CANCOPY Collective Clobbers Copy Shop

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Recently, Mr. Justice Ferrier of the Ontario Court granted a judgment of $132,000.00, including costs, against a copy shop near the University of Toronto called Copy Ink Inc. for illegal photocopying. The case got some attention in the media, which seemed to be under the impression that there was something new and remarkable about the judgment. In fact, it is a very standard default judgment.

What *is* new is that one of the plaintiffs was a "collective", a strange breed of animal created by the 1988 amendments to the Copyright Act. Since collectives were set up, in part, so as to make copyright enforcement workable, the case may be an indication that the collective system is working.

But before exploring the peculiarities of collectives, let's return to Copy Ink Inc.

Copy Ink was not merely copying a few pages of text here and there, at the request of customers. It was actually making copies of whole textbooks and selling them. For example, it was selling copies of a computer text called *Computer Organization* for $20.00 which normally sold for $88.26. In other words, Copy Ink. was a bootleg publisher, not much different from people who sell knock-off records or watches.

Since Copy Ink was operating in an identifiable location, it was an easy target. Usually bootleggers at least have the wit to make themselves difficult to find.

McGraw Hill, publisher of some of the textbooks being copied, and CANCOPY (the aforementioned collective, of which more shortly), both represented by McCarthy Tetrault, got an Anton Piller order in November, 1993. (An Anton Piller order, of course, is an *ex parte* order entitling a party to enter premises to seize evidence, where it can be shown there is a likelihood that the evidence will disappear or not be produced, due to the shiftless, despicable nature of the defendant.)

McGraw Hill and CANCOPY raided Copy Ink under the Anton Piller order, and seized evidence. They also noted Copy Ink in default on their copyright infringement claim, and

moved before Mr. Justice Ferrier for a money judgment on the basis of the default. Judgment was of course granted, and it was this that attracted the press attention. Copy Ink, having already been noted in default, was not represented before Mr. Justice Ferrier. As one would expect in an unopposed motion for judgment, Mr. Justice Ferrier did not release reasons.

In short, there was nothing new about the procedure. I have done it myself a number of times when dealing with bootleggers.

You issue a claim, and get an Anton Piller order. The order allows you to grab evidence (and, as a nice by-product, to cart off the bootlegger's inventory). Then you use the seized evidence to establish approximately how much bootleg material has been sold. If you're lucky, you settle with the defendant after the raid for an amount that pays for the enforcement, with maybe a little left over.

If this doesn't happen, you can always move for a default money judgment, as was done by Copy Ink. Bootleggers don't generally file defences. But the cost of moving for judgment has to be weighed against the chances of recovering anything from the culprit. Usually, you skip this stage, since the culprit is unlikely to pay up, and the Anton Piller raid has generally shocked him into stopping the infringement anyway.

In the Copy Ink case, who knows, maybe CANCOPY will actually collect something on the judgment. But more likely, the judgment was obtained to make a point and attract some attention.

Which brings us back to collectives.

The problem with copyright enforcement has always been the *de minimus* nature of most infringment. People copy a tape here, a magazine article there. Teachers copy magazine articles to hand out to their students. Most infringements are too small to be worth litigating. Yet it all adds up to a very considerable loss of royalty revenue for copyright owners. As well, there is the problem that even the person who *does* want to get permission doesn't know who to call.

In 1988 the Copyright Act was amended to provide for the formation of "collectives" to administer author's rights. If copyright owners choose, they can be represented by the collective. The collective monitors the use of the works, arranges licensing agreements, collects licensing fees, and distributes these as royalties to its members. It also provides "one stop shopping" for anyone seeking copyright permission.

There are various collectives, each dealing with a particular field, and all, for some reason, known by capital letter acronyms. There is, for example, SOCAN, for musicians, VISART for visual artists and the Canadian Reprography Collective, known as CANCOPY, for creators of literary works in English, the plaintiff in the Copy Ink case.

CANCOPY enters into comprehensive licensing deals with big users of copyrighted material such as the Ontario Ministry of Education. It received a fee of $2 million from the Ministry for the 1994 - 1995 school year.

As well, the federal government has just signed its first photocopying license jointly with CANCOPY and the Quebec collective UNeQ. This agreement - worth 13 million over seven years - makes the government of Canada one of the few governments in the world to observe its own copyright laws.

CANCOPY may do better in future negotiations for license fees now that it has shown that it is prepared to thrown its weight around by going after Copy Ink.

“We mainly wanted to get the message across that this kind of copying is not acceptable,” said Lucy White, Compliance Manager for CANCOPY. “I think we made our point.”