



True North in
Canadian public policy

Commentary

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How to really support Canadian culture: Heritage and the copyright brief

Richard C. Owens

1. INTRODUCTION

Once relatively obscure law, copyright has raised its profile, propped up by technological and political change. The attendant increases in attention and public participation have not facilitated the work of the Copyright Policy Branch (“Branch”) of the Ministry of Canadian Heritage (“Heritage”). Its experience may show that sometimes to labour in quiet obscurity is a good thing.

However, Heritage should have a significant role to play as Canada enters the next round of debate over its copyright regime. This paper will consider the role of intellectual property (“IP”) in promoting Canadian culture and cultural industries. It will examine the minister’s brief with regard to emerging copyright issues, and argue that copyright protection should be of primary concern for a department that is charged with defending the interests of Canada’s artists, musicians, and authors.

The pace of copyright’s evolution has quickened. Trade treaties, including the *North American Free Trade Agreement* (“NAFTA”) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS”), spurred legislative change to the *Copyright Act* (Canada) (“Act”).¹ The latest round of amendments to the Act arose out of the need to implement the World Intellectual Property Organization (“WIPO”) *Copyright Treaty* (“WCT”) and the *WIPO Performances and Phonograms Treaty* (“WPPT”). Canada signed and ratified these

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treaties in 1997. The *Copyright Modernization Act* (“CMA”)², enacted in 2012, implemented these treaties into Canadian law by amending the Act. What took so long?

Interested observers will recall that the Harper government made several false starts to reforming the Act. On June 2, 2010, the Government of Canada introduced Bill C-32, the *Copyright Modernization Act*, which died on the order paper, but which, reintroduced in the next Parliament as C-11, eventually passed and has gradually come into force. It was the fourth attempt to amend the *Copyright Act* since 2005, and it succeeded where bills C-60 (2005), C-61 (2008), and C-32 (2010) did not.

Each of the previous bills died to some extent for failure of consensus on the entirely necessary reforms they contained. The bills met objections in consultation. Notable was the protest at an appearance by Minister of Canadian Heritage James Prentice in Calgary in 2010, staged by the Pirate Party of Canada.³

With the advent and growth of the Internet has come mass appropriation of its cornucopia of digitally perfect content. Coincidentally, great interest has arisen in the applicable usage rules, to wit, copyright. It is trite (albeit not undisputed) knowledge that illegal copying has greatly reduced returns to copyright holders. Yet, the attractiveness of illegal copying has engendered a strong and shameless constituency in Canada, epitomized perhaps by the Pirate Party. Many others who do not necessarily advocate illegal copying still seek weaker copyright.

In 1997 the recording industry made a mistake, supporting a private copying right and attendant blank media levy. It was an infernal deal. Since then, it has not been a question of whether stealing copyright-protected material is allowed, but only how much and under what circumstances. A similar debate materialized with the advent of the MP3 player, which gave rise to the question of whether copying one’s own music onto a player was legal. It was not, of course, but since it was practically harmless the Canadian Recording Industry Association (now Music Canada) agreed to permit such format shifting. The point is, permission to copy became an open question, unlike the unadulterated “copying is theft” message that preceded it. This question is now much politicized by academics such as Lawrence Lessig and Michael Geist, and pundits such as Cory Doctorow.

The process of copyright reform reflected its new politicization. In an attempt to ensure the passage of C-32, the government engaged in extensive consultation with the public, both through meetings and written submissions, in 2008. But the consultation process ended up providing relatively little legitimacy for planned amendments. As discussed in my study of written responses to the call for comment on copyright reform, many of the responses came from foreign nationals, principally pirates and game “modders” encouraged by online links on Web sites frequented by such folk to submit form letters. These made up a bulk of the written responses.⁴

Still, artists of all media, and their representative organizations, also responded, and they made it very clear that they sought copyright legislation that would protect their rights in an increasingly hostile, digital-copying environment.

Copyright evolution has continually been driven by technological change. Copyright is a multi-faceted form of intellectual property protection which embraces both industrial property (software) and cultural property (books, photographs, movies, music, etc.). Responsibility for the Act is shared between Heritage and the Ministry of Industry, Science, and Technology (“Industry”). According to the Heritage Web site:

The Copyright Policy Branch of the Department of Canadian Heritage is responsible, through its policy-making activities, for ensuring that Canada’s copyright policy framework, a cornerstone of cultural policy, supports creativity, innovation and access to cultural works.⁵

Industry, driven by a different remit, has not always seen eye to eye with Heritage on the nature of reforms. Tony Clement, when he was driving the consultation process as Industry minister, seemed to favour less rigid copyright rules. Given the extent and nature of the 2012 amendments, it would not be surprising if the rumours of disagreements between Industry Canada and Heritage about copyright reform were true.

Heritage's own Web site expresses a foundational belief in the importance of strong copyright protection:

Effective copyright protection is key to cultural expression, citizen engagement, and economic growth powered by the rapid expansion of the knowledge-based economy.⁶

The story does not end with the CMA. Urgent issues with copyright remain.

2. ENTER A NEW GOVERNMENT

Prime Minister Justin Trudeau appointed Mélanie Joly as Heritage minister. He set out the following objectives for her in his mandate letter:

- Review current plans for Canada 150 and champion government-wide efforts to promote this important celebration;
- Restore and increase funding for CBC/Radio-Canada, following consultation with the broadcaster and the Canadian cultural community;
- Review the process by which members are appointed to the CBC/Radio-Canada Board of Directors, to ensure merit-based and independent appointments;
- Double investment in the Canada Council for the Arts;
- Increase funding for Telefilm Canada and the National Film Board. Restore the Promart and Trade Routes International cultural promotion programs, update their design, and increase related funding;
- Increase funding for the Young Canada Works program to help prepare the next generation of Canadians working in the heritage sector;
- Work with the Minister of Infrastructure and Communities to make significant new investments in cultural infrastructure as part of our investment in social infrastructure;
- Develop a new multi-year Official Languages plan to support English and French linguistic minorities;
- Establish a free, online service for learning and retaining English and French as second languages;
- Work with the President of the Treasury Board to ensure that all federal services are delivered in full compliance with the Official Languages Act;
- Work in collaboration with the Minister of Indigenous and Northern Affairs to provide new funding to promote, preserve, and enhance Indigenous languages and cultures;
- Work with the Minister of Justice to update and reinstate a Court Challenges Program.⁷

It is noteworthy that these initiatives are almost completely focused on government programs and money. There is no mention of the minister's stewardship of copyright rules, nor of any other aspect of the private sector facilitating cultural creation with its own resources. Yet, cultural industries are enormously sensitive to vicissitudes in copyright protection. It can easily be argued that one of Heritage's primary concerns should be to ensure an appropriate copyright regime. Subsidies go to limited targets, whereas the ground rules for artistic expression affect everyone.⁸

3. EMERGING ISSUES (BRIEFING BOOK)

The importance of copyright to the Heritage remit, while below the horizon of the Prime Minister's concerns, is well reflected in the ministerial briefing book the department prepared for the incoming minister. It dedicates an entire section to it. Most of what follows enlarges on bullet points from a slide deck presented to the minister.⁹

a. Preparations underway for 2017 parliamentary review of the Act

The CMA introduced a mandatory review of the *Copyright Act* every five years ("Review"). Section 92 of the Act now provides:

Five years after the day on which this section comes into force and at the end of each subsequent period of five years, a committee of the Senate, of the House of Commons, or of both Houses of Parliament is to be designated or established for the purpose of reviewing this Act.

The following issues are likely to be top of mind in such a review, except in the relatively unlikely event that they are resolved prior to it. Legislative action prior to the review is not anticipated.

b. Copyright infringement using VPNs

Copyright infringement using VPNs involves the circumvention of geolocation technologies which limit site access to jurisdictions to which rights are held, through the use of a virtual private network ("VPN") for the viewer to appear to be situated in such a jurisdiction. This results in a copyright violation, since the copyright-protected material being exhibited here is not licensed for Canadian viewing.

To be specific, this is principally the Netflix problem, although of course other services on the Internet are affected. Whether the content provider be a victim or beneficiary depends on how stringently it defends contractual limitations on access over additional, foreign-sourced revenue. By far the most visible protagonist, though, is Netflix. Many Canadians, for good reason, prefer the US Netflix offering over the Canadian one. Far more content is available in the US than Netflix has the rights to exhibit in Canada. Thus, Canadians subscribe to the US Netflix offering by hiding behind VPN services, designed and intended specifically to obscure geographic location. Netflix has recently become strict about such evasion and has used its ability to detect VPNs to deny access to the US offering to customers using them. The party is ending.

The matter has claimed a good deal of public attention. Access to good entertainment through Netflix US has turned a surprisingly large number of otherwise law-abiding citizens into technologically savvy pirates. Still, there is no pressing public policy reason for Heritage to act on the matter. Aggrieved content providers, whose works will be exhibited in Canada without consent or, one assumes, adequate royalty, will be primarily American. Canadian content providers will only lose any difference between the US royalty and the Canadian — assuming that to be a positive difference. It is Netflix's obligation to police its viewers so as not to breach its covenants not to exhibit licensed content in Canada, which is not really Canada's problem.

It could become a problem in the unlikely event that, contrary to Canadians' preference, CanCon rules were to be imposed on Netflix. Such rules would apply only to Canadian Netflix, of course. If this were to be the case, then Heritage, through the CRTC, could want Netflix's connivance to see that Canadians watch what they are supposed to.

Could Heritage overrule citizen preference and impose CanCon rules on Netflix? For all sorts of reasons, it seems a fight better to forgo. Remember the CRTC's attempt to force Netflix to provide user data in 2014? However, the

answer ultimately will depend on the policy outcome of Heritage's ongoing, extensive consultation on CanCon rules.¹⁰ In the meantime, however, Heritage Minister Mélanie Joly, herself a Netflix fan, has assured Canadians that "there will be no Netflix tax."¹¹

c. Hybrid legal/illegal offer of online content

Michael Geist and others have speculated that this point refers to the Netflix problem,¹² but discussions with Heritage indicate a different concern. This is about Internet sites, the example given being Popcorn Time, that offer a mixed bag of legal and illegal content. The question was whether or not the current Act presents the tools to deal with such a problem.

Popcorn Time is essentially an open-source Netflix. It displays thumbnail links to movies available on torrent sites and then plays them through its integrated media player. Torrent sites use a technology that involves breaking large files into smaller pieces and reassembling them in order to speed downloads.

The courts have not found much to defend in Popcorn Time. In October 2015, the MPAA obtained a court injunction in Canada to stop the Canadian programmers of popcorntime.io, which had become the main Popcorn Time Web site, and later obtained the domain name, although the project reappeared on a new Web site, popcorntime.sh.¹³ Orders blocking Popcorn Time or seizing related domain names have been obtained in Canada, Israel, the UK, Sweden, Norway, New Zealand, and Denmark, where two people were also arrested in connection with it.¹⁴

A better example of problematic hybrid content might be YouTube. One commentator, Chris Castle, recently wrote of YouTube:

YouTube enables large scale theft in plain sight and benefits from it to the tune of billions of dollars. To hide behind the DMCA, to pay artists little or nothing in their legitimate deals they do offer and then have "Do The Right Thing" as a corporate motto is the ultimate irony. [Bold in original]¹⁵

Also, in a recent letter to the US government, a plethora of recording artists and organizations complained about YouTube and the inappropriate shelter provided by the US *Digital Millennium Copyright Act* (DMCA).¹⁶ So what's the difference with Popcorn Time? YouTube is operated by one of the world's largest corporations, Google, itself the benefit of considerable jurisprudential largesse on copyright issues.¹⁷ It has an institutional response to allegations of theft, protected by the DMCA. Is this enough of a distinction to save it from Heritage's concern?

It is also worth noting that much of the theft on YouTube might be protected by the User Generated Content provision of the Act (see below), were it effective.

d. ISP blocking of illegal sites hosted outside Canada.

Apparently, Heritage was concerned about whether it was possible to require certain sites to be blocked by law, and in particular whether or not Quebec could block gambling sites infringing on its legislated monopoly. The monopoly, which Quebec created by recently passing Bill 74, was an action one colleague described as winning the "trifecta" of being "illegal, unconstitutional and odious". That said, it isn't really a copyright problem. The Act provides rights in published material, but it provides no positive rights to publish works. It is likely that the bill

will be challenged on constitutional grounds, both for violating *Charter* protections on freedom of expression, and for intruding on the federal power to regulate telecommunications.

4. TOPICS RECENTLY RAISED BY STAKEHOLDERS

There are a number of “topics recently raised by stakeholders” listed in the briefing book the department prepared for the minister. The list is:

- a. Implementation of the *Beijing Treaty*;
- b. Reintroduction to Parliament of amendments to implement the *Marrakesh Treaty*;
- c. Copyright clearance by educational institutions;
- d. Extending term of protection for works;
- e. Artist resale right;
- f. Effectiveness of notice-and-notice;
- g. Efficiency in collective management of rights.

Some of these issues are relatively more significant than others. I treat each in turn.

a. Implementation of the *Beijing Treaty*

The *Beijing Treaty on Audiovisual Performances* (2012) (“BTAP”)¹⁸, provides singers, musicians, dancers, and actors in audiovisual productions with rights in their performances, just as the WPPT did for aural performances. Canada is not yet a signatory. It updates for the digital era the protections contained in the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1961). Performers are granted the economic rights of reproduction, distribution, rental, and making available, in respect of fixed (i.e., digitally recorded) performances. In live performances, performers would be granted the right of broadcasting, the right of communication to the public, and the right of fixation. The BTAP also grants performers moral rights in their performances; specifically, the right to be identified as the performer, and the right to object to any distortion, mutilation, or other modification that would be prejudicial to the performer’s reputation.

Unsurprisingly, performers and their associations are boosters of BTAP accession. ACTRA (Alliance of Canadian Cinema, Television and Radio Artists), for instance, strongly supports accession to the treaty.¹⁹ Meanwhile, the BTAP is criticized by the digital rights community for erecting higher barriers of copyright to their copying habits, and for making projects such as documentaries more difficult due to the need for increased rights clearances.²⁰ While compliance will become an issue, however, the performer’s efforts and art are worthy of protection at law.

b. Reintroduction to Parliament of amendments to implement the *Marrakesh Treaty*

The *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*²¹, provides exceptions to copyright to make text-based works accessible for persons with disabilities. Canada has not signed the treaty. A Conservative bill to implement its provisions died on the order paper with the election call. The Liberal government has introduced a bill entitled *An Act to Amend the Copyright Act (access to copyrighted works or other subject-matter for persons with perceptual disabilities)* (Bill C-11). It received Royal Assent on June 23, 2016. The legislation makes Canada one of the first to implement the *Marrakesh Treaty*, which will come into force once 20 countries ratify it.

One is reluctant to argue that blind people should be denied access to published content. It does not, however, follow that subsidizing access ought to be at the copyright-holder's expense.

c. Copyright clearance by educational institutions

This is one of the major issues facing Canadian copyright now. How Heritage responds to the pressing needs of the educational publishing industry, and the egregiously bad state of copyright law affecting it, will be a real measure of its efficacy. Heritage has received strong representations from the affected educational publishing community. If legislative action were to be taken prior to the review, this may well be the subject of it.

In particular, the education field is glaringly instructive of how overemphasis on fair dealing has a strongly negative impact on the production of copyright-protected works. To understand this, we need to spend a little time treading the tortured path the law of fair dealing has been marched along by the Canadian judiciary — more specifically, the Supreme Court of Canada (“SCC”).

Fair dealing was long understood to be what the Act said it was — a defence to copying a material part of a work. If a copy were made for certain purposes, such as news reporting or criticism, and were otherwise fair, then a copier would not be liable for damages. Section 29 of the Act now reads:

29. Fair dealing for the purpose of research, private study, **education**, parody or satire does not infringe copyright. [Emphasis added. Note that education, parody, and satire were additions to the Act made through the CMA. News reporting and criticism, subject to additional conditions, are covered in subsequent sections.]

In the leading case, *CCH Canadian Ltd. v. Law Society of Upper Canada* (“CCH”)²², fair dealing ceased to be a mere defence and was newly deemed by the SCC to be a “user right” — whatever that means. So-called user rights are widely perceived to be good things, better than a mere defence. But no coherent theory of what they may be or how they would apply in practice has emerged from any quarter, and given the inherent difficulties of reconciling their internal, jurisprudential contradictions and conundrums, it is unlikely that one ever will.

The facts of CCH are salient — a bad set, perhaps, on which a publisher might seek damages. Law publishers complained of the practice of the Great Library of the Law Society of Upper Canada (“Library”) to make copies of articles and textbooks and deliver them, usually by fax, to lawyers working at a geographic remove from the library. The Court unanimously found that the Library's dealing was fair. It appears that the Court couldn't countenance lawyers having to buy their own books — or at least, to pay to cover royalties to the publishers.

Further distressing about the decision is its novel means of applying copyright law. The reasoning in CCH ran that, for the purpose of a fair dealing analysis, the purpose of the user supplants the purpose of the copier, where both are involved. Recall that fair dealing has to be for an allowable purpose. Under the Court's analysis, then, it was not the Law Society distributing material that mattered, but the private purposes of individual lawyers. Since the lawyers were found to be engaging in research and private study, an allowable purpose, this substitution of intentions carried the day. There may be such a justifiable carve-out where the copier is merely the agent of the end user, a functionary of the copy process with no actual interest in the copy, such as a personal assistant. But to abstract the Law Society from the process is a judicial sleight of hand. So is it to ignore the fact that lawyers are in a business which is perfectly capable of bearing the costs of its inputs (most likely by simply downloading them onto clients).

In the case of *Alberta v. Canadian Copyright Licensing Agency*, 2012²³, (“Alberta”) the SCC pursued a similar analysis to a still worse end. The majority, by a slim 5-4 margin, adopted the “end user” analysis of CCH to considerably

expand the scope of the private copying exception, and thereby effected an enormous transfer of wealth from the struggling publishing industry to the well-established and largely publicly funded education industry.

The facts on appeal in Alberta were stated in the case headnote as follows:

Access Copyright represents authors and publishers of printed literary and artistic works. It filed a proposed tariff with the Copyright Board with respect to the reproduction of its repertoire for use in elementary and secondary schools in all the provinces and territories other than Quebec. The Copyright Board concluded that copies made at the teachers' initiative with instructions to students that they read the material were made for the allowable purpose of "research or private study" under s. 29 of the Copyright Act. They did not, however, constitute fair dealing and were therefore subject to a royalty. On judicial review, the Federal Court of Appeal upheld the Copyright Board's conclusion that the copies were not fair dealing.

In fact, however, the Copyright Board ("Board") and the Court of Appeal further emphasized the teachers' purposes, being the impermissible purpose of instruction, over the purpose of the students (the Board is the administrative tribunal responsible, *inter alia*, for the certification of tariffs proposed by copyright collectives).

The SCC not only decided that the students' purpose counted, but it found those purposes to be "research or private study". This, in spite of the fact that the students played no role in initiating the copying, and that they studied the work as a class, not individually. Surely, that exception is meant to apply where the initiative to copy is the researcher's, not a teacher's, (indeed, so had the Board held)²⁴ not to mention the fact that it strains credulity that to make copies for a classroom full of students is "private". The dissent enlarged on these points; both the Court of Appeal and the Board had found the purpose of the copying to be instruction, not private study. Again, the Court erases the presence of the actual copier in a wholly unconvincing manner.

On top of this, the CMA introduced fair dealing for educational purposes. According to the preamble to the statute:

And whereas Canada's ability to participate in a knowledge economy driven by innovation and network connectivity is fostered by encouraging the use of digital technologies for research and education ...

If the rights of educational publishers could be so thoroughly trodden underfoot with the pre-existing private study exemption, just think what risk they run with the new education exemption. The dealing would still have to be fair, but if making copies for a whole class is fair for the private study exemption, as it was found to be in the Alberta case, why would it not be for education?

Frankly, the current situation is unlikely to meet the requirements of the *Berne Convention* on copyright, and other treaties to which Canada is bound. The *Berne* "three-step test", set out in Article 9(2), has been adopted by other treaties to which Canada is bound. These include TRIPS, in which the three-step test is stated as follows:

Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.

On a plain reading, it would seem that the current combination of judicial and legislative exemptions for educational use (a) may be a special case, although education as a case is so broad as to potentially challenge the application of the term "special"; (b) clearly conflicts with a normal exploitation of the work; and (c) undoubtedly

unreasonably prejudices the rights holder's legitimate interests. As such, Canada's education copyright regime is open to challenge in a trade dispute under the WTO.

According to the briefing book:

Educational institutions have dramatically changed the way they manage copyright clearance in a way that disrupts the former business models of many authors and publishers, and their collective societies. These latter have initiated court proceedings in Ontario and Quebec on behalf of publishers.

Access Copyright retained the audit and consulting firm PricewaterhouseCoopers to perform a detailed study of the educational publishing market in Canada. Its excellent study, entitled *Economic Impacts of the Canadian Educational Sector's Fair Dealing Guidelines*,²⁵ was released in June, 2015. The tale it tells is as unfortunate as it was predictable. In response to the greatly increased scope of the fair dealing exception, educational institutions and authorities in Canada adopted new fair dealing guidelines pursuant to which the payment of royalties to content producers was greatly attenuated. The study should be reviewed by anyone who questions the practical effects of strong copyright laws. The report's executive summary, worth quoting in full, is as follows:

PwC assessed the actual and expected market impacts of the implementation of the Fair Dealing Guidelines (also referred to as "Guidelines") adopted in 2012 by the Council of Ministers of Education, Canada (CMEC), Association of Universities and Colleges Canada (AUCC), and Colleges and Institutes Canada (CICan). These Guidelines apply to K-12 schools and post-secondary institutions in Canada, excluding the province of Quebec.

Our Assessment finds that, since implementation of the Fair Dealing Guidelines, the educational publishing industry in Canada has been subject to a significant negative impact. Licensing income is substantially reduced. Revenues from sales are experiencing an accelerated decline. These declines, we believe, will accelerate further, causing adverse structural change in an industry already weakened by numerous other negative developments in the educational content market.

Application of the Guidelines significantly compromises the ability of educational publishers to publish original materials and meet varied academic needs. Indeed, we expect that over time, the publishing of new content for K-12 schools in Canada will for the most part disappear, and the quality of the content used by school students will thereby decline. As for post-secondary institutions, we expect that the publishing of materials will be rationalized and consolidated to focus only on certain segments of the market. Specialty subjects will be underserved in favour of high-enrolment subjects, with a corresponding decline in the availability of Canadian content. Many small and medium-size publishers that currently serve this market will be forced out of it in search of more profitable publishing areas. This development will lead to lower competition, less content diversity, and higher prices for what is produced. In short, fewer works will be developed by Canadian content producers, both creators and publishers.

The economic footprint of the educational publishing industry is shrinking. If present patterns persist, many relatively high-paying jobs are expected to disappear. Foreign publisher subsidiaries may be forced to transition from producing Canadian content in Canada to distributing U.S. content in Canada. The incomes of Canadian writers, authors and illustrators from Canadian sources will decline, and as no immediate or eventual replacement is apparent, this income decline will drive many from the sector.

The Guidelines, and the resulting market impacts, impede the ability of content producers to seize digital opportunities and discourage innovation in the Canadian digital knowledge-based economy.

Oxford University Press, for instance, has closed its Canadian business. So have Emond and Nelson.²⁶ Access Copyright's revenues are much diminished, calling the collective's future into question.

It should be no surprise that to establish a regime in which people are expected to provide their products for free would lead to supply drying up. Why is this such a hard lesson to learn? What makes the whole mess even more inexcusable is that we are dealing with *education*. Did not courts and legislators advert to the fact that education relies on published content, and is in fact one of its most important markets?

It is up to legislators to turn this around. It has to be one of the foremost issues on the table for the 2017 review of the Act, if it is not dealt with before. Clearly, the SCC will not have (or, perhaps, take) the opportunity to reverse itself on the issue any time soon. Admittedly, the current politics of copyright will make righting these copywrongs difficult; it will be up to Heritage to show strong leadership.

One component of a solution would be to make it clear in the Act that a copy, to be for research or private study, must be made at the instigation of the person using that copy. Also, a provision could be added that in all cases it is the copier's purpose that is significant to a determination of fair dealing except in very narrow circumstances, such as when the copier is an employee of the user. These circumstances in any event should exclude cases where there is a clear institutional motivation to copy, as in the case of libraries and schools. These changes can undo some of the damage the SCC wrought.

d. Extending term of protection for works

In 2015, the term of protection for audio recordings was extended to 70 years from the making of the recording. While this is a start, many jurisdictions, including Canada's major trading partners, have adopted a term of 70 years from the date of the author's death for other works, while the term for other works in Canada remains at 50 years from the date of the author's death. Europe, the United States, and many others have moved to the 70-year term. This is the right thing to do, both deontologically and practically. Deontologically, as, for the reasons set out below, there is no legitimacy to the limitation of copyright terms. Practically, for the innovation incentive effect of the term's extension.

Besides these reasons, however, there is the Trans-Pacific Partnership ("TPP")²⁷, which requires Canada to extend its term to 70 years. The TPP seems to be in limbo. Parliament is going through consultations with Canadians about its implementation. Hopefully, the way will soon be clear for that implementation.

However, there is still another reason to extend our term, which is that it will gain Canadian authors a reciprocal benefit in Europe and other jurisdictions. This is because they have implemented a 70-year term under the "rule of the shorter term", permitted under the *Berne Convention* and other copyright treaties. This rule provides that extending the benefits of domestic copyright protection which exceeds the treaty minimum, to foreign treaty nationals, can be done on the basis that those nationals' nation extends the same. Absent the invocation of this rule, foreign copyright holders of treaty nations are protected as domestic nationals and automatically subject to the full protection of the law. Therefore, if the longer term is enacted, Canadian authors will automatically benefit from stronger protection of their works in export markets.²⁸

Economic analysis commissioned by the Government of Canada indicates that the impact of the term extension would be very small. Even this doesn't seem to account for the increase in copyright revenues arising from the term extension, both as a result of greater incentive to create here in Canada, increasing overall output, and because it would result in greater protection in export markets, particularly Europe.

e. Artist resale right

An artist resale right entitles certain visual artists to revenues on the resale of their work. Thus, if a painter sells a painting to A, and sometime later A resells to B, then a portion of the proceeds of A's sale to B goes to the painter. As a market is established and value grows for an artist's work, then returns accrue to the artist. The United Kingdom, Australia, Ireland, and Germany, as well as about 90 other countries, have such a right. There is strong support for such a right in Canada. CARFAC, Canadian Artists Representation, for instance, is lobbying vigorously for a 5 percent artist resale right for visual artists with Heritage.²⁹ Establishment of the artist's resale right would allow Canadian artists also to benefit from reciprocal recognition in other countries which have the right, in a manner similar to that described above in respect of the longer, 70-year copyright term. Heritage is assessing the proposal.

Is the ARR a good idea? In the existing model, an artist profits from the increase in value of her works not by siphoning off resale proceeds but by producing and selling new works, or by withholding a portion of her work from the market until that market grows. As, effectively, a tax on sales, an ARR would act as a drag on the resale market, possibly inhibiting value maximization of the artist's work. Still, the effect may be subtle and it is not hard to imagine that the artist, if not the buyer, will be better off.

Interestingly, the argument that visual artists deserve compensation in part because they cannot make multiples of their work may be specious. Take the examples of print makers, bronze sculptors, or photographers. Each of them can make multiple art objects from the original "code", but to do so drives values down. Ergo, they too should benefit from the ARR, if there were one (for the sake of transparency, I should note that I am also a photographer). This is because they will ensure scarcity to the extent of revenue maximization, a calculation based on the effects of multiple copies on price versus the benefits of selling multiple copies.

f. Effectiveness of notice-and-notice

On January 2, 2015, the notice-and-notice provisions of the CMA came into force. They are one of the most controversial sections of the CMA. The so-called notice-and-notice regime is a means to deal with copyright infringement on the Internet. Pursuant to this regime, an Internet service provider ("ISP") who receives a notice that one of its users is infringing copyright must forward that notice to the user. Although provision is made in the Act for ISPs to require payment of a fee, set by regulation, for doing so, currently no fee has been approved and the Act provides that without such approval, none may be charged.

Compared to the alternative notice-and-takedown regime, notice-and-notice is perceived, quite rightly, as much less effective at preventing infringement.

Notice-and-notice works like this, according to an Industry Canada Web page:

When a copyright owner thinks that an Internet user might be infringing their copyright, they can send a notice of alleged infringement to the user's Internet service provider (ISP). Notice and Notice requires that the ISP forward (e.g., via email) the notice of alleged infringement to the user and then inform the copyright owner once this has been done.

For example, a copyright owner observes an Internet user with a Canadian Internet protocol (IP) address downloading a movie from a pirate site. Not knowing who the person is, the copyright owner can send a notice of alleged infringement to the ISP that owns the relevant IP address. The ISP must then forward the notice to its subscriber who was using that IP address at the time of the alleged infringement.³⁰

The notices apply both to infringing material on Web sites, and to illegal file sharing.

A system that actually attaches penalties is better, such as France's Hadopi (*Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits d'auteur sur Internet*). This system originally threatened users with losing Internet access, but after a French court declared Internet access to be a basic human right, a system of graduated fines replaced this penalty in 2013. In any event, the concern is less that any particular type of punishment be implemented, than that there be consequences for illegal downloading and failing to obey a notice where, of course, the notice is appropriately made. There is a strong case to be made for a publicly administered consequence to infringement. The loss to society from forgone artistic production owing to piracy is widespread, and enforcement by individual complainants is difficult and expensive.

Alternatively, the US notice-and-takedown system has the benefit of resulting in the takedown of the allegedly infringing material if the recipient of a notice does not protest the notice requesting it.

This is an active issue. The US is engaged in the preparation of a major report on its notice-and-takedown system. The public consultation process ended in May of this year and the report is now being prepared — with no specific publication date on the horizon.

Also interesting are the controversies over the misuse of the notice-and-notice system. Some companies, acting as agents for producers of content, have sent notices containing demands for settlement. While the Act does not prohibit such demands, it is seen by some to be an abuse of the notice process, and leads to the pejorative term “copyright trolls” for some. Such demands can confuse those receiving the notice, who do not necessarily know that they may have defences to a claim, or that the copyright owner doesn't know who they are, since the ISP typically keeps that information private unless a court order is received. In many cases the notices are sent, as I noted, by intermediaries. Some of those intermediaries (and, of course, principals) are American and their notices may more resemble American notice-and-takedown notices. Many ISPs seek to mitigate consumer confusion by posting FAQs on their Web sites dealing with copyright law and the notice process, and by including detailed notice, or a “wrapper”, setting out the legalities and privacy protections concerning the forwarded notice.

ISPs automate the processing of notices to the fullest extent possible. The costs of such systems and of exceptions processing are disproportionately heavy for smaller ISPs.

g. Efficiency in collective rights management

The efficiency of collective rights management organizations has been a sleeping issue for too long. Unlike the business corporation, ostensibly answerable to clearly defined constituencies under clearly defined procedures, the rights collective is in a position relatively immune to any form of market, or regulatory, discipline. The results are widely perceived to be as one would expect — inefficiency and perquisite consumption. Think, for instance, of the blank media collective, which three years into its operation had yet to distribute a penny, while sitting on many millions in revenue (since then, however, the collective has made up for its early lack of distribution).³¹

Moreover, the collective administration of copyright in Canada is highly fragmented. There are 38 collective management societies listed on the Web site of the Copyright Board of Canada.

This was an issue that has not been dealt with in some time, and so it has been raised with the minister by Heritage. It is unlikely any action will be taken before the review is complete.

5. OTHER ISSUES IN CANADIAN COPYRIGHT LAW

In addition to the foregoing issues set out in the minister's briefing book are the following.

a. UGC

In the CMA, the most novel, most highly unusual provision was the Non-Commercial User Generated Content, or UGC, provision, section 29.21. This section provides as follows:

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker, or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

(2) The following definitions apply in subsection (1):

Intermediary means a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public.

Use means to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything.

It is widely perceived that the UGC provision could be a hole in the Act of dimensions similar to the education exemption seeming, as it does, to allow wide dissemination on the Internet of otherwise infringing content based on loose conditions. Even the requirement not to have a substantial adverse financial effect will be difficult to apply, and may work only in hindsight. The requirement not to have a commercial purpose appears to apply only to the author of the UGC work, not, it should be noted, the intermediary.

But it is also quite possible that the UGC provision could be more or less useless because of the circumstances in which it is most likely to be supposed to be used. It has been widely known as the "YouTube exception" because of its obvious application to mashups posted on that video-sharing service. It is not clear that there

are circumstances which would lead YouTube, or any similar online service, to pay any heed to an odd, obscure, parochial exception to copyright. Perhaps a Canada-only service someday will, but who would rely on Canadian copyright law to exhibit a work across the whole Internet? In other words, if Google, YouTube's parent, receives a takedown notice for content relying on the UGC provision, what is the likelihood that it will refuse pursuant to Canadian copyright law? It will rely on the common provisions of copyright, and US ones by default. There is no analogue to this provision anywhere in the world; Canada pulled it out of thin air. Thus, while we might be better off without the UGC provision, it may be ineffectual enough not to matter.

As with the education exception above, it is questionable whether the UGC provision meets the three-step test for exceptions to copyright and as such is open to international challenge.

Is there any benefit to local experimentation with copyright, such as the UGC provision instantiates? It is difficult to say that no benefit will ever derive from thinking outside the internationally defined copyright box — but that said, it is a big box, founded in well-established principles, and ever expanding through international discussions.

b. Set-top boxes

A recent development in copyright law is the Bell Media case, F.C. Docket: T-759-16 ("Bell Media"), in which an injunction was issued on June 1, 2016. The case pits Bell Media and other media companies against several companies in the business of marketing set-top television boxes. Their boxes came pre-loaded with software designed to make unauthorized content and television signals available on the televisions to which they were attached. The defendants advertised freedom from cable and subscription fees, and made available instructional videos and other materials that promoted the use of the boxes for infringing purposes. While the Court declined to extend the injunction to similar businesses other than those actually represented in court, plaintiffs have since served several others with notice of the injunction. They have two weeks to raise objections, and, unless the objections convinced the Court not to, an order would issue extending the existing injunction to them.

The difficult issue in Bell Media is that none of the defendants' actions are themselves infringing copyright; it is only that they lead others to infringe, and that on a massive scale. Thus if legal remedy is to be found for copyright infringement effectively caused by the defendants' behaviour, it must be indirectly, for the infringement of other people.

Thus the case is noteworthy for deciding that inducement to copyright infringement is a serious issue to be tried in a Canadian court. This US doctrine has not until now found a place in Canadian jurisprudence. It was borne of the file-sharing cases culminating in *Grokster*,³² in which the US Supreme Court found *Grokster* to have induced others to infringe copyright through its service. This formed the basis for *Grokster*'s liability, since it too could not be said to be copying illegally itself, but only causing others to do so.

It appears as though the evolving common law of copyright may save the plaintiffs' interests in Bell Media, although it is by no means certain that a Canadian court will pick up a US copyright doctrine, however sensible it may be to do so.³³ If the Federal Court does not effectively curtail the sale and promotion of the infringement-inducing software on the set-top boxes, then legislative action may be the only answer. In that case, expect to see it raised in the 2017 review of the Act.

6. THE NATURE OF COPYRIGHT AND WHY TERM LIMITS ARE INIMICAL TO IT

In US courts, copyright is often referred to as providing “thin” protection. Such thin protection is in contrast to the relatively stout monopolies attendant on patents. Thin protection is aptly named, and it is at the heart of how courts and commentators misunderstand copyright and consider it to be a balance between the public domain and a legislated monopoly. In fact, so much is carved away from copyright protection for individual works, that term limitation is effectively unnecessary, and a double taking.

There are several doctrines pursuant to which copyright is restricted to only certain narrow elements of a work. These include such doctrines as merger, fair dealing, and abstraction-filtration-comparison, and its Canadian equivalent. After the application of these, much or even all of a work may be unprotected by copyright. What is left is a hard kernel of truly original copyright-protected expression. No true monopoly is established over it, but only the obligation not to copy it. Why limit such an obligation? What is gained by releasing copyright-protected work into the public domain? Why encourage plagiarism, and the disrepute of our cultural treasures, by the lapse of moral rights?

A counter-argument runs that people could buy works more cheaply were the sales of them not burdened by the need to pay authors royalties. There are several answers to this argument. First, it is not at all clear that cheaper access offsets the commercial incentives for publishers to keep a book or recording on the market. Moreover, typically, prices are not lower. Surely, such a motive is even more urgent in the first 100 years of a work’s life than subsequently.

Moral rights in particular ought never to end. I walked with my wife one afternoon as a break from the heavy toil of writing this paper and we were subject to the dreadful auditory assault of Beethoven’s *Für Elise* emanating tinnily from an ice cream truck (Mrs. Softy’s was the offender). Now admittedly, there is no guarantee an active guardian of Beethoven’s interests would have persisted into the present day — but then, there is no guarantee one will survive 70 years, or 50, either; hence the need for orphan works provisions. Such provisions might, in fact, work to provide for licences for older works. Or, where no heir survived, a collective could take over and distribute proceeds, for instance, to living artists. In particular, such a licensing process should take great care of the moral rights attached to the work, which must also survive. Our culture will be far better off for it.

Thus in principle the extension of copyright term is entirely legitimate and ought to be pursued. While fair dealing is an entirely necessary defence to infringement, and apparently, in some muddled way, a user’s right, the courts and legislature have let it get out of hand and departed from the entirely sensible core principles governing the exception.

7. RECOMMENDATIONS

While the passage of the CMA largely brought the Act up to date, we are not ready to give up on the Copyright Policy Branch of Heritage just yet. Issues remain to be addressed. In particular:

- The current state of the law arguably exempts educational institutions to a very large degree from the application of the Act. This is the fault of legislative amendment to the fair dealing provision, but especially of the SCC by its expansive interpretation of the prior fair dealing rights. The court's overreaching requires legislative remedy;
- The basic period of copyright protection should be extended to life of the author plus 70 years (if not longer!);
- Notice-and-notice should be closely studied and consideration be given to replacing it with notice-and-takedown or a graduated response system;
- The Heritage Minister should actively support implementation of the Trans-Pacific Partnership and its consequences for the Act;
- The Heritage Minister should look to copyright as a significant pillar of cultural and economic policy, and actively champion a stronger Act.

Between now and the close of the 2017 review of the Act, the branch will have its hands full.

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ABOUT THE AUTHOR



Richard C. Owens

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

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

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

He is on the boards or advisory boards of other companies and not-for profit enterprises. Richard is an adjunct professor, teaching courses on the law of information technology and electronic commerce, innovation law and policy, intellectual property, digital content and the creative economy, and the law and policy of biotechnology, all at the University of Toronto Faculty of Law, where he has taught for over twenty years and also served as the Executive Director of the Centre for Innovation Law and Policy.

Richard has written and published widely on intellectual property law, the law of information technology, privacy, and the regulation of financial institutions.



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Intelligent and informed debate contributes to a stronger, healthier and more competitive Canadian society. In five short years the Macdonald-Laurier Institute has emerged as a significant and respected voice in the shaping of public policy. On a wide range of issues important to our country's future, Brian Lee Crowley and his team are making a difference.

JOHN MANLEY, CEO COUNCIL