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Business Law

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The New Copyright Law and Your Business: Stay on Top of Recent Changes to Protect Your Rights

Canada's *Copyright Act* underwent major revisions late last year but copyright law and policy remains a continuing concern for media creators, broadcasters and rights owners as well as for service providers and digital consumers. This newsletter highlights some of the key changes.

As almost every business has invested in some form of intellectual property, copyright law can have an impact on the way most organizations do business. Your business probably has a logo and a website, and you may have created (or paid a professional designer to create) art work and graphic designs. You've probably also developed written content describing and promoting your business' products and services. You may have even produced some videos showcasing your services or your retail or manufacturing operations. All of this material is potentially protected by copyright law.

In general terms, copyright law protects original written, artistic and musical works, photographs, movies, and computer programs as well as sound recordings and communication signals. In the digital era, it also covers the songs on your iPod and the videos on YouTube. Copyright law gives the owner of the work the right to copy or distribute the work, broadcast it on TV or the Internet, licence it to somebody else for a fee or use it to make a new work. If you or your employees created the work, copyright law also supplies you, as the rights holder, with various legal means of preventing others from infringing on your copyright by using your work without authorization. If you paid someone else to do the work for you, you may also own the copyright, depending on the terms of your agreement with the creator.

Copyright law works both ways, however. If your website uses images that you "found" on the internet, or you play background music in your restaurant without paying a royalty, you may be infringing somebody else's copyright. Copyright infringement by consumers is a major concern of many businesses that produce, broadcast or distribute electronic media or computer software, as well as businesses that act as intermediaries between producers and consumers.

What's New in Copyright Law?

Canada's *Copyright Act* was first enacted in 1921 and has been revised many times since then. The latest round of amendments are far-reaching and affect a variety of stakeholders, including performers, authors, film studios, recording companies, Internet service providers ("ISPs") and consumers as well as any business that relies on the Internet and digital content to operate. Changes, however, were long overdue as Canada's copyright law had not been substantially updated since 1997. As a result, the federal copyright regime was outdated and did not reflect technological innovations such as the use of the Internet and digital media.

After much debate and three failed attempts, Bill C-11, the *Copyright Modernization Act* (the "CMA") received Royal Assent last summer and was mostly proclaimed into force in November 2012 (some provisions have been delayed pending ratification of international instruments and others will need a public consultation process before regulations can be finalized).

The amended *Copyright Act* strives to balance several competing policy considerations, such as increasing innovation and competition, permitting users to deal fairly with legitimately acquired copyright materials and permitting content creators to protect their works from unauthorized use. The amendments update the rights of copyright owners to better address the challenges and opportunities posed by the Internet and conform to international standards. Another goal is to clarify ISP liability for customer infringement and to expand the allowed uses of copyright material by libraries and schools.

Protecting Rights Management Information

The *Copyright Act* now prohibits the removal of rights management information ("RMI"), an important concept in

licensing copyright materials and other intellectual property. RMI is basically information that identifies content which is protected by copyright, the identity of the rights holder and the terms and conditions of use. Digital watermarks are a common example of RMI as they are used primarily as the rights holder's "label" but can also interact with playback devices to provide information about the material. A musical recording, for example, may be watermarked with RMI that includes the artist's name, the track's title and the scope of playback rights.

RMI allows users to verify the authenticity of purchased works while also allowing copyright owners to attach their chosen terms and conditions for use. Removing electronic RMI is strictly prohibited in new section 41.22 of the *Copyright Act*. This section also permits rights holders to seek legal remedies such as injunctions, monetary damages or delivery of property when RMI has been removed or altered.

Technological Protection Measures

The amendments bring the *Copyright Act* closer to the international Copyright Treaty adopted by the members of the World Intellectual Property Organization ("WIPO"), which include Canada. The amended Act now protects technological protection measures ("TPMs"), commonly referred to as "digital locks." A TPM is defined as any technology, device or component that controls access to a work or prevents certain uses of a work. These technologies, devices or components include encryption software (found on DVDs and some digital media, such as e-books and music), access codes and passwords. Basically, TPMs are placed on a device, file or disc to allow the content creator to dictate how the content will be used and to help prevent piracy.

New sections 41 to 41.22 of the *Copyright Act* implement the provisions of the WIPO Copyright Treaty aimed at preventing the circumvention of TPMs, except under certain limited circumstances (some of which are listed below). Circumventing access control TPMs is now prohibited, as is offering services to the public which are intended primarily for the purpose of circumventing TPMs. Manufacturing, importing or distributing devices or technologies designed to circumvent TPMs is also prohibited. It is worth noting, however, that no statutory damages may be awarded if the copyright infringement was for an individual's private purposes. Further, only injunctions (and not monetary damages) are available if a library, archive, museum or educational institution inadvertently contravenes these provisions.

Circumventing access control TPMs will not infringe copyright in certain legitimate "public interest" circumstances, which include:

- law enforcement and national security activities
- encryption research
- personal information protection
- network security
- access for persons with a perceptual disability
- unlocking a wireless device

The provisions dealing with TPMs are likely the most controversial amendments to the *Copyright Act*. On the one hand, Canadians now have the right to use and manipulate copyrighted material for their own personal use by allowing for time-shifting, format-shifting and back-up copying (all discussed in further detail below). On the other hand, these provisions effectively disallow activities that the *Copyright Act* otherwise permits. As well, the listed circumstances under which breaking an access control TPM is permitted do not include personal or educational use.

Prohibiting "Enablement"

Section 27 of the *Copyright* Act has been amended to include a new form of secondary infringement called "enablement". This section will provide copyright holders with a cause of action they can use to sue those who provide a service primarily for the purpose of enabling acts of copyright infringement. A peer-to-peer file sharing site, for example, may be considered to enable users to infringe copyright in the shared works. This new section will make it easier for copyright owners to stop copyright infringement by pursuing sites that facilitate file-sharing.

The government has stated that this new provision is intended to stop media piracy and help support the development of significant "legitimate" markets for downloading and streaming media in Canada. The amended *Copyright Act* also expressly excludes services that enable infringement from provisions that protect ISPs and search engines from liability for infringements by subscribers.

Expanding the "Fair Dealing" Exception

The "fair dealing" exception in the *Copyright Act* provides a defence to a claim of infringement by allowing users to "deal" with copyright materials for certain specific purposes provided the dealing is "fair". The amended *Copyright Act* adds the new categories of education, parody and satire to the existing exemptions for research, private study, criticism, review and news reporting.

Fair dealing is examined by the courts on a case-by-case basis. The court will determine first if the use in question falls within one of the above categories and then assess the fairness of the use under the circumstances. In a leading case, *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Supreme Court of Canada identified factors such as the amount of copyright material used, the purpose of the use and the available alternatives as relevant to determining whether a use is fair.

The amendments to the *Copyright Act* expand the first part of the test by including additional categories of allowable use but do not change the requirement that the use be fair under the circumstances. This means, for example, that while instructors may now display or use copyright material for educational purposes, they cannot do so unfairly by, for example, making excessive copies.

"Mash-up" Exception

Teachers and other users may also benefit from a new provision of the *Copyright Act* dealing with non-commercial user-generated content that essentially allows a user to "remix" copyright works for non-commercial reasons, including educational purposes.

This uniquely Canadian exception has been dubbed the "YouTube" or "mash-up" exception because it allows users to take copyright materials, such as music, to create new materials, such as personal videos, and share them with others (e.g., using social media) without fear of infringing the original artist's copyright. In order for this exception to apply, the source of the original content must also be mentioned (where reasonable) and the user must believe that the source material was non-infringing. As well, the mash-up cannot have a substantially adverse financial or other effect on the copyright holder's ability to use its own material.

Expanding Rights for Private Copying

A new section of the *Copyright Act* (29.22) gives individual users the right to reproduce copies of legally obtained copyrighted works, such as music from purchased CDs, for private purposes on a digital medium or device such as an MP3 player. This is often referred to as "format-shifting". This right is subject to certain limitations, however. The copy used to make the reproduction must not be an infringing copy; the copying must not involve circumventing any TPMs; and the individual user must not give the reproduction away. Essentially, this provision legitimizes the common practice of transferring CDs to an iPod. It does not, however, allow a user to copy music onto an iPod if the music is from a borrowed CD.

Another new section (29.23) introduces a time-shifting exception which makes it permissible to make a single copy of a broadcast program for later viewing. This is known as "time-shifting", but the exception is popularly referred to as the "TiVo exception". As with the format-shifting exception, however, certain limitations apply.

In addition, new section 29.24 allows users to make a back-up copy of copyright material that has been legally acquired for personal use if they have done so solely for the purpose of protecting against damage or loss. Obviously, this exception does not apply if a TPM has been circumvented in the process of making a back-up copy.

These changes are significant for members of the Canadian public as they represent an acknowledgement by legislators of the ways in which digital media is actually being used by consumers, unlike the previous version of the *Copyright Act* which prohibited these types of reproductions.

Capping Statutory Damages

The amended *Copyright Act* now distinguishes between infringement for commercial and non-commercial purposes for purposes of a copyright owner's ability to claim damages for infringement. The CMA did not introduce any changes to the statutory damages which may be awarded for copyright infringements made for commercial purposes.

The *Copyright Act* now provides that statutory damages for non-commercial infringement will be capped at $5,000 and courts are now permitted to award as little as $100 for a

single non-commercial infringement. Under the prior legislation, copyright owners could sue for statutory damages for copyright infringement of $500 to $20,000 for each act of infringement, whether the infringement was commercial or non-commercial, without having to prove that they suffered actual damage. The reduction is intended to ensure that Canadians do not face disproportionate penalties for minor infringements.

As a result of these changes, copyright holders will likely find in uneconomical to pursue court claims against individual consumers for infringements like illegally downloading a single movie or music CD. Cases currently before the courts, however, suggest that owners have not given up their fight against infringement. One strategy being pursued in Canada (as well as in the US and the UK) is for rights holders to use third party "enforcement" firms to identify the IP addresses of computers that have downloaded copyright material and then seek court orders to require the ISP to disclose the names and addresses of the customers associated with those IP addresses for purposes of making a settlement demand. This practice of "speculative invoicing" has been highly controversial in other jurisdictions but it remains to be seen how the Federal Court of Canada will respond to these types of ISP disclosure requests.

Putting the "Notice-and-Notice" Regime on Hold

The so-called "notice-and-notice" regime is a significant feature of the CMA which remains outstanding as of the date of publication of this Newsletter. New sections 41.25 and 41.26 of the *Copyright Act* will allow a copyright owner to send a notice of alleged infringement, in a prescribed form, to an ISP or search tool provider. The regime then requires the recipient to forward these notices "as soon as feasible" to the individual subscriber or user who is allegedly infringing the copyright and to keep records allowing those individuals to be identified.

These are just some of the changes to copyright law accomplished by the CMA. Rights holders and creators, broadcasters, Internet intermediaries and media consumers will require a more detailed analysis of how Canada's new copyright regime will affect them and the way they do business. If you need help understanding these changes or applying copyright law to your business, please contact a member of our Business Law group.

Olivia Gismondi is a member of the Business Law Practice.

Helen Ferrigan is the firm's Director of Knowledge Management.

Pallett Valo LLP Business Law Practice

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Contact Members of the Business Law Practice

Murray Box mbox@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 240

Olivia Gismondi ogismondi@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 209

Joe Conte jconte@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 217

Murray Gottheil gottheil@pallettvalo.com
Direct Dial: 905.273.3022 Ext. 245