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Straightened Up and Flying Right: Canadian Courts Offer Renewed Support for IP Rights

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Canadian courts, most particularly the Supreme Court of Canada (SCC), have in recent years issued a few problematic intellectual property (IP) judgments – more than enough, alas, to be remarked upon; and usually, for interesting reasons. It is in the way of the common law that mistakes eventually get fixed. This paper is about that process of error and correction.

It has been suggested that the SCC was leading a trend towards trendier IP policies (Geist 2017). Actually, as this paper will demonstrate, the trend is very much back to more doctrinally sound IP principles. Activist law professors might be able to gull Canadian legislators for a while, but the courts are more discerning.

It is true that the consequences of a poor judgment – particularly by an ultimate court of appeal like the SCC – can be serious, given the power of precedential cases in Canada's common law system. IP is a very complex and specialized area of law, and one which perhaps has suffered disproportionately from problematic jurisprudence in Canada (although our Federal Court system is quite expert in it). Liberty is at stake in criminal law; in IP, "only" the economy and innovation and shareholders suffer. But suffer they do. As the fell consequences of trendier, less doctrinal decisions in the IP sphere emerged, courts have responded with decisions showing greater respect for IP rights.

What causes courts to drift into uncharted waters? I have suggested reasons in other papers and articles. These include, in the case of the SCC, the paucity of IP cases dealt with when the court was almost entirely consumed by interpreting the new *Charter of Rights and Freedoms* ("*Charter*"). This led them to return suddenly to IP with no recent experience. Also, the return of IP to the SCC was at a time when the unsound ideas of Lawrence

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Lessig, and of much of the Canadian IP academy, were briefly ascendant. It has also been suggested that to these we can add the end of ties to British courts of appeal. There is no one reason, which makes cauterization of sources of error more complex.

Problems often arise too when courts make policy. Particularly for the SCC, policy-making cannot be entirely avoided, especially with respect to the *Charter*. The dominance of the *Charter*, in particular within SCC jurisprudence, has made courts more accustomed to policy-making – to the quasi-legislative role which foundational documents like the *Charter* assign to them. Accustomed now to a certain necessary scope of policy-making, perhaps it assumes a too-ready place in the judicial tool holster, as many conservatives complain.

One of the two data points on the alleged trend was a cluster of five cases – the "Pentalogy" of long-awaited SCC copy-right decisions issued with dramatic simultaneity. IP law is the creature of statute and the statutes set out the policy quite well and, in general, thoroughly. The principles behind contemporary IP statutes continue to stand up very well in the age of the Internet and do-it-yourself gene editing, despite common assertions to the contrary.

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Canadian jurisprudence does not give rise to many highly influential IP judgments. The cases we deal with in this paper are few, but critical and highly indicative of the continued adherence of the courts to a steady course on IP rights. It is difficult to overstate the importance of such a steady course in our IP and technology-intensive world. Those that argue otherwise are merely averse to private property; for certainly they have – in general – fastened on no inherent inadequacy of IP rights to meet core objectives of securing to creators the benefits of their creativity and of creating effective commercial distribution systems and of the sharing of knowledge.

The cases with which we will principally deal are *Harvard College v. Canada* (*Commissioner of Patents*) (2002) ("*Harvard Mouse*"), in which the SCC denied patent protection for "higher life forms"; *Monsanto v. Schmeiser* (2004) ("*Monsanto*"), in which the SCC essentially restored patent protection for higher life forms; *AstraZeneca v. Apotex* (2017) ("*AstraZeneca*"), in which the SCC finally extirpated the odious "promise doctrine"; *Access Copyright v. York University* (2017)) ("*York*"), in which a rigorous Justice Phelan of the Federal Court (FC) finally imposed some order on the wild west of Canada's disintegrating fair dealing rules; and *Google v. Equustek* (2016) ("*Equustek*"), in which the SCC asserted the primacy of IP protection over specious arguments of Internet freedom.

The argument that there has been a "trend" to faddish approaches to IP, referred to above, is based primarily on two data points that concern SCC cases regarding fair dealing under copyright law (see below). Two data points do not a trend make – especially when a growing number of data points are orthogonal to the alleged trend. In any case, this "trend" on fair dealing is being reversed. The other cases dealt with in this paper are perhaps less influenced by trendy thinking than by other factors. *Harvard Mouse* seems to founder on concern for the murine soul; the promise doctrine was less about trendy thinking than (a) simple error, and perhaps (b) anti-innovation sensitivity to health care costs in Canada.

In fact, trendy thinking has been promoted mostly in academia, where there has been a great deal of hostility to property rights within a stratum of the intelligentsia concerned with IP. User rights are emphasized over those of creators. The thinking is associated with people like Lessig, a constitutional law scholar at Stanford, who gradually took on IP; Eban Moglen, an open source ideologue at Columbia; Michael Geist, an energetic economic nationalist and surprisingly influential derider of property rights at the University of Ottawa; and other younger figures in Canadian law schools.

One of the two data points on the alleged trend was a cluster of five cases – the "Pentalogy" of long-awaited SCC copy-right decisions.[1] The Pentalogy was issued with dramatic simultaneity by the SCC. The Pentalogy was released July 12, 2012, and consisted of: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* ("*ESA*"); *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada* ("*Rogers*"); *Re:Sound v. Motion Picture Theatre Associations of Canada* ("*Re:Sound*"); *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada* ("*Bell*"); *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* ("*Alberta Education*"). Each of these cases dealt with new copyright challenges or in some way trod new ground for copyright law. Several had strong dissenting minority decisions, and it is perhaps these minorities whose voices are now coming to dominate the judicial discourse.

- In *ESA*, the court decided that downloading a videogame did not amount to downloading the music contained in it, analogizing the download to a taxi delivery of a boxed game. The minority found this to fly in the face of the wording of the *Copyright Act*.
- In *Rogers*, a point-to-point communication (on-demand streaming) was found to be "to the public," within the meaning of the *Copyright Act*, if the same communication were offered to anyone who wanted it.
- In *Bell*, the court decided that Bell could make available approximately 30-second snippets of songs to market them because buyers were using them for "research" into what music they wanted to buy, and was therefore fair dealing, a rather astonishing outcome in keeping with the deeply flawed reasoning in *CCH v. Law Society of Upper Canada* ("*CCH*"), discussed below.
- In *Alberta Education*, the court, in the face of a withering minority judgment, reached the conclusion that to make a copy of a substantial portion of a work for every student in a large class was fair dealing for the purpose of private study, a judgment of great counterintuition.

The foundation for the bold decisions in the Pentalogy was laid by another anomalous SCC case, *CCH v. Law Society of Upper Canada* ("*CCH*"), the second point in the supposed trend line. In this the court struck out into new copyright territory, specifically opening up the scope of fair dealing. The approach in *CCH* clearly presaged, and indeed laid the jurisprudential groundwork for, the Pentalogy. But with the gradual limits on the Pentalogy's impact and of fair dealing generally, *CCH*'s influence will fade and it will echo ever more softly through future cases. The impact of *CCH*, and the meaning of fair dealing, are explained more fully below.

Let us turn now to a few, recent examples of reversals/modifications of IP rulings.

The Harvard Mouse Case

In *Harvard Mouse*, the SCC decided, by a narrow 5-4 majority, that so-called "higher life forms" could not be patented. The reasoning of the majority was as bad as its result. Not only did the court destroy an important source of patents for life sciences researchers, it set patent law back by suggesting that only inventions anticipated by the 19th-century legislature that enacted the *Patent Act* could be patentable subject matter (*Harvard Mouse*,

paras 120, 165, et passim). How could that be a workable rule of interpretation? On a strict application of this rule, virtually every invention would be presumed to be excluded subject matter. "Subject matter" means the inventions allowed to be patented in Canada, as set out in Section 2 of the *Patent Act*:

> ***invention*** means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter

The facts of *Harvard Mouse* were straightforward. Researchers at Harvard had developed a transgenic mouse – that is, one the genetic structure of which had been manipulated – which was much more likely to develop cancer, making it "oncogenic" (it is also known as the "oncomouse"). Harvard filed for a patent on the mouse, a patent that issued everywhere else in the world without cavil.

In an assertion of legislative power it has never possessed (see below), the Canadian Intellectual Property Office (CIPO) denied the application for the mouse itself, while allowing claims on: a method for testing a suspected carcinogen; a method of producing transgenic cell culture; a method of producing a transgenic mammal; the use of a transgenic mammal for testing; the plasmid used to splice it into the murine DNA; and the somatic cell culture. Harvard appealed through the patent appeal board, FC, Federal Court of Appeal (FCA) and SCC, leaving behind it a trail of decisions of varying degrees of insightfulness (the decision of Justice Marshall Rothstein at the FCA being a particular stand-out).

It is worthwhile to observe that, as happens with some frequency, Canada owes the persistent advocacy of a US actor, Harvard College in this case, for its rights, for (what could have been) an advancement in Canadian patent law.

The majority decided, on what the court called a "common sense basis," that higher life forms such as the oncomouse could not be patented because they were not anticipated by the 19th-century legislature that enacted the first *Patent Act* (*Harvard Mouse*, paras. 120, 199, 165). It did not appear to be open to the court, as it might have liked, to decide that life *per se* was not patentable because Canada already had issued patents for "lower" life forms such as fungal yeast cultures and bacteria. Thus an entirely unworkable distinction between "higher" and "lower" life forms entered the jurisprudence.[2]

This unfortunate decision left some 1500 patent applications stranded at the time of its issuance. And, of course, in spite of the issuance of the several method and other claims cited above, Harvard itself was out of luck; for, as W.L. Hayhurst astutely observed:

> Some patents for processes may be of little practical value. To discover that a competitor is carrying out the process may be difficult. If a process produces a living organism that reproduces itself, the process may have to be carried out only once: competitors who are able to get their hands on the organism need not repeat the process of producing it. What is needed is a patent for the organism … (quoted by Binnie, J., *Harvard Mouse* ….)

In other words, mice breed by themselves; no one need use any patented process to reproduce them.

The minority, in an eloquent and thorough dissent written by Justice Binnie, decided that the oncomouse was patentable as a "composition of matter," based on a simple reading of the *Patent Act* (*Harvard Mouse*, minority judgment).

In the end, a bad result was founded, as they often are, on bad reasoning. But *Harvard Mouse* was to have its comeuppance in a case soon to come. However, before we look, it is important that we have a brief look at emerging error in the CIPO. One looks at *Harvard Mouse* in isolation and realizes the great costs and losses to Harvard, but to know that 1500 or so patent applications already filed were lost with the issuance of the judgment is to better understand its impact.

Canadian Intellectual Property Office

While not a court *per se* (although it does include the Patent Appeal and Trademark Opposition Boards, which are specialized tribunals), the CIPO merits some examination here. The CIPO is the statutory authority that maintains IP registers for the Canadian government and examines and issues patents, through its component Patent Office. It is a Special Operating Agency associated with the Ministry of Innovation, Science and Economic Development Canada.

One of the glaring issues behind the judgment of the SCC in *Harvard Mouse* is the arbitrary rule-making of the CIPO. That the SCC ultimately upheld the CIPO's decision does not change the fact that the CIPO was wrong in the first place. Its decision was ratified rather than upheld, as it were. The CIPO overstepped the bounds of its statutory authority by ignoring its obligation under the *Patent Act* to grant a patent to Harvard, and by making up policy reasons not to do so (*Harvard Mouse*, para 47). Its persistence in defying Harvard, moreover, underscores the profound conservatism and tepid support for the rights it oversees in the Patent Office.

The oncomouse patent is not an isolated instance of the CIPO overstepping its bounds. More recently, the CIPO has taken to generally refusing to issue patents for diagnostic methods – a refusal that flies in the face of the legal authority that governs the CIPO. Not only does the Patent Office (a division of the CIPO) stymie personalized medicine patents as patentable subject matter, but in order to more effectively do so it has explicitly instructed its examiners to ignore rules of interpretation set out as binding law by the SCC (McMillan and Gale 2017)!

Patents of this type are potentially very many, and of great importance to innovation in Canada; an entire field of Canadian innovation is being shut down. Is CIPO, contrary to its remit, putting concerns for health care costs ahead of innovation? If the federal government were serious about innovation, it would bring the CIPO to heel.

The fact is that the CIPO has no rule-making or policy power to rely on for decisions like these. It is fair to ask whether Canada benefits from having its own Patent Office. It is supposed to encourage innovation, not to inhibit it. The CIPO should face a class action lawsuit from all those inventors who have lost the value of their inventions because of wrongly withheld patents. Apparently aware of the weakness of its policy, there are reports that the CIPO has brought pressure against those speaking out against the practice.

Monsanto v. Schmeiser

In *Monsanto*, the SCC effectively reversed *Harvard Mouse*. How it did so is, again, somewhat complex. The option of fully and simply reversing *Harvard Mouse* was not available to the Court in *Monsanto*; Monsanto had not made a claim to patent the entire canola plant, and so the court could not decide to uphold such a patent. Therefore the SCC had to adopt more circuitous means involving the concept of "use." "Using" an invention is a right reserved to the patentee under section 42 of the *Patent Act*. The make-up of the court had changed from the time of *Harvard Mouse* and the newly configured court was determined to correct the damage that had been wrought.

Even a lay person might pride herself on knowing with some certainty what "using" means, but she would not reckon with the insights of the SCC.

The facts of the case involved a farmer, Percy Schmeiser, who without permission cultivated and saved Monsanto's proprietary Roundup-ready Canola seed and then planted it, allegedly in violation of Monsanto's patent.

The facts of *Monsanto* were not altogether felicitous for the Court to descry that Schmeiser had used the inventions at issue. This is because while Schmeiser planted and grew the Roundup-ready canola, the plant was

not patented, as mentioned above; and, there was no evidence that Schmeiser actually sprayed the crop with Roundup (a proprietary Monsanto glyphosate herbicide). So, had he used the invention, which, essentially, was Roundup resistance?

The inventions at issue in the case were the gene conveying Roundup resistance, and the cellular structure containing that gene. In order to find that these inventions were infringed, the court had to go determinedly through many steps. The court first established that "use" should be interpreted purposively, the question asked being a rather loaded one under the circumstances:

> did the defendant's activity deprive the inventor in whole or in part, directly or indirectly, of full enjoyment of the monopoly conferred by law? (*Monsanto*, 919; emphasis in original)

The Court found that any commercial benefit to be had from the invention belonged to the patent holder (*Monsanto*, 927). This is a broader, purposive interpretation of "use" than could have been used. A more formal definition would have looked not at secondary effects, i.e., economic benefits, but at the direct engagement of the invention; but since the plant was not the invention, this approach could have caused problems.

> "Even a lay person might pride herself on knowing with some certainty what "using" means, but she would not reckon with the insights of the SCC."

The court had to find that, by using something which itself is not patented but which contained other patented inventions, the contained inventions were themselves, by implication, used, and this it did (*Monsanto*, 921). Schmeiser argued, and the minority judgment found, that he would have had to use the inventions in isolation from the whole plant in order to be found to have infringed the patent. He would have had to breed a cell line, for instance, not grow a plant.

Then arose the question of whether the inventions were "used" if Roundup were not sprayed. Relying on the "insurance" or "stand-by" value of the invention, the court determined that they were used (*Monsanto*, 922-924). Schmeiser had the Roundup resistance available to him in case he needed it, a fact from which he could take comfort and commercial value. In doing so the court analogized Schmeiser's growing of Monsanto's canola to other cases in which, for instance, pumps aboard a ship had insurance value even though they were not used in a jurisdiction in which a patent inhered, and of a fire extinguisher, too.

However, in relying on the insurance value to constitute use, the court elaborated that intention to use if the need arose was an important element of the use. The court ruled that intention would be inferred as a rebuttable presumption, and that Schmeiser had not rebutted that presumption (*Monsanto*, 924-925).

Of course, on this reasoning, the *Harvard Mouse* is, while not patentable, fully protected from infringing uses. One struggles to imagine a circumstance in which a higher life form would not be fully protected, under the principles in *Monsanto*, by pleading use of constituent inventions.[3]

The court was perfectly aware that it was effectively nullifying *Harvard Mouse*. The minority specifically cites as a flaw with the majority decision that it was allowing the patentee rights that *Harvard Mouse* had expressly

denied. The court could have found quite easily and sensibly that no patent was infringed. The minority did so and its decision, while not the best result, is logically based. No violence to patent law would have been done beyond what *Harvard Mouse* had already wreaked. But the court seems to have been determined to overcome that case, and it did so.

False Promises

Judges nourished another unfortunate patent law in the so-called "promise doctrine," which had consequences perhaps even more deleterious than *Harvard Mouse*. The promise doctrine essentially stated that if a patent appears to promise more than it delivers, the patent will be invalidated, as it is considered to lack utility, an essential element of patentability.

Normally only a minimal level of utility – a so-called "scintilla" – is required to sustain the grant of a patent. The utility must be appropriate to the patent itself, but need not be high. Utility must be sufficient only to prevent premature patent grants; in other words, if the inventor cannot yet put the invention to use it is a mere idea and not patentable. But only some degree of use is needed; it is ultimately up to markets to sort the real value of any patent.

The so-called promises on which the courts relied were never, of course, express in the patent specification, but were inferred in hindsight by the court long after the drafting and issuance of the patent.

Among the 30 or so patents invalidated under the promise doctrine were those for two drugs, Strattera and Zyprexa, patents for which were held by US drug company Eli Lilly. Eli Lilly's estimate of its losses for its inability to sell these drugs alone under patent in Canada was CDN $500 million. It sued Canada for this amount under the investor protection provisions in Chapter 11 of the North American Free Trade Agreement (NAFTA).

The long and complex decision of the NAFTA arbitral tribunal was released March 16, 2017. Eli Lilly lost. The tribunal found that while the promise doctrine amounted to a change in Canadian patent law, it decided that the change wasn't big enough or sudden enough to be confiscatory and thereby qualify Eli Lilly for compensation. Having decided this, the tribunal didn't even get to Eli Lilly's claim that the promise doctrine was not in keeping with Canada's IP obligations under NAFTA, as it certainly seemed not to be (NAFTA Tribunal, final decision, 2017).

"This doctrine has sapped billions of dollars in drug sales from the Canadian market."

Eli Lilly patented Strattera in 81 jurisdictions. Only in Canada was the patent invalidated. It is not like Eli Lilly tried to promote useless inventions: the drugs were useful and had large markets. Only Canada had anything like the promise doctrine to deprive Eli Lilly of the economic benefits of marketing the drugs.

The promise doctrine, along with other intellectual property sins, had Canada dubbed a bit of a rogue state in the IP community. Not on the scale of China or Venezuela, to be sure, but in the bad books of the US and others nonetheless. The 2016 Special 301 Report of the Office of the US Trade Representative (2017) has Canada on its watch list. The promise doctrine was high on its list of concerns. This doctrine has sapped billions of dollars in drug sales from the Canadian market.

The promise doctrine was English law domesticated in error, like the rabbit to Australia. Its origins are traced to the 1981 SCC case, *Consolboard V. Macmillan Bloedel* ("*Consolboard*"), although this was a case that did not make clear what the promise doctrine meant, mentioned it only in passing, and was about disclosure, not utility. The case had no intention of wreaking the harm it did, of importing what became the promise doctrine, but it certainly planted the seed.

The promise doctrine evolved from a reference in *Consolboard* taken from *Halsbury's Laws of England*, a terse one to the effect that inutility is that the invention will not do what the specification promises it will do (*Halsbury's Laws of England*, para.122). The edition of Halsbury's cited, the third, was out of date at the time the SCC turned to it. The third edition was published in 43 volumes from 1952 to 1964. The fourth was published 1973-1987. Thus, *Consolboard* fell between updates. So, out-of-date law was imported; the English "false promise doctrine" was done away with in England by the *Patent Act*, 1977. By dint of this new statute, the then published Halsbury's misstated the law of England as it was in 1981 – the result being a reference to inapplicable and defunct English law.

In England there was never a promise doctrine *per se* but rather the "false promise doctrine." It was not directed to utility but to misleading the crown – the grant of a patent being the prerogative of the crown until made statutory in 1977 (as, of course, it is in Canada; see section 27(1) of the *Patent Act*). This purpose of the false promise doctrine was pointed out in the SCC's *AstraZeneca Canada v. Apotex* ("*AstraZeneca*"). Basically, the false promise doctrine provided that if the patent specification contained some untrue promise of the functionality of the patent, the patent would be invalidated, since no court would second-guess the crown on what part of the patent bargain had been critical to the crown's decision to grant the patent.

AstraZeneca abolished the promise doctrine. The Court did not mince its words; it simply stated that the promise doctrine was "not the correct approach" (*AstraZeneca*, para. 2); is "unsound" (para. 36), and "excessively onerous" (para. 37). No doubt about it, the promise doctrine has been confined to the dustbin.

AstraZeneca also set out a long list of the inadequacies of the doctrine. These included the following:

- That the promise doctrine is unsound as inconsistent with the words and scheme of the *Patent Act* (*AstraZeneca*, para. 36);
- That the promise doctrine is counter to the scheme of the act by conflating ss. 2 (invention) and 27(3) (disclosure) (*AstraZeneca*, para.44);
- That there is a difference between "useful" in S.2, and the 27(3) obligation to describe "operation or use." Thus, that latter phrase does not import utility into specification, and it need not be described in the specification (*AstraZeneca*, para. 43).
- That a single use makes a subject-matter useful as required by s.2 (*AstraZeneca*, para. 48).
- The promise doctrine is "antagonistic" to fulsome disclosure. That is, threatened with construal as a promise, a patent draughter is more likely to omit marginal description that might nonetheless contribute to an understanding of the invention (*AstraZeneca*, para.51); and
- That utility's purpose is to prevent the patenting of fanciful, speculative or inoperable inventions – i.e., patenting too early in the inventive process (*AstraZeneca*, para. 55, 56).

It has been suggested that Canada is left without a utility doctrine as a consequence of the *AstraZeneca* decision, but this is demonstrably far from the case. While critical of SCC judgments from time to time, I would not

attribute to the Court so fundamental an error as to simply erase a necessary and long-standing aspect of patent law. It could not anyway – utility is in the statute. As *AstraZeneca* itself demonstrates, courts have picked up the scintilla requirement right where they left off, without difficulty – hardly surprising since it persisted simultaneously with promise doctrine in application to patents without discoverable promises. Several decisions since *AstraZeneca*, including *Pfizer Canada and Wyeth v. Teva*, *Apotex v. Shire*, and *Bristol-Myers Squibb Canada v. Apotex*, all applied the scintilla standard in obedience to *AstraZeneca*. Nothing has been lost in the return to the scintilla standard at all except a sort of invalidation lottery for the benefit of generics.

It is also urged that the promise doctrine was good policy, but how could that be?[4] After all, it developed from double mistake – the wrong doctrine wrongly interpreted – a circumstance which would only adventitiously correspond to sound policy. It verges on the self-evident that to have two separate standards for utility is unfair, confusing, and unsupported by the statute.

The fact that the promise doctrine is largely discriminatory against one technology –pharmaceuticals – is itself a strong argument against it. Patent law is supposed to be technology-neutral. And if, as the SCC found, the main purpose of the utility requirement is to prevent premature patenting, then the doctrine must fail, for only an objective standard can reliably do that; a promise may fall below the threshold at which this policy goal is attained. The promise doctrine could, thus, be gamed.

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What led courts to wander in the unprecedented wilderness of the promise doctrine? What was behind the perpetuation of such a costly error? For however many patents were actually invalidated because of it, billions were lost in and by Canada.

Such is the gradual development and warping of the promise doctrine that it is hard to point to any clear motive; only the misapplication of old English law, which, at least initially, appeared innocent. However, it is a cogent observation that the promise doctrine was not inconsistent with past Canadian health care and patent policy favouring the generic drug industry. No doubt this was not an overt motive, of course, but perhaps some inherent preference in the system.

The promise doctrine was not an instance in which the SCC overruled itself, since the promise doctrine was developed and applied by the FC and FCA. Nonetheless it was well-entrenched by the time the SCC excised it from the body of Canadian law.

Thus, unlike the Pentalogy, the promise doctrine seems to have arisen less from misdirected exuberance than from simple mistake. The mistake cost, it is said, 30 or so pharmaceutical patents. Like the Pentalogy, however, one may discern a certain correlation with the IP zeitgeist, but there is certainly no clear evidence that such sympathies influenced any of the courts. But when we see an institution like the CIPO apparently distorted by concern for health costs, what else may we not suspect?

Eli Lilly's NAFTA challenge was an important signal of how egregious the costs and effects of the promise doctrine were. NAFTA, whatever its future, looms over the SCC, giving others a right of final appeal not allotted to Canadians themselves.

It has been suggested that the SCC in *AstraZeneca* threw away a major NAFTA negotiation point (Gold 2017a). According to this logic we should keep bad laws on hand in case of negotiations, denying justice and charging the SCC with keeping tally of our negotiating chits. It is like having a short copyright term – preserving national disadvantages just to trade them away.

There is even a theory put on the table by a Canadian law professor (Gold 2017b) that the promise doctrine never existed but was only a nefarious plot by Eli Lilly and its lobbyists to concoct a NAFTA challenge. Really. It is unfortunate commentary on the quality of our IP professoriate that it takes to spinning conspiracy theories.

Fair Dealing

In several cases, the SCC took the long-settled, if complex, law of fair dealing in copyright, and marched it on a crooked path to a desolate destination. Happily, a white knight of the FC has ridden to save it. This demonstrates that even less senior courts can avoid the worst consequences of poor SCC judgments, adroitly and subtly refining and refocusing them to properly address the issues, while nonetheless obeying them.

Fair dealing is a right to copy a portion or portions of a work protected under the *Copyright Act*, to an extent which would otherwise be actionable without the fair dealing protection.

In *CCH v. Law Society of Upper Canada* ("*CCH*"), the SCC, in apparent exuberance, threw over the traces of precedent and statute and tried to make fair dealing into something new. Before CCH, fair dealing was a defence to infringement, and so it should have stayed. But the SCC in CCH decided that it was an "integral part" of the *Copyright Act* rather than "simply a defence" (*CCH*, para. 48), and must be given a "large and liberal interpretation in order to ensure that users' rights are not unduly constrained" (*CCH*, para.51).

One effect of this decision was to amplify "fair dealing" into something like the "fair use" exception under the United States Copyright Act – but the consequences were far worse than have inhered under the US regime.

Where the fell consequences of CCH came into sharpest focus – so far – has been in education. This was brought about in large part because of another SCC case that followed *CCH*, *Alberta Education*, one of the Pentalogy.

"Again, the SCC struck out boldly and decided, against common sense and in the face of a strong dissent, that such a use was in fact fair dealing — as a private use!"

In *Alberta Education* the court was faced with a simple set of facts. A teacher made copies of a substantial part of a work for all of his students. Again, the SCC struck out boldly and decided, against common sense and in the face of a strong dissent, that such a use was in fact fair dealing – as a private use! The consequences, as I have outlined elsewhere, were catastrophic for the educational publishing industry (Owens 2016; 2017). In other cases in the Pentalogy fair dealing was also stretched, but none of them has had the same terrible impact.

This impact arose primarily from the perception by educational institutions that they had been emancipated from the need to pay licence fees for the materials they used. In response to the greatly increased scope of the fair dealing exception, educational institutions and authorities in Canada adopted new fair dealing guidelines (Universities Canada 2012) pursuant to which the payment of royalties to content producers was greatly

attenuated. The guidelines were poorly thought out and naively grasping. These were prepared and endorsed by what is now Universities Canada. This situation was then made worse by the *Copyright Modernization Act* (*CMA*) which added "education" itself to the list of permitted purposes for fair dealing. "Fair dealing" had ceased to be fair or even reasonable.

York University adopted the guidelines. In keeping with *CCH* it gave its fair dealing rights, in light of *Alberta Education*, a broad and generous interpretation indeed, deciding essentially that the material copied on its behalf to be made available for students largely did not require consent or payment.

When a skilled and experienced judge is bound by inconvenient legal precedent, justice may nevertheless prevail. *York*, a judgment written by the Honourable Michael L. Phelan of the FC, is a great example. The case involved massive and flagrant copying of published materials by York University in accordance with its new copying guidelines. AC, which exists to collect royalties on behalf of creators and publishers under the authority of a certified copyright tariff, suffered a catastrophic decline in revenues and sued York.

The fairness part of a fair dealing case is assessed on six factors: purpose of the dealing (somewhat confusingly, different than the statutory purpose assessment); the character of the dealing; the amount of the dealing (amount of copying); alternatives to the dealing; the nature of the work; and the effect of the dealing on the work. York's copying was for a statutorily permitted purpose, education. But the Court found that York's dealing was unfair, or grossly unfair, on several of the six factors. It also found the Guidelines to be unfair, poorly conceived and arbitrary, not to mention that York made no effort to see that they were followed.

It was not open to the Court to overturn the binding SCC precedents, specifically the *CCH* and *Alberta Education* cases, as well as other, prior cases. But there was no need to, for the reasoning of the decision is consistent with them. Justice Phelan did an assiduous and scrupulous job interpreting them and conducted his exhaustive fairness analysis as they directed. The precedents were carefully distinguished on their facts where appropriate.

> "York, and the rest of the education industry, will be better off for having to pay these royalties."

Further protecting the decision from appeal is that fairness is a factual enquiry, highly dependent on the facts and evidence of each case. Trial judges are much more able to undertake such review than appellate courts and, absent obvious legal error, their decisions will be granted deference. The great care taken with this decision, its extensive reliance on facts and a vast body of evidence, and its soundness from a copyright policy perspective, will make very hard to appeal successfully; unfortunately, however, York has launched an appeal. On the bright side, this will eventually result in affirmation by higher courts, with greater precedential value, of the law as interpreted by Justice Phelan.

Has York financial reserves against its liability for damages and costs? If not, there could be a heavy blow once the bill for damages comes due. But York, and the rest of the education industry, will be better off for having to pay these royalties. Not only do its employees create most of the materials at issue, but the education industry absolutely relies on the existence of educational publications – ones which wouldn't exist if fair dealing diminished unduly remuneration of creators and publishers. Some publishers have closed up shop and left Canada because of the wide application of the fair dealing exception. The decision creates new hope for publishers and creators.

Equustek v. Google

In *Equustek*, the SCC, while making a somewhat unique order, stuck to established legal principles in doing so – but strongly affirmed its support for IP. This is no small achievement in the circumstances in part because of the boldness of issuing a worldwide injunction, as the court did. US courts, faced with the choice of protecting Google, on the one hand, and protecting artists, on the other, have consistently, for dubious policy reasons, sided with Google (*Perfect 10, Inc. v. Amazon.com, Inc. and A9.com Inc. and Google Inc*. 508 F.3d 1146). Indeed, US courts, as set out below, have interfered in the enforcement of the SCC judgment.

Equustek, a BC technology firm, first obtained an order in a British Columbia court to keep its competitor, Datalink, from copying Equustek's intellectual property, selling products containing it and advertising them over the Internet. Datalink failed to comply, and so Equustek had effectively no remedy. Google was brought in as a third party, because Datalink was in almost all cases located through a Google search. The British Columbia Supreme Court issued an injunction against Google as a third party from returning results for the many web sites Datalink used to promote infringing wares. Google appealed the injunction to the British Columbia Court of Appeal and then to the SCC which on June 28, 2017 upheld the injunction.

Google argued that if it must comply with a court order it should be for the Google.ca domain only. This was a token gesture on Google's part that would have provided no remedy for Equustek, as the Datalink domains can simply be searched from Google.com. The response is a nod to the Canadian residence of the court, but of course the .ca domain does not conform to the jurisdiction of the court, either. It is a position bound to leave courts and plaintiffs alike unsatisfied, and to beg a wider order.

Google argued it does not make the offending sites, it merely, and automatically, indexes them. Enforcement, it argued, should be against the sites and servers, not the indexer. However, it is impractical for aggrieved parties to seek enforcement in the jurisdictions in which such actors hide, assuming it were even possible to find them. Google is better off acknowledging the responsibility this entails to avoid indexing illegal sites on request, lest Google be more deeply implicated in the enterprise of purveying illegal goods. This is particularly so as the Court found Google's costs of compliance to be very low.

Google claims to have the responsibility to truthfully present the web as it finds it, alleging that it would corrupt its mission to discriminate amongst content. However, Google already filters results both out of a sense of corporate responsibility (child pornography, hate speech) and because it is subject to orders such as the SCC upheld already (including European orders regarding the "right to be forgotten").

Equustek deserves a remedy. There is no reason it should remain the subject of IP piracy. No principle of free speech is impinged. Canadian – or other national – courts are Equustek's only way to vindicate its rights. If the courts fail it, Equustek is lost, and because of a situation Google creates. Google gets a lot of mileage out of posing as an Internet utility, but it is more than that – it is a very big business, doing what it does to sell advertising, and it needs to be regulated as such.

Since Google says it would comply, if necessary, with an order requiring it to scrub the .ca domain, then it is in effect only the scope of the order Google contests, not the existence of an order. Presumably Google would thus admit the validity of similar orders from other jurisdictions if it were to accept one from Canada. On this scenario, Equustek could protect itself by fighting Google in every nation, getting one after another to issue an order in respect of its respective domain extension – an expenditure of treasure and energy that would make no sense for either party. It makes far more sense for one court to issue one properly crafted order. The BC order is uncontroversial against Datalink, although it has worldwide effect; so too it should be acceptable against Google.

Admittedly, courts should not lightly make such orders and the SCC did well to delimit the circumstances and principles which make them appropriate and legitimate, such as not affecting speech that should be free (which marketing counterfeit goods is not). Thus, while it is in any event unlikely that a Canadian court order would mean much by way of precedent to Turkey or China or Russia or other despotism, its terms could be held up to distinguish it from, for instance, an order to muzzle political opposition. The terms of the judgment delegitimize those from the onset.

If Google shirks reasonable legal requirements it will only further the image of the Internet as lawless – and ultimately drive calls for regulation, perhaps even by an international oversight body. The legal contours of the cyberworld remain to be fully explored. The adjudication of novel issues will establish some of those contours through energetic advocacy and wise adjudication. How better? If the only viable legal authorities were to keep wholly away, then into what monster might the Internet develop?

For Google to be seen to comply with a reasonable order of a sound court of a democratic country is far from the worst that could happen to it. For now, this is the best possible outcome for Google. It ought to like it more than lump it. Nonetheless, Google has obtained an order from a Federal Circuit Court in Northern California interfering with the enforcement of the SCC injunction (Sookman 2017).

Conclusions

When do judges make poor decisions? And how does the institution of the judiciary nonetheless keep track and return to it?

Any judicial decision is a complex balancing of diverse factors and policy imperatives. Even the most disciplined and trained minds cannot always find the perfect path to resolve these conflicting dynamics and create effective precedent for the long term. In a perfect world all judgments would be just and pareto-optimal; however in this imperfect world, we have to settle for the occasional suboptimal judgment, even though the costs to society can be very high. I strongly believe that judges strive to bring greater justice to the world. It is a very high calling. A mark of this is the stories in this paper – demonstrating the good will of courts to fix the problems they create.

It is an essential feature of the common law that bad decisions can have serious and prolonged impact. While the essential project of the common law, the continual discovery and refinement of the law, is a bold and noble one, it does prevent the handy "reset" from a poor decision that is a facet of the civil law, always basing decisions on the original statutory law and not on subsequent cases. But it is another feature of the common law which helps lead the process of refinement on the path to correcting suboptimal judgments, and that is adversarial procedure. Lawyers are the memory and to a lesser extent the coaches of the judiciary. It is a procedure that brings a lot of research and mental processing authority to each opportunity to refine, limit or reverse poor jurisprudence.

Perhaps there is no better example of reversal than *Carter v. Canada (Attorney General)* ("*Carter*"), which determined the existence of a limited *Charter* right to a medically assisted death, reversing the earlier case of *Rodriguez v. British Columbia (Attorney General) Rodriguez v. British Columbia (Attorney General)* ("*Rodriguez*"). In a careful and nuanced judgment, the court in *Carter* dealt carefully with the factors the court should consider in deciding to reverse *Rodriguez*, then turned 180 degrees on the main issues. I have not dealt with it extensively in this paper because it is not an IP case; nonetheless any student interested in the issues surrounding SCC reversal should look closely at *Rodriguez* and *Carter*.

Rodriguez was, in the view of the court, less decided wrongly than it was an artefact of an earlier stage of debate and of societal attitudes. The other cases discussed herein are more in the way of misjudgment, or outright error.

With due respect to the Court, *Harvard Mouse* is simply a case of error. The judges for some reason did not have the collective stomach for the obvious outcome of the patent law regime. Moreover, they seem to have been prepared to take a bad way out rather than no way out. It is never going to be numbered among the SCC's better moments.

The promise doctrine was also a case of error, but a more complex one. A succession of errors of interpretation and application led to the growth of the promise doctrine to the point where its ugly head needed the SCC's might for its decapitation.

Perhaps the worst error was *Alberta Education*. How the majority could have reached the decision it did is baffling. In the Pentalogy every decision favoured the defendants; maybe the drama of releasing five copyright cases at once, coupled with the apparent animus to copyright protections, left the justices swept up in the process and having lost track of obvious details.

Let us hope we are in a new era in which Canadian courts will prove friendlier to IP and issue judgments more in keeping with principle and precedent – and less in need of reversal or repair. Our innovation economy demands it.

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Endnotes

1 One could quibble that five cases amount to five data points; however, I argue that it is not so, because the same court issued all the cases at the same time without intervening feedback or criticism.

2 Technically the Court could have also extinguished the right to patent "lower life forms" as well. However, such patents were of long standing and had been accepted by the Patent Office. The specific facts of those cases were not before the court. Therefore, the court was not emboldened to take the harsher step with much greater and unknown consequences (not argued by counsel) of ruling out all life forms.

3 It is, of course, theoretically possible that a patented life form could arise from some use of an unpatentable process, such as traditional breeding. This seems very unlikely but, it is to be admitted, that it is so only from the perspectives of current technologies. Still, one would suppose that some intervention in the breeding process, likely a patentable one, would be necessary to ensure the patentable outcome.

4 That the promise doctrine had policy value was asserted nonetheless before the NAFTA tribunal. As articulated by the tribunal, the public policy justification for the promise doctrine advanced by the government of Canada seems wishful, thin and tautological – in what amounted to a retroactive justification, a sow's ear roughly stitched, although it had the merit of apparently convincing the tribunal.

About the Author

Richard Owens is a Munk Senior Fellow with the Macdonald-Laurier Institute and a lawyer who has specialized in business and commercial law, regulation of financial institutions, intellectual property and technology.

He has served financial services providers, technology companies, drug companies and others in Internet, technology, intellectual property strategy and patent law, M&A, outsourcing, strategic alliance and joint ventures, licensing and other areas. He has been repeatedly recognized as among Canada's best lawyers in technology law and attained the highest rating on Martindale Hubbell.

He conducted his practice with three of Canada's leading law firms. Richard is past chair of the board of directors of the University of Toronto Innovations Foundation, and member of the advisory committee to the Office of the Privacy Commissioner of Canada. He is a member of the board of the Center for Innovation Law and Policy at the University of Toronto Faculty of Law, and served as a director of the International Technology Law Association.

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