



Canadian Federation of Library Associations
Fédération canadienne des associations de bibliothèques

Brief to the Standing Committee on Industry, Science and Trade (INDU)

As part of the review of the Copyright Act

Submitted by the Canadian Federation of Library Associations /
Fédération canadienne des associations de bibliothèques

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Introduction

The Canadian Federation of Library Associations/Fédération canadienne des associations de bibliothèques (CFLA-FCAB) is the united, national voice of Canada's library community. Our purpose is to advance library excellence in Canada, champion library values and the value of libraries and influence national and international public policy impacting libraries and their communities. Our membership includes national, provincial, regional, special and territorial library associations across Canada.

Libraries have a societal role to provide equitable access to information and preserve knowledge. In Canada, the *Copyright Act* recognizes the unique function of libraries to achieve the government's public policy objectives around research, innovation and lifelong learning through the *Act's* exceptions and limitations.

CFLA-FCAB applauds Canada for steadfastly maintaining the copyright term of life plus 50 years established in the Berne Convention. CFLA-FCAB also praises Parliament's 2016 amendment for the creation of alternate format works for persons with perceptual disabilities, in compliance with the 2013 Marrakesh Treaty.

Summary of Recommendations:

CFLA-FCAB recommends:

That Parliament leave Sections 29, 29.1 and 29.2 of the *Copyright Act* unchanged to retain current allowable uses.

That Parliament amend the *Copyright Act* to make it clear where the *Act* provides that an activity is not an infringement of copyright no contract can override the *Act*, using the Irish legislation as a model.

That Parliament amend the *Copyright Act* to make it clear that the *Act* is technologically neutral and that circumvention of TPMs is permitted for non-infringing, digital and analog uses, in sections 29; 30.1 - 30.5; and 80(1).

That Parliament eliminate Crown copyright on all publicly accessible government works or make those works openly licensed by default and examine section 12 to clarify the need for Crown copyright in other government works.

That the *Copyright Act* respect, affirm and recognize Indigenous peoples' ownership of their traditional and living respective Indigenous knowledge.

Fair Dealing

CFLA-FCAB is satisfied with the fair dealing exceptions in the Act. With the 2012 modernization, Parliament confirmed fair dealing and added new purposes for education, parody and satire, and user-generated content. The 2012 changes are consistent with court interpretations and legislative developments in Canada and other countries.

The library associations represented by CFLA-FCAB have observed enormous shifts in the content market in the past ten years, as digital material licensed from distributors and freely available, unrestricted resources continue to increase. Physical or digital copying of materials is a declining part of the process of education, research and private study when compared to 20 years ago, or even since 2012, when ebooks, tablets, and smartphones were just emerging for the general public. Nevertheless, the library market remains an important and perhaps increasing segment of book publishing sales in Canada, accounting for an estimated 70 million dollars in 2017.¹ The 31 member libraries of the Canadian Association of Research Libraries (CARL) spent 339 million dollars on information resources in 2015-16,² demonstrating a clear commitment to accessing print and digital content legally, and rewarding content owners accordingly. School libraries in Canada rely increasingly on open educational resources and the Internet, while using diverse types of media to support a range of learners.

Fair dealing promotes innovative interactions that create new works and contribute to economic growth.

Recommendation:

CFLA-FCAB recommends that Parliament should leave Sections 29, 29.1 and 29.2 of the Copyright Act unchanged to retain current allowable uses.

User Generated Content

CFLA-FCAB applauds the inclusion of section 29.21 on user generated content.

Contract Override

In the digital environment, considerable content in libraries is acquired under license. Librarians negotiate these complex licenses, usually without legal counsel, and in many cases without an understanding of what the *Copyright Act* permits. Some licenses are presented to librarians as non-negotiable. This often means that contractual clauses disallow fair-dealing uses and other statutory rights. Inter-library lending may be prohibited and Canadians may be unable to print an excerpt of a work.

To further the design and balance Parliament has chosen for the *Copyright Act*, the CFLA-FCAB submits that any contractual provisions that enable a publisher to override Parliamentary intent by disallowing activities Parliament specifically designated as non-

¹ Rivera, E. (2017, May). IBISWorld Industry Report 51113CA. *Book publishing in Canada*. Retrieved from:

² Canadian Association of Research Libraries. (2017). Total materials expenditures. *CARL statistics | 2015-2016*. Ottawa, ON.

infringing uses, or otherwise prohibit or restrict their exercise or enjoyment, should be unenforceable. This will ensure that digital vendors cannot defeat rights that policy makers intended to enable.

On examination of comparable and preferable systems in place worldwide, CFLA-FCAB finds that the Irish model would provide a suitable legislative framework. Another approach would be to address this issue as part of each exception, following the United Kingdom's model. The United Kingdom's legislation may limit the scope of contract override, whereas the Irish legislation deems irrelevant any act that would infringe on rights set out in the legislation:

"Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act."³

Recommendation:

CFLA-FCAB recommends that Parliament amend the *Copyright Act* to make it clear where the Act provides that an activity is not an infringement of copyright no contract can override the Act, using the Irish legislation as a model.

Technological Protection Measures

CFLA-FCAB believes that the principles in the *Copyright Act* should be applied consistently, regardless of format. The 2016 amendment to ratify the Marrakesh Treaty permitted the circumvention of digital locks to achieve access for people who have a print disability.

CFLA-FCAB recommends that Canada balance its obligations under the WIPO copyright treaties to protect TPMs while simultaneously allowing flexibility for rights such as fair dealing and permitting libraries, archives and museums (LAMs) to preserve for posterity copyright material protected by TPMs.

The CFLA-FCAB proposes a technical amendment to Section 41 of the *Copyright Act*:

The following definitions apply in this section and in sections 41.1 to 41.21.

circumvent means,

- (a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition *technological protection measure*, to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner or it is done for a purpose that would not otherwise infringe copyright or moral rights under this Act, including but not limited to making a copy under sections 29, 30.1-30.5, and 80(1); and
- (b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition *technological protection measure*, to avoid,

³ <http://www.irishstatutebook.ie/eli/2000/act/28/section/2/enacted/en/html#sec2>

bypass, remove, deactivate or impair the technological protection measure except to the extent this action is undertaken for a purpose that would not otherwise infringe copyright or moral rights under this Act, including but not limited to making a copy under sections 29, 30.1-30.5, and 80(1). (*contourner*)

This amendment uses wording similar to Bill C-60 (2005). This wording meets Canada's obligations under the WIPO copyright treaties, while preserving fair dealing rights for consumers and preservation rights for libraries, archives and museums.

Recommendation:

CFLA-FCAB recommends that Parliament amend the *Copyright Act* to make it clear that the *Act* is technologically neutral and that circumvention of TPMs is permitted for non-infringing, digital and analog uses, in sections 29; 30.1 - 30.5; and 80(1).

Crown Copyright

With most government information exclusively distributed over the Internet, researchers, libraries and archives must be assured that making, distributing, and preserving copies of digitized and born digital government works does not result in copyright infringement.

Canadian libraries and archives external to government have built print collections of government materials that are relied upon by the public and government employees alike. In the print era, these collections included but were not limited to publications distributed by the Depository Services Program of Canada (1927-2013). Today, this program provides access to select federal born digital and digitized works and is informed by policies established by the Treasury Board of Canada Secretariat. Separately, the *Libraries and Archives of Canada Act* provides this cultural memory organization with the ability to acquire and act as a repository for government information. All three components of this information ecosystem are needed to ensure that access to government information is maintained. Unfortunately, Crown copyright is a barrier to this work, restricting the reproduction and dissemination of government information.

Section 12 of the *Copyright Act* pertains to Crown copyright and is based on s 18 of the UK *Copyright Act of 1911*. Though the UK statute has been extensively amended since, however, section 12 remains functionally unchanged since its enactment in 1921 and provides governments with copyright protection for works

“...prepared or published by or under the direction or control of Her Majesty or any government department.”

Because a term length is only specified for published works in section 12, unpublished works hold Crown copyright in perpetuity. This presents a problem for libraries and archival institutions across the country.

Interpretation of this provision is currently the responsibility of government rights holders; i.e., individual government agencies. This is separate from policies established under the *Access to Information Act*, which maintains a balance between the right to access

government information and security of the state. It is unclear why economic (copyright) controls for these materials are required in addition to controls related to dissemination.

Recommendation:

CFLA-FCAB recommends that Parliament eliminate Crown copyright on all publicly accessible government works or make those works openly licensed by default (e.g., using a Creative Commons licence). CFLA-FCAB also recommends that Parliament examine section 12 to clarify the need for Crown copyright in other government works. This examination should be an open process that includes submissions, public consultations, and parliamentary hearings.

Indigenous Knowledge

Canadian libraries are actively working towards reconciliation and may hold Indigenous knowledge through research, appropriation, or with the participation of Indigenous communities and authors.

Indigenous knowledge and cultural expressions include but are not limited to tangible and intangible expressions including oral traditions, songs, dance, storytelling, anecdotes, place names, and hereditary names. Indigenous refers to First Nations, Métis and Inuit peoples of Canada. Indigenous knowledge is dynamic and has been sustained and transformed.

Who may hold "legal" copyright to that knowledge or cultural expression under Canada's current *Copyright Act* is often contrary to Indigenous notions of copyright ownership. Indigenous knowledge may be found in published works as a result of research or appropriation, and in these cases, the author of the published work holds the "legal" copyright to that knowledge or cultural expression, while Indigenous peoples would see the owners as the people from whom the knowledge originated.

Our recommendations are informed and can be read in the context of the CFLA-FCAB Truth and Reconciliation Committee Report (2017)⁴, which includes a recommendation to address intellectual property concerns. Canada's *Copyright Act* must take steps to address protection of Indigenous knowledge and languages and ensure that Indigenous peoples can actively benefit from sharing, but also maintaining agency over their own knowledge. This can be achieved through collaboration with Indigenous peoples in Canada and include protection of Indigenous knowledge in Canada's legislation as understanding of the needs evolves. On the international level, this understanding may arise through the work of the World Intellectual Property Organization (WIPO) – Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore⁵ and the exploration of national experiences in that forum.

⁴ http://cfla-fcab.ca/en/indigenous/trc_report/

⁵ <http://www.wipo.int/tk/en/igc/>

Canada's work in this area must accord with the *UN Declaration on the Rights of Indigenous Peoples*, noting in particular Article 31:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Recommendation

CFLA-FCAB recommends that the *Copyright Act* respect, affirm and recognize Indigenous peoples' ownership of their traditional and living respective Indigenous knowledge.