PREFACE

The *Copyright Act* is an important law affecting the many sectors of the Canadian economy as well as the richness, diversity and vibrancy of Canada's cultural life. It is thus a key instrument for promoting Canada's economic, cultural and social development. In modernizing the *Copyright Act*, policy makers have therefore sought to meet both cultural and economic policy objectives.

The Government of Canada is committed to ensuring that copyright law promotes both the creation and the dissemination of cultural and other works. The cultural policy objective of the *Copyright Act* is to ensure adequate protection for creators of cultural content and appropriate access for all Canadians to works that enhance the cultural experience. The *Copyright Act* is seen as the foundation for creative endeavour. It allows traditional cultural industries, such as publishing, music, film and audiovisual, to grow and thrive.

The *Copyright Act* is also an increasingly important policy instrument for the development of information-based industries, such as business services (e.g. architectural and engineering services, computer services), software and database producers, and Internet service providers (ISPs). Consequently, the Government of Canada is also committed to ensuring that the *Copyright Act* serves as a powerful lever to promote innovation, entrepreneurship and success in the new economy.

In 2000, the gross domestic product (GDP) of the copyright-related sectors (publishing, film, music, software, visual arts, etc.) was estimated at $65.9 billion or 7.4 percent of Canadian GDP. Between 1992 and 2000, the value of these sectors increased by an annual average of 6.6 percent, compared with 3.3 percent for the rest of the Canadian economy. Together, these sectors formed the third most important contributor to the growth of Canada's economy.

This report is submitted in compliance with section 92 of the *Copyright Act*. The amendments to the *Copyright Act* in 1997 (Bill C-32) included an obligation stipulating the following:

> Within five years after the coming into force of this section [i.e. September 1997], 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.

A parliamentary committee will be tasked with reviewing this document and reporting back to Parliament within one year after the report of the Minister.

This report also follows up on the Government of Canada's paper, *A Framework for Copyright Reform*,[1] released by the Ministers of Industry and Canadian Heritage in June 2001 to guide future copyright reform. In that document the Government of Canada recognized that the rapid pace of technological change and international developments affecting copyright meant that large-scale amendments of the *Copyright Act* may no longer be the most effective approach to copyright reform. It identified a number of matters to be dealt with in future copyright revisions and outlined how it would consider them, consult Canadians and propose legislative amendments in a balanced, step-by-step manner. The Government of Canada invites parliamentarians to consult *A Framework for Copyright Reform*.

This report initiates the parliamentary review process under section 92 and provides an approach to managing copyright reform. The first chapter sets out the current reform environment, key copyright concepts, an overview of recent legislative history and the Government of Canada's approach to copyright reform. The second chapter provides a description and assessment of how the *Copyright Act* is currently functioning and key issues that may need to be addressed during the reform process. The third chapter sets out the Government of Canada's recommended approach for managing the reform process and an agenda for grouping priorities for reform.

In today's knowledge economy, copyright policy and law are of growing importance in Canada's economic and cultural success. This report is an important step to ensure that Canada's copyright framework remains among the most modern and progressive in the world. The Government of Canada looks forward to receiving the parliamentary committee's report.

[1] Industry Canada and Canadian Heritage, *A Framework for Copyright Reform* (Ottawa: Industry Canada and Canadian Heritage, 2001), on-line: Strategis (**http:/strategis.ic.gc.ca/SSG/rp01101e.html**).

EXECUTIVE SUMMARY

Introduction

This report is submitted to parliamentarians in compliance with section 92 of the *Copyright Act*, which requires that the Minister of Industry table a report within five years of the coming into force of Bill C-32 in September 1997 to initiate a comprehensive review of the *Copyright Act*. It also follows up on *A Framework for Copyright Reform* (the Framework document), released by the Government of Canada in June 2001 to guide future copyright reform.

Copyright is the right of the creator of an original work (and certain other subject matter) to authorize or prohibit certain uses of the work or to receive compensation for its use. It may be an exclusive right to control certain uses such as reproduction or a right to receive compensation such as the communication to the public or performance in public of a sound recording. Remuneration and control for rights holders, and the dissemination and access to their works, are the two fundamental principles underlying Canadian copyright policy.

Since it came into force in 1924, the *Copyright Act* has been an effective tool for fostering the creation of works by Canadians, and for enabling users, schools, libraries, communities, businesses and governments in Canada and around the world to have access to and use of these works. This important framework law contributes to the growth of many sectors of the Canadian economy and to the cultural richness and diversity of Canadian society.

Through the review and reform of the *Copyright Act*, the Government of Canada aims to provide better copyright protection and to ensure that the *Copyright Act* remains among the most modern and progressive in the world. Copyright reform will support the increased investment in knowledge and cultural works as set out by the Government of Canada in the 2002 Speech from the Throne and in its Innovation Strategy.

Over the years, the Government of Canada has ensured that the *Copyright Act* remains adapted to Canadians' priorities and values and continues to provide a fair, clear and efficient framework for the creation and dissemination of copyright-protected works. Today more than ever, copyright policy and law are being challenged by new and rapidly evolving technologies, global competition, and the growing importance of knowledge as a factor in economic success and cultural development. Given its direct impact on the creation and dissemination of new copyright material over media of all kinds, the Act must continue to evolve to respond to all these developments.

The Internet and digital technologies are continuously challenging the traditional notions of copyright as well as establishing new frontiers for the potential operation of the *Copyright Act*. These technologies enable the making of perfect copies that can be instantly transmitted around the world, making it difficult to control their use.

All stakeholders have called for copyright policy to be clarified for the use of digital technologies. Rights holders are looking for confidence in the protection of their material in an on-line environment. At the same time, users call for clear and fair rules of access and use of Internet content. In meeting cultural and economic policy objectives, policy makers will therefore need to balance competing domestic interests, and to assess the impact of new scientific and technological breakthroughs.

Canada must also learn from other nations' best practices and must continue to respect its obligations under international copyright and related rights treaties, such as the Berne and Rome Conventions, and under international trade agreements, namely the *North American Free Trade Agreement* (NAFTA) and the *World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). It also adhered to the principles embodied in two World Intellectual Property Organization (WIPO) treaties of 1996 — the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT) — which came into force in early 2002. Canada has yet to ratify these treaties. Ratification will be possible only after legislative amendments have been made.

As issues are being examined during the review, it will be important to be mindful of the key concepts underlying the *Copyright Act*, including, for example, types of rights (e.g. economic, moral, exclusive, remuneration); limitations (e.g. fair dealing, compulsory licence) and exceptions (e.g. for non-profit institutions, broadcasters, persons with perceptual disabilities); and remedies (e.g. summary proceedings, statutory damages).

Provisions and Operation of the *Copyright Act*

This report sets out the Government of Canada's assessment of the operation of the *Copyright Act*, including a listing of key issues that may need to be addressed in the coming years. It comprises outstanding issues from previous rounds of amendments, new issues that have emerged primarily as a result of the development of the Internet and other digital technologies, and the key issues relating to specific international trends and challenges. These issues are organized under two themes: recognition and protection of works and other subject matter; and access to and use of works and other subject matter.

The public policy objectives of remuneration and control for rights holders, and the dissemination and access to their works are the fundamental principles underlying Canadian copyright policy. From such principles flow the economic and moral rights that benefit creators and rights holders and enrich the Canadian cultural fabric. Stakeholders have expressed concerns with respect to the scope and adequacy of existing rights and have emphasized the need for legislative amendments. This report sets out 31 key rights holder issues relating to the copyright and moral rights in the following: literary, dramatic, musical and artistic works; performers' performances, sound recordings and communications signals; and related issues.

Although the recognition and protection of rights provide the basis for copyright, works are generally created in order to be disseminated. The report also sets out 14 key issues relating to uses of copyright material, typically comprising three different types:

individual use of copyright material for private consumption; use of copyright material for commercial exploitation (e.g. the use of music by broadcasters); and the use of copyright material by non-profit institutions (such as educational institutions). Also laid out in this report are many user issues relating to rights management, limitations and exceptions, and the private copying regime.

Agenda for Copyright Reform

The current statutory review builds on a process of reform and amendment initiated in the mid-1980s. The overarching objectives were to keep pace with international trends, to address the opportunities and challenges presented by emerging technologies, and to recognize the balance between the legitimate interests of creators to be paid for the use of their works and the needs of users to have access to those works.

The Government of Canada has already commenced the copyright reform process on a number of critical digital-related issues. It held consultations and proposed amendments to the *Copyright Act* regarding Internet retransmission of free over-the-air broadcast signals (Bill C-48). It also consulted on the four digital issues found in the *Consultation Paper on Digital Copyright Issues,* which relate to the two WIPO treaties (WCT and WPPT) and to ISP liability.

In the *Framework for Copyright Reform* document, the Government of Canada acknowledged the challenges ahead in further modernizing the *Copyright Act* and indicated that large-scale legislative amendments may no longer be the most effective approach to copyright reform. Consequently, it proposes in this report a copyright reform agenda that deals with issues packaged together according to a common thematic denominator for which policy work and legislative change could be reasonably and effectively achieved in a balanced, step-by-step manner. These thematic linkages are based on public policy needs, international developments, categories of works, or issues relevant to specific industry or cultural sectors. The Government of Canada proposes three groupings of issues to be addressed in the short, medium and long terms. These groupings were developed by using the broad principles and criteria laid out in the Framework document.

Conclusion

This report provides the basis for parliamentarians to engage in a dialogue on important and complex public policy issues that underpin the *Copyright Act*. The Government of Canada is seeking parliamentarians' views on the comprehensiveness of the list of major issues to be addressed, the grouping of certain issues and on the recommended copyright reform agenda. Over the coming year, the Government of Canada intends to continue to consult on and develop legislation to address the issues designated as requiring short-term attention. As the Government of Canada moves forward over the coming years to modernize Canada's copyright law, Parliament will have the opportunity to engage in public debate on specific pieces of legislation amending the *Copyright Act*.

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CHAPTER 1: INTRODUCTION

A. Background

In Canada, copyright falls exclusively under federal jurisdiction. It is a statutory right. In other words, no person is entitled to copyright protection other than under and in accordance with the *Copyright Act* (the Act). Copyright is the right of the creator of an original work (or certain other subject matter) to authorize or prohibit certain uses of the work or to receive compensation for its use. It may be an exclusive right to control certain uses such as reproduction, or a right to receive compensation, such as for the communication to the public or performance in public of a sound recording. It is distinct from the ownership of a physical copy of the work. Copyright differs from other forms of intellectual property, such as trade-marks and patents. Trade-marks such as words and designs are used to distinguish products and services of an individual or a company from those of its competitors. In order to be protected, inventions must be the subject matter of a patent granted by the Canadian Intellectual Property Office (CIPO).

As in many other countries, the origins of copyright law in Canada draw from a mixture of Anglo-American and continental European legal traditions. The Anglo-American legal system reflects an approach centred on the author's contribution to the pool of human art, knowledge and ideas through his or her work. Copyright law under this system is rooted in the British tradition, which took the form of monopoly protection of authors and publishers, and it has remained essentially economic in nature. In contrast, the continental European approach, which traces back to the mid-eighteenth century, was born in the human rights tradition and placed more emphasis on the link between the author and his or her creation. While the laws of continental Europe have adapted to economic realities, they remain centred on the work as the author's personal intellectual creation.

Both traditions have influenced Canada's legal framework for copyright. Modern copyright legislation in Canada recognizes the importance of protecting works while also seeking to advance important public policy objectives — cultural, economic and social — by striking an appropriate balance between creators' rights and users' needs.

B. The Current Reform Environment

B.1 The Domestic Context for Reform

Since coming into force in 1924, the *Copyright Act* has been an effective tool for fostering the creation of works by Canadians, and enabling users, schools, libraries, communities, businesses and governments in Canada and around the world to have access to and to use these works. These public policy objectives – remuneration and control for rights holders, and the dissemination and access to their works – are the fundamental principles underlying Canadian copyright policy. Over the years, the Government of Canada has ensured that the Act remains adapted to Canadians' priorities and values and that it continues to provide a fair, clear and efficient framework for the

creation and dissemination of copyright-protected works. Copyright law needs to be considered as well in association with other Canadian laws, including those dealing with privacy, broadcasting, competition and human rights.

Today more than ever, copyright policy and law are being challenged by new and rapidly evolving technologies, global competition, and the growing importance of knowledge as a factor in economic success and cultural development. A number of recent Canadian court decisions interpreting the *Copyright Act* constitute another aspect of the changing domestic context for copyright reform. The *Copyright Act*, given its direct impact on the creation and dissemination of new copyright material over media of all kinds, must evolve to respond to all these developments.

The growing importance to Canada's society and economy of reforming the *Copyright Act* was emphasized in the 2001 Speech from the Throne. The Government of Canada undertook to "provide better copyright protection . . . [and] . . . ensure that Canadian laws and regulations remain among the most modern and progressive in the world, including those for intellectual property and competitiveness." The Speech affirmed, "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 importance of ensuring that Canada has a progressive regime was reiterated by the Government of Canada in the September 2002 Speech from the Throne.

More recently, the importance of copyright reform to the management of knowledge was emphasized as one of the Government of Canada's highest priorities in its innovation strategy, as outlined in *Achieving Excellence — Investing in People, Knowledge and Opportunity.*[2] In that document, the Government of Canada stressed the need to "keep our intellectual property regime up to date, as knowledge advances," and "by 2010, complete systematic expert reviews of Canada's most important stewardship regimes" through "substantive comparisons and benchmarking against major international competitors." The goal of this strategy is to encourage citizens, communities, businesses and governments across Canada to create, innovate and benefit from these creations and innovations.

B.2 The International Context for Reform

Canada must also continue to respect its obligations under international copyright and related rights treaties. These include the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention) and the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (the 1961 Rome Convention). Canada has also joined trade agreements that contain copyright-related obligations, namely, the *North American Free Trade Agreement* (NAFTA) and the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs). These agreements establish minimum standards of protection for

[2] Canada, *Achieving Excellence — Investing in People, Knowledge and Opportunity* (Ottawa: Industry Canada, 2001), on-line: Government of Canada (**http://www.innovationstrategy.gc.ca**).

intellectual property that are bolstered by strong dispute resolution mechanisms. (A brief description of these international instruments can be found in the Appendix.)

With its signature in 1997, Canada also signalled its commitment not to derogate from the principles embodied in the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT), which were concluded under the auspices of the World Intellectual Property Organization (WIPO) in 1996. Both treaties came into force in early 2002. Canada has yet to ratify these treaties, as ratification will be possible only after legislative amendments have been made.

The WIPO Standing Committee on Copyright and Related Rights normally meets twice a year to discuss international copyright and related rights issues. Its recent meetings have focussed on database protection and the rights of broadcasters, and new agreements in these areas are likely to emerge over the coming years.

B.3 The Technological and Social Context for Reform

As new technological tools make it easier to create, copy, and share artwork, software, music, photographs and literature, copyright is more relevant to more people than ever before. Canadians have embraced the possibilities of new Internet tools and practices. Web pages, frames, hyperlinks and peer-to-peer transmissions are but a few examples of new tools used by Canadians to retrieve and share ideas and information.

The Internet and digital technologies in general are continuously challenging the traditional notions of copyright as well as establishing new frontiers for the potential operation of the Act. These technologies enable the making of perfect copies that can be instantly transmitted around the world, making it difficult to control their use. Fundamentally, the new digital environment relies on content, including literary text, pictures, drawings, sound recordings, video clips and software. As new, quicker, and more effective ways to access and communicate copyright material over the Internet in digital formats are developed, applying the traditional principles of copyright is becoming increasingly challenging. Too often conflicts arise among those who create, use, access, transmit and store protected works.

All stakeholders have called for copyright policy to be clarified for digital technologies. Rights holders are looking for confidence in the protection of their works in an on-line environment. At the same time, users call for clear and fair rules of access and use of Internet content. In meeting cultural and economic policy objectives, policy makers will therefore need to balance competing domestic interests, assess the impact of new scientific and technological breakthroughs and learn from other nations' best practices.

C. Key Copyright Concepts

An understanding of the key concepts underlying copyright law will be helpful in assessing the issues and reform agenda discussed in this report.

C.1 Work and Author

In the *Copyright Act*, the traditional subject matter protected by copyright is called a "work" and the person who creates a work is referred to as the "author" of the work.

C.2 Categories of Works

Modern copyright law applies to all original literary, dramatic, musical and artistic works. Each of these categories encompasses a large range of works. Literary works include novels, poetry, and essays, but also other types of texts, such as computer programs. Films, other audiovisual productions and plays are examples of works protected as dramatic works. Musical works include instrumental compositions as well as works containing lyrics and music. Artistic works include paintings, photographs, sculptures and architecture.

The Act also protects compilations. These include works resulting from the selection or arrangement of literary, dramatic, musical or artistic works. Compilations may also include multimedia products such as electronic games and databases, where the selection and arrangement of the underlying works or data give them an original character.

C.3 Authors' Rights

Typically, the *author* of a work is the first copyright owner of his or her work, except under certain circumstances such as when the work was created by an employee in the course of his or her employment. There are two kinds of author's rights: economic and moral rights.

Economic rights allow the author (or the person who has been assigned these rights) to authorize and seek payment for, or to prohibit certain uses of, the protected work. These uses include the reproduction of the work, its public display or performance, its adaptation, and its communication to the public (for example on the radio or television or via the Internet). These economic rights extend to the rental of copies of the work, but only for computer programs, musical works and sound recordings. Authors can *assign* their economic rights in whole or in part to someone else. These rights can also be inherited.

Moral rights stem from the continental European legal tradition and are based on the relationship between the author and his or her work. These rights allow an author to protect the integrity of his or her work from prejudicial alterations and to be associated with the work as its author by name or under a pseudonym or to remain anonymous. Moral rights are separate and distinct from economic rights. Since moral rights are intended to protect the reputation of the author, they cannot be assigned. They can, however, be waived in whole or in part and may also be inherited.

Subject to special cases, the rights of the copyright owner are *exclusive* and *distinct*. *Exclusive* means that only the copyright owner has the right to control how his or her work is used. *Distinct* means that each right in the work is independent from the other

rights. The copyright owner may therefore negotiate separately each right, such as the right to publish, adapt and translate, when according different users permission to use a work.

C.4 Originality and Fixation

To be protected under copyright law, a work must be *original*. Although there is no legislative definition of originality, case law provides a general understanding of what it entails in terms of content and labour. In terms of content, originality is embodied not in the idea contained in the work but in the expression of that idea. For example, historical facts and events are not protected by copyright. These unprotected ideas are available to anyone to shape into an original work. It is the work — that expression of ideas — that is then subject to copyright protection.

In terms of the labour involved in expressing an idea, some case law suggests that mere "industry" is insufficient to meet the test of *originality* — there must be some evidence of creativity and ingenuity.[3] Other cases suggest that the requirement of originality is satisfied if the product is the result of a substantial degree of skill, industry or experience.[4]

Although *fixation* is not explicitly required by the Act, some case law has suggested that a work must be "fixed" for it to be protected in Canada. For a work to be protected, it must be expressed in an identifiable and more or less permanent material form.[5]

C.5 Public Domain and Term of Protection

Public domain refers to material available to the public that is not or is no longer protected under the *Copyright Act*.

Works do not remain protected by copyright law indefinitely. The rights holder enjoys exclusive rights over his or her work only for a limited period of time. In general, the law protects published works for a specific period, typically the life of the author plus 50 years. Moral rights maintain the same term of protection as copyright. When the term of protection of these rights expires, the work falls into the public domain.

C.6 International Protection

The work of a Canadian author is protected in foreign countries if these countries are members of one of the relevant international conventions. The most important element of this protection is *national treatment*, which grants Canadians and their works in foreign jurisdictions the same level of protection as that country grants to its own citizens and

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[3] *Tele-Direct (Publications) Inc.* v. *American Business Information Inc.* (1997), 76 C.P.R. (3d) 296 (F.C.A.).

[4] *C.C.H.Canadian Ltd.* v. *Law Society of Upper Canada,* [2002] F.C.J. No. 690 (F.C.A.), on-line: Federal Court (**http://decisions.fct-cf.gc.ca/fct/2002/2002fca187.html**).

[5] *Canadian Admiral Corp.* v. *Rediffusion, Inc.* (1954), 20 C.P.R. 75 (Exch. Ct.).

their works. Most countries adhere to the conventions to which Canada adheres. Similarly, the Canadian *Copyright Act* applies to foreign authors, who are nationals of member countries, subject to certain conditions.[6]

C.7 Rights of Performers, Sound Recording Makers and Broadcasters

Performances, sound recordings and broadcast signals "capture" and transmit traditional works. Performances, sound recordings and broadcast signals are not considered works in themselves. However, many countries, including Canada, have moved to protect them, beginning with sound recordings in the early twentieth century.

In Canada, prior to 1997, sound recording makers had a limited right regarding the reproduction, rental and publication of their sound recordings, and performers could prevent the unauthorized recording of their performances. However, with the passage of Bill C-32, additional rights were established for three new categories of rights holders: performers, sound recording makers and broadcasters. These rights had gained widespread international recognition with the conclusion of the 1961 Rome Convention. They are often referred to as *neighbouring rights*.

Neighbouring rights are provided to acknowledge the investment and artistic effort that goes into making a record, putting on a performance, or operating a radio or television broadcasting station. They are more limited than authors' rights; notably they do not include moral rights.

Sound recording makers enjoy the right to publish their sound recordings for the first time, to reproduce them in any material form, and to prohibit the rental of copies of the sound recording.

Performers have specific rights regarding the use of their performances, whether live or recorded, including the right to prevent or allow the recording of their performances, to prevent the making of unauthorized copies, and to authorize the communication to the public of their live performances by telecommunications.

Broadcasters have limited rights in their communication signals, including the right to "fix" the signal in a recording, and to authorize the simultaneous rebroadcast of the signal by another broadcaster. A communication signal is defined as radio waves transmitted through space.

Both performers and sound recording makers have the right to be compensated for the communication to the public by telecommunication and the public performance of their published sound recordings. The term of protection in a performance is 50 years after its

[6] These elements of copyright are drawn from the *Berne Convention for the Protection of Literary and Artistic Works*, of which Canada is a member [hereinafter Berne Convention], on-line: WIPO (**http://www.wipo.int/treaties/ip/berne/index.html**).

first recording, or 50 years after its occurrence if it is not recorded. The term of protection in a sound recording or a broadcast is 50 years following the first fixation or broadcast.

C.8 Collective Management of Rights

Collective management societies ("collectives") serve as intermediaries between copyright owners and users through the collective administration of copyright. Collectives originated in order to streamline the licensing of copyright material when the individual management of rights for specific uses would be unmanageably complex, costly and time-consuming. Collective management provides copyright owners with a centralized mechanism for authorizing, controlling and receiving compensation for the use of their copyright material. It also increases the bargaining power of copyright owners. At the same time, collectives provide users of copyright material with a "minimum stop" or even "one-stop" rights clearance process, thereby simplifying the acquisition of authorizations.

C.9 Limitations and Exceptions to Rights

Access to culture and the dissemination of information remain important public policy objectives for Canadians. Limitations and exceptions to copyright protection strive to balance the rights of copyright owners with the access considerations of certain users. The Act, therefore, has several provisions that lay out these limitations and exceptions.

Fair dealing allows, without the permission of the copyright owner, a portion of a work to be reproduced for research or private study, and, with acknowledgement of the source of the work, for purposes of criticism, review or news reporting.

A *compulsory licence* gives entities, such as cable and direct-to-home companies, the permission to retransmit "over-the-air" radio and television signals without the permission of the rights holders, provided that applicable royalties are paid and specific statutory conditions are met. The rate of royalties is set by the Copyright Board.

Non-profit institutions have exceptions for the use of copyright materials in certain specific situations.[7] For example, not-for profit libraries, archives and museums can make copies of copyright material in their permanent collections to maintain or manage their collections. Non-profit educational institutions are allowed to play sound recordings and use television and radio programs when they are being aired, subject to certain conditions.

Broadcasters licensed under the *Broadcasting Act* have an exception that allows them to make a temporary recording of an event or performance to be broadcast later without requiring the copyright owner's permission. Broadcasters may also make a temporary copy of a sound recording, for the purpose of reformatting the material for broadcasting.

[7] Some of these exceptions do not apply if the use in question can be licensed by a collective society.

This is a limited exception since it does not apply when a collective society exists to provide remuneration for the rights holder.

Persons with perceptual disabilities have an exception allowing them to produce copies of works or sound recordings in perceptible formats without the permission of the copyright owner. However, the exception is not available when a suitable alternative format is already commercially available.[8]

C.10 Infringement

In general terms, an infringement of copyright means the carrying out of any of the protected uses of a protected work without the copyright owner's permission, unless a specific exception or limitation applies. It is also an infringement of copyright to engage in certain commercial activities (e.g. sale or importation) involving infringing copies of works or other copyright-protected subject matter (e.g. sound recordings). These latter activities are referred to as "secondary infringements." Infringement of the author's moral right occurs only if the work is distorted, mutilated or otherwise modified or is used in association with a product, service, cause or institution that prejudices the author's reputation or honour.

C.11 Remedies

Remedies for infringement available under the Act include injunctions ordering the infringing activities to stop; monetary damages paid to compensate rights holders for their losses; statutory damages; seizure and delivery up of infringing goods; and the costs of legal action. Although enforcement of rights is largely left to the rights holders who may seek civil remedies, commercial dealings in infringing material may reach a degree where state intervention is warranted. In such cases, the Act outlines a number of offences that entail criminal sanctions.

Several new measures came into force in 1999 as a result of Bill C-32, including *summary proceedings* (simplified court procedures to reduce the cost of litigation to all parties and shorten the time required for the resolution of issues); *statutory damages* (allowing the copyright owner to claim an amount between $500 and $20 000 in respect of each work, sound recording, performance or communication signal that is infringed); and *wide injunctive relief* (allowing a court to grant an injunction with respect to works later acquired by the plaintiff, even if the work did not exist at the time the legal proceedings were started).

[8] The Canadian *Copyright Act* defines perceptual disabilities to include hearing or visual impairment, the inability to manipulate or hold a book, and impairment relating to comprehension. This exception does not cover large print books or the subtitling or captioning of a cinematographic work.

D. Overview of Recent Legislative History

The current statutory review builds on a process of reform and amendment initiated in the mid-1980s. Seeking to keep pace with international trends and to address the opportunities and challenges presented by emerging technologies, the Government of Canada released in 1984 a White Paper on Copyright entitled *From Gutenberg to Telidon.*[9] The goal was threefold: to recognize and secure creators' rights in a communications era; to provide new opportunities for growth in the Canadian entertainment and information industries; and to strike an appropriate balance between creators' rights and users' needs, especially where market forces had not responded adequately to such rights and needs.

In 1985, after extensive review of and public hearings on the issues raised in the White Paper, the Standing Committee on Communications and Culture released *A Charter of Rights for Creators*,[10] a report with numerous recommendations. The Government of Canada responded publicly to these recommendations in 1986 and generally endorsed the Committee's view that "copyright legislation must reflect the legal recognition of the exclusive right of a creator to determine the use of a work and to share in the benefits produced by that use."[11] However, the Government of Canada also stated that "new copyright legislation must recognize the balance between the legitimate interests of creators to be paid for the use of their works and the needs of users to have access to those works."[12]

The reform process for Canada's copyright regime was subsequently carried out over two main phases — Phase I ending in 1988 and Phase II ending in 1997. The following five major outcomes are the result of this phased process.

1) *Modernization of the* Copyright Act — A number of new provisions, including a compensation right for cable retransmission and a clarification of the scope and strength of moral rights helped to modernize Canada's copyright legislation.

2) *Stronger Recognition of Collective Administration and the Copyright Board* — Collective societies administer specific rights on behalf of their rights holder members. Phase I allowed the emergence of new types of collectives over which the Copyright Board was given jurisdiction. Phase II provided for collective

[9] Consumer and Corporate Affairs Canada, *From Gutenberg to Telidon: A White Paper on Copyright* (Ottawa: Supply and Services Canada, 1984).
[10] House of Commons, Standing Committee on Communications and Culture, *A Charter of Rights for Creators — Report of the Subcommittee on the Revision of Copyright* (Ottawa: Supply and Services Canada, 1985).
[11] Canada, "Letter from Minister of Consumer and Corporate Affairs and Minister of Communications," *Government Response to the Report of the Sub-Committee on the Revision of Copyright* (Ottawa: Supply and Services Canada, 1986), p. 2.
[12] Government Response, *ibid*., p. 2.

administration for new rights for performers, sound recording makers and broadcasters. The Copyright Board became a full-time administrative tribunal.

3) *Introduction of Rights for Performers, Sound Recording Makers and Broadcasters* — New rights for performers and sound recording makers ensured that they would be compensated when their performances or recordings were communicated to the public or performed in public. Broadcasters were given certain rights in their signals, including the right to "fix" them, as well as certain limited rights in relation to their rebroadcast or public performance.

4) *Introduction of New Exceptions in Favour of Non-Profit Institutional Users* — The Phase II amendments provided schools, libraries, archives and museums with new exceptions. Some of these exceptions only apply if no collective is able to license the uses in question.

5) *Private copying* — Phase II created a regime for compensating rights holders for the unauthorized copying of sound recordings for private use. This regime consists of a levy payable in respect of certain types of media used for such copying. The amount of the levy is set by the Copyright Board and, since 2000, the levy is collected and administered by the Canadian Private Copying Collective.

The Government of Canada also brought the *Copyright Act* in line with commitments made under the *Canada-United States Free Trade Agreement* (FTA) in 1989, the NAFTA in 1995, and the WTO TRIPs Agreement in 1996. With Phase II complete, Canada had substantially modernized the Act, and had dealt with numerous issues of domestic and international concern. It was able to become a party to an international agreement (the 1961 Rome Convention) and to meet the standards and ratify the latest (1971) version of the Berne Convention.

Following these amendments, however, many issues remained outstanding and new issues were emerging. These new issues related primarily to the development of the Internet and other digital technologies. Some were flagged by the Information Highway Advisory Council (IHAC) in its 1995 report, *Connection, Community, Content: The Challenge of the Information Highway*.[13] It recommended that, given the accelerated digitization of information, the Government of Canada recognize that encouraging the creation of works is critical to national and cultural identity and economic development. In December 1997, the Government of Canada signed the *WIPO Copyright Treaty* (WCT) (for authors) and the *WIPO Performances and Phonograms Treaty* (WPPT) (for sound recording makers and performers), partly in response to a recommendation made

[13] Industry Canada, Information Highway Advisory Council, *Connection, Community, Content: The Challenge of the Information Highway* (Ottawa: Supply and Services Canada, 1995), on-line: Industry Canada (**http://strategis.ic.gc.ca/SSG/ih01070e.html**).

in IHAC's 1997 report, *Preparing Canada for a Digital World: Final Report of the Information Highway Advisory Council*.[14]

E. Canada's Approach to Copyright Reform

Copyright reform is a work in progress. Technological development — new and constantly changing methods of reproduction, distribution and dissemination — has meant that copyright laws around the world constantly face calls for review. The tools, skills, talents and technologies that creators rely on to create copyright works are constantly changing and developing. Ensuring that the Canadian *Copyright Act* remains responsive to domestic and international developments, and to technological change, is challenging.

In the past, the Government of Canada attempted to meet the needs of a wide range of stakeholders by undertaking comprehensive phases of legislative change. However, the often-varied interests of copyright stakeholders resulted in polarization and an unwieldy legislative process. The government, in support of good public policy and in recognition of the need to make legislative change quickly and efficiently, sought a new approach to copyright reform.

With the release of *A Framework for Copyright Reform* (the Framework document) in June 2001, the Government of Canada outlined a step-by-step process for reforming Canadian copyright legislation in the coming years. As set out in the Framework document, the Government of Canada is working to build a strong copyright framework for the future through regular cycles of legislative reform. Revisions will be more effective and responsive by dealing with targeted groupings of related issues and by being guided by strong public interest objectives. The Framework document sets out the four key objectives to be met through the reform process:

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

In addition, two sets of pressing issues were identified in the Framework document for immediate attention: Internet retransmission of broadcast programs; and certain key threshold digital issues, including the three main Internet issues raised by the WCT and WPPT and the question of ISP liability. The Government of Canada began public consultations in June 2001 with the release of two consultation papers on these issues.[15]

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[14] Industry Canada, Information Highway Advisory Council, *Preparing Canada for a Digital World: Final Report of the Information Highway Advisory Council* (Ottawa: Industry Canada, 1997), p. 72, on-line: Industry Canada (**http://strategis.ic.gc.ca/SSG/ih01650e.html**).

[15] Industry Canada and Canadian Heritage, *Consultation Paper on Digital Copyright Issues* (Ottawa: Industry Canada and Canadian Heritage, 2001), on-line: Strategis

With respect to Internet retransmission, Bill C-48 was introduced in December 2001. The Bill was adopted by the House of Commons in June 2002 and has now been referred to the Senate. With respect to the digital issues, the Government of Canada received more than 600 submissions from interested parties during the fall of 2001 and held face-to-face round table meetings across Canada in the spring of 2002. It is currently reviewing the results of these consultations in preparation for addressing the first group of issues in the reform agenda, as presented in Chapter 3.

The Government of Canada's aim is to maintain a modern *Copyright Act* that promotes the best interests of Canadians, while adhering to our international obligations. While parliamentarians consider this report, the Government of Canada will continue to develop policy options and proposals and to consult Canadians. As the Government of Canada moves forward over the coming years to modernize Canada's copyright law, Parliament will have the opportunity to engage in public debate on specific pieces of legislation amending the Act.

The Government of Canada invites parliamentarians to consider the information and analysis in this report and the proposed agenda for the policy work ahead.

(**http://strategis.ic.gc.ca/SSG/rp01099e.html**). Industry Canada and Canadian Heritage, *Consultation Paper on the Application of the Copyright Act's Compulsory Retransmission Licence to the Internet* (Ottawa: Industry Canada and Canadian Heritage, 2001), on-line: Strategis (**http://strategis.ic.gc.ca/SSG/rp00008e.html**).

CHAPTER 2: PROVISIONS AND OPERATION OF THE *COPYRIGHT ACT*

This chapter sets out the Government of Canada's assessment of the operation of the *Copyright Act*, including a listing of key issues that may need to be addressed in the coming years. Although this list is extensive, it is not meant to be exhaustive. It comprises outstanding issues from previous rounds of amendments, new issues that have emerged primarily as a result of the development of the Internet and other digital technologies, and the key issues relating to specific international trends and developments.

The Act has for the most part served Canadians well since its coming into force in 1924. Its basic layout remains unchanged and, with relatively minor modification, it has responded to the technological challenges to rights holders posed by the phonogram, radio and television broadcasting, and the videocassette recorder. Now the Act faces another major challenge with respect to the Internet (and the digital environment). It is timely to assess the issues that the Government of Canada may need to address to keep the *Copyright Act* modern, balanced and consistent with international trends.

The typical legislative response to new technological developments has been to implement new rights for authors and others, often with corresponding exceptions for users. The *Copyright Act* has as a result become a complex array of rights, exceptions, rules and procedures that interplay across nine parts. It has accordingly been criticized for being overly complex, unclear and at times difficult to apply. Since copyright is now relevant to so many individuals, businesses and institutions, the ability to understand the Act is an important element of its function and purpose. As issues are being considered, thought will therefore have to be given to how ultimately to make the Act simple, coherent, balanced, internally consistent and easily comprehensible. This is the broad issue affecting the operation of the *Copyright Act* as a whole.

The specific issues set out in this chapter are organized thematically under two sections: recognition and protection of works and other subject matter; and access to and use of works and other subject matter, as well as related issues. They comprise both outstanding issues left over from previous reform efforts and new issues that have arisen as a result of technological developments. In each case, the issue is stated and followed by a brief discussion including, where relevant, reference to the reform activities in foreign jurisdictions.

A. Recognition and Protection of Works and Other Subject Matter

The *Copyright Act* recognizes rights and provides protection for creators and other rights holders in order to promote important cultural, economic and social public policy objectives. From such recognition flow the economic and moral rights that benefit rights holders and enrich the Canadian cultural fabric. Stakeholders have expressed concerns with respect to the scope and adequacy of existing rights and have raised the need for

legislative amendments. This section addresses rights holder issues relating to the copyright and moral rights in literary, dramatic, musical and artistic works, performers' performances, sound recordings and communications signals, as well as related issues.

A.1 Copyright and Moral Rights in Literary, Dramatic, Musical, and Artistic Works

A.1.1 Authorship of films and videos

Issue: *Whether the Act should be amended to specify the author or the first owner of copyright in a film or video.*

The Act does not currently identify the author of a cinematographic work (i.e. film). A long-standing issue is who should be considered the author or authors of such a work (e.g. director, producer or screenwriter). The film industry has settled some of the practical issues through various contractual mechanisms. However, to facilitate copyright clearance, and film production financing, some believe it may be desirable to clarify who is the author or to create a rule on the first ownership of copyright in cinematographic works. Moreover, there must be an identifiable author to determine the applicable term of protection in cinematographic works.

The European Union (EU) has decided that the principal director of a film is an author, and allows member states to determine whether any other parties may be a co-author.[16] The U.K. makes the producer and director joint authors.[17] France provides authorship to screenwriters and composers of the screen music in addition to the director, but anyone who has contributed some creative input can be classed as a co-author.[18] In Australia, the producer is considered the author and the owner of the copyright.[19]

A.1.2 Authorship of photographs

Issue: *Whether section 10 of the Act should be amended to provide photographers with the same authorship right as other artistic works.*

The author of a work is usually the person who creates it. Where the work is a photograph, however, the owner of the initial negative or photograph (if there is no negative) is deemed to be the photograph's author. This rule of authorship of photographs

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[16] EC, *Council Directive 92/100 of 19 November 1992 on the rental right and lending right and on certain rights related to copyright in the field of intellectual property*, [2001] O.J. L. 167/10, art. 2.2, on-line: The European Commission (**http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31992L0100&model=guichett**).

[17] The *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48, s. 9(2)(a), [hereinafter the U.K. Act] on-line: HMSO (**http://www.hmso.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm**).

[18] *Code de la propriété intellectuelle* (Fr.), art. L. 113-7, [hereinafter the French Code], on-line: Legifrance (**http://www.legifrance.gouv.fr/html/frame_codes1.htm**).

[19] *Copyright Act 1968* (Aus.), ss. 98, 189, on-line: Australasian Legal Information Institute (**http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/**).

deviates from the general rule that the human creator is the author of a work (the rationale being that the author can be an individual or a corporation). The rule also means that photographers who do not own the negative or photograph hold neither the copyright nor the moral rights in the photograph. This deviation dates back to when photography was commonly regarded as an industrial operation rather than a potential art form, and when the inadequacy of early photographic equipment restricted a photographer from expressing "originality" in his or her work. Photographers argue that the deviation is no longer justifiable and seek an amendment to the Act. The copyright regimes of most of Canada's international partners generally treat photographs in the same way as other artistic works.

A.1.3 Crown copyright

> ***Issue:*** *Whether section 12 of the Act should be amended to limit copyright protection in certain government material, including limiting the comprehensive nature of the government's right when a work is produced by an independent author, or to limit its perpetual right in unpublished Crown works.*

Crown copyright refers to copyright in works by federal, provincial and territorial governments and their agencies. Examples of Crown copyright material include government reports and studies, parliamentary debates, statutes and regulations, judicial decisions and statistics. The *Copyright Act* provides that, subject to any agreement to the contrary, governments own the copyright in any work that has been prepared or published by any of their departments or under their direction or control.

Because government materials are produced in the public interest and from public funds, it has been argued that governments ought not to exercise copyright to limit their accessibility or use. By eliminating Crown copyright, however, the ability of governments to provide material on a cost-recovery basis could be hampered,[20] which could limit the types of information that would be produced for the benefit of the public. The Government of Canada may of course grant a royalty-free licence to use certain works protected by Crown copyright (as is the case for laws and judicial decisions[21]), but other documents would have to be licensed. At present, licensing the use of works subject to Crown copyright may sometimes represent a substantial burden for the user. Unless user-friendly licensing is put in place, there is likely to be increasing pressure to remove from the Act Crown copyright protection entirely.

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[20] Note, though, that the U.S. Government publishes large amounts of material in spite of the absence of copyright protection on (domestic) governmental documents in that country.

[21] At the national level, the Government of Canada has already determined that its laws and regulations ought to be freely available to its citizenry. Although Crown copyright still exists in such material, the Government of Canada has decreed, by Order in Council, that it will not exercise its rights except to prevent alteration or other clear abuses. *Reproduction of Federal Law Order*, P.C. 1996-1995, SI/98-113(F), on-line: The Department of Justice Canada (**http://laws.justice.gc.ca/en/otherreg/SI-97-5/177965.html**). These laws and regulations are available on-line from the Justice Canada Web site.

This issue has important implications for the various departments and Crown agencies as well as for users such as librarians and archivists. There will also be a need to coordinate between the various levels of government.

A.1.4 Databases

Issue: *Whether the Act should be amended to provide for some form of protection for non-original databases.*

A database is a collection of digitized information, facts, works or other material that has been arranged in such a way that a user can retrieve items having certain characteristics or meeting certain criteria. Organizations, such as publishers, commercial enterprises, hospitals, educational institutions, libraries and archives, expend considerable resources in developing and maintaining databases, whether for commercial or non-commercial, internal or external use. Providing appropriate legal protection for databases can therefore provide important incentives to invest in their creation and use.

A work that results from the selection or arrangement of works or data may itself be protected as a "compilation" as defined in the *Copyright Act*. From this definition, many databases receive copyright protection with its attendant rights, exceptions and term of protection. Exactly which databases benefit from copyright protection remains unclear, however. Recent court decisions suggest that the selection and arrangement of the underlying works or data must be sufficiently "original" to qualify for protection. The fact that considerable effort or money was invested in the creation of the database may be irrelevant. A broader issue is whether copyright protection, with its particular rights, exceptions and term of protection, is the most appropriate way to protect databases.

Internationally, the issue of database protection was raised during the 1996 Diplomatic Conference in Geneva, which led to the conclusion of the WCT and WPPT.[22] No consensus was reached among WIPO member states at that time. In the same year, however, the EU adopted its Database Directive, which provides for special rights for "non-original" databases.[23] The directive prohibits the extraction from, or re-use of, any database in which there has been a substantial investment in obtaining, verifying or presenting the data. Australia protects databases under traditional copyright law based on the effort needed for their creation.[24] In the U.S., compilations are protected on the

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[22] *Basic Proposal For The Substantive Provisions Of The Treaty On Intellectual Property In Respect Of Databases To Be Considered By The Diplomatic Conference*, on-line: WIPO (**http://www.wipo.org/eng/diplconf/6dc_sta.htm**).

[23] EC, *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*, [1996] O.J. L. 77/20, on-line: The European Commission (**http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31996L0009&model=guichett**); implemented in the U.K. in 1998 as a new 15-year "database right." See also, Robert Howell, *Database Protection and Canadian Laws* (October 1998) prepared for Industry Canada and Canadian Heritage, on-line: Strategis (**http://strategis.ic.gc.ca/SSG/ip01045e.html**).

[24] The Australian *Copyright Act 1968*, *supra*, note 19, ss. 10, 32. Also, *Telstra Corporation Ltd.* v. *Desktop Marketing Systems Pty. Ltd.* [2002] FCAFC 112.

condition of originality.[25] A number of bills protecting non-original databases have been presented to Congress,[26] but no consensus has yet been reached.

A.1.5 *Droit de suite* (resale royalty right)

Issue: *Whether the Act should be amended to provide visual artists with the right to receive a percentage of the price paid upon subsequent resale of their work.*

Unlike writers and composers who can collect royalties whenever their works are performed or published, the income of many visual artists is derived primarily from the first sale of works embedded in a unique original or in a limited number of copies (e.g. sculpture or signed lithographs). *Droit de suite* is the right of the author of an artistic work to receive a percentage of the selling price arising from its subsequent resale. Concerns have been expressed that the introduction of such a right would discourage resale of such artistic works in Canada (i.e. important works might be sold at auctions in jurisdictions without such a right.) No such right exists in Canada at present, though the Act does not prevent a buyer and seller from voluntarily including such a term in an agreement of purchase and sale. The EU requires its member states to phase in a *droit de suite* in their legislation[27] and the state law of California also provides for a resale right.[28] Further analysis is required to assess the potential impact of a *droit de suite* on buyers, sellers and intermediaries.

A.1.6 Distribution right

Issue: *Whether the Act should be amended to introduce an explicit distribution right in order to comply with the WIPO treaties.*

The 1996 WIPO treaties provide for a "right of distribution" which includes the right of authorizing the making available to the public of tangible copies of copyright material through sale or other transfer of ownership.[29] In Canada, this right may be covered to a large extent by the publication right.

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[25] The definitive case in this area is *Feist Publications, Inc.* v. *Rural Tel. Serv. Co.,* 499 U.S. 340 (1991).

[26] There have been at least two different federal statutes proposed in the U.S. to deal with the protection of databases but neither has yet passed. Bill H.R.354, *The Collection of Information Antipiracy Act*, 106 Congress (introduced 1/19/1999), on-line: The Library of Congress (**http://thomas.loc.gov/**) and Bill H.R. 1858, *The Consumer and Investors Access to Information Act of 1999*, 106 Congress (introduced 5/19/1999), on-line: Library of Congress (**http://thomas.loc.gov/**).

[27] EC, *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art*, [2001] O.J. L. 272/32, on-line: The European Commission (**http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32001L0084&model=guichett**).

[28] *California Civil Code* s. 986, on-line: Official California Legislative Information (**http://www.leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=00001-01000&file=980-989**)

[29] *WIPO Copyright Treaty*, 20 December 1996, CRNR/DC/94, art. 6, on-line: WIPO (**http://www.wipo.org/eng/diplconf/distrib/94dc.htm**), [hereinafter WCT]; *WIPO Performances and*

A.1.7 First ownership of commissioned photographs

Issue: *Whether to amend subsection 13(2) of the Act to provide that the author is the first owner of copyright in a commissioned photograph.*

The first owner of copyright in a commissioned photograph, engraving or portrait is deemed to be the individual or corporation who commissioned the work. Bill C-32 altered the ownership rule for photographs slightly by effectively making the photographer the owner of copyright in the event that he or she has not been paid for the commissioned work.

Photographers have asked that this rule be eliminated so that, as with other types of works, the photographer is the first owner of copyright. They argue that eliminating this rule would be necessary for Canadian photographers to exploit large and valuable databases of photographs that may be commissioned for advertising or other commercial purposes but are never used. Other concerns have been expressed, however, with respect to photographs commissioned for private or domestic purposes, e.g. family or wedding portraits, notably that the photographer may use these photographs in ways not contemplated by the person who commissioned the photograph.

There is no EU-wide regulation dealing with this issue. The U.S., U.K. and Australia do not have a special rule with respect to the first ownership of commissioned photographs. The U.K. grants certain rights of control to a person who commissions a photograph or film for private or domestic purposes, while Australia has a comparable right with respect to photographs only.[30]

A.1.8 Fixation

Issue: *Whether the Act should be amended to clarify whether fixation is a requirement for copyright protection.*

Although not defined in the Act, fixation refers to the existence of a work in a material form. Case law effectively makes fixation a requirement for copyright protection in Canada and some other countries (e.g. the United States (U.S.)), but not in a number of other countries around the world. The question is whether it should remain as a substantive condition of copyright (*condition de fond*) when in fact its origins suggest that it is essentially a practical, evidentiary requirement.[31] While the requirement seems understandable for certain types of works (e.g. sound recordings and audiovisual productions), its application in other areas is questionable. It has led to incongruous judicial decisions in the case of oral works (such as speeches and interviews) where

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Phonograms Treaty, 20 December 1996, arts. 8 and 12, on-line: WIPO (**http://www.wipo.int/clea/docs/en/wo/wo034en.htm**) [hereinafter WPPT].

[30] The U.K. *Act, supra*, note 17, s. 85. The *Copyright Act 1968* (Aus.) *supra*, note 19, s. 35(5) and (7).

[31] *Canadian Admiral Corp.* v. *Rediffusion Inc.*, *supra*, note 5.

copyright was granted not to the speaker but to the person recording what was said.[32] Fixation as a substantive requirement for protection has essentially been eliminated with respect to musical performances.

A.1.9 Linking

> ***Issue:*** *Whether the Act should be amended to provide that linking to another Web site, which contains infringing material, ought to be considered copyright infringement*.

In the Internet context, "linking" refers to the use of a hypertext link by which a Web site and its content are made directly accessible from another site that the user is "browsing". Typically, the user reaches the new site by clicking on underlined text or an icon that represents the link. Although a given site may contain no infringing material, its links may lead to sites that do.

A.1.10 Making available right

> ***Issue:*** *Whether the Act should be amended to give rights holders an exclusive right to make their copyright material available on an on-demand basis over digital networks.*

The current *Copyright Act* covers all forms of communication to the public over digital networks (i.e. the Internet) whether by an exclusive right (for authors) or the right of remuneration (for performers and sound recording makers). Rights holders consider it essential to have the right to authorize or control the appearance of their copyright material in all media including the networked environment. This control is provided for in both the WCT and WPPT in the form of a *making available right*.[33] This would be an exclusive right to authorize a communication on an "on-demand" basis, i.e. at a time and place of the choosing of the user, as opposed to a right of remuneration. The communication right that currently exists in section 3 of the Act may already afford this type of protection to authors. However, the Act would likely need amendment if the same type of protection were to be recognized for sound recording makers and performers.

Similar to Canada, the U.S., the EU[34] and Australia[35] have communication rights that largely cover authors. The U.S. has recognized rights for communication to the public in

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[32] *Gould Estate* v. *Stoddart Publishing Co*. (1996), 30 O.R. (3d) 520, aff'd (1998), 39 O.R. (3d) 545; *Hager* v. *ECW Press* (1998), 85 C.P.R. (3d) 419 (F.C.T.D.).

[33] WCT, art. 6(1) and WPPT, art. 8(1), *supra*, note 29.

[34] EC, *Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, [2001] O.J. L. 167/10, art. 3(1), on-line: The European Commission (**http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32001L0029&model=guichett**).

[35] *Copyright Act 1968* (Aus.), *supra*, note 19, ss. 10, 31.

a digital environment for the owner of the sound recording. (i.e. phonorecord delivery[36] and interactive communication[37]). Performers have such rights if they are co-authors of the sound recording. The EU requires member states to provide for the exclusive right to authorize or prohibit the making available to the public of both performances and sound recordings.[38] Australia provides for a making available right to the copyright owner of the sound recording[39] through the definition of the communication right. Performers do not yet have any performance or communication right with respect to fixed performances.

A.1.11 Moral rights

> ***Issue*****:** *Whether sections 14.1, 28.1 and 28.2 of the Act should be amended to address outstanding moral rights issues.*

New technologies have provided more ways for users to manipulate works, which has raised questions surrounding the scope of moral rights. Writers and artists have expressed concern that digital technologies, such as the Internet, facilitate the alteration of the integrity and paternity of works, and that stronger protection of moral rights may therefore be warranted. Moreover, authors contend that the Act creates unfavourable contractual circumstances because it explicitly indicates the possibility of waiving moral rights but does not require that the waiver be in writing. Authors believe that some parties will require them to waive their moral rights as a pre-condition to the use of their works. Some stakeholders have also suggested that the absolute right of integrity in certain artistic works in subsection 28.2(2) should be explicitly limited to originals or limited editions.

A.1.12 Reproduction right for artistic works

> ***Issue:*** *Whether the Act should be amended to change the definition of "reproduction" as it relates to artistic works, thereby expanding the reproduction right of visual artists, given the emergence of new technologies that allow transference of works from one medium of display to another.*

This issue arises from the interpretation of "reproduction" that the Supreme Court applied in the recent *Théberge* decision.[40] The Court found that a transfer of a print of a painting from a poster to a canvas through a chemical process that left the poster blank did not constitute a "reproduction" within the meaning of the *Copyright Act*. Artists have expressed concern that the reproduction right may be inadequate to protect what they view as their right to prevent such copying of their works by people who can take advantage of new technologies to transfer works without producing additional copies.

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[36] 17 U.S.C. § 115(c)(3)(H), on-line: The United States Copyright Office (**http://www.copyright.gov/title17/circ92.pdf**).
[37] 17 U.S.C. § 114 (d)(1), *ibid*.
[38] EC, *Council Directive 2001/29*, *supra*, note 34, art. 3(2).
[39] *Copyright Act 1968* (Aus.), *supra*, note 19, ss. 10, 85.
[40] *Théberge* v. *Galerie d'Art du Petit Champlain Inc.* (2002) SCC 34, on-line: Lexum (**http://www.lexum.umontreal.ca/csc-scc/en/rec/html/laroche.en.html**).

A.1.13 Rights management information

> ***Issue:*** *Whether the Act should be amended to prohibit tampering with rights management information that is normally used to identify works and other subject matter.*

Rights management information generally refers to information that identifies a work or sound recording, such as the title, the author or first owner, the performer and an identifying code. It can also refer to terms and conditions related to the use of copyright material. The ability of rights holders to embed rights management information in their material helps them assert their interest in the material and monitor its use, especially in the network context. It can also facilitate on-line licensing. The information is only useful if its integrity is maintained, however. The WCT and WPPT both require member states to provide legal protection against tampering with rights management information that may be embedded in a work or sound recording.[41] The *Copyright Act* currently contains no such provisions.

A.1.14 Rights of freelance periodical writers

> ***Issue:*** *Whether the Act should be amended to expressly provide that any rights not explicitly assigned remain with freelance periodical writers.*

Recent cases in both Canada and the U.S.[42] have addressed whether freelance writers who sell their material to newspapers, magazines or similar periodicals for print publication may prevent other uses of their material not originally contemplated by agreement or industry custom, notably digital reproduction and distribution. The Act gives rights holders considerable flexibility in assigning or licensing their rights. Some have requested, however, that the Act be amended to expressly provide that any rights not explicitly assigned remain with the author. This issue is complicated because it raises difficult questions of contract law, including questions related to the writers' bargaining power.

A.1.15 Technological protection measures

> ***Issue:*** *Whether the Act should be amended to provide sanctions against persons who use circumvention technologies to infringe copyright by defeating protective technologies such as encryption.*

New technologies have made it relatively easy to make "perfect" copies of digitized material with no loss in quality from the original. When combined with networks such as

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[41] WCT, art 12; WPPT, art 19, *supra,* note 29.

[42] *Tasini* v. *The New York Times*, 200 U.S. 321 (2001). *Robertson v. Thomson Corp*., [2001] O.J. No. 3868 (S.C.J.); *Association des journalistes independants du Québec (AJIQ-CSN) c. CEDROM-SNEI,* (1999), 500-06-000082-996J.Q. no. 4609.

the Internet, which transmit digitized content, these technologies mean that copyrighted material becomes easily available to a worldwide audience. Some rights holders are naturally concerned that once their works, performances or sound recordings are available over the Internet, preventing unauthorized dissemination becomes nearly impossible. They have indicated that the adoption of protective or "counter" technologies — encryption, for example — is the means by which they plan to disseminate their material in the networked environment and protect it from copyright infringement. At the same time, such measures could significantly affect lawful access, for example, by fair dealing, various exceptions, and access to material in the public domain. The WCT (for authors) and the WPPT (for sound recording makers and performers), both have provisions dealing with the legal protection of such technological measures.[43]

The *Copyright Act* would have to be amended to implement these WCT and WPPT provisions and permit ratification. The various possible approaches to implementation are controversial. U.S. and EU copyright law both have provisions that prohibit not only the act of circumventing protective technological measures, but also the manufacture and trade in devices that may be used to circumvent.[44] Australian law targets only the devices and not the act of circumvention itself.[45]

A.1.16 Term of protection

> ***Issue:*** *Whether section 6 of the Act should be amended to extend the term of protection to 70 years following the author's death.*

The current term of protection under the *Copyright Act* for a work is consistent with the Berne Convention, which generally requires member states to provide a term of protection of the life of the author plus 50 years. The EU and the U.S. have extended the term of protection to the life of the author plus 70 years.[46] Rights holders would like Canada to follow suit, but others question as a matter of public interest the need for such an extension.

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[43] WCT, art. 11: "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."
WPPT, art 18: "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law." *Supra*, note 29.

[44] 17 U.S.C. § 1201, *supra*, note 36; EC Directive 2001/29, art. 6, *supra*, note 34.

[45] *Copyright Act 1968* (Aus.) *supra*, note 19, s. 116A.

[46] EC, *Council Directive 93/98/EEC of 29October 1993 harmonizing the term of protection of copyright and certain related rights*, O.J. L. 290/9, on-line: The European Commission (**http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31993L0098&model=guichett**); *Sonny Bono Copyright Term Extension Act*, Pub. L. No. 105-298, 112 Stat. 2827 (1998), the United States *Copyright Act* 17 U.S.C. § 302, *supra*, note 36.

A.1.17 Term of protection of photographs

> ***Issue:*** *Whether section 10 of the Act should be deleted so as to allow the term of protection of photographs to follow the general rule applicable to other categories of works, currently the life of the author plus 50 years.*

The term of protection for photographs prior to Bill C-32 was 50 years from when the initial negative was made, but Bill C-32 changed it to the life of the author plus 50 years if the author is an individual or a corporation owned and controlled by the photographer. If the author is a corporation *not* owned and controlled by the photographer, then the term is 50 years from the time the initial negative or photograph (if there is no negative) was made. Many photographers believe that the existing rules are confusing and impractical given that corporate authorship can yield different results. The term of protection under the WCT is the life of the author plus 50 years for all photographs.

A.1.18 Term of protection for unpublished works

> ***Issue:*** *Whether section 7 of the Act should be amended to alter the provisions, which will result in certain old unpublished works falling into the public domain in 2004.*

The term of copyright protection in Canada is the life of the author plus 50 years following the year of the author's death. The general rule does not apply in all cases, however. Prior to Bill C-32, unpublished works had perpetual protection and posthumous works (i.e. works published for the first time after the death of the author) had protection for 50 years after the date of publication. The Act was amended to change the terms of protection in both cases to the regular term of life of the author plus 50 years following the author's death.

Section 7 sets out two transitional provisions for authors who died more than 50 years before the amendments took effect in 1998 and for those who died within the 50 years immediately preceding the amendments. Unpublished works of authors who died more than 50 years before 1998 are protected until 2004. Unpublished works of authors who died within 50 years of 1998 are protected until 2049.

These transitional provisions have created difficulties for the estates of certain rights holders. Those rights holders who have an interest in unpublished works that will fall into the public domain in 2004 believe that there is insufficient time to exploit the works. This issue is time-sensitive, as any amendments to the Act will need to come into force before 2004.

A.1.19 Traditional knowledge

> ***Issue:*** *Whether to amend the Act so as to create a new class of rights or alter existing rights to protect works of traditional knowledge to take into account the special circumstances of the creation and use of such works.*

While copyright protects the creation of specific new works, Aboriginal communities in Canada have expressed concerns regarding their collectively created traditional cultural expressions, often referred as "traditional knowledge". Examples of cultural expressions that Aboriginal people in Canada wish to protect are their stories, songs, music, dances, plays, paintings, decorative art, apparel, architecture, totem poles and designs.

Particular concerns have been raised regarding the misuse of traditional cultural expressions, such as the unauthorized, commercial exploitation of sacred symbols, stories, and songs. In some cases, concerns have been expressed regarding the inability to derive or share in the economic benefits arising from the use of traditional expressions, and the lack of acknowledgment of the source of such expressions. Broader concerns have also been expressed regarding the need to preserve and promote practices and knowledge within their specific cultural context.

Aboriginal groups are raising these concerns domestically in the context of self-government negotiations, and at international discussions. The *1996 Report of the Royal Commission on Aboriginal Peoples* recommended, "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."[47] At the international level, issues related to intellectual property and the protection of traditional knowledge are being addressed at various UN fora, such as WIPO, the Convention on Biological Diversity and the UN Permanent Forum on Indigenous Issues, as well as at the World Trade Organization's TRIPs Council, which deals with trade-related aspects of intellectual property rights.

Traditional knowledge does not fit neatly within the usual parameters of intellectual property rights and copyright in particular, often because there is no identifiable author who will be "individually" rewarded and because there may be no identifiable, fixed work. Creating new rights related to traditional knowledge must be approached with caution since there may be an impact on existing rights holders. Analysis must therefore be undertaken to determine whether Canada's copyright regime provides the most appropriate way to protect Aboriginal cultural expressions or whether a new legal regime should be considered.

A.2 Copyright in Performers' Performances, Sound Recordings and Communication Signals

A.2.1 Moral rights for audio and audiovisual performers

Issue: *Whether the Act should be amended to provide audio and audiovisual performers with a moral right in their performances.*

[47] Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 3 (Ottawa: Supply and Services Canada, 1996), p. 601, highlights available on-line: Department of Indian and Northern Affairs Canada (**http://www.ainc-inac.gc.ca/ch/rcap/rpt/index_e.html**).

Performers want moral rights to ensure that their performances are not used in ways that detrimentally affect their honour or reputation. The Act does not currently provide moral rights with respect to performers' performances.

The WPPT contains provisions for performers with respect to their live or fixed audio performances, including the right to be identified as the performer of a performance (the right of attribution), and the right to object to any prejudicial distortion, mutilation or other modification of a performance (the right of integrity).[48] The WPPT does not have similar provisions for audiovisual performers (i.e. actors).

The U.S. and Australia do not have any statutory provisions that grant moral rights to performers. The EU provides for the exercise of moral rights in accordance with, among others, the provisions of the WPPT.[49] France protects the moral rights of audio and audiovisual performers,[50] although not as comprehensively as the moral rights of authors.[51]

A.2.2 Reproduction right for performers

> ***Issue:*** *Whether section 15 of the Act should be amended to extend the current reproduction right for performers to comply with the WPPT.*

Performers currently have the right to prohibit the fixation of their performances. They also have the right to prohibit the reproduction of any unauthorized fixation, and any authorized fixation if the reproduction is made for purposes other than those for which the original authorization was given. The WPPT provides performers with a full reproduction right, namely, the exclusive right to authorize any fixation or any reproduction of their performances.[52] To comply with the WPPT, the existing reproduction right under the Act would need to be amended to apply to all performances fixed in the preceding 50 years.

A.2.3 Rights for audiovisual performers

> ***Issue:*** *Whether the Act should be amended to enhance the rights of audiovisual performers* vis-à-vis *those of producers and copyright owners of films and videos.*

Currently, audiovisual performers (e.g. actors) have the right to authorize the embodiment of their performances in cinematographic works (i.e. films). The Act also provides them with the legal means to enforce any right to receive the compensation that is specifically acquired under contracts governing the reproduction, public performance and communication to the public of such cinematographic works. If such contracts are

[48] WPPT, art. 5, *supra,* note 29.
[49] EC, *Council Directive 2001/29 supra*, note 34, recital 19.
[50] The French Code, *supra*, note 18, art. L. 212-2.
[51] The French Code, *supra*, note 18, arts. L. 121-1 to L. 121-4.
[52] WPPT, art. 7, *supra*, note 29.

silent on particular uses, however, performers have no right to receive compensation for those uses. Performers want an exclusive right to authorize uses (e.g. reproduction) not specifically assigned away by contract.

A.2.4 Rights for broadcasters

Issue: *Whether section 21 of the Act should be amended to extend the rights broadcasters currently have in their signals.*

While technological developments bring many benefits, they have also facilitated the unlawful exploitation of broadcast signals. As a result, broadcasters are seeking additional rights to enable them to control access to their over-the-air signals and to receive additional revenues from uses of their signals (such as a full reproduction right, a public performance right and a retransmission right). There is also an issue of whether such signal rights should also be granted in respect of direct-to-cable transmissions (such as specialty channels and pay television). At the international level, the WIPO Standing Committee on Copyright and Related Rights is currently examining the possibility of providing an increased level of protection for broadcasters.

A.2.5 Term of protection for sound recording makers and performers

Issue: *Whether section 23 of the Act should be amended to extend the term of protection for sound recording makers to be consistent with the WPPT, and at the same time extend the term for performers.*

For sound recording makers, the WPPT provides for a term that is 50 years following "publication" of the sound recording or, failing such publication within those 50 years, 50 years from the year of fixation.[53] The term of protection could theoretically amount to 99 years (if publication occurs in the 49th year following fixation). The result is that the makers would potentially be entitled to a longer term of protection than what is currently provided for authors under the Act.

Performers are protected for 50 years following "fixation" of their performances. If the term of protection is extended for sound recording makers, consideration should also be given to providing such an extension for performers to ensure consistency. Such an extension is not required by the WPPT.

A.3 Enforcement and Remedies

A.3.1 Criminal offences — minimum value of infringing copies

Issue: *Whether section 42 of the Act should be amended to set a minimum value of the infringing copies in order to be subject to criminal remedies.*

[53] WPPT, art. 17(2), *supra*, note 29.

Although there is prosecutorial and judicial discretion, it may be desirable to set a minimum retail value of the infringing copies necessary to trigger criminal remedies. In the U.S., the retail value of the copyright works that are illegally reproduced or distributed must exceed $1000 in order for the criminal offence provision to apply.[54]

A.3.2 Definition of "infringing" copy

Issue: *Whether the Act should be amended to distinguish between "infringing" and "pirated" copies.*

In Canada, the Act's definition of "infringing" copy triggers both criminal and civil remedies. Each occurrence of infringement automatically triggers the application of criminal remedies. The TRIPs Agreement[55] distinguishes between infringing material (which gives rise to civil remedies) and pirated material (which gives rise to criminal remedies). Introducing a separate definition of "infringing" copy for more serious pirated material for the purposes of criminal remedies may better ensure that the civil and criminal remedies apply in the appropriate circumstances.

A.3.3 Distribution of infringing copies of a work

Issue: *Whether section 27 of the Act should be amended to extend infringement to the electronic distribution of infringing copies.*

It is a secondary infringement of copyright to "distribute" infringing copies of a work or other subject matter. In the international context, including the WCT and WPPT, the concept of "distribution" applies to tangible copies only.[56] For the purposes of secondary infringement in Canada, however, it may be desirable to determine whether "distribute" ought to apply to intangible material (e.g. electronic material) and clarify whether dissemination by digital means should be made a form of secondary infringement.

A.3.4 ISP liability

Issue: *Whether the Act should be amended to prescribe circumstances under which ISPs, acting as intermediaries, should be held liable for the transmission and storage of copyright material when their facilities are involved.*

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[54] 17 U.S.C. § 506(a)(2), *supra*, note 36.

[55] Being Annex 1C to the Final Act and Agreement Establishing the World Trade Organization, 15 December 1993, 33 I.L.M. 81 [hereinafter TRIPs].

[56] The WCT Agreed statement can be found at **http://www.wipo.int/treaties/ip/wct/statements.html** Concerning Articles 6 and 7 the statement reads as follows: "As used in these Articles, the expressions 'copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects."
The WPPT Agreed statement can be found at **http://www.wipo.int/treaties/ip/wppt/statements.html** Concerning Articles 2(e), 8, 9, 12, and 13, the statement reads as follows: "As used in these Articles, the expressions 'copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer to fixed copies that can be put into circulation as tangible objects."

One of the main functions of the Internet service provider (ISP) is to act as an intermediary between content providers and end users, providing them with the network facilities and services needed to enable communication. The Act does not clearly identify the conditions for imposing liability, nor does it explicitly set out any limitation to such liability. The Copyright Board has considered the question of ISP liability in the context of the right of communication to the public by telecommunication, and their decision has been reviewed by the Federal Court of Appeal.[57] Application for leave to appeal that decision has been filed with the Supreme Court of Canada.

The U.S. has a limitation on liability of ISPs with respect to transiently reproducing, and caching, hosting of or linking to copyright material.[58] Except for transient reproduction, liability will be triggered when the ISP is made aware of the infringement and does not take prompt action to remove or disable access to the material (except for transient copies, this is referred to as "notice and take down"). The EU has a mandatory exception for ISPs with respect to transient or incidental reproductions.[59] With respect to their caching and hosting activities ISPs also benefit from a limited liability regime similar to the notice and take down scheme.[60] With respect to the communication right, the mere provision of physical facilities for enabling a communication is not considered to amount to communication.[61] Australia exempts ISPs from liability with respect to infringing material communicated via their facilities unless they have control of the material (i.e. they administer the Web site themselves), or following application of certain criteria (e.g. the ability to prevent the infringement, the relationship with the infringer, etc.), they are considered as having authorized an infringing act by their subscribers.[62] In addition, temporary reproduction of a work as part of the technical process of making or receiving a communication does not trigger liability.[63]

A.3.5 Printers' liability

> ***Issue:*** *Whether the Act should be amended to limit the liability of printers and copy shops.*

Because infringement of the reproduction right is a matter of strict liability — actual knowledge of the infringement is irrelevant — printers and copy shops may be liable for the infringing activities of their customers even if they lack knowledge of the infringing

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[57] *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Association of Internet Providers, et. al.*, [2002] F.C.A. 166 [hereinafter Tariff 22].
[58] 17 U.S.C. § 512, *supra*, note 36.
[59] EC, *Council Directive 2001/29*, *supra*, note 34, art. 5(1)(a), confirming EC, *Council Directive 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market*, O.J. L. 178/1, art. 12(2), on-line: The European Commission (**http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf**).
[60] EC, *Council Directive 2000/31/EC*, *ibid.* arts. 13, 14.
[61] EC, *Council Directive 2001/29*, *supra*, note 34, art. 5.
[62] *Copyright Act 1968* (Aus.), *supra*, note 19, s. 39B.
[63] *Copyright Act* 1968 (Aus.), *supra*, note 19, ss. 43A, 111A.

character of such activities. The issue is whether, taking into account existing licensing arrangements, the liability of printers and copy shops should be excluded or whether they should be subject to more limited remedies, considering their practical inability to control the content of the material processed through their services. Consideration may need to be given as well to extending limited liability to other independent reproduction services.

A.3.6 Statutory damages

Issue: *Whether section 38.1 of the Act should be amended to alter the criteria for awarding statutory damages.*

Arguments have been raised for both lowering and raising the limits of statutory damages for copyright infringement. If they are set too high, they represent a hardship; if set too low, their power to deter infringement is limited.

At present, virtually any infringement of the Act, however minor, can trigger statutory damages. In certain circumstances, these can create hardships or inequities. Although no case of minor or innocent infringement in Canada has yet been awarded statutory damages, the issue arises as to whether the plaintiff should be required to establish a minimum threshold of actual damages suffered *before* statutory damages may be claimed. In addition, given that the boundaries of fair dealing are not obvious in all circumstances, it may be desirable to exempt certain potentially infringing acts from the application of statutory damages, such as those undertaken for research or private study or for private, non-commercial purposes.

A.4 Registration and Priority of Security Interests

Issue: *Whether the Act should be amended to provide for the creation of a national registry system for security interests in copyright.*

In Canada there are some legal impediments that affect businesses' ability to borrow money on the basis of collateral consisting of their intellectual property assets. Although the Copyright Office at CIPO allows registration of most security interests, the legal value of such registration in the face of provincial securities registration systems remains uncertain. To assist financial institutions in the valuation of copyrights, it has been proposed by stakeholders that a national registry might be desirable. The Law Commission of Canada has been considering this issue.

There are federal-provincial considerations underlying this issue. Security interests in personal property are generally regulated under provincial personal property security legislation in the common law provinces and under Book Six of the *Civil Code of Quebec*. Another consideration is the priority that a security interest takes when there is more than one type of interest registered against the same intellectual property.

B. Access to and Use of Works and Other Subject Matter

Although the recognition and protection of rights provide the basis for copyright, works and other subject matter are generally created in order to be disseminated. Uses of works typically comprise three different types: individual use of copyright material for private consumption: use of copyright material for commercial exploitation (e.g. the use of music by broadcasters); and use of copyright material by non-profit institutions (such as educational institutions). A distinction may also be made between direct access to or use of a work (i.e. performing to an audience) and uses in which the work is incorporated into another product, which is then dealt with separately.

Legal access to protected material can be achieved in many ways: purchasing books or sound recordings or other material; seeking authorization from individual rights holders directly; negotiating licences via collective societies to which rights holders have assigned their rights; or making use of exceptions that are provided in the *Copyright Act*. Note that exceptions or limitations may or may not entail payment to rights holders.

The Government of Canada has been encouraging the collective management of rights as a means to ensure both proper remuneration for rights holders and efficient access to copyright material. By and large, collective management has worked well, but many stakeholders seek legislative reform to enhance access. This section addresses user issues relating to rights management, exceptions and the private copying regime.

B.1 Rights Management

B.1.1 Collective management of copyright

> ***Issue:*** *Whether Part VII of the Act should be amended to simplify rights acquisition and clearance for the benefit of both rights holders and users.*

Collective societies were established to enable the licensing of copyright material when the individual management and enforcement of rights for specific uses would be unmanageably complex, costly and time-consuming. Users and consumers of copyright must be able to clear copyright efficiently and at the lowest cost possible. At the same time, rights holders are more likely to be compensated for the use of their material when copyright clearance is fast, simple and straightforward. For example, a person wishing to develop new material by integrating pre-existing material into his or her work may have to clear copyright from a variety of rights holders and even collective societies. Respect for copyright and efficiency of the process could both be strengthened and improved if that user could clear all rights through a "one-stop" or "minimum-stops" process.

In 1995, the Information Highway Advisory Council (IHAC) 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."[64] There currently exist in Canada 36 collectives, more than in any other country. The advent of digital technology and the Internet have created additional pressures to streamline collective management. The Internet provides easy access to millions of works and other materials, including government documents; legal, scientific, medical and other professional journals; music; video excerpts; e-books; etc. In many cases though, uses other than browsing require the clearance of copyright through a number of individual rights holders or collective societies.

The Government of Canada has undertaken concrete measures to implement the IHAC's recommendation. It has invited Canadian copyright collectives to round tables to explore practical solutions. These include administrative solutions that facilitate a more efficient rights management system, and possible legislative solutions such as extended licensing (i.e. a licensing scheme that allows for a collective with a substantial number of voluntary participating rights holders in a certain category to extend its licensing authority to all national and foreign rights holders in the same category). An Electronic Copyright Fund has also been created to assist collectives in improving the collective management of rights in the digital environment.

B.1.2 Copyright Board

> ***Issue:*** *Whether section 66 of the Act should be amended to provide for streamlined and more efficient administrative procedures for the Copyright Board.*

Certain collective societies are subject to the tariff-setting power of the Copyright Board, an administrative body whose powers and jurisdiction are set out under Part VII of the Act. This part also sets out the process that the Board must follow in certifying tariffs.

Before 1988, the Copyright Board had tariff-setting jurisdiction over performing rights societies representing composers and music publishers with respect to public performance and communication to the public of musical works. As a result of amendments to the Act since 1988, the Board was assigned new duties, such as:

- setting tariffs (on which royalties are based) payable to collective societies representing sound recording makers and performers with respect to public performance and communication to the public of sound recordings and performances;
- setting tariffs with respect to the retransmission of works contained in distant television and radio signals;
- setting the levies with respect to blank audio recording media (private copying);
- setting tariffs with respect to the use of certain material by educational institutions;

[64] *Connection, Community, Content: The Challenge of the Information Highway*, *supra*, note 13, p. 119.

- setting the royalties and related conditions of licensing where the collective society and the user are unable to agree, with respect to uses and rights other than those described previously;
- examining, at the request of the Commissioner of Competition, particular licence agreements with collective societies that have been filed with the Board; and
- issuing licences with respect to published material of rights holders who cannot be located.

In setting tariffs, the Board considers tariff proposals filed by the collective societies and takes into account the representations of interested parties, including those who may object to the proposed tariff.

Many consider the Copyright Board process to be both cumbersome and costly. At a disadvantage are those collectives and users who do not have the means or resources to present an efficient case before the Board. Cost awards, as is the case with the Canadian Radio-television and Telecommunications Commission (CRTC), could be considered as one way to streamline the process.

B.1.3 Layering of rights

Issue: *Whether the Act should be amended to simplify the clearance of multiple rights in a work.*

As in most countries, Canada's *Copyright Act* establishes different rights for different activities. The most fundamental rights include the right to reproduce and the right to communicate to the public by telecommunication. In 1988, the Government of Canada added an exhibition right for artistic works and in 1997 a rental right for sound recording and computer programs. In this era of convergence, a single activity may now implicate a range of different rights. For example, when an artistic work is posted over the Internet, reproduction, communication and perhaps the exhibition rights may apply. The net effect is that multiple clearances and payments may be required. This issue becomes even more complex because existing rights holders are potentially adversely affected with the introduction of additional rights, and because different collectives manage different rights and any associated remuneration.

B.1.4 Unlocatable copyright owners

Issue: *Whether section 77 of the Act should be amended to address the scope of application of the* in absentia *licence for the material of copyright owners who cannot be located.*

The Copyright Board may license the material of rights holders who cannot be located in order to facilitate access to such material. There are concerns that the *in absentia* licensing process for unlocatable copyright owners has overburdened the resources of the Copyright Board, and that improvements to the process are needed. At the same time, *in absentia* licensing applies only to published works or published performances and sound recordings. Consideration could be given to whether the *in absentia* license should be

extended to unpublished material. Unpublished material, especially archival material, may also be of public interest.

B.2 Limitations and Exceptions

B.2.1 Administration of justice

Issue: *Whether the Act should be amended to extend exceptions to satisfy the interests of the justice system.*

Lawyers, litigants and the general public do not have specific exceptions in the Act that would allow them to copy the legal material that they need in their interactions with the justice system. Pursuant to collective licensing, many provincial law societies, law libraries and law firms copy legal material upon payment of a fee. The Government of Canada also issued an order in 1997 allowing anyone to reproduce federal legislation and federal tribunal and court judgements.[65] Following a recent court decision[66] that indicated exceptions should not be construed narrowly, it could be inferred that fair dealing may apply to such uses.

Exceptions for the administration of justice exist in the copyright laws of the U.K.,[67] Australia[68] and many other Commonwealth jurisdictions. Such an exception would likely constitute a fair use in the U.S.[69]

B.2.2 Computer programs

Issue: *Whether section 30.6 of the Act should be amended to extend exceptions concerning computer programs.*

The *Copyright Act* was amended in 1988 to provide limited exceptions with respect to computer programs, such as for the making of a single copy of a program for back-up purposes. There are no exceptions, however, for activities that have become common practice since that time, such as reverse engineering, debugging and ensuring the interoperability of computer programs across different computer operating systems or platforms.

In the U.S., there is a limited exception with respect to the use of a particular program on a particular computer.[70] General research on computer programs (including reverse

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[65] *Reproduction of Federal Law Order*, *supra*, note 21.
[66] *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, [2002] F.C.J. No. 690, at para. 126 (F.C.A.).
[67] The U.K. *Act*, *supra*, note 17, ss. 45-50.
[68] *Copyright Act 1968 (*Aus.*), supra*, note 19, s. 182A.
[69] 17 U.S.C. § 107, *supra*, note 36.
[70] 17 U.S.C. § 1201(f) *supra*, note 36, establishes a limited reverse engineering exception for computer programs.

engineering) falls under the U.S. fair use provision, which specifically acknowledges that research may constitute fair use.[71] The EU directive allows for "error correction" and de-compilation for purposes of achieving interoperability.[72] In Australia, certain additional exceptions apply with respect to computer programs, including exceptions for the creation of interoperable products, error correction and security testing.[73]

B.2.3 Contractual limitations on exceptions and uses

Issue: *Whether the Act should be amended to provide that statutory exceptions should not be nullified or limited by terms contained in licensing agreements.*

The Act provides for specific exceptions for certain users in certain contexts. A number of stakeholders have been concerned that exceptions permitting certain uses of copyright material are effectively undermined by the terms of use found in standard-form contractual agreements, such as so-called "shrink-wrap" licences that accompany software. With this type of licence, the act of removing the wrap or cover signals the agreement of the user to the terms of use. This standard-form contract would thereby override the statutory exceptions in the Act. There is a corresponding concern that such standard-form contracts can also be used to extend the scope of protection beyond what is contemplated in the Act.

The U.K. has a provision in its Act that prevents an educational exception from being limited by contractual agreement.[74] In the U.S., this matter is addressed at the state level.

B.2.4 Ephemeral recording exception

Issue: *Whether section 30.9 of the Act should be amended to extend the ephemeral recording exception.*

Under the Act, licensed broadcasters may make temporary copies of sound recordings to facilitate programming. Such recordings are permitted because they are considered technically necessary to carry out a broadcasting operation. The Act, however, provides that the exception will not be available if there is a collective licensing system in place. Broadcasters have argued that rights holders are already compensated for the communication to the public of their material, and that the exception should exist without regard to the existence of collective licensing. In addition, some have argued that the

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[71] 17 U.S.C. § 107, *supra*, note 36; *Sega Enterprises Ltd. v. Accolade Inc*., 977 F.2d 1510 (9th Cir. 1992)
[72] EC, *Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs*, O.J. L 122/42, arts. 5(1), 6, on-line: The European Commission (**http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31991L0250&model=guichett/**).
[73] *Copyright Act 1968* (Aus.), *supra*, note 19, ss. 47D, 47E, 47F.
[74] The U.K. *Act*, *supra*, note 17, s. 36(4).

exception should be extended to independent audio Web-casters, who would not normally be licensed by the CRTC .[75]

B.2.5 Exceptions for individuals with perceptual disabilities

Issue: *Whether section 32 of the Act should be amended to extend the current exception concerning individuals with perceptual disabilities to address new technologies.*

New technologies provide individuals with perceptual disabilities with increased access to works. However, the current exceptions in the *Copyright Act* for individuals with perceptual disabilities exclude activities and new technologies such as closed captioning of audiovisual works, audio description of audiovisual works for the visually impaired, and software that can read books for visually impaired individuals. The impact of technological advancements on current exceptions should be considered.

B.2.6 Exceptions for libraries, archives and museums

Issue: *Whether section 30.1 of the Act should be amended to adapt existing exceptions for non-profit libraries, archives and museums to address new technologies, or to extend such exceptions to certain for-profit libraries, archives and museums.*

The exceptions currently available to non-profit libraries, archives and museums may need to be revisited to assess how effectively they support public policy objectives regarding access to copyright material that is collected and managed by these institutions. One specific issue in this area is whether the exceptions relating to archival material should extend beyond non-profit institutions. Another relates to the need to preserve and manage the collections of libraries, archives and museums. Currently the Act provides for the preservation of copies of material in obsolete format, but these non-profit institutions seek the ability to make copies in an alternate format in anticipation of the current format or technology becoming obsolete.

Finally, as is the case for educational institutions, current educational exceptions may not address activities undertaken by these institutions in the digital environment. As a result of the increasing use of digital technology in libraries, archives and museums, the present exceptions in the Act should be examined to consider whether they need to be adapted to new technology and the digital environment.

[75] The Canadian Radio-television and Telecommunications Commission, "Exemption Order for New Media Broadcasting Undertakings" (*Public Notice* CRTC 1999-197), on-line: CRTC (**http://www.crtc.gc.ca/archive/ENG/Notices/1999/PB99-197.HTM**).

B.2.7 Exceptions for non-profit educational institutions

Issue: *Whether sections 29.4 to 29.9 of the Act should be amended to extend the exception for educational use to certain freely available material on the Internet.*

Educational institutions currently rely on both analogue and digital technology to deliver programs to their students. The *Copyright Act* provides educational institutions with a number of specific exceptions. Many of these exceptions do not apply, however, when information and communications technologies are used to overcome the physical limitations of the classroom or provide access to modern instructional media. Educators feel that learning institutions risk copyright liability for commonplace activities in the classroom involving use of the Internet. They are seeking a broad exception for the use of any material "freely available" on the Internet that is used in an educational setting.

In May 1999, the U.S. Copyright Office[76] recommended that certain amendments be made to the U.S. copyright law to facilitate distance education. A bill addressing these issues has passed the Senate and is before the House of Representatives.[77] In the EU, member states may develop their own frameworks for technology-enhanced learning and may enact exceptions or limitations to the reproduction right for non-commercial educational purposes, including distance learning.[78]

Access to copyright material for educational purposes can also be achieved via compulsory licensing. Australia extended existing educational statutory licences to the digital environment so that an educational institution does not infringe copyright if reasonable amounts of copyrighted electronic material are copied and communicated to staff and students (e.g. via a closed-circuit television system or intranet) and equitable remuneration is paid. Larger amounts of electronic material may be copied and communicated if the material cannot be obtained within a reasonable time at an ordinary commercial price by the staff or students.[79]

B.2.8 Fair dealing

Issue: *Whether sections 29 and 29.1 of the Act should be amended to expand the scope of fair dealing to ensure that it does not exclude activities that are socially beneficial and that cause little prejudice to rights holders' ability to exploit their works and other subject matter.*

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[76] The United States Copyright Office, *Report on Copyright and Digital Distance Education* (Washington: Copyright Office, 1999), on-line: (**http://www.copyright.gov/docs/de_rprt.pdf**)

[77] *Technology, Education and Copyright Harmonization Act of 2001*, on-line: The Library of Congress (**http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s487rfh.txt.pdf**).

[78] EC, *Council Directive 2001/29*, *supra*, note 34, recitals 34, 42 and arts. 5(2)(c), 5(3)(a).

[79] *Copyright Act 1968* (Aus.), *supra*, note 19, ss. 135ZMB, 135ZMD. The *Digital Agenda Act* came into force in March 2001.

Fair dealing is a defence to copyright infringement for certain activities. It currently only comprises reproduction for the purposes of research or private study, criticism, review or news reporting. In the U.S., the corresponding concept of "fair use" is much broader.[80] U.S. courts have not limited fair use to particular categories of use and have relied on the doctrine to allow activities such as parody and the recording by private individuals of television and radio programming for time-shifting purposes.[81] The EU allows member states to provide for exceptions or limitations that allow fair use for the purpose of caricature, parody or pastiche,[82] for copying for time-shifting purposes and for private use on condition that the rights holders receive fair compensation.[83] Australia and the U.K. permit free time-shifting for private use.[84]

A related issue concerns the fact that it is not considered "fair dealing" if the user fails to acknowledge sources in a criticism, review or news report.[85] In practice, a complete acknowledgment of sources can be lengthy and cumbersome since they could include not only an author, but also a performer, sound recording maker or broadcaster.

B.2.9 Performance of an audiovisual work on the premises of an educational institution

Issue: *Whether section 29.5 of the Act should be amended to allow the showing of films and videos, in addition to performances of other works on the premises of an educational institution.*

Despite the fact that an important source of educational material can be found among audiovisual works, including audiovisual works that are part of a multimedia work, this material cannot be performed for educational purposes on the premises of an educational institution without the authorization of the rights holder. The issue is whether the current exception, which allows for performances of a play, live music, the playing of a CD or tape and the watching of a television program on the premises of an educational institution for educational purposes should be extended to allow for the showing of films and videos.

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[80] 17 U.S.C. § 107, *supra*, note 36.
[81] Time shifting in this context refers to the technologically enabled ability of a domestic user to record a TV program for viewing once only, but at a later and more convenient time.
[82] EC, *Council Directive 2001/29*, *supra*, note 34, art. 5(3)(k).
[83] EC, *Council Directive 2001/29*, *supra*, note 34, art. 5(2)(a).
[84] *Copyright Act 1968* (Aus.), *supra*, note 19, s. 111; the U.K. *Act*, s. 70, *supra*, note 17.
[85] Article 10 of the Berne Convention, *supra*, note 6, has certain requirements with respect to naming the source and the author of a work. On-line: WIPO (**http://www.wipo.int/clea/docs/en/wo/wo001en.htm#P142_25795**).

B.3 A Special Regime for Music: Private Copying

Issue: *Whether sections 79 to 88 of the Act should be amended to address adverse effects on stakeholders from the application of the private copying regime in a digital environment.*

The private copying regime, introduced by Bill C-32, provides for an exception that permits the making of a copy of a musical sound recording for the private use of the person making the copy. It also provides for a levy to be paid by manufacturers and importers of blank audio recording media. Tariffs on blank audio recording media are set by the Copyright Board and are payable to the Canadian Private Copying Collective (CPCC), which is a consortium of collective societies representing eligible authors, sound recording makers and performers. The CPCC then distributes the money to these collectives for the benefit of their members.

The regime was introduced because unauthorized copying of sound recordings by individuals was resulting in significant economic losses to rights holders. Many countries, including the U.S., France and Germany, have developed similar collective remuneration schemes to compensate rights holders, typically through the imposition of a levy on blank audio recording media or equipment.[86]

The Act provides an exemption to the levy where the blank audio recording medium is used on behalf of persons with a perceptual disability. The current provisions, however, give neither the Government of Canada nor the Copyright Board the power to exempt particular classes of users from the payment of the levies. The CPCC has been voluntarily operating a "zero-rating scheme," however, which effectively provides an exemption, subject to certain conditions, in favour of certain classes of persons who do not use the media for copying recorded music.

Since the introduction of the private copying regime, significant technological changes have occurred. Audiocassettes are nearly obsolete and Canadians are turning to CD-Rs, DVDs, MP3 flash card technologies and the Internet for the purposes of peer-to-peer file sharing. What exactly constitutes private copying in this environment remains unclear.

As a result, a number of issues have been raised with respect to the application of the private copying regime.

- The levies are payable even on media that are ultimately sold to users who do not use them to copy music. Stakeholders in the high tech sector who, for example, use

[86] In the U.S. see: *supra*, note 36, 17 U.S.C. § 1004; in France see the French Code, *supra,* note 18; see also the EC, *Council Directive 2001/29*, *supra,* note 34, art. 5(2)(b). In Germany see the *Law Dealing with Copyright and Related Rights (Copyright Law)*, art. 54.

CD-Rs for storing data, computer programs or other digital products, have pointed out that the levies applicable to digital recording media amount to cross-subsidization and add substantially to their costs, in turn affecting their competitiveness. There is a concern that a grey or black market in recording media may emerge as a result. The administrative difficulties in tracking use and preventing abuse of blank audio recording media make it difficult to provide a broad exemption based on consumer use. Consideration could be given to redefining the scope of application or how the "zero-rating scheme" could be incorporated into the Act. The U.S. excludes from the definition of "digital audio recording medium" any medium that is primarily used to record "audiovisual works or non-musical literary works" such as computer programs or databases.[87]

- Many Canadians currently use video cassettes to tape television programming. Some stakeholders have as a result suggested expanding the private copying regime to other works, including audiovisual works.

- The private copying exception arguably allows private copying from all sources, including unauthorized sources, as long as the copy is made onto an audio recording medium. It has been suggested that the exception be narrowed to specify that it applies only to copies made from authorized sources. The normal copyright remedies would then apply to copies made from unauthorized sources.

- The question arises as to whether the private copying regime is consistent with the requirements of the WPPT. The exception for private copying currently applies to all performances and sound recordings, but only Canadian sound recording makers and performers (or makers and performers from other countries on a reciprocal basis) are entitled to receive payment from the levy. When Canada ratifies the WPPT, it may be necessary to amend the Act, either by narrowing the scope of the exception in section 80 or by paying royalties from the levy to sound recording makers and performers from all WPPT countries on a national treatment basis. National treatment means that Canada would give sound recording makers and performers in WPPT countries all the benefits that Canadians are entitled to receive under the Canadian private copying regime, regardless of whether they have such a regime in their domestic law.

- The levy applies to blank recording media that are imported or manufactured for sale in Canada, but does not apply to importers who import the blank media for their own use. Some stakeholders argue that this creates another incentive for a grey market for blank media, affecting the Canadian suppliers' market and the rights holders' remuneration. The issue is whether all importers should be subject to the levy for all imports, not merely for those they sell in Canada. Some stakeholders have also argued that retailers should be liable when they knowingly or negligently sell blank media for which their respective supplier or importer has not paid the required levy.

[87] 17 U.S.C. § 1001, *supra*, note 36.

- Since sound recordings may now be protected by anti-copying technologies that may prevent the making of private copies, there may be a need to assess whether recordings protected by such technologies ought to be excluded from the private copying regime.

CHAPTER 3: COPYRIGHT REFORM AGENDA

A. Introduction

This chapter provides the Government of Canada's recommendations for a copyright reform agenda. It moves from a brief review of the Government of Canada's current policy work to a proposed roadmap for future policy and legislative work.

As mentioned in Chapter 1, the Government of Canada has already commenced the copyright reform process on a number of critical digital-related issues. It held consultations and proposed amendments to the *Copyright Act* regarding Internet retransmission of free over-the-air broadcast signals (Bill C-48). It also consulted on the four digital issues found in the *Consultation Paper on Digital Copyright Issues.* As a result, the Government of Canada's position on these issues has evolved significantly. In fact, there has been sufficient work to plan to introduce a bill on these and related issues in the coming year.

Much work remains to be done, however. The review of the Act in Chapter 2 illustrates the many issues that have been raised affecting the operation of the Act. The Government of Canada recognizes the importance of addressing all outstanding issues as part of the copyright reform process. It remains aware of the needs of stakeholders but is also mindful of the necessity of dealing with issues in a systematic and structured way instead of attempting to deal with all issues at once. Building on the approach set out in *A Framework for Copyright Reform*, the Government of Canada will therefore develop policy proposals and legislative amendments in a more focussed, more frequent but gradually staged manner. In this way, the *Copyright Act* can be maintained as a modern, progressive instrument.

In developing its copyright reform agenda, the Government of Canada has considered the various copyright challenges laid out in this report. As it moves forward, the Government of Canada will also continue to bear in mind the following principles that are designed to meet the economic and cultural policy challenges of Canada:

- 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; and
- ensuring a direction for reform that takes into account, and helps shape, international trends.

Criteria were also established to provide a rational guide to the public policy considerations for determining which issues ought to be examined in a particular sequence:

- where action is necessary to preserve the integrity of the Act;
- where action is dictated by an externally driven time line;
- where the issues have been thoroughly analysed and consulted upon;
- where Canada can seize early opportunities in the marketplace; and
- where consensus exists among stakeholders.[88]

Consistent with these principles and criteria, the Government of Canada now proposes a copyright reform agenda that deals with issues packaged together according to a common thematic denominator for which policy work and legislative change can be reasonably and effectively achieved in a balanced, step-by-step manner. These thematic linkages are based on public policy needs, international pressures, categories of works or issues relevant to specific industry or cultural sectors. This agenda comprises three groupings of issues for which the Government of Canada hopes to effect legislative change over the short, medium and long term. The first grouping reflects issues for which policy work is well under way, as well as issues requiring urgent attention. The second and third groupings can be defined as part of the medium or long-term reform agenda, consisting of issues that the Government of Canada has been working on or is beginning to work on but that, for various reasons, are not yet ripe for legislative amendment (e.g. awaiting international developments), and for which parliamentarians may wish to provide input as a result of their review of this report.

Together, the three groupings represent the Government of Canada's current perspective on the best strategy to sequence these issues in the legislative reform agenda, while providing some flexibility. This strategy will be refined and specified as more research, analysis and consultation are undertaken on these issues. Policy development and consultations will necessarily be conducted at different stages for different issues. The Government of Canada will continue to assess the priority of issues on an ongoing basis, taking account of the above principles and criteria, available resources, domestic, international and technological developments, as well as parliamentarians' advice following their review of this report.

These groupings are neither conclusive nor definitive. Certain of the issues raised in Chapter 2 are set out in each grouping to illustrate the theme and scope of the grouping in practical terms. Not all issues raised in Chapter 2 will necessarily be found in the groupings, however.

B. First Grouping: Short-Term Reform Agenda (1 to 2 years)

The Government of Canada's work in the short term focuses on key issues that support the needs of stakeholders by addressing international and domestic pressures, particularly in the digital environment. Issues that have been identified based on policy work already

[88] *A Framework for Copyright Reform*, *supra*, note 1, p. 6.

completed by the Government of Canada include the four digital issues and other WIPO treaty issues, access and education, photographic works, and transitional periods for unpublished posthumous works.

i) Digital issues and WIPO treaties

These issues include ISP liability and three WCT and WPPT digital issues for which consultations and preliminary policy analysis have taken place:

- making available right (refer to Chapter 2: A.1.10);
- legal protection of rights management information (refer to Chapter 2: A.1.13);
- legal protection of technological measures (refer to Chapter 2: A.1.15); and,
- ISP liability (refer to Chapter 2: A.3.4).

This grouping also includes the following WIPO treaty-related issues that the Government of Canada will consider over the coming months, as required. Some of these issues may require more analysis than others:

- distribution right for works (WCT) (refer to Chapter 2: A.1.6);
- distribution right for performers and record producers (WPPT) (refer to Chapter 2: A.1.6);
- extended term of protection for photographs (WCT) (refer to Chapter 2: A.1.17);
- moral rights in live and fixed audio performances (WPPT) (refer to Chapter 2: A.2.1);
- full reproduction right for performers (WPPT) (refer to Chapter 2: A.2.2);
- extended term of protection for sound recordings (WPPT) (refer to Chapter 2: A.2.5); and,
- impact of ratification of the WPPT on Canada's private copying regime. (This issue will be considered separately from the issues under the private copying regime as a whole, to be considered as part of the second grouping of issues.) (Refer to Chapter 2: B.3.).

Based on the principles and criteria outlined above, these issues are important for both domestic and international reasons. Dealing with these issues in a timely way is critical to maintain the responsiveness of the Act to technological innovation, to preserve the integrity of the Act in terms of creators' rights and users' needs, and to take account of international trends and developments. Many stakeholders in Canada have called for copyright policy to be clarified for the digital era. Rights holders affirm a need for confidence in the protection of their copyright material in an on-line environment. At the same time, users call for clear and fair rules for access to Internet content. Legislative action implementing both WIPO treaties has been taken in the U.S. and in Japan, while the EU has adopted a directive to guide domestic legislation and Australia now has legislation in place to deal with WCT provisions.

Canada signed both WIPO treaties in 1997 but has yet to ratify them. The Government of Canada is committed to bringing the *Copyright Act* in conformity with the WCT and WPPT once the issues involved are thoroughly analyzed and appropriately consulted upon. Ultimately, the purpose of ratification is to ensure that Canadian rights holders will benefit from copyright protection recognized in all treaty countries. Canada's obligations under these treaties could not be met without amending the *Copyright Act*.

These digital issues also raise associated policy concerns, e.g. the extent to which WIPO treaty obligations relating to technological protection measures and exceptions and limitations will affect Canada's private copying regime.

ii) Access and educational use ***(refer to Chapter 2: B.2)***

The various digital issues also raise fundamental questions about the nature and scope of access to digital material. These questions are pressing because of Canada's commitment to lifelong learning, innovation and access to culture, and the need to preserve balance in the Act. In particular, the Act needs to be consistent with the Government of Canada's strategies to invest in people, promote research and education, and support the knowledge-based economy. Since the Internet represents the most significant new medium to reach and teach Canadians of all ages at home and abroad, copyright legislation should facilitate new Internet opportunities for culture, education and innovation.

Concerns with respect to access were raised by many stakeholders during the Government of Canada's recent consultations on digital issues. These concerns reflect the fact that the traditional environment for teaching and education is evolving rapidly with the introduction and use of new information and communication technologies. Ensuring appropriate access could include expanding existing exceptions, introducing new exceptions or clarifying and streamlining existing rights clearance approaches.

iii) Photographic works ***(refer to Chapter 2: A.1.2, A.1.7, and A.1.17*****)**

The WCT requires that the term of protection for photographs be extended. Addressing this issue offers the Government of Canada the opportunity to consider all the outstanding issues related to photographic works, including those concerned with authorship and ownership. The central question is whether to recognize the photographer as the author and first owner of the copyright in the work. Such an amendment would make photographers' rights consistent with the rights of other creators.

iv) Transitional periods for unpublished works ***(refer to Chapter 2: A.1.18)***

This issue concerns the transitional periods for the term of protection of unpublished works set out in section 7 of the Act. Although not a digital issue, it requires urgent

attention since affected works would begin entering the public domain in 2004. Consultations were held recently on how the transitional periods could be amended before 2004.

C. Second Grouping: Medium-Term Reform Agenda (2 to 4 years)

The varied and complex impact of digital technologies on copyright policy necessitates that the Government of Canada's work on digital issues continue into the medium-term with the view to maintaining the responsiveness of the Act to future innovation and evolving business models. This second grouping includes issues that are not yet ready for immediate legislative consideration in the Government of Canada's current view. Nor is there any definitive timeframe that needs to be taken into consideration. Over the medium-term, however, the Government of Canada will need to address remaining and new issues arising from the use of digital technologies and Internet practices, as well as issues having an impact on copyright protection and rights management. This grouping embraces a host of important issues requiring further research and analysis, as well as ongoing monitoring and evaluation of international developments to support the Government of Canada's assessment of the need for legislative amendment.

The second grouping of issues includes:

- further issues relating to digital and new technologies, including the applicability of current remedies in the new digital environment (refer to Chapter 2: A.3);
- protection of rights in visual and audiovisual works, including multimedia works (refer to Chapter 2: A.1.1);
- Crown copyright (with government as owner and user of works) (refer to Chapter 2: A.1.3);
- collective rights management of copyright material, such as extended licensing (refer to Chapter 2: B.1.1);
- term of protection (refer to Chapter 2: A.1.16);
- ephemeral recording exception (refer to Chapter 2: B.2.4), and
- private copying regime as a whole (refer to Chapter 2: B.3).

D. Third Grouping: Long-Term Reform Agenda (beyond 4 years)

These issues have been identified through the Government of Canada's monitoring of a continuously changing domestic and international environment. On the domestic scene, this monitoring has included tracking both new technologies and any new goods and services that may result in new business opportunities. Some of these issues raise questions about the fundamental nature of copyright protection. Research and analytical work continues in these areas toward building a policy that responds to domestic concerns, while also defining Canada's international position. Canada's monitoring of the international scene includes participating in fora, such as the WIPO Standing Committee on Copyright and Related Rights, as well as in ongoing meetings about treaty and international trade mechanisms where many issues remain unsettled. In the area of

traditional knowledge and folklore, for example, much work is being done now, but more work is needed both domestically (e.g. the Minister of Canadian Heritage's National Gathering on Traditional Knowledge in 2004) and internationally (e.g. ongoing work at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore) in order for the Government of Canada's policy recommendations to mature. This grouping of long-term issues includes:

- traditional knowledge (see Chapter 2: A.1.19);
- database protection (see Chapter 2: A.1.4);
- audiovisual performers' rights (see Chapter 2: A.2.3);
- signal rights for broadcasters (see Chapter 2: A.2.4); and
- clarifying and simplifying the Act.

The table below highlights the main policy issues that are part of the Government of Canada's proposed legislative reform agenda. In moving forward with the agenda, the Government of Canada will continue to acknowledge stakeholder interests, consider international developments and respond to parliamentarians' recommendations in support of the modernization of the *Copyright Act*.

Legislative Work Ahead

Short-Term (1-2 years)	**Medium-Term (2-4 years)**	**Long-Term (beyond 4 years)**
• **WCT and WPPT Issues** • **ISP Liability** • **Access and Education Issues** • **Photography Issues** • **Section 7 (Unpublished Works)**	• **Further/New Technology Issues** • **Audiovisual Works** • **Crown Copyright** • **Collective Rights Management** • **Term of Protection** • **Ephemeral Recording Exception** • **Private Copying Regime**	• **Traditional Knowledge** • **Databases** • **Performers' Rights** • **Signal Rights for Broadcasters** • **Clarification and Simplification of the Act**

CONCLUSION

The Government of Canada views this report and the ensuing parliamentary review as an opportunity to further the process of copyright reform announced in June 2001. This process is a major vehicle for the Government of Canada to realize the economic and cultural policy objectives that it set for Canada in the 2002 Speech from the Throne and in its Innovation Strategy. The ultimate objective is to provide for a *Copyright Act* that responds to the many technological and other challenges with legislation that is simple, clear, efficient and balanced.

It is the Government of Canada's hope that this report will provide the basis for parliamentarians to engage in a profound and constructive dialogue concerning the key public policy issues that underpin the *Copyright Act*. Parliamentarians will hear the varied and sometimes opposing views of numerous copyright stakeholders and individual Canadians on a variety of complex issues. In reporting back, they may wish to share with the Government of Canada their views on the list of issues set out in Chapter 2 and the reform agenda described in Chapter 3, specifically the comprehensiveness of the list, the grouping of certain issues and the proposed priority to be given to these issues. While parliamentarians consider this report over the coming year, the Government of Canada intends to continue to consult on and to develop legislation to address the issues designated as requiring short-term attention. As the government moves forward to modernize Canada's copyright law, Parliament will have the opportunity to engage in public debate on specific pieces of legislation amending the Act.

The Government of Canada will ensure that this copyright framework remains among the most modern and progressive in the world. Proceeding with copyright reform in a timely, balanced and manageable manner will help ensure that the *Copyright Act* remains a vital part of the Government of Canada's efforts to promote cultural expression, innovation and the knowledge economy. To this end, the Government of Canada looks forward to working with parliamentarians in pursuing its copyright reform agenda.

APPENDIX

International Conventions on Copyright and Neighbouring Rights

Several treaties define internationally agreed, basic standards of protection for either copyright or neighbouring rights in member countries:

- *The Berne Convention for the Protection of Literary and Artistic Works*, implemented in 1886, contains a series of provisions defining the minimum standards of protection regarding copyright. It requires national treatment with respect to most rights. It has been revised several times since its adoption. Canada first joined the Berne Convention in 1923 and ratified the 1971 version of the Berne Convention on 28 September 1998. The Convention is administered by the World Intellectual Property Organization (WIPO).

- *The Universal Copyright Convention* was adopted in 1952 and has been revised since then under the aegis of UNESCO. The Convention stipulates the methods of copyright protection appropriate to all nations, sets minimum standards, which are somewhat lower than those in the Berne Convention and also requires national treatment. It provided international copyright protection for a number of countries that did not meet the standards required by the Berne Convention. Canada adhered to the Convention on August 10, 1962.

- *The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (the Rome Convention) was adopted in 1961. It was the first international convention dealing with performers, phonogram producers (i.e. sound recording makers) and broadcasting organizations. Canada ratified the Convention on June 4, 1998. This Convention is administered by WIPO, UNESCO and the International Labour Organization (ILO).

- *The WIPO Copyright Treaty* and *the WIPO Performances and Phonograms Treaty* (the Internet Treaties) are the first treaties to address copyright and neighbouring rights in the digitally networked environment. Signed by Canada in 1997, they came into force in 2002. Canada is currently considering their ratification.

International Trade Agreements

Several international trade agreements include provisions on intellectual property, including copyright and related rights. They seek to strengthen but not replace existing international conventions on these matters.

- *The Canada-United States Free Trade Agreement* (FTA) came into force in 1988 and resulted in amendments to the *Copyright Act* to include provisions on the retransmission of terrestrial radio and television programs by cable and satellite systems.

- *The North American Free Trade Agreement* (NAFTA) came into force, for the most part, on January 1, 1994. It includes requirements with respect to national treatment and most favoured nation treatment; minimum standards for protecting intellectual property, including copyright; standards for enforcing these rights; and a mechanism for resolving disputes on the compliance of NAFTA members with these standards. The cultural industries provision in the NAFTA means that copyright obligations with respect to cultural industries (as defined in the NAFTA) are limited to the obligations under the *Canada-United States Free Trade Agreement*.

- *The World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs) came into force in Canadian law on January 1, 1996. It includes requirements with respect to national treatment and most favoured nation treatment; minimum standards for protecting intellectual property, including copyright; standards for enforcing these rights; and a mechanism for resolving disputes on the compliance of WTO members with these standards.

(Note: Most favoured nation treatment means that if a country grants additional protection to another country, it must extend that protection to all other members of the relevant treaty.)