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Intellectual Property

# Amendments to the Copyright Act: Another Attempt

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## INTRODUCTION

After three earlier bills and years of rumours, the federal government recently tabled Bill C-11, the *Copyright Modernization Act* (CMA) in Parliament. Bill C-11 replicates the 2010 attempt, Bill C-32, which died with the dissolution of Parliament prior to the federal election earlier this year.

The CMA represents a comprehensive set of long-awaited amendments to the *Copyright Act* (Act). It will, if passed, not only significantly modernize the Act (which has not been significantly amended since 1997) but also align domestic Canadian law with two of Canada's long-standing international treaty commitments: *The World Intellectual Property Organization* (WIPO) *Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*.

The proposed amendments in the CMA are numerous and complex. Some of the highlights include:

## RIGHTS

- **Making Available Right:** The CMA would confirm that copyright holders have the exclusive right to authorize or prohibit their works being made available for dissemination on the Internet.
- **Protection for Technological Protection Measures (TPMs):** The CMA would protect TPMs (colloquially referred to as "digital locks") from cracking by treating instances of TPM circumvention as instances of copyright infringement.
- **Penalties for TPM Enablers:** Persons who market or distribute TPM-circumvention tools (e.g., digital lock-cracking software) or set up services to enable infringement (e.g., torrent tracker sites) would be subject to sanctions under the CMA.
- **Moral Rights for Performers:** The CMA would grant performers the right to protect the integrity of their recorded works and to have them attributed (or not attributed) to them as they choose.
- **Ownership of Photographs:** The CMA would provide that photographers own copyright in their commissioned works. Currently, the first owner of copyright in a photograph is generally the person who commissions the photograph unless the parties contract to the contrary.

## LIMITATIONS ON RIGHTS

- **Internet Service Providers (ISPs):** The CMA would confirm that ISPs do not infringe copyright when they act strictly as communications intermediaries for the infringements of their customers. The CMA would also formalize the often used "notice and notice" regime of contact among copyright holders, ISPs and their customers.
- **Hosting:** The CMA would provide that it is not an infringement to provide digital memory which another person might use to store an infringing copy (e.g., online network storage space, network-side personal video recorders, etc.).
- **Search Engines:** The CMA would allow search engines to make copies of protected materials if those copies are necessary for the technical operation of the search engine.
- **Software:** The CMA would permit the copying of software for back-up, security and encryption research, as well as interoperability purposes.
- **Temporary Reproduction for Technological Processes:** The CMA would permit the making of copies of protected works temporarily as an essential part of a technological process.
- **Educational Institutions, Libraries, Museums and Archives:** The CMA would permit a wide range of activities by educational institutions, museums, libraries and archives. The CMA would permit these institutions, subject to limitations, to make and distribute electronic copies of course materials, books and other protected works.

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- **Fair Dealing:** The CMA would expand the scope of "fair dealing" in the Act to include education, parody and satire.
- **Remixing:** The CMA would permit non-commercial "remixes" of copyrighted content, providing, among other things, that the new work has no substantial adverse impact on the original work.
- **Use Shifting:** The CMA would allow "format shifting" (e.g., moving music from a CD to an MP3 player) and "time shifting" (e.g., recording television for future viewing), two activities which, though widely practiced by Canadians, have never been permitted by the Act.
- **Statutory Damages:** The CMA would create separate statutory damages regimes for "commercial" and "non-commercial" copyright infringement. Statutory damages for non-commercial infringement would be capped at C$5,000 per *legal proceeding* and subject to a "first to sue and elect" limitation. Infringement undertaken for commercial purposes would remain subject to statutory damages of up to C$20,000 *per work* infringed.

Interested in learning more about the *Copyright Modernization Act*? Ready to prepare your business for the new realities? Please contact any member of our Intellectual Property Group, including:


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