

Session II: The Impact of International Copyright Treaties and Trade Agreements on the Development of Domestic Norms*

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Thank you very much for inviting me to this symposium. I'm very happy to thank Jane, of course, as well as June and Pippa. It's a real delight for me to come to talk to you about how trade treaties have affected the way the Canadian Copyright Act has evolved in the past years. Actually, perhaps it will be surprising to you, but our current Copyright Act still has as its basic framework its 1921 legislation, which was essentially a redrafting of the 1911 United Kingdom Act.¹ Obviously, since that time many events have taken place, and, in particular, after the Second World War, a good number of countries started revising their copyright legislations.

In the 1950s and 1960s, many studies have led ultimately to the overhaul of the existing texts. For instance, here in the United States, the 1976 Act has been part of this movement. In Canada, studies were also undertaken. There was first a royal commission on intellectual property as a whole, which was followed by more studies that focused on copyright only.² However, technology was progressing at its own pace, and even though some issues had already been dealt with previously, like the protection of sound recordings (because England had it in 1911), the Copyright Act was becoming increasingly anachronistic.³ The real impetus came from the computer industry in the 1980s, which needed the legal certainty provided by an affirmative legal provision on the copyrightability of computer programs.

And just as there were Apple cases making their way in the court systems throughout the world, the Supreme Court of Canada also participated in this debate.⁴ The issue of the protection of computer programs became a driving force for updating the Canadian Copyright Act, but by then—the 1980s—Parliament was increasingly aware that the necessary changes corresponded to a vast operation. It therefore decided to proceed in phases. Phase I, which took place in 1987, was therefore meant to deal with the more pressing issues like computer programs, with the understanding that the rest would be dealt with in a few years.⁵

* These remarks are adapted from the transcript of a talk that was given on October 14, 2016, at the Kernochan Center Annual Symposium at Columbia Law School.

1. Copyright Act 1911, 2 Geo. 5, ch.46 (Eng.).
2. Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, Report on Copyright. Ottawa, Queen's Printer, 1957.
3. Copyright Act 1911, *supra* note 1.
4. Apple Computer Inc. v Mackintosh Computers Ltd., [1990] 2 S.C.R. 209 (Can.).
5. Gregory C. Ludlow & Mark A. LeBlanc, *Survey of Intellectual Property Law: Part V: Copyright and Industrial Designs*, 31 OTTAWA L. REV. 93 (1987-1999).

That first phase of modernization of the Act took place at a time when copyright and intellectual property became part of trade treaties. Indeed, in the 1980s, Canada was negotiating a free trade agreement with the United States.⁶ Intellectual property was very important in that agreement, but not necessarily in its text: the only intellectual property issue in the U.S. – Canada Free Trade Agreement was the requirement to introduce the retransmission right in Canada, where it did not exist, but which was part of the U.S. Copyright Act.⁷ However, simply in order to negotiate that agreement, Canada had to change its rules on pharmaceutical patents as a prerequisite for negotiating the agreement.⁸ After that, intellectual property issues in trade agreements took on a life of their own.

After the Canada – U.S. Free Trade Agreement came NAFTA,⁹ which contains a chapter that is very similar to the TRIPS chapter in the WTO Agreement and which required that Canada negotiate the TRIPS Agreement. But the Canadian approach to the implementation of these trade agreements, NAFTA and TRIPS, has always been to legislate minimally because we are a net-importing country of intellectual property material.¹⁰ We therefore implemented these treaties into the text of a statute that had been initially drafted in 1921. Some of the changes required by these trade agreements were encroaching on our Phase II process that had been meant to come soon after Phase I. Consequently, Phase II took place in 1997, several years—about ten—after Phase I.¹¹ As you know, 1997 is just a year after the WIPO treaties. The same dilemma arose then as in previous assessment of the relationship between Phase II and the earlier trade agreements: if we were to incorporate the Internet issues of the WIPO treaties in Phase II, the work that it required could affect the likelihood of dealing with the issues that the Phase II process was meant to cover. The outcome was that Internet issues would be addressed later, so that the aspects that urgently needed modernization in 1997 would not be further delayed.

Phase II thus became an opportunity for Canada to tackle the issue of neighboring rights, i.e., the protection of performers, record producers, and broadcasters, and to decide if it wanted to work within the framework of the Rome Convention. The policy choice that was made was to align ourselves with the Rome Convention. Since then, our Copyright Act bears the hallmark of the Rome Convention; that is, a clear distinction between the protection of works and of what we call the “other objects of protection.”¹² One of the consequences is that we implemented the 1996 treaties in our 2012 Modernization Act and, in particular, dealt with the digital aspects that they cover.¹³ In 2012, however, another phenomenon was starting to make its way into the trade treaties as well as in the copyright and neighboring rights treaties that were

6. Canada-United States Free Trade Agreement, Cn.-U.S., Jan. 2, 1988.

7. *Id.*

8. *Id.*

9. See Canada-United States Free Trade Agreement, *supra* note 6; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

10. *Statistics Canada*, GOVERNMENT OF CANADA, <https://perma.cc/J5JT-UA8S>.

11. Copyright Act, R.S.C., ch. C-42, § 29-29.2 (1985), amended by S.C. 1997, c. 24, § 18(1) (Can.).

12. Parties to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), <https://perma.cc/G28J-5C6Q>.

13. Copyright Modernization Act, S.C. 2012, c. 20.

taking shape in the WIPO environment, as opposed to the WTO environment: the issue of exceptions as user rights.

The user rights movement, which equates exceptions with user rights, did not start in 2012 with the series of decisions by the Supreme Court of Canada that we call “the Pentalogy,” but rather with an earlier Supreme Court decision in 2004, the CCH decision.¹⁴ It is with this decision that exceptions started to be seen as user rights.¹⁵ Thus in 2012, the Internet issues from the 1996 WIPO treaties conflated with the rise of the user right movements for exceptions.

This means that our current statute, which is still on the basis of the 1921 Act—I don’t think we will ever get a complete overhaul of our Copyright Act; it would be much too daunting—reflects the very strange combination of minimal compliance with various international treaties and with the philosophical stream that is the user rights movement.¹⁶

Perhaps one of the best examples to illustrate how complicated the drafting can become is that of the provisions on performer’s rights. The basic performer’s rights system in the Act is derived from the Rome Convention (of which the United States is not a member). In addition to the provisions that apply to members of the Rome Convention, similar rules—but with the necessary differences—are set out for members of the WPPT, one of the WIPO treaties. General provisions for those who are neither members of the Rome Convention or of the WPPT are also required.¹⁷ This fairly complicated drafting style becomes necessary because we are not the drivers of international modifications, and therefore need to adjust to the treaties as they come along.

How is copyright faring in Canada since the 2012 amendments? Several divergent attitudes and playing fields are vying for attention. First and foremost, the 2012 amendments incorporated the obligation to hold a five-year parliamentary review.¹⁸ This means that 2017, next year, will be an important year for copyright in Canada because the copyright milieu has been working on seeking modifications of the Copyright Act since the year of both the Copyright Modernization Act and the Pentalogy. The general thinking seems to be that this is an occasion that must not be missed.

At the same time, trade agreements continue to be negotiated. We have signed the CETA agreement, the comprehensive trade agreement with the European Union.¹⁹ There are intellectual property rights issues in that agreement, but not copyright issues. It is worth noting that, even though our basic term of protection is still “life plus fifty,” the European Union did not request “life plus seventy” from

14. MICHAEL GEIST, THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATION OF CANADIAN COPYRIGHT LAW 435-436 (2013).

15. CCH Canadian Ltd. v. Law Soc’y of Upper Canada, 2004 SCC 13 (Can.).

16. See Copyright Modernization Act, *supra* note 13.

17. *Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, WIPO (1961), <https://perma.cc/CAJ8-ZNG4>.

18. See Copyright Modernization Act, *supra* note 13, at Clause 58.

19. COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT, CHAPTER TWENTY (INTELLECTUAL PROPERTY), <https://perma.cc/P2C4-SWUY>.

Canada.²⁰ Obviously, this issue did not seem very important to the Union, maybe because they figured it would be handled by someone else.

What was important for them, however, was the matter of geographical indications: the intellectual property chapter of CETA is all about GIs. Canada, like the United States, also sits between the Atlantic and the Pacific oceans. Indeed, our national motto is “from sea to sea,” *a mari usque ad mare*. In international trade terms, this means that, on the western side of the country, we have the Trans-Pacific Partnership (“TPP”), through which “life plus seventy” would be coming to Canada. As an example of trade negotiations, the Canadian experience in the TPP is very interesting because, even though the country came late in the negotiation process, the Canadian negotiators were very proud to say that they had managed to maintain, for Canada, its “notice and notice” provision for ISPs, a system that is much less forceful than “notice and take down.”²¹ We may be starting to see some sort of Canadian carve-outs in international agreements with the TPP.

What will happen next? The exceptions to copyright that we now have in the Canadian Act are so numerous that it would probably require some outside involvement for them to be studied in light of the three-step test. Will that be achieved through standard WIPO activities or through some other international trade agreements? I guess only the future will tell. Thank you for your attention.

20. *Id.*

21. Joseph Davis, *The Trans-Pacific Partnership on Internet Service Providers Notice, Counter-Notice, and Liability Limitations*, B.C. INT'L PROP. & TECH. FORUM (2015).