



Canada's proposed *Copyright Modernization Act* and cloud computing

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Overview

- Bill C-11, the *Copyright Modernization Act*, is a long-overdue, comprehensive copyright law reform package
 - Given its breadth, it is controversial on many counts
- The bill contains a number of provisions that are directly relevant to consumer use of cloud services
 - (and many more that are not, and therefore not covered here)
- In general, the bill does a good job of enabling consumers to make legal uses of cloud computing services, while protecting the legitimate interests of rights-holders
 - However, the primacy of technological protection measures (TPMs) may render some personal use rights illusory



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Terminology

- Among other things, public cloud computing services enable users to access digital media files anywhere over the Internet
 - By means of an application or a browser
 - By means of downloads or streams
 - On a variety of types of devices
- My focus:
 - commercial copyright works, not user-created files
 - consumer use cases, not business
- Three types of cloud services at issue:
 - Remote storage services
 - Cloud storage services, e.g., Microsoft SkyDrive, Bell Personal Vault
 - Network-based personal video recorder (NPVR) services
 - Licensed content services
 - Music: e.g., iTunes; video: e.g., Netflix; e-books: e.g., Kobo
 - Hybrids



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Bill C-11

- Harper government's fourth attempt to update Canada's copyright law for the digital age, re-introduced Sept. 29

The government's description of what the *Copyright Modernization Act* will do:

"This bill will implement the rights and protections of the World Intellectual Property Organization (WIPO) Internet treaties and give Canadian creators and consumers the tools they need to remain competitive internationally. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, negotiated in 1996, established new rights and protections for authors, sound recording makers and performers of audio works.

Through this legislation, the Government will:

- modernize the *Copyright Act* to bring it in line with advances in technology and international standards;
- advance the interests of Canadians, from those who create content to the consumers who benefit from it;
- provide a framework that is forward-looking and flexible, and that will help protect and create jobs, stimulate the Canadian economy, and attract new investment to Canada; and
- establish rules that are technologically neutral, so they are flexible enough to evolve with changing technologies and the digital economy, while ensuring appropriate protection for both creators and users."

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Personal use rights: format/platform-shifting

- Bill C-11 includes a series of "personal use rights" intended to legitimize common consumer practices with respect to copyright works

29.22 (1) It is not an infringement of copyright for an individual to reproduce [a work] if

- (a) the copy of the [work] from which the reproduction is made is not an infringing copy;
- (b) the individual legally obtained the copy of the [work] 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 [an access-control or copy-control TPM], or cause one to be circumvented;
- (d) the individual does not give the reproduction away; and
- (e) the reproduction is used only for private purposes.

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

- A cloud storage service is a form of digital memory
 - "Format shifting: Allows consumers to copy and retrieve legitimately acquired content, such as songs, to devices they own, such as smart phones and MP3 players, or to or from online personal storage space they control."
 - "Canadians will be able to download material from their online personal storage spaces without triggering a double payment."

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Personal use rights: format/platform-shifting

- There are a number of limitations on this user right:
 - Only 'individuals' can take advantage, not corporations or vendors
 - Individual must 'own' a legitimate copy of the work
 - Individual must own the device or be authorized to use the medium onto which the copy is made (e.g., not a friend's iPod)
 - Cannot circumvent a TPM
 - Individual cannot give the copy away (and certainly not sell it)
 - The copy can only be used for 'private purposes' (e.g., cannot be used to perform or display the work in public)
- Access to works that the individual does not own or is not authorized to use is not covered by this user right (and implicitly would be subject to licensing and royalties)
 - E.g., cloud music services that allow end-users to store their own copies of their own tracks, vs. providing access to tracks that the individual owns, vs. providing downloads or streams of tracks that the individual does not own



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Personal use rights: time-shifting

- VCRs and PVRs will finally be legal in Canada
 - Though arguably their use has always constituted fair dealing

29.23 (1) It is not an infringement of copyright for an individual to fix a communication signal, to reproduce a work or sound recording that is being broadcast or to fix or reproduce a performer's performance that is being broadcast, in order to record a program for the purpose of listening to or viewing it later, if

- (a) the individual receives the program legally;
- (b) the individual, in order to record the program, did not circumvent [an access-control or copy-control TPM], or cause one to be circumvented;
- (c) the individual makes no more than one recording of the program;
- (d) the individual keeps the recording no longer than is reasonably necessary in order to listen to or view the program at a more convenient time;
- (e) the individual does not give the recording away; and
- (f) the recording is used only for private purposes.

(2) Subsection (1) does not apply if the individual receives the work, performer's performance or sound recording under an on-demand service.



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Personal use rights: time-shifting

- Similarly, there are limitations on this user right:
 - The right is for the benefit of the end-user, not the access provider
 - Content must be originally acquired legitimately
 - Cannot circumvent a TPM
 - Can only make one recording
 - Cannot build a permanent library
 - Cannot give the recording away (and certainly not sell it)
 - Recording can only be used for 'private purposes' (e.g., cannot be used to perform or display the work in public)
- Network-based personal video recorder (NPVR) services provide same functionality as PVRs, but storage medium is on the premises of the cable company, instead of in home
 - Previous bill contained curious carve-out of NPVR services from scope of time-shifting right
 - NPVR playback does not trigger royalty payments

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Personal use rights: backups

- Consumers can also make backup copies of works, subject to the same kinds of limitations

29.24 (1) It is not an infringement of copyright in a [work] for a person who owns — or has a licence to use — a copy of the [work] (in this section referred to as the "source copy") to reproduce the source copy if

- (a) the person does so solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable;
- (b) the source copy is not an infringing copy;
- (c) the person, in order to make the reproduction, did not circumvent [an access-control or copy-control TPM], or cause one to be circumvented; and
- (d) the person does not give any of the reproductions away.

(2) If the source copy is lost, damaged or otherwise rendered unusable, one of the reproductions made under subsection (1) becomes the source copy.

(3) The person shall immediately destroy all reproductions made under subsection (1) after the person ceases to own, or to have a licence to use, the source copy.

- No limitation on the type of device or medium, so cloud storage services can probably be used to store copies

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Safe harbour for network service providers

- In addition to the existing safe harbour for telecommunications service providers in section 2.4(1)(b), Bill C-11 provides protection from liability for “network service providers”

31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a [work] through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that [work].

(2) Subsection (1) does not apply in respect of a service provided by the person if the provision of that service constitutes an infringement of copyright under subsection 27(2.3).

- This protects Internet service providers (ISPs) but also other kinds of intermediaries – perhaps too many kinds?
- Does not protect ‘enablers’ – those who enable piracy (more below)



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Safe harbour for hosts

- Content-neutral web hosts are already immune from liability for infringements made using their services under existing jurisprudence, but Bill C-11 makes it explicit
 - The person who posts content online communicates it for copyright purposes, not the host (*SOCAN Tariff 22, SCC 2004*)
 - But host can lose that immunity if it were to “sanction, approve and countenance” infringing activity (authorization)

31.1 (5) Subject to subsection (6), a person who, for the purpose of allowing the telecommunication of a [work] through the Internet or another digital network, provides digital memory in which another person stores the [work] does not, by virtue of that act alone, infringe copyright in the [work].

(6) Subsection (5) does not apply in respect of a [work] if the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the [work] in the digital memory infringes copyright by making the copy of the [work] that is stored or by the way in which he or she uses the [work].

- Note that this is not a “notice-and-takedown” regime
 - Only a court can determine if infringement has taken place
 - Claim of alleged infringement from rights-holder not enough



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Anti-piracy obligations of intermediaries

- Bill C-11 will formalize the voluntary “notice-and-notice” service that Canada’s major ISPs have provided for approximately ten years
- The philosophy of bill is to enable rights-holders to go after the real ‘bad guys’ and enforce their rights directly, instead of placing socially undesirable obligations on intermediaries
- Copyright owners can send notices of claimed infringement to network service providers, hosts, or search engines, which match the complaint to a user (where possible) and forward it to that user, without revealing the user’s identity to the claimant or otherwise disciplining the user
- Intermediary must retain records relating to the claim in order to support subsequent court proceedings
 - Note that this is neither ‘graduated response’ nor monitoring

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“Enablers”

- Bill C-11 contains a provision intended to capture those who claim to be intermediaries, but intentionally enable piracy

27(2.3) It is an infringement of copyright for a person to provide, by means of the Internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

(2.4) In determining whether a person has infringed copyright under subsection (2.3), the court may consider

- (a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;
- (b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
- (c) whether the service has significant uses other than to enable acts of copyright infringement;
- (d) the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;
- (e) any benefits the person received as a result of enabling the acts of copyright infringement; and
- (f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

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Legal protection for TPMs

- The most controversial aspect of Bill C-11 is its prohibition against circumvention of technological protection measures (TPMs) (aka 'digital locks')
 - Access-control TPMs control access to a work (e.g., password interface to a cloud video service)
 - Copy-control TPMs restrict the ability to reproduce, communicate, perform a work, etc. (are there any copy-control TPMs anymore?)
- General prohibition: no person shall "avoid, bypass, remove, deactivate or impair" an access-control TPM (or provide services or tools that do so)
- Personal use rights cannot be exercised if doing so involves circumvention of either an access or copy-control TPM
 - That is, new personal use rights to format/platform-shift, time-shift, and make backup copies are trumped by TPMs



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Legal protection for TPMs

- Legal protection for passwords controlling access to licensed content services makes sense
- But to make the personal use rights meaningful, and so as not to foreclose fair dealing, individuals ought to be able to circumvent either kind of TPM for those legal purposes
- Government has indicated that it will not make this amendment, despite enormous opposition



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Some cloud tune-ups for Bill C-11

- Beyond the TPM issue, there are a number of minor amendments that could be made to ensure that the government's policy intentions with respect to cloud services are achieved:
 - Make sure safe harbours for true, neutral intermediaries do not contain loopholes that piracy enablers can claim the benefit of
 - Clarify the rules for notice-and-notice service to make them more efficient and effective for all involved
 - Ensure that the new 'making available' right is recognized in a way that enables rights-holders to fight piracy but does not create duplicate, regulated royalties in favour of the same rights-holders



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