

Request for Comments

Draft CALL/ACBD Position Paper:

Copyright Law in the Digital Age

The paper which follows was prepared by Ted Tjaden, Chair of the CALL/ACBD Copyright Committee. On behalf of the CALL/ACBD Executive Board, I want to thank Ted for all his considerable efforts on this project.

Comments from the membership on the draft position paper are now requested. The period for comments will last until March 17, 2006. Once the comment period has ended, the Executive Board will review any comments received and determine if any changes to the position paper are required. The final version of the position paper will then be adopted and distributed publicly.

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I look forward to receiving your feedback.

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Canadian Association of Law Libraries/
l'Association canadienne des bibliothèques de droit
(CALL/ACBD)

Position Paper on Copyright Law in the Digital Age

(February 1, 2006)

February 1, 2006 DRAFT

FOR INTERNAL CALL/ACBD DISCUSSIONS ONLY

Position Paper on Copyright Law in the Digital Age

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1) Introduction and Issues

Copyright law and policy in Canada continue to play an important role in our society. These laws and policies affect our country’s competitiveness in the global marketplace by ensuring that all Canadians have access to information and other artistic, literary or musical works to help maintain that global competitiveness at the same time as providing creators incentive to produce their work. In the age of the Internet and new technologies, it is increasingly important that copyright policy in Canada maintain the traditional balancing of interests among all owners and users of copyrighted material. This important balance – between promoting the public interest in the encouragement and dissemination of works of the arts and intellect, on the one hand, and obtaining a just reward for the creator, on the other hand – has consistently been recognized by the Supreme Court of Canada in a number of important decisions.¹

At times, the debate over copyright policy has become polarized between the two broad interest groups – the owners or creators of copyrighted material versus the public interest and users of this material. This polarization can be unfortunate since solutions and compromises on issues of copyright policy need not be mutually exclusive or a “win-lose” scenario. In addition, the reality is that the “users” side of the equation – or the public interest – lacks the same visible lobbying force as the “creators” side and the public interest perspective risks being overlooked in an “us” versus “them” scenario as part of the Canadian copyright policy debate.

In part because of the ubiquitous nature of the Internet in today’s society and the growing importance of new technology in the digital age, debate surrounding copyright reform in Canada will instead involve *all* members of society due to the high profile of some of these issues and the fact that all Canadians are now directly affected by copyright law and copyright policy. The Canadian Association of Law Libraries/

¹ See, for example, *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13, ¶ 10, 23-24, 41, 48 and *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, ¶ 30-31.

l'Association canadienne des bibliothèques de droit (CALL/ACBD)² strongly believes that copyright policy in Canada must maintain a fair balance between users' rights and owners' rights and that any future amendments to the *Copyright Act* must maintain this balance. This position paper comments on recent federal government initiatives involving copyright reform in Canada, including issues arising from the following recent government reports:

- **May 2004:** *Interim Report on Copyright Reform – Report of the Standing Committee on Canadian Heritage* (the “Bulte Report”)³
- **October 2002:** *Industry Canada: Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (“Section 92 Report”)⁴

This position paper therefore identifies a number of current issues affecting copyright policy in Canada in the digital age, ranging from education and research access issues, the educational use of the Internet, Internet service provider (ISP) liability, Canada's obligations concerning international copyright treaties, proposed amendments regarding photographs, the private copying regime and Crown copyright.

2) About CALL/ACBD and Past Position Papers

CALL/ACBD – formally established in 1963 – is a national organization representing law librarians and law libraries across Canada. One of the purposes of CALL/ACBD is to increase the usefulness of Canadian law libraries and to promote access to legal information for all Canadians. The Association represents a wide variety of law library interests across Canada. With professional representatives from various fields of legal activities, such as law firms, law schools, government departments and organizations, courthouses and private corporations, it provides a forum for the exchange of information and ideas among members and fosters cooperation among Canadian law libraries.

² Home page: <<http://www.callacbd.ca>>.

³ Available online: <<http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf>>.

⁴ Available online: <<http://strategis.ic.gc.ca/SSI/rp/section92eng.pdf>>.

CALL/ACBD has remained active in copyright issues in Canada, being a member of the Copyright Forum, a group of Canadian institutional members consisting of national library, education, museum and archives organizations. In addition, CALL/ACBD and many of its own members closely monitored the 2004 Supreme Court of Canada decision in *CCH Canadian Ltd v. Law Society of Upper Canada*,⁵ a decision involving, among other things, fair dealing within a law library.

CALL/ACBD has prepared a number of position papers and other submissions relating to copyright law. The formal position papers include:

- **September 2001:** *Comments on “A Framework for Copyright Reform” and “Consultation Paper on Digital Copyright Issues”*:⁶
- **Position Paper 1997/2:** *Intellectual Property Protection of Databases: A Brief* (June 3, 1998):⁷
- **Position Paper 1997/1:** *Internet Content-Related Liability Study: A Brief* (June 3, 1998):⁸
- **Position Paper 1996/1:** *Canadian Copyright Law* (February 19, 1996):⁹

⁵ *Supra* note 1.

⁶ Available online: <<http://www.callacbd.ca/images/comments.pdf>>. This paper commented on two papers issued at the time by Industry Canada and Canadian Heritage. CALL/ACBD expressed concern over the “phased approach” recommended by the first paper and the priorities identified (digital issues and Internet retransmission of broadcast programs) when there were other equally important priorities. Regarding the second paper, CALL/ACBD reviewed and commented on the proposals identified, which included: (i) a making available right, (ii) legal protection of technological measures, (iii) legal protection of rights management information, and (iv) ISP liability. Many of these topics are still “open issues” and will be discussed below in more detail.

⁷ Available online: <<http://www.callacbd.ca/ip0a825e.html>>. In this paper, CALL/ACBD expressed the concern that *sui generis* protection for databases would fundamentally impede access to the law. For law-related databases, which include a lot of public domain material made freely available by the government, it would be unconscionable to then allow the bulk of this material to be licensed and regulated. Commercial vendors of databases are already protected by existing legislation and through license agreement.

⁸ (1998) 23 Can L. Lib. 203. Also available online: <<http://www.callacbd.ca/ip0a824e.html>>. This paper commented on the *Internet Content-Related Liability Study – Cyberspace is Not a No Law Land* commissioned by Industry Canada. CALL/ACBD recommended that Internet browsing not be deemed infringement, especially if the *Copyright Act* is to be “technologically neutral”. Tinkering with copyright principles because of technology could severely limit public access to legal information.

⁹ (1996) 21 Can L. Lib. 20. Also available online: <<http://www.callacbd.ca/ip0a806e.html>>. In this paper, CALL/ACBD commented on a number of copyright issues, with the two major issues being Crown copyright and fair dealing. On Crown copyright, the paper urged governments to take a more liberal approach to making works of the Crown available to the public. On fair dealing, the paper advocated specific statutory criteria for fair dealing (along the lines of the American approach). The paper also

- **October 1989:** “Brief on Stage II Amendments to the *Copyright Act*” (1990) 15 Can L. Lib. 24.¹⁰

Because of the increasing use of electronic media by all Canadians to access and disseminate law-related information (and all types of information across the cultural spectrum), CALL/ACBD welcomes the opportunity to express its views in this position paper on digital copyright issues and copyright reform in general.

3) History of *Copyright Act* Amendments

Modern copyright law in Canada dates from January 1, 1924 with the enactment of the *Copyright Act*.¹¹ Copyright legislation obviously existed prior to this but it was a complicated regime due in part to the application of British legislation by implication.¹² Although minor amendments were made to the *Copyright Act* from time-to-time, it was not until the 1977 report of Keyes and Brunet¹³ and the 1984 white paper entitled *From Gutenberg to Telidon*,¹⁴ combined with the introduction of new technologies, that enough impetus was raised to prompt major copyright revisions.

In 1985, after holdings hearings, the Subcommittee on the Revision of Copyright of the Standing Committee on Communications and Culture issued its report entitled *A Charter*

discussed a single exemption copy for libraries and for inter-library loan and various issues involving electronic access.

¹⁰ In this brief, CALL/ACBD stated the importance of quick and easy access to primary sources of law (case law and legislation) and expressed concern over a “copyright collective” regime where some of the major legal publishers were not part of the collective or formed their own collective. The brief also expressed concern over Crown copyright and whether private publishers would charge for statutes and reasons for judgment in addition to also commenting on fair dealing and library exemptions for making single copies.

¹¹ *Copyright Act*, S.C. 1921, c. 24, as am. S.C. 1923, c. 10.

¹² See John S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs*, 4th ed. (Toronto: Carswell, 2004-) at para. 3.1 for a review of the pre-1924 law and the entire Chapter 3 for a general overview of the history of copyright legislation in Canada. This position paper drew upon Chapter 3 in summarizing the history of *Copyright Act* amendments.

¹³ A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, Consumer and Corporate Affairs, Canada: Ottawa 1977.

¹⁴ Consumer and Corporate Affairs Canada, *From Gutenberg to Telidon: A White Paper on Copyright* (Ottawa: Supply and Services Canada, 1984).

of Rights for Creators.¹⁵ Based on this report, the federal government announced it would introduce many of the recommendations.

Phase I amendments, as they came to be known, occurred in 1988¹⁶ and were primarily focused on “creators”. Phase I amendments included amendments involving an exhibition right for artistic works; explicit protection of computer programs; enhanced moral rights; the creation of a new Copyright Board; increased criminal sanctions; measures to improve the collective administration of copyright and the abolition of compulsory licences for the recording of musical works.¹⁷

Phase II amendments (also later known as the “Bill C-32” amendments”) were to focus on user rights and were meant to immediately follow the Phase I amendments, but their introduction was delayed for a number of years. The Phase II amendments included provisions to provide royalties to producers and performers of sound recordings; a levy on recordable, blank audio media, such as cassettes and tapes, to remunerate creators for private copying of their musical works; provisions to give exclusive distributors of books in Canada greater protection in the Canadian market; and exceptions from copyright law for groups such as non-profit educational institutions, libraries, archives and museums, as well as people with perceptual disabilities.¹⁸

In addition to the Phase I and Phase II amendments, the *Copyright Act* was amended on several occasions to have the Act comply with various international treaties:

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

¹⁵ 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).

¹⁶ *An Act to Amend the Copyright Act and to Amend Other Acts in consequence thereof*, R.S.C. 1985, c. 10 (4th Supp.).

¹⁷ See Canadian Heritage, *How has Canada’s Copyright Act Been Amended?* Available online: <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/legislation/hist_e.cfm>.

¹⁸ *An Act to amend the Copyright Act*, S.C. 1997, c. 24. See also April 25, 1997 news release from Canadian Heritage.

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.¹⁹

More recently, with the statutorily-required Section 92 Report (released in October 2002)²⁰ and the May 2004 Bulte Report²¹, debate continues on amending the *Copyright Act* regarding, among other things, the issues discussed below, including education and research access issues, the educational use of the Internet, Internet service provider (ISP) liability, Canada's obligations concerning international copyright treaties, proposed amendments regarding photographs, and the private copying regime.

4) Education and Research Access Issues

CALL/ACBD strongly encourages the Canadian government to be careful not to over-regulate or hamper any legitimate educational use of material in digital format, given the importance of ensuring that all Canadians are able to study and learn on the same footing as Americans and persons in other countries. The Section 92 Report identified “access and educational issues” as “pressing because of Canada’s commitment to lifelong learning, innovation and access to culture, and the need to preserve balance in the Act.”²² The Report also noted that “[s]ince 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.”²³

CALL/ACBD is concerned, however, that Recommendation 6 of the Bulte Report for extended collective licensing for online distance education materials and Recommendation 7 involving online interlibrary loans are too restrictive:

¹⁹ Industry Canada, Chapter 1(d), “Overview of Recent Legislative History” in *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (October 3, 2002) (“Section 92 Report”). Available online: <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00863e.html>>.

²⁰ *Supra* note 4.

²¹ *Supra* note 3.

²² *Supra* note 4 at 44.

²³ *Ibid.*

RECOMMENDATION 6

The Committee recommends that the Government of Canada put in place a regime of extended collective licensing to ensure that educational institutions' use of information and communications technologies to deliver copyright protected works can be more efficiently licensed. Such a licensing regime must recognize that the collective should not apply a fee to publicly available material....

RECOMMENDATION 7

The Committee encourages the licensing of the electronic delivery of copyright protected material directly by rights holders to ensure the orderly and efficient electronic delivery of copyright material to library patrons for the purpose of research or private study. Where appropriate, the introduction of an extended collective licensing regime should also be considered.²⁴

Such a regime would likely result in educational institutions incurring unnecessary extra expenses given the Supreme Court's ruling in *CCH Canadian v. Law Society of Upper Canada* that if copying is being done for the purpose of "research", the meaning of "research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained, even where the research is "for profit"²⁵.

CALL/ACBD is therefore encouraged by the government's March 24, 2005 backgrounder²⁶ to its response to the Bulte Report, which indicates that a more balanced approach will be adopted:

The current exception that permits the performance or display of copyright material for educational purposes within the classroom would be modified to enable students in remote locations to view a lecture using network technology, either live or at a more convenient time.

Material that may be photocopied and provided to students pursuant to an educational institution's blanket licence with a collective society would be permitted to be delivered to the students electronically without additional copyright liability. Provisions in this regard would apply until such time as the collective societies' blanket licenses authorize such electronic delivery.

²⁴ *Supra* note 3 at 18 and 21.

²⁵ *Supra* note 1 at ¶ 51.

²⁶ Canadian Heritage, Copyright Policy – Copyright Reform Process: "Government Statement on Proposals for Copyright Reform - March 2005 - Backgrounder" (March 24, 2005). Available online: <http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/index_e.cfm>.

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In the above instances, educational institutions would be required to adopt safeguards to prevent misuse of the copyright material.

The electronic interlibrary desktop delivery of certain copyright material, notably academic articles, directly to library patrons would be permitted, provided effective safeguards were in place to prevent misuse of the material.

As such, we would urge legislators to consider an amendment to section 30.2 of the *Copyright Act* to update its language to go beyond print copies so as to incorporate new technologies to permit libraries, archives or museums, equipped with appropriate but reasonable technological safeguards, to provide a copy of an original journal article *in any format* for the purpose of research or private study. Stated differently, the provision of interlibrary loans should be technologically neutral. In making these amendments it is important that the technological safeguards imposed on libraries to prevent misuse of copyrighted material not be overly burdensome and that libraries be exempt from liability for copyright infringement where reasonable efforts have been made to safeguard the material (such as putting the recipient on notice of the copyright in the materials and destroying the digital copy within a reasonable period of time once it has been sent and received).

Regarding delivery of electronic copies of materials, we support the following statements of the Canadian Internet Policy and Public Interest Clinic:

Research in Canada is currently inhibited by a prohibition against libraries providing patrons with a digital copy of material obtained electronically from another library via inter-library loan. Instead, the library must make a single print copy of the material for the patron. The rule is meant to prevent unauthorized distribution of the material by library patrons. It has the effect of putting Canadian researchers at a disadvantage to those in other jurisdictions where electronic delivery of copyrighted material is permitted.

Libraries should be permitted to deliver electronic copies of electronic materials to library patrons, without having to pay for the right to do so. Libraries should not have to pay for the right to distribute electronic copies of materials to patrons that they are permitted to distribute in hard-copy form for free. Increasing the cost of access to library materials by Canadians is not in the public interest.²⁷

²⁷ See Canadian Internet Policy and the Public Interest Clinic, “CIPPIC/PIAC Response to the May 2004 Standing Committee on Canadian Heritage *Interim Report on Copyright Reform*” (June 21, 2004) at 5-6. Available online: <http://www.cippic.ca/en/news/documents/Response_to_Bulte_Report_FINAL.pdf>.

5) Educational Use of the Internet

CALL/ACBD is concerned that the Bulte Report's recommendations for extended licensing of materials on the Internet are regressive by artificially restricting the definition of publicly available material to that which is labeled as such. This mischaracterizes the nature of the Internet and how most people use it and understand it – as a means of exchange of information. The default rule should be opposite to what the Bulte Report recommends and instead assume that material posted on the Internet is publicly available unless the owner of the material indicates to the contrary. Owners of information can protect themselves on the Internet by not posting information they do not want readily copied or through other technological means (passwords or licensing, for example). To set up an extended licensing scheme for materials on the Internet is regressive since much of this material will either be in the public domain or otherwise publicly available without any expectation of compensation. To require licensing of such material is wasteful and an intrusion on, or limitation of, the rights of users to access information on the Internet, especially when the existing *Copyright Act* already has provisions for handling fair dealing of copyrighted material.

In addition, the recommendations of the Bulte Report would put us at a disadvantage to our American cousins by introducing even more copyright licensing fees for Canadian educational institutions, costs not incurred by American educational institutions.

CALL/ACBD also agrees with the concerns expressed by Professor Michael Geist on this point in his May 31, 2004 *Toronto Star* column:

Rather than adopting an approach that facilitates the use of the Internet, the [Bulte Report] has called for the creation of a restrictive regime in which nothing is allowed unless expressly permitted. The result will be an Internet in which schools will be required to pay to use Internet materials contrary to the expectations of many creators.

A far more balanced approach, and one that would be more in line with Canadian values, would be to permit all uses unless specifically prohibited. This could be easily achieved in a manner that respects copyright by establishing a publicly available definition that includes works not technologically or password

protected and for which the copyright holder has not expressly asserted limitations on the use of the work.

Canada displayed foresight in the late 1990s in identifying the potential for the Internet and new digital technologies to benefit all Canadians. In order to fulfill that vision, we need to reconsider the Bulte committee's recent recommendation so that the balance that is so critical to creators, users, and the broader public interest is preserved.

The backgrounder²⁸ recommendation for further public consultation on the issue of the educational use of the Internet is preferable to the Bulte Report's recommendation for licensing of the Internet. However, CALL/ACBD feels that there has been sufficient consultation on these points and that the government should instead adopt Option 1 mentioned in, but not recommended by, the Bulte Report – to amend the definition of fair dealing to specifically accommodate educational uses:

Option 1 ...

Amend the definition of fair dealing as it relates to copyrighted material available online, expanding its scope to encompass teaching and study by educational institutions using such material. Currently, the Act's fair dealing provisions enable use of portions of copyright material for limited purposes without infringing copyright. The fair dealing purposes currently include research, private study, criticism, review and news reporting — but not specifically educational purposes.

No licence would be required for uses which are covered by an expanded fair dealing exemption. For other uses, different licensing approaches might apply, depending on whether or not the accessed material is "publicly available." One possibility is to impose compulsory licensing, i.e. mandatory authorization combined with tariffs to be paid by users and distributed to rights holders, for uses of publicly available material that are not included within an expanded fair dealing exemption.

With respect to non-publicly available material, uses that are not covered by an expanded fair dealing exemption would be subject to the normal copyright licensing requirements.²⁹

²⁸ *Supra* note 26.

²⁹ *Supra* note 3 at 13.

6) Internet Service Provider (ISP) Liability

Although CALL/ACBD is not an Internet service provider, many of our members use the Internet on a daily basis and would be directly affected on issues of ISP liability. We therefore think the government’s March 24, 2005 response to the Bulte Report calling for a more balanced “notice and notice” scheme (instead of the “notice and takedown” scheme proposed by the Bulte Report) is an improvement; we also support the government’s acknowledgement that ISPs would be exempt from copyright liability in relation to their activities as intermediaries:

A “notice and notice” regime in relation to the hosting and file-sharing activities of an ISP's subscribers would be provided for. When an ISP receives notice from a rights holder that one of its subscribers is allegedly hosting or sharing infringing material, the ISP would be required to forward the notice to the subscriber, and to keep a record of relevant information for a specified time.³⁰

We urge the legislators to adopt an approach to ISP liability that infringes the least on freedom of expression. Any proposed amendments regarding ISP liability should ensure: (i) appropriate judicial oversight and due process; and (ii) minimal bureaucratic expenses and procedures for ISPs if they are called upon to remove material from the Internet for reasons of suspected copyright infringement.

7) International Treaty Obligations

CALL/ACBD is concerned that ratification of the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* will result in overly broad domestic copyright law that would prohibit the circumvention of technological protection measures (TPMs) used by copyright holders. The concern here is that anti-circumvention laws will adversely

³⁰ *Ibid.*

affect libraries by preventing them from accessing TPM-protected data they have paid for should the technologies for accessing the data become obsolete in the future. Thus, it is possible that a library will have legitimately paid for material covered by a TPM and subsequently be unable to access that material due to technological changes. It may also be unable to circumvent the TPMs if overly broad anti-circumvention rules are introduced as a result of the application of international treaty obligations.

We encourage the legislators to heed Professor Geist’s cautionary tale regarding the negative effects of TPMs:

The experience with technological protection measure legal protection in the United States, which enacted anti-circumvention legislation as part of the Digital Millennium Copyright Act (DMCA) in 1998, demonstrates the detrimental impact of this policy approach — Americans have experienced numerous instances of abuse that implicate free speech, security, user rights under copyright, and fair competition.

From a traditional copyright perspective, anti-circumvention legislation, acting in concert with technological protection measures, has steadily eviscerated fair use rights such as the right to copy portions of work for research or study purposes, since the blunt instrument of technology can be used to prevent all copying, even that which copyright law currently permits. They also have the potential to limit the size of the public domain, since in the future work may enter public domain as its copyright expires, yet that content may be practically inaccessible as it sits locked behind a technological protection measure.

...

In fact, the time has come for all Canadians to speak out and to tell the responsible ministers along with their local MPs what is increasingly self-evident. Canada does not need protection for technological protection measures. In order to maintain our personal privacy, a vibrant security research community, a competitive marketplace, and a fair copyright balance, we need protection *from* them.³¹

The Canadian Internet Policy and Public Interest Clinic also highlights the negative impact that TPMs can have on libraries and the public domain:

DRM [digital rights management] poses a serious threat to the ability of the public to access and use copyright works in the public domain. DRM conflicts with copyright in this way because under copyright law, copyright protection has

³¹ Michael Geist, ““TPM’s: A Perfect Storm for Consumers” *Toronto Star* (31 January 2005). Available online: <http://www.michaelgeist.ca/resc/html_bkup/jan312005.html>.

a limited term. After the copyright term expires, the work enters the “public domain” and the public is free to access and use the work. For its part, DRM has the potential to protect a work indefinitely, long after copyright in the work might have expired. This permanent lock-down of the public domain runs contrary to the principle of balance in copyright law. In a related way, DRM also threatens to lock-down works forever because data stored in proprietary DRM formats (whether it be songs, software, electronic books or other data) is at a much greater risk of being lost once the playback media is no longer available. DRM protection has the potential to outlive its useful life cycle, and to lock away the protected data forever. Indeed, this has already happened, according to Dennis Dillon, a librarian at the University of Texas in Austin, and information bought and paid for has become inaccessible. Allowing libraries to circumvent DRMs, as recommended by some library associations is likely a poor substitute for information accessibility. One is hard-pressed to imagine library associations employing armies of experts dedicated to defeating DRMs on material to be archived. Under DRM, libraries and archives of the future may be filled with irretrievable knowledge. The same holds true for individuals’ collections of digital copyright works. In September 2004, a vice-president of Warner Music Group stated that, because of a lack of interoperability in DRM-related services, “[n]ext year, you’ll start seeing people with potentially large libraries of content that won’t play with their devices.”³²

In addition, we are concerned that ratification could significantly expand the rights of copyright holders to the detriment of user rights (including the possible *political* pressure Canada might be under from the United States to extend the term of copyright protection to “life of an author plus 70 years”), thereby overriding the balanced approach between the rights of copyright owners and the rights of users taken by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*³³.

We therefore urge the government to proceed with caution regarding potential ratification of these international treaties without first putting measures in place in the domestic legislation that protects the public interest and avoids the problems raised by the American experience with TPMs.

³² Canadian Internet Policy and Public Interest Clinic, “Digital Rights Management” (8 April 2005). Available online: <<http://www.cippic.ca/en/faqs-resources/digital-rights-management/>>.

³³ *Supra* note 1.

8) Photography Issues

Although CALL/ACBD understands the advantage of harmonizing the term of copyright protection for photographs with the term for other works under the *Copyright Act*, we are concerned with the Bulte Report's recommendation that the default provision be for copyright to vest in the photographer. The government's March 24, 2005 backgrounder, however, appears to acknowledge the problematic effect of this in terms of the typical commissioning of photographs for weddings and baby pictures, for example, when it states that "the interests of consumers in the use of photographs commissioned for domestic purposes would be protected."³⁴ CALL/ACBD is of the position that resorting to federal and provincial privacy legislation is not sufficient to protect consumers whose photos have been taken by a photographer. Instead, a default rule needs to be created for consumer transactions that sees the copyright residing in the consumer commissioning the photographs.

CALL/ACBD is also concerned with the Bulte Report recommendation for "life plus 50" for photographs where the copyright in the photographs is owned by a corporation. This would extend the term of the copyright unnecessarily and harm the public domain. Instead, a rule of 50 year protection for corporations should be more than adequate.

9) Private Copying Regime

CALL/ACBD welcomes the government's announced intention to release a discussion paper on the issues involving the private copying regime, amendments to which affect many stakeholders within Canadian society. While the purpose of the private copying regime was meant to provide some form of compensation for creators (typically musicians or their record companies), some have called into question its effectiveness. The government may therefore wish to consider a wide number of options, including dropping a private copying regime in favour of a fair use defense (e.g., it would be fair

³⁴ *Supra* note 26.

use for a consumer to copy a CD they purchased onto their computer or iPod).³⁵ CALL/ACBD advocates, consistent with any other proposed amendments, that our legislators take a balanced approach to any possible amendments to the private copying regime to ensure a robust public domain and an appropriate level of protection for fair dealing and other users' rights.

10) Crown Copyright

Although the Bulte Report does not specifically raise the issue of Crown copyright, CALL/ACBD thinks this is an issue that remains important in the digital age. Since most Canadians now rely on the Internet to access statutes, cases and other government and law-related information, we think the federal government can further open its position on Crown copyright and arrange to have the same open principles applied at the provincial level as well.

Crown copyright is statutorily enshrined in section 12 of the *Copyright Act*:

Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

In the United States, by way of contrast, there is no equivalent to Crown copyright,³⁶ a situation that does not appear to have hurt the American government. Although the Canadian federal government softened its position with the *Reproduction of Federal Law Order*,³⁷ there is no absolute right to reproduce all federal material and the position involving provincial government material is less than clear.

³⁵ See, for example, Michael Geist, "Copying Levy hasn't Worked Well for Anyone" *Toronto Star* (8 August 2005).

³⁶ 17 U.S.C. §§ 101, 105 (1976). See also, David Vaver, "Copyright and the State in Canada and the United States" (6 June 1995). Available online: <<http://www.lexum.umontreal.ca/conf/dac/en/vaver/vaver.html>>.

³⁷ See SI/97-5. This order allows cases and legislation issued under authority of the government to be freely used so long as any reproductions are accurate and not represented as official versions.

Professor Geist has called for the abolition of Crown copyright:

The Internet and new technologies foster that dual role, providing millions of Canadians with the ability to create and distribute new culture, political speech, and entertainment. Canadians admittedly have access to government documents and audio-visual materials through government publishing and access to information requests, however, they still lack the unfettered right to use those materials.

Eliminating crown copyright and adopting in its place a presumption that government materials belong to the public domain to be freely used without prior permission or compensation would change that.³⁸

Although abolition is certainly a possible option, CALL/ACBD earlier advocated a modified approach to lessening the potentially restrictive application of Crown copyright in our 1996 position paper, a position that we re-assert and set out in its entirety below:

The prime concern of the Association is that there should be quick and easy access to legal information, especially legislation and case law. The Association supports the Information Highway Advisory Council's views on Crown Copyright aimed at ensuring universal and easy access to public information. We urge that all governments adopt a more liberal approach to making works of the Crown available to the public including making more public information available on the Information Highway without requiring payment or prior authorization.

The Association supports the following Information Highway Advisory Council recommendations:

- Crown copyright should be maintained.
- The Crown in Right of Canada should, as a rule, place federal government information and data in the public domain.
- Where Crown copyright is asserted for generating revenue, licensing should be based on the principles of nonexclusivity and on the recovery of no more than the marginal costs incurred in the reproduction of the information or data.

The Association also asks that as far as statutes, regulations, judicial decisions and decisions of administrative boards are concerned:

- there be no licensing fees for use of this material.

³⁸ See Michael Geist, "Keeping an Eye on a Canadian Prize" *Toronto Star* (14 March 2005). Available online: <http://www.michaelgeist.ca/resc/html_bkup/mar142005.html>.

- subject to the enforcement of moral rights to protect the accuracy and integrity of statutes, regulations, judicial decisions, and decisions of administrative boards, the Crown should not refuse to permit this information to be used in any publication, reproduction, adaptation, performance in public, or communication to the public.
- both federal and provincial governments shall be bound by these provisions.
- where the text of this material is used in any derivative work, copyright in that derivative work shall not extend to the actual text of the statute, regulation, judicial decision, or administrative tribunal decision.
- the federal and provincial Crowns have an obligation to enforce the Crown's moral rights to protect the accuracy and integrity of the information and the Crown should not waive its moral rights over this material.
- there should be an exemption for the use of copyrighted material in legislative, judicial or administrative proceedings or in reports of such proceedings.

11) Conclusions

In closing, CALL/ACBD would like to re-assert the need for any amendments to the *Copyright Act* to take into account the balance of interests between users and creators. Furthermore, in making amendments to the Act, legislators should avoid a "phased" approach where owner rights are addressed first and user rights are addressed later (as occurred in the 1980s and 1990s), since the delay between the "phases" would likely result in an imbalanced approach. Stated differently, to avoid imbalance or unfairness, any amendments to the Act should carefully balance at the same time and in the same amendments the rights of users and creators.

We also encourage our legislators to keep in mind the following core principles adopted by the Copyright Forum regarding any proposed copyright reform in Canada:

Balance in Copyright Law

Copyright law must serve the public interest by providing a reasonable balance between the rights of copyright owners and the rights of citizens to reasonable access to copyrighted works.

Primacy of the Copyright Act

The rights granted to users of copyright content by the *Copyright Act* must not be allowed to be unilaterally overridden by contract. The contractual licensing of copyright works does not replace or fully achieve the public policy objectives of copyright law.

Technological Neutrality

Copyright laws must remain “technology neutral” in the sense that the provisions they embody ensure that technological developments detract neither from the rights of copyright owners nor from the legitimate rights of users to have reasonable access to protected works.

The Right to Read

Nothing in the *Copyright Act* should impede an individual’s fundamental freedom to read, view, or listen to material protected by law.

The Right to Lend

The non-profit public lending of legally obtained copyright content is one of the cornerstones of a democratic society and must be permitted to continue irrespective of the format of the content.

A Robust Public Domain

A robust public domain is an essential element of an informed and participatory society.

Facts are Not Copyrightable

It is essential that individuals maintain their ability to access and use facts. It would be inappropriate to extend a *sui generis* property right to compilations of facts.

Privacy

The right of individuals and institutions to retain their privacy relating to choice of reading or research content must be protected.

DRAFT – FOR DISCUSSION

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