



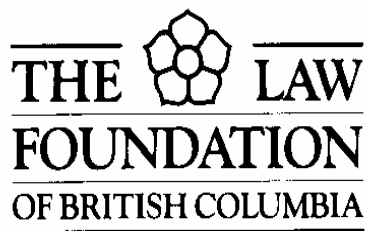
BC FREEDOM OF
INFORMATION
AND PRIVACY
ASSOCIATION

Submissions on Copyright Reform

**Submission to
The Consultation on Copyright Reform
September 13, 2009**

**BC Freedom of Information and Privacy
Association**

FIPA wishes to acknowledge the Law Foundation of British Columbia for their ongoing support of FIPA's activities in the areas of law reform, research and public education



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Introduction

The BC Freedom of Information and Privacy Association (FIPA) is a non-profit society established in 1991 for the purpose of advancing freedom of information, open and accountable government, and privacy rights in Canada. We serve a wide variety of individuals and organizations through programs of public education, legal aid, research, public interest advocacy and law reform.

Although we are based in British Columbia, FIPA has maintained an active role on the federal scene as well.

We applaud the Government of Canada for taking a much more open and consultative approach to copyright reform than their last effort, Bill C-61. Although it may have its problems, the current consultation has given all Canadians an opportunity to be heard on what is a very important issue for all Canadians.

We are also encouraged that the government appears to be looking at a long term, durable approach which will not be tied to rapidly outdated technology as was C-61. Incorporating the views of Canadians can only help with process.

Our President, Richard Rosenberg, gave a preliminary view for our organizations at the Vancouver Round table on July 20. This submission expands on his remarks.

FIPA Supports the CIPPC submission

Overall, we support the positions set out by the Canadian Internet Policy and Public Interest Clinic (CIPPIC). There should not be a tyranny of one interested group over another in the field of copyright, and we believe the well-reasoned positions set out in CIPPIC's submission strikes the right balance.

FIPA's particular copyright concerns

FIPA would like to elaborate on a few issues of particular concern to organizations interested in freedom of information and privacy rights.

1. Crown Copyright

Crown copyright is set out in s. 12 of the Copyright Act.

Where copyright belongs to Her Majesty

12. Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.

The *Copyright Act* sets out specific exemptions for the release of records under the *Access to Information Act* or equivalent provincial acts.

No infringement

32.1 (1) It is not an infringement of copyright for any person

(a) to disclose, pursuant to the Access to Information Act, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material;

(b) to disclose, pursuant to the Privacy Act, personal information within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like information;

(c) to make a copy of an object referred to in section 14 of the Cultural Property Export and Import Act, for deposit in an institution pursuant to a direction under that section; and

(d) to make a fixation or copy of a work or other subject-matter in order to comply with the Broadcasting Act or any rule, regulation or other instrument made under it.

Limitation

(2) Nothing in paragraph (1)(a) or (b) authorizes a person to whom a record or information is disclosed to do anything that, by this Act, only the owner of the copyright in the record, personal information or like information, as the case may be, has a right to do.

Section 32.1 (2) has not been subject of judicial consideration, but it does not impose a duty on a copyright holder to restrict the uses of a record released under FOI legislation. Nor does it say how rights must be exercised.

Intimidation via copyright

FIPA has recent and direct experience with how Crown copyright can be used in an attempt to intimidate freedom of information requesters and possibly inhibit the dissemination of records obtained through FOI requests. The government of British Columbia has been in the habit of sending 'friendly reminder' copyright notices to selected requesters. The copyright notices read as follows:

"We wish to notify you that this response letter and the enclosed records are being provided to you in accordance with the Freedom of information and Protection of Privacy Act. These records are protected by copyright under the federal Copyright Act, pursuant to which unauthorized reproduction of works are forbidden. Permission of the copyright holder must be obtained prior to any reproduction, dissemination or sale of these records (including the posting of such records on the Internet). If you wish to reproduce a record or a portion of a record that is subject to Crown copyright, you must send a copyright request to the province's Intellectual Property Program."

This notice purports to say that every record released is subject to Crown copyright, and that reproduction, dissemination or sale of any or all of the information is prohibited. It suggests that penalties and other negative consequences will result if such actions are taken by the person requesting the information. The notice will have, and is probably designed to have, a chilling effect on anyone wishing to publish or otherwise disseminate the information.

This is the equivalent of the 'libel chill' journalists and others face when the powerful and wealthy, by the simple threat of lawsuits, are able to prevent publication of information contrary to their interests.

The inclusion of a notice like this with the released information would probably be taken by a reasonable person to mean that the government intends to take legal action of some sort if permission is not obtained for any dissemination of the 'copyrighted' information.

Given that the government in many cases will already have resisted the release of the documents, a reasonable person would also assume that the same government would be unwilling to approve further publication of the same information.

"An anachronistic relic"

The federal Information Commissioner highlighted the danger of abuse of Crown Copyright in his 1991/92 annual report at p.22:

From an information commissioner's perspective, the concept of a perpetual Crown copyright in any field richly deserves to be challenged. It is an antique curiosity essentially incompatible with the government's own stated information policies and the spirit of the Access to Information Act.

The works covered by this anachronistic relic cover everything published by government. But Crown copyright is capriciously and arbitrarily invoked. In particular, Crown copyright makes no sense in an era of expanding government databases when records are held electronically, in T.S. Eliot's phrase, between "fixity and flux".

The federal commissioner then adds:

Crown copyright is not a necessary restriction. It flies in the face of the principles of the *Access to Information Act*. The power to copyright, as noted by Robert Gellman, the U.S. Congress's freedom of information expert, "is the power not to publish". It is monopoly without a regulator. Crown copyright by another name is political or bureaucratic control and bureaucratic empire building. One of the reasons why Canada has an access law is precisely to take the decision of what is released out of the hands of politicians and bureaucrats. Crown copyright is a residual remnant of the bad old way....

B.C. drops copyright notices

Following a complaint by FIPA to BC's Information and Privacy Commissioner, the provincial government agreed to cease including copyright notices with materials released under FOI.

After the hearing before the BC Information and Privacy Commissioner, however, the government advised that it "reserves the right to assert and/or enforce copyright in its materials in appropriate cases, including situations where such material is subject to an existing legal obligation of the Province (i.e., a licence) or someone makes copies of something purporting to be the official version of Provincial material, but which is out of date, and distribute those copies to others, thus creating the potential for inconvenience, or worse, to third party recipients of that material."

Democracy and public information

The health of Canadian democracy and the quality of our collective decision-making is dependent on the existence of a highly-informed citizenry. FIPA considers it to be a prerequisite that government information, which is really the public's information, should be as freely available and broadly disseminated as possible.

One of the most persistent barriers to the broad dissemination of public records and information is the legal concept of Crown copyright. FIPA considers that the best way to eliminate it as a barrier to public education and prevent its use to intimidate FOI requesters is to eliminate Crown copyright itself.

Little evidence of harm from copyright violations

There are very few incidents of Crown copyright violation.

In their response to our complaint about the use of Crown copyright notices, the BC government admitted in an affidavit that fewer than five cases a year involve breach of copyright of the government's own materials.

At the federal level, University of Ottawa Professor Michael Geist has identified a similarly low number of breaches, despite the existence of a federal office dedicated to the issue.

Given the repressive potential of Crown copyright, and the lack of evidence that violation of Crown copyright is a significant problem for government, FIPA is of the view that government should either come up with a justification for its continuation, or abolish it.

Section 32 of the *Copyright Act* protects FOI workers from actions for violating Crown copyright if, in response to a request, they release records subject to Crown copyright under FOI laws. There is no equivalent protection for the requester and recipient of the information.

If Crown copyright is not going to be abolished in upcoming legislation, then we urge the government to enact provisions to protect FOI requesters from arbitrary and vindictive use of Crown copyright by governments. We would be pleased to assist with that process if requested.

2. Internet Service Providers should not become de facto investigative agencies for government or rights holders

FIPA is of the view that access to Internet content should not be conditional on waiving privacy rights.

More specifically, ISPs should not be forced into the role of investigating the activities of their customers. Copyright law proper provides adequate remedies and tools for rights holders and governments to deal with possible transgressions. ISPs do not have an interest in copyright violations; they are the utilities through which content flows. We don't want them violating the privacy of their customers.

In fact, the American *Digital Millennium Copyright Act*, possibly the world's most favourable law for rights holders, limited the responsibilities of ISPs. Anything that goes beyond the provisions of the DMCA in this regard would be unacceptable to FIPA. Whatever legislation flows from this process must respect the ISPs' work responsibilities and the privacy of their customers.

3. Anti-Counterfeiting Trade Agreement negotiations should be opened up.

FIPA is concerned that the good work being done in this copyright process may be undone by the ongoing secret negotiations to create the Anti-Counterfeiting Trade Agreement (ACTA).

There is a great deal of concern that the secret negotiations will be a form of 'policy laundering', whereby governments will impose unpopular policies that are against the interests of their own people while claiming their hands are tied by international obligations (which they themselves negotiated and signed).

Public policy, like nature, abhors a vacuum. In the absence of concrete information about what is being discussed and what positions are being taken, rumour fills the void.

The Government of Canada should follow the example of the Australian government and institute a similar dialogue with the broader public about the issues involved and the state of play before the next meeting in November 2009.

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FIPA thanks the Government of Canada for the opportunity of making this submission.