain policyholders typically face. Admittedly the number of commercial enterprises that face such exposure is growing. That said, the liability and the dollar exposure is faced by a somewhat limited range of enterprises who may benefit from a speciality product. The speciality product consideration may also be motivated by changes in copyright law. Growth of claims, change in law and legal nuances reflected by developing legislation as well as refined legal principle lends itself to consideration of the sale and purchase of speciality coverage for copyright infringement.

A third possibility exists for carrier and risk manager. The uncertainty brought by new examples of infringement as well as application of the technological neutrality principle may lead to removal of coverage for copyright infringement from the CGL policy. This option may seem unattractive presently. However, premium level and indemnity exposure, not to mention the high cost of defence, may necessitate some evaluation of this option for certain carriers and policyholders. Again, a separate policy for copyright infringement can be considered for those who may be significantly or uniquely exposed.

Speciality products do exist. However, the evolving exposure to infringement claims arising from recent technology, the global economy, re-evaluation of damage principles as well as legislative initiatives necessitate further evaluation of the speciality products. Underwriters, risk managers and brokers are compelled to scrutinise exposure and determine if wordings are suitable. The boilerplate CGL Section B language probably is insufficient. Query whether certain speciality products, deductible levels and premiums imposed for the same are satisfactory. Emerging intellectual property principles will lead to change in product placement as well as wordings and pricing.

Copyright infringement: issues impacting coverage

Recent developments impacting liability exposure for and assessment of damages arising from copyright infringement, as

noted above, are and will continue to impact policy coverage. Underwriters, brokers and risk management will need to assess a number of factors in assessing the need for and suitability of a policy to respond to changing copyright infringement exposure. Such factors include but are by no means limited to:

- (i) As defined in the *Copyright Act*, a “communication” can be public or private. A communication to the public (as opposed to a private communication) attracts liability for copyright infringement if unauthorised.
- (ii) As defined in the *Copyright Act*, the right to communicate is separate to the right to reproduce. A communication to the public over a digital network may require permission from more than one rights holder to avoid liability for copyright infringement. For example, broadcast-incident copying engages both the reproduction and communication rights which are exclusive to the owner(s) of copyright.
- (iii) Data may be proprietary, such as “trade secrets” and possibly “metatags”. The proprietary nature of emerging subject matter, such as metatags, remains unclear, as noted in *Red Label Vacations Inc. v. 411 Travel Buys Ltd.*, 2015 FC 19.
- (iv) Criminal sanctions attach to unauthorised reproduction and communication of material which is protected by copyright, and has been claimed (albeit unsuccessfully to date) in conjunction with misappropriation of client lists.
- (v) Private contracts, with express and implied licences, may be construed as waivers of rights.
- (vi) The emergence of new torts is continuing in this area, like initial interest confusion and intrusion upon seclusion.
- (vii) International treaties provide useful tools for harmonisation, however they are not self-executing. Rather, the checks and balances of Canadian law are definitive of the applicable bases of harm and quantification of damages.
- (viii) Canadian laws (rather than foreign decisions) establish precedents to follow when quantifying risk of harm in Canada.
- (ix) Current technology allows for the transmission of vast amounts of data rapidly across borders without regard to legislative boundaries. A Canadian court may rely on Canadian law to issue a takedown order that extends outside of Canada in order to reduce the damage arising from noncompliance with Canadian laws: *Equustek Solutions Inc. v. Jack*, 2015 BCCA 265.

Considerations for moving forward with technology-related issues

In addition to the copyright-specific factors listed above, there are a number of technology-related issues that will need to be determined by legislators and/or the courts. The determination of these issues will have implications for insurers that extend beyond copyright infringement exposure. Insurers, but also risk management and the brokerage community, will want to consider the following issues:

- (i) Are vendors of cloud services complying with the laws by offering products and services, which share information across borders? (Consideration: consumer protection legislation, which is under provincial jurisdiction in Canada.)
- (ii) What is the effect of linking to access systems remotely? What if the links are secured? (Consideration: compliance with privacy legislation, which in Canada is provincial and federal, depending on the nature of the information.)
- (iii) Data is stored on servers, anywhere and everywhere, on servers reaching into the cloud and onsite, and desktops with local and shared drives. Is the information that is transmitted from or received in Canada proprietary? (Consideration:

intellectual property laws.) Confidential data may be shared inadvertently and unwittingly.

- (iv) What is the nature of the information being transmitted out of Canada? For example, special purpose legislation such as the B.C. *Freedom of Information and Protection of Privacy Act* bars public agencies from letting personal data on citizens leave Canadian soil. It is reported that research universities fear this provision adds costs and administrative complexity for them to be able to exchange ideas in other jurisdictions.
- (v) With reference to the quality of the information being shared over the Internet, can it be itemised and categorised? Proprietary commercial information such as customer and vendor names and price lists, contract terms and conditions, programming data and product may be sought after by competitors as part of their competitive intelligence strategy.

Conclusion

The recent advent of new technologies and their prevalence in usage has provided modern society with many advantages and conveniences. These technologies, however, have also created novel liability exposure; which exposure extends to the cost of responding to claims. One of the impacted areas involves copyright law. Emerging technology, but also evolving legislation and legal principles, results in not just increased exposure but further complexity.

The principle of technological neutrality serves as but one example of modification which complicates the operation of business and the exposure of insurers providing cover. The emerging principle does not absolve a user of infringement for failure to obtain a licence of one of those rights on the basis that a right of a different type has been licensed. To the contrary, however, the principle does recognise that emerging technologies chew up the use of rights as surely as communication of content over the Internet chews up bandwidth. The quantum payable for the exercise of those rights may be limited by the principle of technological neutrality. Technological neutrality impacts, as do other technologies, legislation and common law, consideration of liability and damages for copyright infringement under Canadian law. In turn, these developments significantly impact those involved in assessing, creating, selling and procuring insurance coverage responding to this intellectual property risk. Emerging developments will continue to require those involved in the sale and procurement of policies, intended to be responsive to copyright infringement claims, to continue to assess not simply the product but the underlying emerging technology and law.

Endnote

1. In Canada, the Insurance Bureau of Canada (the “IBC”) provides model policy and endorsement wordings. The IBC is a national industry association representing Canadian home, car and business insurers. While the IBC wordings serve as benchmarks for the industry, their adoption or modification is discretionary. The CGL provisions referenced throughout this paper are taken from the 1 April 2014 edition of the Commercial General Liability Policy IBC form 2100.

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**Andrea F. Rush**

Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, M5C 3G5
Canada

Tel: +1 416 593 2951
Email: ARush@blaney.com
URL: www.blaney.com

Andrea's copyright practice has led her to the Supreme Court of Canada, Federal Court of Appeal and to the Copyright Board concerning communication of music over the Internet, fair dealing, performance of music in retail stores, communication of pre-recorded performances of music in fitness venues, and copying of print and digital literary works within the Ontario public sector. Andrea received the Air and Space Prize from McGill University, Faculty of Law, then completed an LL.M. in law on a Duff Rinfret Scholarship awarded by the Federal Department of Justice focusing on copyright protection for computer software under supervision of the Honourable Louis Philippe Pigeon. The first Canadian to be awarded the Charles Seton prize for a publication on software protection from the Copyright Society of the USA (CSUSA) Andrea was also the first Canadian Trustee of the CSUSA. Andrea served on the federal government Information Highway Commission, copyright subcommittee. Past Chair of the Association Litteraire et Artistique Internationale (ALAI) Toronto Chapter, Andrea served on the ALAI Board of Directors and continues to remain active in ALAI and the CSUSA. Andrea taught courses on copyright law and business at the Ontario College of Art and Design (OCAD University) and the Osgoode Hall Law School LL.M. programme in e-commerce.

Andrea is peer reviewed in this area, ranked in Chambers, Best Lawyers, Lexpert, Who's Who Legal and Martingale Hubbell in the areas of media and technology, intellectual property law and litigation.

She practises in Toronto with Blaney McMurtry as a specialist certified by the Law Society of Upper Canada in copyright and trademarks, a registered patent agent, and member of the Barreau du Quebec. Andrea completed advanced mediation training through the International Trademarks Association (INTA) and received a postgraduate certificate from the University of Windsor.

In January 2015, Andrea received an award from the Law Society of Upper Canada for her commitment to professional development in intellectual property.

**Brian K. Lau**

Blaney McMurtry LLP
2 Queen Street East, Suite 1500
Toronto, M5C 3G5
Canada

Tel: +1 416 593 3965
Email: BLau@blaney.com
URL: www.blaney.com

Brian is an associate at Blaney McMurtry LLP and is developing a specialty with respect to insurance coverage. Working on his own and alongside senior counsel, Brian acts on behalf of insurers and has provided advice pertaining to commercial general liability, property claims, including business interruption, professional errors and omissions, director and officer liability, and privacy and data breach.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk