

Introduction to Copyright Law *and prospects for new legislation*

Prof. Samuel E. Trosow
University of Western Ontario
Faculty of Information and Media Studies
Faculty of Law

strosow@uwo.ca
<http://samtrosow.ca>

Concordia University Presentation

January 14, 2008

Overview of Presentation

- ◆ Overview of Existing Copyright Law
- ◆ Recent revisions and the ongoing review process
- ◆ implications of expansion of fair dealing
- ◆ WIPO Treaty / DMCA issues
- ◆ Other issues that could be addressed in copyright reform
- ◆ Questions / discussion

Overview of Copyright Law

- ◆ Constitutional Basis
- ◆ Copyright legislation in Canada
- ◆ What interests does copyright protect?
- ◆ In what works does copyright subsist?
- ◆ Criteria for Copyright (originality and fixation)
- ◆ Ownership and Duration of Copyright
- ◆ Infringement, Fair Dealing, other Exceptions
- ◆ Moral Rights

Constitutional Basis

Constitution Act of 1867 (B.N.A.), Section 91

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within [matters] assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, ... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

23. Copyrights.

History of Copyright Legislation

1710: Statute of Anne (England)

1832: Copyright Act of Lower Canada

1841: Legislation in united provinces of Upper and Lower Canada

1868: Post-confederation Copyright Act

1921: Modern Copyright Act (in force January 1, 1924)

1957: Ilsey Commission (Royal Commission Inquiry prepared report but no amendments followed)

1977: Copyright in Canada – Proposals for Revisions of the Law (Keyes/Bruner Report)

1984: White Paper Report "*From Gutenberg to Telidon*"

1988: Assent to 1985 amendments (R.S.C. 1985, c 10)

1997: Second phase amendments (R.S.C. 1997, c. 24)

2001: Consultation process begins

2002: Section 92 Report tabled

2005: Bill C-60

2007: Throne Speech promises new legislation

Copyright: A Legal Framework

The Copyright Act provides the legal framework within which creators and other rights holders are entitled to recognition and control of, and payment for, the use of their works. Examples of works protected by copyright are: films, novels, songs, information products and computer programs.

Copyright establishes the economic and moral rights of creators and other rights holders to control the publication and commercial exploitation of their works, protect the integrity of their endeavours, and ensure that they are properly remunerated. The law provides creators and other rights holders with a number of legal rights to authorize the use of works.

A Framework for Copyright Reform

What interests does copyright protect?

Section 2: "copyright" means the rights described in

- (a) section 3, in the case of a work,
- (b) sections 15 and 26, in the case of a performer's performance,
- (c) section 18, in the case of a sound recording, or
- (d) section 21, in the case of a communication signal;

It is very important to distinguish between WORKS and the other subject matter as different rules apply. This presentation will focus on WORKS

What is a WORK?

Every original literary, dramatic, musical and artistic work is protected whatever may be the mode or form of its expression.

Section 3:

"copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right . . .

Copyright in works- includes the sole right to:

- (a) to produce, reproduce, perform or publish any translation of the work,
- (b) to convert [a dramatic work] into a novel or other non-dramatic work,
- (c) to convert [a novel or other non-dramatic work] into a dramatic work, by way of performance in public or otherwise,
- (d) to make any sound recording, film or other contrivance by means of which the [literary, dramatic or musical] work may be mechanically reproduced or performed,
- (e) to reproduce, adapt and publicly present the [literary, dramatic, musical or artistic] work as a cinematographic work,

cont'd...

Copyright in works- includes the sole right to:

- ◆ to communicate the [literary, dramatic, musical or Artistic] work to the public by telecommunication,
- ◆ to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,
- ◆ in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and
- ◆ in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts

Think of each of these rights as a separate stick in a bundle, as they are separately assignable. Any infringement analysis must be based on one or more of these sole rights

Criteria for Copyright

In order to qualify for copyright protection, a work must be both:

- ◆ Original (no clear definition in Act, mostly based on case law, last word from SCC in *CCH v LSUC*)
- ◆ Fixed

Where is the threshold for originality?



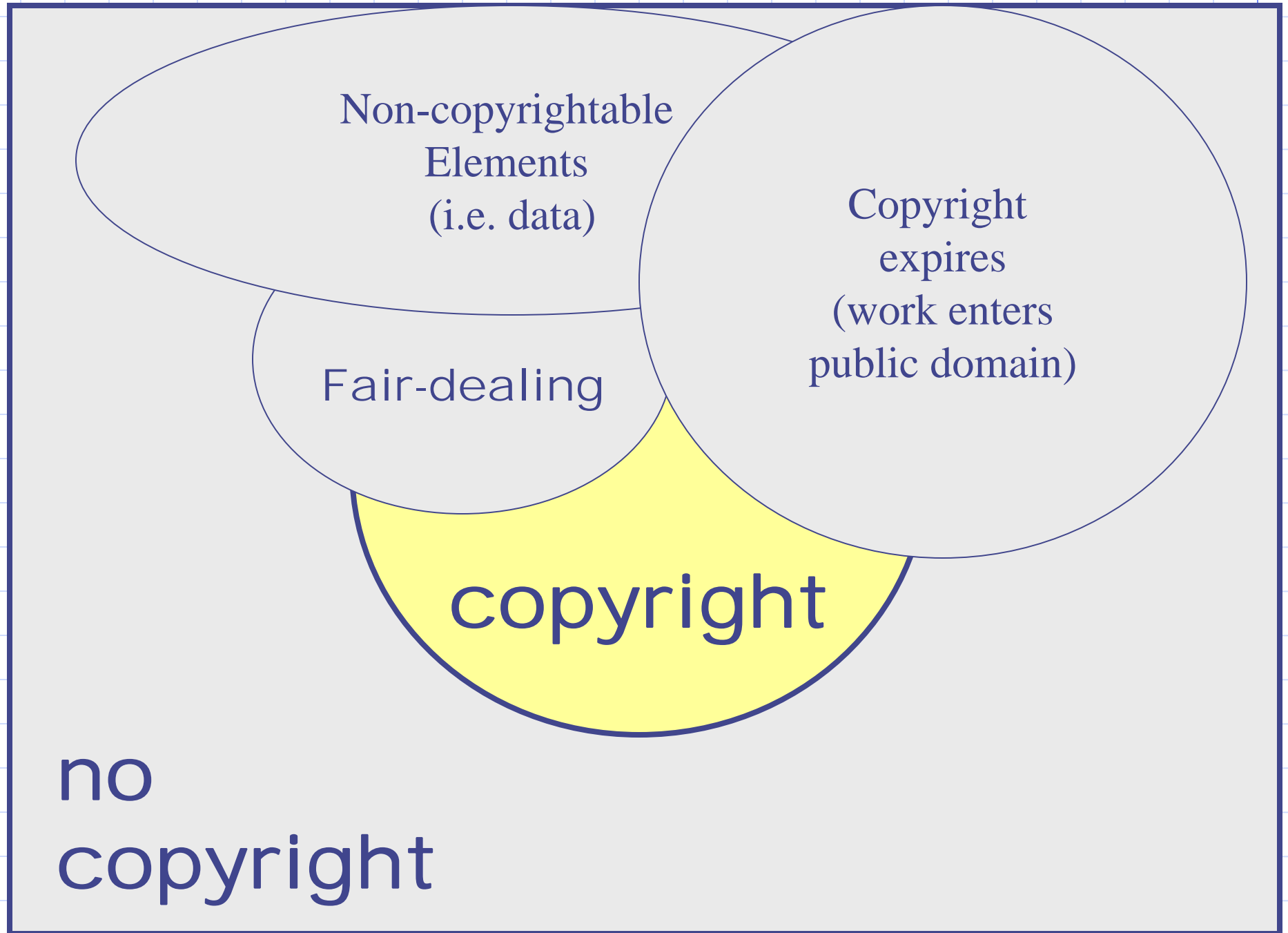
Creative Spark

SCC says too high

...work must be more than a mere copy of another work but need not be creative, in the sense of being novel or unique...an exercise of skill and judgment is required. ...skill means the use of one's knowledge, developed aptitude or practised ability in producing the work. Judgment means the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. (see CCH v LSUC, para 16)

Sweat of the Brow

SCC says too low



Ownership of Copyright

Section 13(1): ... the author of a work shall be the first owner of the copyright therein.

Section 13(3): Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright,

Section 13(4) a copyright owner may assign the right, wholly or partially, and either generally or subject to limitations (to territory, medium or market sector) for the whole term or any part of the term

[Note how the “bundle of rights” is very divisible and that between sections 13(3) & (4) authors are often not the “rightsholders” of the exclusive rights]

Registration of Copyright

- ◆ Registration is NOT required for the copyright to be effective
- ◆ But there are advantages to registration:
 - Provides good evidence of the facts
 - Prevents defendant from claiming innocent infringement
- ◆ Most copyrights are not registered
- ◆ important to remember that copyright subsists at the moment of fixation into a tangible medium of expression regardless of formalities

Duration of Copyright

General rule in section 6:

...life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.

At the end of the copyright period, the work becomes part of the *public domain*.

Moral Rights

Another class of rights granted to authors is moral rights (section 14.1)

The author of a work has the right to:

- ◆ the integrity of the work and the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym
- ◆ the right to remain anonymous.

No assignment of moral rights –but they may be waived. Waiver is not implied by a mere assignment of economic rights.

Copyright Infringement

Section 27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

Note: Applies generally to works and other subject matter, so you need to refer back to the specific section that creates the rights (i.e. section 3 in the case of a work)

A pronouncement from the Supreme Court about the proper balance in copyright law:

"The proper balance . . . lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists . . . as it would be self-defeating to undercompensate them."

Théberge v. Galerie d'Art 2002 SCC 34

paragraph 31

A pronouncement from the Supreme Court about the proper balance in copyright law:

"Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization."

Théberge v. Galerie d'Art *paragraph 32*

Thereby foreshadowing their ruling in CCH v LSUC.

Exceptions to Infringement

- ◆ Fair dealing for the purpose of research or private study (section 29)
- ◆ Fair dealing for the purpose of criticism, review or news reporting if certain attributions are made (section 29.1, 29.2)
- ◆ Certain acts of educational institutions, Libraries, Archives and Museums (sections 29.4-30.5, SOR/99-325 effective September 1999)
- ◆ Certain copying for persons with perceptual difficulties (section 32)
- ◆ Others

Current Canadian Fair-Dealing provisions

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

- (a) the source; and
- (b) if given in the source, the name of the
 - (i) author, in the case of a work,
 - (ii) performer, in the case of a performer's performance,
 - (iii) maker, in the case of a sound recording, or
 - (iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned: (same as 29.1)

CCH v LSUC

2004 SCC 13

“important to clarify some general considerations about exceptions... Procedurally, a defendant is required to prove that .. dealing with a work has been fair; however the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence.”

paragraph 48

CCH v LSUC

2004 SCC 13

“User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.”

paragraph

CCH v LSUC

2004 SCC 13

Section 29 is always available to a library, resort to [specific library exemption in s. 30.2] only necessary if library cannot make out the fair dealing exception.

To show fair dealing, defendant must prove: "...(1) that the dealing was for the purpose of either research or private study and (2) that it was fair."

"research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. (includes work done by lawyers carrying out commercial practice –para 51)

this reasoning (underlying the need for the broad interpretation of research) should apply to private study, criticism, review and news reporting as well

CCH v LSUC

2004 SCC 13

SCC adopts list of factors. . .

- ◆ purpose of the dealing
- ◆ character of the dealing
- ◆ amount of the dealing
- ◆ alternatives to the dealing
- ◆ nature of the work
- ◆ effect of the dealing on the work

"...a useful analytical framework to govern determinations of fairness in future cases" (para 53)

Conclusion on weighing of factors:

“factors ... considered together, suggest that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair.

- Access Policy places appropriate limits on type of copying LS will do.
- states that not all requests will be honoured -- request rejected if doesn't appear to be for the purpose of research, criticism, review or private study.
- **If question arises as to whether the stated purpose is legitimate, Librarian will review** (note discretion is vested in librarian-- court is recognizing the expertise of librarians in this area)
- Policy limits the amount of work that will be copied, and Librarian reviews requests that seem excessive and has the right to reject

Court concludes that LS' dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright.” [para 73]

Disposition of Case

- Law Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made in accordance with its "Access to the Law Policy".
- Law Society does not authorize copyright infringement by maintaining photocopiers in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright.
- fax transmissions did not constitute communications to the public
- court would have found that Great Library qualifies for the library exemption (were it necessary)

Other exceptions

- ◆ certain listed acts of educational institutions, Libraries, Archives and Museums in sections 29.4-30.5 (very specific and subject to counter-rules)
- ◆ Certain copying for persons with perceptual difficulties (section 32)
- ◆ One view is that these remaining exceptions are now less important on account of the breadth given to the fair dealing defense by the CCH court (and on account of the numerous counter-rules they contain)
- ◆ They seemed more important in the last round of Copyright reform leading up to 1997

Recent revisions and the ongoing review process

- ◆ 1988 Copyright Amendments (Phase I)
- ◆ 1997 Copyright Amendments (Phase II)
- ◆ Current review process (Industry Canada and Canadian Heritage Consultation)

1988 Copyright Amendments

Phase I passed in 1988, included:

- ◆ statutory protection for computer programs
- ◆ clarification and extension of moral rights
- ◆ elimination of the compulsory licence for the reproduction of musical works and the substitution of a right of negotiation
- ◆ the introduction of a new procedure to licence works where the owner could not be located
- ◆ new rights for visual artists to exhibit their works in public
- ◆ increased criminal sanctions,
- ◆ enactment of rules under which collective organizations could form and operate under the supervision of a revamped Copyright Board.

1997 Copyright Amendments

Phase II, passed in 1997 (Bill C-32), included:

- ◆ provisions granting exclusive book distributors legal protection in the Canadian market;
- ◆ new exceptions to non-profit educational institutions, libraries, archives, museums, broadcasters and persons with perceptual disabilities allowing them to reproduce or use copyright material in specific circumstances without paying royalties or obtaining authorization from rights holders;
- ◆ statutory damages and wide injunctions to enhance the enforcement of copyright;
- ◆ further review requirement - Minister of Industry shall send Parliament a report on the provisions and operation of the Act, including any recommendations for amendments.

Recent activity

- ◆ 2001 round of consultations
see http://strategis.ic.gc.ca/epic/site/crp-prda.nsf/en/h_rp01132e.html
- ◆ Section 92 report
<http://www.ic.gc.ca/epic/site/crp-prda.nsf/en/rp00863e.html>
- ◆ Bulte Report
<http://www.parl.gc.ca/InfocomDoc/Documents/37/3/parlbus/commbus/house/reports/herirp01/herirp01-e.pdf>
- ◆ Responses to Bulte Report (next slide)
- ◆ [Bill C-60](#)
- ◆ General lack of new consultations since 2005
- ◆ Extreme external pressures from USTR and content owners
- ◆ Throne speech promises new copyright legislation to implement WIPO Treaties
- ◆ Dec 2007--Bill in Notice Paper but not tabled
- ◆ 2008 ????

Responses to Bulte Report

Government Statement on Proposals for Copyright Reform

http://pch.gc.ca/progs/ac-ca/progs/pda-cpb/reform/statement_e.cfm

Canadian Internet Policy and Public Interest Clinic and the Public Interest Advocacy Centre

http://www.cippic.ca/en/news/documents/Response_to_Bulte_Report_FINAL.pdf

"The Truth About Copyright Reform"

<http://www.cippic.ca/en/projects-cases/copyright-law-reform/truth.html>

CFHSS Statement:

<http://www.fedcan.ca/english/pdf/advocacy/CFHSSCopyrightPosition-e.pdf>

Canadian Copyright Forum (14 Associations)

http://www.fedcan.ca/english/pdf/advocacy/copyright_10_22_e.pdf

Bill C-60

- ◆ Tabled by liberal government in 2005

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-60&parl=38&ses=1&language=E>

- ◆ Represented somewhat of a middle ground, not as extreme as Bulte Report or the US DMCA but still had many flaws

- ◆ See articles in Michael Geist [ed], *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law, 2005)

<http://www.irwinlaw.com/books.aspx?bookid=120>

- ◆ Died on order paper with fall of parliament

Issues to look for in new bill

- ◆ WIPO Implementation remains largest issue
- ◆ Canada under pressure from US government and industry groups to conform to DMCA-type rules
- ◆ Other issues to look for in bill
- ◆ What could be in more user-oriented legislation

Anti-Circumvention Rules?

- ◆ A number of technologies are now available that may be used to thwart the infringement of copyright materials on-line. Many rights-holders use such protective technologies (i.e, encryption) in disseminating their works.
- ◆ Copyright law protects rights holders against unauthorized uses, while technological measures serve to provide an **additional layer of protection** for works.
- ◆ **The issue arises** whether and under what circumstances copyright legislation ought to provide sanctions against persons who engage in activities related to the circumvention of these protective measures

Copyright Rights Management Rules?

- ◆ The ability of rights holders to embed certain Copyright Management Information (CMI) in their material can help them to assert their interest in the material and to monitor its movement.
- ◆ CMI can also serve to facilitate on-line licensing.
- ◆ However, the information is only useful to the extent that its integrity is maintained. The issue arises whether and under what circumstances copyright legislation ought to provide sanctions against persons who provide false CMI or alter/remove existing CMI
- ◆ Privacy Implications need to be considered for “smart” CMI systems

The Baseline: WIPO Treaty Obligations

Article 11 of the 1996 WIPO Copyright Treaty:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict Acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

- What would be required to comply with this obligation?
- What is meant by “*adequate legal protection and effective legal remedies?*”
- Does this “obligation” go beyond protecting against acts of infringements under the Copyright Act?

US implementation of the WIPO treaty

1998 DMCA adds prohibitions on:

◆ engaging in acts of circumvention

No person shall circumvent a technological measure that effectively controls access to a work protected under this title.

◆ providing circumventing products, services or devices

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that . . .

◆ **effectively controls access. . .**

◆ **protects a right of owner. . .**

DMCA Section 1201- Device Prohibitions

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that (with respect to both)

(A) is primarily designed or produced for the purpose of circumventing a technological measure . . . ;

(B) has only **limited commercially significant purpose** or use other than to circumvent a technological measure . . .

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure . . .

“...the anti-circumvention provisions have been used to stifle a wide array of legitimate activities, rather than to stop copyright infringement. As a result, the DMCA has developed into a serious threat to several important public policy priorities.”

Electronic Frontier Foundation.

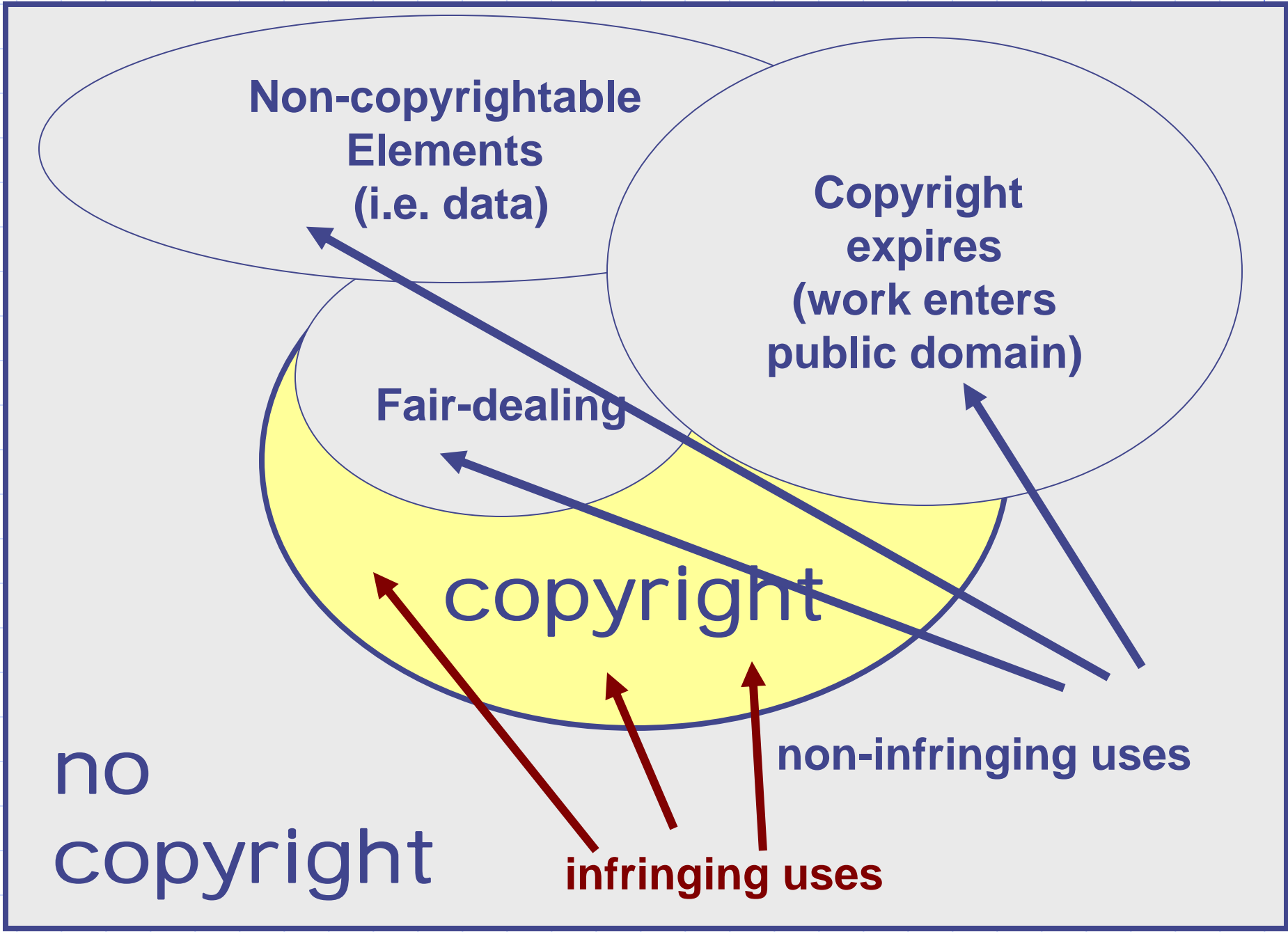
*Unintended Consequences:
Seven Years under the DMCA*

<http://www.eff.org/wp/unintended-consequences-seven-years-under-dmca>



copyright

no
copyright



**Non-copyrightable
Elements
(i.e. data)**

**Copyright
expires
(work enters
public domain)**

Fair-dealing

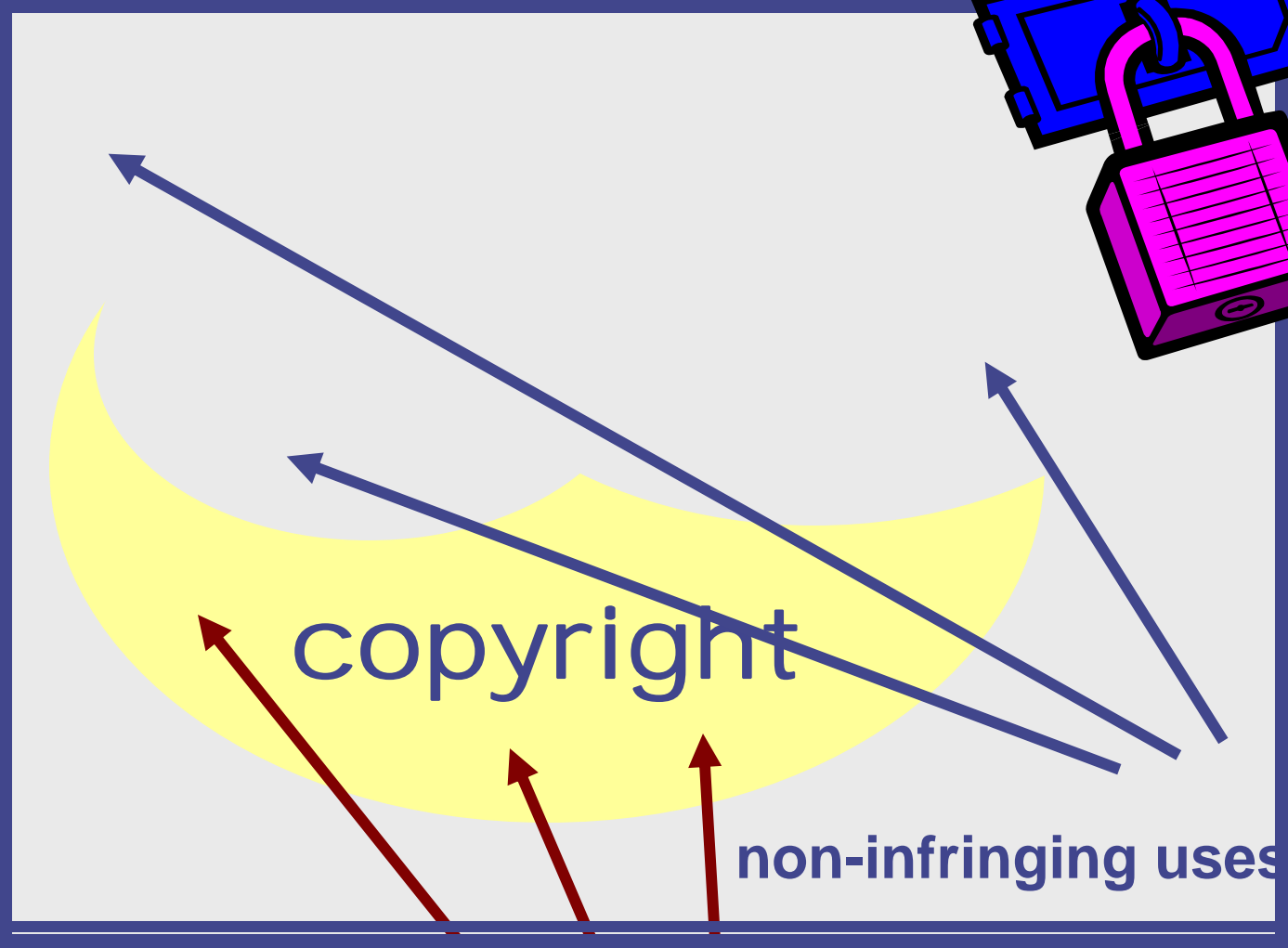
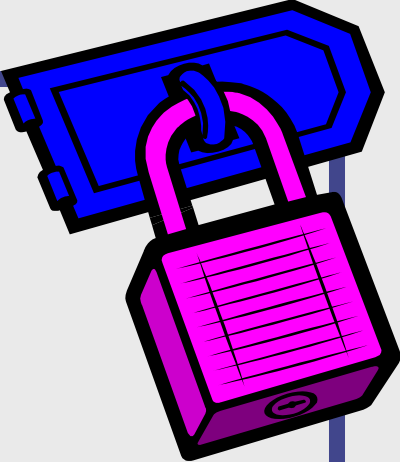
copyright

**no
copyright**

non-infringing uses

infringing uses

anti-circumvention rules



copyright

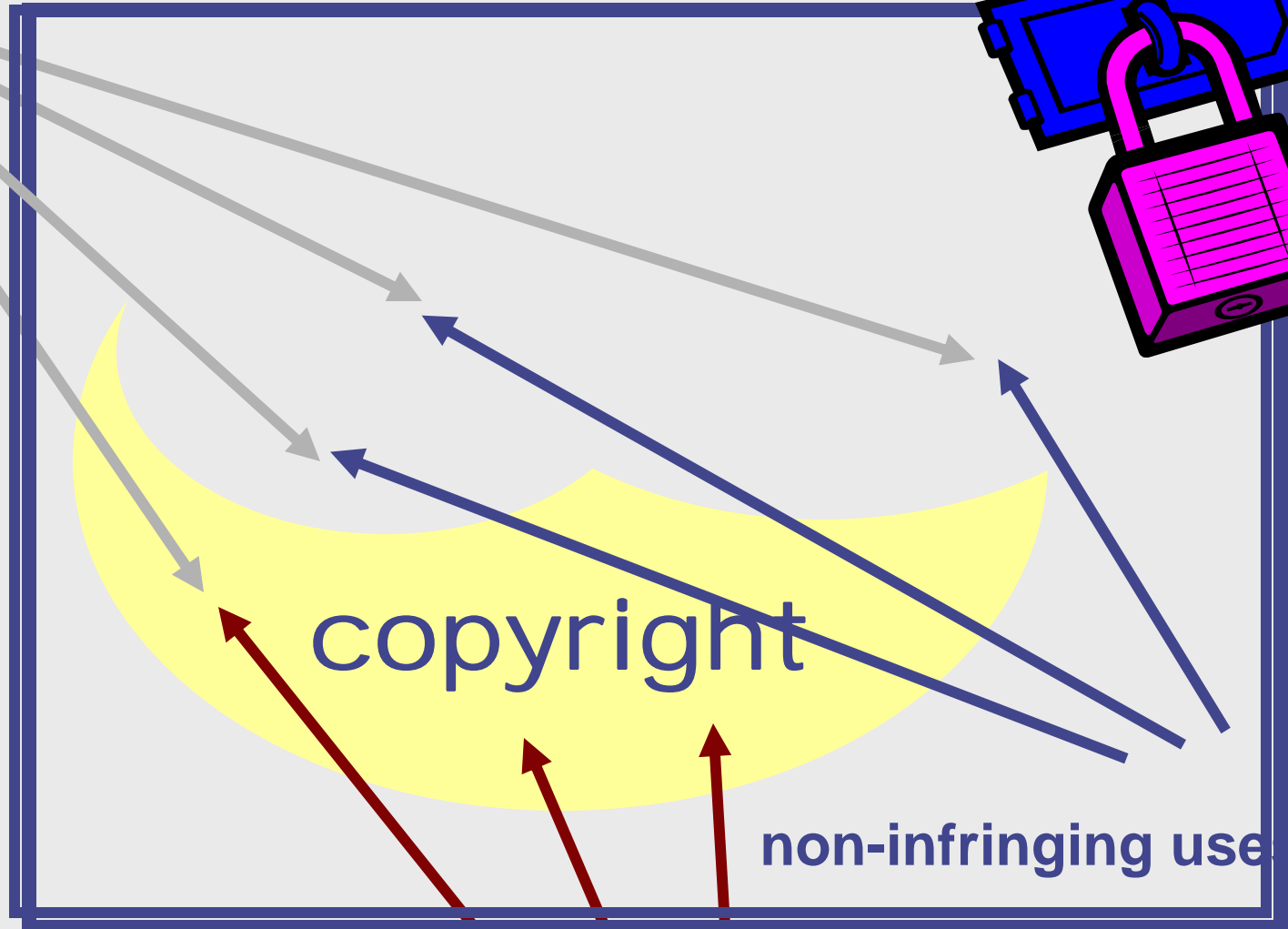
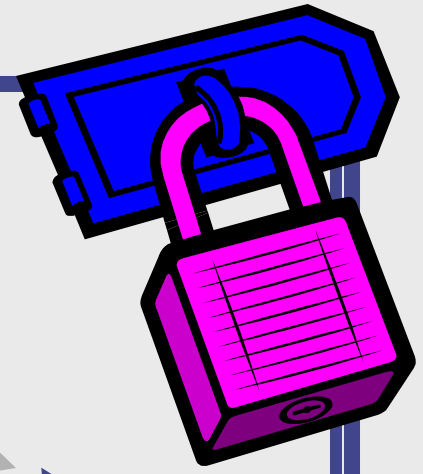
non-infringing uses

infringing uses

no

copyright

all
violations of **anti-circumvention rules**

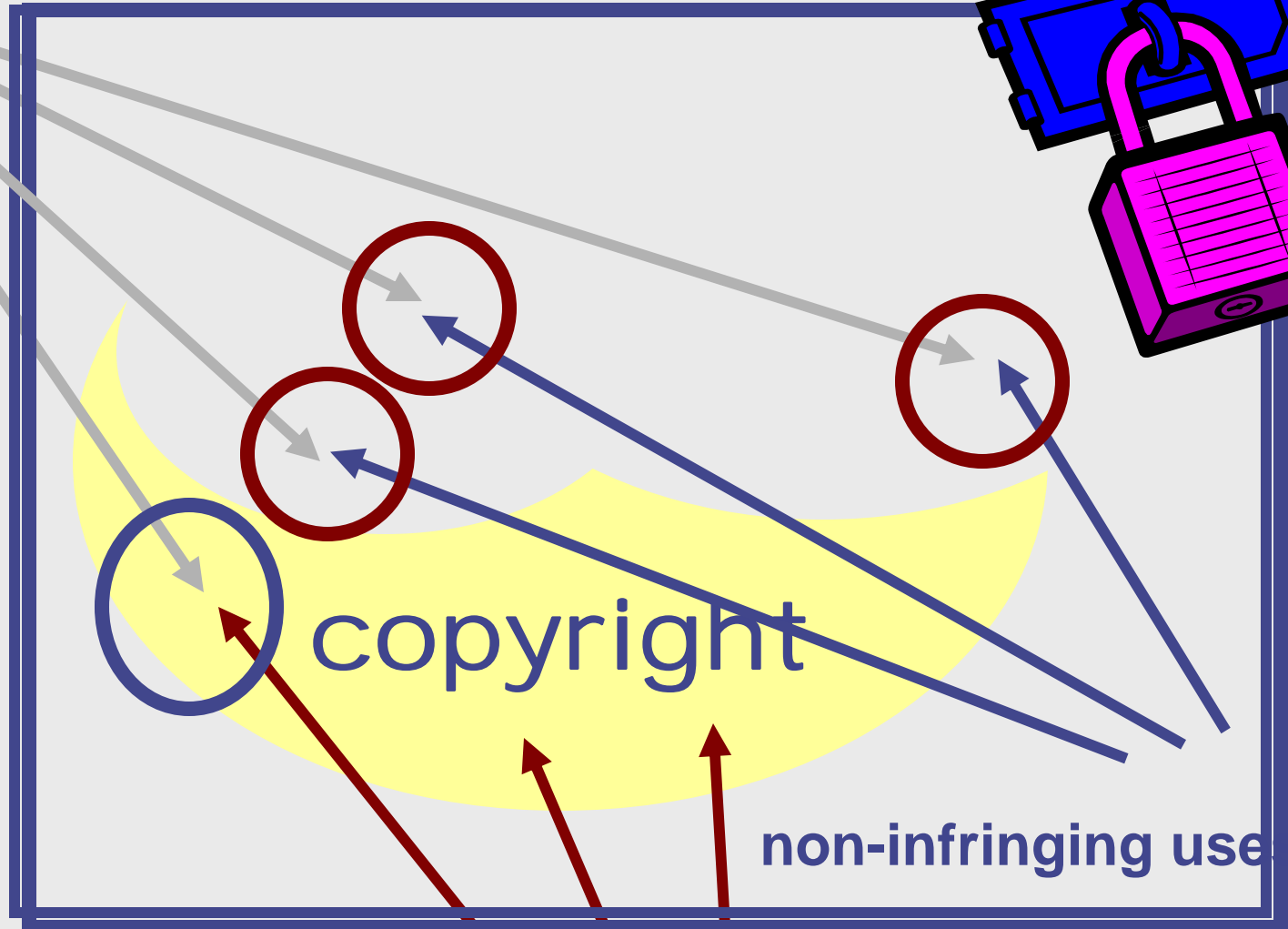
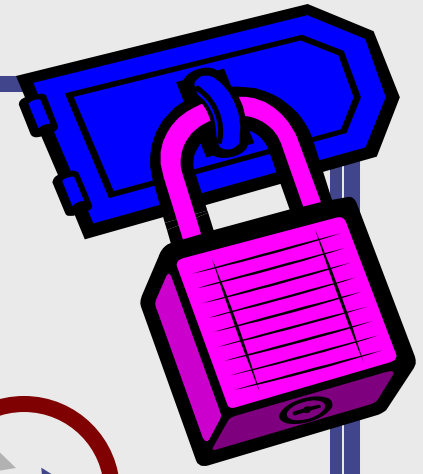


no
copyright

non-infringing uses

infringing uses

all violations of anti-circumvention rules



no copyright

non-infringing uses

infringing uses

Should Canada adopt US type anti-circumvention rules?

YES:

It's necessary to comply with WIPO and insure against infringement in the networked environment. Strong DRM's are needed along with circumvention and device prohibitions

NO:

Canadian law is already WIPO compliant (or very close), the American rules go beyond infringing activities: they threaten the traditional copyright balance, pose a threat to personal privacy, and chill computer-related research.

Other issues to look for in legislation

- ◆ ISP Liability (“notice and takedown” versus “notice and notice”)
- ◆ Term extension?
- ◆ Extension of licensing requirements to materials available on Internet
- ◆ User-oriented reforms . . .

Other issues to look for in legislation. . .

User oriented reforms

- ◆ Limitations on statutory damages
- ◆ Reform of Crown Copyright
- ◆ Recognition of expansion of fair dealing
- ◆ Use of Orphan Works
- ◆ Limitations on waivers of moral rights
- ◆ What other measures can help creators?

What other measures can help creators?

Besides copyright, there are other policy tools that could be used to provide support for artists/creators:

- tax policy
- status of the artist legislation
- droit d'suite
- Funding issues
- Contract issues

December 2007

- ◆ The government was set to table a bill
- ◆ Upsurge in opposition evident by early December
- ◆ Facebook group attracted over 20,000 (now over 35K)
<http://www.facebook.com/group.php?gid=6315846683>
- ◆ See <http://www.faircopyrightforcanada.ca/> for info on local chapters
- ◆ (Parliament to reconvene January 28th)



Canadian Copyright Guide: A Citizen's Guide

by Laura Murray and Samuel Trosow

published by Between the Lines (Oct 2007)

ISBN: 978-1897071-30-4 (224 pgs, \$24.95)

http://www.btlbooks.com/Links/ordering_info.htm

Introduction:

<http://samtrosow.ca/images/introduction.pdf>

Chapter 1: Copyright's Rationales:

http://www.openbooktoronto.com/magazine/fall_2007/articles/canadian_copyright

Quill and Quire Review:

http://www.quillandquire.com/reviews/review.cfm?review_id=5823



Some Rights Reserved

This presentation is licensed under a Creative Commons License, although certain works referenced herein may be separately licensed.

<http://creativecommons.org/licenses/by/2.5/ca/>