Kluwer Copyright Blog

Oh Canada! True Patriot Love (for Thy Copyright Act Review)

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Readers in Europe and around the world may have heard some refreshingly contented murmurings recently about a new—and, "miraculously, an eminently sensible"—copyright policy report coming out of Canada. The report of the Standing Committee on Industry, Science & Technology, released earlier this month, was the culmination of a statutorily mandated parliamentary review of Canada's Copyright Act, commenced five years after the coming into force of the Copyright Modernization Act 2012.

The 2012 Act was, itself, the result of a long and consultative reform process aimed at ratifying the 1996 WIPO Internet Treaties and bringing Canadian copyright law "up to date" with modern digital technologies. It enacted, for the first time in Canada, anti-circumvention measures to protect digital locks (similar to those of the 1998 US DMCA); a Notice & Notice system for Internet Service Providers (ISPs) (in lieu of Notice & Takedown); and a new cause of action for "enabling" infringement online (crafted to capture the kind of peer-to-peer services that had attracted liability elsewhere: see here and here). On the other side of the copyright policy ledger, the 2012 Act also expanded the fair dealing defence to include new permitted purposes (parody, satire and education); created new exceptions for common consumer practices (e.g. making back-ups, time- and format-shifting); and established the world's first explicit "non-commercial user-generated content exception" (colloquially, the "YouTube exception").

The five year window, of course, provided little opportunity either for evidence-gathering or for the practical implications of these policy innovations to manifest. Nevertheless, it afforded an opportunity for lobbyists, interest groups and stakeholders to mobilize once again, hoping to

expand the good, rewind the bad, and reform whatever they found ugly about the 2012 amendments.

As part of the review process, the Industry committee requested an advisory report from the Canadian Heritage committee (Heritage being the other federal department tasked with copyright policy) on 'Remuneration Models for Artists and Creative Industries.' Released with a bit of a thud a few weeks before the final Industry report, the Heritage report was the kind of policy document that many copyright experts have come to both fear and expect—an utter and seemingly uncritical embrace, by ostensibly objective democratic representatives, of the transparently self-interested and profit-motivated urgings of the usual private actors and industry lobbyists (see well-founded criticism here, here and here). Its 22 recommendations, virtually every one proposing an expansion of owners' rights and increased enforcement powers, included: extending Canada's copyright term to life of the author plus 70 years (regarding which, it was disingenuously claimed, "no witnesses expressed outright opposition"); clarifying or *removing* existing exceptions to comply with the Berne Convention's 3-step test; "clarifying" that the fair dealing defence should *not apply* to educational institutions in respect of commercially available works; promoting a return to collective licensing; increasing efforts to combat piracy; and reviewing safe harbors to ensure that ISPs "are accountable for their role in the distribution of content." The report included multiple mentions of the so-called "value gap" that creators are suffering, decried "the decline of the artistic middle class" and "the negative impact of technology on creative industries," while noting that ISPs "enjoy and greatly benefit from access to the music they give their clients." This line of reasoning will be familiar to readers in Europe, as it reproduces the rationale commonly proffered for the most controversial aspects of the EU Digital Single Market Directive.

All in all, the Heritage report was a disheartening reminder of how and why copyright policy-making can go awry when powerful market incumbents and copyright collectives succeed in setting the agenda to preserve (or restore) their own position in the cultural industry ecosystem. Also on full display was the ease with which the rhetoric around fairness and artists' rights can obscure the gulf between these private commercial interests and copyright's public policy objectives (see here).

Against this backdrop, it does indeed seem quite astounding that the Canadian review process ultimately produced a well-balanced report from the Industry committee that paves the way for measured, public-interest oriented copyright reform. The report provides an even-handed review of the submissions of stakeholders and experts on each topic, followed by committee observations that make explicit the reasoning behind the resulting recommendations. Of these, perhaps the most notable include: making Canada's fair dealing defence open and flexible by turning the enumerated purposes into an illustrative list; facilitating the lawful circumvention of digital locks for certain non-infringing purposes; minimizing the impact of any term extension by requiring formalities for protection beyond life-plus-fifty; allowing authors' termination rights to trigger 25 years post-assignment (with notice) rather than 25 years after death; increasing the transparency of the collective administration of copyright; and adopting open licensing practices for works under Crown copyright.

As for suggestions made to the committee that Canada follow the EU's lead, adopting something akin to the controversial Article 17 of the EU DSM Directive as "an effective way to handle [Online Service Providers (OSPs)]," the committee notes that we are "yet to see…how EU members will implement the Directive and what results different approaches will yield. The Government should take the time to learn from the successes and failures of these initiatives to

determine whether they serve the long-term interests of all Canadians." (On the challenges of Article 17 implementation, see here.) The report further recommends ensuring that any content management system employed by OSPs subject to safe harbors "must reflect the rights of rights-holders and users alike." Interestingly, the committee observes that any additional regulation of OSPs "should also reflect a balanced approach," and should not, for example, require the take down of content "before giving its uploader the opportunity to respond to allegations of…infringement." (Contrast this with, e.g., Article 17(4)(b) and (c) EU DSM Directive). Acknowledging a problematic imbalance of power between creators and large intermediaries, the report notably points not only to OSPs (such as the large user generated content platforms that bore the brunt of critique in Europe), "but also [to] large record labels and publishers."

Perhaps most refreshing of all is the committee's recognition that many of the problems identified by creators and creative industries during the review cannot be effectively addressed by the "limited tools" of copyright law: the Copyright Act alone "cannot suffice to ensure that Canadian creators and creative industries receive fair compensation." If this seems obvious, it is worth emphasizing how rarely it is acknowledged, while the positive implications of expanding copyright control are commonly assumed. One of my greatest frustrations in copyright debates is the persistence of the fallacy that copyright law is either responsible for—or remotely capable of solving—the inequities and unfairness experienced by artists, or the dismal underfunding of culture and the arts, in the context of our economic system.

Overall, the Industry committee's report reveals a critical engagement by its members with the pleas and provocations of stakeholders, and a nuanced understanding of the tensions inherent in the task of copyright law: rewarding authors while encouraging both the creation and dissemination of works, balancing the rights of owners and users, and ensuring the preservation of a vibrant public domain. In this sense, it reflects the copyright balance articulated by Canada's Supreme Court (see here). It is this principle of balance, I would note, that has led to the judicial recognition of "user rights" in Canada, as well as carefully circumscribed rights in respect of intermediary liability and communication to the public, and an overarching commitment to technological neutrality (see here and here). The report also demonstrates a strong preference for evidence-based policy-making, recommending measures to improve objective and reliable data-gathering on the economic impacts of copyright legislation in Canada. No wonder, in today's copyright climate, and in the shadow of controversial developments in the EU in particular, this report elicited excitement and accolades from copyright experts and activists internationally.

There are surely features of the "living and grounded" Canadian parliamentary review process that permitted this result, and from which other jurisdictions might learn. The Industry committee's report is the "culmination of hundreds of oral and written testimonies," having consulted with a broad range of stakeholders, beginning with witnesses representing specific industries and sectors, moving on to interest groups and Indigenous witnesses involved in multiple sectors, and concluding with academics and legal experts "who could speak broadly about the Act and comment [on] previous testimony." [Disclosure: I am one of the academics.] As the report notes, any stakeholder will have a preferred course of action, and of course "things get more complicated" when multiple viewpoints are taken into account; but "they also come closer to reality." The reality is that copyright regulation is a complex undertaking that requires an "ongoing and dynamic" conversation. It is true that "a parliamentary report of this nature must find a compromise between different perspectives"—but as the report demonstrates, this needn't entail a compromise of democratic values or the public interest. Rather, any compromise should reflect the delicate balance between protecting authors, users and the public domain that is essential to

advancing the purposes of the copyright system amidst shifting cultural, technological and economic realities.

And so, for this eminently sensible copyright review, I think Canada deserves a little international acclaim. We the North can be proud—and not just because the Raptors won the NBA finals!

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