Internet Society Canada Chapter
Draft Policy Statement on Copyright and the Internet
Motion for Policy Adoption

Prepared by Cynthia Khoo for the ISCC Policy Committee
23 October 2017 (Revised 9 November 2017)

A. Purpose and Overview

The purpose of this document is to have the Internet Society Canada Chapter (ISCC) adopt a policy on copyright and the Internet. This policy would guide the ISCC in its positions and activities on issues regarding copyright law and policy, and its impact on Internet openness and accessibility.

Examples of actions that the ISCC might take based on this policy include writing submissions for copyright-related consultations; signing joint statements and open letters about copyright and the Internet; and publishing materials or hosting events that educate the public on copyright issues in context of the Internet.

Example issues that the ISCC may become involved in include:

- Online Intermediary Liability / Safe Harbour (Notice-and-Notice)
- Copyright Terms (Extension / Reduction) and the Public Domain
- Application of Fair Dealing in Online Environments (e.g. Open Access, Academia)
- Copyright Enforcement (digital rights management, technological protection measures / digital locks, potential criminalization of copyright infringement, website blocking, content identification and filtering, traffic management, DNS interference)
- Misuse and Abuse of Copyright Law to Remove Online Content
- Copyright in Trade Agreements (TPP, NAFTA)
- Copyright in Artificial Intelligence and Machine Learning
- Copyright in Broadcasting and Cultural Policy (vertical integration concerns, impact on telecommunications policy, implications for diversity of “Canadian creators”)

The policy proposed for the ISCC to adopt is set out in Section B.

Section B is followed by an Appendix, which provides background material in support of the proposed policy. This includes: context and history on the importance of copyright in Internet law and policy; information on the Internet Society’s prior involvement in copyright issues; a brief overview of relevant Canadian copyright law and international treaties; and a survey of past issues and concerns for the Internet in copyright law and policy.

B. Internet Society Canada Chapter Policy on Copyright and the Internet

The Internet Society Canada Chapter (ISCC) commits to upholding Canadian copyright principles of balance, proportionate measures, fair dealing, users' rights, and applying a common sense approach in context of Internet openness and technological advances. These principles are enshrined in the Canadian *Copyright Act* as well as in numerous Supreme Court of Canada (SCC) decisions—in particular, five fair dealing decisions that the SCC handed down on July 12, 2012, known as the Copyright Pentalogy (described in more detail in the Appendix).

The ISCC also adopts the following principles as recommended by the Internet Society in its Issues Paper on Intellectual Property on the Internet, with respect to intellectual property and Internet policy:

> ***Intellectual Property and Multistakeholder Governance:*** *All discussions about intellectual property in the Internet should be conducted under a multistakeholder framework.*
>
> ***Intellectual Property and Transparency:*** *the need for transparency is reflected both in the Geneva Principles as well as in the Open Government Paradigm. The Internet Society believes that this need should further be reflected in agreements like the Anti-Counterfeiting Trade Agreement (ACTA), the Trans-Pacific Partnership Agreement (TPP) and the Canada-Europe Comprehensive Agreement (CETA).*
>
> ***Intellectual Property and the Rule of Law:*** *Intellectual property should be based on principles such as due process, equality of rights, fairness, transparency, the right to be heard and legal certainty.*
>
> ***Intellectual Property and Internet Architecture:*** *The Internet Society has long recognized that the infringement of intellectual property rights is a critical issue that needs to be addressed, but, at the same time, it must be addressed in ways that do not undermine the global architecture of the Internet or curtail internationally recognized rights.*
>
> ***Innovation without permission:*** *All intellectual property laws and policies should bear in mind the Modern Paradigm for Standards Development, shaped by adherence to the following principles: cooperation; adherence to principles including due process, consensus, transparency, balance and openness; collective empowerment; availability; and, voluntary adoption.*[1]

Lastly, the ISCC commits to undertaking the following analysis when considering copyright law and policy in the context of Internet governance and openness. This analysis consists of a non-exhaustive list of factors set out by the Internet Society in its report, "Perspectives on Policy Responses to Online Copyright Infringement: An Evolving Policy Landscape":

a) *What methods of copyright infringement and/or categories of infringers is the policy designed to address?*
b) *How effective is the policy likely to be at preventing or reducing copyright infringement?*

---

[1] Available at: <https://www.internetsociety.org/wp-content/uploads/2017/08 /Internet20Society20 Issues20Paper20on20Intellectual20Property20on20the20Internet20Final_EN.pdf>, at pages 1-2 ["ISOC IP Issues Paper"].

c) *What solutions might infringers choose or develop in response? What impact would these have?*
d) *What impact would the policy have on privacy?*
e) *Would the policy discriminate against legitimate uses of applications?*
f) *Would the policy discourage or prevent the use of certain technologies and/or development of new communication protocols?*
g) *Would the policy alter the basic architecture of the Internet? Are there any unpredictable or identifiably negative consequences?*
h) *What impact would the policy have on security?*
i) *Would the policy inhibit or enhance users' willingness to access the Internet or obtain access to the Internet?*
j) *Would the policy directly or indirectly reduce Internet access or the availability of Internet access?*
k) *Would the policy materially raise or lower the costs of Internet access?*
l) *Is there any risk of significant or material damage to third parties' use of or access to the Internet?*
m) *Would the policy encourage or discourage the use of certain business models?*[2]

The Internet Society Canada Chapter will adhere to the policy as set out above, in conjunction with Canadian copyright, telecommunications, and other relevant laws, when engaged in discussions or activities at the intersection of copyright and the Internet.

[2] Internet Society, "Perspectives on Policy Responses to Online Copyright Infringement: An Evolving Policy Landscape," online: <http://www.wipo.int/edocs/mdocs/copyright/en/wipo_isoc_ge_11/wipo_isoc_ge_11_ref_00_runnegar.pdf> ["ISOC Perspectives on Policy"].

APPENDIX

A. Introduction and Background: Why adopt a policy on copyright and the Internet?

Just as "the Internet is for everyone", so too is copyright. The rise of the Internet and its fundamental role in upheaving various copyright-heavy industries, along with the latter's attempts to respond, have ensured copyright law and policy a significant seat at the table of Internet governance, law, and policy. No longer is copyright law predominantly the domain of Copyright Board tariffs, entertainment licensing agreements, or narrowly circulated legal scholarship. For many years now, it has formed the central subject of or impetus for young adult novels,[3] rock concerts,[4] podcasts,[5] and of course, several landmark Supreme Court of Canada decisions[6] that have helped shape the Internet today.

Copyright is for everyone in two senses. Both of them also go to why it is so crucial for advocates of the open Internet to get it right on copyright.

The first sense is the original notion of copyright as the bargain between creators and society: for creating a work nominally of value to society—whether in contributing to art, culture, social commentary, political discourse, or otherwise the public sphere—the creator receives a temporary exclusive monopoly over that work, or a set of exclusive rights to benefit from use of the work. In exchange, society benefits from the work, first through its mere existence and in limited ways as fair dealing laws permit, and then through the ability to use, incorporate, and build upon that work freely once its copyright expires.

The expiration of copyright means that the created work now enters the public domain. It provides raw material for further creation of new works, whether art, knowledge, research, parody, or something that would have been otherwise unimaginable without the original work. In this sense, then, everyone benefits from a copyright system that successfully strikes a balance between incentivizing creators to create, through the assurance of just rewards, and equally ensuring that society and future creators may subsequently build upon such creations, thereby contributing to their communities.

Copyright policy, in context of the Internet, is for everyone. Those who ignore it do so at their peril. Copyright-dependent industries that have experienced the greatest (financial) pain as a result of the Internet—music record labels and film production companies, for example—have zeroed in on the Internet as the primary source of their woes. This is due to factors such as:

---

3 "Doctorow: *Pirate Cinema* was inspired by a legislative event in the United Kingdom where I live. In 2009 they introduced legislation called the *Digital Economy Act*, which includes something called "three strikes," which says that if you're accused — without proof — of three acts of copyright infringement, you and your family get disconnected from the internet." "With Pirate Cinema, Cory Doctorow Grows His Young Hacker Army" (14 November 2012) *Wired*, online: <https://www.wired. com/2012/11/geeks-guide-cory-doctorow/>. *Pirate Cinema* available for download at: <http://craphound.com/pc/download/>.

4 "Rock Against the TPP w/ Rebel Diaz & Anti-Flag" (16 September 2016) *blogTO*, online: <www.blogto.com/events/rock-against-the-tpp-w-rebel-diaz-anti-flag/>; see also RockAgainsttheTPP.org.

5 Techdirt Podcast, online: <https://www.techdirt.com/blog/podcast/>.

6 Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013). Available for download at: <https://press.uottawa.ca/the-copyright-pentalogy.html>.

- peer-to-peer (P2P) sharing of copyrighted content, before the rise of legal, convenient, and affordable avenues such as Netflix and similar services;
- the intangible and cross-border nature of the Internet, which is particularly confounding to an area of law as territoriality-based as intellectual property; and
- the challenge of identifying and persecuting individual infringers due to their number and anonymity.

Rather than give way to technological advances and market forces, however, copyright industries have largely chosen to seek forms of "restitution" from the Internet. Their efforts have manifested in a range of troubling proposals—some of which have become law—targeting: Internet service providers (ISPs) and online intermediaries such as search engines, social media platforms, and domain registrars. Additional measures expose users to legal liability or penalties even where they have engaged in legal activities. The cumulative effect of these measures is widespread and long term chilling of online activity and free expression throughout the Internet, and by extension, in the world generally.

Such measures proposed or implemented have included:

- traffic shaping (which violates Canada's net neutrality laws);
- website blocking (which would likely violate section 36 of the *Telecommunications Act*);
- takedown requests of links, search results, or the allegedly infringing content itself;
- content identification and filtering (which prevents content from being uploaded to a website in the first place);
- DNS manipulation;
- industry measures, such as YouTube's automated bot system ("Content ID"); and
- terminating Internet access entirely by suspending subscribers' broadband accounts (the UK,[7] France,[8] New Zealand,[9] and Korea[10] all once proposed "three strikes" laws).

Law professors, intellectual property lawyers, copyright experts, technologists, digital rights advocates, librarians and educators, engaged citizens, and large numbers of creators, artists, musicians, and authors across Canada and around the world have criticized many of these measures, as well as industries' expansionist approach to copyright generally. Such approaches are considered overbroad, disproportionate in their impact, ineffective, and insufficiently mindful of damage to third parties, to innovation and the underlying infrastructure of the Internet, and to principles such as rule of law, procedural fairness and due process, or human rights.

In addition, overly punitive approaches to copyright law have allowed instances of copyright misuse or abuse to proliferate. In these cases, parties use legal mechanisms intended for copyright to force the takedown of online content for reasons not related to copyright. Examples include claiming copyright to request or enforce takedowns of unfavourable reviews or

---

7 Georgina Prodhan, "UK moves towards "three strikes" Internet policy" (6 March 2012), online: Reuters <https://uk.reuters.com/article/internet-piracy-britain/uk-moves-towards-three-strikes-internet-policy-idINDEE8250F020120306>.

8 Jacob Kastrenakes, "France reverses 'three strikes' piracy law, will no longer suspend violators' internet access" (9 July 2013), online: The Verge <https://www.theverge.com/2013/7/9/4507620/ france-ends-hadopi-three-strikes-internet-suspensions>.

9 Simpson Grierson, "Caught in the outfield: three strikes and you're out – New Zealand's Copyright (Infringing File Sharing) Amendment Act 2011" (12 May 2011), online: Lexology <https://www.lexology.com/library /detail.aspx?g=0d2270b6-9174-4d1a-a737-b5f99823e66d>.

10 Danny O'Brien and Maira Sutton, "Korean Lawmakers and Human Rights Experts Challenge Three Strikes Law" (29 March 2013), online: EFF <https://www.eff.org/deeplinks/2013/03/korea-stands-against-three-strikes>

reputation-related content,[11] to crush political dissent or critical commentary[12]—including of copyright takedown law itself[13]—and simply to extort Internet users for money through threats of litigation, even when users have not engaged in copyright infringement at all.[14]

B. The Internet Society and Copyright Policy

In consequence of the above, the Internet Society (ISOC) as well as several of its chapters have been active on the issue of copyright and intellectual property. ISOC is a Permanent Observer to the World Intellectual Property Organization (WIPO), a UN agency that administers a number of international IP treaties. ISOC has also issued several policy papers on this topic, including:

- Perspectives on Internet Content Blocking: An Overview (March 2017)[15]
- Paper on Intellectual Property on the Internet (June 2013);[16] and
- Perspectives on Policy Responses to Online Copyright Infringement: An Evolving Policy Landscape (June 2011).[17]

The Internet Society Switzerland Chapter (ISOC-CH) has submitted comments to a government working group on Swiss copyright law reform,[18] and Internet Society France Chapter (ISOC-FR) actively opposed early versions of France's "three-strikes" law (HADOPI).[19]

Thus far, the Internet Society and its chapters engaged on the issue have demonstrated their commitment to ISOC's vision and mission of promoting a free and open Internet as much in matters of copyright as in matters of telecommunications or privacy. Recognizing that the Internet is for everyone includes ensuring its benefits remain available to not just copyright owners, but also artists, collaborators, innovators, students and researchers, everyday individuals, and creators and performers.

The vision and mandate of the Internet Society Canada Chapter (ISCC) include being vigilant that the Internet remains open and accessible. Issues such as net neutrality and wholesale service policies directly concern the structure of Internet networks themselves, and the markets and regulations aimed at Internet networks directly. Copyright law affects the Internet in less direct but no less fundamental ways. Copyright policy, in the context of Internet governance,

---

11 Mostafa El Manzalawy, "Bad Reviews: How Companies Abuse the DMCA to Silence Negative Criticism" (28 July 2017), online: Lumen <https://lumendatabase.org/blog_entries/797>.

12 Katie Sykes, "Opinion: Aqua-gag — How the Vancouver Aquarium abuses copyright" (27 April 2016), online: Vancouver Sun <vancouversun.com/opinion/aquagag-how-the-vancouver-aquarium-abuses-copyright-law-to-silence-criticism>.

13 Mike Masnick, "Chilling Effects On Chilling Effects As DMCA Archive Deletes Self From Google" (12 January 2015), online: Techdirt <https://www.techdirt.com/articles/20150112/06545529675/chilling-effects-chilling-effects-as-dmca-archive-deletes-self-google.shtml>.

14 Sophia Harris, "'A shakedown against Canadians': Hollywood still telling internet pirates to pay up" (20 June 2016), online: CBC <www.cbc.ca/news/business/piracy-copyright-infringement-canada-1.3640434>; Rosa Marchitelli, "'Shocked' grandmother on hook for illegal mutant game download" (31 October 2016), online: CBC <www.cbc.ca/news/canada/ottawa/notice-and-notice-system-internet-copyright-enforcement-settlement-1.3823986>.

15 Available at: <https://www.internetsociety.org/resources/doc/2017/internet-content-blocking/>.

16 ISOC IP Issues Paper, *supra* note 1.

17 ISOC Perspectives on Policy," *supra* note 2.

18 See: https://www.isoc.ch/archives/1682; and https://www.isoc.ch/wp-content/uploads/2016/04/Vernehmlassungsantwort_Revision-URG_ISOC-CH-20160331.pdf.

19 LINX, "ISOC France calls for the withdrawal of the HADOPI draft law" (18 June 2008), online: <https://www.linx.net/public-affairs/isoc-france-calls-for-the-withdrawal-of-the-hadopi-draft-law>.

examines both the ways in which copyright enforcement efforts may threaten central functions of the Internet including those activities that subscribers rely on the Internet to do.

The aim is to ensure that copyright laws strike a fair balance between the original bargain between private monopoly to reward creators and the public interest that arises from access to their works. This also includes ensuring that copyright enforcement does not result in undue collateral damage to human rights, innovation without permission, or the infrastructure and technical functioning of the Internet. Such an objective requires copyright laws and policies to fulfill the legitimate interests of those who own copyright in works, while promoting the public domain and ensuring users' rights. These include doctrines of fair dealing (or fair use), the right to freedom of expression, the right to procedural fairness and due process. These objectives govern the policy that the Internet Society Canada Chapter (ISCC) adopts.

Copyright will continue to be an ongoing source of concern for a free and open Internet. Copyright law and policy lies within the ambit of the Internet Society Canada Chapter's concerns and activities.

C. Guiding Principles in Canadian Copyright Law

There are four main legal authorities that give rise to Canadian copyright law:

1. The federal *Copyright Act*,[20] updated for the first time since 1997 in 2012, by the *Copyright Modernization Act*;

2. Court decisions, including from the Supreme Court of Canada (SCC), Federal Court of Appeal (FCA), and Federal Court of Canada (FCC), most notably a landmark set of SCC cases from 2012 released on the same day and known as the Copyright Pentalogy;

3. International intellectual property treaties administered by WIPO and to which Canada is a signatory, including the *Berne Convention*, *Universal Copyright Convention*, *Rome Convention*, *Geneva Convention*, *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS), the *North American Free Trade Agreement* (NAFTA), the Canada-EU *Comprehensive Economic and Trade Agreement* (CETA), the *Marrakesh Treaty*, and if it comes to pass, the *Trans-Pacific Partnership* (TPP); and

4. Copyright Board decisions (which go to the Federal Court of Appeal and tariffs.

Copyright battles concerning the Internet have occurred in all four of these arenas.

a) Copyright Board

As an administrative tribunal, the Copyright Board is in some ways the frontline of the evolution of Canadian copyright law, where disputes over royalties eventually ascend into "foundation-shaking" legal reform at the Supreme Court of Canada.[21] The Copyright Board operates in relative obscurity with respect to the Canadian public. Little attention is given to regular public consultation or public interest intervention, and fewer resources are provided for in the way of process, outreach, or funding. Whether or not this will remain the case is open to question, as

[20] *Copyright Act*, RSC 1985, c C-42.

[21] Michael Geist ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013).

the Copyright Board recently completed a public consultation on its own operations and processes.[22]

b) International Treaties

Canada has signed a number of international treaties related to copyright and other forms of intellectual property, spanning from the Berne Convention for the Protection of Literary and Artistic Works in 1928, to the most recent Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, which came into force in September 2016.[23] These treaties establish international standards that Canada must meet in its domestic copyright laws. For example, Canada's copyright term is life of the author plus 50 years, which is based on the *Berne Convention*,[24] as opposed to life plus 70 years in the United States. These treaties have assisted Canada in standing up to pressure from the United States to expand copyright laws and copyright enforcement aggressively, in a way that goes beyond what the international community has agreed upon and that would impair the carefully attempted balance in Canadian copyright law.

The *Marrakesh Treaty* is particularly notable for open Internet advocates: it is the first and only international copyright treaty that bolsters users' rights, rather than further restricts them. Marrakesh ensures that those who are visually impaired are able to use published materials in accessible formats, without fear of being accused of copyright infringement or illegal circumvention of technological protection measures (TPMs). In contrast, every other treaty and agreement over the past several decades resulted in the expansion and strengthening of owners' rights in copyright. This has not operated in Canada's favour, due to its position as a net importer, rather than net exporter, of copyright properties (i.e. mass entertainment products such as films and music), meaning that such measures result in greater revenues flowing outside of Canada into other jurisdictions (predominantly the United States) than flow back in.[25]

Finally, the Supreme Court of Canada's decisions, particularly the Copyright Pentalogy, and the 2012 *Copyright Modernization Act* as enshrined in the current *Copyright Act*, have firmly established protection for users' rights and fair dealing in Canadian copyright law.

c) Legislation – Copyright Act

Regarding legislation, the modernized *Copyright Act* was heralded as a uniquely "made in Canada" approach that struck an appropriate balance between users and owners. It included new explicit fair dealing protections for parody, satire, private use (time shifting and format shifting, such as making private back-ups), and non-commercial user-generated content, including mash-ups and remixes—with the latter colloquially known as "the YouTube clause". This ensured that innovative uses of copyrighted works, which proliferated with the rise of social media and the Internet generally, would be protected from liability for copyright infringement. Pre-existing categories of fair dealing in Canada still include research, private study, criticism or

---

22 Copyright Board, "A Consultation on Options for Reform to the Copyright Board of Canada" (5 October 2017), online: Government of Canada <www.ic.gc.ca/eic/site/693.nsf/eng/00160.html>.

23 World Intellectual Property Organization, "Canada's Accession to Marrakesh Treaty Brings Treaty into Force" (30 June 2016), online: <http://www.wipo.int/pressroom/en/articles/2016/article_0007.html>.

24 There are two key exceptions: First, sound recordings and performances have a copyright term of 70 years from release date, an expansion over the former 50-year-from-release term. This was quietly implemented through the federal government's 2015 federal budget (at pages 305-06) under former Prime Minister Stephen Harper. Second, Crown copyright, which applies to government works, has a term that lasts until 50 years after the date of publication.

25 Myra J Tawfik, "What Is Canada's International Copyright Policy?" (13 July 2015), online: *Centre for International Governance Innovation* <https://www.cigionline.org/publications/what-canadas-international-copyright-policy>.

review, and news reporting.[26] While "fair dealing" in Canada is categories-based, and its United States counterpart, "fair use", is broad framework-based (using a four-factor test), Professor Michael Geist has noted how the two may have grown more similar in practice over time.[27]

One key element of the *Copyright Modernization Act* was the decision to implement safe harbour provisions for online intermediary liabilities, and specifically through a notice-and-notice system rather than a notice-and-takedown system as the United States implemented through the *Digital Millennium Copyright Act* (DMCA). Under notice-and-notice, intermediaries who receive notice of copyright infringement, such as ISPs, must forward such notice to the identified account, to meet their obligations for safe harbour. Under notice-and-takedown, intermediaries must take down the content to avoid risking legal liability, even if the content falls under fair use or is otherwise legal. Many consider notice-and-notice a more balanced and reasonable approach to addressing potential copyright infringement online, as it provides copyright owners with an avenue of recourse without engaging concerns around due process, presumption of guilt, and freedom of expression, to the extent that notice-and-takedown did and continues to.

Notice-and-notice has its faults. Foremost among them is that the lack of regulations prescribing a set format and content for notices has led to frequent abuse of the system, where copyright trolls have exploited notice-and-notice to issue to unsuspecting and uninformed subscribers implied litigation threats and offers or requests to settle.[28] Additionally, there are privacy concerns to do with ISPs being asked to release subscribers' identities to copyright owners,[29] as well as broadband affordability concerns that ISPs will raise Internet prices if they are not compensated by copyright owners for this work.[30] These are issues that the federal government must address in the upcoming legislative review (perhaps first waiting to see if the SCC grants Rogers leave to appeal on its compensation case against Voltage Pictures LLC).

Furthermore, while modernizing fair dealing in Canada, the 2012 *Copyright Act* also implemented new and stringent copyright enforcement provisions. This included a unique "enabler" provision establishing a "new cause of action against online services that are primarily for the purpose of enabling acts of copyright infringement".[31] More prominently controversial, however, were digital locks provisions that made it illegal to circumvent TPMs (technological protection measures). Altogether, despite its ostensible commitment to balance, Canada has also arguably become "home to some of the toughest anti-piracy rules in the world".[32]

Anti-circumvention laws are significant because they make the act of circumvention itself illegal, regardless of the purpose of circumvention or if the resulting copy of or access to the work was

---

[26] *Copyright Act*, sections 29.1 to 29.24.

[27] Michael Geist, "Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use" in Michael Geist ed., *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013).

[28] Nicole Bogart, "No, you do not have to pay a 'settlement fee' if you get an illegal download notice" (13 January 2017), online: *Global News* <https://globalnews.ca/news/3179760/no-you-do-not-have-to-pay-a-settlement-fee-if-you-get-an-illegal-download-notice/>.

[29] Daniel Tencer, "Court Ruling in TekSavvy Piracy Case A 'Bad Message for Privacy'" (19 March 2015), online: *HuffPost* <www.huffingtonpost.ca/2015/03/19/teksavvy-voltage-piracy-privacy_n_6904406.html>.

[30] Emily Jackson, "Why Rogers wants the Supreme Court to reconsider a copyright ruling on pirated content" (14 August 2017), online: *Financial Post* <business.financialpost.com/telecom/rogers-seeks-to-appeal-copyright-ruling-on-pirated-content-in-supreme-court-of-canada>.

[31] Heenan Blaikie LLP, "The Copyright Modernization Act: aligning Canadian copyright laws with the realities of the digital economy" (27 March 2013), online: Lexology <https://www.lexology.com/library/detail.aspx?g=485156cb-b134-40f7-ba4f-89f866cae458>.

[32] Michael Geist, "Canada is now home to some of the toughest anti-piracy rules in the world" (6 March 2017), online: Globe and Mail <https://beta.theglobeandmail.com/report-on-business/rob-commentary/canada-is-now-home-to-some-of-the-toughest-anti-piracy-rules-worldwide/article34223771/>.

legal. This is another reason that the Marrakesh Treaty is so important. Without that explicit protection, those who are blind or visually impaired would be liable for copyright infringement under Canadian law, by virtue of having to circumvent digital locks in order to convert works—legally obtained and paid for—into a format that allows them to access the work. Crucially, Marrakesh covers only those who are visually impaired or otherwise *print*-disabled, and does not include other forms of disabilities that may require circumventing digital locks in other kinds of media to make copyrighted works accessible.

d) Supreme Court of Canada Decisions

As for Supreme Court of Canada decisions,[33] the Canadian Internet Policy and Public Interest Clinic (CIPPIC) summed up the 2012 Copyright Pentalogy as "a big win for rational, flexible copyright law",[34] and Michael Geist stated at the time, "[I]t is hard to imagine a bigger victory for education, Internet users, and innovative companies. … the Supreme Court has delivered a vision of copyright that emphasizes balance, user rights, and innovation."[35] The five cases definitively reinforced and gave new life to, among other points, the following principles in Canadian copyright law:

- fair dealing generally and particularly in education (educators making photocopies for their students falls under fair dealing for purposes of private study and research; and what is relevant to the test for fair dealing is each specific instance of fair dealing in question, not "what is happening in aggregate across the educational sector");
- technological neutrality (recognizing that there is "no practical difference between a buying a durable copy of the work in a store, receiving a copying the mail, or downloading an identical copy using the internet");
- legality of on-demand online services ("a transmission of a single copy of a work to a single individual is not a 'communication to the public' [therefore does not engage exclusive copyright] within the meaning of the *Copyright Act*"); and
- legality of using copyrighted work for consumer research; that the relevant "purpose" for the test is the user's purpose and not the intermediary's purpose; and research does not have to occur in the context of creative work (in this case, the Court found that free 30-second song previews on iTunes falls under fair dealing).[36]

While some recent decisions have signaled an alarming trend towards owners' rights in intellectual property,[37] the Copyright Pentalogy and prior landmark SCC cases, as well as the *Copyright Act*, remain as foundations that must be used to protect technological advances, users' right to free expression online, and Internet functionality and openness.

END

---

[33] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38.

[34] CIPPIC, "Copyright Pentalogy (Fair Dealing, Technical Neutrality & More, online: <https://cippic.ca/en/copyright/copyright_pentalogy>.

[35] Michael Geist, "Supreme Court of Canada Stands Up for Fair Dealing in Stunning Sweep of Cases" (12 July 2012), online: <www.michaelgeist.ca/2012/07/scc-copyright-cases/>.

[36] *Ibid*.

[37] See, *e.g.*, *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34; and *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57