

# DISCUSSION PAPER ON THE IMPLEMENTATION OF THE WIPO COPYRIGHT TREATY

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The purpose of this paper is to state what, if any, amendments are necessary to the Canadian *Copyright Act* in order to comply with the WIPO Copyright Treaty.

Options that could be considered in terms of actual amendments are proposed, where appropriate. These options are stated in conceptual rather than statutory language. They indicate possible approaches as opposed to precise legislative wording.

The paper represents the views of the authors and not necessarily those of the Department of Industry or the Department of Canadian Heritage.

In this document, all references to the Canadian *Copyright Act* (the "Canadian Act") apply to the amendments included in Bill C-32 as contained in S.C., 1997 c. 24, whether or not the amendments have yet been proclaimed.

## WIPO COPYRIGHT TREATY

### Article 1: Relation to Berne

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

### Option:

Status quo. Canada is in compliance with the Treaty.

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**Article 2: Scope of Copyright Protection**

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

**Option:**

Status quo. Canada is in compliance with the Treaty.

**Article 3: Application of Articles 2 to 6 of the Berne Convention**

Contracting Parties shall apply mutatis mutandis the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

**Option:**

Status quo. Canada is in compliance with the Treaty.

**Article 4: Computer Programs**

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

**Option:**

Status quo. Canada is in compliance with the Treaty.

**Article 5: Compilations of Data (Databases)**

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

**Option:**

Status quo. Canada is in compliance with the Treaty.

**Article 6: Right of Distribution**

1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the

first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

**Option:**

Status quo. Canada is in compliance with the Treaty.

**Article 7: Right of Rental**

(1) Authors of  
(i) computer programs;  
(ii) cinematographic works; and  
(iii) works embodied in phonograms, as determined in the national law of Contracting Parties,

shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.

(2) Paragraph (1) shall not apply

(i) in the case of computer programs, where the program itself is not the essential object of the rental; and

(ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

(3) Notwithstanding the provisions of paragraph (1), a Contracting Party, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to material impairment of the exclusive right of reproduction of authors.

**Option:**

Status quo. Canada is in compliance with the Treaty.

**Article 8: Right of Communication to the Public**

Without prejudice to the provisions of Articles 11(1)(ii), 11<sup>bis</sup>(1)(i) and (ii), 11<sup>ter</sup>(1)(ii), 14(1)(i) and 14<sup>bis</sup>(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

**Option:**

Status quo. Canada is in compliance with the Treaty.

## Article 9: **Duration of the Protection of Photographic Works**

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

### **Analysis:**

This provision requires that photographic works be governed by the general rule regarding the duration of copyright protection provided by Article 7 of the Berne Convention, as opposed to any exception to this duration. Article 7(4) of Berne states that the duration of protection shall last at least until the end of a period of twenty-five years from the making of such a work. Under Article 9, above, protection of such works is now subject to the duration rule of life of the author plus fifty years after his death.

Under the Canadian Act, there are three situations relating to the duration of protection in photographs. First, where the author of the photograph is a natural person, the duration is life-plus-fifty until the calendar year end, and therefore complies with Article 9, above.

Second, where the owner is a corporation, the duration of protection is the remainder of the year of the making of the initial negative or plate from which the photograph was derived or, if there is no negative or plate, of the initial photograph, plus a period of fifty years. It is arguable that this provision is not in compliance with the Treaty as fifty years from the making of the negative or plate is not equivalent to fifty years after the author's death.

Third, where the owner is a corporation, the majority of the voting shares of which are owned by a natural person who would have qualified as the author of the photograph, except for the conditions set out in 10(2) of the Canadian Act, the life-plus-fifty rule applies, and therefore complies with Article 9, above.

### **Options:**

#### **Option 1**

Revise the *Act* to eliminate the corporate ownership alternative and its related duration rule.

#### **Option 2**

Revise the *Canadian Copyright Act* with respect to the duration of corporate ownership so that it would be equivalent to the duration for a natural person, for example, 75 years from the making of the photograph.

## Article 10: Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

### Option:

Status quo. Canada is in compliance with the Treaty.

## Article 11: Obligations concerning Technological Measures

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.

### Analysis:

Technological protection measures include many different types of technology such as data encryption, signatures, access codes, asymmetric key systems, etc. These measures may ultimately serve to prevent copyright infringements but they may also fulfil broader commercial purposes, like getting users to pay for using the material provided. There are a variety of means to circumvent such technological protection measure, ranging from the use of specialized devices to the unauthorized acquisition of access codes. The problem resides in deciding how to establish the liability for infringement.

The Canadian *Act* is of very limited assistance to address infringements associated to the tampering of technological protection measures. In certain circumstances, it could be inferred that the circumvention of technological measures by a person is an infringement of the exclusive right to authorize certain uses of the work in contravention of section 27(1) but the level of evidence required would make such circumstances exceptional.

In order to fully comply with Article 11 the Treaty, Canada will have to adopt a specific provision. Given that it would be implemented in the *Copyright Act*, such a provision should be limited to activities in relation to copyright protected materials. A key question in drafting the provision is to determine whether the provision should relate to "devices" used to circumvent technological protection measures or to "conduct" relating to technological measures or to both.

In the case of devices, it may be difficult to prove contributory infringement in situations where it may not be demonstrated with certainty that such devices will be extensively used in contravention of any rights under copyright law. In addition, with the current wording of article 11 of the Treaty, unless it is very carefully drafted, a provision aimed at the devices used for by-passing technological measures may go beyond our obligations under the Treaty.

Finally, the provision could focus on conduct which knowingly infringe copyright or it could create a strict liability test.

In light of the above, and after examination of the Treaty implementation provisions contained in the proposed E.C. Directive and U.S. Bills, we recommend the following possible approaches:

**Proposals:**

**Proposal 1**

It would be an infringing act to remove or bypass, for infringing purposes, any device or measure intended to limit reproduction, [performance in public or communication to the public]/[or any other right granted under the *Copyright Act*] of a work or other subject matter.

**Possible addition to Proposal 1**

It would be an infringing act to distribute or transmit a work or other subject matter knowing that such a device or measure had been removed or bypassed.

**Proposal 2**

It would be an infringing act to manufacture, import or distribute a device which has the [purpose of]/[effect of] removing or circumventing any device or measure intended to limit reproduction [performance in public or communication to the public]/[or any other right granted under the *Copyright Act*] of a work or other subject matter.

**Possible addition to Proposal 2**

It would be an infringing act to provide a service the [purpose]/[effect] of which is to remove or bypass, for infringing purposes, any device or measure intended to limit the reproduction [performance in public or communication to the public]/[or any other right under the *Copyright Act*] of a work or other subject matter.

## Article 12: **Obligations concerning Rights Management Information**

(1) Contracting Parties shall provide adequate and effective remedies against any person knowingly performing any of the following, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

### **Analysis:**

The *Copyright Act* contains provisions that either partially or indirectly address the obligations set out in Article 12 of the Treaty.

Sections 27(2), 42(1) of the Canadian *Act* could also find some limited applications since by the removal of either the title or the name of the author, one may infringe the author's moral right of paternity, and third party dealings with such infringing copies would be violations as well. However, this provision only covers part of the obligations included under the Treaty.

Subsection 43(2) of the *Act* creates an offence for anyone to cause "to be made any change in or suppression of the title, or the name of the author, of any dramatic or operatic work or musical composition in which copyright subsists (...) in order that the work or composition may be performed in whole or in part in public for private profit...". This provision, however, would apply in very limited and unlikely circumstances given that the work transmitted by electronic means would have to be performed in public for private profit.

### **Option:**

We recommend the adoption of a specific provision incorporating the obligations set out in Article 12. The Treaty refers to both civil and criminal remedies. It is worded in sufficient detail to be codified almost intact into the proper parts of the *Act*.

**Article 13: Application in Time**

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

**Option:**

Status quo. Canada is in conformity with the Treaty.

**Article 14: Provisions on Enforcement of Rights**

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

**Option:**

Status quo. Canada is in conformity with the Treaty.