

Introduction

A. BACKGROUND

Copyright reform has always been a contentious issue. In the 1880s, publishers battled authors. In the early 1900s piano-roll manufacturers clashed with a nascent sound-recording industry. In the late 1990s, rights-holder groups, comprised primarily of the recording industry, Hollywood, and copyright collectives, challenged librarians and the education community. Decade after decade, the battle for an appropriate copyright balance remains the same — only the players involved in the debate evolve.

Bill C-60, officially unveiled on 20 June 2005, is the latest round of Canadian reform. It is likely to attract more public attention and invite more participation than all previous copyright reform processes combined. The earlier processes were typified by negotiated compromises between relatively small groups of “copyright stakeholders.” The major copyright industry associations such as the Canadian Recording Industry Association and the copyright collectives such as Access Copyright or SOCAN advocated for stronger protections, most business associations adopted a neutral position, while the education and library communities represented the interests of millions of Canadians.

The Internet and new technologies have dramatically altered the composition of copyright stakeholders. The original groups are certainly still present, but today the broader public also demands a seat at the table. The public’s interest in copyright — something inconceivable even a few years

ago — is the result of the remarkable confluence of computing power, the Internet, and a plethora of new software programs, all of which has not only enabled millions to create their own songs, movies, photos, art, and software but has also allowed them to efficiently distribute their creations electronically without the need for traditional distribution systems.

As the distinction between copyright creators and copyright users becomes blurred, individual Canadians increasingly recognize the direct impact of copyright reform on their everyday lives. This shift toward greater public concern with copyright has been building over the past few years.

In 2001, Industry Canada and Canadian Heritage held cross-country consultations on copyright reform. Packed auditoriums were filled with individual Canadians determined to ensure that Canada's copyright policy will reflect their interests and priorities. Hundreds of people, unable to attend in person, submitted comments to the federal government.

Even the Supreme Court of Canada has thrust itself into the debate, using a trio of copyright cases to re-shape Canadian copyright law to create a balance which, in the words of Justice Ian Binnie, "lies not only in recognizing the creator's rights but in giving due weight to their limited nature."

Bill C-60 is an ambitious bill that purports to prepare Canada for the implementation of the World Intellectual Property Organization's Internet treaties. It addresses a variety of digital copyright issues including the creation of a new "making available" right, liability of Internet service providers (ISPs), the establishment of a "notice and notice" system for allegedly infringing content posted on the Internet, and new legal protections for digital locks, known as technological protection measures. These provisions sit alongside new rights for performers and photographers as well as limited new exceptions for the education and library communities.

Moreover, policy makers have signaled that Bill C-60 represents not an end but a beginning (or perhaps more accurately a continuation of a reform process dating back to the early 1980s). On the horizon lie fierce debates over the appropriate role of copyright in education, the future of the private copying levy, the term of copyright protection, crown copyright, the curtailing of statutory damages, the expansion of fair dealing into a U.S.-like fair use provision, as well as new legal protections for databases and traditional knowledge. In fact, while the uncertainty surrounding the present minority government may forestall swift passage of the bill within the current parliamentary session, there is little doubt that the policy issues raised by the bill are not going to disappear. Today, Canadians face critical copyright policy issues that will impact the future of Canadian ed-

ucation, research, innovation, and culture. The debate surrounding these issues will likely to last into the foreseeable future.

Given the importance of these issues, I feel privileged to serve as the editor for this remarkable collection of essays devoted to the future of Canadian copyright law. Responding to the need for non-partisan, informed analysis of Bill C-60, an exceptional group of Canadian scholars have come together to assess Canada's plans for copyright reform. While biographies of each contributor are included at the end of this book, I believe that it is fair to say that this volume brings together the majority of Canadian academics researching and writing about intellectual property today — with representatives from ten universities stretching from Dalhousie on the east coast to the University of British Columbia on the west.

The diversity of interests among these scholars is reflected in their wide-ranging contributions. More than half of the contributions are devoted to assessing specific provisions found in Bill C-60. Many other of the essays provide both context for the current round of reform as well as a look to the future path of Canadian copyright law.

Contributions are grouped into three parts. Part One features a trio of essays that establish the context for Bill C-60. Each considers Canadian copyright reform through a different lens — political rhetoric, the domestic shift toward copyright balance, and the obligations to comply with international copyright norms.

Part Two contains eleven essays on Bill C-60, covering virtually every substantive element of the Bill. This includes essays on the constitutional, freedom of expression, privacy, and marketplace competition dimensions of anti-circumvention legislation. There are also essays on rights management information, the “making available” right, ISP liability, performers' rights, and photographers' rights, as well as a pair of contributions on copyright in the education and library communities.

Part Three looks ahead to future Canadian copyright reform, with five essays on important issues overlooked or omitted from Bill C-60. These include coverage of the implementation of a fair use provision, greater attention to user rights, a reconsideration of the term of copyright protection, new collective licensing models, and crown copyright reform.

B. COPYRIGHT REFORM IN CONTEXT

Professor Laura Murray's “Copyright Talk” article provides a helpful perspective to better appreciate the importance of language in Canadian copyright reform. Murray dissects dozens of policy documents and pub-

lic speeches from both Industry Canada and Canadian Heritage to shed light on how language has played a critical role in defining the positions of rights holders and the education community.

Murray contends that creators and individual Canadians (who are increasingly one and the same) are lost in the shuffle as the discourse over use and access leaves their interests behind. Moreover, Murray expertly illustrates how music file sharing has been used as a ready substitute for the broader copyright reform agenda, which does little to ensure that important copyright reform issues receive their due regard.

While Murray's article focuses on copyright rhetoric, Professor Teresa Scassa's contribution highlights the interests of copyright stakeholders. Copyright is frequently characterized as a balance between creators and users, yet Scassa demonstrates that the reality behind each stakeholder is far more complex than is generally appreciated.

On the creator side, Scassa distinguishes between creators and owners, noting that their respective interests are not always the same. Similarly, user interests are categorized into four primary uses — consumption, transformation, access, and distribution — each of which raises different societal interests. Moreover, Scassa argues that the societal interest may differ from user interests, with both sides ready to argue that greater or lesser protection is in the societal interest.

Given Bill C-60's emphasis on responding to the WIPO Internet treaties, Professor Myra Tawfik establishes the international context for copyright reform. Tawfik argues that the issues of balance that dominate the domestic discussion are mirrored at the international level. She underscores her point by reviewing provisions in multiple international intellectual property treaties, all of which include more than a passing reference to the need for an appropriate balance.

Tawfik's research highlights another important aspect of international copyright law: namely, that its implementation offers far more flexibility than is commonly perceived. She notes that while certain countries, such as the United States, are often perceived to offer model domestic legislation, countries have considerable freedom when implementing international norms into national copyright law.

C. BILL C-60: AN ANALYSIS

The anti-circumvention provisions of Bill C-60, which bring to mind the U.S. *Digital Millennium Copyright Act*, are likely to be the Bill's most controversial provisions, with advocates on both sides of the copyright balance

arguing that the Canadian implementation of anti-circumvention provisions are either too weak or too strong.

This collection features four essays that examine the anti-circumvention provisions. Professor Jeremy deBeer considers the novel issue of the validity of anti-circumvention provisions under Canadian constitutional law. Although Bill C-60's anti-circumvention approach includes a link to copyright infringement, deBeer identifies several provisions that may bring their constitutional validity into question and suggests alternative language that would enable the Bill to rest on stronger constitutional footing.

In assessing the constitutional issues raised by Bill C-60, deBeer also raises the notion of provincial participation in copyright policy. He argues that several provisions focus primarily on property rights that would fall under provincial jurisdiction. Given the privacy, e-commerce, property rights, and consumer protection concerns raised by the anti-circumvention provisions, he urges the Provincial Attorneys General to inject themselves into the copyright policy process.

Professor Jane Bailey continues the examination of the anti-circumvention provisions by assessing their potential impact on freedom of expression. Her article amplifies deBeer's constitutional discussion with analysis of the impact of the 1996 *Michelin* decision. In light of recent Supreme Court of Canada jurisprudence, Bailey casts doubt on the applicability of *Michelin* within the current copyright law environment.

Bailey's review of the Bill's anti-circumvention provisions also raises specific concerns about the effect on freedom of expression of both the technology and its supporting legal framework. Noting that the Supreme Court of Canada has created a positive obligation to facilitate expression, she argues that technological protection measures (TPMs) and Bill C-60 may together work to limit speech. Her article concludes with several legislative recommendations that would serve to maintain the policy goals found in the draft Bill while limiting the adverse impact on constitutionally protected freedoms.

While Bill C-60 provides new legal protections for TPMs, Professor Ian Kerr suggests that policy makers ought to consider protection from TPMs. Kerr is particularly concerned with the privacy implications of the new provisions. He expresses frustration that privacy considerations appear to have been overlooked in developing a balanced approach to copyright reform.

Kerr calls for inclusion of an alternative form of anti-circumvention provision — a prohibition on the circumvention of the protection of Canadian

privacy law. He argues that this can be best achieved by including express provisions prohibiting the circumvention of privacy and permitting circumvention for personal information protection purposes. Moreover, sitting alongside these provisions, Kerr recommends including a stipulation that TPM licenses shall be voidable in the event they violate privacy law.

My own contribution focuses on the competitive impact of Bill C-60's anti-circumvention provisions. It concludes that the Canadian approach to anti-circumvention has the potential to serve as a model for many other countries around the world. The decision to link anti-circumvention to copyright infringement and the presumed exclusion of legislating against devices is a welcome change from a U.S. approach that has both repeatedly resulted in lawsuits and effectively chilled innovation.

While the Canadian Bill is better than most, I argue that there remains room for improvement. The most urgent amendments include explicit protection for the Competition Bureau to act against abusive conduct arising from the exercise of a TPM, establishment of a positive user right to circumvent in appropriate circumstances, and clarification of the meaning and effect of Bill C-60's service provider provision.

Although the anti-circumvention provisions garner the lion's share of policy debate, Bill C-60 also includes a related provision pertaining to the protection of Rights Management Information (RMI). Professor Mark Perry explains that RMI focuses both on the information about the author/creator of the work and about the work's uses. After reviewing the implementation of RMI provisions in other jurisdictions, Perry expresses disappointment with the Canadian approach.

He argues that the Canadian provision would benefit from a more balanced approach by giving additional consideration to the impact of using RMI together with user information. Echoing Kerr's concern, Perry notes that RMI can be used as a "quasi-secret tracking device of user behaviour" and calls instead for provisions that ensure RMI transparency and protect user privacy.

The recording industry's lobbying pressure over Internet file sharing is viewed by many as the primary driver behind Bill C-60's inclusion of a new "making available" right. David Fewer, legal counsel with the Canadian Internet Policy and Public Interest Clinic, assesses the potential impact of the provision which was heralded as providing greater certainty on the legality of "uploading" on peer-to-peer file sharing systems.

Fewer's essay demonstrates that the making-available right actually raises far more questions than it answers. He concludes that "never before in Canadian copyright history has a new right come into force with so

little known about it.” Fewer’s analysis highlights the uncertainty regarding the making-available right’s impact on the marketplace as well as its jurisdictional uncertainties.

The role of ISPs has been another prime focus of the recording industry. Professor Sheryl Hamilton offers support for Bill C-60’s approach to ISP liability and content removal in her essay. Hamilton notes that Canada currently uses a combination of law, self-regulation, and industry agreement to address the thorny question of how an ISP should respond to claims of copyright infringement on its system. She argues that there is merit in codifying a system to provide all stakeholders with greater certainty.

After canvassing the approaches in the United States and the European Union, she argues that the “made in Canada” proposal of a notice-and-notice system has several advantages. These include its consistency with other Canadian legislation, its impartiality, and its technology neutrality. To improve the current proposal, Hamilton would add a penalty provision for wrongful notices and amend the approach to search engines, that alone face a notice and takedown system.

Professor Mira Sundara Rajan tackles one of Bill C-60’s most overlooked series of provisions — those pertaining to performers’ rights. As Sundara Rajan ably notes, Bill C-60 contains a wide range of new performers’ rights that have been included primarily to enable Canada to implement the WIPO Internet treaties.

Sundara Rajan provides a critical analysis of these proposed changes, highlighting the potential conflict between the moral rights of authors and those of performers. Her contribution focuses on the need to update Canadian copyright law to better reflect the interests of performers, yet she expresses concern that the proposed Bill may ultimately harm the public interest in creative expression.

While the Canadian media focused its initial attention on recording industry issues such as the making-available right, the notice and notice system, and the anti-circumvention provisions, much of the debate that followed focused on Bill C-60’s education and library provisions. Professor Margaret Ann Wilkinson’s contribution features a blistering account of those provisions, which she argues are unnecessary and potentially damaging.

Wilkinson begins by discussing recent Supreme Court of Canada copyright jurisprudence, which has reshaped the context for copyright law and education. She contrasts the broad protection provided by Canada’s highest court with the tepid provisions in Bill C-60 that offer little if anything to the education and library communities. Wilkinson is particularly con-

cerned with the Bill's impact on education, questioning why the government was unable to reach a firm policy position on Internet-based publicly available materials.

Professor Sam Trosow covers similar terrain in his essay, which emphasizes Bill C-60's impact on the library community. Trosow masterfully dismantles the value of "hard won" provisions for the library community by engaging in a step-by-step analysis of the current state of Canadian copyright law. He argues that in light of the recent Supreme Court jurisprudence, the broad "fair dealing" exception must be read alongside the specific exceptions crafted for the library community. While some in the legal community believed that the specific exceptions supplanted the general exception, Trosow notes that the Court ruled that libraries effectively benefit from both exceptions.

This analysis becomes particularly relevant in light of Bill C-60's library provisions, which purport to expand the ability for libraries to deliver materials electronically. Trosow argues that these provisions are narrower in scope than the equivalent protections afforded by the fair dealing provision, which arguably allows libraries to deliver point-to-point materials electronically without being subject to the limitations incorporated into Bill C-60.

Alex Cameron, an Associate with the Canadian Internet Policy and Public Interest Clinic, examines the provisions associated with copyright in photographs. Unlike the provisions that focused on new technologies, debate over the photographic provisions has been ongoing for decades. Cameron appeared before a Senate Committee that examined this issue in 2004, and repeats many of the concerns that resonated at that time with the Committee.

The photography provisions could easily fall below the radar screen since at first blush they provide the sense of mere housekeeping. Cameron provides compelling evidence that the impact of the proposed changes will be widely felt by all consumers, particularly given recent stories of photography labs that have refused to copy photographs for customers due to fears of potential copyright infringement. While there has been some attempt to protect consumers in the photography provisions, Cameron identifies several additional changes that would better balance the interests of photographers and Canadian consumers.

D. FUTURE CANADIAN COPYRIGHT REFORMS

The emergence of user rights within the Canadian copyright balancing construct is one of the leading themes in this collection. Delving into it in her essay, Professor Carys Craig calls for legislative change to allow the *Copyright Act* to catch up to the courts. Craig skillfully reviews Canadian fair dealing jurisprudence, noting that prior to the *CCH* decision it was typified primarily by its restrictiveness. Even with the Supreme Court of Canada calling for a liberal interpretation of fair dealing, the Canadian provisions may still be unduly restrictive to permit socially beneficial uses of copyrighted work.

Craig recommends following the U.S. example by adopting a broad fair use provision that would include the current fair dealing exceptions but also permit other fair uses to be assessed on the basis of criteria identified by the Federal Court of Appeal and cited with approval by the Supreme Court of Canada. Moreover, Craig notes that there is a strong digital copyright component to such change, since without fair use reform, Internet browsing, time shifting, and reverse engineering may all fall outside the current list of permitted uses under Canadian copyright law.

Professor Abraham Drassinower provides an alternate perspective on user rights in his contribution. He illuminates the concern associated with Internet browsing by arguing that Canadian copyright law is sufficiently robust to ameliorate the legal concerns associated with the practice, provided that the courts incorporate the full meaning of user rights into our law. His article distinguishes between reproduction and infringement, maintaining that a reproduction that does not harm the authorial right of the author ought not to be treated as an infringement, but rather as a legitimate use covered by user rights. Drassinower's contribution provides a forward thinking analysis of the implications of the *CCH* decision, suggesting that the Supreme Court of Canada has provided a framework enabling the interests of both creators and users to be appropriately addressed.

While the extension of the term of copyright protection afforded to corporate owners of photographs is a relatively minor aspect of Bill C-60, Professor David Lametti uses it as a springboard for re-considering Canada's approach to copyright's term of protection. As copyright terms have been extended in other jurisdictions, the issue has moved to the fore, leading to a contentious debate in Canada several years ago regarding the term of protection for unpublished works of deceased authors.

Lametti proposes a novel approach to the issue by arguing for different terms of protection for different works. He argues that creators ought

to enjoy protection for life when they hold the copyrights, but that term would be reduced to a fifteen or twenty-year term if assigned to a corporate interest. Lametti offers alternative terms for specific works — database and information products would face a higher threshold for protection as well as a shorter term of protection, while multimedia and software products, which typically have a very short marketable life span, would be limited to a three-year term, renewable once.

Professor Daniel Gervais takes another direction. His article convincingly makes the case that copyright law is ill-suited to be applied to end-users in the manner that has been witnessed in recent months for one simple reason — “it is not what copyright was meant to do.” Rather, Gervais argues that the history and underlying policy objectives of copyright indicate that it is a right to be exercised by and against professionals. He notes that many countries have implemented rules that seek to provide protection to users for uses in the private sphere, such as private copying regimes.

Gervais offers an intriguing solution for addressing the incompatibility of copyright law applied to end users. He suggests adopting an extended licensing system, which he argues would enable those who provide content on the Internet to be paid where appropriate. He notes that such a system would account for uses permitted under the current fair dealing provisions (particularly in the education context) as well as provide content that is made freely available by creators under systems such as the remarkably successful Creative Commons project. Gervais puts his theory to the test in the context of music file sharing, demonstrating how an extended licensing system would yield hundreds of millions of dollars for artists and record companies, while removing the questions associated with the legality of sharing music on peer-to-peer systems.

The collection of essays concludes with an often-overlooked aspect of Canadian copyright reform — crown copyright. Professor Elizabeth Judge examines the historical dimensions of crown copyright, noting that many other Commonwealth countries have taken steps to reform or eliminate its application to many types of government documents.

Judge is particularly concerned with the application of copyright to legal materials. Although the federal government, along with several provincial governments, has established some limited reforms in recent years, much work remains to be done. While some may not view crown copyright as a digital copyright issue, Judge makes a strong case that emerging technologies and the Internet offer new opportunities for greater access and that crown copyright plays a central role in that regard. Judge offers several recommendations, including statutory provisions on publishing rights

and obligations with respect to government-produced materials, the elimination of both the royal prerogative and crown copyright in public legal information, as well as the establishment of a statutory duty to disseminate public legal information in both paper and electronic formats.

E. ACKNOWLEDGMENTS

Bringing a peer-reviewed book of this size to publication frequently requires several years of work. Thanks to the remarkable efforts of the dedicated group of people involved in this project, we managed to shrink that time scale to less than six months.

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Once the initial essays were delivered to the editor, two additional sets of contributors emerged. First, thanks to the international panel of peer reviewers who not only provided helpful advice that improved the quality of each essay, but did so within strict timelines to ensure that the project remained on schedule. Second, thanks to the first-rate group of student editors, including Jordan Halpern, Kristal Low, Koren Marriott, Mark McCans, Kathi Simmons, Daniel Steinberg, Jeremy Teplinsky, Jacqueline Tsai, and Warren Yeung, who provided exceptional citation and fact-checking reviews. Their work was particularly valuable given the decision to implement the University of Ottawa's *Law and Technology Journal* citation guide, which adopts an open access model to legal citation.

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Finally, thanks to my three incredible children Jordan, Ethan, and Gabrielle, who put a smile on my face day and night. Copyright may not mean much to them today, but they, and their contemporaries, are the reason that we must work toward identifying copyright policy choices for the benefit of all Canadians.

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