

STATUS REPORT ON COPYRIGHT REFORM

submitted to the Standing Committee on Canadian Heritage
by the Minister of Canadian Heritage and the Minister of Industry

INTRODUCTION

1. Members of the House of Commons Standing Committee on Canadian Heritage have expressed their strong and continuing interest in the progress being made with regard to the further modernization of Canada's *Copyright Act* (the "Act"). The Ministers of Industry and of Canadian Heritage have accordingly asked their officials to prepare this report on the current state of their work on copyright reform.
2. It will be recalled that Chapter 3 of *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (the "Section 92 Report"), tabled in Parliament in October 2002, set out the issues for consideration for reform in the short term, i.e., within two years of tabling (see: <http://strategis.ic.gc.ca/pics/rp/section92eng.pdf>). Officials have since been conducting policy and legal analysis and undertaking consultations on many of these issues in a rapidly changing policy environment.
3. The Section 92 Report also states that the Government "is committed to bringing the *Copyright Act* in conformity with the WCT [World Intellectual Property Organization (WIPO) Copyright Treaty] and WPPT [WIPO Performances and Phonograms Treaty] once the issues involved are thoroughly analyzed and appropriately consulted upon". It remains the Government's objective to bring Canada into conformity with these "WIPO Treaties" with a view to ratification. The Government's immediate intention is to address all issues identified as "short-term" within the time frame specified in the Section 92 Report, i.e. the WIPO Treaties-related issues, photographic works, Internet Service Provider (ISP) liability and access issues. (As for unpublished works, an attempt was made in the past year to address this issue in other legislation, but it has been dropped from consideration given that the works in question have since entered the public domain.) The overall aim is to modernize the Act to make it more responsive to the challenges and opportunities presented by the Internet and digital technologies.
4. Ministers have indicated their intention to seek Cabinet approval of proposed amendments to the Act later this year with a view to tabling a bill shortly thereafter. It should be noted, however, that questions have arisen with regard to the consistency of Canada's private copying regime with the WPPT. These questions continue to be analyzed.

5. This status report sets out both the progress that has been made on the short-term issues and the work that remains to be done. The approaches reflect current thinking and do not constitute final policy positions. For those issues that are WIPO Treaties-related, the approaches are put forward with a view to meeting the obligation contained in the relevant provision of the WIPO Treaties. Ministers welcome the views of the Committee and stakeholders on all issues in order to permit the timely finalization of policy positions. Supplementary information on each issue can be found in Chapter 2 of the Section 92 Report.

WIPO TREATIES-RELATED ISSUES

MAKING AVAILABLE RIGHT

Issue: How to implement the “making available” right required by the WIPO Treaties.

6. The Internet represents a new platform for disseminating copyright material. Rights-holders have argued for greater control over their online material through a new “making available” right. Such a right aims to reduce the possibility of infringement and to further support new online opportunities. The WIPO Treaties require such a right. As formulated therein, the right applies specifically to copyright material made available on an on-demand basis, i.e. available at a time chosen by the user.
7. The Act currently provides authors with an exclusive right of communication (and authorization of communication) of their works to the public. Sound recording producers and audio performers, on the other hand, have only a right of remuneration with respect to communication of their material. Most experts believe that the current exclusive communication right for authors satisfies the requirements for a making available right under the WCT, but that amendments would be necessary with respect to performances and sound recordings in order to implement the right under the WPPT.
8. Two approaches are being considered, either of which would need to take into account issues associated with clearing of rights:
 - (a) No amendment would be made with respect to authors, on the basis that the existing exclusive right of communication covers online uses. The Act would be amended to give sound recording producers and performers an exclusive making available right with respect to on-demand communication of their material. Implementation should be effected in a way that would not give sound recording producers and performers preferential treatment over authors.
 - (b) Amend the Act to grant a new exclusive making available right both to authors and to sound recording producers and performers. Under this approach, the making available right would be distinct from the existing communication right for authors’ works. This approach would ensure that the new right would be identical for works, performances and sound recordings, and thereby eliminate any concerns about preferential treatment for sound recording producers and performers. Implementation should address the overlap between the making available right and existing rights.

LEGAL PROTECTION OF TECHNOLOGICAL MEASURES

Issue: How to protect rights holders against persons who circumvent protective technologies for purposes of infringing copyright.

9. Technological protection measures (TPMs), such as encryption, can be used by rights-holders to prevent infringing uses of their copyright material. There is currently no provision in the Act that specifically protects against the circumvention of a TPM. The WIPO Treaties contain provisions that require such legal protections.
10. The approach being considered is to amend the Act to introduce a remedy against acts of circumvention of TPMs when done for purposes of infringing copyright. A TPM would need to be defined. There could also be a further provision against distributing copyright material from which a TPM has been removed or rendered ineffective (similar to the current provisions in the Act for secondary infringement addressing the sale or distribution of infringing copies of copyright material). The provision would apply where the person dealing with the copyright material knew or should have known that the TPM has been removed or rendered ineffective.
11. This approach would supplement existing legislative measures in the Criminal Code and the *Radiocommunication Act* and, together with these measures, would ensure effective protection against unauthorized uses without unduly restricting lawful access to material, e.g. material subject to exceptions or in the public domain.

LEGAL PROTECTION OF RIGHTS MANAGEMENT INFORMATION

Issue: How to protect against tampering with rights management information that is used to identify copyright material.

12. Rights management information (RMI) can be used by rights-holders to help identify and track uses of copyright material. There is currently no provision in the Act that specifically protects against tampering with RMI. The WIPO Treaties contain provisions that require such legal protections.
13. The approach being considered is to amend the Act to introduce a remedy against tampering with RMI when done for purposes of furthering or concealing infringement. RMI would be defined as information used in association with digital material, such as the name of the author, performer, title, and terms and conditions of use. There could also be a further provision against knowingly distributing copyright material from which the RMI has been removed (similar to the current provisions for secondary infringement).
14. This approach would supplement the existing legislative framework in the Criminal Code and facilitate rights clearance and protection.

DISTRIBUTION RIGHT

Issue: How to implement the distribution right required by the WIPO Treaties.

15. The WIPO Treaties require the recognition of a distribution right for tangible copies of copyright material, but allow countries to set their level of exhaustion for the right, i.e. circumstances under which a right expires, such as through first sale of a work anywhere in the world.
16. Under the Act, authors and sound recording producers control the distribution of their material through a combination of the rights of first publication and reproduction, coupled with remedies. However, there is currently no publication right and no full reproduction right for performers.

The approaches being considered are:

- (a) Amend the Act to grant performers reproduction and publication rights akin to those of creators and sound recording producers.
- (b) Amend the Act to introduce a new exclusive distribution right. This approach, however, could create problems of overlap with existing rights. It might also be necessary in relation to the matter of exhaustion to clarify what is meant by a sale (as distinct from a licence or lease).

PHOTOGRAPHIC WORKS

17. While term of protection for photographs is a WIPO Treaties-related issue, associated photograph authorship and ownership issues are also being considered. Bill S-16 is a private members' bill currently before the Senate which also addresses these issues. Photographs have historically been treated differently under international standards from other copyright material. The rationale for this differential treatment is disappearing, and proposals have therefore been made to put photographs on an equal footing with other copyright material.

Authorship of Photographs

Issue: How to provide photographers with the same authorship right as other creators.

18. Currently, the owner of a plate or negative, who may not be the photographer, is deemed to be the author of a photographic work. The result is that the author is often a corporation.
19. The approach being considered is to amend the Act to eliminate this rule, making the photographer the author of all photographic works. This approach would be consistent with that taken for other categories of works. It would also provide photographers with moral rights in all their photographs. This issue falls outside the WIPO Treaties.

Term of Protection of Photographs

Issue: How to provide for a term of protection of photographs consistent with the general rule applicable to other categories of works.

20. Currently, most photographs, as with other works, enjoy a term of copyright protection equal to the life of the author plus 50 years. However, certain photographs created by corporations enjoy a term of copyright protection equal to only 50 years from the creation of the work (reflecting the fact that corporations may exist indefinitely). The WCT requires a term of protection of life of the photographer plus 50 years for all photographs.
21. The approach being considered is to amend the Act to provide that the term of protection in all photographs be the life of the author plus fifty years.

Ownership of Commissioned Photographs

Issue: How to provide for the ownership of copyright in a commissioned photograph.

22. Current rules provide that copyright in a commissioned photograph belongs to the person commissioning the work, not the photographer, unless there is an agreement to the contrary. This issue falls outside the WIPO Treaties.
23. The approach being considered is to amend the Act to grant photographers ownership in commissioned photographs equal to those enjoyed by creators of other works. However, consumers who commission photographs for private or domestic purposes as opposed to commercial purposes, e.g. photographs commissioned by a publisher for use in a magazine, may want assurance that they are able to make personal use of the photographs, e.g. posting on personal Web sites, and as a matter of privacy that their photographs will not be used without their consent. Two further elements are therefore being considered that would address photographs that are commissioned for private or domestic purposes:
 - (a) Copyright would be held by the person commissioning a photograph (not the photographer) in cases where the photograph is taken for private or domestic purposes, unless there is an agreement to the contrary. Such a provision would aim to ensure that any assignment of consumers' personal use or waiver of privacy rights to the photographer is brought to the attention of the consumer. This is the approach taken in Australia.
 - (b) Copyright would remain with the photographer of a commissioned photograph taken for private or domestic purposes. For privacy protection purposes, however, there would be a limitation on the ability of the photographer to make certain public uses of the photograph, unless there is an agreement to the contrary. This is the approach taken in the United Kingdom.
24. A related question is whether to create a similar rule for films or videos commissioned for private or domestic purposes, e.g. wedding videos.

MORAL RIGHTS FOR AUDIO PERFORMERS

Issue: How to provide audio performers with a moral right in their performances.

25. The Act currently provides authors with moral rights in respect of their works, but not performers in respect of their performances. A moral right for performers would ensure that their performances are not distorted or modified in ways that would be prejudicial to their honour or reputation or used without appropriate attribution. The WPPT requires the introduction of moral rights for performers in respect of their live and fixed performances.
26. The approach being considered is to amend the Act to provide moral rights for audio performers. For consideration is the application of moral rights to live performances, and the potential implications that extending such rights may have for specific interests such as live music promoters or music venues.

REPRODUCTION RIGHT FOR PERFORMERS

Issue: How to provide a full exclusive reproduction right for performers.

27. The Act currently provides performers with an exclusive reproduction right, but only with respect to fixations made without their consent, e.g. bootleg recordings of live performances, or reproductions not contemplated in their original consent. The WPPT requires that performers be accorded a full reproduction right, namely, the exclusive right to authorize any fixation or any reproduction of their performances fixed in the preceding 50 years.
28. The approach being considered is to amend the Act to grant performers a full reproduction right. In accordance with the WIPO Treaties, the right would apply retrospectively. For consideration is the application of the reproduction right to online uses of old material relating to locating performers from several decades ago, including those from other jurisdictions.

TERM OF PROTECTION FOR SOUND RECORDING PRODUCERS AND PERFORMERS

Issue: How to extend the term of protection for sound recording producers and performers.

29. The Act currently provides a term of protection of 50 years for sound recordings and performances following the time of first fixation. The WPPT requires, with respect to sound recordings only, a term of 50 years following the time of publication.
30. The approach being considered is to amend the Act to provide a term of protection of fifty years following the time of publication for sound recording producers and, though not required by the WPPT, for performers. A possible theoretical concern, however, is that a term of fifty years following publication of the sound recording could be added before the expiry of the 50 years from the year of fixation, which would result in 99 years of protection (more than for authors) if publication occurs in the 49th year following fixation.

PRIVATE COPYING: IMPLICATIONS FOR RATIFICATION

Issue: How to address implications of ratifying the WIPO Treaties.

31. The Act's private copying regime provides for an exception to copyright that permits the making of a copy of a sound recording for private use. It also provides for a levy to be paid by manufacturers and importers of blank audio recording media. This levy is paid out to authors (songwriters and composers) regardless of their nationality, but only to sound recording producers and audio performers who are Canadian. The WPPT contains a provision requiring national treatment with respect to the exclusive rights in the treaty, i.e. treatment of nationals of other member countries must be no worse than that of one's own nationals. It also contains a provision requiring that any exception be consistent with certain specific standards, e.g. that the exception not interfere with the normal exploitation of the performance or sound recording.
32. The Government indicated in the Section 92 Report that, as part of its short-term group of issues, it would consider the "impact of ratification of the WPPT on Canada's private copying regime". Questions have been raised regarding the ability of Canada to ratify the WPPT in the absence of changes to the private copying regime. Analysis continues in this regard.
33. The private copying regime as a whole has itself been identified as an issue for medium-term reform. Policy analysis is underway now with a view to consulting later this year on all aspects of this issue.

INTERNET SERVICE PROVIDERS' LIABILITY

Issue: How to clarify the circumstances under which Internet Service Providers (ISPs), acting as intermediaries, should be held liable for the transmission and storage of copyright material over their facilities.

34. The degree to which ISPs are currently liable under the Act for the transmission and storage of copyright material using their facilities is unclear. A limited exemption from copyright liability for the "communication" of copyright material currently exists in the Act for persons that merely provide the necessary means of telecommunication. Whether ISPs qualify for this exemption is a question currently before the Supreme Court of Canada in the *Tariff 22* case, which is considering the liability of ISPs to pay royalties for communication of copyright material over their facilities. The exemption would in any event not encompass all activities that ISPs engage in as intermediaries. In that regard, there remains an outstanding tariff proposal before the Copyright Board that would impose liability on ISPs to pay royalties for any reproductions that may occur on their facilities. The implications of the recent Supreme Court of Canada decision in *CCH v. the Law Society of Upper Canada* also need to be examined. And the lawsuits launched by the Canadian Recording Industry Association (CRIA) in the Federal Court will have to be monitored since they raise the issue of whether ISPs should be required to provide information about their subscribers.

35. ISPs seek to be exempt from liability for copyright infringement on their facilities on the basis that they act only as intermediaries. Right-holders seek to impose liability on ISPs regarding copyright material on ISPs' facilities, including the removal of infringing material. Many ISPs currently have informal understandings with rights-holders whereby they will forward any notice received from rights-holders to any subscriber who is alleged to be using the Internet to infringe their copyright (so-called "notice-and-notice" procedure).
36. Although ISP liability is not addressed by the provisions of the WIPO Treaties, many jurisdictions, such as the United States and the European Union, have dealt with it concurrently.
37. Two approaches are being considered:
 - (a) Amend the Act to exempt ISPs from any liability for copyright infringement when they act merely as intermediaries. However, ISPs could be made subject to civil sanctions if they did not comply with certain requirements designed to promote the removal of infringing material that may be circulating over their network facilities. For example, the "notice and notice" procedure could be codified to ensure that all ISPs play a role in curbing infringing activities on the Internet. This approach would acknowledge that it is primarily content providers, and not ISPs, that select, upload and exploit the material that is accessible on-line, while recognizing that ISPs can play a role in curtailing the circulation of infringing material.
 - (b) Amend the Act to provide that ISPs would be subject to liability for copyright material on their facilities. ISPs could escape liability if they meet certain prescribed conditions, namely, timely and effective action to respond to specified requests or proposals from rights-holders regarding copyright material on their facilities. The actions could include forwarding notices regarding infringing material, or collecting royalties for copyright material. The cases before the courts may need to be taken into account to specify these conditions and assess the optimum scope of ISP liability. Such an approach would serve to ensure the participation of ISPs in rights-holders' efforts to protect their rights.

ACCESS ISSUES

USE OF INTERNET MATERIAL FOR EDUCATIONAL PURPOSES

Issue: How to facilitate the use for educational purposes of material which is publicly available on the Internet.

38. The Internet has become an important resource for students and teachers to conduct education-related activities. Internet material is often downloaded, reproduced or transmitted to students and teachers for the purposes of assignments, lessons and research. Use of Internet material in the classroom setting may trigger copyright liability, however. Educators seek an exception for use for educational purposes of Internet material which is “publicly available” (generally understood to be material in respect of which the rights-holder does not seek compensation for use). Rights-holders want to encourage use of the Internet in an educational context through licensing approaches. The challenge is how to ensure a copyright framework that will facilitate Internet use in the classroom in a manner that will not unreasonably impair the rights of rights-holders.
39. Consultations on this issue have been extensive and are ongoing. Over the past year, a working group was organized, comprising representatives of various stakeholder groups, to address this issue and possible solutions. In its recent report, the group reached a common understanding in five areas regarding educational use of Internet copyright material:
- “i. there is a significant number of works that are “available for free” on the Internet that can be used by teachers and students for educational purposes without the need to obtain prior authorization from or to provide payment to the copyright owner;
 - ii. such works should not be subject to payment under collective licensing or otherwise;
 - iii. the educational sector is willing to pay for the use of materials on the Internet where there is an expectation for remuneration;
 - iv. there is a need to maintain and encourage “learning moments”; and
 - v. there is a need for a solution that is easily understood by teachers and students.”
40. Two approaches are being considered:
- (a) Amend the definition of fair dealing as it relates to copyright material available online, expanding its scope to encompass teaching and study by educational institutions using such material. Currently, the Act's fair dealing provisions enable use of portions of copyright material for limited purposes without infringing copyright (research, private study, criticism, review and news reporting – but not specifically for educational purposes). For uses encompassed by an expanded fair dealing exemption, no licence would be required. For extended uses, i.e. uses that are not covered by the fair dealing exemption, such as posting on an Internet site, different licensing approaches might apply, depending on whether or not the

accessed material is publicly available. For publicly available material, one possibility could be to have compulsory licensing, i.e. mandatory authorization combined with tariffs to be paid by users and distributed to rights-holders, for such extended uses. Extended use of non-publicly available material, however, might be subject to the normal copyright licensing requirements. Such an approach may help to simplify the rights clearance process for educational institutions and at the same time ensure that rights-holders are appropriately compensated.

- (b) Amend the Act to require that educational institutions, in order to use copyright material on the Internet, have a blanket licence. Given the enormous amount of material that is available on the Internet, voluntary licensing models are inadequate to enable authorization and facilitate access. This licence would therefore take the form of either a compulsory licence or an extended licence (allowing a copyright collective society claiming to represent a “substantial” repertoire of certain types of material to be recognized as representing the entire international repertoire of such types of material). This licensing regime would recognize that certain types of copyright material may be posted or accessed on the Internet without expectation of payment. The scope of these licences would need to be considered.

TECHNOLOGY ENHANCED LEARNING

Issue: How to facilitate the use of the latest information and communications technologies (ICTs) to extend the reach of the classroom beyond its physical limits.

- 41. ICTs such as the Internet have provided educational institutions with an effective means for reaching students beyond the physical limits of the classroom, and thus the ability to respond to changing institutional and student needs, e.g. insufficient classroom space, distance and time constraints. However, the use of these ICTs to deliver copyright material to students and teachers gives rise to copyright liability in addition to any liability associated with the fundamental use of the material for educational purposes. Fundamental use refers to the making of copies of material for students or the performances of works to students.
- 42. Two approaches are being considered:
 - (a) Amend the Act to exempt educational institutions from additional copyright liability for use of ICTs (in lieu of or in addition to the classroom) as a medium for delivering curriculum content, provided that there are appropriate safeguards, including special consideration for material specifically created for the education market. Existing copyright rules applicable to fundamental educational uses of copyright material would continue to apply.
 - (b) Encourage licensing of ICT use of copyright material for educational purposes. Work would continue with all interested parties to promote this approach to meet the objectives of technology enhanced learning, including consideration of the tools necessary to support new licensing models.

INTER-LIBRARY LOANS

Issue: How to adapt existing exceptions for non-profit libraries, archives and museums to allow the electronic delivery of copyright material to patrons of other libraries.

43. The Act currently provides that a library may make a copy of copyright material for a patron if that patron is entitled to make the copy themselves under the fair dealing exception to copyright, and a library may also make a copy of certain periodical articles for purposes of research or private study by a patron. This exception applies to all scholarly, scientific and technical articles and to articles in other periodicals which have been published more than one year previous. Libraries may also send such copies to other libraries to comply with a request made by a patron at that other library. The copy may be sent electronically to the requesting library but the patron at the other library must not receive it in digital form. The research community seeks digital access to this material to assist research in the field or where regular access to a library is not feasible or convenient. Rights-holders, however, are concerned that electronic delivery may result in the loss of control over further dissemination of their material.
44. Two approaches are being considered:
- (a) Amend the Act to extend existing exceptions to the electronic delivery of copyright material to library patrons, provided that there are adequate technical safeguards to prevent the recipient from forwarding it to others or making multiple copies. Consideration would also be given to allowing viewing only, with no possibility of making a copy. There have been significant advances in the ability to deliver material electronically in ways that the recipient cannot forward to another person or make more than one copy.
 - (b) Encourage licensing of the electronic delivery of copyright material to library patrons. Rights-holders would retain the ability to decide for themselves whether technological safeguards adopted by libraries are sufficient to adequately protect against the unauthorized dissemination of their material. Work would continue with all interested parties to promote this approach in a manner that enables rights-holders to have effective control over use of their material.