A Clear Message on Crown Copyright

Introduction

Since 1921, the Canadian Copyright Act ("Act") has provided that the ownership of any work produced by the government belongs to the Crown (i.e., the government itself). The century-old provision states:[1]

> 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. [*emphasis added*]

Under this rule, people re-using a substantial part of government work (e.g., legislative reports, statutes, judicial decisions, IP applications, security prospectuses, etc.) without permission would be subject to a copyright infringement claim. While the enforceability of infringement is uncertain,[2] this provision raises major concerns for institutions such as libraries and in the context of public-private partnerships.

The original justifications for Crown copyright, namely as a means of revenue generation and to ensure accuracy and integrity over government work,[3] are no longer relevant today in a digital world. Over the years as other countries including the US, Australia and UK revised their respective Crown copyright policies, the issue has drawn robust consensus for reform in Canada. To illustrate, this article will present three perspectives on the issue of Crown copyright in Canada – specifically, from industry stakeholders, the legislature and the judicial branch.

Industry Stakeholders

The Canadian Federation of Library Associations (CFLA) has been a leading advocate for Crown copyright reform as the rule presents a barrier for libraries acting as stewards of government information in a digital and democratic society.[4] Under the current scheme, librarians must apply for a licence[5] or contact the responsible government department to receive permission for re-use.[6] Since government departments do not receive copyright training, most requests are ignored.[7] In turn, librarians and archivists cannot re-produce government work to provide the public with perpetual access. For example, government websites are frequently updated (e.g., Parks Canada's educational guides) and any previous content will disappear when they are not picked up by internet archive in the absence of permission to do so.[8] Another example being the Vancouver Public Library's failure to digitize and preserve a collection of photographs by local photographers who had received

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[1] *Copyright Act*, RSC 1985, C-42, s 12.
[2] Dryden, 2017. "Rethinking Crown copyright law", (25 September 2017), online: *Policy Options* https://policyoptions.irpp.org/magazines/september-2017/rethinking-crown-copyright-law/
[3] *Ibid*.
[4] Wakaruk. "Crown copyright in Canada", (4 October 2020), online: *Amanda Wakaruk* https://amandawakaruk.ca/crown-copyright-in-canada/ [Wakaruk Sept 2020].
[5] Wakaruk, Amanda. "Reforming Crown Copyright in Canada", (3 November 2020), online: *DttP: Documents to the People* https://journals.ala.org/index.php/dttp/article/view/7421/10223. at 15 [Wakaruk Nov 2020].
[6] *Ibid* at 12.
[7] *Ibid*.
[8] Geist. "Episode 30: 'It's Only Going to Get More Important' - Amanda Wakaruk and Jeremy deBeer on Crown Copyright in Canada", (4 November 2019), online: *Michael Geist* https://www.michaelgeist.ca/2019/11/lawbytespodcast-episode30/.

government grants, as librarians' requests were ignored.[9] CFLA has also emphasized that the current scheme is inconsistent with principles of Open Government,[10] a national plan to encourage transparency, accountability and participation.[11] Other experts have supported the position that integrity and accuracy of information can be upheld without compromising public access.[12] In addition, it is unclear why a taxpayer should be subject to infringement claims on work produced using tax dollars.[13]

Legislative Actions

As mandated by the Act, the most recent statutory review of the Act was published in June, 2019 by the Standing Committee on Industry, Science and Technology ("Report").[14] The Report first summarizes a range of reform proposals from stakeholders and noted that there was no support Crown copyright's continuation – "a rare point of consensus".[15] The Report then takes a narrow approach and recommends that the existing open licenses system should be expanded to content "in the public interest and for the purpose of public use, education, research, or information." Interestingly, the recommendation hardly aligns with the summarized submissions, including supplemental reports prepared by the Conservative and NDP groups both calling for abolishment. In addition, the Report recommends introducing legislation to protect governments themselves from infringement claims under certain circumstances – an issue that is unrelated to the concerns presented in the submissions.[16]

The Report also formed part of the basis for Bill C-209 which was introduced in September 2020 with the aim to abolish Crown copyright.[17] The Bill's sponsor (Brian Masse) argued that the current provision is against open government and requires a significant amount of tax dollars. While this Bill closely aligns with the proposals summarized in the Report, it is important to note that as a private member's bill, it is unlikely that it will pass to become law.[18]

Keatley Surveying v Teranet, SCC 2019[19]

The Keatley case is the first SCC decision on Crown copyright. The Court unanimously agreed that the Ontario government acquired copyright in the third-party works in question by virtue of publishing the work under government authority. However, the judges disagreed on how to determine *when* a government acquires copyright in third-party works. The majority concluded that the test is whether the Crown exercised sufficient direction or control that it can be said that Crown copyright subsists.[20] The minority articulated the test as whether the nature of the work is a "government work" (i.e., something that serves a public purpose).[21] It is also

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[9] Freeman, 2019. "Government should do the right thing and end Crown copyright", (29 April 2019), online: *iPolitics* https://ipolitics.ca/2019/04/26/government-should-do-the-right-thing-and-end-crown-copyright/ [Freeman].
[10] "Copyright: Modernizing Crown Copyright", (9 May 2020), online: *Canadian Federation of Library Associations* http://cfla-fcab.ca/en/guidelines-and-position-papers/.
[11] *Freeman*, *supra* note 9.
[12] Judge, "Copyright, Access, and Integrity of Public Information" (2008) 427:1 Journal of Parliamentary and Political Law at 432.
[13] *Wakaruk Nov 2020, supra* note 5.
[14] Canada, Parliament, House of Commons, Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act*, 42nd Parl, 1st Sess (June 2019) (Chair: Dan Ruimy). https://www.ourcommons.ca/DocumentViewer/en/42-1/INDU/report-16/page-108#22.
[15] *Ibid.*
[16] *Wakaruk Sept 2020*, supra note 4.
[17] "Bill C-209, online: *openparliament.ca* https://openparliament.ca/bills/43-2/C-209/.
[18] *Wakaruk Nov 2020, supra* note 5 at 15.
[19] *Keatley Surveying Ltd. v. Teranet Inc*., 2019 SCC 43.
[20] *Ibid* at 63.
[21] *Ibid* at 99.

interesting to note that on the issue of copyright over public legal documents (e.g., regulations, judicial decisions), the court's view was to "leave it for another day".[22]

To highlight the SCC's view on Crown copyright, the judges described the provision as "legislative monstrosity" with "atrocious drafting"[23], and calls on Parliament to "consider updating the provision…as it sees fit".[24] As articulated by Professor Jeremy de Beer, this is "as blunt as judges can be about the need for statutory reform".[25] In the meantime, private parties in a public-private partnership are advised to remain cautious and arrange for contractual overrides to protect their ownerships.[26]

The Message

As demonstrated from the different perspectives, maintaining Crown copyright is no longer appropriate for Canadians. Proposed reforms include abolishing Crown copyright entirely to align with the approach in the US[27] or creating a default open license system similar to Australia and UK.[28] While Crown copyright has not received much attention in the past century, the clear and unanimous message now is that a reform is long overdue.

[22] *Ibid* at 142.
[23] *Ibid* at 55.
[24] *Ibid* at 90.
[25] Okorie. "[Guest Post] Can the Government Get Your Copyright? The Supreme Court of Canada Says 'Yes'", (4 October 2019), online: *The IPKat* https://ipkitten.blogspot.com/2019/10/guest-post-can-government-get-your.html [Okorie].
[26] Mikus. "Keatley Surveying v Teranet: Supreme Court Addresses Crown Copyright for the First Time", (18 January 2021), online: *Fasken* https://www.fasken.com/en/knowledge/2019/10/keatley-surveying-v-teranet-supreme-court-addresses-crown-copyright-for-the-first-time/.
[27] *Wakaruk Nov 2020, supra* note 5 at 12.
[28] *Okorie, supra* note 24.