

Crown Copyright and Copyright Reform in Canada

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A. INTRODUCTION

This book is devoted to copyright reform and responds in large part to the recent copyright reform process and the government's proposals in Bill C-60, *An Act to amend the Copyright Act*.¹ Numerous copyright issues have been raised in this recent round of reform proposals and the public consultation process. In light of the ample complexity of the issues in the current reform agenda, this article has a somewhat strange premise. It seeks to call attention to Crown copyright, an area that is not included on the current copyright reform agenda but is slated for review as a "medium-term" issue, and to argue that this review should be prioritized and that significant revisions in the Crown copyright scheme should be implemented.

Crown copyright, or government copyright, refers generally to copyright in materials produced by the government. Practices with respect to government works vary tremendously across jurisdictions.

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1 Bill C-60, *An Act to amend the Copyright Act*, First Reading in the House of Commons on 20 June 2005, <www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60_cover-E.html>.

The tension with Crown copyright has been a push and pull for the government between, on the one hand, the acknowledged need to provide wide access to government information, particularly laws, in a free and democratic society and, on the other hand, the inclination to exercise government control over the printing of materials. Canada's conclusion thus far has been that Crown copyright must be retained in order to ensure accuracy and integrity of government materials. The exercise of Crown copyright is often combined with permissive licensing to reproduce materials, as is the situation with federal law.

This article argues that Canada should engage in a comprehensive review of Crown copyright in the short term and suggests changes to the Crown copyright system. In support of that joint objective of review and reform, this chapter provides a summary of other jurisdictions' approaches to government ownership of government-produced works. Canada's policy on Crown copyright parallels that which many Commonwealth jurisdictions had in place, but it needs to be modernized. The United Kingdom, Australia, and New Zealand have all addressed Crown copyright in recent copyright amendments or reform proposals or are engaged in a review of Crown copyright. In many other jurisdictions, primary law, such as legislation and judicial decisions by courts and tribunals, is not covered by copyright and can be freely reproduced.

The article concludes by recommending that Crown copyright should not apply to public legal information because those works are produced with the obligation to make them available for the purposes of public access and notice of the law. While accuracy and integrity of those materials are important objectives, and while copyright may have been an appropriate legal mechanism at one time to achieve those ends, other legal, and technological, mechanisms are better suited now to ensure accuracy and integrity, while at the same time facilitating the public's access to those materials. Government ownership of public legal materials is a blunt instrument to approach the laudable goals of facilitating the dissemination of accurate and timely public legal information and may, to the contrary, work to deter and delay the circulation of law in accessible formats. With respect to other government-produced works, the article recommends that the Crown copyright statute should be re-drafted to clarify (and narrow) the category of works to which it applies and to specify reciprocal obligations by government to publish these materials in publicly accessible formats and media using appropriate updated technologies.

B. CROWN COPYRIGHT

1) General Description

Crown copyright is sometimes thought of as a single idea encompassed by a single statutory section in the *Copyright Act*, but it is more accurately conceptualized as having three general sources: 1) section 12's substantive provision; 2) the historic royal prerogative referred to in the introductory clause to section 12 which predates statutory copyright provisions and is of perpetual duration; and 3) general copyright provisions in the *Copyright Act*, including such provisions as the ownership rules governing copyright of works by employees.

2) Section 12

Section 12 provides for Crown copyright and preserves the pre-statutory Crown prerogative to publish such government materials as judicial decisions and legislative enactments. Section 12 of the *Copyright Act* provides that “where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty” for a period of fifty years following the end of the calendar year of the publication of the work.²

It is trite law that copyright law is wholly “a creature of statute” in Canada.³ Section 89 of the *Copyright Act* explicitly states that “[n]o person is entitled to copyright otherwise than under and in accordance with the Act or any other Act of Parliament”⁴ This principle that copyright is “purely statutory law”⁵ and that statutory “rights and remedies” are “exhaustive”⁶ has been affirmed repeatedly by the Supreme Court of Canada to dispel the

2 *Copyright Act*, R.S.C. 1985, c. C-42, <<http://laws.justice.gc.ca/en/C-42/>>, s. 12.

3 *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336 at 338, <www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol2/html/2002scr2_0336.html>, 210 D.L.R. (4th) 385, 17 C.P.R. (4th) 161, 285 N.R. 267 [*Théberge* cited to S.C.R.].

4 **Above note 2 at s. 89.**

5 *Télé-Métropole Inc. v. Bishop*, [1990] 2 S.C.R. 467 at 477, (*sub nom. Bishop v. Stevens*), <www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol2/html/1990scr2_0467.html>, 72 D.L.R. (4th) 97, 31 C.P.R. (3d) 394 [*Télé-Métropole* cited to S.C.R.].

6 *Théberge*, above note 3 at 338. See also *Compo Co. v. Blue Crest Music* referring to copyright as “neither tort law nor property law in classification, but is statutory law.” *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 at 372-73, 105 D.L.R. (3d) 249, 45 C.P.R. (2d) 1, 29 N.R. 296 [*Compo* cited to S.C.R.].

idea of either common law or natural law copyright in Canada. Copyright law is of federal competence according to article 91(23) of the *Constitution Act, 1867* which enumerates copyright as a federal head of power.⁷

That said, section 12 begins by preserving historical copyright privileges, which pre-exist the copyright legislation. Section 12 is introduced with the important caveat that it is “[w]ithout prejudice to any rights or privileges of the Crown.” This residue preserves the traditional royal prerogative to print certain works.

C. ORIGINAL REASONS FOR CROWN COPYRIGHT

Several reasons have been proffered to justify Crown copyright, which can be summarized as accuracy and integrity (including moral rights-type issues of association and attribution), and more general concerns that the government be able to control and supervise publication of government works as the public’s trustee.⁸ Early English commentary averred that legislation and judicial decisions were simply the “property” of the King since “he saith” the laws and pays the Judges.⁹ It has been argued that Crown copyright inures to the public benefit because it provides publications at a lower cost than commercial private publishers could. Some also argue that Crown copyright is an important revenue-generating mechanism for the government. These reasons continue to be raised by those jurisdictions choosing to retain Crown copyright after modern reviews of copyright law. The United Kingdom, for example, in a 1999 White Paper, reiterated that Crown copyright is needed to protect the integrity of government works and to ensure their “official status” by serving as a “brand” of “status and authority.”¹⁰

Some of these rationalizations in support of Crown copyright were initially well-intentioned to serve public purposes, and the idea of having government ownership and publication control was a reasonable approach to meet the objectives of accuracy and integrity, and certainly was logically

7 *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No.5.

8 See, for example, *Millar v. Taylor*, 4 Burr. 2303 (1769); *Rex v. Bellman* (1938), 3 D.L.R. 548 (NB SC (AD)); *Attorney General of New South Wales v. Butterworth & Co. (Aus.) Ltd.* (1938), 38 N.S.W. S.R. 195.

9 *The Stationers v. The Patentees about the Printing of Roll’s Abridgement* 1661 (Eng.) 124 E.R. at 843.

10 United Kingdom, Minister for the Cabinet Office, *Future Management of Crown Copyright*, CM 4300 (London: Her Majesty’s Stationer’s Office, 1999), <www.hmso.gov.uk/archives/copyright/future_management_cc.doc> at para. 5.1.

linked to the goal of revenue generation. Historically, it can be argued that the public purposes of ensuring authentication, accuracy, integrity, public notice, and credentialing were usefully, even best, served by the Crown copyright regime. Given a world in which printing was the method of disseminating government information, where piracy and forgery were rife, and where the printed word might circulate far in time and space from the originator of the words, it made some sense for the Crown to exert control over the printer by asserting ownership in the content in order to ensure that the public received accurate and (relatively) timely works in full.

However, the original reasons put forth to justify Crown copyright either no longer apply or, where they do continue, can be better served by other legal or technological means than asserting ownership over the materials and controlling the means of reproduction. Copyright, in short, is not the best way to achieve the public purposes for which the Crown copyright system was designed. Instead, Crown copyright should be clarified and narrowed in its scope and re-designed to better balance the interests of the public and to take advantage of information and communication technologies.

Crown copyright should be repealed with respect to its application to public legal materials. Instead, Parliament should enact a dedicated statute covering the ownership and publication of public legal information. For other categories of government-produced material, the Crown copyright provision in section 12 of the *Copyright Act* should be amended. The provision should be re-drafted to elucidate its scope and application, to add provisions specifying governmental obligations with respect to publishing these works (apart from constitutional obligations and existing statutory requirements providing for the publication of court decisions, regulations, and legislation,¹¹ and obligations arising under such regimes

11 Constitutional obligations could arise from the general rule of law and, more specifically, publication requirements for official languages purposes. Federal and provincial statutes include requirements to publish statutes and regulations, and court decisions. Those legislative obligations that exist, however, are focused more on transparency, rather than on achieving freely available public access sources for government-produced materials and promoting technological enhancements. For a discussion of Canadian requirements to publish the law and specific statutory provisions, see Tom McMahon, "Improving Access to the Law in Canada with Digital Media," <www.usask.ca/library/gic/16/mcmahon.html> at s. 2. McMahon concludes, "[D]espite these legal obligations to publish the laws, there is nothing that expressly requires governments or courts to publish the laws using modern media, to publish in a medium that has the potential to reach the widest audience, or to make the laws available at the lowest marginal cost of reproduction." *Ibid.* at 21.

as the *Access to Information* legislation¹²) and to eliminate the reference to the royal prerogative. The royal prerogative makes it difficult for users to ascertain what types of materials are covered in this perpetual printing right. Moreover, many types of materials for which royal prerogative is claimed, such as legislation and regulations, would in any event be covered by Crown copyright under the statutory application of the substantive portion of section 12, and making the entire scheme statutory would simplify Crown copyright.

It should also be emphasized that there is nothing in this proposal that would limit the government's ability to continue to offer publications of government works; in fact, this chapter contends that government should have a positive duty to continue to publish official versions and to do so in both print and digital formats. The government versions should include credentialing markers to indicate that these official versions have the "status and authority" of being published by the government's designated printer. The special scheme for official marks under the *Trade-marks Act* could be used to prevent other versions from being presented as "official."¹³ For example, the United Kingdom's Office of Public Sector Information's website, containing an electronic version of the 1988 copyright legislation published by the Queen's Printer of Acts of Parliament, states:

the right to reproduce the text of Acts of Parliament does not extend to the Queen's Printer imprints which should be removed from any copies of the Act which are issued or made available to the public. This includes reproduction of the Act on the Internet and on intranet sites. The Royal Arms may be reproduced only where they are an integral part of the official document.¹⁴

A specific mark could also be adopted for the official versions of individual categories of government materials such as public legal information.

Indeed, the recommendations proposed here envisage the government taking on more responsibilities with respect to publishing public legal information, at the same time that non-governmental publications of public legal information would be encouraged. The recommendations propose that the government commit to making public legal information available in of-

12 *Access to Information Act*, R.S. 1985, c. A-1, <<http://laws.justice.gc.ca/en/a-1/8.html>>.

13 *Trade-Marks Act*, R.S.C. 1985, c. T-13, <<http://laws.justice.gc.ca/en/t-13/105826.html>> [*Trade-marks Act*], s. 9(1)(n)(iii).

14 **Electronic version of the Copyright, Designs and Patents Act 1988 (UK)**, c. 48, <www.opsi.gov.uk/acts/acts1988/UKpga_19880048_en_1.htm>.

official versions in print and digital formats. The government would also keep the role of archiving and preserving these works, of ensuring that databases are in relatively stable locations, and that materials remain permanently accessible even as formats and media become obsolete. That is, the proposal does not suggest that government should entirely privatise the publication of official materials, but that Crown copyright should be removed at all levels of government for public legal information to facilitate other publication providers offering versions of these materials. The government would carry on its role of providing *official versions* of public legal information with their attendant branding to indicate accuracy and integrity; and, as such, there could be different treatments accorded these versions with respect to authentication and evidentiary weight for public submissions.

D. SCOPE OF CROWN COPYRIGHT

1) Government Works

What exactly Crown copyright covers is unfortunately murky. Leaving aside the introductory clause, section 12 covers any work prepared or published under the direction and control of the Crown or any government department. Unless there is a contractual agreement that the individual author has copyright, the copyright in such works belongs to the government. This is one of the exceptions to the general presumption under copyright law that the author of a work is the first owner.¹⁵ To take an example, where an individual who is a government employee writes a report in the regular scope of her duties, the copyright belongs to the government unless there is an agreement to the contrary. Likewise, where an independent contractor prepares a report “under the direction or control” of the government, the copyright belongs to the government.

A high-water mark for the application of Crown copyright in works prepared by employees of the government came in *Hawley v. Canada* before the Federal Court of Canada.¹⁶ In that case, a prisoner who painted a large landscape picture as part of his rehabilitation while at a correctional facility was found to be a government employee and his artwork to belong to the government by the application of section 13(3). Section 13(3) specifies that where an author of a work is employed by another under a contract of service and makes the work as part of his employment, the employer is

15 *Copyright Act*, above note 2, s. 13(1).

16 *Hawley v. Canada* (1990), 30 C.P.R. (3d) 534 (F.C.T.D.) [*Hawley*].

the first owner of the copyright unless a contract specifies otherwise. The prisoner, on his release, was denied permission to take possession of the physical work and to photograph the work for his portfolio and he sued for the painting. The Federal Court found that the work had been commissioned by the prison authorities, who selected a theme based on the prisoner's art portfolio, that the painting was intended to decorate the correctional facility, had been painted during the prisoner's assigned work hours and that he had been remunerated for it (at six dollars per diem). The Crown therefore owned the painting and its copyright.

A further uncertainty is the scope of the "Crown" in Crown copyright. Does Crown copyright extend only to the Federal government (the Crown in right of Canada) or does it include the provinces and territories (for example the Crown in right of Ontario)? Within the Federal government, which entities are part of the Crown? And, does the Crown include only the executive branch of the government or does it also include the legislative and judicial arms?¹⁷

The types of materials prepared and published under the direction and control of the government are quite extensive. In addition to the obvious "government" documents such as public legal materials, government works include maps, surveys, census information, statistics, government forms, books and films, and many other materials.

2) Royal Prerogative

The royal prerogative is not a type of copyright right but more properly a property right, or a prerogative right, granting a monopoly in printing of perpetual duration. It is not subject to the usual statutory copyright term. The royal prerogative is referenced at the start of section 12 of the *Copyright Act* — the section is "without prejudice to any rights or privileges of the Crown," using language which was adopted from the former UK 1911 copyright legislation.

This introductory clause exaggerates the indeterminacy of the scope of Crown copyright because the type of materials covered by the "royal pre-

17 See Barry Torno, *Crown Copyright in Canada: A Legacy of Confusion* (Ottawa: Consumer and Corporate Affairs Canada, 1981) especially at 6–7, 15–20, 28–38. Australia's Copyright Law Review Committee considered the scope of the "Crown," whether the "Crown" includes the legislative and judicial arms of government as well as the executive, and factors for determining whether government entities should be considered the "Commonwealth" and "State." See *Crown Copyright Final Report (Aus.)*, below note 93, c. 2 & 8.

rogative” relates back to its historical origins and there is no exhaustive list of the categories of works that are covered.¹⁸ The royal prerogative included many powers, one of which was related to printing.¹⁹ In the United Kingdom, Crown grants based on the royal prerogative accorded exclusive printing and publication rights. These Crown grants included at least the King James Bible, Measures of the Church of England, statutes, and judicial decisions. Crown copyright in legal materials in Canada, including reasons for judgment by courts and tribunals, have been claimed to derive from the traditional prerogative power to publish certain materials.²⁰

3) Reproduction of Federal Law Order

Although there has been scholarly debate off and on about Crown copyright, which was re-invigorated by advocates of free public law in cyberspace,²¹ and Crown copyright has been included in copyright reform studies by the government for several decades, the general attitude toward Crown copyright has been complacent. It might be argued that the public is simply not familiar enough with the contours of copyright, much less the intricacies of Crown copyright, to be bothered. But even among copyright specialists, Crown copyright has not generated as much attention in the swirl of recent copyright debates. This may either be explained by, or be the cause of, its omission from the short-term copyright reform agenda. On the academic front, this may be partially explained by the fact that the scholarly debate has been spurred by news, court cases involving peer-to-peer file sharing, and digital copyright issues. Crown copyright could be characterized as a musty concept that is not overly pressing, in the face of other attention-grabbers. This view, I think, is misguided. Crown copyright is not only integral to the digital copyright reform agenda but, as it significantly affects access to justice, is a core aspect of the extent to which citizens know the law and, in turn, can exercise such rights as freedom of expression to comment on it.

18 “Constitutional changes have shattered the idea of prerogative but there remains in the Crown the sole right of printing a somewhat miscellaneous collection of works, no catalogue of which appears exhaustive.” *Rex v. Bellman*, above note 8, Baxter C.J.

19 For a list of prerogative powers, see Torno, *Crown Copyright in Canada*, above note 17 at 4–5.

20 See *ibid.* at 13, 38–45; David Vaver, “Copyright and the State in Canada and the United States” (1996) 10 I.P.J. 187 at 189–90.

21 In the 1990s, especially, there was a flurry of debate. See, for example, the collection of articles published in volumes 10 and 11 of the *Intellectual Property Journal* (1996) on Crown copyright.

This lingering attitude that Crown copyright is not a high priority issue may be due to a sense that the issue was discussed and adequately addressed by the *Reproduction of Federal Law Order*. In December 1996, an Order in Council was made with an annexed *Reproduction of Federal Law Order* where Crown copyright in federal statutes and decisions of federal courts and tribunals was retained, but the government provided blanket permission for the public to reproduce this law as long as certain conditions of accuracy and authentication were met.²² The preamble to the Order in Council acknowledged that it was of “fundamental importance” that the law be “widely known” and that the citizens of a “democratic society” should have “unimpeded access” to law, and thus the federal government would license the public’s reproduction of federal law to facilitate such access. According to the annexed *Reproduction of Federal Law Order*:

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.

The *Reproduction of Federal Law Order*, however, while laudable for increasing access to the law, judged relative to the situation before the order was made, is not a panacea. The Order fails to provide “unimpeded access” to law, a failure which is exacerbated as information and communication technologies improve over time. The Order does not cover all legal information. By category, it covers only the “federal law” of statutes, consolidations, and court and tribunal decisions; it does not license the public to reproduce any other kind of public legal information. Moreover, the Order covers only the Government of Canada, not the provinces or municipalities.

The Order also permits the public to (only) “reproduce” federal law. Whether the scope of the federal order includes all media and forms of reproduction, including Internet access, html, PDF, or scanned formats; whether it extends to give permission to the separate right under copyright law to communicate to the public by telecommunication; and whether the permission extends to Canadian law posted and accessed outside of Canada are not clear. These ambiguities potentially affect the willingness of private publishers to provide digitally enhanced versions of public le-

22 PC 1996-1995, SI/97-5, 19 December 1996, <<http://laws.justice.gc.ca/en/otherreg/SI-97-5/189099.html>>, vol. 131, no. 1 *Canada Gazette* — Part II 444 (8 January 1997).

gal information. The residual and perpetual Crown prerogative to publish judicial decisions and legislative enactments likewise leave a persistent uncertainty as to users' rights to access and reproduce the material in all media and formats. This contrasts with the updated language of the United Kingdom which, with respect to legislation, expressly permits "by way of illustration" "reproducing and publishing the Material in any medium," "reproducing the Material on free and subscription websites which are accessible via the Internet," "establishing hypertext links to the official legislation web sites," "reproducing the Material on Intranet sites," and many other uses such as inclusion in theses and student course packs.²³

1) Provinces and Territories

The provinces and territories, in contrast to the Federal Government, vary in approaches toward public access to law, but the trend overall is to provide increasingly more permissive access to public legal information. New Brunswick announced in April 2005 that it would offer free full-service Internet publication of all its public acts and regulations in both French and English, in a fully automated Internet publication service providing automatic updates, full searching, and historical versions of public acts and regulations.²⁴

Many provinces follow a similar model to the Government of Canada's approach of claiming Crown copyright and allowing reproduction, although the provinces are more restrictive with respect to the permitted purposes. Where the Government of Canada's *Reproduction of Federal Law Order* permits "anyone ..., without charge or request for permission, [to] reproduce," the provinces generally restrict their permission to non-commercial personal uses and require further permission for commercial purposes. The copyright notice for Manitoba Justice, for example, provides that any user may reproduce the information without charge or request for permission for "non-profit educational purposes," but specific permission for any other purpose must be obtained.²⁵

Ontario asserts Crown copyright and is fairly permissive with respect to reproduction for non-commercial purposes. The Government of Ontario

23 "Guidance — Reproduction of United Kingdom, England, Wales, and Northern Ireland Primary and Secondary Legislation," Number 6, 27 October 1999, rvsd. 9 May 2005, <www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/reproduction-of-legislation.htm>.

24 "E-Laws to give New Brunswickers better access to justice," 27 April 2005 <www.gnb.ca/news/just/2005e0480ju.htm>.

25 Province of Manitoba, Manitoba Justice "Disclaimer and Copyright" <www.gov.mb.ca/justice/disclaimer/>.

website expressly states the materials are “protected by Crown copyright unless otherwise indicated, which is held by the Queen’s Printer for Ontario.” For “non-commercial purposes,” reproduction of the materials can be made providing “credit is given and Crown copyright is acknowledged.” For commercial purposes, the “materials may only be reproduced ... under a licence from the Queen’s Printer, with the exception of Government of Ontario legal materials (statutes, regulations and judicial decisions).”²⁶ Legal materials are separately treated in a model paralleling the *Reproduction of Federal Law Order*. Although copyright is claimed by the Queen’s Printer for Ontario, “any person” can reproduce both text and images of statutes, regulations, and judicial decisions “without seeking permission and without charge,” as long as they are accurate and not represented as an official version, acknowledge Crown copyright, and include a notice that it is an “unofficial version of Government of Ontario legal materials.”²⁷

The Yukon grants broad permission: “The legal material on this site may be reproduced in whole or in part and by any means without further permission from Yukon Justice,” providing the reproduction does not suggest it is officially endorsed by Yukon Justice.²⁸ The materials on the official site of the Legislative Assembly of Nunavut likewise may be reproduced “by any means, without further permission.”²⁹ At the other end of the spectrum, the Government of British Columbia takes a restrictive approach, stating for example of the province’s revised statutes online: “No person or entity is permitted to reproduce in whole or in part these *Statutes and Regulations* for distribution either free of charge or for commercial purposes unless that person or entity has a signed license agreement with the Queen’s Printer for British Columbia.” Only single copies of acts and regulations, in whole or in part, for “personal use or for legal use” are permitted.³⁰ Some provinces charge subscription fees for online comprehensive and current access to legislation by the provincial Queen’s

26 Government of Ontario, “Copyright,” <www.gov.on.ca/MBS/english/common/queens.html>.

27 Government of Ontario, “Policy on Copyright on Legal Materials,” <www.gov.on.ca/MBS/english/common/copypolicy.html>.

28 Government of Yukon, “Disclaimer and Copyright information related to this legislative material” <www.gov.uk.ca/legislation/pages/copydsc1.html>.

29 Legislative Assembly of Nunavut, “Bills and Legislation” <www.assembly.nu.ca/english/bills/index.html>.

30 British Columbia Ministry of Management Services Queen’s Printer, “Important Information About the Statutes and Regulations on this Web Site” <www.qp.gov.bc.ca/statreg/info.htm>.

Printer.³¹ Saskatchewan oddly calls the province's online access service for acts, bills, and regulations "Saskatchewan's Queen's Printer Freelaw[®]" service.³² Confusingly, "free" is less "free" than one might assume. Users can use the "free" Adobe reader to view and print PDF files for personal use. That service, though, is funded by the sale of paper copies. An additional characteristic of public legal information available on the official government sites is that these online versions are not official. Thus sample disclaimers on the official sites state that the legal information is provided "as is"³³ and are "prepared for convenience of reference only,"³⁴ and refer people "who need to rely on the text ... for legal and other purposes" to the "Queen's Printer official printed version."³⁵

With respect to other government materials, again the practices vary. The Privy Council Office, for example, permits reproduction for personal and public non-commercial use without charge or permission, providing there is attribution and accuracy, but prohibits commercial reproduction without prior permission in order that the "most accurate, up-to-date versions" are made available.³⁶ Federally, with respect to Government of Canada works, excepting primary federal legal information, the general Application for Copyright Clearance on Government of Canada Works requires applicants to submit information on the copyright right (reproduction, adaptation, revision, translation) for which the applicant seeks permission, the format, number of copies, end use, commercial sale price or cost-recovery basis, distribution area, and any prior approvals to use the same Crown copyrighted material.³⁷ Provincially, with respect to website contents on government sites, generally the copyright notices permit non-commercial reproduction, with the usual conditions of ensuring accuracy and not representing the versions as official, but require advanced

31 See, for example, Alberta Queen's Printer, QP Source Internet <<http://qpsource.gov.ab.ca/>>; British Columbia QP LegalEze <www.qplegaleze.ca/> (offering day, ten-day, and monthly passes and site licences).

32 Saskatchewan Queen's Printer, "Freelaw[®]" <www.qp.gov.sk.ca/>.

33 Province of Manitoba, Manitoba Justice "Disclaimer" <www.gov.mb.ca/justice/disclaimer>.

34 Northwest Territories, Department of Justice, "Disclaimer" <www.justice.gov.nt.ca/Legislation/legislation_disclaimer.htm>.

35 British Columbia Ministry of Management Services Queen's Printer, "Important Information," above note 30.

36 Canada, Privy Council Office, <www.pco-bcp.gc.ca/default.asp?Language=E&Page=ImportantNotices>.

37 "Application for Copyright Clearance on Government of Canada Works," available at Crown Copyright, <<http://publications.gc.ca/helpAndInfo/cc-dac/application-e.html>>.

written permission for commercial purposes.³⁸ More permissively, the Government of Newfoundland and Labrador “grants permission for the information [on the official] website [in which the province holds copyright] to be used by the public and non-governmental organizations.”³⁹

E. PROBLEMS WITH THE CROWN COPYRIGHT SYSTEM IN PRACTICE

In practice, public access to legal information is unsatisfactorily resolved by the issuance of the *Reproduction of Federal Law Order*. Crown copyright is still inconsistent between levels of government. The federal government grants the public the right to “reproduce” federal law and does not expansively define what constitutes “federal law.” Provinces variously claim copyright without a general licence for reproduction or follow the federal government’s model of copyright with conditional permission to reproduce provincial law, usually for non-commercial purposes, or, in a few noteworthy cases, provide near unrestrictive rights to reproduce law.

Such uncertainty with respect to reproduction of public legal information produces uncertainty among the general public, which in turn leads to self-censoring and a chilling effect. Indeed this effect seems deliberate: the catalogue of types of works covered by the royal prerogative is resolutely undefined in the Canadian statute, referring only to “any rights or privileges of the Crown.” If the royal prerogative is retained, a specific list of materials to which it applies should be issued to provide the “exhaustive list” which has been missing.⁴⁰

Crown copyright’s negative effect on access to justice is exacerbated because commercial and individual providers are reluctant to take advantage of new technologies to provide access to legal information. The prerogative right looms, and the federal *Reproduction of Federal Law Order* and the provincial licences to reproduce law, where they exist, are tenuous since they can be revoked.

38 See, for example, Government of Yukon, “Copyright,” <www.gov.yk.ca/copyright.html>, Government of Saskatchewan, “Copyright Information,” <www.gov.sk.ca/copyright>.

39 Government of Newfoundland and Labrador, “Copyright,” <www.gov.nl.ca/disclaimer.htm>.

40 A similar proposal that “an exhaustive list of items coming with the prerogative be enumerated in any new Act” if the Crown retained prerogative copyright was recommended back in 1977. The Crown retained the royal prerogative, but did not incorporate a list of items in the legislation. A.A. Keyes & C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Ottawa: Consumer and Corporate Affairs Canada, 1977) at 226. See also *Rex v. Bellman*, above note 8, quoted in above note 18.

Another cascading effect results from the *Berne Convention's* national treatment principle requiring that a signatory country give citizens of other signatory countries the same treatment as its nationals. Followed strictly, one would need copyright permission under Canadian law in order to reproduce in Canada the primary law from a country that has placed that law in the public domain. Practically, it is unclear who could assert copyright ownership of other countries' public domain law in Canada.⁴¹

F. THE COPYRIGHT REFORM PROCESS AND STUDIES OF CROWN COPYRIGHT

Recommendations on Crown copyright have vacillated between support for abolishing Crown copyright and support for retaining Crown copyright but liberalizing the licensed uses in some manner.

A 1984 federal white paper, *From Gutenberg to Telidon: A White Paper on Copyright — Proposals for the Revision of the Canadian Copyright Act*, considered Crown copyright and recommended against abolition so that the Crown can enforce copyright “when such action is in the public interest.” The White Paper recommended guidelines be created “to assuage fears that the Crown might unduly restrict public access to important government materials” and that the following factors should be taken into account: furthering the broadest possible dissemination of information; protecting official material from misuse by unfair or misleading selection or undignified association or undesirable advertising; and recapturing public funds spent to create those works where a market demand exists. The White Paper stated that the Crown and not the individual writers of judicial opinions and legislation should own copyright in those works. The Crown prerogative to authorize the printing of legislative acts and judicial opinions should remain “in order to ensure the integrity of use of such works,” the White Paper concluded.⁴²

41 See Ysolde Gendreau, “Crown Copyright in Cyberspace: Teachings from Comparative Law” (1996) 10 I.P.J. 341 (discussing the rules of national treatment and the comparison of terms); Vaver, “Copyright and the State in Canada and the United States” above note 20 at 209 (discussing national treatment); and, on the application of the *Universal Copyright Convention*, B. Ringer & L.I. Flacks, “Applicability of the Universal Copyright Convention to Certain Works in the Public Domain in Their Country of Origin” (1979–1980) 27 Bull. Copr. Soc’y 157 cited in J.A.L. Sterling, below note 86.

42 Consumer and Corporate Affairs Canada, *From Gutenberg to Telidon: A White Paper on Copyright — Proposals for the Revision of the Canadian Copyright Act*, by Judy Erola & Francis Fox (Ottawa: Supply and Services Canada, 1984) at 75–76.

In 1985, the Sub-Committee of the House of Commons Standing Committee on Communications and Culture on the Revision of Copyright was formed to consider all aspects of copyright revision and to modernize the *Copyright Act*. The Sub-Committee's Report recommended a Charter of Rights for Creators.⁴³ Recommendations 10 to 12 of the Sub-Committee's report, and part of this Charter, involved Crown copyright issues and recommended that Crown copyright be abolished for some categories of materials and that the scope be greatly restricted for other categories. Recommendation 10 concluded that "[s]tatutes, regulations and judicial decisions of court tribunals at all levels of jurisdiction should be in the public domain." The Report pointed to the United States as a jurisdiction that put even more legal information into the public domain and had success with private publishers adding value to published legal information. The net effect, with the low-cost official versions, was greater variety and convenience for users. The Sub-Committee carved out those works which are "not documents needed for policy debate and evaluation," such as films by the National Film Board, as ones which should continue to have copyright.

The Sub-Committee further recommended that there should be no copyright in government works except for a moral right of integrity to ensure accuracy, and except for works produced by a Crown agency "to entertain rather than to assist in policy debate evaluation," and custom-made statistics with restricted circulation, "if it is found desirable to continue the practice of making these works available to particular users on a cost-recovery basis."⁴⁴

Significantly, the Sub-Committee also recommended that there should be parity between federal and provincial documents with respect to copyright and that the federal government should begin a consultation process with the provinces.⁴⁵

Crown copyright revision stayed dormant until the following decade. In 1995, the Information Highway Advisory Council recommended retaining Crown copyright but liberalising the government's approach to making Crown works available to the public. The Council advocated that, as a

43 *The Revision of Copyright, Minutes of Proceedings and Evidence of the Sub-committee of the Standing Committee on Communication and Culture, First and Second Reports to the House, 27 June–24 September 1985 [Revision of Copyright Sub-Committee Report]*. The Charter of Rights for Creators is Part I.C of the *Revision of Copyright Sub-Committee Report*.

44 *Ibid.*, Recommendation 11.

45 *Ibid.*, Recommendation 12.

default position, federal government information should be in the public domain, and that licensing should be on a cost-recovery basis.⁴⁶

In 1996 the *Reproduction of Federal Law Order* was made which instituted a change in the approach to some primary legal information. The Order did not place primary law in the public domain. The Government of Canada opted instead to adopt a moderate position, which retained Crown copyright but permitted users a blanket licence to reproduce without payment or permission. The Order does not cover provincial law, deviating from the Sub-Committee's recommendation in 1985 that there should be parity as to copyright in provincial and federal law.

A substantial revision of copyright law is now ongoing, with Phase III focusing on digital copyright issues. Crown copyright, however, has not been slated on the agenda for consideration as a short-term priority issue.

The section 92 report, *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act*, tabled in October 2002, identified Crown copyright as one of the "medium-term" issues on the reform agenda, which were scheduled for review in a two to four year timeframe.⁴⁷ Since then, the copyright revision process has focused on the short-term issues.

The Standing Committee on Canadian Heritage presented an Interim Report on Copyright Reform in May 2004. That report focused on short-term issues from the Section 92 report and in particular copyright amendments which might be required to ratify the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*, to both of which Canada is a signatory.⁴⁸ Crown copyright was not addressed by that May 2004 Report.

46 Industry Canada, Information Highway Advisory Council, *Connection, Community, Content: The Challenge of the Information Highway* (Ottawa, Supply and Services Canada, 1995), recommendations 6.7 (b) and (c).

47 *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (Ottawa: Industry Canada, 2002), <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00863e.html>>, at A.1.3 & C. The Section 92 Report follows up on the outline for copyright reform in Industry Canada and Canadian Heritage, *A Framework for Copyright Reform*, 22 June 2001 (Ottawa: Industry Canada and Canadian Heritage, 2001), <<http://strategis.ic.gc.ca/pics/rp/framework.pdf>>.

48 Canada, House of Commons, Standing Committee on Canadian Heritage, *Interim Report on Copyright Reform*, May 2004 (Ottawa, 2004), <www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf>. The six issues in the Interim Report are private copying and WIPO ratification; photographic works, Internet service providers' liability; and three educational issues (use of Internet material for educational purposes, technology-enhanced learning, and interlibrary loans).

In March 2005, the Government of Canada tabled its Response to the Standing Committee on Canadian Heritage's May 2004 Interim Report. The Government response addressed most issues in the Interim Report but demurred on the educational use of Internet material, so as to initiate a public consultation process, and on the private copying regime. The Government's announcement at that time of the upcoming amendments to the *Copyright Act* stated that they would fulfill the Government's commitment to address the "short-term" copyright reform issues; the amendments are unfortunately unlikely to address Crown copyright, given that it is slated as a "medium-term" issue and the current Bill C-60 does not include Crown copyright provisions.⁴⁹

Finally, as part of the summary of copyright reform, the Supreme Court of Canada decided *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁵⁰ which involved the reproduction for legal research purposes of private publishers' enhanced versions of primary law such as reported decisions, statutes, and regulations. The photocopied reproductions of commercially published legal materials that were at stake in the case were done by the Great Library of the Law Society of Upper Canada on a request basis for legal researchers.⁵¹ With respect to judicial decisions, the Supreme Court interestingly found that "the reported reasons, when disentangled from the rest of the compilation — namely the headnotes — are *not* covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons."⁵² The royal prerogative and section 12 are not discussed in *CCH*. The Court's assertion that reported reasons are "not" covered by copyright is at odds with the statement in the *Reproduction of Federal Law Order*, which assumes that there is Crown copyright in judicial reasons.

This recapitulates a long-standing debate as to whether judicial reasons in Canada are within Crown copyright as part of the prerogative right. The traditional position is that the "Crown" includes all three branches (judicial,

49 Above note 1.

50 *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339.

51 The copyright notice in the Ontario Reports, the reporter containing reasons for judgment that are edited under the authority of the Law Society of Upper Canada by LexisNexis Canada, Inc., is interesting to note. It asserts "all rights are reserved by the Law Society of Upper Canada. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holder, application for which should be addressed to the Law Society of Upper Canada." Copies of individual decisions are permitted for fair dealing purposes.

52 *Ibid.* at para. 35.

executive, and legislative) of the government. The argument is that judges are officers of the Crown and thus reasons for judgment are Crown copyright protected. Others find this too reductionist and alternatively argue that judges are not part of the Crown, which properly encompasses only the “government,” and that judicial independence suggests that judicial reasons are not owned by the Crown.⁵³ These scholars argue it is nearly inconceivable, so contrary is it to the rule of law, that the executive (or legislative) arms of the government could prevent a court’s publication of its reasons for judgment. It has been suggested that judges’ reasons for judgment may be one example where it is “inherent in the circumstances to recognize the claim to copyright would be contrary to public policy.”⁵⁴ The Supreme Court’s phrasing in *CCH* indicates that in the Court’s view the original versions of judicial decisions disseminated by the courts are not copyright protected. If, however, judicial reasons are not already in the public domain and are not placed there during the copyright reform process, there may be good reasons to separate out Parliamentary copyright and judicial copyright from the rest of Crown copyright, as the legislatures and courts are better placed to ensure the accuracy and integrity of their own written materials.

The *CCH* decision applies fair dealing and other statutory copyright exceptions to commercially produced legal information, but leaves open the question of whether those statutory exceptions apply to Crown copyright protected materials derived from the royal prerogative.

Why has Crown copyright not been included in the current reform agenda as a priority issue? It might be tempting to interpret the fact that the Crown copyright section of the Government of Canada website is under revision as a sign of more immediate review.⁵⁵ However, there are no explicit statements that Crown copyright is on the government’s copyright agenda in this latest round of reform in 2005–2006, and the Government’s announcement of the upcoming amendments explicitly limited those to “short-term” issues.

53 In addition to the *CCH* case, above note 50, see, for example, on the prerogative right and judicial decisions, Gérard Snow, “Who Owns Copyright in Law Reports” (1982), 64 C.P.R. (2d) 49 (concluding that the “printing of all judgments, regardless of their original form of expression, probably remain to this day under the exclusive and indefinite control of the Crown by way of royal prerogative” at 66); Jacques Frémont, “Normative State Information, Democracy and Crown Copyright” [1996] 11 I.P.J. 19 at 25–29.

54 *British Columbia Jockey Club v. Standen* (1985), 8 C.P.R. (3d) 283 at 288, 22 D.L.R. (4th) 467 (B.C.C.A.) per Hutcheon JA. (concurring) [*British Columbia Jockey Club* cited to C.P.R.].

55 Government of Canada, <<http://publications.gc.ca/helpAndInfo/cc-dac/crownis-e.html>>.

As already stated, Bill C-60 does not include Crown copyright provisions.⁵⁶ In the wake of *CCH v. Law Society of Upper Canada*, a comprehensive consideration of Crown copyright's application to public legal materials would seem to be a logical step. Other jurisdictions have included Crown copyright reform and modernization in recent copyright amendments, even without the prompt of a high appellate court case to spur consideration.

Some speculations as to why Crown copyright is not explicitly on the reform agenda can be proffered. One might argue the following: Crown copyright is not a "digital copyright" issue, it can be isolated and studied as a single issue at a later time, it deserves more extensive review, or other issues are of a higher priority because they involve compliance with international treaty obligations, such as the WIPO Internet Treaties, which raise such issues as the "making available" right and the private copying regime.

Taking some of these in turn, Crown copyright is very much linked with digital technologies and could profitably be prioritized. Access to legal information in electronic formats is crucial to enabling the public to have notice of the law and to be able to debate it accordingly.

To be sure, there are other reform initiatives that should be undertaken for comprehensive reform and which deserve attention. This acknowledgment is to agree that there are other deserving candidates for copyright reform, yet to argue that these are in addition to, rather than supplanting, a priority consideration of Crown copyright. Some copyright measures that might be thought of as mere housekeeping may have a significant effect on people's perception of copyright, worthiness of the intellectual property right, the merits of the bargain struck, and willingness to abide by the copyright system. Failing to modernize copyright in a timely manner may inculcate a habit of disregard by the public and a shift in attitudes toward the copyright right. A good example is time-shifting for personal recording of television programs.⁵⁷ The same concerns could be raised about Crown copyright. It too risks inculcating a habit of disregard if public expectations as to access and reproduction rights with respect to public legal information are subverted.

56 See above note 1.

57 Australia's recent Issues Paper on fair use highlights time-shifting and format-shifting. See *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age*, Issues Paper, May 2005, <[www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf)>, s. 11 "Possible new exceptions to copyright."

G. WHY CROWN COPYRIGHT SHOULD BE REFORMED

My concern in this chapter is to highlight especially the effect of Crown copyright on access to legal information. In a free and democratic society, access to the law is of foundational importance. The maxim that individuals are not excused by an ignorance of the law imposes a duty on citizens to be familiar with the law; for this duty to operate fairly, there must be a parallel obligation for the government to make the law available (and “law” here should be construed broadly). This obligation should be a dynamic one so that the means and media by which the law is made known incorporate advances in technologies in a timely manner to enable citizens to have as unrestricted an access to the law as possible. The duty to disseminate can be seen as a correlative aspect of a Crown copyright right to publish, and, regardless of whether Crown copyright is retained, as an integral part of the government’s responsibilities to the public. The fulfillment of this duty to disseminate should evolve over time such that merely providing access to printed versions of the law should not suffice where the means exist to provide immediate access to technologically-enhanced government information to the public.

Some scholars have persuasively argued that in a global community, with an increasingly networked world and trans-national trade, the obligation to make law publicly accessible also extends beyond enabling citizens to access their own jurisdiction’s law to enabling foreign actors to access the national laws of other countries.⁵⁸ For this purpose, the publication of official versions in digital format on the Internet is vital.

H. DOES THE SUBJECT-MATTER OF CROWN COPYRIGHT COMPORT WITH THE OBJECTIVES AND PUBLIC POLICY OF COPYRIGHT?

1) Objectives and Public Policy of Copyright Law

The Supreme Court of Canada in *Théberge*, and more recently in the unanimous decision of *CCH*, described the philosophy of copyright law, explaining it as a balance between two objectives of an incentive and reward:

58 See, for example, Uta Kohl, “Multi-State Liability of Online Actors: How Accessible Must or Should National Law be to Foreign Online Content Providers?” (Paper presented to the Law via the Internet 6th Conference, 3–5 November 2004, Paris, France) <www.frlil.org/article.php3?id_article=81>.

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).⁵⁹

Similar statements that copyright law needs to balance the “rights of authors and the larger public interest” have been recognized at the international level.⁶⁰ Neither the “incentive” nor the “reward” objective named by the Supreme Court clearly applies to Crown copyright, especially with respect to public legal information. It is difficult to rationalize the subject matter protected by Crown copyright with the objectives of copyright law.

The copyright objective is to provide incentives to create. The author, as first owner, under general rules, has the exclusive right to decide the timing and audience for publication and circulation. Unlike patent law, copyright law has no *quid pro quo* as part of a bargain with the public that the owner of the intellectual property right is required to disclose the intellectual property that is protected in exchange for the limited term monopoly. Thus, copyright rights provide an incentive to create but have no explicit reciprocal requirement to disseminate, although it is expected that authors will usually circulate their works for financial and reputational reasons.

This incentive system is difficult to square with Crown copyright. The courts and parliamentary bodies do not need a copyright incentive to create laws. Judicial and statutory law are created as part of the regular business of the courts and legislative bodies. Parliament has political incentives to enact laws. The courts produce reasons for judgment as part of their obligation to notify the parties and the public of the grounds for decision.⁶¹ In addition to not being correlated with quantity, Crown copyright also does not seem designed to produce better quality material.

59 *Théberge*, above note 3 at paras. 30–31; and see *CCH*, above note 50 at paras. 10 & 23.

60 See, for example, the Preamble to the *WIPO Copyright Treaty* “[r]ecognizing the need to maintain balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the *Berne Convention*.” *WIPO Copyright Treaty*, adopted 20 December 1996, <www.wipo.int/treaties/en/ip/wct/trtdocs_woo33.html#preamble>.

61 On the duty of the trial judge to give reasons in criminal cases, see *R. v. Shepard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903.

Copyright's exclusive right to reproduce copyright-protected content is likewise over-inclusive. The objective for legal information should be to increase free or cost-recovery public access to accurate sources of law. Designating and protecting an official private publisher (Queen's printer) is no longer necessary to ensure accurate and timely access to government-produced works. Crown copyright works in practice to lock in print versions as the only official versions of legal information and to retard progress in making public legal information available electronically. So far, the government has been slow even to provide quasi-official sources for non-official versions of the law in electronic form with updated functionality, and are routinely reluctant to provide official sources on public Internet sites, except where the document is available in PDF format.

Further, given the vast improvements in technology for publishing and disseminating information, and the advances in cost-effective storage, the government is now increasingly making public legal information available electronically. The government could improve this publication of official materials by implementing more cross-linking, distributed content, indexing, and searching capabilities for legal information databases. These developments are positive ones, but Crown copyright incentives are unlikely to be primarily responsible for this growth in e-government. Rather, technological advances, reduced cost, and responsiveness to constituent needs are spurring this process and will continue to motivate the process of making public legal information available in digital format regardless of whether the material is covered by Crown copyright.

In the Crown copyright context, copyright could be as likely to keep information from circulating as to provide an incentive to publish. Crown copyright could, in theory, be used to censor materials, delay access, or to chill discussion. Crown copyright permits the government to charge royalty fees and to require permission before protected materials can be reproduced. The *Reproduction of Federal Law Order* currently provides a blanket licence for users to reproduce federal law without payment or permission; but this licence could be rescinded and Crown copyright exercised. Additionally, under the current system, only federal law is covered in the Order, leaving a confusing patchwork of licences and requirements at the provincial level with respect to law and different rules at the federal level for government materials other than law.

The copyright right to decide when to publish or to restrict the audience has some application to the types of materials covered by Crown copyright but is a function that would be better served by other laws. There can be legitimate reasons that a government would wish, or would be required, to

limit publication of materials, as for example because of national security and defence, Cabinet secrets, or obligations to other governments from which the information was received. However, copyright is an awkward legal mechanism to protect such works for these purposes. For this subset of materials, other legal means, such as evidentiary privileges and the existing exceptions in the access to information regimes, are more measured to meet those objectives, with detailed statutory and regulatory requirements and at least some judicial oversight. Copyright, by contrast, risks being applied to too broad a category of works. The existing access to information regimes do not, however, provide timely access rights to government works, do not include published or purchasable materials, and do not obviate the Crown copyright which subsists in those works. Thus, an additional statute specifying the government's obligations with respect to providing access to public legal information and other designated categories of government materials would be crucial.

2) Is Crown Copyright Still Needed to Meet Historical Purposes of Integrity and Accuracy?

It continues to be argued that Crown copyright is still necessary to ensure integrity and accuracy; and thus, proponents of Crown copyright argue that if the goal is to increase access it is preferable to retain Crown copyright and have statutory exceptions or blanket licences. But Crown copyright is no longer necessary as a guarantor of integrity and accuracy. Major legal publishers are unlikely to publish versions of public legal information which suffer from inaccuracies, include unmarked elisions or redactions, or are otherwise misleading. The publisher's reputation is linked to the quality of its published works. With respect to public legal information, it will be easy and cost-effective for others to check whether a "non-official" version is consistent with the official version available at the courthouse or through a government body or on an official website. Unlike the historical situation, people not only can easily cross-reference non-official to official versions, but they can also communicate any inaccuracies to others. Word travels fast through email and blogs. With rival companies and users checking the published versions of legal information, and with information and communication technologies enhancing the ability to compare documents, publishers of both print and electronic documents would be subject to informal and formal credentialing processes judging the quality of their versions. A publisher who puts out shoddy versions would soon be avoided. For those enamoured of Crown copyright control, an alternative

would be for the Crown to retain only moral rights-type interests in works to ensure accuracy and integrity.

Security concerns about the integrity of public legal information are legitimate and should not be dismissed. However, these could be adequately addressed through a combination of having the government publish official versions in print and electronic formats and having multiple providers of non-official versions. Digital versions could be protected so that they could not be modified under ordinary means (but without incorporating privacy-invasive technology that would log users' identities, require personal identifiers, or limit the number of times users could access a particular work).

One can argue that the copyright incentive in the Crown copyright system has not worked as well as other incentives to induce government to make publications more accessible. Other laws are better suited than copyright to serve the ends of integrity, accuracy, and control of publication. Official marks through the *Trade-marks Act*, for example, can be used to ensure the integrity of the official versions of public legal information. It is up to the public users of legal information to decide if they wish to use unofficial versions; those private publishers with a reputation for accuracy and value-added materials will attract legal professionals and other users to their editions and those publishing abbreviated, misleading, or inaccurate versions will not. A complementary option is for the government to retain only moral-rights type interests to ensure accuracy and integrity.

As for the "reward" part of the copyright objective, some have suggested that Crown copyright also is intended as a revenue generator for the government. Even if this were a legitimate objective, governments in Canada, with some exceptions, do not tend to exploit this opportunity, nor should they; and this is especially so with respect to public legal information. Government works are produced with public funds for public purposes.⁶²

In thinking about the types of protection for public legal information, and the legal mechanisms available, copyright is ill-suited. The wide control and exclusive rights that copyright offers are not appropriate for public legal information. Transparency and accountability should be the default for government works. Where public policy weighs in favour of

62 For a discussion of whether public information should be used by governments for revenue generation or placed in the public domain, see James Boyle, "Public information wants to be free" and Richard A. Epstein, "Should all public information be free?" *Financial Times.com* <<http://news.ft.com/cms/s/cd58c216-8663-11d9-8075-00000e2511c8.html>>.

secrecy (national secrets, defence), confidentiality is better protected through specific schemes in the *Access to Information Act* and evidentiary privileges than through the control provided by copyright law.

Copyright gives the author control, and copyright law contemplates that this control can be exercised to prevent publication or to delay the time of publication as much as to protect an exclusive right to publish. For government works, however, the public policy militates for publication (given the interest in transparency and access to information) rather than for ensuring control over the works *per se*, providing that accuracy and integrity of the work are safeguarded.

Copyright is not the appropriate legal means to govern public legal information. Nor is it by any means clear that some kinds of public legal information, such as judicial decisions, are even included in Crown copyright under the royal prerogative, which enhances the case for releasing public legal information to the public domain.

With respect to other government-produced works, Crown copyright may be an appropriate legal vehicle. However, how Crown copyright is triggered should be specifically addressed, the categories of works delineated, and the residual royal prerogative eliminated. The public should have clear notice of which categories of works are protected, the duration of Crown copyright, and the public's associated rights. Parliament can abolish or narrow aspects of the royal prerogative through legislation, which either grants back some or all of the rights to the Crown by statute or removes the rights entirely.⁶³ The United Kingdom's own copyright changes support this, where the 1988 Act modified the royal prerogative rights by providing that "no other right in the nature of copyright" applies to certain Crown and Parliamentary copyright protected works which would have otherwise been within the royal prerogative.⁶⁴

Moreover, the government should have a positive obligation with respect to both public legal information and other government materials to make these available in suitable formats using newer information and communication technologies.

63 This point has been argued by Torno, *Crown Copyright in Canada*, above note 17 at 4.

64 *Copyright, Designs and Patents Act 1988 (UK)*, below note 79, at s. 171 preserving the Crown's non-statutory rights and privileges, subject to s. 164(4) & s. 166(7) on Crown and Parliamentary copyright and stating that no other right in the nature of copyright applies to an Act or Measure or bill covered by the copyright statute.

I. RECOMMENDATIONS FOR REFORM

The suggested reform is:

- to eliminate the royal prerogative so that the scope of Crown copyright is clearly ascertainable from the statutory provisions,
- to eliminate Crown copyright in public legal information, and
- to move Crown copyright into a dedicated statute that sets out the categories of works; the term; users' rights (with respect, for example, to making materials available in various media and formats, including on the Internet); and the Crown's rights in "official versions" and the associated credentials which visibly notify the public that a version is "official" (by official marks, for example) and that designates that the "official version" should be made available in electronic format as well as print.

There should also be a statutory duty of government to disseminate public legal information. Such a statutory provision would clarify existing obligations under the common law, and extend these obligations to require that appropriate information technologies be used to disseminate public legal information in order better to facilitate public access.

These recommendations comply with international copyright obligations, are consistent with the larger calls in copyright to facilitate public access, and are consistent with the trend recently for governments to narrow the scope of government ownership of copyright in government works.

1) International Obligations

The *Berne Convention for the Protection of Literary and Artistic Works*, to which Canada is a signatory, leaves the decision as to government ownership of government works in the discretion of the individual governments. The *Berne Convention* explicitly provides that it "shall be a matter for legislation in the countries of the Union" to "determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts" and whether "to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings."⁶⁵ In

65 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 U.N.T.S. 221, as last revised 24 July 1971, <www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> [*Berne Convention*], at Art. 2(4) and Art 2bis(1). The wording of the relevant provisions was introduced in the 1967 Stockholm

effect, each country has discretion to decide whether to protect official texts or to place them in the public domain, and if they are copyright protected, it is permissible to restrict the degree and term of protection below the general copyright statutory protections.

2) Public Access and Public Domain

The recommendations outlined here for the reform of Crown copyright are consistent with the larger movement to encourage the public domain.⁶⁶ The Declaration of Principles from the United Nations' World Summit on the Information Society in 2003 extolled the benefits of a rich public domain.⁶⁷ Initiatives to increase public access to works of creativity and scholarship include the burgeoning Open Access project, where academic journals and individual researchers publish their work in publicly accessible sites online, and the Creative Commons and iCommons project, where author- and user-friendly templates for copyright licences are made available for authors who wish to facilitate the access and re-use of copyrighted works.⁶⁸

Conference. For analysis of the effect of *Berne Convention* provisions and Crown copyright, see André Françon, "Le Modèle Français, Les Pays Continentaux et la Convention de Berne," <www.lexum.umontreal.ca/conf/dac/fr/francon/francon.html>; in English, "Crown Copyright in Comparative Law: The French Model, Continental Europe and the *Berne Convention*" (1996) 10 I.P.J. 329.

- 66 For a description of the public domain, see Pamela Samuelson, "Mapping the Digital Public Domain: Threats and Opportunities" 66 *Law & Contemp. Probs.* 147 (Winter/Spring 2003); and Diane Leenheer Zimmerman, "Is There a Right to Have Something to Say? One View of the Public Domain" (2004) 73 *Fordham L. Rev.* 297. On the importance of preserving the public domain, see the papers from the Duke University Conference on the Public Domain, November 2001, <www.law.duke.edu/pd/papers.html>; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin, 2004); Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books, 2001); Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain" (1999) 74 *N.Y.U. L. Rev.* 354; Jessica Litman, "The Public Domain" (1990) 39 *Emory L. J.* 965; and David Lange, "Recognizing the Public Domain" (1981) 44 *Law and Contemp. Problems* 147.
- 67 "Declaration of Principles: Building the Information Society: a global challenge in the new Millennium" World Summit on the Information Society, United Nations, Geneva 2003, <www.itu.int/wsis/docs/geneva/official/dop.html>.
- 68 On Open Access, see the science project, Public Library of Science, <www.plos.org>, and the law project <www.openaccesslaw.org>. On Creative Commons, see <www.creativecommons.org>; for Creative Commons Canada, see <www.creativecommons.ca>. For examples of scholarly peer-reviewed journals which publish full text versions online on publicly accessible sites, see, for example, in science, PLoSGenetics, <www.plosgenetics.org> and the *University of Ottawa*

Moreover, these ideas for facilitating public access have already resulted in influential projects to apply these principles to the legal realm to promote free public access to law. In 2002, the Montreal Declaration on Public Access to Law, adopted by a body composed of the Legal Information Institutes, such as CanLII and AustLII, declared that “public legal information” (meaning “legal information produced by public bodies that have a duty to produce law and make it public,” and including both primary and secondary interpretive public sources) is “digital common property and should be accessible to all on a non-profit basis, and where possible, free of charge.”⁶⁹ By this definition, “public legal information” would not include, for example, scholarly commentary in a law review by an individual commenting on the legal decision or an annotated selection of cases published by a private commercial publisher. A non-exhaustive list of “public legal information” might include court judgments and tribunal decisions, bills, statutes, regulations, official records of parliamentary debates, and reports of parliamentary committees and official inquiries.

Following the Paris Conference in 2004 on “Law via the Internet” the participants there, including legal research institutes and representatives of national public authorities and international institutions, declared:

that the dissemination of law in intelligible form on a medium accessible to all citizens is a guarantee of their equality before the law and that the development of information technology must contribute as extensively as possible

... that it is the responsibility of those who draft rules of law:

to promote exhaustive, coherent dissemination of them, in the original version but also in consolidated form, and in an official version provided free of charge in authenticated digital format;

[and]

to extend freely accessible legal data to include any national or local administrative document that contributes to understand-

Law & Technology Journal <www.uoltj.ca>. For examples of public access to primary law, see, for example, the Legal Information Institutes, such as Cornell's Legal Information Institute, <www.law.cornell.edu>, the Canadian Legal Information Institute (CanLII) <www.canlii.org>, and the Australasian Legal Information Institute (AustLII) <www.austlii.edu.au>.

69 Montreal Declaration on Free Access to Law, <www.lexum.umontreal.ca/declaration/index_en.html>.

ing the meaning and development of legal provisions⁷⁰

Crown copyright is not expressly mentioned in these declarations, but the spirit of their vision is consonant with changes to the Crown copyright system such as those recommended here. A harmonized approach toward public access to public legal information would speed the construction of digitalized legal databases for public access to law.

These calls to eliminate copyright in law are hardly novel, and many scholars have identified Crown copyright as a major hindrance to the development of publicly accessible databases of the law in Canada.⁷¹

J. OTHER JURISDICTIONS AND APPROACHES TO CROWN COPYRIGHT

The inclination to increase public access is punctuated when the content is legal information and where other jurisdictions have either had, recently introduced, or have recent Crown copyright revision studies in progress which support public access to law by narrowing government control of its publication.

1) United States

The situation in the US provides a useful contrast to the Canadian compromise.⁷² The United States, of course, does not have a history of “Crown copyright.” The United States does have a long experience in eschewing the equivalent rights that could be asserted by a republic. In the United States, copyright is “not available” for “any work of the United States Government,”⁷³ which is defined as a “work prepared by an officer or employee of the United States Government as part of that person’s official duties.”⁷⁴ Since copyright is “not available” for this category of works, neither the

70 Note from French delegation to Working Party on Legal Data Processing on Paris Conference — “Law via the Internet” — Paris Conclusions, 24 November 2004, Brussels, Council of the European Union, 13584/04, <www.frlrii.org/article.php3?id_article=165>.

71 See, for example, Teresa Scassa, “The Best Things in Law are Free? Towards Quality Free Public Access to Primary Legal Materials in Canada” (2000) 23 *Dalhousie L.J.* 301; paper available at <www.ciaj-icaj.ca/francais/publications/LD90-Scassa.pdf>.

72 For a comparison of US and Canadian copyright law and perspectives on government ownership of government materials, see David Vaver, “Copyright and the State in Canada and the United States” [1996] 10 *I.P.J.* 187.

73 *United States Copyright Act 1976*, 17 USC s. 105 (1976).

74 *Ibid.*, s. 101.

government, nor the individual employee author, owns copyright. The US Government is not precluded from being a copyright owner, though; it can own copyrights through assignment, bequest, or other transfers.

US courts have ruled that court opinions are in the public domain, and this applies to both federal and state court decisions; however, publishers can claim copyright in original editorial material and annotations added to the judgments.⁷⁵

The United States *Copyright Act* provision applies only to the federal government. As a result, as is the situation in Canada with respect to the policies of Canadian provinces and territories on Crown copyright, there is quite a range of approaches among the individual states and local governments. Some U.S. states explicitly have statutes in the public domain; in others, the state expressly claims copyright in statutes and codes. One scholar's recent comprehensive study of state law found that "statutory codes in at least half of the fifty states provide for state copyright in official statutory compilations, court reports, or administrative regulations."⁷⁶

2) Commonwealth

By comparison, the Commonwealth countries traditionally shared a similar approach to Crown copyright as that in Canada. The Crown copyright scheme for Canada, Australia, and New Zealand not surprisingly was derived from that of the United Kingdom. The language of Canada's Crown copyright provision in the *Copyright Act* is near identical to the United Kingdom's former copyright legislation, from which it was borrowed.⁷⁷

These other countries, however, including the United Kingdom, have amended their Crown copyright provisions in recent years and, regardless of whether the specific changes of other countries are adopted in Canada, Canada could profit from studying their approaches.

a) United Kingdom

Crown copyright in the United Kingdom is owned by Her Majesty the Queen, who has vested the right in the Controller of Her Majesty's Station-

75 *Wheaton v. Peters*, 33 U.S. 591 (1834), where the US Supreme Court stated in *dicta*: "It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges cannot confer on any reporter any such right" at 668.

76 Irina Y. Dmitrieva, "State Ownership of Copyright in Primary Law Materials" (2000) 23 *Hastings Comm. & Ent. L.J.* 81 at 83.

77 *Copyright Act, 1911 (UK)*, s. 18.

nery Office, as Queen's Printer and Queen's Printer for Scotland, by Letters Patent.

Crown copyright provisions were studied as part of an extensive review of copyright law by the Whitford committee in 1977, which recommended that Crown copyright should be abolished.⁷⁸ In 1988, the United Kingdom enacted the *Copyright, Designs and Patents Act 1988* which narrowed the scope of Crown copyright from works "by or under the direction or control" of the Crown to works "by an officer or servant of the Crown in the course of his duties"⁷⁹ and abolished Crown copyright in works which were "first published" by the Crown. By section 164, Crown copyright also includes "every Act of Parliament or Measure of the General Synod of the Church of England." The term for Crown copyright material is 125 years from the date of creation for unpublished material (narrowing what had been a duration in perpetuity for unpublished material) and fifty years from the date of publication for published materials.⁸⁰ For legislation, the period lasts from Royal Assent until fifty years after the calendar year in which Royal Assent was given.⁸¹

The 1988 copyright legislation also established a separate regime for Parliamentary copyright, set out in sections 165 and 166. Parliamentary copyright, according to section 165, applies to works "made by or under the direction or control of the House of Commons or the House of Lords" and includes "any work made by an officer or employee of that House in the course of his duties." "Works" include sound recordings, film, live broadcast, or live cable programme. Parliamentary copyright does not extend to works "commissioned by or on behalf of" the House of Commons or House of Lords. Parliamentary copyright lasts for fifty years from the end of the calendar year in which the work was made.

Section 166 provides that Parliamentary copyright applies to all bills introduced in Parliament (with subsections specifying when copyright belongs to a single House and when it is jointly held) and lasts until either Royal Assent or the bill is withdrawn or rejected (except where the bill can be presented for Royal Assent that Session) or the Session ends.

78 Committee to consider the law on copyright and designs, *Copyright and designs law: Report of the Committee to consider the law on copyright and designs*, Cmnd 6732 (London: Her Majesty's Stationer's Office, 1977).

79 *Copyright, Designs and Patents Act 1988 (UK)*, c. 48, <www.opsi.gov.uk/acts/acts/1988/Ukpga_19880048_en_1.htm>, s. 163(1).

80 *Ibid.*, s. 163(3).

81 *Ibid.*, s. 164(2).

The changes introduced by the 1988 Act usefully make the scope of the respective schemes, Crown and Parliamentary copyright, more explicit, and also clarify the relationship between Crown prerogative rights and Crown copyright under the statute. Section 171 modifies the Crown prerogative rights, specifying that non-statutory rights and privileges of the Crown are not affected, but making that savings subject to sections 164(4) and 166(7); those subsections specify that no other right in the nature of copyright applies to an Act or Measure or bill except that specified in the 1988 Act in the respective Crown and Parliamentary copyright provisions.

The copyright for works which the government commissions from non-Crown individuals or organizations rests with the author unless there is an agreement to the contrary which transfers or assigns copyright to the Crown.

In 1999, a White Paper on the “Future Management of Crown Copyright” put forward eight guiding principles for future management of Crown copyright: “coherent application for the re-use and licensing of government materials,” “transparent licensing and charging terms,” “consistency of approach across central government,” “finding guides” to locate material, “increasing use of waiver of copyright liberalising broad categories of information with the lightest of management,” “a streamlined administrative process, where licensing control is required, making maximum use of new technology,” “strengthened accountability,” and “clear coordination and control by HMSO providing a central one-stop shop approach,” as well as a proposal that the general principles of Crown copyright be “extended, where possible, to non-Crown governmental bodies and to local government.”⁸²

The White Paper also specified eleven classes of Crown copyright protected material where waivers are granted.⁸³ The categories include legislation and explanatory notes, Crown copyright protected public records, which were unpublished at the time they were deposited with the Public Record Repository or are open for public inspection; and government and court forms. According to the waiver, Crown copyright is asserted to protect the material against misleading use but the Crown does not exercise the legal right to license, restrict use, or charge for the reproduction of these materials. HMSO Guidance Notes describe how the waiver for those

82 Minister for the Cabinet Office (UK), *Future Management of Crown Copyright*, Cm 4300 (HMSO, 1999), c. 3, available in full text through <www.opsi.gov.uk> [*Future Management of Crown Copyright (UK)*].

83 *Ibid.*, c. 5.

classes of Crown copyright materials will be applied.⁸⁴ The specific permissions for categories vary, but documents subject to the waiver generally can be reproduced in any format or media anywhere in the world without payment or licence (excepting images), on condition that they are reproduced accurately, and publisher imprints and Royal Arms (except when an integral part of the material) are removed. The material can be sold commercially, included in databases, and made available electronically.⁸⁵ Bills and explanatory notes, protected under Parliamentary copyright, are treated similarly to the waivers on Crown copyright protected material, with no restrictions on their reproduction, along with the other provisos that the reproduction be accurate, not misleading, and not suggest that it is an official version. Officially published reports of judgments are also treated as being covered by Crown copyright.⁸⁶

Further, an Advisory Panel was established in 2003, in part to advise the government on “changes and opportunities in the information industry, so that the licensing of Crown copyright and public sector information is aligned with current and emerging developments.”⁸⁷

The United Kingdom has recently announced two initiatives that will facilitate open access to government works and works funded by public research councils. A group of public sector bodies in the United Kingdom, including the British Library, the Museums, Libraries and Archives Council (MLA), the National Archives, the Cabinet Office’s e-Government Unit, and the Department for Education & Skills, has commissioned a report, to be completed in the summer of 2005, to study the idea of deploying Creative Commons licences for government content on the Internet.⁸⁸ With respect to scholarly works, Research Councils UK (RCUK), an umbrella body of eight research councils, has issued a position statement proposing

84 For HMSO copyright guidance notes, see <www.hmso.gov.uk/copyright/guidance/guidance_notes.htm>.

85 See *Copyright Guidance on the website of the Office of Public Sector Information (UK)*, <www.opsi.gov.uk/advice/crown-copyright/copyright-guidance>.

86 On case law and the argument that the prerogative right is either supplanted by the statutory provisions in the 1988 Act or “overlaid” by the statute, see J.A.L. Sterling, “Crown Copyright in the United Kingdom and Other Commonwealth Countries,” II.4, <www.lexum.umontreal.ca/conf/dac/en/sterling/sterling.html>.

87 *Advisory Panel on Public Sector Information (UK)*, <www.appsi.gov.uk>. The APPSI also advises the government on the re-use of public sector information. See below note 108 on the EU directive on the re-use of public sector information.

88 See “Government intellectual property under scrutiny: The British government is looking toward Creative Commons licences to handle its content on the Web,” <<http://news.zdnet.co.uk/business/0,39020645,39206465,00.htm>>.

a rule that will require researchers to archive work funded by the RCUK in open access repositories and that the deposits should be timed to coincide, wherever possible, with publication.⁸⁹

b) Australia

Australia's *Copyright Act 1968* contains special provisions on Crown copyright in sections 176 to 179.⁹⁰ Sections 176 and 178 together provide that the Commonwealth or State owns the copyright in original works, sound recordings and cinematographic films that are "made by, or under the direction or control of" the Commonwealth or the State unless there is an agreement to the contrary. Section 177 provides that the Commonwealth or State owns works that are "first published in Australia by, or under the direction or control of" the Commonwealth or State unless there is an agreement to the contrary. The copyright term for copyright under these provisions is generally fifty years after the calendar year end of the publication date; however, the copyright is perpetual as long as the work remains unpublished. By contrast, the term for copyright under the general provision in section 33(2) is the life of the author plus seventy years.⁹¹ Two other sources for Crown copyright in Australia are the Crown prerogative and the general copyright provisions on employer ownership of the copyright in employees' work. The Australian copyright legislation also provides that Crown copyright is not infringed by making a "reprographic reproduction" of "one copy" of statutory instruments (including legislation, regulation, or by-law) or judgments (including courts' or tribunals' reasons for decisions, orders or judgments) "by or on behalf of a person and for a particular purpose."⁹²

Australia is currently engaged in an extensive study of Crown copyright. Recently, in April 2005, the Copyright Law Review Committee issued its final report on Crown copyright,⁹³ following the publication in

89 See Donald MacLeod, "Research councils back free online access" *The Guardian* (29 June 2005), <www.guardian.co.uk/online/story/0,3605,15173848,00.html>. On the Research Councils UK see <www.rcuk.ac.uk>.

90 *Australia Copyright Act 1968* <www.austlii.edu.au/au/legis/cth/consol_act/ca/1968133>.

91 *Ibid.*, s. 33(2). See Table 2 in the *Crown Copyright Final Report (Aus.)*, below note 93, at 18–19 for a helpful comparison of the copyright term provisions.

92 *Ibid.*, s. 182A.

93 *Copyright Law Review Committee (Aus.)*, *Crown Copyright Report*, Final Report, April 2005, <www.ag.gov.au/agd/WWW/clrhome.nsf/Page/RWP3D1B9A992032DBE9CA256FEB00239309> [*Crown Copyright Final Report (Aus.)*].

2004 of the Committee's Issues Paper⁹⁴ and discussion paper,⁹⁵ as well as public consultations and submissions. The Copyright Law Review Committee was established in 1983 as a specialist advisory body to report to the Government of Australia on specific copyright law issues that are referred to it. Crown copyright was the twelfth and final such reference and was referred to the Committee in late 2003. One of the immediate impetuses for the reference to the Copyright Law Review Committee was concern that the existing Crown copyright provisions in Australia's copyright legislation put the government in a more favourable competitive position than other contractors.⁹⁶ Another committee, tasked to look at the interaction between intellectual property legislation and competition policy, had flagged the government's preferential treatment under copyright law as a problem in 2000 and recommended that the *Copyright Act* be amended.⁹⁷ The government's immediate response to that committee was to develop best-practice guidelines rather than to amend the *Copyright Act*, but the competition issue was highlighted in the terms of reference for the Copyright Law Review Committee.⁹⁸

According to those terms of reference, the Committee was given a fairly broad mandate to consider such issues as the "underlying social and economic problems" addressed by government ownership of copyright material, the "extent and appropriateness" of the government relying on copyright to control access to and use of information, the objectives of such government ownership, and any preferred arrangements for government ownership of copyright. In addition, the Committee was asked to consider the effect of new technologies and international comparisons.⁹⁹

94 Copyright Law Review Committee (Aus.), *Crown Copyright*, Issues Paper, February 2004, <www.ag.gov.au/agd/WWW/clrHome.nsf/Page/RWPE3A8E257D1641333CA256E2D007C541F>.

95 Copyright Law Review Committee (Aus.), *Crown Copyright*, Discussion Paper for Consultation Forum, 27 July 2004, <www.ag.gov.au/agd/WWW/clrHome.nsf/Page/RWPoBA9BDE557B887F7CA256ED1001CB9D5>.

96 See *Crown Copyright Final Report* (Aus.), above note 93, "Background to the inquiry" c. 1, para. 1.04.

97 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (Canberra, Australia: 2000), <www.ipcr.gov.au/IPAustralia.pdf> at 14.

98 Government of Australia, *Response to Intellectual Property and Competition Review Committee Recommendations*, 28 August 2001, <www.ipaustralia.gov.au/pdfs/general/response1.pdf>.

99 Terms of Reference of the Copyright Law Review Committee (Aus.), <www.ag.gov.au/agd/WWW/clrHome.nsf/Page/RWP3C2E5B1D1B98D6FACA256DE3000E9471>.

The Committee highlighted that the recommendations in its final report were informed by the two themes of ensuring that the government was treated like other parties and of “promoting the widest possible access to government-owned materials.”¹⁰⁰ Interestingly, the Committee recommended that the Crown copyright provisions in sections 176 to 179 be repealed and that the government instead be able to claim copyright ownership under the general provisions of the Act and therefore required to meet the same threshold criteria for copyright.

The Committee also recommended that the government be more proactive in educating government employees about copyright. These efforts, the Committee believed, would be even more important if the Committee’s recommendations to repeal the current statutory provisions on Crown copyright were followed because the government would be likely to rely more heavily on the general employee provisions in the copyright legislation and contractual arrangements for commissioned works.¹⁰¹

c) New Zealand

In New Zealand, since 1 April 2001 no copyright exists in certain categories of public legal information, which formerly had been part of Crown copyright. Section 26 of New Zealand’s *Copyright Act 1994* is the primary section on Crown copyright.¹⁰² It defines as “Crown copyright” a work made by a person employed by the Crown under a contract *of or for* services or apprenticeship, and further provides that the Crown is the first owner of the copyright in those works. New Zealand thus includes commissioned works within Crown copyright. According to section 26, Crown copyright now lasts for a period of one hundred years from the end of the calendar year in which the work was made, which is longer than the period in Canada; however, if the work is a “typographical arrangement of a published edition,” Crown copyright in New Zealand lasts only for twenty-five years from the end of the calendar year in which the work was made.

Significantly, New Zealand’s *Copyright Act* also carves out certain categories of works as no longer part of Crown copyright. Section 27 provides that no copyright exists in these public legal materials: any bill introduced by the House of Representatives, any Act, regulation, bylaw, Parliamentary debate, report of select committees laid before the House of Representatives, judgment of any court or tribunal, and any report of a Royal com-

100 *Crown Copyright Final Report (Aus.)*, above note 93 at xix.

101 **Recommendation 16** of *Crown Copyright Final Report (Aus.)*, above note 93 at xxxiii.

102 *Copyright Act 1994 (N.Z.)*, s. 16, <www.legislation.govt.nz>.

mission, commission of inquiry, ministerial inquiry or statutory inquiry. New Zealand, thus, has moved these categories of materials into the public domain. New Zealand's Parliamentary Counsel Office states clearly on its website that it "no longer administers Crown copyright in legislation."¹⁰³ As section 225(1)(b) of the 1994 Act provides that the Act does not affect any Crown right or privilege existing otherwise than under an enactment, presumably any royal prerogative of Crown copyright is preserved.

3) European Union

The European Union does not have a uniform law on the existence of copyright, or the ownership of copyright, in government documents. The *EU Directive 93/98* on the duration of copyright and related rights obliges member states to provide a general term of copyright protection of life plus seventy, but the Explanatory Memorandum exempts the protection of laws from these terms.¹⁰⁴ In many civil law countries in Europe, judgments, statutes, and other government materials are excluded from the relevant copyright law.¹⁰⁵

The European Council and Commission adopted a regulation in May 2001 with a policy for public access to European Parliament, Council, and Commission documents. The Regulation's purpose is to give the "fullest possible effect to the right of public access to documents." Exceptions for public security, international relations, and individual privacy are included. In addition, the Regulation provides that institutions "shall refuse access" to a document if the disclosure would undermine "commercial interests of a natural or legal person, including intellectual property," or "court proceedings and legal advice," among other exceptions.¹⁰⁶ The Eur-Lex Internet portal provides free online public access to the documents specified by the Regulation.¹⁰⁷

103 "Crown Copyright on New Zealand Legislation," <www.pco.parliament.govt.nz/legislation/copyright.shtml>.

104 *Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights*, <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993L0098&model=guichett>; Explanatory Memorandum, COM (92) 33 final - SYN 395, para.16.

105 For commentary, see, for example, André Françon, above note 65; and J.A.L. Sterling, above note 86, listing countries at Notes.

106 Regulation regarding public access to European Parliament, Council, and Commission documents, Regulation (EC) 1049/2001, 30 May 2001, <http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_145/l_14520010531en00430048.pdf>.

107 Eur-Lex, <www.europa.eu.int/eur-lex/en/index.html>.

An EU Directive that came into force on 31 December 2003 specifying principles on the publication and dissemination and re-use of government documents is also significant. It states that “making public all generally available documents held by the public sector — concerning not only the political process but also the legal and administrative process — is a fundamental instrument for extending the right to knowledge, which is a basic principle of democracy.” However, the Directive expressly provides that it does “not affect the existence or ownership of intellectual property rights of public sector bodies.”¹⁰⁸ The Directive does not oblige Member States to allow re-use of documents and instead applies only to “documents that are made accessible for re-use when public sector bodies license, sell, disseminate, exchange or give out information.”¹⁰⁹

4) International Groups and International Efforts

International bodies do not claim the equivalent of government or Crown copyright in their materials. Such international courts as the International Court of Justice (ICJ), the criminal tribunals for the former Yugoslavia and for Rwanda, and the International Criminal Court do not explicitly address copyright in relevant legislation and decisions. The ICJ, for example, does not discuss copyright in its decisions and it is not mentioned in the Covenant of the ICJ; but the ICJ website states that “information or data contained at this site may not be reproduced or used for commercial purposes,”¹¹⁰ presumably permitting personal and non-commercial use by implication. The World Intellectual Property Organization’s website, which includes full texts of intellectual property agreements, includes broad permission for anyone to “use or reproduce any information presented on this website,” provided that WIPO is credited as the source.¹¹¹

National legislation, however, may accord these international organizations copyright in original works. The United Kingdom, for example, vests copyright in an original work which is made by “an officer or employee of, or is published by, an international organisation” and where that interna-

108 *Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information*, <http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_345/l_34520031231en00900096.pdf>.

109 *Ibid.*, Recital 9.

110 International Court of Justice, disclaimer, <www.icj-cij.org/icjwww/idisclaimer.html>.

111 World Intellectual Property Organization (WIPO), terms of use, <www.wipo.int/tools/en/disclaim.html>.

tional organization is included in an Order in Council declaring that it is “expedient that the section should apply.”¹¹²

Additionally, Protocol 2, annexed to the *Universal Copyright Convention*, provides that “works published for the first time by the United Nations, by the Specialized Agencies in relationship therewith, or by the Organization of American States” shall enjoy the same copyright protection as the contracting States provide their nationals.¹¹³

K. SUGGESTED REGIME FOR GOVERNMENT MATERIALS CURRENTLY PROTECTED UNDER CROWN COPYRIGHT

1) Public Legal Information

Crown copyright in Canada should not apply to the following categories of works at federal, provincial and municipal levels:

- reasons for judgment by courts and tribunals,
- judgments, orders, awards, and motions,
- statutes and regulations, bills, by-laws, and orders-in-council,
- parliamentary debates, parliamentary reports and committee reports,
- provincial legislative debates and reports and committee reports,
- municipal council public hearings and reports, and
- other like categories to be specified by regulation.

“Public legal information” should be in the public domain and this category should be interpreted broadly.

In recommending that Crown copyright be eliminated for these categories, I am arguing that there is a substantive distinction between the approach of the *Reproduction of Federal Law Order* (retaining copyright but granting a licence to reproduce with accuracy) and abolishing Crown copyright altogether. Perhaps foremost, the federal Order could be rescinded and full Crown copyright rights exercised again. This leaves private publishers and public users in a precarious position. The public should have clear access to any public legal information, and certainty as to their rights with respect to this material. Preserving copyright in public legal infor-

112 *Copyright, Designs and Patents Act 1988 (UK)*, above note 79, s. 168.

113 *Protocol 2 — Annexed to the Universal Copyright Convention as Revised at Paris on 24 July 1971 concerning the Application of that Convention to the Works of Certain International Organizations*, 1 (a) & (b), <http://portal.unesco.org/en/ev.php-URL_ID=15239&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

mation makes it more difficult for the public to understand their rights to access this material. It is preferable to abolish Crown copyright altogether on these materials because, as discussed above, the purpose for copyright law does not apply to public legal information and the interests of protecting the accuracy and integrity of this material is better served by other legal means. Given that, neither blanket licences nor statutory exceptions are valid compromises.

There is great value in adopting a uniform practice with respect to public legal information, namely that there is no copyright ownership, as such a system is simple for the public to understand and will facilitate quicker access to legal material with little risk to integrity or accuracy. Public legal information should be made available in the most accessible format and in media that incorporate such functions as search capabilities, hyperlinking, and RSS feeds to syndicate discrete items. Removing copyright will help to promote international databases of public legal information to disseminate national laws globally and facilitate comparative study. The trend toward liberalising the use of public legal information, which was begun in Canada with the *Reproduction of Federal Law Order*, should be carried further, with the abolition of Crown copyright in public legal information and a clarification of the categories of material in which Crown copyright continues to subsist. This approach would also be consistent with the growing trend by other countries toward restricting government ownership of copyright in public material.

The effect of abolishing government copyright for public legal information and moving those materials into the public domain would thus hardly be untested. This reform would be consistent with the recommendations proposed to or adopted by other countries that historically have had a Crown copyright system similar to Canada's, such as New Zealand. It is also consistent with the US system at the federal level, where primary legal information has not been copyrighted. Many countries and international bodies are already operating under a system where there is no government (or organizational) ownership of primary legal information.

2) Dedicated Statute on Government Publication of Government Materials

A dedicated statute on government publication of government materials, covering obligations to publish and protection for official versions, would help users to navigate the convoluted terrain of Crown copyright. To take one example of the Library and Archives Canada website, the copyright no-

tice explains that “some of the material” is protected by copyright owned by Library and Archives Canada and users require written permission before it can be reproduced; other material is protected by copyright owned by third parties; some material is in the public domain (although there are still reproduction conditions attached in some cases); and some material has a pre-authorized licence and does not require permission “for certain purposes.”¹¹⁴ The average user could be forgiven for finding this daunting. Although this is a loaded example, given that it comes from the particularly complicated environment of an archives website, and that the complexity is compounded by special statutory copyright provisions which apply to archives, it is fair to say that users trying to figure out Crown copyright for government materials would encounter a good number of complexities, and some of these could be ameliorated with reforms to the Crown copyright regime.¹¹⁵

The interplay between the royal prerogative and the copyright statute is complicated. There is no consensus on which works are covered by the royal prerogative or the constitutional effect of abolishing royal prerogative by statute. The royal prerogative should preferably be eliminated or clarified, by amendment to section 12 of the *Copyright Act*, to specify what materials are covered under royal prerogative and to make the traditional prerogative right wholly statutory. The statute should expressly indicate that all other works are *not* covered under the royal prerogative; that is, the statute should provide a comprehensive and ascertainable list of materials that are covered and the criteria for identifying those materials. The term of protection for the official versions could be longer than statutory terms but should require periodic renewal. A statutory provision could follow a model in which government materials are presumed public domain unless the government asserts to the contrary.

All public legal information should be outside copyright, including all reasons for judgment by courts and tribunals and all federal, provincial, and municipal laws and regulations. However, drafts and working versions

114 Library and Archives Canada, <www.collectionscanada.ca/notices/o16-200-e.html>.

115 One initiative that other countries are examining is to have a simplified and centralized process for requesting permission to reproduce government material that is not covered under an existing licence or waiver to avoid the problem of users being referred to multiple departments. See *Crown Copyright Final Report (Aus.)*, above note 93, c. 11, “Management of Crown Copyright”; *Future Management of Crown Copyright (UK)*, above note 82, c. 7 “Streamlined administration,” discussing the use of fast-track and blanket licences to avoid one-off applications.

should explicitly be protected and exempt from the publication obligation, as provided for under Access to Information legislation.

Any value-added material by a private publisher could still be covered under copyright providing that the work meets threshold copyright criteria, including the originality standard of non-mechanical and non-trivial skill, labour, and judgment, as set out in *CCH v. LSUC*. Original headnotes, summaries, annotations, and original selection and arrangement of cases, as examples, would continue to be copyright protected under the general provisions in the copyright statute, and also subject to fair dealing and other applicable exceptions and defences. Editions of cases and statutes, which add only formatting, font selection, and pagination to the original text of the court or legislature, ordinarily should not meet the originality standard for full copyright protection. Some countries have rights provisions for typographical arrangements, which do not accord the same panoply of rights as copyright.

Finally, there should be a commitment to publishing works that are covered by Crown copyright and to doing so by electronic, publicly accessible means. “Official versions” of public legal information should be available in both print and electronic formats.¹¹⁶ Currently, where reasons for judgment and legislation are made available electronically, the electronic versions, even where they reside on an official website of the government agency or court, are not designated as “official” versions. The government should commit to providing public access to public legal materials in electronic formats (and to updating these formats as reliable technologies for the publication of such documents become available).¹¹⁷

116 The foundation for this has begun to be laid by Parts 2 through 5 of the *Personal Information and Electronic Documents Act*, 2000 C-5, which amended the *Canada Evidence Act*, R.S. 1985, c. C-5, the *Statutory Instruments Act*, R.S. 1985, c. S-22, and the *Statute Revision Act*, R.S. 1985, c. S-20 (amendments not in force). The purpose of these parts of *PIPEDA* was to give electronic documents legal significance and to smooth e-governance.

117 New Zealand’s Parliamentary Counsel Office has committed to providing up-to-date official legislation in electronic (free) and print (cost-basis) formats in order to facilitate public access to legislation. Although the idea of this “Public Access to Legislation Project” is a good model, the project has not yet been put into operation. For more information, see <www.pco.parliament.govt.nz/pal/>. California has enacted statutory requirements for the State to make bills, statutes, the California Code, and the California Constitution available to the public “in one or more formats and by one or more means in order to provide the greatest feasible access to the general public in this state,” and no fee can be charged for access (Sec. 10248 of the Government Code of the California Code, <www.leginfo.ca.gov/calaw.html>). Tom McMahon discussed this provision in

This reciprocal obligation to publish in newer media and formats should be enacted as part of a dedicated statute on Crown ownership of government materials, to make more explicit what the commitment to publish law entails. This statutory requirement should be implemented for all levels of government. Governments should be newly obligated by statute to provide official versions in digital formats (and in appropriately updated media over time).

A reform proposal such as the one outlined could lead to a strange convergence of agendas between public domain advocates and the legal publishers, who both could be expected to support a decrease in the scope of Crown copyright or its repeal. This would not be the first policy issue to create strange bedfellows. Private publishers would be a beneficiary of any reform that dismantled or narrowed Crown copyright. In most contexts in Canada, licences are in place in most provinces permitting personal reproduction, but commercial for-profit uses require prior permission, and usually additional licensing conditions, royalties, and fees. Publishers must also negotiate the complexities of the different procedures for Crown copyright management among the federal and provincial governments, for individual entities within the governments, and for different types of material and formats for reproduction. Under the Crown copyright reform proposal outlined here, publishers would be able to publish content without further permission or payment for those materials that are no longer protected by Crown copyright. Should the private publishers provide additional value sufficient to merit copyright protection, their editions would be protected under copyright law and could have royalties attached to them.

It is important therefore that government have a positive obligation to publish government materials in publicly accessible formats and taking advantage of new information technologies. This will improve public access to government materials. It will also likely lead to a variety of user options for government-produced materials. With respect to legal information, governments, law societies, public interest groups, the Legal Information Institutes, academic institutions, legal databases, and legal

“Improving Access to the Law in Canada with Digital Media,” above note 11 at s. 7. McMahon described “A Ten-Point Dream for Electronic Access to the Law” in 1999. While the legal resources available to the public for free on the Internet have increased substantially in quantity and capability in the years since his article, through private and government sites, much remains to be done and much can be added to the wish list given the improvements in technologies.

publishers of printed editions all might be expected to begin or to continue to offer access to law materials, some for profit, some with copious annotations and editorial additions, some with cross-references to other jurisdictions, point-in-time histories of amendments, or other enhancements. The positive obligation on governments to disseminate government materials and to incorporate appropriate information technologies would also provide incentives for private publishers to add value to their published versions to differentiate their market.¹¹⁸

L. CONCLUSION

This article has reviewed the history of Crown copyright reform in Canada, examined other jurisdictions' approaches to the protection and publication of government-produced materials, and considered international copyright obligations with respect to Crown copyright. It recommends that the government consider prioritizing a review of Crown copyright as part of the short-term copyright reform agenda. The article proffers a suggested reform, including enacting detailed statutory provisions on publishing rights and obligations with respect to government-produced materials, the elimination of the royal prerogative, the elimination of Crown copyright in public legal information and clarification of the treatment of official versions, and statutory duties to disseminate public legal information in paper and digital formats as a component of access to justice.

118 For a discussion of the effects of having academic, commercial, and governmental providers of information, and their respective competencies, responsibilities, institutional positionings, styles, and target markets, see Thomas R. Bruce, "Public Legal Information" [2000] *Univ. of Tech. Syd. Law R.* 3, <www.austlii.edu.au/cig-bin/disp.pl/au/journals/UTSLR/2000/3.html>.