Canadian Copyright Consultation submission

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Let me begin by thanking you for opening up the issue of copyright for wide consultation with Canadians. This is an important issue for Canadians–in particular individuals who use copyrighted works, and entrepreneurs in our technology sector. I believe a sober and balanced process of examining copyright issues which face us will result in a well-reasoned and future-compatible copyright policy for Canada, which will put us in a good position to balance the needs of the copyright holders as well as the public, and succeed in the global marketplace.

Severalguiding questions were asked, however these are very similar, and don't provide a good framework for discussion, so I've chosen to respond in a more freeform manner. I should point out that among others, Michael Geist and the Electronic Frontier Foundation have articulated much of what I've said below in more detail.

1 How do Canadas copyright laws affect you?

I interact with Canada's copyright laws on a nearly daily basis in several related contexts. As an author, I encounter these laws as an editor of "free culture" projects like Wikimedia projects, and secondly as an occasional amateur programmer for several FLOSS (free/libre/open source software) projects. I have many colleagues from the United States, and I therefore have some understanding of where their copyright scheme has gone wrong, so much of these comments will be framed in those terms. Since that's my primary frame of reference, I think it'd be helpful to examine where the US laws have shortcomings and where Canada should emulate them. As well, I am of course a consumer of copyrighted works as a music lover, and a university student who relies upon CanCopy and educational use exceptions for many school materials.

I operate on both sides of the fence: both as a creator of copyrighted works (whether cultural or technical) and as a consumer of copyrighted works. Because of this fence-sitting, I understand the need to have real protection for copyrighted works, as well as the need to balance that protection against the public interest in accessing and using those copyrighted works.

2 How should existing laws be modernized?

One feature the government should aim for in drafting legislation is to make the proposal technology- and format-neutral. If this isn't achieved, Canada will end up with copyright laws which are out-of-date before the ink dries. For example, in creating private copying provisions, the legislation should not dictate which techologies or formats may be used. Instead, a generic exception for any form of private copying from any format to any other, using any technology should be proposed - then let the courts apply the principles to specific cases. This ensures that our copyright laws can withstand the test of time, and are flexible enough to deal with complex and changing ambiguities.

Copyright is not a means to protect broken-by-design DRM schemes, nor to exercise undue control over fair uses of copyrighted works - any proposed legislation must reflect the core principle that copyright is for protecting creativity *and only creativity.*

3 Specific concerns & recommendations

3.1 Digital rights management

Digital rights management (DRM) must be restricted by law so it is not permitted to infringe upon the rights of Canadians. Among other things, this means that DRM on public domain works must be illegal and that copying for personal use must remain legal. DRM schemes have been a disaster for Americans and it would be a similar disaster for Canadians. Anti-circumvention laws mean that interoperability, long-term storage and archiving, and the freedom to use one's property are all eliminated on the whim of unaccountable corporations - this would be a literally horrific change to Canada's copyright laws. Finally, DRM poses a serious and growing threat to the privacy of Canadians - Canada's Privacy Commissioner has explained this in some depth, so I won't expand on that here.

Reverse-engineering for the purpose of interoperability may become illegal on the basis that doing so would be copyright infringement. This would spell doom for innovation in both hardware and software, greatly harming Canada's young tech companies. Some software corporations have taken the view that their copyright (and/or patents) on software *precludes* the possibility of interoperability. This line of thinking has had serious negative consequences for competition, innovation and consumer choice elsewhere in the world, and Canada would do well not to emulate these policies.

The best copyright policy would be no restriction on circumventing DRM schemes *at all.* Any protection for DRM constitutes a highjacking of the concept of copyright to lock consumers into a broken-by-design scheme which severely threaten the freedom and privacy of individual Canadians, as well as innovation and competition in the tech sector. Since DRM by definition doesn't work, those who use it rely upon the abuse of copyright law to make circumvention illegal. This also means that DRM must actually become a surveillance system, which is why the privacy implications are of such concern to the Commissioner.

In addition, DRM technologies can reduce educational use exceptions to a farce if they are protected by law. Libraries, universities, museums and other public institutions of education require the educational use exceptions they currently enjoy - those must be protected from infringement and erosion by DRM schemes. As well, Canada's archives could be similarly threatened.

In recognition that reverse-engineering and other similar activities are a key part of how the technical world progresses, Canada must at least have an explicit exception in anti-circumvention laws for such activities. DRM schemes mean digital files cannot be copied, backed up and restored, or reformatted without breaking the DRM cryptography - personal copying and educational use provisions must be exempt from anti-circumvention restrictions if they are to be anything beyond meaningless words. Indeed, any protection for DRM schemes must be explicitly tied to copyright infringement causing damages. The law does not concern itself with trivialities, including cases where no harm is done. On that principle, the punishment for infringement should fit the damage caused–zero liability where there is zero damage, and statutory limits on liability where real damage can be proven.

3.2 Personal copying & educational use

As stated previously, it is important that these provisions be technology- and format-neutral. If this isn't achieved, we will have a permanently archaic law. In particular, personal copying and educational use must be protected in whatever law Canada adopts.

Critically, copying for personal usage must remain legal regardless of the medium—the alternative is criminalizing essentially the entire nation, which would be a perversion of the law. As well, these provisions must be broad - not a restrictive patchwork of "time-shifting" and "format-shifting" co-mingled with layer upon layer of exceptions, limitations and loopholes by which consumers' legitimate rights are removed. Here, an expansion of the levy scheme would be an excellent solution. Cory Doctorow has made other excellent policy suggestions in the US context, which could be applied in Canada just as easily. You can find those suggestions (as well as numerous examples of copyright law gone horribly wrong) at `http://www.eff.org/` where he was a staff member, and continues to be a fellow.

Similarly, educational use must be explicitly protected for Canada's heritage and educational institutions. Our libraries, museums, universities and archives require these exceptions to function. Protection for DRM in particular threatens to erode these rights to meaninglessness.

Anti-circumvention provisions, if any, should be tied to copyright infringement causing damages, and must include a clear exception for private copying, educational use, and public domain or freely-licensed works. Otherwise, the consumer's right to use copyrighted works is eliminated: no backups, no hope of long-term use or archiving (since DRM is not interoperable over time), and no ability to share cultural works which form integral parts of our lives. The public has a clear interest in using these works, and that interest must be protected from infringement.

3.3 Fair dealing

I don't wish to give the impression that the US copyright scheme is all bad–there are two ways in which the US has made excellent choices. Canada should emulate these successes seen south of the border.

The Canadian fair dealing provisions are startlingly and embarassingly insufficient. Our fair dealing rules don't have an exception for parody, a time-honoured case of free speech. Copyright must never be allowed to infringe upon free speech, including parody. Our fair dealing provisions should be replaced with American-style fair use. This would allow case-by-case application of core principles rather than an insufficient patchwork of specific exemptions.

3.4 Crown copyright, length of copyright protection & public domain

Crown copyright is a perversion of the public interest, and should be eliminated. American copyright law recognizes that as a democracy, government is by the people, for the people. When any work is created by an employee of the US federal government, no rights are reserved, and the work is released to the public domain. Canada should do the same, and expand that to all levels of government. The Canadian government represents the Canadian people, and any work it does is on their behalf, and should thus be owned by Canadians–that means the public domain. Canadians have an interest in being able to use the materials they have funded through their tax dollars, and Crown copyright effectively eliminates that possibility.

As well, further extensions on copyright must not be enacted. Currently, copyright protection extends 50 years past the death of the author, however this can be highly ambiguous. We need a method by which a work can be presumed to be in the public domain based upon the date of publication. I'd recommend 50 years past the date of publication or the death of the author, whichever is later, but other reasonable rules are possible. The key is to reduce ambiguity for

works where the date of death is unknown (or where the author is unknown), and explicitly exclude the possibility of further extensions.

Again, the public domain must be protected by making illegal

- DRM on public domain works; and
- charging access fees for public domain works (see Howard Knopf's commentary.

These represent attacks on the very concept of public domain.

3.5 No guilt by accusation

Canada's deliberations can also be informed by the spectacular failure of New Zealand's section 92A. This legislation would have reversed "innocent until proven guilty" into a perversion of justice: if an internet user is accused of copyright infringement on three occasions, their connection is suspended. Of course, advocates of such draconian measures will argue that the end result isn't *necessarily* kicking the user offline, but in fact *any* punishment on the basis of accusation is illegitimate. Thankfully, the Kiwis recognized the draconian nature of this policy, and the resulting uproar forced the plans to be shelved. Tech giant Google and New Zealand's second largest ISP both refused to implement the policy because it would undermine the "incredible social and economic benefits of the internet." Canada must retain it's fundamental legal framewor—guilt by accusation is no basis for a democratic society ruled by law. Instead, a notice-and-notice process by which ISPs and other neutral intermediaries simply pass along both content and complaints of copyright infringement—the infringer must be held accountable for their actions, not the intermediary. Furthermore, notice and takedown provides a massive incentive for abuse of the process, which is demonstrated on a nearly monthly basis in the United States. The EFF have done excellent work in tracking these abuses and proposing solutions, and suggests that the US move away from the notice-and-takedown to a notice-and-notice approach due to rampant problems.

Another problem with notice-and-takedown is sending bad notices: the incentives to take down are *massive*, while the penalties for abusive notices are simply factored into the operating costs of giant corporations which are generally immune from counter-actions because of the massive disparity in resources between the copyright holder and the accused copyright infringer. Even worse, much of this is now migrating away from the minimally-fair legal processes into voluntary detection and takedown schemes where not even the minimal user protections are available. This is even more worrying because there is no recourse at all.

In this way, much legitimate speech has been taken down, and because of the various hurdles to users exercising their legal rights (whether a lack of knowledge, cost, or time for legal proceedings... the list goes on), the speech stays down. This chilling effect might be acceptable South of the border, but hopefully Canadians, including our politicians, take free speech more seriously than that.

As Michael Geist points out, Notice-and-notice balances user privacy, copyright holder rights, and free speech, and as outlined in Bill C-60, this would be a good solution for Canada.

3.6 The dumb pipe

Internet intermediaries, whether ISPs or other service providers (such as wiki or forum providers), must be protected from liability when their users infringe copyright. A notice-and-notice process (not the notice-and-takedown process which has been so abused in the US) would suit Canada's purposes best by allowing parties to the dispute to deal with one another without introducing huge incentives for abusing notice-and-takedown provisions, as we've seen in the US.

However, this relies upon the internet being a dumb pipe. The principle of net neutrality is critical for keeping Canada competitive in the global economy, and for the success of the internet writ large.

3.7 The ACTA treaty

International treaties are not a way to legislate domestic policy. It is of grave concern to myself—and, I suspect, many other Canadians—that this treaty could require Canada to enact legislation which is not supported by the Canadian people. It is critical that our domestic reforms take place first, and any international treaties to be signed or ratified are done so afterwards, and in line with the priorities Canada has identified through this process of consultation, proposing and adopting legislation.

The ACTA treaty is of grave concern to producers of copyrighted works such as myself. Being involved in "free culture" and FLOSS projects, I need the ability to waive or release the rights granted to protect my creative works. ACTA threatens that process by giving broadcasters copyright-like rights over works to which they do not hold *real* copyright. This spells disaster for innovation and creativity by subverting copyright for the benefit of broadcasters instead of the producers of creative works.

These plans also pose massive threats to the privacy and freedom of Canadians through provisions for warrentless *ex officio* searches without probable cause, surveillance of online activities, possible filtering of online content, protection of DRM from Canadians instead of protection of Canadians from DRM, and enforced incompatibility of technologies. This proposed treaty is directly contrary to the interests of Canadians. A simple solution would be to simply remove the internet provisions entirely, along with protection for DRM technologies.

Furthermore, the secrecy surrounding this treaty is troubling. Luckily, some documents leaked so Canadians and other citizens whose representatives haven't seen fit to share the policies being decided upon on their behalf can see the plans. Luckily the negotiations are not yet complete, but I again urge that the internal copyright reform process be undertaken and finished before the ACTA treaty is signed—and in fact, if the final product looks anything like the leaked plans, the treaty should of course not be signed at all.

4 Conclusion

There are several key issues I've touched on:

1. Copyright laws must ensure that personal copying, and interoperability between technologies and through time are clearly legal;

2. DRM is an unacceptable threat to freedom and privacy in Canada and we should be protecting Canadians from DRM instead of protecting DRM from Canadians;

3. Personal copying provisions must be broad as well as technology- and format-neutral, lest we criminalize the entire country or get stuck with out-of-date legislation;

4. Fair dealing should be replaced by a broader fair use doctrine which supports the full range of free speech Canadians engage in;

5. Crown copyright should be abolished, and copyright terms must not be extended; and

6. Guilt by accusation is no way to run a democratic nation–a notice-and-notice process for infringement complaints is fair and effective.

Again, thank you for reaching out to consult Canadians on this critical matter. I look forward to seeing new rules which strike a good balance between the protecting the public interest and protecting the rights of copyright holders. Thank you for your consideration of my views.

Mike Doherty