

Canadian Copyright Law in Transition

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It is fair to say that the last 5 years in Canadian copyright law have been eventful. In many ways it has been a period of turmoil in Canadian copyright law. This is in part due to the challenges, shared by many other countries, posed by digitization and the Internet. Canada has been under pressure to amend its copyright legislation to implement the *WIPO Copyright Treaty* (WCT)¹ and the *WIPO Performances and Phonograms Treaty* (WPPT),² and the nature of any such amendments has provoked a healthy level of debate. It is also a reflection of the coming of age of copyright law in Canada. Over the last decade, intellectual property law has become recognized as a legitimate area of academic pursuit in Canada; most law schools in the country now have at least one faculty member who teaches and researches in the area of intellectual property law. Further, these academics are gradually becoming more established. The last 5 years has seen a flurry of Canadian legal scholarship on intellectual property issues. The Supreme Court of Canada has also shown a renewed interest in intellectual property generally, and copyright law in particular. Since 2002, there have been three major copyright decisions from that Court.³

¹ *WIPO Copyright Treaty*, adopted in Geneva on December 20, 1996, online: WIPO: http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

² *WIPO Performances and Phonograms Treaty*, adopted in Geneva on December 20, 1996, online: WIPO: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

³ These decisions will be discussed in detail below. The Court has also been very active in the last 5 years in the area of patent law. Consider for example: *President and Fellows of Harvard College v. Canada* (*Commissioner of Patents*), 2002 S.C.C. 76; *Free World Trust v. Electro-Santé Inc.*, [2000] 2 S.C.R. 1024;

In this paper I will address two major developments in Canadian copyright law with a view to explaining recent developments through the lens of the particular character of copyright law in Canada. The two developments I will consider are first, the recent spate of Supreme Court of Canada decisions that have had a dramatic impact on the interpretation of the *Copyright Act*,⁴ and second, government proposals for copyright law reform to bring Canada's legislation into line with Canada's obligations under WCT and WPPT.

1) Copyright Law at the Supreme Court of Canada

In 2002, the Supreme Court of Canada released its decision in *Théberge v. Galerie d'Art du Petit Champlain*.⁵ The case involved a dispute over whether the use of an ink transfer process to remove the ink surface from a paper poster and transfer it to a canvas backing amounted to a reproduction of the artistic work depicted in the poster, or whether, at best, it would be a moral rights infringement. The majority of the Court, in a 4-3 decision, ruled that the ink transfer process did not amount to a reproduction. The majority defined reproduction as: "the physical making of something which did not exist before",⁶ and rejected the idea that there could be "'reproduction' without multiplication".⁷ In the view of the majority, the respondent was "asserting a moral right

Whirlpool Corp. v. Camco Inc., [2000] 2 S.C.R. 1067, 2000 SCC 67; *Apotex v. Wellcome Foundation*, [2002] 4 S.C.R. 153.

⁴ R.S.C. 1985, c. 42, as am.

⁵ *Théberge v. Galerie d'art du Petit Champlain* [2002] 2 S.C.R. 336, 2002 SCC 34; online: <http://www.canlii.org/ca/cas/scc/2002/2002scc34.html> [*Théberge*].

⁶ *Ibid.*, at para 44.

⁷ *Ibid.*, at para 45

in the guise of an economic right”⁸ The approach of the majority placed a limit on the economic rights of authors *vis à vis* owners of physical copies of works. Gonthier J., writing for the dissenting justices, rejected this approach, stating:

. . . the primary and essential meaning of the word "reproduce" as it appears in s. 3(1) C.A. is "produce a copy of" or "cause to be seen again" or "give a specified quality or result when copied". Accordingly, in order for a work to be reproduced, there is no requirement whatsoever to establish that there has been an increase in the total number of copies of the work.⁹

More significant, perhaps, than the dispute over the meaning of reproduction in the Act was the statement of the purpose of copyright that was articulated by the majority of the Court. Binnie J. wrote:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).. . .

The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.¹⁰

This statement is significant because up until this point, there had been no authoritative statement of the purpose of copyright law in Canada. Both the Constitution¹¹ and the *Copyright Act* were silent on this point, and past court decisions had either avoided the issue, or offered inconsistent views. More importantly still, the *Théberge* decision articulated a view of the public domain that had been largely lacking from Canadian copyright law. Binnie J. wrote: “Excessive control by holders of copyrights and other

⁸ *Ibid.*, at para 74.

⁹ *Ibid.*, at para 139.

¹⁰ *Ibid.*, at paras 30-31.

¹¹ *Constitution Act, 1867*, U.K., 30 & 31 Victoria, c. 3, s. 91(23).

forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”¹² The statement of purpose combined with the remarks about the public domain, and the limits placed by the majority on the economic rights of authors have since given new hope to advocates of both so-called users’ rights and the public domain in Canada. It is worth noting that in a subsequent decision, which will be discussed further below, the unanimous Supreme Court of Canada reiterated the importance of a strong public domain in Canada. The Court emphasized the public interest “in maintaining a robust public domain that could help foster future creative innovation.”¹³

Théberge is also an interesting decision in the Canadian context because of the tension in the two opinions between civil law and common law copyright concepts. While this tension is present in the *Berne Convention*¹⁴ as well, and therefore, in theory, present in other jurisdictions, Canada is in a peculiar position because it is a country in which both common and civil law traditions are present. Perhaps ironically, it is the majority of the Court, represented by four common law trained justices that finds that the issue before them is a moral rights issue rather than an economic rights issue. Binnie J. opined that:

Moral rights, by contrast, descend from the civil law tradition. They adopt a more elevated and less dollars and cents view of the relationship between an artist and his or her work. They treat the artist’s *oeuvre* as an extension of his or her personality, possessing a dignity which is deserving of protection.¹⁵

¹² *Théberge*, *supra* note 5, at para 32.

¹³ *Ibid.*, at para 23.

¹⁴ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 U.N.T.S. 221.

¹⁵ *Théberge*, *supra* note 5, at para 15.

In this case, the majority reasoned, since there had been no reproduction, the only complaint would have to be in relation to the modification of the copies of the work by transferring the images to a new backing:

My view is that Parliament intended modification without reproduction to be dealt with under the provisions dealing with moral rights rather than economic rights. To adopt a contrary view, i.e., to treat the modification of the substrate here as the violation of an economic right, would allow copyright holders other than the artist to complain about modification (despite the non-assignability of moral rights).¹⁶

The three civil law trained justices in dissent would have characterized the issue squarely as one of economic rights.

In *Théberge* the Supreme Court of Canada also engaged the issue of Canada's place in a more global intellectual property environment. Binnie J. noted: "In light of the globalization of the so-called "cultural industries", it is desirable, within the limits permitted by our own legislation, to harmonize our interpretation of copyright protection with other like-minded jurisdictions."¹⁷ The majority of the Court looked to both English and U.S. case law for guidance on the main issue of reproduction and derivative works.

In *CCH Canadian Ltd. v. Law Society of Upper Canada*,¹⁸ the Supreme Court of Canada took on key issues in the interpretation of copyright law in Canada. The decision is clearly a landmark case. The dispute involved a claim by a group of law book publishers that the Great Library of the Law Society of Upper Canada (LSUC) had infringed copyright in a range of their works through its document delivery services, and through the provision of photocopy machines on their premises. The LSUC responded

¹⁶ *Ibid.*, at para 60.

¹⁷ *Ibid.*, at para 6.

¹⁸ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13; online: <http://www.canlii.org/ca/cas/scc/2004/2004scc13.html> [*CCH Canadian Ltd.*]

by arguing, *inter alia*, that many of the works lacked the originality required for copyright to subsist; that they had not authorized copyright infringement by providing photocopy facilities to their patrons, and that in any event, the dealings of their patrons with works in the library were fair dealing for the purposes of research or private study.

The issue of the appropriate standard of originality in Canada was a live one. The Federal Court of Appeal had most recently ruled that “compilations of data are to be measured by standards of intellect and creativity”,¹⁹ and that in-column yellow-pages listings failed to meet that standard. Writing for a unanimous Supreme Court, McLachlin C.J. in *CCH Canadian Ltd.* adopted a standard which she claimed lay between the “originality” standard set by the United States Supreme Court in *Feist Publications Inc. v. Rural Telephone Service Inc.*,²⁰ and the “sweat of the brow” standard articulated in older English cases. The adopted test for originality is that an original work must originate from the author and “be the product of the exercise of skill and judgment that is more than trivial”.²¹ I have argued elsewhere that this test is not substantially different from that of the U.S. Supreme Court in *Feist*, and that, to the extent it is different, it creates its own set of problems.²²

The Court in *CCH Canadian Ltd.* also addressed the issue of copyright liability for authorizing infringement through the provision of free-standing photocopy machines in the Great Library. The Federal Court of Canada had been influenced by the *University*

¹⁹ (1996), 74 C.P.R. (3d) 72 (F.C.T.D.), aff’d [1998] 2 F.C. 22; (1997), 76 C.P.R. (3d) 296 (F.C.A.), leave to appeal to S.C.C. denied, [1998] 1 S.C.R. xv, FCA at para 15.

²⁰ *Feist Publications Inc. v. Rural Telephone Service Co. Inc.*, 449 U.S. 340, at 347 (1991) [*Feist*].

²¹ *CCH Canadian Ltd.*, *supra* note 18 at para 28.

²² See Teresa Scassa, “Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada’s Decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*”, (2004) 3 *Canadian Journal of Law and Technology* 89. I am not the only one to express this view; see: Daniel Gervais, “Canadian Copyright Law Post-CCH”, (2004) 18 I.P.J. 131.

of *New South Wales v. Moorhouse*²³ decision from Australia, into adopting the view that the Great Library had authorized infringement of the plaintiffs' copyrights. The Supreme Court took a different view. McLachlin C.J. disagreed with the Federal Court of Appeal that a library will authorize infringement if it is aware of the likelihood that infringing copying is taking place and fails to take steps to prevent it. Noting that the establish test would find authorization when a party's conduct is to "sanction, approve and countenance"²⁴ infringing activity, she emphasized the importance of giving real meaning to the term "countenance". In her view: "a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright."²⁵ Further, she noted that "Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law."²⁶ The presumption is rebuttable if "a certain relationship or degree of control"²⁷ can be established.

The Court in *CCH Canadian Ltd.* specifically rejected the line of reasoning developed in *Moorhouse*. According to McLachlin C.J., "the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole."²⁸ In the result, the Court found that the Great Library had not authorized infringement. There was no evidence that the photocopy machines had actually been

²³ [1976] R.P.C. 151 (H.C.A.) [*Moorhouse*].

²⁴ *CCH Canadian*, *supra* note 18, at para 38, citing *Muzak Corp. v. Composers, Authors and Publishers Association of Canada Ltd.*, [1953] 2 S.C.R. 182 at 193.

²⁵ *CCH Canadian*, *ibid.*, at para 38.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.* at para 41.

used to make infringing copies, and in any event, the Great Library had no real control over the conduct of its users.²⁹

The decision in *CCH Canadian Ltd.* is also significant for its approach to the interpretation of the fair dealing provisions in the *Copyright Act*. In contrast to the American “fair use” defence, the Canadian provisions are framed very narrowly. They allow fair dealing only for the purposes of research or private study,³⁰ criticism or comment,³¹ or news reporting.³² Further, any dealing with a work must be “fair”, and the provisions relating to criticism, comment and news reporting contain additional formal requirements.³³ The result is a set of defences to infringement that have typically been construed very narrowly by Canadian courts.

In *CCH Canadian Ltd.*, the Court took a very expansive approach to fair dealing. Not only did it find that the defence was available independent of any of the other (narrowly) framed exceptions in the legislation,³⁴ McLachlin C.J. ruled that the Great Library could rely upon the purposes of its patrons in its defence, and that it need not lead specific evidence to establish that all of its patrons dealt fairly with the publishers’ works. Instead, the Great Library could rely upon its general practices to establish the defence:

²⁹ By contrast, in *Moorhouse*, *supra* note 23, at para 15, the Australian High Court had found that the university was liable for authorizing infringement by its patrons because it “did not adopt measures reasonably sufficient for the purpose of preventing infringements taking place.”

³⁰ *Copyright Act*, *supra* note 4, s. 29.

³¹ *Ibid.*, s. 29.1.

³² *Ibid.*, s. 29.2.

³³ The exceptions for both criticism or comment (s. 29.1) and news reporting (29.2) both require that mention be made of the author and source of a work before a dealing can qualify as fair. This is particularly problematic in the case of parody, where courts have ruled that it is not sufficient for the parodic piece to evoke the original. See, for example, *Compagine Générale des Etablissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*, [1997] 2 F.C. 306.

³⁴ *CCH Canadian*, *supra* note 18, at para 49. These exceptions include specific detailed provisions addressing activities of, *inter alia*, educational institutions (see *Copyright Act*, *supra* note 4, ss. 29.4-30), and libraries, archives and museums (ss. 30.1-30.21).

“Dealing” connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research and private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.³⁵

Beyond this, the Court’s actual interpretation of the fair dealing provisions mandates an expansive approach to these exceptions. McLachlin C.J. framed this as forming part of the balance inherent in copyright law: “[i]n order to maintain the proper balance between the rights of a copyright owner and users’ interests, [fair dealing] must not be interpreted restrictively.”³⁶

The determination of whether a particular dealing is “fair” is one that must be made on the facts of a given case. McLachlin C.J. adopted a set of criteria drawn in part from a decision by Lord Denning in *Hubbard v. Vosper*,³⁷ and in part from the statutory criteria for assessing fair use in the U.S. The criteria are:

(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.³⁸

To the criteria McLachlin C.J. attaches the usual *caveats*: that they may not all be present in any given case, that no one factor is determinative, and that other factors might also be relevant depending upon the particular set of facts.³⁹

³⁵ *CCH Canadian Ltd.*, *ibid.* at para 63.

³⁶ *Ibid.* at para 48.

³⁷ [1972] 1 All E.R. 1023 (C.A.) cited in *CCH Canadian*, *ibid.*, at para 52.

³⁸ *CCH Canadian*, *ibid.*, at para 53.

³⁹ *Ibid.*, at para 60. For a description of her analysis and application of these criteria, see Scassa, *supra* note 22.

*In Society of Composers and Authors and Music Publishers of Canada v. Canadian Internet Service Providers*⁴⁰ the Supreme Court of Canada tackled another series of important issues. The dispute centred on whether the Copyright Board should impose a license tariff on Internet Service Providers (ISP) for musical works transmitted over their facilities. The ability of the Copyright Board to impose this tariff depended upon the ISPs being found to have engaged in activity with respect to these works which would infringe on the rights of the owners of copyright in the works. SOCAN, a copyright collective, argued that ISPs either communicated works to the public by telecommunication, or authorized their communication. Canadian ISPs argued that they were insulated from liability by s. 2.4(1)(b) of the *Copyright Act* which exempted intermediaries from liability for communicating works to the public by telecommunication. In considering the appeal, the Court dealt with a number of related issues raised first before the Copyright Board. Central to these was whether the Canadian *Copyright Act* could apply to communications that had their point of origin outside the country.

On the issue of the territorial application of the *Copyright Act*, the majority of the Court ruled that

The applicability of our *Copyright Act* to communications that have international participants will depend on whether there is a sufficient connection between this country and the communication in question for Canada to apply its law consistent with the "principles of order and fairness ... that ensure security of [cross-border] transactions with justice"⁴¹

⁴⁰ *SOCAN v. CAIP*, 2004 SCC 45; online: <http://www.canlii.org/ca/cas/scc/2004/2004scc45.html> [SOCAN].

⁴¹ *Ibid.* at para 57.

The Court adopted the “real and substantial connection” test which originated in the context of court jurisdiction issues. In reaching this decision the majority discussed developments in Europe, Australia, and the United States, as well as obligations under the WCT and WPPT. Binnie J. noted: “National practice confirms that *either* the country of transmission *or* the country of reception may take jurisdiction over a “communication” linked to its territory, although whether it chooses to do so is a matter of legislative or judicial policy”.⁴² As a result, the *Copyright Act* can apply to an unlawful communication of a work even if that communication originated outside of Canada, so long as there is a real and substantial connection between the communication and Canada.

The Court also ruled that ISPs could take advantage of the s. 2.4(1)(b) defence. In keeping with the balancing approach launched in *Théberge*, the Court mandated that the provision should be interpreted with an eye to the copyright balance: “Under the *Copyright Act*, the rights of the copyright owner and the limitations on those rights should be read together to give “the fair and balanced reading that befits remedial legislation””.⁴³ Binnie J. went on to add that: “Section 2.4(1)(b) is not a loophole but an important element of the balance struck by the statutory copyright scheme.”⁴⁴ The Court concluded that ISPs who did nothing more than provide the infrastructure necessary for communications to take place over the Internet were not liable for infringing content transmitted using that infrastructure. However, the majority also noted that the role played by an ISP could attract liability, if it strayed too far from simple provision of connectivity. Providing server space to clients in and of itself would not render an ISP

⁴² *Ibid.* at para 68.

⁴³ *Ibid.* at para 88.

⁴⁴ *Ibid.* at para 89.

liable for any infringing content posted on its server; however, the Court suggested that the situation of an ISP with notice of infringing content might be different. Following the Court's restrictive interpretation of "authorization" in *CCH Canadian Ltd.*, Binnie J. noted that:

The knowledge that someone *might* be using neutral technology to violate copyright (as with the photocopier in the *CCH* case) is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did "[g]ive approval to; sanction, permit; favour, encourage" (*CCH*, paras. 38) the infringing conduct.⁴⁵

However, he went on to add that "notice of infringing content, and a failure to respond by "taking it down" may in some circumstances lead to a finding of "authorization"."⁴⁶ He opined that it would be best if Parliament took on the issue of developing "notice and takedown" provisions to govern liability in such contexts.

2) Current Federal Government Proposals for Copyright Reform

At the time of writing, the federal government has released an outline of its reform proposals in what it identifies as a first phase of copyright reform. The actual provisions have not yet been tabled before Parliament, but it is expected that they will be shortly. The Government *Statement on Proposals for Copyright Reform*⁴⁷ is the product

⁴⁵ *Ibid.* at para 127.

⁴⁶ *Ibid.*

⁴⁷ Departments of Heritage and Industry, *Government Statement on Proposals for Copyright Reform*, March 24, 2005 [Statement]. Online: http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm?nav=2.

of a lengthy discussion and consultation process that started in 2001.⁴⁸ The Statement has already been bluntly criticized by the U.S. government in its *Special 301 Report*.⁴⁹

The copyright reform proposals emerge from a very particular context. Digitization and the Internet have had a real impact on copyright industries in Canada as they have elsewhere. The industry groups lobbying for copyright reform have been loud and persistent. Notably, the voices of “user” groups and communities have been more prominent than usual in this round of reform. Perhaps given strength by the recent approach taken by the Supreme Court to various copyright issues, these groups would appear to have received more attention in the drafting of the proposals. Media attention has been heightened, and the coverage given to controversial issues such as music downloading have kept copyright reform issues in public view.⁵⁰

In its *Statement on Proposals for Copyright Reform*, the government emphasizes from the outset the need to “maintain an appropriate balance between the rights of copyright owners and the needs of intermediaries and users.”⁵¹ This sets the tone for the description of a series of proposed amendments that are significantly more balanced than many expected, and which do not go nearly so far as, for example, the provisions of the *Digital Millennium Copyright Act*⁵² in the United States in implementing the WCT and WPPT provisions.

⁴⁸ The federal government released its discussion paper on these issues in 2001. See: Industry Canada and Heritage Canada, *Consultation Paper on Digital Issues*, (Ottawa, June 22, 2001).

⁴⁹ United States Trade Representative, *2005 Special 301 Report*, April 29, 2005, online: http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Special_301/Section_Index.html

⁵⁰ The recent Trial Division and Federal Court decisions in *BMG Canada Ltd. v. John Doe*, 2004 FC 488 (T.D.), 2005 FCA 193, online: <http://decisions.fca-cf.gc.ca/fca/2005/05.shtml>, have prompted a great deal of debate about the legality of file-sharing in Canada.

⁵¹ *Statement*, *supra* note 47.

⁵² *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified, in relevant part at 17 USC § 1201 (Supp IV 1999)).

With respect to the two WIPO treaties, the proposals describe a series of amendments designed to implement Canada's obligations. The Statement provides that "the existing exclusive communication right of authors would be clarified to include the making available right."⁵³ The wording chosen suggests this is merely a clarification, and that such a right is already encompassed in the Canadian legislation *via* the exclusive right to communicate a work to the public by telecommunication.⁵⁴

The *Statement* promises that amendments to the Act will include provisions that make "circumvention, for infringing purposes, of technological measures (TPMs) applied to copyright material would itself constitute an infringement of copyright."⁵⁵ It is significant that the reference here is to circumvention "for infringing purposes", as it suggests that circumvention for non-infringing purposes will be permitted. The *Statement* does go on to note, however, that circumvention of a TPM in a sound recording would not be permissible "notwithstanding the exception for private copying."⁵⁶

Under the described proposals, amendments will make it an infringement to alter or remove rights management information (RMI) embedded in copyright material, if this is done to further or conceal infringement. Anyone who assists in enabling or facilitating the interference with RMI, or who distributes copyright protected material with RMI altered or removed would also infringe copyright, if their actions were for infringing purposes. Again, as with TPMs, an important limitation on such an amendment would

⁵³ *Statement*, *supra* note 47.

⁵⁴ *Copyright Act*, *supra* note 4, s. 3(1)(f).

⁵⁵ *Statement*, *supra* note 47.

⁵⁶ *Ibid.*

seem to be that it would not be infringement to interfere with RMI for non-infringing purposes.

Amendments are also contemplated which would give owners of copyright the “ability to control the first distribution of their material in tangible form”.⁵⁷ The proposals will also provide for moral rights for performers in their performances, whether fixed or live, a reproduction right for performers in sound recordings, and an adjustment to the term of protection provided to sound recording makers. Rather than have the 50 year term run from the date of first fixation of the work as is currently provided,⁵⁸ the term will run from date of first publication.

The proposed amendments will confirm the ruling of the Supreme Court of Canada that, to the extent that they function only as intermediaries, ISPs are not liable for infringing conduct carried out over their facilities. Caching, hosting, providing information locating services, and connectivity are activities which will be deemed to fall within their functions as intermediaries. The proposals also address the challenge issued by the Supreme Court of Canada in *SOCAN* – that Parliament design a “notice and takedown” scheme to address issues of ISP liability where an ISP hosts potentially infringing material, posted by a subscriber, on its server. However, rather than the “notice and takedown” regime contemplated by *Binnie J.*, the proposals refer to less onerous “notice and notice” regime. Under such a system, “when an ISP receives notice from a rights holder that one of its subscribers is allegedly hosting or sharing infringing material, the ISP would be required to forward that notice to the subscriber.”⁵⁹ ISPs would not be required to block access to the subscriber except where a court order was

⁵⁷ *Ibid.*

⁵⁸ *Copyright Act, supra* note 4, s. 23.

⁵⁹ *Statement, supra* note 47.

successfully sought by the rights holder. Further, ISPs who are in receipt of a notice from a rightsholder would have obligations to record certain types of information and to retain those records for a specified period of time.

The “notice and notice” system responds to some of the concerns expressed about the chilling effects of “notice and takedown” regimes. If an ISP is required to remove material from its server when it has been given notice that the material infringes copyright, the ISP is put in the position of either having to pay out of pocket for legal advice as to the legitimacy of the claim, or removing the material. This has the potential to stifle freedom of expression, particularly where issues of interpretation of the scope of copyright or fair dealing are at play. Not surprisingly, given the pro-industry orientation of the United States, the *Special 301 Report* calls for Canada to adopt the more stringent “notice and takedown” approach.⁶⁰

The proposed amendments will also include measures specifically addressing educational and research access to copyright works. The use of the Internet to transmit materials required for distance learning will be specifically permitted, to the extent that such use of the Internet is consistent with analogous exceptions for in-class performance or display of copyright protected materials, or for copying and distribution of print materials for classroom purposes. A specific amendment will permit electronic document delivery through inter-library loan (subject to the provision of satisfactory safeguards). However, the *Statement* notes that the much more contentious issue of the ability of educators to make use of “publicly available”⁶¹ Internet material for educational purposes will be deferred to a subsequent round of consultation and policy development. The

⁶⁰ *Special 301 Report*, *supra* note 49.

⁶¹ Part of what is contentious in this issue is the definition of what work is to be considered “publicly available” on the Internet.

Statement notes that the “challenge is how to ensure a copyright framework that will facilitate Internet use in the classroom in a manner that will not unreasonably impair the rights of copyright owners.”⁶²

The proposed amendments will also address the rather anachronistic provisions in the Canadian *Copyright Act* which deal with copyright in photographs. Currently, photographers are treated differently under the legislation from most other creators. The proposals would change the legislation so that the photographer is presumptively the author of the work in all circumstances.⁶³ Further, the term of protection for photographic works will be fixed at life of the author plus 50 years.⁶⁴ The law with respect to ownership of copyright in commissioned photographs will also change, making the photographer the presumptive first owner of copyright, with certain exceptions for individuals who commission such works to make personal and non-commercial uses of the works.

Significantly, one of the most contentious sets of copyright issues in Canada today – those relating to the private copying exception for musical works – have been deferred to further consultation and policy making processes. The *Statement* does indicate that the consultation paper on private copying will be issued in short order. It remains to see what will come of this issue, and on what time frame.

In short, Canada’s copyright law is in a period of transition, both in terms of judicial approaches to the interpretation of the legislation, and in terms of pending reforms. Although under pressure from the U.S. to follow American approaches to the

⁶² *Statement*, *supra* note 47.

⁶³ Currently, under s. 10(2) of the *Copyright Act*, *supra* note 4, the author of a photograph is considered to be either the owner of the initial negative, plate or photograph at the time of its making.

⁶⁴ Currently, under s. 10(1) of the *Copyright Act*, *ibid.*, the term of protection for photographs runs from the end of the calendar year in which the negative, plate or photograph was made, plus fifty years.

implementation of the WCT and the WPPT, the Canadian position would seem to diverge in some significant respects. Those who seek to access and use copyright protected works are likely to find a more receptive legislative and judicial environment in Canada, at least in the short term.