The Hill Times (Ottawa, ON)

Monday, November 29, 2021

The Hill Times (Ottawa, ON) • p. 1,4 • 1570 words

Source name
The Hill Times (Ottawa, ON)
Source type
Press • Newspapers
Periodicity
Bi-Weekly or Tri-weekly
Geographical coverage
National
Origin
Ottawa, Ontario, Canada

p. 1

p. 4

‘Out of step with other nations’: Canada’s Crown copyright laws in need of an overhaul, say library associations

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The portion of Canada’s Copyright Act that deals with Crown copyright is outdated and restrictive, and needs to be overhauled or replaced with a Creative Commons licensing used in countries including Australia and New Zealand, according to the Canadian Association of Research Libraries and the Canadian Federation of Library Associations.

“We have an antiquated, outdated and unnecessary system of Crown copyright that is hampering innovation, that is preventing good government work from having the impact and visibility it deserves, and we need a review of the system,” said Amanda Wakaruk, who chairs the copyright committee at the Canadian Federation of Library Associations and Crown Copyright Working Group, a nonprofit group formed in 2018.

Ms. Wakaruk said there is a lack of clarity around open licensing and permissions for government publications, since perpetual copyright terms for unpublished government records prevent archivists from digitizing and openly sharing government documents that are more than 100 years old.

Section 12 of the Copyright Act provides that the Crown “owns the copyright in works that are prepared or published by or under the direction or control of the Crown or any government department, subject to any agreement stating otherwise,” according to Innovation Canada. The language of that portion has remained virtually unchanged since 1921, when it was copied from the 1911 U.K. Copyright Act.

Innovation Minister François-Philippe Champagne said in February 2021 that 'every Canadian is affected by Canada’s copyright laws,'and that the government expects copyright to be 'fair and balanced, and to keep pace with technological and social change.'The Hill Times photograph by Andrew Meade

There have been attempts to change the Crown copyright portion of the act, but none have been successful thus far. In 1993, former federal Justice Minister Robert Kaplan tabled a private member’s bill asking for its abolishment. In February 2020, NDP MP Brian Masse (Windsor West, Ont.) introduced another, Bill C-209, aiming to amend the Crown copyright portion of the act, saying that the government had “closed the door” when it comes to government publications and research, costing taxpayers money and going against the principles of open government. The bill was never passed.

2019 House committee report recommends abolishing Crown copyright, bolstered by 200 submissions While working as a librarian, Ms. Wakaruk said there were numerous instances in which she was not allowed to make web archives out of government content due to Crown copyright laws, or where permission requests from libraries were ignored altogether. Ms. Wakaruk said this happened even when the works had already been made available to the public, which sparked in her an "awareness and realization that Canada is a country out of step with other nations."

In 2017, a year before the start of the last review of the Copyright Act, more than 1,000 Canadians signed a parliamen-tary petition asking the government of Canada to eliminate Crown copyright for government works made available to the public. Ms. Wakaruk said she was "heartened" to see over 20 written submissions from organizations and institutions asking for Crown copyright reform, and pointed out that the statutory review of the Copyright Act released by the House Industry, Science, and Technology Committee said their various testimonials were a "rare point of consensus."

The report proposed abolishing Crown copyright altogether, in line with more than 200 submissions calling for that result. The report argued it creates unnecessary barriers to the use of works produced with public funds and that all government works should enter the public domain automatically. Ms. Wakaruk said an alternative to this would be to follow in the footsteps of Australia and New Zealand, which uniformly licences all Crown copyright under a Creative Commons Attribution Licence, enabling the free distribution of the work.

"That would at least prevent the fear of infringement from hampering the work of libraries and archives. At a minimum, that's better than nothing," she said.

Ms. Wakaruk said she hopes the Liberal government will go back to what the stakeholders said in the report and follow their recommendations, but unfortunately, some of the committee's recommendations were "kind of out of step with what the experts said." Ms. Wakaruk said one of the committee's recommendations is focused on potential copyright infringement by the government of Canada, which is "completely unrelated" to the issues and concerns that were brought before the committee. "So there's a bit of a disconnect there that left us scratching our heads," Ms. Wakruk said.

Ms. Wakaruk said the Canadian Federation of Library Associations and the Canadian Association of Research Libraries (CARL) have been in discussion on and off with the political staff and bureaucrats at the Treasury Board and Heritage Canada. In September 2021, they sent a letter to then-heritage minister Steven Guilbeault (LaurierSainte-Marie, Que.), Innovation François-Philippe Champagne (Saint-Maurice-Champlain, Que.), and then Treasury Board president Jean-Yves Duclos (Québec, Que.) calling on federal and provincial governments to make official publications more accessible by assigning a Creative Commons licenses to publicly available government information.

There needs to be a community of stewards to protect Canadian culture, artifacts, and government information, Ms. Wakaruk said, "but if there's a fear of copyright infringement, that work is not getting done and democracy suffers as a result."

Adopting a Creative Commons license for Crown works would have 'advantages' over current model Susan Haigh, executive director at the Canadian Association of Research Libraries (CARL), said Canada's Copyright Act is ideal in many ways, with a "balance of user and creator rights, general technological neutrality and reasonably strong exceptions," but that it could still use some tweaking.

Ms. Haigh said CARL has long advocated that the Crown copyright should be waived entirely, but the government has not done so and "they likely don't have time to look at it" before the Canada-United States-Mexico Agreement (CUSMA) takes hold. The pact came into force in July 2020. But in the shorter term, she said CARL would like to see a Creative Commons licensing implemented, which has "some advantages over the current license used."

In February 2021, the federal government launched a public consultation, led by Mr. Champagne, on how to implement its CUSMA commitment to extend Canada's general copyright term of protection, while mitigating potential negative implications. Canada has agreed to extend its general copyright term of protection from 50 to 70 years after the life of the author by the end of 2022, which is more in line with the U.S.and Mexico.

"Every Canadian is affected by Canada's copyright laws, and I invite them to share their views on term extension," said Mr.

Champagne at the time. "Canadians expect copyright law to be fair and balanced, and to keep pace with technolog-

ical and social change. These consultations will help meet our commitments under CUSMA and guide us as we move forward with copyright reform."

Ms. Haigh has an issue with this move, saying it is "going in the wrong direction." Because of this provision, no works will enter the public domain for 20 years after CUSMA is ratified, and CARL has previously said "the digitization work and access to a rich array of materials will grind to a premature halt" if the copyright term is extended.

Michael Geist, a law professor at the University of Ottawa who holds the Canada Research Chair in internet and e-commerce law, said the problem with term extension is that the "vast majority" of works have already been created, so the extension would result in a 20-year period where "nothing would even enter into the public domain."

Prof. Geist said the extension would be a "windfall" to a very small percentage of works that are commercially viable, but at the cost of "locking down" all other works for another 20 years."

The House committee's report recommended an option to "optin" to the copyright extension, which he said would have the effect of limiting the negative impacts to a small segment of commercially viable works, while leaving the vast majority of works still in the public domain.

Prof. Geist said Canada's Crown copyright law is "overly restrictive and woefully outdated." He said given that the Liberal government has attempted to make transparency a priority, the fact that works created by it are still subject to such restrictions "remains a significant problem."

The simplest way to remedy this, according to Prof. Geist, would be for the federal government to remove the Crown copyright approach and take one similar to the United States, where works created by the government are available to the public by default. The next best approach would be adopting an open licensing like Creative Commons.

"There's no reason that someone should have to seek the permission of the government to actively work with the government's own materials," he said. "These are, in effect, the works of the public, and so the law should reflect that."

The term extension issue will likely get attention due to it having a built-in deadline because of the trade agreement, and Prof. Geist said the government has not signalled a great interest in dealing with the Crown copyright issue. "It wasn't something mentioned in the Speech from the Throne, so it's pretty clearly not one of their top priorities."

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