

## Entertainment and Communications Law

November 19, 2012

### Most (but not all) of the *Copyright Modernization Act* comes into force in Canada

On November 7, 2012, upon the publication in the Canada Gazette of an Order-in-Council dated October 25, 2012, most (but not all) of the provisions of the *Copyright Modernization Act* (the “Act”) came into force in Canada. The Act amends the *Copyright Act* of Canada and it represents the first major reform of Canadian copyright law since 1997 and follows no less than four prior failed Canadian government attempts at substantially revising the *Copyright Act*, namely, in 2006 (Bill C-60, died on the order paper), 2008 (Bill C-61, died on the order paper), 2010 (Bill C-32, died on the order paper) and 2011 (Bill C-11, which died as a result of a Canadian federal election and was re-introduced by the ruling Conservatives in 2012 and eventually received Royal Assent on June 29, 2012).

The Act strives to balance the legitimate interests of creators in protecting their respective works and performances from unauthorized use with the rights of users to deal fairly with legitimately acquired copyrighted materials. According to its preamble, one of the key objectives of the amendments is to update the rights and protections of copyright owners to better address the opportunities and challenges of the Internet and bring Canada’s domestic copyright laws in line with the international standards of applicable World Intellectual Property Organization (WIPO) copyright treaties.

While many of the key provisions of the Act which amend the *Copyright Act* are now in force, the provisions which relate to the new “Notice-and-Notice” regime to combat copyright infringement and the corresponding duties of Internet service providers and search engines will come into force, after regulations are created, on a

later date which will be determined through a separate Order-in-Council process. In addition, certain provisions of the Act which implement Canada’s obligations under the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty will also come into force on later dates specified by separate Orders-in-Council or at the time that the respective WIPO Treaties are ratified by Canada.

Among the key provisions of the Act which have now come into force in Canada and are included in the revised *Copyright Act* are the following:

- expansion of the fair dealing exception to include education, parody and satire as new allowable purposes
- introduction of new online “making available” and “distribution” rights for copyright owners
- creation of “safe harbours” for network service providers and providers of online hosting services who act as mere intermediaries
- new moral rights for performers in their performances, comparable to the moral rights of authors in their works
- changes to the copyright protection of photographs which grant photographers the same rights as other creators
- introduction of a new form of secondary infringement for persons who “enable” acts of infringement
- new provisions which strictly prohibit the circumvention of technological protection measures such as the breaking of digital locks or the removing or changing of digital copyright information, with limited exceptions
- the introduction of a new uniquely Canadian exception which permits the incorporation of legitimately acquired copyrighted works in non-commercial user-generated content (sometimes called the “YouTube/Remix exception” or the “mash-up exception”)
- new exceptions which permit the time shifting and format shifting of legitimately acquired copyrighted material
- new exceptions which permit the temporary reproduction of works including back-up copies, copies for encryption research and testing purposes

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- new rules which enable individuals to use commissioned photographs and portraits for private purposes
- a significant decrease in the statutory damages for non-commercial copyright infringement from \$500-\$20,000 per infringement (ie. formerly, the same as commercial infringement) to \$500-\$5000 for *all* acts of infringement

On November 7, 2012, the Governor in Council also published the *MicroSD Cards Exclusion Regulations* which amend Part VIII of the *Copyright Act* to exclude microSD cards from the application of the “private copying” regime.

For a more complete description of the Act, including the various provisions described above which have now come into force in Canada, please see our prior Goodman's Update – *The Copyright Modernization Act Becomes Law*.

If you would like further information about copyright law, please do not hesitate to contact any member of our Entertainment or Communications Law Groups:

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