

Focus Paper

Consultation Meetings on Digital Copyright Issues

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Table of Contents

1. Making Available Right

- a) Issue Summary p. 1
- b) Perspective p. 1
- c) Questions p. 2

2. Legal Protection of Technological Measures

- a) Issue Summary p. 4
- b) Perspective p. 4
- c) Questions p. 5

3. Legal Protection of Rights Management Information

- a) Issue Summary p. 7
- b) Perspective p. 7
- c) Questions p. 8

4. Liability of Network Intermediaries

- a) Issue Summary p.10
- b) Perspective p.10
- c) Questions p.11

1) Making Available Right

a) Issue summary

Many rights holders consider it essential that they have the right to authorize the appearance of their works or protected subject matter within the networked environment. This control over the dissemination of works is referred to as the “making available right”.

The specific notion of a “making available right” emerged during the ongoing negotiations leading to the conclusion of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in 1996. Some concerns were expressed that certain categories of works were not covered in the *Berne Convention for the Protection of Literary and Artistic Works*. Another concern referred to "on-demand" communications. An on-demand service allows consumers to access and download works (text, music, pictures, video) from the service at the time and location they choose.

Technology has given rise to the possibility of easily making copies with no loss in quality from the original. Networks such as the Internet permit each network user to make works easily available to a worldwide audience. Consequently, some right holders are concerned that once their works, performances or sound recordings are available over the Internet, the opportunity for containing unauthorized dissemination is greatly impaired.

The WCT extends the traditional exclusive right of authors to communicate to the public to all categories of works. Furthermore, the WCT explicitly provides that the right of communication to the public explicitly includes the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

The WPPT, on the other hand, creates for performers and producers of phonograms distinct exclusive making available rights which are set out in articles 10 and 14.

b) Perspective

The departments are of the view that the right to authorize communication to the public embraces a making available right in respect of authors. However, this issue is currently before the courts.

The Act does not provide performers and sound recording makers with the exclusive right to make a particular performance or recording of that performance available to the public on an on-demand basis.

Based on current technology, the making available of a work over the Internet usually entails the making of a copy which is uploaded onto an Internet site or streamed from a server to the listener. In this circumstance, the reproduction right may be adequate for sound recording makers and performers based on existing Internet dissemination models. However, with rapidly evolving technology, the availability and or the delivery of works on-line may be feasible without an intermediate reproduction.

Concerning Performers and sound recording makers, the departments are prepared to study a proposal that in effect would provide an exclusive right to authorize the on-demand communication or performance to the public of a sound recording protected under the Act. For the purposes of this new provision, an "on-demand communication [or performance]" would be one in which the communication or performance of the particular recording could be initiated by the recipient at the time of his or her choosing such that the communication or performance of the recording would follow within the interval of time required for the transmission processes to be completed.

The departments would attempt to draft the right so as to meet the requirements of the WPPT, but the new right would not cover streaming activities as such, other than on-demand streaming.

In determining whether a communication is provided on an "on-demand" basis it must be considered that "a place of choosing" and "a time of choosing" may be constrained by the technology used to transfer or receive the works. The "place of choosing" would presume that the end user could specify a network location for receiving the work. However, "the time of choosing" perhaps represents a greater definitional challenge as the works would need to be available at the request of the user and not stored and delivered at the rights holder's or content provider's discretion. In some cases, a specific work may not be requested by name, but rather may be delivered based on a preference profile of the content provider's clients.

c) Questions

- The *Copyright Act* rests upon a balance between the interest of the rights holders and the public interest. Such balance is reflected in certain limitations of the copyright protection, e.g. the finite term of protection, the exceptions to certain rights and the fair dealing principle.

How would amendments ensuring that sound recording makers and performers have a making available right for the on-demand communications of sound recordings, whether as a separate right or as part of an existing right, affect this balance? Moreover, should such amendments be made, how would Canadian consumers benefit from the new legislative measures?

- A distinction between “on-demand” and “near on-demand” communications could be drawn as follows: in the first case, the time of delivery would be determined by the user (“as soon as possible” or “at this precise time”); in the second case, it would be determined by the content provider. Technological evolution may complicate the distinction.

What parameters of “time” and “place” are needed to appropriately restrict the exclusive right to “on-demand” communication?

- C An amendment in relation to making available raises difficult questions including whether or not certain provisions in the Act which were formulated prior to advent of the new information and communications technologies continue to be appropriate in the digital world. In particular, the notion of publication under the Act is a threshold for certain legal consequences in copyright.

If the communication right were amended to explicitly address making available for sound recording makers and performers, should the government reconsider whether and under what circumstances the act of communicating copyrighted material to the public should constitute publication of such material, especially given the references to publication in ss 2.2, 5, 15(3), 18(3) and 19(1) of the Act?

- C To the extent that some rights are collectively managed, some aspects of exclusive on demand communications may already be captured by licensing schemes that are provided under the Act.

How would any clarification affect existing licensing schemes for the communications right, such as the regimes for authors of musical works, for retransmission, or for ephemeral recordings?

2. Legal Protection of Technological Measures

a) Issue Summary

The opportunities for infringement on a large scale is forever present with the rapid development of digital information and communications technology. For example, music can be digitally copied and illegally transferred to millions of listeners around the world without any adverse effect on the quality of the infringing copies.

On the other hand, the protection of technological measures is commonly understood to mean the legal measures that support the use, by rights holders of technologies for retaining control over material available on-line and thus, for thwarting infringement. Such measures allow for varying degrees of control: access restrictions such as passwords, confirmation measures such as signatures and watermarks, or fuller controls such as encryption.

Both the WCT and WPPT set out a framework for legislative recognition for such technological measures. The language of the treaties is sufficiently flexible to permit different countries to adopt varying levels of legal protection of technological measures in their respective national legislation.

The *Copyright Act* does not currently have provisions on legal protection of technological measures. The issue then arises whether and under what circumstances copyright legislation ought to provide sanctions against persons who engage in activities related to the circumvention of these protective measures. The issue also arises as to the appropriate sanction.

b) Perspective

Any policy response to the questions of legally protecting technological measures, must be considered within the framework of Canadian copyright law, where certain uses of works and limitations on copyright protection are recognized as serving legitimate and important public policy objectives. Such limitations are evidenced by the finite term of copyright protection, the fair dealing provisions and the exception provisions. Any attempt to affect that balance may require a reconsideration of the current extent of the exceptions provisions.

The departments consider that the WCT and WPPT themselves recognize this balance, as they refer to the use of technological measures for the exercise of copyright. The departments are of the view that providing a sanction against an act of circumvention, where the act is motivated by an infringing purpose, may be addressed under copyright principles. A broader prohibition, including a prohibition against the manufacture and distribution of circumvention devices, may, in its effect protect

rights that are beyond the scope of copyright protection (e.g. contractual rights). Such broader prohibitions may need to be considered under different policy principles and under a different legal regime.

Some stakeholders have questioned the value of such lesser protections. However, the departments are of the view, that in a given case where, a third-party that does not directly engage in infringement, but contributes to it by helping to effect the circumvention, may usefully be subject to such sanctions. In this regard, the prohibition may have deterrent value and is not a mere duplication of existing copyright protection.

In cases where infringement occurs on commercial scale, it may be appropriate to consider the imposition of criminal sanctions, such as those found in s. 42 of the *Copyright Act*. Such sanctions could also apply to the third-party who contributes to the infringement, if he/she has the requisite intent, or has knowledge of the intent of the actual infringer.

c) **Questions**

C It has been argued that a regime protecting technological measures should not interfere with uses permitted under the Act. The latter could be identified through a set of exceptions to the protection regime of technological measures.

If a broad prohibition on the circumvention of technological measures was to be implemented, should a set of exceptions to the protection of technological measures be adopted and, if so, what would those exceptions specifically be?

- Monetary relief normally represents compensation for the losses suffered by the right holder following infringement of his or her rights. In this setting, if no losses are incurred, it could be argued that the aim of a legal regime protecting technological measures should be to put a stop to circumvention. If losses are incurred, consideration should be given as to whether monetary relief should be obtained from the person who has circumvented the technological measures.

What should the nature of the remedy against the circumventer be, given that he or she may be distinct from the infringer or the potential infringer? Should the remedy be limited to injunctive relief or should it be extended to compensatory damages, or even to statutory damages?

- The circumvention of technological measures can serve different objectives, one of them being commercial profit. The latter generally implies large scale objectives as the profit will be

proportional to the volume of operations. A rational actor will weigh the costs of the infringing act against anticipated profits. As in other areas of the law, civil sanctions may be insufficient where their cost remains lower than the anticipated profit. In such circumstances, consideration ought to be given to the appropriate sanctions needed to obtain the desired deterrent effect.

Under what conditions, if any, should criminal sanctions be available? What would the appropriate standard of knowledge or intention be? Should it be identical to the one found in s. 42 of the *Copyright Act*?

- In some instances, more than one rights holder may have an interest in the same copyrighted work or subject matter.

How does the fact that there may be multiple rights holders in a given work, sound recording or performance affect the introduction of any legal regime for technological measures?

- There are situations where the incentive to apply technological measures on copyrighted objects will be felt by others than the rights holders. Where rights holders do not take such an initiative, their interest may or may not be served when third parties apply technological measures on their copyrighted objects.

If a legal regime protecting technological measures was to be implemented, would the authorization of the rights holders be required before applying a technological measure on copyrighted objects? Should the availability of remedies for circumvention be premised on such authorization?

- There are situations where the person who exploits the copyrighted object is distinct from the original right holder. This person's activity can be lawful under either contractual agreement or statutory licence. In both cases, it might not be clear whether the exploiter of the copyrighted object has a right of action against someone who circumvents a technological measure.

Where the person who has applied the anti-circumvention measure is not the right holder on the object protected by the technological measure, under what circumstances should the former have standing to enforce the right of protection of the technological measure?

3. Legal Protection of Right Management Information

a) Issue Summary

The legal protection of right management information consists of providing adequate and effective legal remedies against tampering with rights management information. More specifically, this protection relates to identifying information pertaining to the work, such as the title, the author or first owner and an identifying code. Such information may also function in conjunction with technological measures, as where a watermark serves to identify a work but may also be a requisite component for enabling the authorized use of a copyrighted work.

The ability of rights holders to embed certain rights management information in their material can help them to assert their interest in the material and to monitor its movement. It can also serve to facilitate on-line licensing. However, the information is only useful to the extent that its integrity is maintained.

Article 12 of the WCT and article 19 of the WPPT provide for the protection of rights management information. The *Copyright Act* does not currently contain measures to protect the integrity of this information

It is important to bear in mind that the protection of rights management information could have implications for personal privacy.

b) Perspective

The departments agree with the principle that rights owners should have effective remedies against tampering with their rights management information, where the tampering is carried out in order to facilitate or conceal copyright. Such remedies, would appear to be consistent with copyright principles.

Further, as a general rule, rights holders or their licensees should be the ones to embed the rights management information, as well as terms and conditions of use, or to authorize such embedding. It is acknowledged, however, that certain transfers of format, done in conformity with the law, may nonetheless cause alteration of the information. In this instance, there may not be an infringing purpose.

With respect to the scope of protection (i.e. the information that is protected), the departments consider that it might be appropriate to define "Rights Management Information" consistently with article

12(2) of the WCT and article 19(2) of the WPPT. The protection would cover only the information identified in the lists set out in these WCT and WPPT articles. However, the means used to embed such information may be addressed under the legal protections for technological measures.

The fact that terms and conditions are protected pursuant to these articles, would not, by itself, mean that those terms and conditions apply in Canada or are legally binding in Canada. Protecting such information should not be construed as confirming the legal validity in Canada of the terms and conditions of use which may be contained in such information.

Legal protection may be appropriately provided in the *Copyright Act* in situations where the information is tampered with for the purpose of infringing copyright. However, when the tampering of protected information results in infringement for commercial purposes, factors such as the intent and the scale of the infringement could determine if criminal sanction would be appropriate.

A prohibition along the lines discussed above would not only discourage those who intend to infringe, but could also discourage third parties from assisting in the tampering.

c) Questions

- Monetary relief normally represents compensation for the losses suffered by the right holder following infringement of his or her rights. In this setting, if no losses are incurred, it could be argued that the aim of a legal regime protecting Rights Management Information should be to put a stop to the tampering. If losses are incurred, it has to be argued whether monetary relief can be obtained from the person who has tampered with the Rights Management Information.

What should the nature of the remedy against the tamperer be, given he or she may be distinct from the infringer or the potential infringer? Should the remedy be limited to injunctive relief or should it be extended to compensatory damages, or even to statutory damages?

- The tampering with Rights Management Information could be driven by unlawful motives to assist in a commercial scale infringement of copyrighted material. The question remains as to whether civil remedies are sufficient to deter such behaviours or further steps should be taken.

Under what conditions, if any, should criminal sanctions be available? What would the appropriate standard of knowledge or intention be? Should it be identical to the one found in s. 42 of the *Copyright Act*?

- As defined in the relevant WIPO Treaties' provision, Rights Management Information may include information which is inaccurate or misleading.

Should the protection of Rights Management Information be limited to accurate information? Should there be sanctions against persons who intentionally or knowingly embed false or misleading Rights Management Information?

- The Rights Management Information protection regime should only apply where justified. It should not interfere with the pursuit of legitimate goals. One approach could be to identify a set of exceptions to the Rights Management Information protection regime.

If a list of exceptions to Rights Management Information applications was needed, what main items should it include and what would the reasons warranting the selection be?

- C The definition of Rights Management Information as found in the WCT and WPPT is limited to information, and not the manner in which the information is embedded in the copyrighted material. The definition of a technological measure in the WCT and WPPT may include a measure "used by authors in connection with the exercise of their rights".

Could adhering to these definitions of Rights Management Information and of technological measures result in overlapping legal protections? In terms of any legal protection, could such adherence have other implications that should be taken into account?

4. Liability of Network Intermediaries

a) Issue Summary

One of the main functions of the Internet Service Provider (ISP) is to act as an intermediary to provide the network services that enable the connections between content providers and end users. This intermediary function can encompass various distinct types of activities. At a minimum, most provide their subscribers with access to the Internet, which includes the ability to transmit and receive information and to provide services such as e-mail. Many also provide space on their servers to their clients for use as Web sites, take measures (such as caching) to increase the efficiency of the network system, and provide or facilitate access to a wide range of content and consumer-oriented services.

Some within the copyright sectors and the ISP community noted that the application of the *Copyright Act* to ISP activities is unclear in certain respects. Under current copyright law, the main rights at play in relation to ISPs are the communication to the public right and the reproduction right.

Concerning the communication right, a preliminary ruling from the Copyright Board indicates that the mere fact of providing services as an intermediary (e.g. e-mail and streaming) does not entail liability, as such activities are in many respects analogous to those of telephony's common carriers, and are specifically exempted pursuant to s.2.4(1)(b) (the "common carrier" exception) of the Act.

In respect of reproduction, legal commentators have stated that in Canada, infringement of the reproduction right can give rise to strict liability; if correct, ISPs whose facilities are used to effect a reproduction (e.g. web site hosting, caching, mirroring and possibly even in a transient fashion through the transmission process) may be liable regardless of whether or not there was an intent to infringe copyright.

The departments note that agreements have already been concluded between certain rights holders and ISPs to deal with the presence of potentially infringing material on the ISPs' network facilities.

b) Perspective

The wide diversity of organizations and individuals who now qualify as rights holders or who provide services as ISPs means that direct collaboration and agreement may not always be feasible. Accordingly, a role remains for the government to establish a copyright policy that sets out clear and fair liability rule.

The departments raise the possibility of establishing a complaints-driven notice process. The process would be subject to any contractual arrangements entered into by ISPs with rights holders; in the absence of such contractual arrangements, a statutorily-specified process would apply. Other approaches to address the potential for infringement online include licensing, such as through collective licensing of the ISPs in respect of the copyright materials circulating over their facilities.

In the context of a notice-based approach, an ISP would be compelled to take specific action within a specified time of receiving "notice" from a rights holder or other interested party indicating that material on one or more of its sites was potentially infringing. The notice system could possibly expedite the removal of such material from its sites. Quick action on the part of the ISP would mitigate the negative impact of having such infringing material posted on its sites.

Two approaches were identified in the written phase of the consultation process: (1) notice and takedown and (2) notice and notice procedures. (A variant of notice and takedown would require that the ISP be served with a court order before taking final action against the offending client). "Notice and takedown" consists of a notice being served to the ISP by an alleged rights holder, after which the ISP blocks access to the allegedly infringing material. "Notice and notice" consists of a first notice being served to the ISP by an alleged right holder, and a second notice being served by the ISP to its client; both notices provide information regarding the allegedly infringing material.

c) **Questions**

- The function of ISPs in a networked environment has led to the view in a number of submissions that strict liability is necessary to preserve the active participation of ISPs in preventing infringement or encouraging licensing.

Given this function, should the liability of ISPs be limited? Do these proposed notice schemes ensure a role for ISPs in preventing infringement or licensing of works?

- If it is determined that ISPs, absent knowledge of the infringing nature of the content made available through their services, should have a limited copyright liability, the extent of such limitation on liability would need to be defined.

Before reception of a notice by the ISP, should there be express limitation on its potential copyright liability? Alternatively, should this be a limitation on the remedies that may be ordered against it (e.g. injunctive relief only)?

- Once notified of the infringing nature of the content, the ISP can act in different manners in order to mitigate the harm which may result to the rights holder from the infringement, e.g. forward the information to its client, bar access to the material in question. Whatever the appropriate course of action, the ISP's compliance should serve to mitigate its own potential copyright liability in some way, both towards the rights holder (*i.e.* for copyright infringement) and towards its client (*i.e.* for breach of contract, or economic harm).

After reception of a notice by an ISP, what further step should it be required to take: forward a notice to the ISP's client or takedown the infringing material? Where the ISP takes such steps, should it be relieved of any further liability - vis-à-vis its client or vis-à-vis the right holder?

- A limitation on the liability of ISPs could be warranted on the basis that they do not control the content made available through their services. However, ISPs should help to prevent infringing material from being made available through their services when they are aware of the infringing nature of the content. In order to inform the ISPs of the infringing nature of content on a particular web site, a right holder needs to be able to identify the ISP hosting the site and to contact them.

To the extent that a limitation on liability would only apply to ISPs who identify themselves to the world, is such identification always feasible? What solutions are available and which ones are the most reliable (watermarks, logos, hyperlinks, ...)? Should the policy specify one approach, or allow for several?

- Two main schemes seem to share the forefront of a regime for ISPs which is based on limited liability. The first is referred to as "notice and notice" and consists of a first notice being served to the ISP by an alleged right holder and a second notice being served by the ISP to its client, both of which provide information regarding the alleged infringing material. The second is referred to as "notice and takedown" and consists of a notice being served to the ISP by an alleged right holder upon which the ISP will block access to the alleged infringing material.

What advantage do "notice and notice" and "notice and takedown" schemes offer over each other?

- Both schemes only work if the ISP can identify the provider of the allegedly infringing material. It remains to be determined whether some situations preclude such identification.

Can an ISP encounter certain situations where, for technological reasons, it would be unable to identify an alleged infringer, though it may be one of its clients?