Legislative Summary **LS-512E**

BILL C-60: AN ACT TO AMEND THE COPYRIGHT ACT

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LEGISLATIVE HISTORY OF BILL C-60

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	20 June 2005	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-60: AN ACT TO AMEND THE COPYRIGHT ACT*

Bill C-60, An Act to amend the Copyright Act, was introduced in the House of Commons by the Minister of Canadian Heritage, the Honourable Liza Frulla, and received first reading on 20 June 2005. The bill makes wide-ranging changes to the *Copyright Act*, and is primarily designed to address digital issues surrounding copyright.

BACKGROUND

Copyright is a property right in a work; it gives the author or creator certain exclusive powers, such as the right to reproduce the work, or to communicate it to the public. It applies to all original literary, dramatic, musical and artistic works. In Canada, these rights are protected under the federal *Copyright Act*.(1) Authors and creators gain copyright only when their ideas are fixed, meaning that those ideas are put down in tangible form.

Canadians increasingly receive information and entertainment through personal computers with broadband Internet connections. Much of this content is openly available on peer-to-peer (referred to as P2P) networks, which allow any person who has downloaded the necessary software to copy digital files from other users of the network. P2P networks are difficult to regulate, since users download from each other; there is no central computer server that can easily be shut down in the event it has been distributing material that infringes copyright.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) R.S. 1985, c. C-42.

Digital technologies have permitted widespread copyright infringement on the Internet. Piracy on P2P networks such as KaZaa, and more recently networks using bit-torrent software, are blamed for falling sales of CDs and are seen as a future threat to sales in other formats such as DVDs. Meanwhile, educational institutions and libraries are struggling with their own uncertainties over digital distribution of materials in their curricula and collections.

The conflict over copyright on the Internet is being fought at the political level, in Canadian courts, and through technologies such as encryption. The entertainment industry and Canadian publishers have called on Parliament to enact tough reforms to the law to stem the flow of unauthorized digital copies of their works over the Internet. Consumer advocates and campaigners for Internet liberalization retort that the proposed measures will block the free flow of ideas, endanger the privacy rights and civil liberties of Canadians, and discourage economic investment in the Internet and new digital technologies.

The current law in Canada has been affected by a series of court decisions, the most important of which are the Federal Court decisions in *BMG Canada Inc.* v. *John Doe*[(2)] and the Supreme Court of Canada decisions in *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Assn. of Internet Providers*[(3)] *(Tariff 22)* and *CCH Canadian Limited* v. *Law Society of Upper Canada.*[(4)] In brief:

- In the case of *BMG* v. *John Doe*, music companies sought to force Internet service providers (ISPs) to divulge the names of customers who were making infringing material available on the Internet. The Federal Court in *BMG* v. *John Doe* held that Canadian law allows the downloading of copyright-protected files for personal use, and the making of those files available to others on peer-to-peer networks. The Federal Court of Appeal upheld the decision, although it cited privacy concerns and the weakness of the music companies' evidence, rather than a right to personal use of downloaded files.

- In *Tariff 22*, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) asked the Copyright Board to impose royalties, known as Tariff 22, on ISPs that facilitated the transfer of published works over the Internet. The case ultimately reached the Supreme Court of Canada, which concluded that ISPs could not be held liable for illegal downloading on their networks, since section 2.4(1)(b) of the Act provided protection when a person or company merely provides the means of communicating copyrighted works to the public.

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(2) *BMG Canada Inc.* v. *John Doe*, [2004] 3 F.C.R. 241 (FCC); (2005 FCA 193) A-203-04, 19 May 2005.

(3) *Society of Composers, Authors and Music Publishers of Canada* v. *Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427.

(4) *CCH Canadian Limited* v. *Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13.

- In the case of *CCH Canadian Limited* v. *Law Society of Upper Canada*, the Law Society of Ontario was sued by legal publishers for providing a photocopy service and maintaining self-service photocopiers in its library for use by patrons. The Supreme Court of Canada held that the "fair use" sections of the Act allowed libraries to have photocopiers available for people to make private copies of works held by libraries for research purposes.

Also central to the debate is Canada's decision to sign the World Intellectual Property Organization (WIPO) treaties. The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) address copyright issues and the Internet. The treaties establish copyright protections for authors, sound recording makers, and performers of audio works. Canada signed the treaties in 1997, but cannot ratify them without amendments to the *Copyright Act*.

Bill C-60 is the first in what will likely be a series of bills amending and updating the *Copyright Act*. The last time the Act underwent significant amendment was in 1997, a time when the evolving digital revolution with its rapid changes in technologies made clear directions difficult to predict. In order to gauge the effectiveness of the 1997 amendments, section 92 of the Act mandated a review within five years of the proclamation of the changes.

This so-called "section 92 review" process began almost immediately after the 1997 changes came into effect, with rounds of public consultations and consultation papers discussing the various issues to be considered in addressing Canada's digital copyright framework.

In 2002, Industry Canada and the Department of Canadian Heritage, which are jointly responsible for copyright policy in Canada, produced a report on the five-year review entitled *Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act* ("the Section 92 Report"). The Report identified 40 issues for possible legislative action, dividing them into those that should be dealt with in the short term, medium term and long term.

In November 2002, the House of Commons Standing Committee on Canadian Heritage received an Order of Reference from the House to begin the statutory review of the Act. Early hearings focusing on the international copyright context, and the issues identified for possible legislative action in the Section 92 Report revealed the need to implement the WCT and the WPPT – which, as mentioned above, would involve amending Canadian copyright law. From the time the Heritage Committee hearings began until October 2003, there was little to indicate that these changes would be immediately forthcoming.

The apparent lengthy delay between Canada's signing of the WIPO treaties and the introduction of the necessary legislation for their implementation led the Heritage Committee to pass a motion in October 2003 recommending that the ministers of Canadian Heritage and Industry instruct their officials to prepare draft legislation that would enable the WIPO treaties to be implemented. The draft legislation was to be ready by 10 February 2004 for review by the Committee.

In response, the then Minister of Canadian Heritage, the Honourable Sheila Copps, told the Committee on 6 November 2003 that cabinet approval for legislation implementing the WIPO treaties had been sought since 1999; nevertheless, a timetable for ratification was not provided. The Minister of Industry indicated in a letter received by the Committee on 6 November 2003 that ministerial guidance on policy proposals to address the implementation of the WIPO treaties, along with the other issues identified for short-term action, would be sought as soon as possible.

The Committee was concluding the first round of hearings on its copyright study when Parliament was prorogued on 12 November 2003.

On 9 March 2004, in an appearance before the Committee, the new Minister of Canadian Heritage stated that the modernization of the *Copyright Act* was a high priority and that the ministers of Canadian Heritage and Industry would soon table in committee a status report on issues that required action in the short term, including the two WIPO treaties. Accordingly, the Heritage Minister invited the Committee to provide its views on these issues so that the government might finalize its position and introduce a bill in Parliament to amend the *Copyright Act* before the end of 2004.

On 25 March 2004, the Minister of Canadian Heritage and the Minister of Industry jointly submitted a *Status Report on Copyright Reform* to the Standing Committee on Canadian Heritage. The Committee reviewed the Status Report and held a series of meetings to consider six short-term issues, namely:

- private copying and WIPO ratification;
- photographic works;
- Internet service providers' liability;
- use of Internet material for educational purposes;

- technology-enhanced learning; and
- interlibrary loans.

In May 2004, the Committee released its findings and nine recommendations in its *Interim Report on Copyright Reform*. Among other things, the Committee recommended that:

- the Government of Canada ratify the WIPO treaties immediately;
- the *Copyright Act* be amended to grant photographers the same authorship rights as other creators;
- the *Copyright Act* be amended to allow for an extended licensing regime for Internet material used for educational purposes;
- 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;
- measures be taken to license the electronic delivery of copyright-protected material directly by rights holders, to ensure the orderly and efficient electronic delivery of such 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.

In an appearance before the Committee in November 2004, the Minister of Canadian Heritage said that the government response to the *Interim Report on Copyright Reform* would be in the form of legislation that she hoped would be before Cabinet "before Christmas."(5)

Four months later, the ministers of Industry and Canadian Heritage jointly released the *Government Statement on Proposals for Copyright Reform*, which outlined proposals for a bill the government planned to table in the spring of 2005. This joint statement constituted the bulk of the *Government Response to the May 2004 Interim Report on Copyright Reform of the Standing Committee on Canadian Heritage* presented to the House of Commons on 24 March 2005.

(5) The Hon. Liza Frulla, Minister of Canadian Heritage and Minister responsible for the Status of Women, 24 November 2004, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=94156.

Bill C-60 was introduced in the House of Commons on 20 June 2005. Much of the bill implements elements of the WIPO treaties in order to allow for Canada's ratification. The bill:

- provides additional rights to performers for their sound recordings, including a right to reproduce the recording, an adjustment in the term of protection, and moral rights in their performances;
- provides that making a copyrighted work available on the Internet, where it can be downloaded by members of the public, on demand, is an infringement of copyright;
- gives copyright holders the ability to control the first distribution of works in a tangible form; and
- tries to ensure that technological protection measures, such as encryption or digital rights management, are not circumvented.

In addition, Bill C-60 institutes a series of additional rules that relate to copyright in digital works. The bill:

- creates a statutory "notice and notice" scheme whereby ISPs are compelled to notify customers that they are infringing copyright, and keep information on such customers;
- creates new rules on how libraries and educational institutions are to deal with digital versions of copyrighted works; and
- repeals sections of the Act that treated photographs differently from other artistic works.

DESCRIPTION AND ANALYSIS

A. WCT and WPPT Ratification

1. Additional Rights for Performers and Makers of Sound Recordings

Clause 1 of the bill amends the definition of "treaty country" to include WCT countries, meaning a country that is party to that WIPO treaty. Also added are definitions for "WCT country" and "WPPT country," which mean countries that have signed the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, respectively.

Under section 5 of the *Copyright Act*, copyright in Canada applies to material copyrighted in foreign countries that are members of the World Trade Organization (WTO) or that have signed the Berne convention on intellectual property. Clause 4 of Bill C-60 makes amendments adding material copyrighted in WCT countries (signatories of WIPO) to Canada's copyright regime. The clauses are retroactive, so that any unexpired copyrighted material becomes subject to copyright upon the country's ratification of the WIPO treaty.

The WPPT deals with "related rights," also known as "neighbouring rights," for performers and makers of sound recordings. Neighbouring rights belong to the performers, producers and broadcasters who are auxiliaries in the intellectual creative process, since they assist authors in the communication of the author's works to the public. Under section 15(1) of the *Copyright Act*, performers currently have the sole right to communicate and perform the performance in public, and, if the performance is fixed, to reproduce the fixation.

In order to comply with the WPPT, Bill C-60 extends the neighbouring rights for performers found in the *Copyright Act*. Clause 8 begins to institute the substantive portions of new rights given to performers for their performances. Subsection 15(1.1) is added to the *Copyright Act* to give a performer a more comprehensive copyright in his or her performance in a sound recording,[(6)] with additional rights to sell the sound recording for the first time, and to make the sound recording available to the public on demand. These rights will apply only to performances that take place in Canada, by Canadians, or by foreign nationals from countries that have ratified the WPPT. The lesser rights granted by the existing section 15(1) will continue to apply to foreign nationals from countries that have not ratified the WPPT.

Clause 9 gives a performer a corresponding moral right to his or her performance, but only for live aural performances or sound recordings. Moral rights allow the performer to exercise power over the integrity of his or her performance, and the right to be associated with the performance or to remain anonymous. Like other moral rights, these rights may not be assigned, but may be waived. Bill C-60's new moral rights of a performer are not retroactive. The bill allows for the succession of moral rights, which can be passed on after the performer dies, in the same way that the author of a work would pass on his or her moral rights. Clauses 16 and 17 make consequential changes to add the new moral rights to the general infringement sections of the Act.

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(6) For a fixed performance, section 15(1) of the *Copyright Act* currently gives a performer the right to reproduce works that were fixed, pursuant to an exception granted under Part III (fair use) or Part VIII (private copying) of the Act. These exceptions are omitted under the new subsection 15(1.1), although both exemptions will continue to exist in relation to copyright in a performer's performance.

Clause 10 of Bill C-60 makes other alterations needed to comply with the WPPT, this time in relation to makers of sound recordings. The existing *Copyright Act* gives makers of sound recordings the right to publish, reproduce and rent out their recordings. New subsection 18(1.1) provides that a sound recording maker's copyright includes an exclusive right to transfer first ownership in a tangible form, and to make the sound recording available to members of the public. Under subsection 18(2.1), these new rights apply only to Canadians and to citizens or residents of a country that has signed the WPPT. The new subsection 18(2) adds WPPT countries to the countries in which the existing copyright protection rights for sound recordings are granted.

Under section 19(1) of the Act, a performer or maker of a sound recording has the right to be remunerated for a public performance or for its communication to the public by telecommunication (e.g., a radio broadcast). Clause 11 changes this section to make an exception for the "making available" right referred to in the new subsections 15(1.1) and 18(1.1), outlined above, and exempts the making available right from equitable remuneration.

Clause 13 amends subsections 23(1) to (3) to set the term of copyright for a performer's performance to 50 years after the end of the calendar year in which the performance occurs, except in the case where a sound recording is fixed or published before the copyright expires, in which case it continues for 50 years after the end of the calendar year in which the first fixation or publication occurs. For communications signals, the copyright term is set at 50 years after the end of the calendar year in which the signal was broadcast.

2. Right to Make Available On Demand, and
   Right to First Distribution of a Work in a Tangible Form

Under the *Copyright Act*, the holder of copyright has the sole right to communicate his or her work to the public. Clause 2 of the bill changes the definition of communication to the public found in section 2.4(1)(a) of the Act to include making the work available in a way that allows members of the public to access it on demand. This change is necessary for Canadian ratification of the WCT and WPPT, and also serves to reverse the *BMG* decision of the Federal Court of Canada, which held that merely making a file available in a shared folder on a computer does not constitute communication to the public.

Related to this change, clause 15 amends section 27 of the Act by adding a new subsection 27(2.1) on secondary infringement. This section states that it is copyright infringement when a person sells, rents, distributes, or communicates a work to the public, and the person knows, or ought to know, that the copy was made for private use under section 80(1) of the Act. New subsection 27(2.2) sets up a similar regime for lessons as defined under section 30.01 of the Act.

In addition, the WPPT mandates that performers and other copyright holders be given the first right to the distribution of their material in a tangible form. Clause 3 of the bill amends section 3(1) of the Act to provide this additional right to copyright holders. This new right serves to reinforce the existing right of distribution, and brings Canada into conformity with those nations that have copyright systems in which the right to first distribution is equated with the right to sell the original copy in its tangible form.

B. Technological Protection Measures and Digital Rights Management

Clause 1 of Bill C-60 adds definitions for “rights management information” and “technological measure” to the Act. These amendments define the scope of new sections of the Act which prohibit the circumvention of encryption and digital rights management measures embedded in media or sound recordings. Both terms refer to measures for copyright protection: a “technological measure” is embedded in a physical copy of a work – for example, a DVD or CD – to prevent copyright infringement; “rights management information” is attachment to or embodied in any form of digital media, and regulates (but does not necessarily prohibit) the uses of the work.

Clause 27 adds the substantive section that deals with digital rights management. New section 34.01 allows the copyright holder to sue any person for copyright infringement who, without the copyright holder’s consent, “knowingly removes or alters any rights management information in electronic form that is attached to or embodied in any material form of the work, the performer’s performance or the sound recording.” The person will be liable only if the removal of digital rights management information is related to a work’s communication to the public by telecommunication, and the person knows, or ought to know, that the removal will facilitate infringement of copyright.

People who subsequently sell, rent, communicate, distribute or import into Canada copyrighted works that have had their digital rights management information removed are also liable for copyright infringement.

New subsection 34.02(1) makes the same prohibitions on removing a technological measure protecting any material form of the work. This subsection prevents the removal of a technological measure embedded in a CD or DVD, including the removal of a technological measure in order to facilitate private copying under section 80 of the Act. Section 80(1) of the *Copyright Act* gives consumers the right to make copies of music recordings for personal use, for example by converting CDs to MP3s so that they can be played on I-pods without the consumers' having to pay for the same song twice. The anti-circumvention rule set out in subsection 34.02(1) would seem to render the right to make personal copies under section 80(1) virtually useless, since it is likely that all future CDs and DVDs will be protected by technological measures.

The subsequent selling, renting, distribution or importation of a work from which the technological protection measures have been removed is also an infringement of copyright.

C. Copyright and Photography

Under the *Copyright Act*, photographers are treated differently from other artists: the person who takes the photograph is often not considered the author of his or her work. Under the existing section 10 of the Act, the holder of the initial negative of a photograph is the author of the photograph. For example, if a tourist asked someone to take a picture of his or her family while on holiday, the tourist, as the owner of the film, would have copyright in the photo. Section 13(2) goes on to state that if the photograph is commissioned, first ownership in copyright goes to the person commissioning the photograph, in the absence of any agreement to the contrary.

Differential treatment of photographs has traditionally been justified by the concern that people who commission photographs for purely domestic uses (such as to record a wedding) should, by default, have control over those photographs. Such measures were believed to ensure privacy and prevent photographers from exercising powers over photographs taken at once-in-a-lifetime events. Moreover, news agencies also wanted to assert control over photos taken by freelance photographers taking pictures on a freelance basis.

Clauses 5 and 6 of Bill C-60 repeal sections 10 and 13(2) of the Act, making photographs subject to the same rules as other artistic works.

Although differential treatment of photographs is for the most part eliminated, clause 21 of Bill C-60 adds a proviso, giving those who commission a photograph for personal purposes the right to use the photograph for non-commercial purposes, in the absence of any agreement to the contrary.

D. Internet Service Provider Liability and the Statutory "Notice and Notice" Scheme

Clause 20 amends sections of the *Copyright Act* that deal with retransmission to include the provision of network services. New section 31.1 clarifies that network service providers are not liable for copyright infringement solely for providing the communication network that allows such infringement to take place. This, in effect, codifies the judicial interpretation of ISP liability found in the *Tariff 22* case noted earlier. Included in this exemption is the caching of a recording or the provision of digital memory. To qualify for the caching exemption, network providers must not modify the content; they must respect any limitations established by the person who posted the content; and they must not interfere with lawful access to data related to it.

The bill provides a further exemption against copyright infringement for a person who inadvertently hosts content on a network by providing digital memory in which another person stores copyright-infringing materials (subsection 31.1(4)). The immunity does not apply where the person hosting the content has actual knowledge of a court decision to the effect that the client who stored the content has infringed copyright.

Clause 29 creates the "notice and notice" regime in which copyright holders inform ISPs of copyright violators on their network. This regime differs from the "notice and takedown" regime instituted in the United States, which requires the ISP to remove content whenever copyright infringement is alleged, without a court order. The notice and takedown system was considered in the May 2004 *Interim Report on Copyright Reform*, but rejected because of the dangers it posed to civil liberties.

Under the notice and notice regime, a copyright holder sends written notice of the claimed infringement to the ISP, digital memory provider or search engine. The notice must state particulars about the claimant, the copyrighted work, its location on the network, and the claimed infringement. The ISP is entitled to charge a fee for each notice it receives (as determined by the Minister, by regulation), after which the ISP must forward the notice electronically to the copyright violator. The ISP must also retain, for six months after its receipt of the notice of claimed infringement, any records that will allow the identity and electronic location of the alleged violator to be determined. If the copyright holder commences legal proceedings against the person, the data retention period extends to a full year.

An ISP that fails to pass the notice on to its client is subject to a maximum damage award of $5,000. Failure to retain data on the copyright violator may entail a maximum damage award of $10,000. The ISP cannot, however, be held liable for the copyright infringement of its clients.

A copyright holder is entitled only to an injunction against a search engine that caches copyright-infringing materials on its system, and cannot seek damages. This provision, however, is subject to the search engine's not engaging in a number of enumerated measures that would enable the copyright violation.

E. Digital Reproduction of Copyrighted Works

1. Educational Institutions

Clause 18 of the bill adds a new section on lessons to the educational exemptions of the Act. The clause defines lesson, and goes on to state that it is not an infringement of copyright for an educational institution or a person acting under its authority to communicate a lesson to the students enrolled in a course. The lesson, however, may not contain material that infringes copyright. The educational institution may not communicate the lesson after the course has ended and must destroy any fixation within 30 days after the course has ended. The educational institution must take measures to prevent the digital copyrighted material from being distributed, and keep records of the dates on which the lesson was recorded and destroyed.

New section 30.02(1) allows an educational institution to enter into an agreement with a copyright collective, and if operating under such an agreement, it is not an infringement of copyright for the institution to make digital copies of works in the collective's repertoire and provide them to any of its students for educational purposes. The educational institution must pay the same royalty for the digital copy as it would pay for a paper copy, with the same licence terms and conditions, if possible, as would apply to a paper copy. The educational institution must take measures to prevent the digital version of the work from being reproduced. Copyright holders have the option of refusing to belong to the copyright collective.

The maximum amount that can be recovered from an educational institution that violates copyright by copying outside the collective's repertoire is the royalty owed; in other words, educational institutions are not liable for statutory damages. Moreover, a copyright holder has no right to sue a student for making a single copy of a work if the student did not know the distribution was in violation of copyright.

2. Libraries

Clause 19 liberalizes, to an extent, the distribution of digital copies of a copyrighted work to clients by libraries. Under the current provisions of the *Copyright Act*, libraries are allowed to provide only a paper copy of a work, making the provision of library collections to remote areas a problem. Under Bill C-60, a library may send clients a digital copy of a work, as long as it takes reasonable measures to prevent digital reproductions and is satisfied that the recipient will not use the copy other than for research or private study.

F. Consequential and Editorial Amendments to the Act, and Transitional Provisions

Bill C-60 contains a series of clauses that make consequential and editorial amendments to the *Copyright Act*. In many cases, these clauses merely update the Act in order to implement the substantive changes outlined above.

- Clause 1 of the bill changes the definition of "moral rights" to include new moral rights given to performers for performances.

- Clause 7 is an editorial amendment, changing the title of Part II of the Act, which deals with performers' rights.

- Clause 12 makes an editorial amendment to subsections 22(1) and (2) of the Act.

- Clause 14 is editorial, changing the heading of Part III of the Act.

- Clauses 22, 23, and 24 put in place a regime compensating a person who made an investment in a work that subsequently gains rights after the bill comes into force or a country becomes a "treaty country." Clause 22 deals with copyright and moral right for performers and copyright for sound recordings. Clause 23 applies to countries that become a treaty country (except for WCT countries). Clause 24 applies to treaty countries that become a party to the WCT (section 33.1), and non-treaty countries that become a party to the WCT (section 33.2).

- Clause 25 makes an editorial change to the "Civil Remedies" heading of the Act.

- Clause 26 is an editorial change, consequent upon the amended definition of "moral rights" that is set out in Clause 1.

- Clause 28 makes editorial changes to make clear that the presumption of copyright applies to civil proceedings taken under the Act.

- Clause 30 makes consequential changes to section 58(1) to include WPPT countries in the copyright regime.

- Clause 31 changes paragraphs 62(1)(a) and (b) to allow the Governor in Council to make regulations to carry out the new parts and rights added to the Act.

- Clause 32 amends paragraphs 70.1(a.1) and (b) of the Act to allow for a licensing scheme for the expanded rights for performers' performances.

- Clause 33 allows the Copyright Board to determine compensation for performers' rights and rights for foreign performers.

- Clause 34 states that there is no revival of copyright in a photograph, and the new sections on photography are not retroactive. In cases where a corporation was deemed to be the author of a photograph, the copyright in the photograph is extended to the life of the person who took the photograph. The sections on commissioned photographs are not retroactive, meaning that the old rules will apply to authorship of photographs taken before Bill C-60 comes into force.

The Act comes into force on a day to be set by the Governor General, except in the case of section 30.02 (the educational exemption), which comes into force when the Act receives Royal Assent, or on 31 December 2006, whichever is later.

COMMENTARY

Bill C-60 is the culmination of various recommendations from a number of studies, including the 2002 *Supporting Culture and Innovation: Report on the Provisions and Operations of the Copyright Act* ("the Section 92 Report"), the March 2004 *Status Report on Copyright Reform*, the May 2004 *Interim Report on Copyright Reform* and the March 2005 *Government Response to the May 2004 Interim Report on Copyright Reform of the Standing Committee on Canadian Heritage*.

While these studies have found much common ground in the issues that must be addressed in forthcoming legislation, they have sometimes offered differing approaches to those issues. Common ground includes the need to update and modernize the *Copyright Act* to better reflect copyright in the digital era, and the need for amendments to the Act to implement the WIPO treaties. As well, the Heritage Committee's *Interim Report on Copyright Reform* recommends, and Bill C-60 implements, changes to the way photographs are treated under the *Copyright Act*.

As previous studies of copyright issues have highlighted, photographs currently receive unequal treatment under the *Copyright Act*. Although photographs are subject to copyright, authorship and ownership may often be conferred on a party who is not the photograph's actual creator. This is the case with commissioned photographs, where the commissioner rather than the photographer is deemed the author. Additionally, the term of protection offered to photographs is frequently shorter than that for other artistic works.

Under the proposed amendments and as recommended by the Heritage Committee, the photographer is considered the author of his or her photos, and the term of protection for photographic works is the life of the author, plus 50 years. This amendment grants photographers the same authorship rights as other creators. First ownership of copyright in commissioned photos will now rest with the photographer, but individuals commissioning a photograph for personal or domestic purposes may, in the absence of any agreement to the contrary, make personal and non-commercial uses of that photograph.

Not all of the recommendations contained in the Heritage Committee's *Interim Report on Copyright Reform* are reflected in the government proposals to amend the *Copyright Act*. For example, while the bill proposes a number of copyright protections required for the implementation of the two WIPO treaties, as well as providing more clarity for Internet service providers with respect to copyright liability in relation to their activities solely as intermediaries – both of which were discussed in the *Interim Report* – the bill stops short of endorsing the Committee's view that Internet service providers should be obliged to immediately remove infringing copyright material or block access to it upon notice by the copyright owner.

Rather, the bill proposes that when an Internet service provider receives notice from a rights holder that one of its subscribers is allegedly hosting or sharing infringing material, the Internet service provider must forward that notice to the subscriber. Blocking access to such material is required only when ordered by a court. Under the proposed amendments, Internet service providers are exempt from copyright infringement where they are simply providing the means for users to transmit copyright materials.

A. Use of Internet Material for Educational Purposes

Similarly, with respect to the use of Internet material for educational purposes, Bill C-60's proposed amendments do not reflect the Heritage Committee's approach. The Committee recommended that Internet material be made available to educational institutions on a licensing fee basis, but the government was of the view that this issue requires further public input and consideration. It therefore declined either to adopt the Committee's recommendation or to include the topic among those proposed for legislative action at this time.

B. Technology-enhanced Learning

The *Copyright Act* currently provides specific exemptions that allow educational institutions, from kindergarten to post-secondary institutions, to reproduce copyrighted material to facilitate learning. The exemptions detail the circumstances in which such material may be legally reproduced.

Many of these educational exemptions, however, do not apply when information and communications technologies are used to extend the reach of the classroom beyond its physical boundaries, such as in distance education, or to provide access to modern instructional media either on campus or away from the classroom.

Therefore, in order to facilitate the use of the Internet for educational access, the proposed amendments allow educational institutions to use the Internet to deliver classroom instruction and material to students remotely; that is, beyond the classroom itself. The bill refers to these as "lessons" "communicated by telecommunication."

Educational institutions are required to adopt reasonable measures to ensure that copyrighted material is not misused. Further, any lessons communicated by telecommunication are subject to strict limitations. Once the course is concluded, the lesson cannot be communicated by telecommunication; in other words, it cannot be used again in that fashion. As well, educational institutions must destroy the lesson within 30 days of the conclusion of the course, and are obliged to retain records that identify the lesson as well as the dates when it was placed on a tangible medium and when it was ultimately destroyed. These records must be kept for three years for each course communicated by telecommunication.

These proposed amendments are at odds with the Committee's recommendation that the Act be amended to institute compulsory licensing to cover technology-enhanced learning.

C. Interlibrary Loans

The Committee and the government also differed on the appropriate approach to the issue of interlibrary loans. The interlibrary loans network allows libraries and patrons to obtain items that are not held in one library from other libraries in the network. In addition to providing patrons with greater access to library material in general, interlibrary loans support and facilitate specific study and research needs of library patrons across Canada and worldwide. This latter activity is mainly restricted to university and research libraries and institutions.

Section 30.2 of the *Copyright Act* currently permits a library to make a copy of certain periodical articles for a patron for the purposes of research or private study. This section applies to all articles published in a scholarly, scientific or technical periodical and to articles in other periodicals that were published more than one year previous. The section further allows a library to send a copy of such an article to another library to comply with a request made by a patron of that other library. The copy may be sent in electronic form to the requesting library. However, the Act states that the patron at the other library must not receive the copy in digital form. The patron must be given a single printed copy of the requested periodical article.

Rights holders expressed concern that electronic delivery of copyrighted material to library patrons would undermine the publishing industry and result in loss of income. They were also concerned that digital delivery of their works would result in the loss of control over further dissemination of their material.

The Committee, therefore, had encouraged the licensing of the electronic delivery of copyright-protected material directly by rights holders to ensure the orderly and efficient electronic delivery of such material to library patrons for the purpose of research or private study. The Committee further stated that, where appropriate, the introduction of an extended collective licensing regime should also be considered.

Notwithstanding the Committee's views, the proposed amendments to the Act permit the electronic desktop delivery of certain copyrighted material directly to the patron, provided that effective safeguards are in place to prevent the misuse of the material or of the interlibrary loans system. These safeguards include limiting further communication or copying of the digital files and ensuring that the digital files cannot be used for more than seven days.

D. Private Copying

The government declared that the issue of private copying was one requiring much further study and would be addressed in consultations on medium-term issues. The *Copyright Act* currently provides for an exemption to copyright that allows the making of a copy of a sound recording for private use.[7] The Act further provides for a levy to be paid by manufacturers and importers of blank audio recording media.

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(7) *Copyright Act*, R.S. 1985, c. C-42, section 80.

This means that an individual who purchases a music CD may make a copy of that music on to a blank CD or blank cassette tape for private, non-commercial use. Typically this situation arises where someone buys a music CD and then makes a copy of it to play in another device, such as a cassette player or another CD player. The levy paid by manufacturers and importers of blank audio recording media is meant to compensate rights holders for their loss of a royalty payment they would otherwise be entitled to receive for the copying of their work.

However, the advent of new digital technologies such as MP3 players and computer programs that permit the easy copying, uploading, downloading and transferring of audio files raise particular concerns. In the pre-digital era, the process of copying music from a CD to a cassette tape was fairly time-consuming and in general only one copy could be made at a time, so the creation of multiple copies was a tedious and lengthy activity. As well, over time the sound quality on the cassette tape would deteriorate with repeated playing.

Few of these problems exist with digital copies. The creation and dissemination of multiple copies of one file is simple. Consider, for example, how easily an e-mail message may be forwarded to multiple recipients, who can then forward it in turn to other recipients and so on, all without any loss of information. The private copying regime of the 1997 *Copyright Act* could not take into account the ease with which music files can now be copied and transferred via such peer-to-peer file-sharing programs as Napster, KaZaa and BitTorrent, nor the number of such transfers, none of which paid any royalties to the copyright holder.

Although the government reserved the issue of private copying for the medium-term study, the related issue of file sharing is directly addressed in the so-called “making available” right that is among the centrepieces of the proposed amendments to the *Copyright Act*. This provision means that sound recording makers and performers have the right to control the making available of their material on the Internet. The bill makes it illegal for anyone other than the copyright holder to place a music file in a shared folder on a computer to which other users of a file-sharing program have access. Thus it will be illegal to *upload* music files onto on-line shared directories, as is the case when using KaZaa or BitTorrent, unless the person uploading the material is the rights holder of that material. *Downloading* music files for personal, non-commercial use remains legal under Bill C-60.

Moreover, the proposed amendments state that tampering with technological protection measures designed to prevent copyright infringing is itself a copyright infringement. In other words, cracking copyright protection seals on CDs or DVDs or circumventing measures to prevent the unauthorized copying of sound recordings or movies is illegal.

Copyright issues have consistently attracted a great deal of attention from various interest groups whenever changes to the law have been discussed or proposed. Bill C-60 is no exception. As is often the case with copyright reform, reaction to the proposed amendments differs sharply between groups representing creators of copyrighted works and those representing users of such works.

Commentators and journalists generally laud the move to make the necessary changes to copyright law that will allow Canada to finally ratify the two WIPO treaties signed in 1997. Moreover, few question the need to update legislation to keep pace with changing technologies. Some, however, question whether the bill is being rushed into law without a full discussion of the issues, and suggest that the bill tips the balance in favour of creators at the expense of those who wish to access works.

Media coverage has focused mainly on the issues of file sharing and ISP liability, with some attention paid to educational and library access issues.(8)

E. "Making Available" File Sharing and Internet Service Provider Liability

The entertainment industry generally considers that the proposed amendments are a step in the right direction, particularly with respect to the "making available" provisions that address file sharing. The music industry had been lobbying Parliament for several years, arguing that file sharing was responsible for declining sales and profits. Graham Henderson, president of the Canadian Recording Industry Association (CRIA), is quoted as being "delighted" with the

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(8) See, for example, "Copyrights and wrongs," Editorial, *The Ottawa Citizen*, 24 June 2005, p. A16; M. Andrews, "U.S. court ruling on file sharing is played down," *The Vancouver Sun*, 28 June 2005, p. D1; B. Bowman, "Copyright Act changes both right and wrong," *The Winnipeg Free Press*, 6 July 2005, p. B7; K. Harris, "Feds to crack down on net music sharing," *The Winnipeg Sun*, 22 June 2005, p. 17; M. Geist, "Canadian copyright law: A missed opportunity for education," *The Ottawa Sun*, 29 June 2005, p. F1; A. Pacienza, "Liberals introduce copyright legislation clamping down on music file sharers," *The Whitehorse Star*, 27 June 2005, p. 16; "Copyright bill targets file sharing," *The Edmonton Journal*, 21 June 2005, p. A5; K. O'Malley, "Industry players react to omnibus Copyright Bill C-60," *The Hill Times*, 11 July 2005, p. 27; J. Kapica, "Could Googling become illegal?" *The Globe and Mail Online Edition*, 12 July 2005.

proposed amendments "after the industry has suffered a 'massive drop' due to file-sharing. [Henderson] claims song-sharing has taken away about 40% of the marketplace, which translates to about $506 million in the last five years."(9)

Although pleased with the progress on file sharing, CRIA believes the amendments do not go as far as they should with respect to ISPs' liability for the transmission of copyrighted material over their networks; nor do they provide adequate protection from hackers seeking to crack digital locks on CDs and DVDs.(10) Rather than the "notice and notice" scheme proposed in Bill C-60, CRIA would prefer to see the "notice and takedown" regime of the United States' Digital Millennium Copyright Act of 1998, which requires Web sites to remove (or "take down") allegedly infringing material or face possible liability.

These sentiments are echoed by the Canadian Motion Picture Distributors Association (CMPDA), which is particularly disappointed with the anti-circumvention measures in the proposed legislation. The issue of piracy is of paramount importance to the CMPDA and computer game developers. These organizations would prefer to see the stronger "notice and takedown" remedy for ISP liability in cases of potential piracy, together with adequate, clear penalties for those who traffic in anti-circumvention devices designed to thwart digital locks on CDs and DVDs.

On the other hand, the Canadian Cable Telecommunications Association (CCTA) is "very pleased" with the proposals for ISP liability and the "notice and notice" complaint scheme.(11) Jay Kerr-Wilson, CCTA vice-president for legal affairs, is quoted as saying, "We think it strikes a fair balance between the rights of rights-holders, and doesn't overburden ISPs, so we want to see both the broad exemption on liability, and the notice-and-notice system currently in the bill preserved."(12)

For its part, the Canadian Advanced Technology Alliance would like to see an amendment to the proposed bill that would penalize those who file wrongful notices of copyright infringement: "If you don't have that disincentive built in, you might have some frivolous

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(9) Harris (2005).

(10) Canadian Recording Industry Association, "Music industry says draft law takes key steps to bring Canada into the digital age," 20 June 2005, http://cria.ca/news/200605_n.php.

(11) O'Malley, "Industry players react to omnibus Copyright Bill C-60" (2005).

(12) *Ibid.*

complaints. We need some controls built in, which would be a fairly manageable change – we're not talking about a major shift in the legislation."(13)

From a broader perspective, some question the need for a legislative response to file sharing at all in light of the *BMG Canada Inc.* v. *John Doe* case, which seemed to clarify the illegality of uploading songs. According to one commentator, since the law on this issue has been settled by the courts, there is little reason now to introduce legislation addressing the matter. Rather than proceed with amendments that may not be necessary, the better approach would be to hold further and more complete consultations on issues such as mandatory statutory damages and the private copying levy regime.(14)

Others wonder whether the proposed amendments will end up "punish[ing] legitimate users of copyrighted material without making much of a dent on illegal file sharing."(15) An editorial notes that an element of the copyright balance between creators and users is the long-established legal right to use products that have been legitimately purchased. Examples of this "fair dealing" use include authors quoting a small section of a copyrighted source or students making sound recordings of different orchestras playing the same symphony for a class assignment. This use of "bits of copyrighted material is essential to education, art, and public discussion"(16) and is permitted as an exemption to copyright infringement under the Act.

The present Act permits the copying of musical sound recordings for private, non-commercial use, and the proposed amendments preserve this. However, the proposed amendments make circumventing a technological protection measure illegal. Therefore, it could be possible for the rights holder of a musical sound recording to place technological protection measures on that recording to prevent this otherwise legal and legitimate use of the material.

Some question whether the measures designed to address file sharing will in fact accomplish their purpose, noting that file sharing continues to flourish in the United States despite the much stronger copyright protections of its Digital Millennium Copyright Act. This

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(13) *Ibid.*, quoting J. Reid, President, Canadian Advanced Technology Alliance.

(14) "Bill C-60 introduces controversial reforms to Canadian copyright law," *Canadian New Media*, 24 June 2005, p. 8.

(15) "Copyrights and wrongs," *The Ottawa Citizen* (2005).

(16) *Ibid.*

situation, it is suggested, may be evidence that those who wish to circumvent copyright protections will continue to do so despite legal sanctions.(17)

F. Educational Issues

The copyright collective Access Copyright, a non-profit agency established by publishers and creators to license public access to copyrighted works, expressed some concerns about the bill's provisions on educational use of digital material. In particular, the agency was concerned that the addition of a compulsory digital licence on top of a voluntary paper licence could remove choice from the rights holder: "We still need to do a much deeper legal analysis, but what [the amendments are] proposing to put in place is a system that wouldn't allow rights-holders to choose whether or not they are going to allow their works to be used digitally, or even at what price. There may even be a statement within the legislation that sets pricing."(18)

With respect to the educational use of Internet material, educational users had sought an exemption for routine activities such as downloading, saving and sharing material that is publicly available on the Internet. The exemption was sought in order that these activities may be carried out without fear of inadvertently infringing copyright law.

However, the ministers of Canadian Heritage and Industry Canada stated that, as the issue is a complex one that raises numerous difficult questions, further consultations and input are necessary before legislation can be put forward. For example, what material on the Internet can be considered "publicly available" and may be used without compensation? While there is some agreement on the principle that "where there is no expectation of payment, there should not be a requirement to pay," the question of what, exactly, constitutes "publicly available material" remains.(19) Consultations on the educational use of Internet material are expected to begin in the fall of 2005.

This delay in addressing educational issues and an exemption for educational uses of publicly available material in Bill C-60's amendments to the *Copyright Act* have disappointed some in the educational community. Chris George, spokesperson for the Canadian Council of Education Ministers, stated, "They didn't listen to what the provincial ministers consider a high

(17) *Ibid.*

(18) K. O'Malley, "Industry players to fight changes to omnibus Copyright Bill," *The Hill Times*, 18 July 2005, p. 16, quoting M. Craven, spokesperson, Access Copyright.

(19) The Honourable David Emerson, Minister of Industry Canada, and the Honourable Liza Frulla, Minister of Canadian Heritage and Minister responsible for the Status of Women, *Canadian New Media*, 20 July 2005, p. 8.

priority issue, which is the educational use of the Internet. There was a specific request for that to be included in the bill, and it was omitted."[20]

This view is echoed by the Canadian Federation of Teachers, whose policy advisor said, "We've been lobbying long and hard on this issue. The materials we are looking to access are those that are freely available, without any indication of the expectation of payment. We're prepared to pay for what is encrypted, or requires a credit card to access, or other indication on the part of the creator that he or she would require payment."[21]

Expressing frustration that the government has not moved on this issue despite years of consultations, an advisor with the Association of Universities and Colleges of Canada stated:

> We had expected that the government would address the educational use of the Internet, and like many national educational organisations, we're not at all happy that this wasn't part of the package.
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> …
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> There have been taskforces, meetings, working groups, and Industry Canada commissioned a study on technology-enhanced learning, which looked at the educational use of the Internet, and supported the position taken by the educational organizations, which is that those who put works up on the Internet, and who make the material publicly available, have no expectation of remuneration when those works are used in an educational setting.
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> …
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> Is the government prepared to move on this issue?[22]

One commentator offered the following observation:

> Word has it that the revised copyright bill has been formulated with an awful lot of input from Canadian subsidiaries of U.S. corporate interests, pushed further along by an insistent U.S. ambassador. It might make music-sharing illegal, but it's more likely to enrage the academic community, which will find itself incapable of photocopying documents or quoting from them for a much longer period of time than before, unless they are willing to pay their owners a lot of money first.

(20) O'Malley, "Industry players to fight changes to omnibus Copyright Bill" (2005).

(21) *Ibid.*

(22) *Ibid.*

> Even with the current law, it's next to impossible to make money in academic publishing. The big worry is that our most important intellectual property might get crushed in the rush to satiate the corporate desire for ever-greater profits from *their* intellectual property.
>
> The principle of protecting one's intellectual property is a good one, but the tough U.S. law has actually thrown the relationship between fair use of intellectual property and rewarding its owners seriously out of balance. The current U.S. law favours corporate desires so much that merely owning it has become an industry unto itself. There are now patent-holding companies that exist solely to extract as much cash as possible by exploiting property they bought from the original inventors.
>
> When you have an industry whose only interest is to stop others from using certain technologies, or to gain handsomely by licensing them, then you stifle development, not encourage it.(23)

It is suggested that the activities of search engines and archivers such as Google or other information location tools may be rendered illegal by the bill.(24)

Bill C-60 defines information location tools as "any instrument through which one can locate information that is available by means of the Internet or any other digital network." Clause 29 of the bill proposes to amend section 40.3(1) of the Act to state that "the owner of copyright in a work or other subject-matter is not entitled to any remedy other than an injunction against a provider of information location tools who infringes that copyright by making or caching a reproduction of the work or other subject matter."

This may imply that information location tools would infringe copyright if they archive *any* material that is copyrighted, not just material that is itself infringing copyright. A careful study of the meaning and implication of the language used in this amendment will be necessary to clarify the matter.

CONCLUSION

It is expected that Bill C-60 will be examined by a special legislative committee, likely composed of members from the House of Commons Standing Committee on Industry,

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(23) J. Kapica, "Patents, copyright and signals from the sky," *The Globe and Mail Online Edition*, 14 June 2005.

(24) J. Kapica, "Could Googling become illegal?" (2005).

Natural Resources, Science and Technology and from the House of Commons Standing Committee on Canadian Heritage. As one writer has explained, "Studies of the Copyright Act are typically done in the Commons heritage committee, but concerns emerged that the committee alone would not conduct a fair study of the bill. Now the government intends to strike a rare, special legislative committee that will receive input from both the heritage and industry departments."(25) Stakeholders from all aspects of the copyright community promise to be on hand to ensure their voices are heard as the bill makes its way through committee hearings.

In addition to groups that represent creators of copyrighted material and users of those works, the Canadian Internet Policy and Public Interest Clinic will be seeking to ensure the voice of the public is heard and the public interest is served: "One of the fatal flaws of copyright reform in Canada over the last 20 years is that there's been a failing to ensure that there is anyone representing ordinary Canadians."(26)

There remains much work ahead. Notwithstanding the significance of Bill C-60's proposals to reform copyright law, it is worth remembering that this bill represents just the first of three stages of copyright reform. The issues addressed in the present bill are largely those identified as short-term agenda issues in "Supporting Culture and Innovation: Report on the Provisions and Operations of the *Copyright Act*" ("the Section 92 Report"). The government will now begin to address medium- and long-term issues.

(25) S. Doyle, "Special committee to study new Copyright Act," *The Ottawa Citizen*, 5 August 2005, p. E1.

(26) O'Malley, "Industry players react to omnibus Copyright Bill C-60" (2005), quoting D. Fewer, legal counsel, Canadian Internet Policy and Public Interest Clinic.