



Faculté de droit
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Le contenu généré par les utilisateurs demande-t-il des adaptations législatives ?

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Summary

In 2012, the Canadian *Copyright Act* was amended and introduced a great number of exceptions, including one for user-generated content (UGC). The panel presentation will situate this provision within its context and focus on the elements that seem to reflect a preoccupation with moral rights concerns, even though the exception is to the economic rights. It will explain how the text of the provision reflects a new drafting style from which four remarks will be extrapolated.

1. The high level of difficulty of conditions for the application of the UGC exception will probably discourage court proceedings; the ensuing climate ought thus to be very pro-user.
2. As an exception to economic rights, the incorporation of moral rights “conditions” will require a difficult assessment of the impact of these “conditions” on economic rights.
3. Since no new remedy for authors for breach of moral rights is created, we are actually back to the general state of the relationship between economic rights and moral rights (from the authors’ perspective), despite the mirroring of the moral rights conditions with those of the UGC exception.
4. This special concern for moral rights issues in the context of an exception, which is not expressly mandated by an international text, may be the sign of a defensive approach by the Canadian authorities to the UGC exception.

Research, private study, etc.

S. 29:

Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

Criticism or review

S. 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.**

News reporting

S. 29.2:

Fair dealing for the purpose of news reporting 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.**

Literary collections

S. 30:

The publication in a collection, mainly composed of non-copyright matter, intended for the use of educational institutions, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works in which copyright subsists and not themselves published for the use of educational institutions, does not infringe copyright in those published literary works if

- (a) not more than two passages from works by the same author are published by the same publisher within five years;
- (b) the source from which the passages are taken is acknowledged; and
- (c) the name of the author, if given in the source, is mentioned.

Work available through Internet

(PAM) 1/3

S. 30.4:

(1) Subject to subsections (2) to (5), it is not an infringement of copyright for an educational institution, or a person acting under the authority of one, to do any of the following acts for educational or training purposes in respect of a work or other subject-matter that is available through the Internet:

(a) reproduce it;

(b) communicate it to the public by telecommunication, if that public primarily consists of students of the educational institution or other persons acting under its authority;

(c) perform it in public, if that public primarily consists of students of the educational institution or other persons acting under its authority; or

(d) do any other act that is necessary for the purpose of the acts referred to in paragraphs (a) to (c).

Work available through Internet

(PAM) 2/3

S. 30.4:

(2) Subsection (1) does not apply unless the educational institution or person acting under its authority, in doing any of the acts described in that subsection in respect of the work or other subject-matter, mentions the following:

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

Work available through Internet

(PAM) 3/3

S. 30.4:

(3) Subsection (1) does not apply if the work or other subject-matter — or the Internet site where it is posted — is protected by a technological protection measure that restricts access to the work or other subject-matter or to the Internet site.

(4) Subsection (1) does not permit a person to do any act described in that subsection in respect of a work or other subject-matter if

(a) that work or other subject-matter — or the Internet site where it is posted — is protected by a technological protection measure that restricts the doing of that act; or

(b) a clearly visible notice — and not merely the copyright symbol — prohibiting that act is posted at the Internet site where the work or other subject-matter is posted or on the work or other subject-matter itself.

(5) Subsection (1) does not apply if the educational institution or person acting under its authority knows or should have known that the work or other subject-matter was made available through the Internet without the consent of the copyright owner.

(6) The Governor in Council may make regulations for the purposes of paragraph (4)(b) prescribing what constitutes a clearly visible notice

Berne Convention

Article 10:

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, **mention shall be made of the source, and of the name of the author if it appears thereon.**

Berne Convention

Article 10bis:

- (1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, **the source must always be clearly indicated**; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

Reproduction for private purposes

S. 29.22:

(1) It is not an infringement of copyright for an **individual** to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if

- (a) **the copy of the work or other subject-matter from which the reproduction is made is not an infringing copy;**
- (b) the **individual legally obtained the copy of the work** or other subject-matter from which the reproduction is made, other than by borrowing it or renting it, and owns or is authorized to use the medium or device on which it is reproduced;
- (c) the **individual**, in order to make the reproduction, **did not circumvent**, as defined in section 41, **a technological protection measure**, as defined in that section, or cause one to be circumvented;
- (d) **the individual does not give the reproduction away;** and
- (e) the reproduction is **used only for the individual's private purposes.**

(2) For the purposes of paragraph (1)(b), a “medium or device” includes digital memory in which a work or subject-matter may be stored for the purpose of allowing the telecommunication of the work or other subject-matter through the Internet or other digital network.

(3) In the case of a work or other subject-matter that is a musical work embodied in a sound recording, a performer's performance of a musical work embodied in a sound recording or a sound recording in which a musical work or a performer's performance of a musical work is embodied, subsection (1) does not apply if the reproduction is made onto an audio recording medium as defined in section 79.

(4) Subsection (1) does not apply if the individual gives away, rents or sells the copy of the work or other subject-matter from which the reproduction is made without first destroying all reproductions of that copy that the individual has made under that subsection.

Non-commercial user-generated content

S. 29.21:

(1) It is not an infringement of copyright for an **individual** to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the **individual** — or, with the **individual**'s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for **non-commercial purposes**;

(b) **the source — and, if given in the source, the name of the author, performer, maker or broadcaster** — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) **the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright**; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

Right of paternity

S. 14.1:

(1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where **reasonable in the circumstances**, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

Non-commercial user-generated content

S. 29.21:

(1) It is not an infringement of copyright for an **individual** to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the **individual** — or, with the **individual**'s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for **non-commercial purposes**;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) **the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright**; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

Right of integrity

S. 28.2:

The author's or performer's right to the integrity of a work or performer's performance is infringed only if the work or the performance is, to the **prejudice of its author's or performer's honour or reputation,**

- (a) distorted, mutilated or otherwise modified; or
- (b) used in association with a product, service, cause or institution.

Non-commercial user-generated content

S. 29.21:

(1) It is not an infringement of copyright for an **individual** to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the **individual** — or, with the **individual**'s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for **non-commercial purposes**;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) **the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright**; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a **substantial adverse effect, financial or otherwise**, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.