

From "Radical Extremism"
to "Balanced Copyright"

Canadian Copyright and the Digital Agenda

edited by Michael Geist

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Introduction

Michael Geist

Copyright has long been viewed as one of the government's most difficult and least rewarding policy issues. It attracts passionate views from a wide range of stakeholders, including creators, consumers, businesses, and educators and it is the source of significant political pressure from the United States. Opinions are so polarized that legislative reform is seemingly always the last resort, arriving only after months of delays.

The latest chapter in the Canadian copyright saga unfolded in June 2010 as Industry Minister Tony Clement and Canadian Heritage Minister James Moore tabled copyright reform legislation billed as providing both balance and a much-needed modernization of the law. The introduction marked the culmination of months of public discussion and internal government debate.

Since the failure of Bill C-61 — the Conservative government's first attempt at copyright reform in 2008 that died on the order paper months after introduction — the government had worked to craft legislation that might satisfy external pressures while garnering favourable reviews at home. In 2009, Clement and Moore held a national copyright consultation that generated considerable praise for its openness and broad participation. In fact, with over 8,000 submissions, roundtable meetings with ministers, and two public town halls, the consultation was lauded as the most successful public policy consultation in Canada in recent memory.

Emboldened by the consultation's success and the evident interest in the issue, Clement and Moore promised new legislation by the summer of

2010 and lived up to this commitment with Bill C-32, tabled in the House of Commons on 2 June 2010.

From the moment of its introduction, it was readily apparent that the bill would be the target of unprecedented scrutiny and public debate. Virtually every copyright stakeholder group wasted little time in posting their quick analysis, often welcoming the introduction of the bill, but reserving judgment on the fine print. Those groups were joined by the tens of thousands of Canadians who over the prior two years had joined Facebook groups, raised copyright concerns with their elected representatives, or participated in the copyright consultation.

The government also mobilized with a media campaign characterizing the bill as “balanced copyright.” Clement and Moore actively engaged with the public, responding to dozens of comments posted on Twitter and assuring the public that they were open to potential amendments. Balance became the watchword of the legislation, as even Canadian Recording Industry Association adopted it by providing financial backing for a website called Balanced Copyright for Canada.

The claims of balance were based largely on efforts to find compromise positions on some of the most contentious copyright issues. Bill C-32 included sector-specific reforms with something for almost everyone: new rights for performers and photographers, a new exception for Canadian broadcasters, new liability for BitTorrent search services, as well as the legalization of common consumer activities such as recording television shows and transferring songs from a CD to an iPod. In fact, there was even a “YouTube” user-generated content remix exception that granted Canadians the right to create remixed work for non-commercial purposes under certain circumstances.

There were a number of areas where the government worked toward a genuine compromise. These included reform to Canada’s fair dealing provision, which establishes when copyrighted works may be used without permission. The government rejected both pleas for no changes as well as arguments for a flexible fair dealing that would have opened the door to courts adding exceptions to the current fair dealing categories of research, private study, news reporting, criticism, and review. Instead, it identified some specific new exceptions that assist creators (parody and satire), educators (education exception, education Internet exception), and consumers (time shifting, format shifting, backup copies).

The Internet provider liability provisions similarly represented a compromise, as the government retained a “notice-and-notice” system that requires providers to forward allegations of infringement to subscribers.

The system is costly for the providers, but has proven successful in discouraging infringement.

It also compromised on the statutory damages rules that create the risk of multi-million dollar liability for cases of non-commercial infringement. The new rules reduced non-commercial liability to a range of \$100 to \$5,000, a figure that is not insignificant, but well below the \$20,000 per infringement cap currently found in the law.

Critics of the bill argued that these attempts at balance were ultimately undermined by the anti-circumvention provisions found in Bill C-32. Those provisions—widely referred to as the digital lock rules—adopted a foundational principle that anytime a digital lock is used, it trumps virtually all other rights. The digital lock rules quickly became the primary focus of public debate, with criticism from all opposition parties and dozens of public interest and education groups.

That criticism soon led to the other watchword of Bill C-32. The government opened with the balanced copyright moniker, but Moore escalated the rhetoric weeks later by telling an intellectual property conference “the only people who are opposed to this legislation are really two groups of radical extremists.” The media seized on the radical extremist comment as well as Moore’s contention that critics “pretend to be for copyright reform,” and were “babyish” who “try to find technical, nonsensical, fear-mongering reasons to oppose copyright reform.” He urged supporters of Bill C-32 to confront the critics “every step of the way” until they are defeated.

Moore’s call for confrontation predictably left many groups disappointed that an issue of such importance—copyright law reform is widely viewed as an integral part of a digital economy strategy—had quickly degenerated into name calling rather than substantive debate and discussion about how Canada could update its copyright law in a manner that meets the public interest, complies with international treaties, and addresses legitimate consumer and creator expectations.

This book represents an effort by some of Canada’s leading copyright experts to shift away from the sloganeering about balance and the name calling of “radical extremists” toward an informed analysis of Bill C-32 and the future development of Canadian copyright law. Responding to the need for non-partisan, expert analysis of Bill C-32, an exceptional group of Canadian scholars have come together to assess Canada’s plans for copyright reform.

This is the second such initiative, following on the successful 2005 book, *In the Public Interest: The Future of Canadian Copyright Law*, which responded to the introduction of Bill C-60. It brought together the majority

of Canadian academics researching and writing about intellectual property with representatives from ten universities stretching from Dalhousie on the east coast to the University of British Columbia on the west. *In the Public Interest* covered a wide range of issues related to copyright reform and though Bill C-60 died on the order paper months after the book was published, it has continued to serve as a useful volume on Canadian copyright law issues.

This book followed much the same approach. All contributors from the first book were invited to participate once again. In addition, new intellectual property scholars were identified and given the opportunity to contribute. Once the dust settled, there were twenty articles on copyright written by independent scholars from coast to coast. The diversity of contributors provides a rich view of Bill C-32 and Canadian copyright law more generally, tackling the history of Canadian copyright, technology issues, the link between copyright and creativity, as well as education and access issues.

While I am honoured to have again served as editor (and contribute my own work on the flexibility in implementing the anti-circumvention provisions in the World Intellectual Property Organization's Internet treaties), it should be noted that each contributor was given complete freedom to address whatever element of copyright reform they saw fit. There was no editorial attempt to prescribe a particular outcome or perspective. Rather, this book endeavoured to bring together as many non-partisan Canadian copyright scholars and experts as possible and gave each the latitude to provide their unique perspective and analysis.

Contributions are grouped into five parts. Part one features six articles that establish the context for Bill C-32. While the last book examined contextual issues such as political rhetoric, this book includes several articles that provide a historical context for Canadian copyright reform. The emergence of Canadian copyright history as a fertile area for scholarly research is a recent and welcome development, since it enables us to better situate the latest round of reforms with the historical context.

Part two contains six articles on the intersection between copyright and technology. Several articles focus on anti-circumvention legislation and digital locks, while others touch on rights management information and intermediary liability.

The creator perspective on copyright reform can be found in the four articles in part three on creativity. Each article touches on a different issue including transformative works, moral rights, user generated content, and the Montreal independent music scene's view of copyright.

Parts four and five delve into education and access issues. Professors Margaret Ann Wilkinson and Sam Trosow discuss the increasingly contentious issues raised by educational licencing and the reform proposals in Bill C-32, while the access chapter includes important contributions on copyright reform and fact-based works and the copyright restrictions on public sector information.

CONTEXT

Sara Bannerman provides the first of several articles that examine current Canadian copyright reform through a historical lens. Bannerman notes that virtually from the moment of confederation, Canada has grappled with contentious copyright reform issues. Reform efforts have invariably come as a response to international pressures, with the United Kingdom exerting significant influence over the early attempts to craft a genuine made-in-Canada copyright law. Bannerman also places the spotlight on the challenges Canada has faced with international copyright treaties, with attitudes that have ranged from outright rejection to strong support.

In light of the international pressures and inconsistent responses to international treaties, Bannerman argues that Canadian copyright reform has historically been characterized by three elements that can be seen in the current round of reforms: slow progress, a minimalist approach, and made-in-Canada approaches that endeavour to respond to domestic Canadian demands and meet the technical requirements of international treaties.

While Bannerman places Canadian copyright reform into historical perspective, Blayne Haggart provides a regional governance analysis in his article by assessing the respective copyright law approaches in Canada, the United States, and Mexico. Notwithstanding a concerted effort to integrate the North American economy through regional trade agreements, Haggart observes that each country continues to possess distinct copyright regimes.

Using a historical institutionalist approach, Haggart concludes that US-style copyright laws are not a foregone conclusion for Canada and Mexico. Rather, current governance structures provide each country with considerable latitude in establishing country-specific, autonomous copyright laws. In fact, Haggart notes that it is the very presence of NAFTA — which guarantees Canada and Mexico access to the US market — that limits the U.S.'s ability to exert significant trade pressures on both countries.

Myra Tawfik also provides historical context in her article. Tawfik delves deeper into the historical purposes behind copyright law, particularly the

importance of enlightenment and education. While most historical analysis has emphasized the importance of publishers (in early copyright laws) and authors (in the 20th century), Tawfik notes that it is education and public access that has consistently influenced copyright norms. Indeed, while publishers are often viewed as the “winners” in the early copyright laws, publisher rights faced significant limitations with the law ensuring rights of access that established important limits on copyrights.

Interestingly, Tawfik observes that prioritizing knowledge dissemination was a foundational objective in both the United Kingdom and France. Although France is often associated with author rights, French parliamentarians grappled with concerns that creator rights might interfere with the public interest in learning and education. Having identified the importance of education within the copyright construct, Tawfik then travels back to the 1830s in Lower Canada, where the same priorities and concerns manifested themselves. Given this historical context, Tawfik is sharply critical of Bill C-32’s digital lock provisions, concluding that the bill has “in one simple but sweeping legislative device, entirely forsaken the educative function that has been an essential feature of the law from its inception.”

Meera Nair offers a third historical piece, one focused specifically on the history and controversies associated with fair dealing within Canadian copyright law. Nair notes the long history behind fair dealing and the reasonableness of its evolution (particularly in light of the 2004 Supreme Court of Canada decision in *CCH Canadian v. Law Society of Upper Canada*).

Nair is critical of both sides of the fair dealing debate, suggesting that critics have consistently undermined fair dealing by seeking to substitute a core element of copyright law with licencing, while lamenting that the education community — an obvious beneficiary of a balanced fair dealing provision — has generally been too timid in exercising its rights. With Bill C-32 setting the stage for another policy battle over the scope of fair dealing, Nair expresses the view that it is at a crossroads, with the very real possibility that it could ultimately become little more than a historical artifact.

Abraham Drassinower’s article uses a different lens to examine current Canadian copyright law and reform — the 2007 Supreme Court of Canada decision *Euro-Excellence Inc. v. Kraft Canada Inc.* The Euro-Excellence case may have focused on the interplay between parallel imports and intellectual property law, but Drassinower demonstrates why it offers important insights into the “balance” in copyright law and the differences between copyright, patents, and trademarks.

The article features an exhaustive analysis of Justice Michel Bastarache's opinion in the *Euro-Excellence* decision, leading to a better understanding of the limits of copyright law in protecting the work of authors. Applied to Bill C-32's anti-circumvention rules, Drassinower offers a stinging conclusion that by "denying the field of permissible use, anti-circumvention denies copyright itself."

While Drassinower considers a single case in his article, Mistrale Goudreau focuses more broadly on the role of the courts in interpreting copyright law. The sole French-language article in this volume, Goudreau also reaches back into history to note the integral role that courts have played in defining concepts such as fair dealing and originality. She is more critical of Canadian legislative reforms, suggesting that they have often placed courts in the difficult position of being forced to make sense of the law. Goudreau expresses concern that the same may hold true for Bill C-32, noting that it leaves important issues open to interpretation.

TECHNOLOGY

Carys Craig opens the series of articles on the intersection between copyright and technology with an examination of the impact of digital locks on fair dealing. Craig welcomes the inclusion of fair dealing reform within Bill C-32, noting that an expansion of fair dealing consistent with the Supreme Court of Canada's *CCH* decision is long overdue and was notably absent from both Bills C-60 and C-61. However, Craig demonstrates why the expansion does not go far enough, concluding that they are "insufficient to ensure the breadth of applicability that the copyright balance demands."

Craig uses the absence of a specific exception for parody within the current law to shine the spotlight on why fair dealing reform is desperately needed. She is generally supportive of the new fair dealing provisions in Bill C-32, but believes that critics have overstated their breadth. In Craig's view, copyright policy would be better served with an open-ended fair use provision. While she believes the Bill C-32 fair dealing provisions could be improved, she reserves her harshest criticism for the impact of the bill's anti-circumvention provisions on fair dealing, concluding that they undermine the social goals of the copyright system and hold the potential to eviscerate fair dealing in the digital age. In order to address these faults, Craig identifies a wide range of potential reforms to the Bill C-32 provisions.

My substantive contribution to this collection focuses on the legal requirements to comply with the World Intellectual Property Organization's

Internet treaties. The government has identified ratification of the WIPO Internet treaties as one of Bill C-32's chief goals, leading to a robust debate on the degree of flexibility contained in those treaties to comply with the digital lock requirements. My article examines the issue from four perspectives: the plain language of the statutory requirements, the legislative history behind the inclusion of anti-circumvention provisions within the treaty, state practice in implementing those requirements, and scholarly analysis of the treaty obligations.

The article confirms that the WIPO Internet treaties offer considerable flexibility in implementation. The legislative history is particularly noteworthy since the record makes it readily apparent that the intent of the negotiating parties was to provide flexibility as the basis for consensus. Countries were free to implement stricter anti-circumvention provisions, but consensus was reached by leaving the specific implementation to individual countries.

Ian Kerr follows with a remarkable article on digital locks and their broader impact on society and ethics. Drawing from a long history of locks, Kerr identifies a crucial concern with policy and business approaches that rely on the use of digital locks, namely the use of technology to shift social defaults that undermine individual freedoms.

Given their power, Kerr expresses concern that the impact of digital locks will be felt far beyond the copyright realm. Rather, he fears that it will impede moral development by "programming people to do the right thing" and in the process remove their ability to make moral choices grounded in ethics and the law. Illustrated through a series of powerful anecdotes, Kerr demonstrates how technology can effectively usurp the role of individual choice and by "automating virtue" would impair our ability to make the morally right choice.

While Bill C-32's digital rights management provisions have garnered the lion share of attention, Mark Perry focuses his analysis on rights management information, the less-discussed and typically less controversial aspect of WIPO Internet treaty implementation. Perry explains that RMI is used for more than just encrypting information about works, since modern RMI systems often also capture considerable information about the user, including viewing or listening habits.

Perry criticizes Bill C-32's RMI provisions on the grounds that they adopt a minimalist approach and miss the opportunity to implement a more forward-looking vision of RMI. He identifies four features that should be included in the RMI legislative package, including transparency (ensuring the RMI information is fully readable by all users), balance (RMI

should identify the portions of the work not subject to copyright), privacy (users should know what information about them is collected), and freshness (data should be kept updated).

David Lametti's article proceeds from an interesting premise. He argues that Bill C-32, particularly the digital lock provisions, is fundamentally flawed and at odds with the longstanding principles of balance in copyright. Assuming the bill becomes law, however, Lametti explores how it might be saved, relying on "virtue ethics" as the basis for hope that all actors, including copyright owners and users, will exercise ethical decision-making to avoid the more problematic elements of the bill.

Lametti examines the ethical approach to copying across several forms of media, including music, movies, and books. His analysis demonstrates that the ethical approach is invariably context specific and far less reflective of the right/wrong paradigm that often dominates copyright debates. Instead, he identifies instances where copying clearly should be permitted on ethical grounds (even if the law states otherwise) as well as instances where permitted copying is still deserving of compensation or prior permission. Although reliance on virtue ethics might sound unlikely in the current environment, Lametti notes that copyright has always relied on informal norms and notions of fairness to address competing claims.

Greg Hagen's article rounds out the technology section with an assessment of Bill C-32's attempt to "modernize" Internet service provider liability. After considering the current state of Canadian law with respect to Internet intermediaries—including recent Supreme Court of Canada jurisprudence—Hagen provides a detailed examination of the bill's provisions.

Hagen identifies the major policy battlegrounds, including the scope of coverage (all Internet intermediaries, ISPs, information location tool providers) and the preferred response to allegations of infringement. He notes that that Bill C-32 rejects the so-called "graduated response" approach that has been adopted in a handful of countries around the world, but also declines to embrace emerging proposals to encourage the availability and dissemination of copyrighted content while compensating copyright owners through a system of levies or compulsory licences.

CREATIVITY

Graham Reynolds opens the creativity section with a look at transformative works. Reynolds acknowledges that transforming existing expression is not new, but maintains that technology has democratized the practice by giving anyone with a computer and Internet access the ability to create, distribute,

and access transformative works. He notes that Canadian copyright law has failed to keep pace with this new power of creativity, leaving an emerging generation of creators at legal odds with existing copyright owners.

Reynolds argues that transformative works should not be treated as acts of infringement under the Copyright Act. While supportive of several measures in Bill C-32, particularly the inclusion of parody and satire within fair dealing and the introduction of a right to create non-commercial user-generated content, he expresses concern that the digital lock provisions may undo many of the benefits for creators who would face liability in their efforts to access digitally-locked works. Reynolds also calls for the expansion of fair dealing by including a right to engage in transformative use of copyright-protected expression.

Tina Piper's contribution is based on a lengthy study into the Montreal independent music scene. The music industry has been divided on Bill C-32, with some offering strong support for the bill, while others lamenting the emphasis on digital locks ahead of levy-based compensation schemes.

Piper's work delves into the copyright culture among musicians and discovers that copyright is rarely a major focus. Rather, she finds that many musicians and labels pay scant attention to copyright policy developments and are skeptical of the emphasis on copyright policy as a key mechanism to encourage the creation of new music. In fact, many are supportive of sharing and strategies that provide free access to their music, identifying increased performance revenues and band profile as clear benefits. Interestingly, Piper found far greater interest in federal and provincial grant programs such as FACTOR, which were lauded as providing real revenues to Canadian artists.

Daniel Gervais focuses on two issues at the intersection between copyright and creativity: music file sharing and user generated content. His article, which is an addendum to his contribution to *In the Public Interest*, argues in favour of legalized file sharing as part of a broader new compensation system. Gervais sketches out a proposed framework for full legalization, including a new levy and the active participation of Internet service providers in collecting new revenues.

Gervais also offers a helpful analysis of Bill C-32's user generated content provision, supporting the government's vision of facilitating this form of creativity, but identifying potential concerns that will ultimately fall to the courts to interpret. A particular challenge will be the need to navigate between commercial and non-commercial uses given the potential for non-commercial uses to attract wide audiences and generate commercial benefits.

Mira Sundara Rajan, a leading expert on moral rights, continues her examination of the issue by criticizing the absence of serious moral rights reform in Bill C-32. Sundara Rajan focuses on moral rights for performances, a relatively new right that is included in the WIPO Internet treaties. She describes the reforms in the bill as a “welcome improvement” for performers, but argues that more could be done.

Indeed, Sundara Rajan envisions Canada as a potential moral rights leader by adopting stronger moral rights for both performers and authors. While acknowledging that Bill C-32 meets the minimum international requirements, she suggests that experience to date reveals that the minimalist approach has done little to benefit creators. In its place, she maintains that comprehensive moral rights reforms are needed to better position creators when negotiating rights with industrial interests.

EDUCATION

Margaret Ann Wilkinson provides the first of two articles on copyright and education. Wilkinson navigates the complex and confusing labyrinth of educational licencing in light of both Bill C-32 and recent education copyright tariff proposals. The role of the Copyright Board of Canada is discussed as Wilkinson endeavours to break down the various rights holders and competing sources of royalty demands.

While the Copyright Board tariff proposals will play out for the next few years, Wilkinson contextualizes those proposals in light of the potential changes found in Bill C-32. Wilkinson expresses support for the inclusion of “education” within the fair dealing categories, arguing that it should be given wide ambit in light of recent Supreme Court of Canada jurisprudence. Moreover, Wilkinson assesses the impact of the provisions targeted at libraries, museums, and archives, noting that several long-standing concerns remain unaddressed.

Sam Trosow continues the assessment of Bill C-32’s impact on Canadian education, with a detailed analysis of the practical application of fair dealing reform. Trosow criticizes the conservative, risk-averse approach adopted by many Canadian educational institutions, noting that the Supreme Court of Canada’s CCH decision appears to provide far broader latitude to exercise fair dealing rights than is presently used by those institutions.

Trosow is generally supportive of Bill C-32’s educational provisions, but remains skeptical about their application in practice. Having noted the prioritization of limiting risk, he is ultimately unsure if they will have their desired effect.

ACCESS

The final section of the volume includes two contributions related to access. Teresa Scassa examines the impact of copyright reform on fact-based works. While many copyright observers will be familiar with the principle that copyright law protects expression rather than facts, Scassa notes the proliferation of fact-based works in databases, maps, videos, photographs, and other sources. Rather than addressing their growing commercial importance, Bill C-32 remains silent. In fact, Scassa expresses concern that the digital lock provisions within the bill could impede access to these works.

Scassa posits that the challenge associated with fact-based works may stem from the distinction between facts and information. Unlike facts, which do not enjoy copyright protection, information may be protected by copyright. Scassa argues the “challenge of the information society is to recognize the extent to which facts are constantly being transformed into information, to recognize the difficulties in separating the information from the underlying fact, and to decide what to do about recognizing, protecting and rewarding the authorship of information where warranted.”

Closely associated with fact-based works is the burgeoning interest in public-sector information, including government geographical information, weather data, reports, and studies. Elizabeth Judge provides a comparative analysis on the use and reuse of public-sector information, noting that many other countries have moved far ahead of Canada in offering their data in open formats accompanied by open licences.

Judge identifies several alternatives to moving toward open data, including government-backed initiatives and the adoption of open licences such as a Crown Commons licence modeled on the Creative Commons licence. She notes that crown copyright remains an impediment to access to Canadian public sector information, but concludes that open licensing offers a mechanism to overcome that barrier without the need for statutory reform.