



ABC on Copyright

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Revisions to the Copyright Act 2010 – ABC – Key Terms

Background:

With the tabling of legislation to revise Canada's Copyright Act, the CCA has been asked to provide a series of background documents to assist in the discussions. Copyright is a complex world which technological developments are further compounding.

The Copyright Act was initially proclaimed in 1924. Since then successive governments have brought forward additional revisions to address undertakings made at the [World Intellectual Property Organization](#), international trade agreements and technological changes. The last two significant revisions to the Act were made in 1988 and 1997. These revisions triggered lively debate about the orientation and substance of Canadian copyright law. The Supreme Court has also played a role in defining creator/copyright owner rights; their [decision](#) on electronic publishing rights is an example of this role.

The CCA and other arts organizations have traditionally supported a *droit d'auteur* approach to copyright similar to the European approach to the issue. Copyright is seen as a bill of economic and moral rights for creators and copyright owners. The approach adopted by the Canadian government is one that seeks to achieve a balance of interest between creators, copyright owners and users of copyright material. It is the quest for this balance that has ensured discussions about copyright revisions are animated and lengthy.

In the current round of discussions, creator groups have already spelled out their [reactions](#) for the legislation. The [consensus](#) amongst cultural organizations and collectives was developed over the past summer.

Some Key Copyright Terms

Economic rights – Creators and copyright owners retain the economic rights in their works: when their work is used by licensees and performed in public, the economic rights are translated into income for the creator or copyright owner. There are a variety of economic rights within the *Copyright Act* that establish how these rights are applied to a variety of media and forms of use. [Section 3](#) of the *Copyright Act* outlines the various forms of works in which copyright protects.

Moral rights – The moral right of the creator or copyright owner protects the integrity of the copyrighted material and the reputation of the creator or copyright owner. The best illustration of this is the case of Michael Snow's flying geese installation at the Eaton Centre, in Toronto. One year the management of the Eaton Centre festooned the necks of the geese big red ribbons to mark the Christmas season. Mr. Snow claimed that this was a violation of his moral rights

and took the Eaton Centre to court to affirm his claim. The Court sided with Mr. Snow and the red ribbons were removed, never again to return. The *Supreme Court* has also addressed the issue of moral rights in [a recent ruling](#).

Fair dealing - The Copyright Act contains a number of exceptions much to the consternation of those who adhere to the purest form of *droit d'auteur*. Fair dealing ([Section 29](#) of the Copyright Act) outlines those instances where a copyright protected work can be used without the explicit consent of the creator or copyright owner. Terms of permissible use of copyright protected works for private study or review, criticism and news are dealt with in this section of the Act. There is no provision in the fair dealing section for parody which is another distinction from the American legislation.

Fair Use – This is a concept found in American copyright legislation that does not exist in its Canadian counterpart. The debate on the next round of copyright revisions will attempt to limit the fair dealing provisions to give more control to creators and copyright owners over the use of their work. In *Section 107 of the American Copyright Act* four factors are laid out to determine whether a use of copyright material in a particular case is fair use or not. These four factors are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyright work as a whole;
4. the effect of the use upon the potential market value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Only the courts can determine whether a particular use is fair use or not.

Three step test - The [Berne Convention](#) allows for certain exceptions to author's rights. According to Article 9(2) of the Berne Convention: "*exceptions and limitations regarding the reproduction right will only be allowed in certain cases and may not conflict with the normal exploitation of the author's work nor unreasonably hinder the legitimate interests of the author*". This test will be referred to as the *three-step test*.

Notice and notice - Under the proposed ["notice and notice" regime](#), an ISP will be required to forward any notice it receives from a copyright owner to a subscriber who is alleged to be engaging in infringing activities online. The ISP will also be required to retain, for a set period of time, information sufficient to identify the subscriber in question. Through this regime, rights holders will have a mechanism for notifying Internet users that their activities may be infringing the rights holders' copyright. In the event that such activities lead to litigation, the record-keeping requirement will better enable identification of the parties alleged

to be involved. In this respect, however, the regime will not require disclosure of the identity of a subscriber; in order to protect Internet users' legitimate expectations of privacy, a court order will be required.

Resale Right - The Artists Resale Right (also known as *Droit de suite*) aims to provide Visual Artists with a share of revenue from sales of their work **after** the initial sale of that work to a dealer or other buyer. The European Union has implemented this [legislation](#). In Canada, the [resale right for artists](#) could be an addition to new copyright legislation.

Time Shifting/ Device Shifting - One area addressed in the proposed legislation deals with issues related to time shifting and device shifting. The current provisions with the *Copyright Act* define the terms under which broadcasters can exercise the ephemeral right necessary to copy programs for broadcast across time zones. Services such as TIVO are seen to be in violation of the current copyright act as are many similar services offered by cable and telephone companies for on demand use by consumers.

A related issue is moving material from one device to another, from a computer to an Ipod or other personal viewing or listening technologies, including smartphones. These are not currently legal under the provisions of [Section 27.2 of the Copyright Act](#).

World Intellectual Property Organization Internet Treaty

One of the motivations for the current round of revisions to the *Copyright Act* is Canada's signature of the *WIPO Treaty* dealing with digitization and the internet. While Canada signed on to the Treaty in 1996, it has not moved forward with a substantive update of the *Copyright Act* to implement some of the undertakings within the [Treaty](#).

Digital Millennium Copyright Act (USA -1998) aka DMCA

The Americans have translated some of these provisions into the *Digital Millennium Copyright Act* of 1998. The government of Canada has been under considerable pressure from the American government and cultural industries to adopt a similar approach to the protection of works in the digitized world and on the internet.

The DMCA has five subsections:

- WIPO Copyright and Performances and Phonograms Treaties Implementation Act,
- Online Copyright Infringement Liability Limitation Act which limits the liability of online service providers for copyright infringement when engaging in certain activities,

- Computer Maintenance Competition Assurance – creates a n exception fo9r making a copy of computer program by activating a computer for purposes of maintenance or repair,
- Vessel Hull Design Protection Act creates a new form of protection for the design of vessel hulls.

The most contentious element is the sub-section on technological protection measures which prohibits the use, production or marketing of circumvention devices designed to prevent copying of a protected work such as a CD, DVD, computer programs, electronic games etc.