

Copyright in International Agreements: a Canadian Perspective

International treaties that address copyright issues are not entirely new. The Berne Convention – an international treaty that defines minimum copyright protection around the world - came into effect more than 50 years ago. What is new is that copyright is now being negotiated as part of a larger movement to remove barriers in international commerce. This is a very strong movement and countries are under some pressure/obligation to join. Since this is a negotiation process, negotiators may well trade-off certain benefits in the interests of other gains.

International agreements aim to harmonize the treatment of copyright across international borders and thus they impact directly on domestic copyright legislation. Countries that ratify international treaties may be required to change existing national laws, to put aside certain principles on which their laws are based and to make these changes a priority. To ensure that this happens, agreements usually include certain economic enforcement measures.

This presentation will provide:

1. An overview of the international copyright agreements
2. The organizations involved and the process that creates these agreements.
3. A look at Canada's current legislation and how libraries have implemented it
4. Where Canada is in terms of copyright reform and compliance with international treaties

There are a complex number of organizations and types of international agreements.

WIPO

- Part of the U.N. and located in Geneva, Switzerland
- 179 member countries
- Administers 23 international treaties that concern aspects of intellectual property protection
- Responsible for 1996 WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty

World Trade Organization

- Created in 1995 and located in Geneva, Switzerland
- Administers trade agreements among the more than 140 member countries, settles trade disputes, assists developing countries with trade policies.
- Member countries agree to abide by rules and respect more than 30 agreements.

GATS (General Agreement on Trade in Services)

- WTO-administered agreement that aims to remove barriers in competition in the services sector.
- Governments may choose the degree to which they apply certain GATS obligations. GATS "should not" apply to publicly funded libraries because it excludes services provided "in the exercise of governmental authority". But libraries should be wary.

TRIPS (Trade Related Aspects of Intellectual Property)

- joint WTO/WIPO agreement that sets out basic trade principles and provides for effective enforcement measures for IP rights.

- The agreement recognizes important exceptions for libraries.

How is international law made?

There are four well-defined stages in this process:

1. Deciding to negotiate

- may be a lengthy process; opportunities for formal and informal stakeholder input

2. Negotiation

- may take years and usually progresses through stages

3. Concluding negotiations

- Much last minute activity; most difficult issues are left to the last

4. Implementation

There are another four stages before countries fully implement the terms of an agreement:

- Adoption – negotiating parties agree to make the agreement open for signature and ratification
- Signature – countries become parties to the treaty
- Ratification – agreeing to be bound as a party to the treaty
- Entry into Force – usually agreements come into force when a specified number of countries ratify them. The treaty is in force only for those countries that have ratified it.

Library groups need to understand the issues and be visible and heard at all stages when input is requested as their governments go through the process of negotiating agreements. Associations that act together have more profile and a stronger voice. In Canada, the national public library associations and the research libraries association have responded to all calls for consultation and feedback on copyright issues, particularly those related to WIPO. A recent US example is the communication to WIPO and the US Patent and Trademark Office by the five major US library groups. The five associations condemned the cancellation of a meeting to discuss IP issues in open and collaborative information dissemination models for the development of public goods.

Canada is in the Implementation stage in this process of ratifying the WIPO Copyright Treaty. The following slides highlight some aspects of Canada's current copyright legislation, how certain clauses have been implemented and the challenges that the WIPO agreement presents to Canadian legislators and the library community.

Canada's current copyright legislation

Canada's Copyright Act was first drafted in 1921 and came into force in 1924. Revisions have been made through the years, the most recent in 1997. The approach adopted by legislators has been that the Act is a tool that promotes both the creation and dissemination of works and preserves a balance among creators, intermediaries and users. An important public policy objective is that the law should promote access to information by and for Canadians. Currently, access is guaranteed through simple rights clearance mechanisms, the establishment of copyright collectives and certain exemptions for schools, libraries, archives and museums.

Canada is a signatory to the Berne Convention. Beginning in 1988, Canada has amended its Copyright Act so that it is in-line with two international agreements – Canada-U.S. Free Trade Agreement and the North American Free Trade Implementation Act. In 1997 Canada signed the WIPO Treaty but has not yet ratified it. To do so, Canada needs to revise its copyright legislation.

Canada is also a member of the Free Trade Area of the Americas (FTAA), Negotiating Group on Intellectual Property that is pursuing efforts to achieve harmonization on intellectual property issues, including copyright. January 2005 is the deadline for concluding the negotiations with the 34 participating countries in North and South America.

Current ILL and Document Delivery in Canada

The current legislation attempts to be technology neutral but was drafted in the context of a print environment. Where it does specifically address digital content and a networked environment, it does so in a restrictive sense. For libraries involved in ILL activities, the Act states that “the copy given to the patron must not be in digital form.” To comply with this requirement, many Canadian libraries are sending copies of articles to other libraries in electronic formats (Ariel and email) with the provision that the library receiving library the copy print the item for the patron.

The requirement that the end user receive a printed copy has also shaped how CISTI has moved forward in offering web delivery of articles to clients. Beginning in Dec. 2003, CISTI will offer a secure desktop delivery option based on the print copies of journals. To comply with copyright law, CISTI has signed individual agreements with publishers. In these agreements, CISTI agrees to use encryption technology that limits viewing and printing privileges and disables the documents after use.

Another feature of Canadian copyright legislation is that the ILL exemption for libraries applies to libraries in not-for-profit organizations. Copyright must be charged to libraries in for-profit companies. CISTI and two other federal department libraries have an agreement with a copyright collective (Access Copyright) to charge a copyright fee and forward these fees to the collective. Access Copyright is responsible for forwarding fees to other national copyright collectives (CCC, in particular) for distribution to publishers in those countries.

It is worth noting that copyright term in Canada is life of the author plus fifty years. It is not clear whether this will be changed when new legislation is drafted. In light of this term of copyright, CISTI has made a policy decision that any publication more than 120 years old is in the public domain and will not be charged copyright.

Copyright Reform

Ratification of WIPO is one aspect of the government’s agenda to revise the Copyright Act. Digital copyright concerns and our international obligations are a major focus of copyright reform in the short term.

There are two federal departments directly responsible for changes to the domestic legislation – the Dept. of Industry and the Dept. of Canadian Heritage. Because Canada has ratified an international treaty on copyright, the Dept. of Foreign Affairs and

International Trade is also involved. The Department's of Industry and Canadian Heritage define the objectives of the reform process as being economic (to create opportunities for Canadians in the new economy and to assure a strong Canadian presence on the Internet); cultural (to stimulate cultural content and diversity); and educational (to enrich learning opportunities).

In 1998, the departments commissioned two Canadian copyright experts to provide their opinions on what would need to be changed in the Act for Canada to ratify the WIPO Treaty. The consultants concluded that the Act provides an adequate framework for most of the treaty provisions. Two specific amendments would be required to ratify Articles 11 and 12:

- Obligations concerning technological measures (Article 11). The treaty calls for effective legal remedies against the circumvention of effective technological protection measures (TPMs) used by copyright holders to protect their works. Canada will need a special provision in the Act to comply with this. The consultants point out that, in drafting the provision, legislators will have to decide whether to identify as an infringement the "devices" to circumvent protection, the "conduct" relating to circumvention, or both.
- Obligations concerning rights management information (Article 12). The treaty calls for remedies against removing or altering electronic rights management information, or knowingly to distribute works where rights management information has been removed or altered. The consultants suggest a new provision with wording taken largely from the Treaty.

The Copyright Policy Branch also commissioned a detailed an in-depth study in year 2000 on how to implement TPMs in the context of Canadian copyright law. The study concludes that the government should wait to see how legislative reforms in other jurisdictions (especially the US Digital Millenium Copyright Act) are accepted and monitor how the technology evolves. One of the tenets of Canadian copyright law is that it is technology neutral. Neutrality will not be respected if anti-circumvention protection for TPMs is written into the Act.

In 2001, the departments launched the reform process by issuing a paper called a "Framework for copyright reform". This document lists the issues to be addressed. The government sees copyright revision as a long process and plans to release more narrowly focused legislative packages in more frequent intervals. The approach will be to act carefully, learning from the experiences of other countries. The two departments acknowledge the dilemma in knowing when, how and to what extent to intervene when the technological environment is changing so rapidly.

Following the framework document, government released another paper - "Consultation paper on digital copyright issues" - and asked Canadians to respond. The paper reflects the government's commitment to move quickly on Internet issues. There was a large public response to this paper - over 600 submissions from individuals and organizations. Submissions were posted to the Copyright Reform web site and responses were summarized in a follow-up focus paper. The departments also held face-to-face consultation meetings in 6 cities across Canada in Spring 2002.

The question of legal protection for technological protection measures drew a flurry of responses. A colleague attended one of the face-to-face sessions and reported that the discussion around the anti-circumvention issue was very animated. Most respondents argued against protective measures. Library associations, archivist and museum groups, software producers and some artists were in this camp. Most opposed protection for acts and devices, or expressed concern that there be very firm and clear exceptions for certain types of activities related to reverse engineering, encryption studies and educational uses.

The government's perspective, as reflected in a focus paper prepared following the public meetings, is that the Copyright Act is a tool that assures balance among stakeholders. There are limitations on copyright protection that serve public policy objectives. The departments feel that it is appropriate to provide a sanction against an act of circumvention, where the act is motivated by an infringing purpose. However, a prohibition against the manufacture and distribution of devices goes beyond the scope of copyright protection. The departments indicate in the focus paper that by legislating against the act of circumvention and not the devices themselves, Canada will be meeting its international obligations.

There has been much less of a reaction to the issue of rights management information. The majority of respondents were in favour of WIPO-compliant information protection. Government supports defining rights management information as set out by WIPO and protecting information as defined in the WIPO Copyright Treaty.

Lastly, in Oct. 2002, the departments issued "Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act". This document is an analysis of the present legislation. It identifies sections of the Act that need revision and sets priorities on work that is required. Revisions that would make the Act compliant with international treaties are among the first group of changes.

The report is with the Standing Committee on Canadian Heritage, which must review it and report back to Parliament. As part of its review function, the Committee has asked for input from individuals and groups. Responses must be submitted by September (2003). The expectation is that there will be a report to Parliament in Spring 2004 followed by draft legislation.