

Intellectual Property Institute of Canada (IPIC) Submission on the Statutory Review of the *Copyright Act*

Submission to the
House of Commons' Standing Committee on Industry, Science and Technology

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INTRODUCTION

The Intellectual Property Institute of Canada (IPIC) is the professional association of patent agents, trademark agents and lawyers practicing in all areas of intellectual property law. Our membership totals over 1,700 individuals, consisting of practitioners in law firms and agencies of all sizes, sole practitioners, in-house corporate intellectual property professionals, government personnel, and academics. Our members' clients include virtually all Canadian businesses, universities and other institutions that have an interest in intellectual property (e.g. patents, trademarks, copyright and industrial designs) in Canada or elsewhere, as well as foreign companies who hold intellectual property rights in Canada.

IPIC is pleased to respond to the consultation on the Statutory Review of the *Copyright Act*.

EVIDENCE-BASED POLICY-MAKING

The preamble to the 2012 *Copyright Modernization Act* described one of the purposes of amending the *Copyright Act* (the “Act”) as promoting “culture and innovation, competition and investment in the Canadian economy”. To date, however, the extent to which any of the desired goals have been achieved *because of the changes to the Act* – remains unknown. There is little to no publicly-available empirical data about the effects of copyright reform that is collected by the government or the Canadian Intellectual Property Office. We recommend that work commence now in anticipation of the next mandated review of the *Act* (scheduled for 2022) to ensure that copyright reform proceeds in a manner informed by rigorous, transparent, and valid data about the results (if any) that copyright reform has already achieved. Parliament needs to identify what would constitute “success” in copyright reform, and should mandate funding to enable the collection and dissemination of data that speak to the identified criteria for success.

\$1.25 MILLION TARIFF EXEMPTION FOR RADIO BROADCASTERS

Section 68.1(1)(a)(i) of the *Act* exempts the first \$1.25 million of advertising revenue earned by commercial broadcasters from payment obligations under Copyright Board-approved tariffs in respect of performer’s performances and sound recordings (other than a nominal \$100 payment). In other words, of the first \$1.25 million of advertising revenue earned by a commercial broadcaster, only \$100 is paid pursuant to tariffs for whom the ultimate beneficiaries are performers and sound recording owners. By contrast, songwriters and music publishers collect payments from every dollar earned by the broadcaster. This is an unnecessary subsidy for broadcasters at the expense of performers and sound recording owners.¹ It is a unique exemption in the *Act* and should be removed.

The exemption was intended as a transitional provision in the 1997 amendments to the *Act*. The exemption not only results in unequal treatment of performers and sound recording owners as compared to other copyright owners, it treats copyright users unequally: small, medium and large businesses such as satellite radio, pay audio, restaurants and retailers pay pursuant to tariffs – but only commercial broadcasters receive a legislated subsidy as found in Section 68.1(1)(a). It has been estimated that removal of the exemption would provide an additional \$8 million in annual

¹ The Copyright Board of Canada has stated that the exemption “is seemingly based on no financial or economic rationale” (Copyright Board of Canada, *Statement of royalties to be collected by SOCAN and NRCC in respect of commercial radio for the years 2003 to 2007* (October 14, 2005)).

compensation to the Canadian music industry – without any additional cost being borne by Canadian consumers or taxpayers.²

DATA AND DATABASES

Increasing commercial value is attributed to data and databases; significant investment is often made in obtaining and processing data, and selecting, arranging, maintaining, and presenting the contents of databases. While that investment may warrant legal protection, the current legal basis for according data and databases copyright protection is uncertain. The Supreme Court of Canada’s recent denial of leave to appeal in the *Toronto Real Estate Board v. Commissioner of Competition* case has raised uncertainties regarding what is a sufficiently “original” and thereby protectable “selection or arrangement of data”. Consideration should be given to amendments to the *Act* to balance the significant investments made in creating databases and inadvertently creating monopolies in the individual facts contained in such databases or deterring competition in fact-driven marketplaces. One approach to this issue is the European Union’s Directive 96/9/EC, which mandates a 15-year *sui generis* form of legislative protection for databases that do not meet the requisite standard of originality for copyright to subsist.

ARTIFICIAL INTELLIGENCE AND DATA MINING

The interface between copyright and artificial intelligence (AI) remains uncertain. The development of machine learning and natural language processing often relies on large amounts of data to “train” AI systems – a process often referred to as “data mining”. Such data mining techniques generally require copying copyright-protected works, but also can require access to large data sets that may themselves be the subject of copyright claims. In 2014, the United Kingdom added Section 29A to its *Copyright, Designs and Patents Act 1988* (the “UK Act”), which permits copying of a work for the purposes of computational analysis. The provision contains restrictions to ensure that the researcher conducting the data mining has lawful access to the content (e.g., by means of a licence), and to restrict content owners from subverting the right to perform data mining activities by means of contractual overrides. We recommend that the Committee consider text and data access and mining requirements (including in relation to licence conditions and technological protection measures) in the context of AI.

As well, whether works created using AI are accorded copyright protection is ambiguous given the requirement of human authorship and human exercises of skill and judgment for a work to be “original”. Issues of protection, authorship and ownership of works created without direct human

² Testimony of Ian MacKay, President, Re:Sound Music Licensing Company, before the Standing Committee on Industry, Science & Technology (INDU), Hearing on the Statutory Review of the Copyright Act, June 14, 2018.

effort need to be considered carefully. A possible solution is an amendment to the *Act* providing copyright protection to works created without a human author in certain circumstances, such as is found in Section 9(3) of the *UK Act*, which provides that the author of computer-generated works is “the person by whom the arrangements necessary for the creation of the work are undertaken”.

DEFINITION OF “SOUND RECORDING”

Performers and owners of sound recordings are entitled to “equitable remuneration” when sound recordings are played by radio broadcasters. However, they are not entitled to such equitable remuneration when their sound recordings are contained in the “soundtrack” of a television program or movie that is played by a television broadcaster, shown in a movie theatre or streamed on the internet. That difference in treatment arises because the current definition of “sound recording” in the *Act* “excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work”. This means that the composers of songs and the owners of publishing rights therein receive a revenue stream that is not available to performers and sound recording owners for the same activity.

We recommend amending the definition of “sound recording” to entitle performers and sound recording owners to receive equitable remuneration when sound recordings that are embodied in audio-visual productions are communicated to the public by telecommunication. That approach is consistent with the copyright laws of jurisdictions such as Australia and the United Kingdom.

INJUNCTIVE RELIEF AGAINST INTERMEDIARIES

Internet intermediaries that facilitate access to infringing materials are best-placed to reduce the harm caused by unauthorized online distribution of copyright-protected works. This principle has been long recognized throughout Europe where Article 8.3 of the *EU Copyright Directive* has provided the foundation for copyright owners to obtain injunctive relief against intermediaries whose services are used by third-parties to infringe copyright.

Building on existing precedents, the *Act* should be amended to expressly allow copyright owners to obtain injunctions, including site-blocking and de-indexing orders, against intermediaries whose services are used to infringe copyright. This recommendation is supported by a broad range of Canadian stakeholders (including ISPs). Moreover, more than a decade of experience in over 40 countries demonstrates that site-blocking is a significant, proven and effective tool to help reduce access to infringing online materials.

While the CRTC declined to consider the merits of implementing the site-blocking regime proposed by the FairPlay Canada coalition on the basis that the CRTC lacks jurisdiction under the *Telecommunications Act*, the CRTC recognized the harm of online piracy to the Canadian

broadcasting system and the economy and suggested that other avenues are more suitable to address this issue, including via Parliament as part of the current review of the *Copyright Act*.³

“SAFE HARBOUR” PROVISIONS

The existing notice-and-notice and enablement provisions in the *Act* address users and services that overtly enable access to infringing copies; however, neither measure requires intermediaries, who are uniquely positioned to effectively restrict access to infringing content, to put in place such restrictions. We recommend that the Committee further study options such as a “notice-and-staydown” obligation on intermediaries.

Section 31.1 of the *Act* contains what are colloquially referred to as “safe harbour” provisions that shield internet service and hosting providers from liability for infringement, even in situations where the internet service providers have actual knowledge that their services are being used to engage in and otherwise facilitate infringing activities. We therefore recommend the following reforms to the *Act*:

- stipulating that the safe harbours are only available to truly passive intermediaries, *i.e.*, those that function in an automated manner such that they have no actual knowledge of alleged infringement and are unaware of circumstances that would give them constructive notice; this should not preclude automated screening content for hate speech, child pornography or cyber-bullying, *etc.*
- stipulating that the safe harbours are only available to intermediaries that have a policy to address repeat infringers and that comply with their obligations under the “notice and notice” mechanism
- changing the knowledge requirement in Section 31.1(5) from having knowledge of a court order to having knowledge of infringement

REVERSIONARY RIGHT

The term of protection for copyright and related rights will be addressed through the amendments to the *Act* required by the *United States Mexico Canada Agreement*. However, the reversionary right found in Section 14 of the *Act* bears further attention. As currently drafted, its operation is problematic and engenders uncertainty amongst both rights-holders and users. We recommend that the matter be studied further, including whether the provision should be repealed altogether or whether consideration should be given to re-casting the reversionary right such that formal

³ See *Telecom Decision CRTC 2018-384*.

notice requirements for heirs be implemented and that the *Act* clarify the effect of any reversion on so-called “downstream” works that are based on a work in which rights have reverted.

RULES OF OWNERSHIP FOR COMMISSIONED WORKS AND FUTURE WORKS

As a matter of commercial practice, many copyright-protected works (such as logos, digital graphics for websites/apps, marketing and advertising materials) are created by non-employee contractors or freelancers hired with the expectation that the works they create would be owned by the party commissioning the work. However, unless the parties properly contract for a transfer of copyright in the works, the contractor will own copyright in the work, contrary to the expectations and customary practices of the commissioning party. In the United States, certain works created pursuant to agreements that designate the commissioned work as a “work for hire” are owned by the party that commissioned the work, and not by the author(s) of that work. We recommend that the Committee consider reforms to the *Act* that enhance certainty regarding ownership for contracting parties.

Relatedly, many copyright-protected works created on a commercial, contractual basis are created pursuant to agreements that are negotiated and signed prior to the creation of the subject works. Canadian copyright law does not expressly recognize a prospective assignment of rights in a work, leading to uncertainty as to the effectiveness of the transfer of rights in the prospective work. We recommend that the Committee consider an express allowance for the written assignment of works not yet created at the time of contracting.

RIGHTS OF JOINT AUTHORS/OWNERS

Many works of copyright are created by two or more joint authors, in which the authors’ individual contributions are indistinguishable. Joint authors are usually the first owners of copyright in the jointly created work; ideally, there will be a written agreement between them that sets out their rights to exploit the work, or at least a written agreement between them and a third party, *e.g.*, a producer or a publisher, that specifies their rights to exploit their jointly-created work, whether together or individually. The absence of such an agreement is likely to result in uncertainty both for the authors and subsequent copyright owners and for their prospective licensees or assignees. We recommend that the Committee consider amending the *Act* to clarify the rights of joint authors or subsequent owners of copyright in a jointly-created work, including whether the consent of all copyright owners is required to enforce copyright rights, to exploit the work and/or authorize its exploitation.

BOUNDARY BETWEEN COPYRIGHT AND INDUSTRIAL DESIGN PROTECTION

The boundary between copyright and industrial design protection has been difficult to determine for “artistic works”. Section 64 of the *Act* attempts to provide a solution but the section, and the exceptions contained therein, can be difficult to apply. The broad restrictions set out in Section 64 and the one year limitation contained in the *Industrial Design Act* significantly reduce the rights available to creators of artistic works in Canada.⁴ By contrast, the European Union and the United Kingdom each provide an unregistered design right. It is submitted that this problem should be studied further so that an appropriate solution – one that includes a comparatively short period of protection – can be arrived at in relation to the *Act* and the *Industrial Design Act*.

⁴ See for example *Corocord Raumnetz GmbH v. Dynamo Industries Inc.* 2016 FC 1369.