

## What next for Copyright Reform?

Friday, 21 December 2007

In the wake of the delay of the government's copyright bill and the many interesting press accounts that have followed, it's probably a good time to sit back and reflect on where to go next. One idea that has been picking up support is the call for a Public Inquiry, or Commission, on copyright legislation. While public inquiries are often thought of as proceedings that follow instances of official wrong-doing, the process could also be considered in the positive sense of contributing to policy formulation in a more transparent and thoughtful manner.

Earlier this month Wayne MacPhail had a piece in Rabble News in which he warned against some of the dangers in mirroring the policies of the DMCA. Pointing to the broad opposition to these policies, he suggests four factors that account for why the government would be taking these positions. To quote MacPhail:

First, because of pressure from the U.S. government. As Deirdre McMurdy has reported in the Ottawa Citizen, U.S. Ambassador David Wilkins has met with both Prentice and Heritage Minister Josée Verner about the issue and clearly wants Canada to tow the American line.

Second, because of lobbying from U.S. and Canadian publishers, who have been loose with campaign funding for folks who they need in their camps.

Third, due to pressure from U.S. companies like Microsoft, who are tying Canadian job creation to tougher intellectual property controls.

Fourth, because Canada has ratified the WIPO (World Intellectual Property Organization) treaty, though it has yet to implement it. However, an Ottawa-based copyright lawyer Howard Knopf points out, indications are that the proposed changes to Canada's copyright law go beyond what WIPO requires.

MacPhail concludes that "[n]one of those reasons have much to do with consumers. They are all about the strength of lobbyists, the Harper government's desire to give the U.S. what it wants and to make Canada a doormat for American industry and its hamfisted, litigious ways." This analysis is a good summary of many of the points that have been raised by other commentators and follows from an earlier piece where MacPhail argued that DRM is counter-productive, impedes the usefulness of new technologies, and should therefore be avoided.

In her posting entitled *The Minister's Misconceptions*, Laura Murray (with whom I have co-authored *Canadian Copyright: A Citizen's Guide*) makes a similar argument about the government's apparent misplaced priorities:

Today, Industry Minister Prentice may introduce new copyright legislation. Listening to the Minister's meet and greet with constituents in Calgary on the weekend was predictably disappointing: it was clear that Prentice hasn't even started to think about what ordinary Canadians need from copyright. (I guess he didn't read the copy of the *Citizen's Guide* we sent him!) He's concerned about "international criticism" of Canada's lack of compliance with the WIPO treaties. He says we have to "update" our law which is "over 100 years old." He's worried about downloading. He says that the CEOs of high-tech companies want his legislation. Nothing whatsoever about consumer rights, education, or the arts. Innovation may be a high priority for this government on paper, but we're certainly not getting it in their copyright thinking.

Jeremy DeBeer has posted some thoughtful end-of-year reflections in the form of 5 copyright resolutions to follow in 2008:

1. Listen more. The Government must meaningfully consult Canadians about what we need from copyright reform. I've got some suggestions for how to do so. [More](#)
2. Lose weight. The Copyright Act is already too fat. Follow my light and simple recipes for a healthy law that will survive well into the future. [More](#)
3. Keep promises. And I mean to the electorate, not the ambassador. Repeal or reform the private copying levy and replace it with a fair use regime for consumers. [More](#)
4. Boost business. Paracopyrights prop up antiquated monopolies and risk stifling innovation. Avoid anti-circumvention laws, thus supporting Canadian creators and entrepreneurs. [More](#)
5. Show leadership. Don't be bullied into bad policies. Lead by example with legislative models that other countries could be proud to emulate. [More](#)

These concerns expressed by MacPhail, DeBeer, Murray and others might be best addressed through some sort of public inquiry process. Howard Knopf has been calling for a public inquiry process for some time now (see [here](#)). The idea has picked up considerable steam in the last few days with support coming from those with varying perspectives on copyright issues (see comments from John Deegen , Christopher Moore, Russell McOrmond, and Michael Geist).

In a recent post, Knopf argues that "[s]uch a commission could solve a major problem for the Government by taking care of an apparently intractable structural problem that has eluded successive governments and ministers for years, which is how to handle the copyright file within the departmental framework."

Knopf's observation that this commission could have much credibility with many stakeholders is right on the mark. Rather than rely on a system that is driven by lobbyists, diplomatic pressures, and other closed-door consultations, copyright policy formulation should be brought out into the open for the public to see. This inquiry should be called for prior to the tabling of any further legislation purporting to implement the WIPO Treaties.

Its mandate should include an examination of the advantages and disadvantages of implementing the WIPO Treaties as a threshold issue. The sorts of problems and unanticipated consequences caused by the DMCA need to be carefully reviewed and considered PRIOR to implementation, not as an afterthought. The question of what changes to the Copyright Act would be needed in order to implement the treaties would follow should it be called for. In this respect I disagree with Christopher Moore's argument that implementing the WIPO minimum provisions should precede the inquiry.

The inquiry might also consider how to simplify the Act and how it could better reflect the policy directions set forth by the Supreme Court of Canada. Could an explicit recognition that fair-dealing should be flexible and purposive obviate the need for many of the special exemptions (that were added in 1997) that seem to be getting dated and stale?

Other issues could include the reform of Crown Copyright, statutory damages , moral rights waivers, as well as better addressing the special needs of persons with perceptual difficulties and making it easier to clear rights to "Orphan Works" where the owners are not-locatable.