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The Copyright Modernization Act Becomes Law

On June 29, 2012, the *Copyright Modernization Act* received Royal Assent amending the *Copyright Act* (the “Act”). The amendments will come into force on a day or days to be fixed by order of the Governor in Council (*i.e.*, the federal Canadian Cabinet) which is expected to take place in the fall of 2012. These amendments are the result of several attempts at copyright reform since Canada became a signatory in 1997 to the World Intellectual Property Organization (“WIPO”) Copyright Treaty and WIPO Performance and Phonograms Treaty (together, the “WIPO Internet Treaties”). The amendments address a wide variety of issues, such as time and format shifting, the expansion of fair dealing, the protection of technological protection measures (“TPMs”) such as “digital locks” and rights management information (“RMI”) in compliance with the WIPO Internet Treaties, the non-commercial use of copyright works, and the liability of Internet service providers (“ISPs”) and search engines for infringements.

Set out below is a brief description of the highlights of the amendments.

Implications for Copyright Owners

New Enablement Right

An amendment to section 27 creates a new cause of action called “enablement”, allowing copyright owners to sue those who provide a service primarily for the purposes of enabling acts of copyright infringement, *e.g.*, illegal peer-to-peer file sharing sites.

Prohibition of TPM Circumvention

New sections 41 to 41.27 implement the anti-circumvention provisions in the WIPO Internet Treaties respecting TPMs. Specifically, the Act now provides legal

protection for TPMs by prohibiting, except under limited circumstances, the following:

- the circumvention of TPMs (including “digital locks” such as passwords, encryption software, or access codes);
- the offering of services to the public if the services are offered primarily for the purpose of circumventing TPMs; and
- the manufacturing, sale or distribution of devices that are primarily designed to circumvent TPMs.

Persons who circumvent TPMs in these ways in order to access or duplicate copyright material, even for personal use, are subject to civil remedies and criminal penalties (subsection 42[3.1]). The following is a list of legitimate “public interest” purposes for which the circumvention of TPMs is not prohibited (see sections 41.11 through 41.18):

- law enforcement and national security activities;
- reverse engineering for software compatibility;
- security testing of systems,
- encryption research,
- personal information protection,
- temporary recordings made by broadcast undertakings,
- access for persons with perceptual disabilities, and
- unlocking a wireless device.

New section 41.21 provides for the enactment of regulations to exclude certain TPMs from the application of these provisions where applying the provision “would unduly restrict competition in the aftermarket sector in which the technological measure is used” or to ensure access to other copyrighted materials after considering certain public interest factors.

Prohibition on Removing RMI

RMI, such as digital watermarks, identify copyright owners and key information relating to their works, and enable copyright owners to police the

terms and conditions of copyright use and users to verify the authenticity of works. Section 41.22 prohibits the removal of RMI and subjects anyone who does so to civil remedies and criminal penalties.

New “Making Available” and “Distribution” Rights

Sections 15 and 18 now grant copyright owners and performers new “making available” and “distribution” rights in respect of their works and performers’ performances, respectively. A copyright owner is granted the exclusive right “to make a work available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public”. In addition, where a work is in the form of a tangible object, the copyright owner is granted the exclusive “distribution right” to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner. Similarly, in the case of a performer’s performance, the Act provides that a performer is granted the exclusive right to make available a sound recording of the applicable performance to the public by telecommunication in a way that permits members of the public to access it where and when they desire. If the performer’s performance is fixed in a sound recording that is in the form of a tangible object, the performer also has the exclusive right to sell or otherwise transfer ownership of the sound recording and to authorize the same, if the ownership has never previously been transferred in or outside Canada with the authority of the owner of the performer’s performance.

Implications for Artists

New Moral Rights for Performers

Sections 17.1 and 17.2 grant performers moral rights in their performances for a period of 50 years from the time of publication. Previously, under the Act,

authors, but not performers, enjoyed such moral rights.

New Rights for Photographers

The Act now grants photographers the same authorship and ownership rights as other creators with the repealing of sections 10 and 13(2). Photographers will become the authors and therefore the first owners of copyright in their photographs, reversing the previous provisions of the Act, which deemed the person who commissioned a photograph to be its first copyright owner. While a photographer, absent an agreement to the contrary, will now own the copyright in commissioned photographs, the person who commissions the photographs will be permitted to make private, non-commercial use of the commissioned photographs unless the contract with the photographer specifies otherwise.

Implications for Internet Intermediaries

Limited Liability for ISPs

New section 31.1 now expressly limits the liability for copyright infringement of ISPs when the ISP is acting solely as an intermediary in communication, hosting and caching activities. The ISP may not modify the material, other than for technical reasons, and may not interfere with the lawful use of technology to obtain data on how the material is used. In order for an ISP to ensure that it will not be held liable for copyright infringement, it must meet the requirements of the “notice-and-notice” regime described below. A claimant’s only remedy against an ISP which fails to comply with the “notice-and-notice” regime is statutory damages in an amount between C\$5,000 and C\$10,000 per infringement as determined in the court’s discretion.

Introduction of the “Notice-and-Notice” Regime

New sections 41.25 and 41.26 entitle a copyright owner to send a notice of claimed infringement, in prescribed form,

to an ISP. The ISP is then obliged to forward the notice electronically “without delay” to the person allegedly infringing the copyright. The ISP must retain records on its network, for a prescribed period, which allow the identity and electronic location of the alleged infringer to be determined. However, the ISP is only obliged to reveal the identity of the alleged infringer pursuant to a court order. This requirement is different from a “notice and takedown” regime, such as that in the United States, which requires the ISP to immediately block access to the material on receipt of notice from the copyright owner with no court order.

Limited Liability for Search Engines

If a search engine, referred to as a “provider of an information location tool”, is found to have infringed copyright, by either making a reproduction of the work or by communicating that reproduction to the public by telecommunication, the only remedy available to a copyright owner against the search engine is an injunction prohibiting further use of the copyrighted material by the search engine, provided that the search engine meets certain prescribed criteria designed to ensure that it is a legitimate business (see new section 41.27).

Implications for Users

New Exceptions for Consumers

The Act now provides consumers with the following additional exceptions to copyright infringement:

- Format Shifting: subject to certain limitations, a consumer may reproduce legitimately acquired copyrighted works, such as music from CDs, for personal purposes on a digital medium or device, such as an MP3 player (see new section 29.22). For the purposes of the Act, a digital “medium or device” includes digital memory in which a work may be stored for the purpose of allowing the telecommunication

of the work through the Internet. Reproductions are only permitted if no TPMs are circumvented, the reproduction is used for private non-commercial purposes and it is not given away.

- Time Shifting: a consumer may fix a communication signal or record a program or performance for later listening or viewing as long as the program is received legally, no TPMs are circumvented, only one recording is made and held for a reasonable period of time, and the recording is held for private purposes only and not given away (see new section 29.23).
- Backup Copying: a consumer, business or institution may create backup copies of legally acquired content for personal use in order to protect against damage or loss (see new section 29.24).

New Categories of Fair Dealing

The existing categories of “fair dealing” in the Act are expanded to include fair dealing for the purposes of education, parody, and satire under section 29.

Exception for Non-Commercial User-Generated Content

Dubbed by some as the “YouTube clause”, new section 29.21 permits an individual to use a legitimately acquired existing copyrighted work as source material in the creation of a new work (“mash-ups”, for example) in certain prescribed circumstances. This new work may be used or disseminated as long as:

- the use of the work is solely for non-commercial purposes;
- if reasonable in the circumstances, the source material is mentioned;
- the individual had reasonable grounds to believe the source material was not infringing copyright; and
- the use of the new work does not have a substantial adverse effect on the exploitation of the existing source material.

Reduced Penalties for Non-Commercial Copyright Violations

Penalties for copyright infringements that are for non-commercial purposes have been reduced under section 38.1. Previously, copyright owners could sue for statutory damages for copyright infringement, whether commercial or non-commercial, of C\$500 to C\$20,000 for each act of infringement. The statutory damages for non-commercial infringement have now been reduced significantly to a one-time payment of between C\$100 and C\$5,000 for all infringements that take place prior to commencement of legal action. No change has been made to the current statutory damages payable under the Act in the case of commercial infringements.

Implications for Educational Institutions

In addition to the new fair dealing exception for education mentioned above, the current references to specific technologies,

such as flip charts and overhead projectors have been removed, from provisions of the Act relating to educational use of copyrighted works, in order to allow for new digital technologies (see section 29.4). A number of other changes relating to the educational use of copyright works have been introduced, including infringement exceptions for the following:

- publicly available material on the Internet that has been legitimately posted for free use by copyright owners for educational purposes (see section 30.04),
- the digital delivery of course materials, such as digital course “packs”, subject to fair compensation to copyright owners (see sections 30.02 and 30.03),
- the use of copyright material in online learning (see section 30.01), and
- the ability of libraries to send digital interlibrary loans (see paragraph 30.1[1][c]).

Additional Amendments

In addition to the above, the amendments also address the following matters, among others:

- the creation of a new exception for broadcasters to permit them to copy music for their own operations (see section 30.9),
- measures to enable activities of technology companies relating to reverse engineering for software interoperability and security testing and encryption research (see sections 30.61, 3.62, and 30.63), and
- the establishment of a periodic “sunset” review of the Act every five years (see section 92). ■



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