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ABSTRACT

The Association of Universities and Colleges of Canada's comments on proposed changes in Canadian copyright law, and further changes implied by or caused by those revisions, are presented. The association argues first that since the proposed revisions are being revealed in stages, legislative committee work should be suspended until all of the planned revisions are made known. Further, it comments on the negative impact on education and scholarship that can be foreseen in certain revisions already proposed, including the general costs of and restrictions on information dissemination imposed by the new regulations and the specific regulation of the right to public exhibit, moral rights of the creator, protection of computer programs, use of a work to the prejudice of the author, and four issues affecting collective copyrights: fair use, a registration system, copyright societies, and the proposed mechanism for licensing creations. Some assumptions underlying the proposed revisions are questioned, particularly concerning the comparability of creations in the college and university community with those in other aspects of society. Some regulatory recommendations are made. (MSE)

A SUBMISSION ON PROPOSED BILL C-60 "AN ACT TO AMEND THE COPYRIGHT ACT AND TO AMEND OTHER ACTS IN CONSEQUENCE THEREOF"

FROM THE
ASSOCIATION OF UNIVERSITIES AND
COLLEGES OF CANADA

TO

THE LEGISLATIVE COMMITTEE ON BILL C-60

1 OCTOBER 1987

INTRODUCTION

The Association of Universities and Colleges of Canada (AUCC) is a national voluntary association of Canadian degree-granting institutions. Among its 83 institutional members are a variety of university-level institutions from the large multi-disciplinary university to the small liberal arts college. The AUCC also has 31 associate members that are national organizations representing major academic or administrative divisions or interests within the Canadian university community.

The revisions to the Copyright Act are being revealed in stages. We believe that many of our concerns may be addressed in subsequent proposed legislation which may improve or worsen the situation for universities.

We ask, therefore, that the committee suspend its work until all of the proposed revisions are known, enabling the community to make a more meaningful contribution to the debate.

Should the House Committee be unwilling to accept the above recommendation, we would like to proceed to make the following observations based on the revisions that have been proposed to date.

This submission deals primarily with the negative impact that the proposed revisions contained in Bill C-60 will have on scholarship and education. Although the economic impact of Bill C-60 cannot be deemed negligible, it will not be addressed in this submission because the magnitude of the costs cannot yet be assessed with precision.

COPYRIGHT AND THE UNIVERSITY COMMUNITY IN GENERAL

The Canadian university community will be directly and greatly affected by revisions to legislation that is designed to stimulate and protect cultural and intellectual creations. Members of the university community are both substantial users and substantial creators of intellectual and cultural properties.

Universities are complex institutions whose primary mission is the development and communication of knowledge in all fields and disciplines. In essence, the university is:

> "... the corporate realization of man's will to know and understand. It is ... committed in the long term to extending and communicating man's understanding of matter...; it is committed to extending and communicating man's understanding of the nature of life...; of the roots and forms of political ideologies and power...; of the behaviour of man in families, cities, organizations; of man's sustaining imagination as expressed in literature, drama, philosophy and religion, about the shape of society as it has been and might become... It is committed to building a capital stock of knowledge from which industry draws in conceiving technologies, from which nations draw in adaptive response to crises, and from which individuals draw in comprehending their place and times..."[1]

The Canadian university community can only achieve its mission if each institution has ready access to the various methods of communicating and preserving knowledge and creativity. Universities must also be able to promote the creation of intellectual properties that will not only communicate the results of the search for knowledge but will also preserve acquired knowledge. While the free flow of knowledge is crucial to our society, one must recognize that those individuals who make an important investment in the creation of cultural works are entitled to a reasonable return by way of royalties.

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[1] Association of Universities and Colleges of Canada, Where do Canadian universities stand in public priorities?, discussion paper prepared by an ad hoc committee of the Board of Directors, Ottawa, 1981, p. 1

The strengthening and expansion of copyright protection to ensure the economic viability of creations addresses but a portion of those works that are protected under the legislation and its proposed revisions. Many of the rules designed to protect the entertainment and information industry will have a restricting impact on the diffusion of knowledge. This is particularly so in the case of those creations which were not primarily developed for the purposes of financial gain.

Admittedly, copyright is the cornerstone of the protection afforded to the creators contributing to the development and maintenance of a Canadian culture. Canada's copyright legislation, however, is not limitted to Canadian creators and extends to all those creations which benefit from the protection of our domestic legislation through international conventions. The proposed revisions will generally afford substantially greater protection in Canada to foreign creators than the protection offered to Canadian creators by the domestic laws of foreign jurisdictions. In excess of 78% of royalties generated from copyright are paid to foreign rights owners, if radio and television are excluded, while the flow of foreign royalties to Canadian creators is substantially lower.

We can anticipate that, unless there is off-setting funding, most of the additional costs to universities will be met by a more selective approach to the use of cultural and scholarly material. Costs that are incurred will be passed on to students at a time when they are experiencing increased debt-loads on graduation and to researchers whose research support has been eroded in recent years and much of the revenue generated from these additional costs will benefit foreign copyright owners.

It is unfortunate that in the process of the revision of copyright in Canada, its citizens stand to lose the benefits of the educational exemption found in the Paris text of the Berne Convention.

To attract copyright protection, a creation need only be original and fixed. The additional criterion of nationality of the creator or first publication in a convention country is defined by Canada's international obligations. A creation need not be of artistic or cultural value to gain property right protection as is

now required by the Copyright Act. This fact is highlighted by the proposal that an "architectural work of art" no longer needs to exhibit an "artistic character and design". Considering the extensive definitions of works protected by the legislation, virtually all creations, except those included within patents, trade marks or industrial designs, are protected.

The definition of copyright contained in section 3 of the Copyright Act does not mention the words "royalties" or "economic return". The right afforded by the copyright legislation is the sole and exclusive right to produce or reproduce, to convert, adapt, copy or publish. If section 2 of Bill C-60 becomes law, the additional right to prevent the public exhibition of artistic works will be included in the definition of those rights. Any discussion of copyright protection must be made with the full realization that the rights that are protected are in fact the rights to prevent the public from benefitting, in whole or in part, from the cultural creation. The protection or right afforded by the Copyright Act is not related to economic potential of the creation. The protection of the economic interests of the creator is merely the fall-out of the ability to prevent public access to the creation.

We question, therefore, the advisability of protecting as a property right the ability to prevent public access to cultural material. Recognizing that Canada has assumed international obligations which prevent the denial of those property rights, we seriously question any extension of the protection beyond those required to meet Canada's international obligations.

SPECIFIC COMMENTS ON BILL C-60

The following comments address specific proposals contained in Bill C-60. These are made with the appreciation that property rights extended to those intellectual creations that cannot be classified as patents, trade marks and industrial designs need only meet the requirements of originality and fixation without requirement of artistic or cultural value.

Right to Public Exhibit

Section 2 of Bill C-60 proposes to amend section 3(1) of the Copyright Act to recognize a right of public exhibit, except for the purposes of sale or hire, of artistic works created after the coming into force of the amendment.

Many of our institutions possess collections of works of art and some have more formal art galleries.

The recognition of the right of public exhibit, we fear, will likely result in a paper trail that will inhibit the acquisition and disposition of works of art. The ability of the creator to deny the right of public exhibit to a particular gallery could have serious effects on the ability of universities to obtain loans of works of art for particular exhibits. We stress here that our concerns are principally related to the public access to cultural heritage which is represented by works of art and not necessarily to the increased costs of operating and maintaining collections. If the objective is to assure a "public exhibit royalty" to the creator of the work of art, that objective, we suggest, is better achieved through contractual rights rather than by the use of property rights where economic benefits are a fall-out and not a primary purpose.

We would suggest that the proposed recognition of an exclusive right in the creator to authorize the public exhibit of artistic works, except for the purposes of sale or hire, should not be protected as a property right. It should be left to the domain of contractual laws.

Moral Rights of the Creator

Section 4 of Bill C-60 proposes the introduction of a new section 12.1 to the Copyright Act prescribing moral rights of the creator. One aspect of these moral rights is the right to remain anonymous.

In its brief to the Sub-Committee of the House of Commons on the Revision of Copyright, the AUCC argued in favour of the recognition of the moral rights of paternity and integrity of the work.[2]

Intellectual creations form an important part of the society in which we live and those intellectual creations tend to shape that society. We submit, therefore, that there is a fundamental danger in protecting as a property right the true identity of creators which, if unpublished with the authority of the creator or his heirs, becomes eternal. Society has a right to know who is responsible for the creation of the ideas and policies which guide it. Unfortunately, if this proposal is adopted into law, there exists the real danger that the rest of the world will be capable of identifying our cultural creators, while Canadian citizens will not be able to benefit from the same knowledge.

We suggest that the introduction of the right to remain anonymous as a property right is an unwarranted extension of those rights. Anonymity, if it is to be protected, should be a matter of contract.

We also suggest that if privacy is the ultimate purpose of this proposal, it should be addressed through privacy legislation rather than copyright.

Computer Programs

Section 5 of Bill C-60, when combined with the definitions in section 1(2) and (3) of the Bill, proposes to protect computer programs as literary works.

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[2] Association of Universities and Colleges of Canada, Comments on the White Paper on Copyright entitled From Gutenberg to Telidon, to the Subcommittee of the Standing Committee on Communications and Culture on the Revision of Copyright of the House of Commons, Ottawa, 1985, p. 4, 5

In its submission to the Sub-Committee on the revision of Copyrights, the AUCC proposed that copyright protection be extended to computer software not only as a stop-gap measure to protect a growing industry but also because our larger trade partners have also adopted this form of protection[3]. In the same submission, we further suggested that copyright protection is inappropriate for computer software because of its importance to an information society. We also proposed that the government of Canada immediately consider a new form of protection for computer software which would take into account the particularities of this type of intellectual creation.

We again urge the government of Canada to consider those proposals in Bill C-60 which extend copyright protection to computer software as an interim measure and proceed, as soon as possible, to develop a specific form of protection for this aspect of the industry.

Use of a Work to the Prejudice of the Author

Section 6 of Bill C-60 proposes the introduction of a new section 18.2 to the Copyright Act. This section would make it an infringement if a work is used "in association with a product, service, cause or institution" to the prejudice of the honour or reputation of the author.

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[3] Association of Universities and Colleges of Canada, Comments on the intellectual property protection of computer programs as discussed in the White Paper on Copyright entitled From Gutenberg to Telidon, to the Subcommittee of the Standing Committee on Communications and Culture on the Revision of Copyright of the House of Commons, Ottawa, 1985, p. 1, 2

We feel that the wording of this section is too broad and lacks necessary precision. The choice of the words "in association with" implies that the unintended inclusion of any work -- such as a photograph depicting a building in the background, a student holding a book or a picture taken in an art gallery-- could conceivably constitute the use of a work "in association with". Furthermore, the causing of prejudice to the honour or reputation of the creator can often only be assessed with hindsight rather than with foresight, severely inhibiting an institution's ability even to communicate with the public those activities which are undertaken within the institution.

We propose that the section be reworded to state that the use of the work to promote the product, service, cause or institution amounts to an infringement. The concept would then apply only to those situations where the work is in fact appropriated to a purpose which might not have been anticipated by the creator and for the benefit of a product, service, cause or institution.

Collectives - Fair Use

Section 14 of Bill C-60 would introduce into the Copyright Act provisions for the "collective administration of copyright". The proposals contained in the new sections 50.1 to 50.8 inclusive differ substantially from those provisions dealing with performing rights societies.

The creation of so-called collectives or licensing associations is touted, in background documents leading up to Bill C-60, as the answer to the reinforced copyright protection proposed in the revisions. It is assumed that these collectives will issue "blanket licenses" to users. Bill C-60 does not assure that collectives will become a reality nor does it mention the existence of "blanket licenses". Quite to the contrary, it provides for individual bargaining between the user and the collective with only limited jurisdiction of the Copyright Board.

The AUCC suggests that of all of the alternatives that could have been provided for the increased protection of creators, the proposals to create the collectives -- as contained in proposed sections 50.1 to 50.8 -- are the most unfortunate.

The White Paper proposed the introduction of the concept of fair use as opposed to the existing concept of fair dealing. That proposal would have greatly alleviated the concerns of legitimate scholarly activity related to the use of copyright material. Unfortunately, that concept was rejected by those responsible for the framing of Bill C-60.

We propose that the mechanism of collectives is insufficient to protect the legitimate users in the academic milieu and that the concept of fair use, as described in From Gutenberg to Telidon, be adopted.

Collectives - Registration System

In its submission to the Sub-Committee, the AUCC proposed that economic rights be subject to a registration system from which the identity of the real copyright owner and the claim to an economic return could be ascertained. The concept of ascertaining property rights and the assignment of those rights is fundamental to the concept of property law and only copyrights appear to escape that concept in our general body of laws. By its international obligations, Canada is only bound to extend the copyright protection afforded to its national creations to those creations of signatory countries without formalities.

We propose that the protection of economic rights be associated with registration, thus allowing the users to ascertain who is the owner of copyright.

Collectives - Rights' Societies

> "Naturally, many witnesses before the Sub-Committee were not concerned with a merely symbolic statement about the rightful place of creators in Canadian society. The Sub-Committee shares with those witnesses the conviction that such symbols have meaning only if they are reflected in the income-earning potential of individual authors, composers, performers, and the many other creative individuals working in Canada."[4]

It is evident that during the whole process leading up to Bill C-60, the Government of Canada assumed that the sole incentive for the creation of cultural properties is the assurance of an economic return and that, if the revisions were to protect the economic interests of creators, the results would stimulate cultural creation. The establishment of collectives would ensure a greater return of royalties to the creators and would afford consumers of cultural creations access to those works. These assumptions may be applicable to the entertainment industry and may also extend to the educational publishing industry.

We submit that the same assumptions are not applicable to a substantial portion of those creations which are fundamental to research in the humanities and social sciences -- such as correspondence, diaries and "unpublished" documents -- so that the duration of copyright protection never begins to run under the terms of the existing Copyright Act. Without the objective of assuring an economic return, it is unrealistic to expect that the creator will ever become a member of a collective or assign copyrights to it to licence the use of the creation.

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4. Canada, Parliament, House of Commons, Sub-committee on the Revision of Copyright, A charter or Rights for Creators, report of the Sub-Committee on the Revision of Copyright, Standing Committee on Communications and Culture, Ottawa, the Sub-committee, 1985, p.4

Current performing rights societies continue to exist and are required to publish their tariffs annually. Any user is entitled to perform a creation contained in their repertoire on payment of the published tariff. Failure to publish the tariff prevents the prosecution of an infringement action.

The proposed collectives in sections 50.1 to 50.8 inclusive are dramatically different from performing rights societies. Each transaction is subject to an individual negotiation with the collective concerned. Not only are the costs to the user subject to this individual negotiation but so is the very agreement to issue or not to issue the licence. The jurisdiction of the Copyright Board is limited to the establishment of the level of royalties to be paid by the user. While we note a substantial difference between the French and English text of proposed section 50.2 as to the conditions required to invoke the powers of the Board, neither version confers upon the Board the power to order the issuance of a licence. Left to the collectives, this discretion places the users, especially those who criticize works of culture, at the mercy of the collectives.

We suggest that the licensing bodies referred to in proposed sections 50.1 to 50.8 should be subject to the same rules that apply to performing rights societies, as described in Bill C-60.

Collectives - Proposed mechanism

Furthermore, there is no limit to the number of collectives per area of cultural activity. The proliferation of collectives within an area of cultural creations, combined with the inability to verify the quality of the repertoire owned by these collectives and the uncertainty of acquiring consent to the licence, fails to protect the rights of consumers. In the AUCC submission noted above, we suggested that there be only one collective per area of copyright creation.

Without this protection, it becomes virtually impossible to ascertain the validity or even the quality of any licence that is obtained and for which payment has been made. Similarly, without some assurance that the collective licenses will protect the licensee from fugitive creators, it may well be that an institution or a user in possession of all available licenses offered by the collectives will still be vulnerable to an infringement action by a creator who has not elected to belong to one of these licencing bodies. Consumer protection in Canada has gone too far to justify the introduction by legislation of the concept of an unwarranted property license.

We submit that if the establishment of collectives is to be viewed as a reasonable alternative answer to the increased protection to be offered to creators and to the rejection of fair use as a defence, the following principles must be introduced in the concept of those collectives:

- there must be only one collective for each area for which copyright protection is afforded;

- the collectives must be required to publish the annual tariff and tendering of the tariff should prevent an action for infringement;

- the collectives must be required to offer "blanket licenses" to users of cultural creations;

- once a blanket licence is obtained, the user should not be required to provide extensive reporting of the use made of the licence;

- once a blanket licence is obtained, any claims from copyright owners should be limited to a claim against the collective and not against the licence holder.