

*Review Essay:*

*Musicians and the Law in Canada (Sanderson) and  
This Business of Music (Shemel and Krasilovsky)*

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Paul Sanderson. *Musicians and the Law in Canada*. Toronto: Carswell Publishing. 2nd ed., 1992. 507 pp. ISBN 459-56780-2 (cloth \$78.00).

Shemel, Sidney and M. William Krasilovsky. *This Business of Music*. New York: Billboard Publications. 7th ed., 1995. 736 pp. ISBN0-8230-7755-1 (cloth \$31.95 US).

In legal circles, books or university courses on “x and the law” (where x might range from free trade to free speech) often meet with much scepticism. A fear is that the results will be neither good law nor good “x,” and even if both, few will be competent to evaluate the outcomes. In general, legal publishing and the legal profession are extremely conservative. In the most conservative settings, a contract is a contract, whether for the sale of a supermarket or a song. Many litigation lawyers see no difference in principle between a medical malpractice lawsuit and a copyright infringement action. But the practice, study and teaching of law are rapidly changing.

To serve clients in such areas as computer software, pharmaceuticals or biotechnology, it is probably no longer enough to be merely a “good commercial lawyer,” for each such business has its own culture, jargon, trade practices, and technological expertise. In musical circles, whether in clubs or on campuses, one can no longer ignore the basics of copyright law. Such neglect invites litigation. Any aspiring entertainer, author, composer, educator, or scholar should know something about corporate and commercial law and the entertainment business.

For decades, the “entertainment sector,” which comprises everything from motion pictures and the music industry to the fine arts and publishing, has been “big business” in North America and Europe. In particular, the “music business” has been a huge economic sector for more than a century, especially since the advent of sound recording and radio. Pre-recorded music sales now have reached the billion dollar a year level in Canada and \$12 billion in the USA (in their respective currencies). Nonetheless, remarkably few books deserve consideration by those concerned with music and the law.

By contrast, dozens of useful texts (and many more, anecdotal trade books) deal with the business and/or law of computers and software. As a mass market, the computer sector is only about 15 years old (and only about 30 years old as any kind of market at all). But as late as 1980, there were virtually no commercially published books on computers and the law.

This difference can be traced to the legal cultures that work in the respective areas. The computer sector is relatively new and much more competitive, and presents fewer “barriers to entry.” On the other hand, entertainment law has had a much longer history and suffered ups and downs in respectability. Its most respected scholars have tended to deal more with copyright law than with business practices — not surprising, as the business of entertainment has been notorious for its unsavoury episodes, and its legal traditions somewhat cabalistic. All the same, two publications stand out as meriting the attention of those concerned with music, the law, and the music business in Canada.

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Consider first the grandparent of all the books on “law and the arts.” Since 1963, Sidney Shemel and M. William Krasilovsky (S&K) have been publishing *This Business of Music* (now in its 7th edition, 1995). Shemel was for a long time in-house lawyer for MGM and United Artists; Krasilovsky practised law for decades in New York City. Their classic book should be read with its companion volume, *More About This Business of Music* (already in its 5th edition, 1994).

The publishers describe the main book as “The bible of the music business, with over 250,000 copies sold”. This presumably refers to its cumulative sales in various editions, but by any academic measure S&K is a best seller. It is not difficult to understand why. The book has something for everyone, from expert musicologists to expert copyright lawyers, and anyone else interested in the music business. From the legal perspective, everything is covered: from tax to payola to trademarks, with most emphasis on copyright law (which is appropriate, given the nature of the music business).

Clearly, the book is American in orientation, with very little to say about the law or business outside the USA. However, this is hardly a criticism. For better or worse, the American popular music industry dominates most segments of the music business (broadcasting, recording, publishing, etc.) in most Western countries, so that non-Americans have to understand how US law and business works (or doesn't work). In any event, much of what S&K have to say about the music business applies to practices in Canada, since the large US record companies and music publishers are very influential here. There, however, important differences between US and Canadian copyright law.

The US has a unique copyright registration system and a unique system for dealing with “termination” of grants to publishers in respect of works by deceased composers. Also, the US has a very distinctive system for dealing with “derivative” works, i.e., works based on pre-existing compositions. Moreover, the Americans have a unique “work-for-hire doctrine” that can treat free-lancers as employees in certain situations. Not legally binding outside the USA, the American provisions are nonetheless very important for understanding who owns what and negotiating Canadian rights in respect of American-owned copyrights. Furthermore, some works are in the public domain in the USA but not in Canada (or vice versa).

S&K will aid in disentangling such puzzles, which arise regularly when rights need to be cleared in the record, publishing, and film businesses. This reviewer has found that knowledge of American law

helps secure better deals for Canadian clients than would be possible without such knowledge. Often, indeed, such knowledge is more important than expertise in Canadian law.

Neither patronizing nor simplistic, S&K manage to explain American copyright law — in particular, the overwhelming changes of 1976 — in a highly accessible way. Further, their account is useful and informative even to specialized lawyers, both in the USA and elsewhere. As a practising copyright lawyer and musicologist *manqué*, I especially appreciate the references to case law this work sometimes (though still not often enough) provides. Too many citations can be confusing or boring — even to lawyers. Too few can render a book useless for the legal profession or cross-disciplinary scholarship. If it is to retain its reputation as the American music industry's "one-stop" bible, future editions should contain even more such references. Non-specialists could happily ignore the additional footnotes, while lawyers would welcome them.

Very useful is *This Business of Music's* inclusion of fairly precise ranges, in dollar amounts, for various practices in the industry (e.g., in the discussion of commercial jingles based upon pre-existing music). As a running theme, the book also compares the practices of the US performing rights collectives — especially ASCAP and BMI, occasionally SESAC — as well as labour agreements of the AF of M and other key groups.

S&K's very useful appendix contains a basic library of statutes and treaties on copyright, contract precedents, and standard form agreements used in the music industry by ASCAP, BMI, AFTRA, AF of M, etc. The companion volume, *More About This Business of Music*, supplements the main book, with much useful, detailed material on legal issues in serious music, jazz, educational music for children, and many more topics.

Musicologists will appreciate main book's Chapter 34 on "Sources of Information" and both books' dozens of references to well-known musicians. As further praise of the S&K works, one should stress their

*Knopf on Musicians and the Law and This Business of Music*

modest prices: \$31.95 and \$20.95 (both US) for books of 736 and 224 pages, respectively. This excellent value is presumably made possible by their large sales and distribution through the Billboard organization, which publishes the trade magazine of the same name read by all professionals seriously involved in entertainment and the media.

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The closest Canadian counterpart to S&K is Paul Sanderson's *Musicians and the Law in Canada*, now in its second edition, 1992. Sanderson's work is more a classic "legal text" than the S&K books. Published by Carswell, a bastion of conservative Canadian legal publishing, Sanderson's text is marketed through legal channels, not as trade book, and hence not readily available in bookstores. Just over 500 pages, with hundreds, if not thousands, of footnotes, its "table of cases" fills 13 pages, and its bibliography, 19.

Carswell has not yet crossed over into the "trade book" market, and shows no signs of doing so soon. This is unfortunate, as Sanderson's readership will be limited largely to lawyers. Covering roughly the same topics as S&K, Sanderson's book emphasizes the legal side more than business aspects.

There is a small tradition of cross-over legal/business/cultural books in Canada. For example, McGraw-Hill published Garth Drabinsky's *Motion Pictures and the Arts in Canada*, which was useful at the time (1976). McGraw-Hill has also published two editions to date of Lesley Ellen Harris's basic primer on Canadian copyright law, mainly useful to non-lawyers (1992). In fact, Sanderson's book itself provides a rather valuable outline of Canadian copyright law as it stood in 1992. David Vaver has recently published an interesting work on intellectual property in general, but it will appeal mostly to lawyers. Despite devoting more than 90 pages to copyright law, Vaver's study does not, perforce, fully assimilate the massive changes brought about by Bill C-32, which was finally passed on April 25, 1997.

Although this is meant to be as much a compliment as a complaint, Sanderson's discussion of copyright law can be characterized as too concise. Most of the relevant Canadian case law is mentioned, as is much of the useful British jurisprudence. However, Sanderson's text is very thin on American law, which is increasingly being referred to in Canada's courts and public policy discussions.

For instance, the immensely important Sony "Betamax" case, decided by the US Supreme Court in 1984, is relegated to only part of a footnote (p. 108). In this case, the Court ruled, *inter alia*, that a manufacturer of VCR's is not guilty of "contributory infringement" for providing a machine that may be — but will not necessarily be — used for infringing activity from time to time, and that the act copying for the purpose of time-shifting can be "fair use" under American law. This decision was crucial in the US law of "fair use." Sanderson gives very little coverage (less than two pages) to the Canadian equivalent of the American "fair use doctrine," and does not even begin to explain the crucial differences with respect to Canadian law. Nevertheless, this issue has major consequences, ranging from "home taping" to permissible limits of parody and what can be done in classrooms. These are areas where Canada permits far less humour and far more limited activity than the US. Sanderson relegates parody to less than one sentence (p. 14).

Another area where I would stop just short of censure is the book's tendency to be either too detached with respect to the current state of the law, or too opinionated. For instance, Sanderson takes no stand on the absence of a performing right in Canadian sound recordings (pp. 22, 106) even though this has been controversial throughout the music industry from 1971 onward. At the opposite extreme, Sanderson casually suggests (in a footnote, p. 48) that the CRTC's Canadian Content rules may give rise to a Constitutional issue under the Charter of Rights and Freedoms, a hypothetical that few would bother to pursue. If worthy of pursuit, the consequences of this suggestion would be simply staggering: accordingly, Sanderson should have provided some authority or reasoning.

*Knopf on Musicians and the Law and This Business of Music*

Sanderson also pulls his punches with regard to some of the politics and practices of Canada's musical rights organizations. Whereas S&K constantly compare practices of ASCAP, BMI, and SESAC, Sanderson is extremely terse and circumspect concerning SOCAN, which, as a monopoly, may need some constructive comments. Such insights would not be unexpected in a book of this sort.

In his effort to be concise, Sanderson glosses over in a few paragraphs such large, complex topics as "communication to the public by telecommunication" and "retransmission." Both were extremely topical when the second edition was published and have become even more so, as the age of the Internet unfolds. Sanderson also gives too short shrift (even bearing in mind the date of publication) to the Federal legislation on the Status of the Artist, which had been passed but not yet proclaimed when his revised version appeared (p. 143). This legislation has since proven to be very important and controversial when applied to such organizations as the AF of M, and the attendant problems were foreseeable at the time of publication.

Finally, Sanderson says nothing useful about legal issues arising from such kinds of music as "jazz," "classical," "folk" etc. He provides no analysis of the copyright issues in musical arrangements, nor of problems for specific kinds of musicians and the various distribution systems used by performing-rights societies. S&K delve into such topics.

According to Carswell, a new edition is being prepared. With updated references to Canadian copyright law, appropriate references to American law, and sufficient treatment of Canada's Status of the Artist law, a revised version could be very useful.

### **Conclusion**

Canadian readers who need to know about the legal or business aspects of music will want to have both works. Though this is not a "desert island" review, S&K is probably nearer to being indispensable. Hopefully, in a third incarnation, Sanderson's volume will come closer

to being a Canadian counterpart, while still retaining sufficient quality as a traditional legal text.

## REFERENCES CITED

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