

An Overview of Submissions on the Consultation Paper on Digital Copyright Issues

Prepared for March - April 2002 Consultation Meetings on Digital Copyright Issues by:
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1. Introduction

This is a report on the first stages of the government's consultation process on digital copyright issues. It provides an overview of the spectrum of views presented by interested Canadians through submissions to the Consultation Paper on Digital Copyright Issues released by the government in June 2001. The reply comments that formed the second part of the consultation will not be summarized. The purpose of this synthesis is twofold. First, given the volume of submissions, it will help everyone who participated in

the process to have a sense of clusters of views on specific issues, as well as of what the government has heard. Second, it will provide an aid for establishing a basis of dialogue for further consultations. The synthesis does not purport to be a comprehensive and detailed report on all the varied views presented.

The consultation paper presented a number of issues that were identified as critical to further the dissemination of works in a digitally networked environment. These included the issue of the liability for Internet Service Providers (ISPs), along with three issues from the two World Intellectual Property Organization (WIPO) treaties relating to copyright and the digital environment, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

The consultation process generated approximately 670 submissions as well as approximately 60 reply comments specifically on the digital copyright issues paper. The volume of comments, range of views expressed, and the apparent diversity of the stakeholders and individuals who participated by providing submissions are unmistakable indicators that the issues raised in the paper are of great interest to many Canadians. The Departments would like to acknowledge the participation of so many Canadians in contributing to the dialogue on copyright policy development. Digital issues open a new set of challenges for copyright. However, these challenges are not unfamiliar in that technological innovations have presented a challenge for copyright policy and its legislative framework in the past.

The Departments have also noted that many submissions referred to issues beyond the scope of the consultation paper. These additional issues are not reflected in this report. Rather, these views expressed will contribute to the development of the government's agenda for future reform of the Copyright Act which will be reflected in the report mandated by Section 92. This section requires a review of the provisions and operations of the Act that must be tabled in both Houses of Parliament by September 2002.

2. Brief Profile of Persons Submitting

Copyright has traditionally been the domain of several distinct types of interests: the various creator and producer groups in art, drama, film, literature, music, and photography; the neighbouring rights groups, and the "user" groups such as educators, libraries and broadcasters. These traditional stakeholders, as well as the information technology sector, were well represented with around 80 submissions from organizations, coalitions, collectives, and corporations. Please refer to the appendix for a comprehensive list of organizations that made submissions.

Submissions were received from individuals from across Canada, as well as from interested persons outside Canada. A significant number of submissions came from individuals who identified themselves as involved in some way with computing sciences, such as researchers, programmers, consultants, academics, etc. Only those who self-identified explicitly as being in the computing field have been noted

as such. We received approximately 186 submissions from this self-identified group. A number of these people also identified themselves as creators.

Approximately 234 submissions seem to have been clearly identified with or closely modelled on a form letter provided by the Electronic Frontier Foundation (EFF), a civil liberties organization based in the United States. A number of other submissions appear to have been inspired by this form letter. Though the letters raise important constitutional and human rights issues and general policy considerations such as privacy and freedom of speech, these letters are only reflected in the following statistics where they elaborate on the substantive issues raised in the consultation documents, for example technological protection measures (TPMs).

2.1 Overview of Responses to the Issues

The following comments are designed to highlight broad and definitive tendencies in the submissions, not to provide a meticulous record of the contents of particular submissions. Not all submissions spoke to all the issues, and the submissions themselves provide views of individuals or organizations. Therefore, while the following statistics take note of explicit comments on the four issues found in the consultation document, they should not be considered as tallied votes in relation to an issue.

With respect to the making available right, 33 submissions argued in favour of providing for it, while 14 submissions argued against it.

With respect to the legal protection of TPMs, 237 submissions argued against it to varying degrees, while 35 submissions argued in favour. This number does not include the EFF form letter. Of those who opposed, most opposed both acts and devices, or expressed concern that there should at least be very firm and clear exceptions for certain types of activities relating to reverse engineering, encryption studies and educational uses. Those who expressed support tended to request both acts and devices, citing the relevant sections of the WIPO Treaties.

With respect to rights management information (RMI) protection, 39 submissions argued in favour (with most of these in favour of Option A - WIPO compliant information protection) while 21 submissions argued against it, some on the same grounds as opposed technological protection measures.

Many submissions addressed legal protections of TPMs and of RMI under the rubric of “digital rights management”(DRM). It was also pointed out that TPMs would necessarily be circumvented to access the RMI. While it is possible that a single application can serve both protection and management functions, as was acknowledged in the consultation document, these will be discussed separately, and indeed a number of submissions asserted that the two types of protection could be treated under separate legal regimes. The concerns raised in submissions about DRM can contribute to the discussions surrounding both issues.

With respect to ISP liability, 58 submissions argued in favour of limiting ISP liability in some way, while 22 submissions argued in favour of some degree of liability.

Individual submissions raised other concerns, some incidental to the topics proposed, such as privacy, while others addressed copyright matters not contained in the consultation document. There was also a number of submissions that addressed proposals in relation to their impact on the development of e-commerce generally.

At least 17 submissions expressed concern about the nature of the process itself, questioning the manner in which the consultation is being conducted or the issues addressed.

3. Detailed Discussion

In general, from the submissions received, there is strong, shared acknowledgement that continued recognition of the rights of creators is crucial to the function of the Copyright Act. Along with this recognition, the Act must continue to work to ensure the maximum dissemination of works. There was a diversity of opinion on how this should be accomplished. Some thought that the current Act applied to the Internet and could successfully deal with any challenges offered up; others felt that the Act needed serious overhaul to reflect the unique exigencies of the digitally networked environment and urged the domestic adaptation of the broad measures proposed in the WIPO Treaties.

Many submissions pointed out that, in addition to ensuring protection and remuneration for creators and other rights holders, the Act also provides for the achievement of other key public policy objectives such as access. While some submissions observed that protection of rights is crucial for the health of Canadian culture and economic development, others felt that maintaining a vibrant Canadian culture required a broader perspective on the policy objectives of the Act. For some this meant that discussions of “rights” should take place in the context of considering limitations on those rights. Some submissions found an urgent need for “updating” the Act, pointing to developments in other jurisdictions and evidence of massive online infringement. Others argued that it may be premature to make any substantial changes, given the experience of change in other jurisdictions but also given the relatively early stages of evolution of some technologies.

Some submissions expressed alarm and claimed that the government proposed to promote access at the expense of rights holders, despite the fact that the consultation paper addressed the adoption of new rights and raised concerns from some “user” groups to that effect.

There was much invocation of the United States Digital Millennium Copyright Act (DMCA), as a model to be either used - to provide a practicable interpretation of the WIPO Treaties - or avoided in crafting provisions. A number of submissions found it to be tilted in favour of rights holders, while others argued that the DMCA restored a balance to copyright policies and legislation. By the same token, a number of submissions lauded it as the best way to promote the dissemination of content online while

protecting the interests of rights holders. Other submissions claimed that the DMCA neither protected rights, nor promoted the dissemination of content online. Some submissions urged the immediate adoption of DMCA-type provisions, while others argued for a wait-and-see approach to gauge accurately the fall-out and impact of the legislation in the US.

There were also submissions that characterized all activities on the Internet that involve unauthorized copying or communications as “piracy” rather than “infringement.” It is unclear how this characterization was intended to relate to the traditional understanding of copyright remedies and sanctions. There is a distinction in the non-digital realm between piracy, which involves commercial-scale operations and a profit motive, and infringement, which can be on an individual, even personal scale, without necessarily any commercial goal. In this respect, there may be a question for the digital environment as to whether there are different considerations at play in developing policies that stop infringement versus policies that stop piracy.

A number of submissions raised points about the proposed overall approach to copyright reform. Some approved of the stepped approach for incremental changes to the Copyright Act, while others raised concerns that this approach was in danger of creating “piecemeal” legislation that threatened the overall balance of the Act and needlessly strained the limited resources of some stakeholders who wished to participate fully.

There were arguments that reform was not necessary because the copyright laws already applied to the digital realm, or that the transformation was too great to allow for copyright to exist. At the same time, some proponents of reform also argued that the digital realm was fundamentally different from the physical realm and should be treated accordingly, which required a rapid reform of the law. Those who favoured stronger and new legislative measures argued that the digital realm encouraged easy dissemination, while those who favoured the maintenance of the current regime argued that the digital environment presented a problem for suitable business models rather than for copyright law. As the principal tool of the digital environment, the personal computer’s ubiquity and status were cited as the crucial factor either for crafting comprehensive legislation or for not acting at all.

Aside from comments on legislative and policy proposals, there were also calls to devise strategies to raise copyright awareness among the general public.

3.1 Right of Making Available

The Canadian copyright regime is based on a fundamental consideration that copyright applies across different media and platforms. The WIPO Treaties set out to clarify some rights, including those that were thought to raise specific challenges in the digital environment. The proposal concerning the right of making available sought comments on whether the Canadian copyright regime needed similar clarification.

Vis-à-Vis The Current Canadian Regime:

Many rights holders agreed with the discussion paper's view that the right of communication to the public for creators as embodied in Canadian law was sufficient to address the corresponding WCT provision. Some viewed the making available right as essential for increasing the number of works online and therefore the development of online business models. From others, the concern was expressed that protection of rights was a cover for extending current business model control to other uses of the work. Some questioned whether recognizing a making available right would achieve any public policy objective relating to e-commerce or protection of digitally distributed works. Their basis for this view was that e-commerce has clearly tended to favour purchases of goods and services, not the delivery/distribution of such. Other submissions expressed support for the view that further consultation is necessary to address the impact on existing rights of recognizing a making available right for neighbouring rights holders. Another perspective was offered that challenged the need for recognizing a making available right on the basis that it provided an inadequate model for conceiving of online distribution, and that a more radical and wholesale rethinking of the digital platform was necessary.

Most submissions agreed that the current Canadian regime is insufficient vis-à-vis the obligation to create an exclusive right for performers and producers since there is currently only a remuneration right for communication to the public for these neighbouring rights. Some submissions added the view that the reproduction right alone, despite being an exclusive right, is inadequate or inappropriate as a substitute for the communication to the public right. The current exclusive right is one of reproduction, but some rights holders were wary that the right could be limited through jurisprudence or could be narrowed by exceptions that excised certain temporary reproductions. From this perspective, the making available right could serve as an "insurance" measure. The suggestion was also made that the WIPO Treaties' protection could be achieved through elaborating on the current regime's communication right and right of reproduction.

Concerns

Several submissions pointed out that to grant a new exclusive making available right to performers and producers for neighbouring rights while relying on the provisions of the current *Act* as sufficient for the making available right for creators may introduce an adverse legal implication for creators' rights vis-à-vis neighbouring rights: the absence of a corresponding explicitly defined right of making available could lead to a legal interpretation of no equivalent right or a lesser right for creators. A further consideration offered in this regard was that a regime exists under the current *Act* to administer the authorization of communication right for musical works for creators. Some submissions raised concerns about having uncoordinated regimes for the communication right, where the creators' rights, including the making available right (if it is part of the communication right) are arranged under a blanket licence managed and recognized only through a collective, while not proposing a similar regime for the administration of neighbouring rights. In other words, from this perspective, the recognition of exclusive rights should embrace creators', performers' and producers' rights, with a coordinated regime among them. Without

some clarification, the fear was expressed that one exclusive right would be devalued since it could be annulled by another exclusive right.

Others felt that the “communication to the public,” of which the making available right is a part, could be limited due to the potential limitations of the term “public”, arguing that it is more likely that communication of works over digital networks may not be considered “public” since the individuals do not necessarily receive a copy simultaneously. One solution suggested was to make the current communication right, by way of clarification, explicitly include the on-demand communication or making available right. There was also a concern expressed that the communication right needed to be made more explicit as part of an argument against the reproduction right which may be limited by exceptions for incidental, economically insignificant copying. While some argued that it was premature to provide for new rights, others who argued in favour of rights felt it was premature to provide for exceptions.

A further question with respect to a making available right would be the nature of exceptions, if any, such as for fair dealing. Some felt that the question of how a making available right would affect the balances among rights holders would not apply to works, and any proposed exceptions would require more detailed analysis in relation to the Berne Convention’s “three-step test”. Some viewed the making available right as a limited right related to downloading activities, which includes the posting of material on a website.

A number of submissions expressed the belief that the addition of another layer of exclusive rights would not affect the current balance among rights holders. A number of submissions expressed the opposite view, and argued that a new right would make it more difficult to make works available online. A related suggested approach was that the number of rights should be reduced and replaced, perhaps through the introduction of an umbrella right with its own collective regime. A concern was expressed that increasing rights protections may result in a danger of monopoly control of access to works in the guise of asserting copyright protections. Some writers pointed to the Copyright Board’s Tariff 22 decision as the basis for arguing against the need for a new distinct right of making available. Others found that the Tariff 22 decision raised more questions about authorization and communication to the public that could not be resolved under the current regime.

Other Aspects

Another issue raised in the context of the making available right is the question of a clear definition of publication, since the current communication right does not recognize that a work has been published whereas an online communication should recognize that the work has been published electronically. Other important considerations flow from the fact of publication, for exceptions and for term of protection.

3.2 Legal Protection for Technological Protection Measures (TPMs)

As was pointed out in some of the submissions, the consultation paper did not offer a specific proposal,

but invited comment on issues raised in this section of the paper. This issue received the most attention and elicited the widest range of responses. The starting point for introducing this issue was the definition provided in the WIPO Treaties: there were many observations on what would constitute an “adequate” level of protection and an “effective” level of remedy, as well as on what would be an “effective” technological measure.

General

The responses were based on different starting premises: access, balance, control, speech. Basically, those in support of legal protections for anti-circumvention devices felt that controlling access was essential to ensuring authorized use, while those opposed argued that legitimate possession for authorized uses did not require access controls. Those who supported such legal protections felt that these were essential to restore an equilibrium that they perceived to have been tilted in favour of users. For this group, TPMs were important simply to maintain rights holders’ currently recognized rights and their ability to exercise them. In addition, submissions in this group saw TPMs as providing for the development of new licensing models and services for the benefit of consumers.

Those who opposed such legal protections felt that these would irrevocably alter the public policy balances in the Copyright Act, and indeed the Act itself, in favour of rights holders, though not necessarily to the benefit of artists. For example, some pointed out that strong legal protection for TPMs would require alterations to the private copying regime or even to collective management, but would not increase access or exposure. This group argued that introducing this form of legal protection would amount to the creation of a new right with no corresponding policy balance, and potentially without expiry. Moreover, legal protections against circumvention could extend beyond copyright or could allow TPMs to replace copyright. Some of those opposed believed that the current Canadian copyright legislation was enough to address access and control measures on digital content, even without adding legal protection for technological measures. There was also a suggestion that more study in this area was necessary before committing to a legislative regime. Those writing from this perspective argued that there was a likelihood that legislation in this area would be technical, complicated, and confusing.

Acts of Circumvention

Control was also important for those who believed that legal protection for TPMs is essential for the development of all online dissemination schemes, including e-commerce, and encouraging rights holders to make content available online. Contrarily, those opposed to such legal measures on the grounds that they would lead to too much control believed that this would hamper innovation and research, and would discourage access to works. In this regard, there was explicit reference to the potential negative effect on access extending to altering the mandate of institutions such as libraries and archives. In all these cases, the importance of the Copyright Act itself as the legislation to frame these policy considerations was often acknowledged or stressed, although there were suggestions that some incompatibility problems could be better dealt with in a competition law context, or even with a specific “computer-tampering” type of legislation. Among those who shared this perspective, there were strong

doubts expressed that any system put in place could be completely effective, and questioned the efficacy of having a non-functioning system that could impact on other areas of civil life. Many submissions that focussed on this type of issue raised public interest concerns about how TPMs could affect free speech and access to cultural heritage, including the public domain; others raised more copyright-related issues relating to first sale and fair dealing. There was even a suggestion that a licensed specialized guild should be established to ensure an effective capacity to access material.

For others, the starting premise was that ownership of a legitimate copy of a work allowed enjoyment of that work in a device or platform of the user's choosing according to the policy objectives of Canada's copyright regime. A further argument was made in this regard that TPMs that simply controlled access or use should not enjoy protection under copyright legislation. Along these lines, the observation was made that a blanket prohibition could be valid only if all circumvention was done for infringing purposes. Submissions from this perspective felt that to provide legal protection for TPMs only made sense if the legal protection was recognized for copyrighted works to begin with; otherwise, TPMs used for non-copyrighted works would create a blanket prohibition that would extend, for example, to works in the public domain or to currently legitimate uses and exceptions. In this respect, there would be an issue as to whether the Copyright Act could be extended in this way. In the same way, some argued that outlawing devices risked an evolution towards 'authorized' devices, since a work is copyrighted and not the device used to access it.

On the other hand, those who saw such legal protections as essential pointed to the ease of circulation of works on digital networks, and argued that ownership of the rights in works would risk becoming meaningless without them. For this group, without some protections, the ability to disseminate works digitally worldwide would be unchecked. They argue some protections are necessary to create friction or disincentive to the easy, illegitimate dissemination of works. With respect to policy balance, many submissions in this group believed that legal sanctions for technological protection measures are clearly matters of concern within the Copyright Act.

The focus for responsibility varied: some felt that rights holders controlling access was too great a risk of limiting access; others felt that rights holders should be responsible for ensuring access for legitimate purposes, thereby requiring them to provide circumvention capacities to people. Some felt that criminal sanctions were important, while others felt that criminalizing circumvention activities would be excessive.

Some submissions expressed doubt about the efficacy of TPMs, as poor TPMs basically forced rights holders to rely on copyright protections. Other submissions pointed out that circumvention programs could be released anonymously which meant that any legislation in this area would discourage legitimate research rather than infringement. Others were concerned that a clear definition of TPMs be adopted, with further criteria for legitimate circumvention, in order to protect against spurious applications that may qualify as 'anti-circumvention measures' simply from their nature as digital code (for example, transferring information that was not copyrighted from one programming language to another or translating a format, making a change for a different device). It was suggested that such an approach

could effectively proscribe competition by keeping out other developers.

Views varied widely on the quality of the TPMs adopted. Some felt that a strong system would be robust enough to withstand circumvention, and that it was a matter of investment in security resources rather than in legal measures to achieve a measure of protection that would discourage most potential infringers. Some felt that the current measures in effect in the United States under the DMCA constituted a serious disincentive to research and development in certain fields of study. Indeed, a number of these submissions argued that Canada stood to gain from the current difference in laws between Canada and the United States because it would attract researchers in encryption and other computing science fields. The argument was also made that the cost of developing technological protection should be borne by those who use it. For this group, criminal sanctions were considered excessive for this type of activity, pointing out that circumvention was endemic to computer use which could result in easily classifying many computer users as criminals. For this reason, this category of submission also urged that a purpose or intention to infringe component would be essential to criminal liability.

Others felt that legal protection was important precisely due to the inadequacy of technological protection. There was also the concern that provisions should be consistent with other jurisdictions in order to avoid creating a “haven” for circumvention. Some submissions claimed that much current circumvention is done for commercial purposes. In this respect, members of this group felt that, in order to be effective, these legal protections must allow for criminal as well as civil penalties. For this group as well, TPMs alone could not sustain their function to prevent the broad and rapid dissemination of works online.

Some submissions believed that both legal protections for TPMs and legitimate access despite such measures were important, and argued for allowing such measures but only with circumvention in clearly defined instances for particular purposes. Submissions varied in their suggestions for ensuring such legitimate access: there was the belief that the Act should enumerate these exceptions; others expressed the view that exemptions would not need to be enumerated if the rights holders ensured access for those legitimate uses. There was widespread belief that flexibility is necessary to ensure circumvention for legitimate purposes. In this respect, some submissions felt that circumvention was necessary for non-copyright reasons such as to ensure interoperability and privacy. The need for flexibility was recognized and expressed by a group in favour of strong legal protection: some submissions pointed out that even with a prohibition in place, the importance of a three year review of the current exceptions and the possibility of emerging needs would be a good mechanism to build into the architecture of the regime in this area.

There was a definite concern with practical implications: how difficult it was to limit the scope of the provision to address only copyright infringing-related activities. In this respect, there was a suggestion that it may be worthwhile to define the acts of circumvention that are for the purpose of infringement. This could be extended to circumvention devices, but would be clearly associated with the purpose or

intention of the act and not simply with the act itself. Among those who argued for limiting legal protection to circumvention in relation to copyrighted works, there was the suggestion that it may be easier to define an infringement than a technological measure, which meant it was easier to define a circumvention when the intention of infringement ties the act explicitly to the underlying copyright. This view corresponds to the position articulated in the submissions that felt it would be easier to prohibit specific acts of circumvention relating to particular uses rather than all circumvention activities generally.

Several submissions noted that the use of TPMs went hand-in-hand with contractual use agreements. Those who acknowledged the need for legal protection wanted at minimum strong and clear exceptions for various purposes dealing with education and research, including reverse engineering for interoperability. There was also a recommendation that there should not be sanctions for circumvention for non-infringing purposes. Others stated this principle in another way: that there should be clear permitted purposes for circumvention. Alternatively, there were suggestions that instead of exceptions, there should be other mechanisms put in place by rights holders to ensure access for all legitimate uses beyond authorized uses. Some suggested that rights holders should have a positive obligation to release technologically protected works into the public domain at the end of the copyright term of protection.

Those who favoured some legal protections for TPMs felt that criminal penalties were necessary as well as civil ones. They also felt that exceptions, such as for fair dealing, should continue to apply and were confident that they could be accommodated by rights holders within any regime that recognized this new layer of protection. For some among this group, in addition to support for a blanket prohibition, there was the belief that intent could be an important part of any prohibition on devices, and that it should be limited to the purpose of copyright infringement, agreeing with those who opposed such legal protections as too powerful a threat to innovation and research.

Devices

The further question was whether the legal protection should be extended to include a prohibition on devices. Some submissions pointed out that this was not part of the WIPO Treaties' obligation, and so could be evaluated strictly on its own policy merits. Some argued that such a provision would have serious costs as part of its introduction. The submissions that argued that prohibitions should be limited to the act of circumvention that included the intention to infringe, and not extend to other, non-infringing purposes, also felt that such prohibitions should not include the manufacture or distribution of circumvention devices. It was argued that it would be debilitating and unfair for research to have a prohibition against devices that also have non-infringing purposes. There was also the suggestion that devices should not be outlawed if they pre-exist the introduction of the technological measure.

Many reiterated the concern raised in the digital paper that it is impossible for circumvention devices to be able to distinguish infringing from non-infringing uses. Some added that if exceptions of any sort are to be allowed, then it would be impossible to have a blanket prohibition on devices. If exceptions or non-infringing uses were recognized, there had to be devices available, at least for the specific exceptions. The fear was expressed that with a prohibition on devices, the ability to restrict legitimate

access expands. Others in this camp pointed out that if legal protections against circumvention measures were viewed as inadequate by rights holders, this should encourage a reassessment of the initial proposal and not its expansion. Numerous submissions argued that rights holders have recourse already under the current Act both against acts of circumvention and against manufacturers of devices. Some felt that a prohibition on devices which may not even be in existence would stifle innovation and development.

Those who supported prohibition on devices argued that legal protection against acts of circumvention would be insufficient protection without protecting at the same time against the devices that may be used in circumvention. Some argued that protecting against acts alone would not be enough to provide “effective” protection required by the WIPO Treaties. From this perspective, limiting the availability of devices would make the prohibition on acts more effective, and without a reasonable assurance of maximum protection, the potential for rapid dissemination of copyrighted works remains strong.

Other Concerns

The issue of privacy was also a concern with respect to legal sanctions for TPMs, since individuals may be forced to accept cookies in order to access or use certain services. An argument was made that DMCA-type legislation required a high degree of monitoring of citizen behaviour, which made privacy concerns more prominent. The function of cookies were raised by a number of submissions as a prominent example of privacy invasion that may result if circumvention was not allowed. From this perspective, there was a fear that a marketing tool would be effectively created by monitoring software without any agreement from or knowledge of users. Some submissions felt privacy was an important consideration in the context of technological measures, while others felt privacy was always present as a consideration, but irrespective of any particular copyright context. For this group, privacy should be treated as part of a larger policy goal.

3.3 Legal Protection for Rights Management Information (RMI)

The consultation paper addressed an obligation raised by the WIPO Treaties to provide “effective” legal protection for information relating to the management of rights holders’ copyrights. This measure is designed to facilitate the administration of rights online in relation to the dissemination of works, since it is important to ensure the legitimacy of copies of works circulating in an online environment where there are scant indicators of authenticity in an intangible form by providing specific information about the work. This was considered to be an essential component of creating an environment of trust online.

The paper presented two options, one fully compliant with the conditions enumerated in the WIPO Treaties’ provisions and one that expressed the crucial rights information relating to authorship or ownership and title, but not necessarily that information relating to licensing terms and conditions as such.

General

A number of submissions supported the view that such information could nonetheless be protected even if it is contained in or represented by the identifying code, without implying that such information is not important to rights management schemes. Many submissions pointed to the fact that their organizations were engaged in projects to provide international standardizing codes, yet these were in relatively early stages. Some submissions proposed leaving the enumeration of specific information to regulations. The paper's treatment of altering RMI made it part of a secondary infringement, since the removal of information relates to a subsequent infringing activity. These submissions claimed that in circumstances where information that is not RMI is changed for other purposes, these should not be captured under the relevant WIPO Treaties' provisions.

Support for legal protection for RMI came from submissions whose authors were interested in the following issues: WIPO Treaty compliance, increased security, protecting information analogous to the information protected under moral rights, and improved management for the purposes of online dissemination. Some members of this group also considered it important to prohibit devices that stripped out RMI, or at least to study this possibility further.

Opposition to legal protection for RMI came from submissions that expressed similar doubt about legal protections for TPMs, on the grounds of concerns around privacy and ensuring interoperability among different systems such as through format changes. There were also concerns that RMI may interfere with legitimate uses and may confuse users about terms of use. Along these lines, there was a suggestion that those who didn't know or who acted in good faith who altered the RMI relating to a work should not be liable for secondary infringement. There were further suggestions of some kind of consumer protection from false claims.

Minimum Level of Protection

The proposed WIPO Treaty provision relates to acts of alteration that "will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty." It was suggested that this means that the legal protections of RMI must exist, at minimum, for rights that are infringed, but that there are also definite limits to the scope of the legal protection. For example, works in the public domain would by definition not be the object of an infringement, and so the removal of RMI from a public domain work should not be legally sanctioned. Similarly, it was also suggested that the alteration of RMI to allow for a permitted use would also not be caught by the proposed WIPO Treaty provision. In this sense, the thrust of the legal protection in the Treaties is oriented towards circumvention for the purposes of infringement, not strictly for the purpose of information management, while the proposal in the consultation document includes removal of information that impedes management of rights.

Function, Scope and Limits of RMI:

Some submissions raised the concern that in some cases, RMI itself might need to be removed in order to allow for authorized uses, or that RMI may be used for other purposes that may impinge on privacy. This group felt that RMI must be related directly to the purposes of rights management online; in other words, oriented towards the work and not towards the user of the work.

Some submissions commented that the concern expressed in the consultation document about inapplicable terms and conditions could be addressed through a legal disclaimer that the provision would not mean the information contained was necessarily valid or legally enforceable under Canadian law. It was also pointed out that the WIPO Treaty provision does not require a voucher of veracity for the work. A view further along these lines was that any information that contributed to confusion would be resolved through industry practises that sought efficiency of rights management. The contrary view expressed was whether confusion is acceptable.

Some submissions wanted RMI to be protected only when it functioned as rights management originating from rights holders. A further element was suggested by those who considered it important to provide sanctions for those who, perhaps knowingly, falsified RMI. Some argued that correction of and addition to RMI (by libraries and archives), for internal purposes but not for the purposes of infringement, should be allowed.

There were also a few expressions of concern for the question of overlap between legal protections for RMI and those for TPMs, though a number of submissions felt that this was not of significant concern. With respect to the privacy issue, the concerns raised generally matched the ones raised for TPMs.

3.4 Liability of Internet Service Providers (ISPs)

The consultation paper raised the issue of providing a legal scheme for dealing with the potential liability of ISPs. The consultation proposals were made from the perspective that ISPs are conduits for the information communicated and have no financial stake in the information conveyed. On this point, some submissions pointed out that the evolution of future business models could alter the ISP's relationship to the information it carries. The paper presented a Notice and Takedown regime to deal with complaints about potentially infringing material, but also presented an alternative "licensing" scheme to introduce a different role for ISPs. The issue is considered important for various public policy objectives relating to the online dissemination of works, including through e-commerce initiatives. The comments received were divided on whether making ISPs liable would be the way to promote or to hinder these public policy objectives. There was general agreement that a standard should be adopted in order to provide certainty for all parties.

The threshold observation in this regard was the suggestion that there must be a clear definition of ISP in order for any such regime to work effectively. Some felt this was very important because, in their view, any exemption from liability for transient reproductions made in the course of communications could have significant potential impact, not only on ISPs, but also if it extended beyond ISPs, to other types of intermediaries. With respect to the knowledge of ISPs about activities on their networks, many suggestions were offered for how to delineate when an ISP does and does not have knowledge of infringing activity on the networks it hosts information. Numerous criteria were suggested.

Some submissions felt that movement in the area of ISP liability was premature, and further evolution of

technology, business models, and relations among the relevant stakeholders must be allowed to develop. In support of this view, it was noted that there were no court cases or other instances of pressure that warranted intervention at this time. There was support expressed for a codification of the Tariff 22 decision that found ISPs not liable for the communication to the public of works of their networks. A third position was also offered in the submissions, that ISPs should not be liable at all for any intermediary activities.

Sources of potential liability:

There are two main areas of concern: the potential liability for the ISPs in carrying out their intermediary functions, including caching and transmitting; and the potential liability of the users of the ISPs' networks. In some submissions these two concerns have been joined together.

However, in some cases, submissions pointed out that rights holders are interested not in ISP liability as such, but in ensuring that ISPs cooperate with rights holders in moving quickly to remove infringing material of which they have been notified by rights holders.

For some submissions, there was no doubt that ISPs are in a position to monitor activities; the question is whether they should be. For this group, the issue was whether, vis-à-vis their clients, ISPs should have the role of monitoring potentially infringing uses that may occur on their networks. The observation was made that the level of responsibility of ISPs for their networks, and therefore of ISP liability, should be consistent with other areas of the law, such as for obscene or hate material, or for defamation.

Some submissions felt that imposing strict liability would be "unrealistic" or inappropriate in some cases given the nature of Internet communication. Some argued further that any solution should ensure the achievement of other policy goals such as privacy and freedom of expression. Others felt that ISPs should not enjoy a special privilege from the liability provisions of the Act.

Arguments were also made that developing schema for making sure that ISPs could avoid liability were essential for the development of e-commerce. Others felt that exempting ISPs for liability for communication and reproduction would create a disincentive to participate in developing frameworks for addressing the potential claims of infringement by rights holders or for ensuring the future development of licensing schemes.

With respect to the potential liability of ISPs themselves, some submissions pointed out that the strict liability status of reproductions meant that there should be an exception for all temporary copying that occurs in the context of internet-related activities. Other submissions felt that ISPs should not have a broad exception for activities, but exceptions should be tied to specific procedures of notification and removal for infringing material. Some felt that the status of intermediary reproductions that take place as part of network activity needs to be clarified.

While acknowledging the suggestion to exempt ISPs from responsibility for third party activities, a number of submissions pointed out that ISPs actually derive financial benefit from caching strategies and other types of prioritizing of content that should not be exempt from either liability or licensing. A

segment of this group also questioned the extent that an ISP could claim to be a mere conduit for information rather than an active participant in organizing and architecting information flows; and called for clear definition of the purely intermediary activities. Along these lines, an observation was made that ISPs engage in automatic caching in order to reduce their own costs, an expense that should not be necessarily shunted away from them in a policy vacuum.

Approaches

With respect to the Notice and Takedown framework, some submissions felt this provided the best model for giving certainty to ISPs in offering services while also ensuring an incentive to remove infringing copies of copyrighted works from networks. Members of this group saw it as cost effective and efficient. This group also felt that this system should work in place of and eliminate the need for a judicial court order. There were observations that the ISPs were not only the best placed to adopt this responsibility, but also had the resources to do so. Some elaborated further, requesting a reply notice mechanism on behalf of users, to allow them to defend themselves once a notice and takedown procedure had been instituted against them. In addition, there was the concern that these mechanisms should address the possibilities of abuse of false claims or of difficult-to-track infringers. Along similar lines, submissions in this vein requested access to information from ISPs concerning users in order to facilitate the tracking of primary infringers.

The vital feature sought from submissions supporting liability for ISPs was ensuring that infringing material was quickly removed due to the Internet's capacity to circulate things quickly. The Notice and Takedown regime is designed to accomplish this goal, though ISPs and others were concerned that a mere notice should not be enough to require ISPs to take action. They requested that a court order be the minimum requirement to ensure the seriousness of the request.

Some submissions pointed out that a Notice and Notice regime would accomplish the same goal, since after a notice, it would still be incumbent on the rights holder to follow through on its claim of infringement. There was support for a Notice & Notice regime, as a codification of successful existing cooperative arrangement between major ISPs and some rights holders. According to various views, this could clarify the role of ISPs in their function as intermediaries, or could provide a reasonable way to ensure privacy and against other incursions of the user. For example, the issue of privacy becomes relevant for this issue in situations where the ISP is required to monitor the activities of its users. From the views expressed, generally, the degree of ISP requirement to become involved in the information of users may be directly related to the degree of responsibility of the ISP.

From many views expressed in both camps, the most effective mechanism to facilitate either type of regime would be to allow for expedited injunctive relief proceedings to be available to prevent further harm while the legal case can be made and determined, and there were different suggestions that such proceedings should take place before a judicial or administrative body. Many expressed the concern that the current legal regime does not allow rights holders to have quick remedy to the discovery of infringing activity. There was also a suggestion that rights holders should shoulder some of the cost for

takedown actions by ISPs to dissuade frivolous claims of infringement.

In relation to the compulsory licensing scheme, there was a suggestion that the combination of a blanket licence and tariff on ISPs, along with a rights clearance mechanism, could efficiently achieve the objective of clarifying online liability and ensuring remuneration for rights holders, while also providing for privacy concerns. There were also comments that a compulsory licensing regime was unworkable, imposed too much responsibility on ISPs, and potentially fragmented the market for dissemination of works online if such a scheme was not applied uniformly. Others expressed the fear that such a scheme would also remove incentives from ISPs to cooperate with rights holders. There was a suggestion that the use of digital networks constituted a new use that should be remunerated. Some argued in favour of a modified scheme from the one presented in the consultation paper whereby ISPs would be exempt from liability for reproductions and communications in instances where licensing schemes have been established or could be established.

Annex - Companies and Organizations

Aliant Inc., Bell Canada, Bell ExpressVu LP, Bell Globemedia Inc., Bell Mobility Inc., Northwestel Inc., Télébec ltée and Telesat Canada
 Alliance of Canadian Cinema, Television, and Radio Artists (ACTRA)
 AmericaOnLine-Time Warner (AOL-TW)
 Association des producteurs de films et de télévision du Québec (APFTQ)
 Association des réalisateurs et réalisatrices du Québec (ARRQ)
 Association for Media and Technology in Education in Canada (AMTEC)
 Association of Universities and Colleges of Canada/Association des universités et collèges du Canada (AUCC)
 Association pour l'avancement des sciences et des techniques de documentation (ASTED)
 Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ)
 Association quebecoise ses auteurs dramatiques (AQAD)
 British Columbia Library Association (BCLA)
 Calgary Public Library
 Canada School Boards Association (CSBA)
 Canadian Advanced Technology Alliance (CATA)
 Canadian Archival Community
 Canadian Association for Interoperable Systems (CAIS)
 Canadian Association of Broadcasters (CAB)
 Canadian Association of Internet Providers (CAIP)
 Canadian Association of Law Libraries (CALL)
 Canadian Association of Research Libraries (CARL)/ Association des bibliothèques de recherche du Canada (ABRC)
 Canadian Association of University Teachers (CAUT)
 Canadian Broadcasting Corporation (CBC)/ Société Radio-canada(SRC)
 Canadian Cable Television Association (CCTA)
 Canadian Chamber of Commerce
 Canadian Copyright Institute
 Canadian Copyright Licensing Agency (CANCOPY)
 Canadian Independent Record Production Association (CIRPA)
 Canadian Library Association (CLA)
 Canadian Motion Pictures Distributors Association (CMPDA)
 Canadian National Institute for the Blind (CNIB)
 Canadian Newspaper Association (CNA)
 Canadian Photographers Coalition
 Canadian Printing Industries Association
 Canadian Publishers' Council
 Canadian Recording Industry Association (CRIA)
 Copyright Coalition of Creators and Producers

Copyright Forum
Council of Administrators of Large Urban Public Libraries (CALUPL)
Council of Ministers of Education, Canada (CMEC)/Consortium sur le droit d'auteur du Conseil des ministres de l'Éducation (Canada) (CMEC)
Council on Access to Information for Print-Disabled
Digital Content Management Services (DCMS)
Directors' Guild of Canada
DIRECTV INC.
Electronic Frontier Canada
e-Privacy Management Systems Inc.
Fédération nationale des communications (FNC-CSN)
FWS Joint Sports Claimants Inc.
Graduate Student Society of the University of British Columbia
IBM Canada
Information Mechanics Ottawa, Inc.
Information Technology Association of Canada (ITAC)
Information Technology Innovation Centre (ITIC)
Intellectual Property Institute of Canada (IPIC)
Joint IPIC / CBA Copyright Technical Committee
JumpTV Canada Inc.
Media Content Coalition (MCC)
National Association of Broadcasters (NAB)
Newspaper Guild Canada and the Canadian Media Guild
OnDisC Alliance
Periodical Writers Association of Canada (PWAC)
Public Interest Advocacy Centre (PIAC)
Regroupement des artistes en arts visuels (RAAV)
RightsMarket Inc
Société des auteurs de radio, télévision et cinéma (SARTEC)
Société des auteurs et compositeurs dramatiques (SACD) et de la Société civile des auteurs multimédia (SCAM)
Société professionnelle des auteurs et des compositeurs du Québec (SPACQ) et la Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada (SODRAC)
Société québécoise de gestion collective des droits de reproduction (COPIBEC)
Society of Composers, Authors and Music Publishers of Canada (SOCAN)
Technical University of British Columbia
TELUS Communications Inc.
The Writers' Union of Canada (TWUC), the League of Canadian Poets (LCP) and the Playwrights Union of Canada (PUC)
TransGaming Technologies Inc.
Union des artistes

Union des écrivains et écrivaines québécois
Writers' Guild of Canada