

A FRAMEWORK FOR COPYRIGHT REFORM

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A Framework for Copyright Reform

1. INTRODUCTION

Copyright is a work in progress. Many amendments have been made since the Canadian *Copyright Act* of 1924 was first enacted. More than ever, however, change continues to be required to adapt to the current economic, social, technological, and international environment.

This document outlines the copyright reform process that the Departments of Industry and Canadian Heritage are undertaking over this government's mandate. Its purpose is to inform Canadians about the objectives of the reform, the process and the underlying principles. It also outlines a number of substantive issues which will need to be considered through the reform process. This list of issues is not exhaustive and it may not be necessary to amend the Act with respect to all of them. New and emerging issues will also need to be considered over the next few years to ensure that Canada further adapts its copyright framework to meet the challenges and seize the opportunities of a fast-changing world. It is imperative that we ensure an appropriate balance between copyright protection and access to works in the new technological environment.

The federal government is committed to ensuring that Canada's copyright regime remains among the most modern and progressive in the world. The objectives to be met through the reform process are:

- C to create opportunities for Canadians in the new economy;
- C to stimulate the production of cultural content and diversity of choices for Canadians;
- C to encourage a strong Canadian presence on the Internet; and,
- C to enrich learning opportunities for Canadians.

2. COPYRIGHT: A PUBLIC POLICY FRAMEWORK

What is Copyright?

The *Copyright Act* provides the legal framework within which creators and other rights holders are entitled to recognition and control of, and payment for, the use of their works. Examples of works protected by copyright are: films, novels, songs, information products and computer programs. Copyright establishes the economic and moral rights of creators and other rights holders to control the publication and commercial exploitation of their works, protect the

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integrity of their endeavours, and ensure that they are properly remunerated. The law provides creators and other rights holders with a number of legal rights to authorize the use of works.

Some uses of works are permitted without the rights holder's consent or without the payment of royalties. These are called "exceptions". In other cases, authorization is not required but creators and other rights holders are entitled to remuneration.

Copyright protection exists for a limited time, typically the life of the author plus an additional fifty years. After that time elapses, protection ends and the work falls into the "public domain".

Economic Policy Objective

The *Copyright Act* is an important framework law that affects many sectors of the Canadian economy. It represents a powerful lever to promote innovation, entrepreneurship and success in the new economy. Copyright protection rewards the creation and dissemination of knowledge and cultural content, and facilitates access to this knowledge and content.

The importance of copyright is highlighted in the January 2001 Speech from the Throne, where the Government indicated that it:

"will provide better copyright protection for new ideas and knowledge [...] It will ensure that Canadian laws and regulations remain among the most modern and progressive in the world, including those for intellectual property and competitiveness. [...] The focus of our cultural policies for the future must be on excellence in the creative process, diverse Canadian content, and access to the arts and heritage for all Canadians."

The *Copyright Act* impacts on the development of Internet content, the use of electronic commerce by business and consumers, and on the growth of a wide range of cultural and information-based industries. In 2000, the gross domestic product (GDP) of the copyright-related sectors (publishing, film, sound recording, broadcasting, visual arts, software, etc) was estimated at \$65.9B, accounting for 7.4% of Canadian GDP. Between

1992 and 2000, these sectors grew at an average annual rate of 6.6%, compared to 3.3% for the rest of the Canadian economy. Together, they represent the third most important contributor to Canada's economic growth.

Cultural Policy Objective

The *Copyright Act* provides protection to creators and other rights holders in the form of exclusive rights over the communication, reproduction and other uses of their works. It is therefore seen as the foundation for creative endeavour. The creation of Canadian cultural content and the availability of diverse choices for Canadians depend on adequate copyright protection and effective enforcement and administration of copyright.

The Government is committed to ensuring that copyright law promotes both the creation and the dissemination of works. The objective of the *Copyright Act* is also to ensure appropriate access for all Canadians to works that enhance the cultural experience and enrich the Canadian social fabric. Access is assured through various means: by establishing simple rights clearance mechanisms; by devising alternate schemes that recognize copyright, e.g. the private copying regime; by allowing specific exemptions to aid users such as libraries, schools and archives to fulfill their vital institutional roles in Canadian society; and by other means that favour the circulation of information and cultural content for and by Canadians. Access is therefore an important public policy objective to consider when reviewing the copyright framework.

Another important public policy consideration for the Government is Canada's international commitments in relation to copyright. In an increasingly interconnected world where the borders between markets are rapidly diminishing, Canada must ensure that its copyright law promotes appropriate availability of copyright works by taking into account the level of protection as defined by international agreements.

3. CONTEXT

Recent Copyright Reform Initiatives

Modernization of the *Copyright Act* was achieved most recently through two massive phases of reform. Phase I, passed in 1988, included:

- C statutory protection for computer programs
- C clarification and extension of moral rights
- C the elimination of the compulsory licence for the reproduction of musical works and the substitution of a right of negotiation
- C the introduction of a new procedure to licence works where the owner could not be

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- located
- C new rights for visual artists to exhibit their works in public
- C increased criminal sanctions, and the enactment of rules under which collective organizations could form and operate under the supervision of a revamped Copyright Board.

In 1997, the Government introduced another large package of amendments known as Phase II (Bill C-32). It included:

- C new remuneration rights to producers and performers of sound recordings when their sound recordings are broadcast or publicly performed by radio stations and in public places like bars and restaurants;
- C a compensation system for private copying, in the form of a levy on blank audio recording media, benefitting eligible composers, lyricists, performers and producers of sound recordings for the making of recordings;
- C provisions granting exclusive book distributors legal protection in the Canadian market;
- C a number of new exceptions to non-profit educational institutions, libraries, archives, museums, broadcasters and persons with perceptual disabilities allowing them to reproduce or use copyright material in specific circumstances without paying royalties or obtaining authorization from rights holders; and,
- C statutory damages and wide injunctions to enhance the enforcement of copyright.

In the intervening years, the Government also adopted a series of smaller legislative amendments, mainly to conform with our international trade agreements. As a result of these amendments, Canada's *Copyright Act* is now consistent with all our international obligations.

Review of the Copyright Act as mandated by Section 92

An important policy development element of the 1997 Phase II revision is the review requirement under section 92 of the *Copyright Act*, which provides as follows:

“Within five years after the coming into force of this section (i.e., no later than September 1, 2002), the Minister (of Industry) shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to this Act.”

The parliamentary committee that will be tasked with looking at the Minister's report must then report to the House or both Houses "*within one year after the laying of the report of the Minister...*".

Parliament sought this review obligation to ensure an early review of copyright issues following Phase II, partly in recognition of the increasing impact of the Internet and other digital technological developments already beginning to affect copyright. In accordance with section 92, a full report on the provisions and operation of the entire Act will be tabled by the Minister of Industry by September 2002.

During the Senate Committee hearings for Bill C-32, the Minister of Canadian Heritage committed to report to Parliament within three years, i.e. September 2000, instead of the mandated five years. Given the fact that certain of the Act's provisions did not fully come into force until 1999, the tabling of a report by September 2000 was seen as premature since the full impact of the Act could not yet be measured.

New WIPO Treaties

In December 1997, the Canadian government signed two new international treaties, one on copyright (i.e., authors and creators) and one on neighbouring rights (i.e., performers and producers of sound recordings). Signature of these treaties signals the Government's commitment not to derogate from the principles embodied therein. These were the first intellectual property treaties to address the digital network environment, by setting out provisions to:

- create a new exclusive right in favour of copyright owners, including sound recording producers and performers, to make their works available on-line to the public;
- prevent the circumvention of copyright protection (i.e., as technology is developed to protect copyright, circumvention of such protection would be made illegal; and,
- prohibit tampering with rights management information.

The Government held consultations in 1998 on amendments that would be required if Canada were to ratify these treaties.

4. THE REFORM PROCESS

The Government is now embarking on a process for copyright reform in which we will consider issues, consult Canadians, and propose legislative amendments, when necessary, in a gradually staged manner. Review of the *Copyright Act* through more frequent revisions involving more manageable packages of issues and more narrowly focussed bills is consistent with the need to

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better respond to the fast-changing technological and business environment. The anticipated result is that issues will be dealt with more quickly and efficiently.

The section 92 report, to be tabled by September 2002, will outline a proposed agenda for copyright reform based on the principles and criteria that are set out below. While the section 92 process will occupy much of the Departments' attention over the next couple of years, we intend to continue to consult on two sets of priority issues and develop legislation, as appropriate. The departments will, of course, subsequently work with the parliamentary committee that will be struck under section 92 to consider the Government's report and hold hearings.

Priority consideration for revisions to the Act will be guided by the following principles:

- ensuring net gains for Canadians
- maintaining the responsiveness of the Act to technological innovation and new business models
- clarifying the law where it will reduce the risk of unnecessary litigation
- ensuring a direction for reform that takes into account, and helps shape, international trends.

Revisions will be sequenced according to the following criteria:

- where action is necessary to preserve the integrity of the Act
- where action is dictated by an externally driven time line
- where issues have been thoroughly analyzed and consulted upon
- where Canada can seize early opportunities in the marketplace
- where there is consensus among stakeholders.

5. THE AGENDA

A number of issues will need to be considered for reform. These include issues which stakeholders and parliamentarians had wanted to see included in the last round of amendments and which had to be put aside to be dealt with later, new issues which have arisen due to technological developments (e.g., advances in audio and video streaming) as well as issues that will emerge over the coming years.

The issues listed below have been largely identified from submissions or representations made to the departments of Industry and Canadian Heritage, and to Parliament as outstanding matters to be dealt with in future phases of copyright revisions. This list is not exhaustive and it does not necessarily reflect how they will ultimately be dealt with in the reform process. Issues are listed

here in alphabetical order:

- Access issues
- Audio-visual works / photographs
- Database protection
- Digital issues
- Government as owner and user of copyright works
- Internet retransmission of broadcast programs
- Performers' rights
- Rights management in an online environment
- Signal rights for broadcasters
- Technology-enhanced learning
- Term of protection
- Traditional knowledge and folklore
- Transitional period for unpublished works (section 7)

The Annex to this paper provides a brief description of each of the above-mentioned issues.

To ensure that Canada's copyright framework remains adapted to the new economy, the Government is moving rapidly with two sets of issues: 1) digital issues; and 2) Internet retransmission of broadcast programs. These are threshold Internet copyright issues which need to be addressed in the near term and on which the Government is prepared to consult now. Two consultation papers on these issues are accordingly being released concurrent with this document.

6. CONCLUSION

With the rapid development of new technologies and the fast-changing business environment, there is a renewed sense of urgency regarding reform of the *Copyright Act*. However, the same rapid rate of change, along with the fact that copyright affects *everyone*, compels the Government to act carefully. By moving with deliberation, the Canadian government can benefit from the lessons learned in other countries as it moves forward with modernization of the *Copyright Act*.

Many issues have been brought forward by interested parties. However, in the Government's estimation, the issues outlined in this paper are the ones that may require more immediate attention as the reform process unfolds. Over the coming years, new issues may emerge that are more pressing. The Government welcomes the views of all Canadians as it tackles the ongoing reform of Canada's *Copyright Act*.

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ANNEX

OUTLINE OF COPYRIGHT ISSUES

Access Issues

The issue is how to ensure adequate protection and administration of copyright balanced with appropriate access to works in both the digital and non-digital environments. In addressing this issue, it will be important to revisit the appropriateness of evolving exceptions and to consider the need for new ones, e.g., the making of copies or other necessary uses of works for purposes of proceedings before courts and tribunals. It may also be worthwhile to consider alternative models that ensure adequate enforcement and administration of copyright, balanced with appropriate access to works, in the digital environment.

Audio-visual Works and Photographs

(a) Ownership of audio-visual and multimedia works

At issue is whether the producer, the screenwriter and/or the director should be the author of a cinematographic work. Applying this general rule to cinematographic works is conceptually difficult because who is the author depends on a complex set of circumstances surrounding the creation of films and videos. Under the current law the author of a work is the first owner of the copyright.

Regarding multimedia works, it is generally taken for granted that the creator of a compilation can claim authorship for the compilation but authorship remains with the creators of the works that are included in the complete product, i.e., the compilation. This, however, is not explicitly laid out in the *Copyright Act*.

(b) Commissioned photographs

The *Copyright Act* provides that a person commissioning a photograph becomes the first owner of copyright only after “valuable consideration” is actually paid. With respect to other works, the first owner of copyright is normally the creator of the work. The issue is whether the photographer should be the first owner in all commissioned photographs.

(c) Authorship of photographic works

The *Copyright Act* specifically grants authorship of photographs to those who own the initial negative when that negative was made. The issue is whether the persons primarily responsible for the composition of the photograph should be deemed to be the authors of photographs.

Database Protection

A database is a compilation of information that has been arranged in such a way that a user can retrieve particular items of information. Computerized databases are the same thing, only in electronic form. In Canada “original” databases are protected under copyright law. However, the Federal Court of Appeal has held that “non-original” databases are not protected. The issue is therefore whether non-original databases should be protected under the *Copyright Act* and, if so, what form that protection should take. Also at issue is whether such databases ought to be protected under traditional copyright principles or according to other principles.

Digital Issues

There are various emerging copyright issues that are related to the digital environment. These include: giving rights holders an exclusive right to make sound recordings available on an on-demand basis over digital networks; preventing the circumvention of technical measures aimed at limiting access to or reproduction of works; and prohibiting tampering with rights managements systems that are normally used as identifiers of works.

Another important issue relates to the circumstances under which Internet service providers should be held liable for the transmission and storage of copyright material when their facilities are involved. The Act does not clearly identify the conditions for imposing liability, nor does it explicitly ascribe any limitation to such liability.

Government as Owner and User of Copyrighted Works

In its 1996 response to the Information Highway Advisory Council entitled *Building the Information Society: Moving Canada into the 21st Century*, the Government indicated that a Task Force on Digitization would be set up to make recommendations to facilitate access to government-held digitized content. The Task Force specifically recommended that the Government create a single window for licensing government-held works. These works generally fall into three categories: works for which the Government holds all the rights; works where the Government may have certain rights but not all; and works that are held in governmental institutions, such as museums, but where the Government holds no rights. In the context of Government On-line, this is a crucial issue. Work on creating streamlined copyright clearance systems is ongoing but remains in its early stage.

Internet Retransmission of Broadcast Programs

Section 31 of the *Copyright Act* provides a compulsory copyright licence, which permits the retransmission of the copyright works associated with over-the-air television and radio signals without the consent of affected rights holders, so long as specified conditions are met, including the payment of any applicable royalties contained in a tariff certified by the Copyright Board. Cable, direct-to-home (DTH) satellite and multipoint wireless systems rely upon this compulsory licence in the course of providing their subscribers with access to over-the-air television and radio signals. The issue is whether the compulsory licence should apply to Internet-based retransmission, and if so, how it should apply.

Performers' Rights

The issue is whether there is a need for increased rights for performers. A number of countries have adopted rights for performers in sound recordings which go beyond those in the Rome Convention. For example, some countries grant performers a full reproduction right in performances, an exclusive right over the online communication of performances and moral rights. Some also grant comparable rights to performers in films and videos.

Rights Management in an Online Environment

The issue is how best to facilitate the clearance of rights in an online environment. In 1995, the Information Highway Advisory Council recommended that “*the federal government should encourage industry and creator and user communities in the creation of administrative systems to streamline the clearance of rights for use of works in a digital medium*”. The Department of Canadian Heritage, in collaboration with Public Works and Government Services Canada and Industry Canada, has undertaken concrete measures to implement this recommendation. It has invited Canadian copyright collectives to round tables to explore practical solutions to copyright clearance, and it created an *Electronic Copyright Fund* (\$3 million over three years) to assist collectives in improving the collective management of rights in the digital environment. Work is ongoing on how best to ensure effective and efficient administration of copyright.

Signal Rights for Broadcasters

Canada currently protects broadcast signals consistent with the Rome Convention. The issue is whether broadcasters should be granted increased rights in their signals (e.g., a full reproduction right, and a public performance right). There is also an issue of whether such signal rights should also be granted to direct-to-cable transmissions (e.g., specialty channels, pay television).

Technology-enhanced Learning

In the knowledge-based society, providing a suitable environment for education and lifelong learning is a fundamental consideration. With the advent of the Internet and the promise of increasing the availability of information to Canadians, no matter where they are physically located, learning has gained an added dimension. Relevant issues include the need to consider appropriate exceptions or limitations to reflect the new digital environment. Other issues, such as the question of technological protection measures and the liability of Internet service providers, may be treated under other groupings of issues, though the overall policy objectives will remain.

Term of Protection

Copyright lasts only for a defined period of time. In Canada the term of copyright, in most cases, is set at the lifetime of the author plus fifty years after the author's death. The issue is whether or not the term of protection ought to be extended to life plus seventy years, as has been done in the United States and the European Union. If an amendment of this type is considered, it would also be appropriate to consider whether it would be granted retrospectively or only to authors who died after the amendment came into force.

Traditional Knowledge / Folklore

"Folklore" refers to traditional forms of artistic expression of a people, group or community. Examples include: tales, poetry, riddles, songs, music, dances, plays, paintings, decorative art, apparel, architecture, totem poles and aboriginal design. The Royal Commission on Aboriginal Peoples recommended that "the federal government, in collaboration with Aboriginal peoples, review its legislation on the protection of intellectual property to ensure that Aboriginal interests and perspectives, in particular collective interests, are adequately protected". In its response to the Royal Commission in *Gathering Strength -- the Government's Aboriginal Action Plan*, the Government did not address this issue specifically. Although in Canada the issue of traditional knowledge is generally associated with Aboriginal Peoples, this concept extends to all cultures.

First Nations people benefit, to the same extent as other Canadians, from the protection offered by the *Copyright Act*. However, because of the unique nature of folklore, the protection offered by the *Copyright Act* is often not available. Four issues need to be considered:

- copyright protection is available to an "author". In the case of folklore, such as traditional songs and dances, authorship often cannot be traced to any single person;
- the *Copyright Act* applies to all works that are "fixed" in material form. Folklore embodied in oral traditions, such as dances, songs and stories, often are not "fixed" and therefore fall outside the protection of the *Copyright Act*;
- copyright protection usually ends when the author of the work has been dead for fifty

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- years. Traditional songs, dances and stories have been around for generations, with the result that most folklore fell into the public domain long ago; and,
- copyright is based on the legal concept of property. The creators of folklore see their work as gifts that no longer belong to their creators once they are shared with the community. Harmonizing the latter view within a legal system based on legal rights attaching to property is a challenge.

Transitional Period for Unpublished Works (Section 7)

Prior to Bill C-32, unpublished works were protected in perpetuity. Amendments made under that bill will bring the protection for unpublished works in line with the general regime, i.e., the life of the author plus fifty years. The amendment contains a five-year transitional period which ends in 2004. After that, all unpublished works by authors who died more than fifty years before the section came into force will fall into the public domain. The issue is whether a fixed date of fifty years before the section came into force is too rigid and whether a more flexible transition period would be more beneficial to creators and to users.

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