

Position on Copyright Reform in Canada

Canadian Coalition for Electronic Rights (CCER)

How can a balance be attained between protecting the rights of creators and their entitlement to compensation for their works and the rights of Canadians who seek to access and use these works? Although there may be no definitive answer to this question there are several factors that need to exist in an amended Copyright Act to ensure a reasonable level of mutual protection for stakeholders and users. The Canadian Coalition for Electronic Rights (CCER) is an advocacy group dedicated to the preservation of user rights throughout the copyright reform process in Canada.

Amending The Canadian *Copyright Act*

The CCER recognizes the need to update Canada's *Copyright Act*. However, a balance and clear consensus must be achieved prior to amending an Act that will affect every Canadian. The CCER also identifies the need to foster development and innovation while protecting the intellectual and financial rights of copyright holders. Canada has been under growing pressure from the U.S. Government and lobby groups representing mostly American corporate interests for many years to adopt a version of the U.S. Digital Millennium Copyright Act (DMCA) containing broad restrictions on the access and use of digital data and media.

A large grassroots opposition to the adoption of DMCA legislation within Canada has emerged comprised of consumers, creators, academics, students and businesses. It was through the efforts of this movement, at least in part, that the current government has delayed the introduction of its *Act to amend the Copyright Act*. This small victory signals an opportunity for these consumers, creators, academics, students and businesses to play a role in the development of a balanced approach to copyright reform in Canada that previously was not available to them.

The CCER would like to use its opportunity to identify the following key points as playing a crucial role in the development of balanced copyright legislation:

1. Anti-Circumvention Provisions

Technological Protection Measures (TPMs) and Digital Rights Management (DRM) are technologies employed by copyright holders and publishers to control access and limit usage of digital media or hardware devices. Provisions included in the U.S. Digital Millennium Copyright Act (DMCA) were designed to offset the many shortcomings of TPMs and DRM by prohibiting the circumvention of such technologies. Canada now finds itself under intense pressure from the United States to adopt similar measures.

Circumvention devices and associated technologies are necessary for Canadians to exercise their user rights under the existing Canadian *Copyright Act* since the TPMs and DRM utilized in many areas of consumer electronics and media today effectively

extinguish such rights. By not adopting the U.S. approach and continuing to allow Canadians to access and use circumvention devices and technologies these rights can be restored.

Canadians should be entitled to use the expensive entertainment and educational software and hardware that they purchase in a manner consistent with their reasonable expectations and the innovative nature of new digital technology. For example, Canadians should be able to use games and commercial DVDs legitimately purchased abroad when they return to Canada. Canadians should be able to engage in time, space, and format shifting of products that they have legitimately acquired. Canadians should be able to continue to enjoy their lawful users' rights, for example for fair dealing, as enunciated by the Supreme Court of Canada.

It is essential that Canadian copyright laws advance consumer and creator interests by not employing an all-encompassing prohibition on the development and manufacturing of circumvention devices and technologies, commercial trade of circumvention devices and technologies, the possession and/or utilization of any device or technology that can circumvent a TPM or DRM for a non-infringing purpose or otherwise lawful activity such as fair dealing, interoperability, time and format shifting.

The Sony "rootkit" fiasco showed the dangers of TPMs and DRM. Strictly speaking, a consumer's attempt to repair her computer from damage caused by Sony was contrary to the DMCA. This example alone illustrates that Canadians need protection from TPMs and DRM more than content owners need protection for them. TPMs and DRM are not so much about preventing piracy as protecting outdated business models, which should be allowed to evolve in a free market without technological restriction.

2. Technological Neutrality

The concept of technological neutrality is paramount when considering changes to Canada's copyright regime that will withstand the test of time. The Government must not integrate protection for specific technologies or business models into any amendments to the *Copyright Act* (e.g. all-encompassing prohibition of circumvention devices and technologies). Bill C-61 failed to maintain a technologically neutral approach by banning the distribution of circumvention devices, blocking the use of certain technologies such as network based PVRs, and by providing specific support for DRM (digital rights management).

In order to develop flexible legislation that can adapt to emerging technologies, business models and modes of distribution it is essential that any amendments to the *Copyright Act* remain technologically neutral.

3. Modernizing Backup Copy Provisions

As part of the 1988 copyright reform, Canadian copyright law was amended to allow for the making of backup copies of computer programs. In 1988, backing up digital data meant backing up software programs. Today, digital data includes CDs, DVDs, and video games. All of these products suffer from the same frailties as software programs, namely the ease with which hard drives become corrupted or CDs and DVDs scratched and non-functional. From a policy perspective, the issue is the same - ensuring that consumers have a simple way to protect their investment.

The *Copyright Act* should be amended to bring the backup copy provision into the 21st century by expanding the right to make an archival backup copy to all digital consumer products regardless of format or media.

4. ISP Liability

In the United States, the Digital Millennium Copyright Act (DMCA) contains provisions which compel Internet Service Providers (ISPs) to remove subscribers content when they are notified by a copyright holder of a possible infringement. This provision has been misused and abused for years in the United States to achieve censorship and to engage in anti-competitive activities. Such practices are documented at www.chillingeffects.org

The alternative to the “notice and takedown” system is the “notice and notice” system whereby a legal safe harbour for Internet intermediaries is established. When the ISP is notified of a possible infringement the notification is forwarded to the subscriber and the ISP is effectively protected from any legal liability of their subscriber’s actions.

Amendments to the *Copyright Act* seeking to add provisions relating to the liability of Internet intermediaries and subscriber actions should take a “notice and notice” approach that will provide the best balance between the protection of intellectual property rights and the fundamental rights of individual and academic expression.

This would be consistent with actual Canadian practice as developed in the marketplace over the last several years, and which has worked well to balance the legitimate rights of IP owners and the legitimate IP and privacy rights of users.

5. Statutory Damages

Copyright holders are entitled to compensation from persons found guilty of infringing copyrighted works. Canada has a similar system of statutory damages to that of the USA. It allows for the copyright owner to elect an amount that is normally a minimum of \$500 for each work infringed, even if the value of that work is less than \$1.00 – for example, a downloaded song. This system has the potential for severe misuse, as has been demonstrated in the tens of thousands of lawsuits aimed at ordinary Americans for commonplace Internet activity. Routine settlements of \$7,500 from

ordinary families have proven to be a new revenue stream for the music industry, and other entities (such as the stock photography industry) are starting to emulate this pattern with exorbitant demands for damages vastly in excess of actual damages that would be awarded on a traditional calculation basis.

These practices have been referred to as “extortion” by some defendants in the American courts. The culmination of this draconian activity was a jury award of \$1,920,000 against a single mother for the downloading of 24 songs, in other words damages of \$80,000 for a song that would have cost \$0.99 to buy, of which only a fraction in turn would have been lost profits to the record companies.

Amendments to the *Copyright Act* need to ensure that statutory damages are limited and users must be protected from statutory damages if the user has good-faith to believe their use of the protected work was fair and non-infringing, or if the user is engaged in purely private and non-commercial activity.

6. Fair Dealing

To further foster innovation, creativity, competition and investment in Canada and to position Canada as a leader in the global digital economy, it is important to entrench, expand and protect the doctrine of fair dealing. Clearly defined and simplified fair dealing language and provisions provide assurances, spur innovation and provide the educational sector with essential tools to educate in a dynamic way that is reflective of new distribution and technological models.

The Supreme Court of Canada ruling in the *CCH Canadian Ltd v Law Society of Upper Canada* established the basis for fair dealing in Canada, however its rigid and focused nature is in need of simplification. By expanding fair dealing, Canadian law could include user rights in instances of parody and satire as well as format shifting, time shifting, and device shifting. Additionally, open and simply defined fair dealing criteria will help to ensure that the *Copyright Act* remains technologically neutral and flexible allowing it to easily adapt to future business models and new forms of creativity.

7. Public Domain

In order to direct and facilitate the digitization of Canadian heritage, a clear commitment needs to be made to preserve the current term of copyright. A pre-determined and generally accepted public domain date must be established for the good of all Canadians and the preservation of the heritage we so proudly maintain. Regional disparities between countries and the expiration of controlled copyrights should be eliminated in favour of a clearly defined, agreeable public domain length. Canada has a unique opportunity to play a leading role in setting realistic public domain dates thus freeing up the vast amount of works that remain locked down and away because they are controlled by overly restrictive and lengthy copyright terms. This term should not exceed the current term of life plus fifty years.

8. Anti-Counterfeiting Trade Agreement

As a member country actively engaged in the negotiation of the Anti-Counterfeiting Trade Agreement (ACTA), Canada should not allow this non-transparent trade agreement to override the democratic process and legal framework of the Canadian domestic *Copyright Act*. While supposedly designed to address counterfeit physical goods as well as Internet distribution and information technology, ACTA provisions may prove to over-ride any type of domestic copyright laws and negate user rights and fair dealing and even the entire copyright reform process.

Conclusion

An amended, modernized *Copyright Act* can best serve users by striking a fair balance between stakeholders rights and the fundamental rights and freedoms of users. Any amendments to this act must not prohibit circumvention devices and technologies, must remain technologically neutral, must modernize backup copy provisions, must provide a safe harbour for ISPs, must keep statutory damages in check, must expand and protect fair dealing and must not increase the term on public domain. Only then will Canada be a place where innovation, development and fair use will coexist in a model that will be respected by other nations. Canada will be in good company in resisting excessive DMCA-type legislation. Nations that have stood up to international and corporate pressures include Israel and New Zealand, countries whose policies Canada should strive to replicate in its *Copyright Act*.