

Frequently Asked Questions

Amendments to the *Copyright Act*

Q1. Why is the *Copyright Act* being amended?

A. Canada's *Copyright Act* needs to be updated and clarified to better address the challenges and the opportunities presented by the Internet and digital technology in general. In accordance with the agenda for copyright reform set out in *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (the "Section 92 Report"), the bill addresses the short-term priority issues relating primarily to the Internet. These amendments will: enhance protection of works in the online environment, both to address infringement and to enable the development of new business models; enable use of the Internet as a tool for learning and research; and clarify Internet service provider (ISP) liability. The enhanced protections will be provided through the implementation of the obligations set out in two treaties that were concluded in 1996 at the World Intellectual Property Organization (the "WIPO Treaties").

Q2. Has the Government thoroughly consulted on the issues in the proposed bill?

A. Copyright law is complex and contentious, more than ever now in the Internet environment. Every country around the world that has introduced or contemplated measures similar to those proposed by the Government of Canada has struggled to address the Internet challenge. In 2001, the Government launched online consultations on four key issues addressed in the bill. Over 700 submissions were received as a result of these consultations. These were followed up by face-to-face consultations in six Canadian cities. With respect to the other issues, consultations were targeted to stakeholders that were most affected by the amendments under consideration. On the matter of the educational use of Internet content, extensive consultations were undertaken and a working group was set up with a view to reaching a consensus on the most pressing questions. Extensive policy, legal, economic and comparative research has also been undertaken to resolve the many outstanding questions.

Q3. What are the WIPO Treaties?

A. The treaties in question are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). They were concluded in 1996 at the World Intellectual Property Organization to address the Internet. Together, these treaties establish protections for authors, sound recording makers and performers of audio works. Canada participated in the negotiations and signed the treaties in 1997, signalling its commitment to the principles they embody, but has yet to ratify them. The treaties came into force in 2002. Canada will be bound when it ratifies the treaties. As of May 6, 2005, there were 52 members of the WCT and 49 members of the WPPT.

Q4. Will the Government be ratifying the WIPO Treaties as a result of this legislation?

A. Canada will be able to ratify the treaties once the *Copyright Act* has been amended to bring it into conformity with the treaties' requirements. The bill will implement all the rights and protections provided for in the WIPO Treaties. The Government will consider ratification of the treaties after the bill has passed. It is still necessary to analyze whether amendments will also be necessary to amend the private copying regime to bring the *Copyright Act* fully into conformity with the treaties. Public consultations on the private copying regime as a whole will be launched as soon as possible after tabling of the bill.

Q5. What is in this bill that will help copyright owners deal with the Internet environment?

A. Generally, the bill addresses the challenge of digital technology by implementing the provisions of the WIPO Treaties. In particular, rights holders will have an exclusive right to control the making available of copyright materials on the Internet. This will clarify that the unauthorized posting or the peer-to-peer (P2P) file-sharing of material on the Internet constitutes an infringement of copyright. The bill also contains legal protections for technological measures (encryptions, password requirements) and rights management systems containing information for the purpose of tracking uses of works. For example, the removal of or tampering with technological measures (TM) for the purpose of infringing copyright will itself constitute an infringement of copyright.

Q6. How does the bill address unauthorized P2P file-sharing? What will be the impact on individuals who share files?

A. The bill provides creators and other rights holders with additional tools to seek legal recourse against individuals engaged in P2P file-sharing or unauthorized posting of copyrighted material. Specifically, rights holders will have the right to control the making available of their copyrighted material on the Internet. It will also clarify that private copies of sound recordings cannot be uploaded or further distributed. Individuals may therefore be subject to legal action for their unauthorized file-sharing activities, but it will be up to rights holders to exercise their new rights. Even so, file sharing has remained a challenge in other countries that have implemented the WIPO Treaties obligations in this respect.

Q7. Is there a risk that protection of technological measures (TMs) will adversely affect users?

A. The protections for TMs contained in this bill will apply consistently with the application of copyright. That is, the circumvention of a TM applied to copyrighted material will only be illegal if it is carried out with the objective of infringing copyright. Legitimate access, as authorized by the *Copyright Act*, will not be altered. These measures will not affect what may already be done for the purposes of security testing or reverse engineering. Circumvention for the purposes of making private copies of sound recordings will not be permitted, however. The proposals have been developed so as to ensure that Canadians' privacy rights are not reduced or undermined.

Q8. Why are Internet service providers (ISPs) being exempted from potential copyright liability? What will ISPs be required to do?

A. ISPs will be exempt from liability for copyrighted material circulating on their networks over which they have no control or authority, i.e., when they act purely as intermediaries. Copyright liability will remain with those persons, including ISPs, who post or transmit copyrighted material without authorization. This approach provides legal clarity for ISPs so as to continue to encourage the availability of high-quality Internet services to Canadians at affordable cost. It is also consistent with the 2004 decision of the Supreme Court of Canada.

ISPs can play a significant role in curbing infringing activities of subscribers on those networks, however. This is important because very often they are the only parties who can help rights holders identify those who are alleged to be infringing copyright, and without whom rights holders could not properly enforce their rights on the Internet. The bill provides that ISPs be required to forward notices of claims of infringement from rights holders to their subscribers (a "notice and notice" requirement). Limited liability of information location tools (e.g. search engines) will also be included.

Q9. How does a "notice and notice" regime work? How will it help to curb the misuse of the Internet for infringing purposes?

A. Under the proposed "notice and notice" regime, an ISP will be required to forward any notice it receives from a copyright owner to a subscriber who is alleged to be engaging in infringing activities online. The ISP will also be required to retain, for a set period of time, information sufficient to identify the subscriber in question. Through this regime, rights holders will have a mechanism for notifying Internet users that their activities may be infringing the rights holders' copyright. In the event that such activities lead to litigation, the record-keeping requirement will better enable identification of the

parties alleged to be involved. In this respect, however, the regime will not require disclosure of the identity of a subscriber; in order to protect Internet users' legitimate expectations of privacy, a court order will be required.

Q10. Why is the Government not instituting a “notice and takedown” regime for ISPs (as other countries have done)?

A. A “notice and takedown” regime typically requires an ISP to block access to material upon receiving a notice from a rights holder that alleges such material to be infringing. The obligation to block access lies with the ISP whose facilities are being used to host the allegedly infringing material. Under Canadian law, the courts already have the ability to order the takedown of infringing material in appropriate cases.

A drawback of “notice and takedown” is that it typically applies only to materials posted on an ISP's facilities; it cannot cover P2P file sharing, arguably the most prevalent source of infringing material, since the files are actually located on the computers of the persons engaged in sharing. The proposed “notice and notice” regime will address P2P file sharing.

Q11. What is in this bill to ensure that users' interests are equitably addressed?

A. In addition to the clarification of copyright liability of ISPs, there are provisions that facilitate the use of digital technologies for educational and research purposes. Specifically, educational institutions and libraries will be able to benefit from digital technology to permit classroom activities to be conducted in remote locations and documents to be electronically delivered. To prevent abuse, the provisions will only apply if appropriate safeguards preventing the unauthorized transmission of works have been put in place. Should these safeguards prove to be ineffective, the educational institutions and libraries will not be able to benefit from these provisions until such time as their effectiveness is restored.

Q12. Why is it necessary to grant photographers copyright for their photographs? Are there special safeguards for consumers?

A. The author of a work is usually the person who creates it. Where the work is a photograph, the owner of the initial negative is deemed to be the photograph's author (though this is often the photographer in practice). With respect to commissioned photographs, the owner of copyright is the person commissioning the photograph, subject to an agreement to the contrary. The existing rules on photographs will be repealed to harmonize the copyright treatment of photographers with those of other authors. With respect to commissioned photographs, those who commission photographs for personal

purposes will be able to make private or non-commercial uses of the photographs unless they enter into an agreement to the contrary. Existing protections of personal information and privacy legislation at the federal and provincial levels will continue to apply, regardless of the ownership of copyright in commissioned photographs.

Q13. Why is the Government not following all of the recommendations in the Standing Committee on Canadian Heritage's Interim Report on Copyright Reform?

A. The Government is, in fact, following many of the committee's recommendations. The Government otherwise carefully considered the important work undertaken by the committee. As well, some of the recommendations made by the committee give rise to issues that the Government sees as best addressed in the medium-term review of copyright reform issues.

Q14. Which parliamentary committee will consider this bill?

A. The Leader of the Government in the House of Commons will make that decision in consultation with his counterparts on the opposition parties. The Government will seek to ensure throughout the legislative process that the proposed amendments benefit from a consideration of the full range of cultural and economic perspectives that should be reflected in modern copyright law.

Q15. Why is the issue of educational use of publicly available material on the Internet not being addressed in this bill? Why another consultation?

A. This has proven to be a very complex and contentious issue. Educational institutions seek clarity in the law in order to use so-called "publicly available" Internet material without worrying about whether that will result in copyright liability. Rights holders seek tools to enable them to be paid for Internet material that is intended to be paid for. It is difficult to know which material on the Internet is intended by rights holders to be freely used in an educational setting and which is not. Moreover, there has been no agreement on the criteria to be used to identify "publicly available" material, nor on how or when educational use of this material is to be permitted. Although some consultations have already been held on this issue, common ground between the concerned stakeholders has not been found. Further public input and consideration is required, and now that the bill has been introduced, the Government will work toward launching a consultation process as soon as possible.

Q16. Why is the Government not acting on the private copying issue?

A. In the October 2002, as part of the Section 92 Report on the Provisions and Operation of the *Copyright Act*, the Government identified private copying as a medium-term issue.

The Government intends to release a discussion paper on the matter as soon as possible.

Q17. When will the other copyright reform issues be dealt with?

A. Work is already underway on certain medium-term issues identified in the Section 92 Report.