Copyright Issues in Trade Agreements

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Part I Part II Part III Part IV

PART 1

I. EXECUTIVE SUMMARY

Over the past several years, we have seen the inclusion of provisions relating to copyright in trade agreements, a trend that seems to be increasing. For Canada, this was first seen as a result of the signing of the Canada-U.S. Free Trade Agreement in January 1989. The Canadian *Copyright Act* was then amended to require cable and satellite companies to pay for the retransmission of works included in distant broadcast signals.

On January 1, 1994, the North American Free Trade Implementation Act came into force, and the Canadian *Copyright Act* was again amended to introduce a rental right for sound recordings and computer programs (to permit copyright owners to authorise or prohibit the rental of their works). It also increased protection against the importation of pirated copyright protected works.

On January 1, 1996, the World Trade Organisation Agreement Implementation Act came into force, increasing the copyright protection afforded by the Canadian *Copyright Act* to all World Trade Organisation countries and protecting performers against bootleg audio recordings (unauthorised recordings of a live event) and unauthorised live transmissions of their performances.

Further, the Multilateral Trade Agreement currently under discussion attempts to address certain copyright issues.

Simultaneously with copyright issues being included in trade agreements, the World Intellectual Property Organisation continues to examine changing copyright norms, especially in light of digital media and two new copyright treaties were adopted by some 160 countries in December 1996. Under the auspices of WIPO, discussions are continuing on important copyright matters including performers' rights and database protection, and how future copyright treaties can protect them.

In conclusion, there is increasing discussion and a growing number of international instruments relating to the protection of intellectual property rights, including provisions in copyright treaties and trade agreements as well as specific international agreements devoted exclusively to the subject (i.e., Trade- Related Aspects of Intellectual Property Rights.) This trend should continue in the future due to the fact that intellectual property is increasingly seen as valuable property and an important contribution to the economies of countries. It is also due to globalisation and intellectual property being at the very heart of the Digital Revolution.

The chart below sets out a pictorial view of the role of copyright in copyright treaties and

trade agreements.

II. CHART: Copyright Treaties v. Trade Agreements

COPYRIGHT

WIPO Treaties		**Trade Agreements**	
Berne	1886 - 1971	FTA	1989
Rome	1961	NAFTA	1994
Copyright Treaty	1996	WTO (including TRIPs)	1996
Performers' Treaty	1996	MAI ??	
Database Treaty??			

III. GLOSSARY OF TERMS

Brief definitions of various acronyms and terms used in this Report are found below, many of which are further explained and discussed throughout this Report.

Berne Ð the *Berne Convention for the Protection of Literary and Artistic Works* (initial agreement signed in 1886; most recent update/version signed in 1971). Canada accedes at the 1928 level (i.e., the level of the Rome Act, 1928.)

FTA Ð *Canada-U.S. Free Trade Agreement.*

GATT Ð *General Agreement on Tariffs and Trade*.

Intellectual Property Ð includes patents, trade marks, industrial designs, trade secrets/confidential information and copyrights.

IPRs Ð "intellectual property rights" refer to the "rights" possessed by the owners of intellectual property.

MAI Ð *Multilateral Agreement on Investment*.

NAFTA Ð *North American Free Trade Agreement.*

Geneva Convention Ð the *Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms* (1971).

Rome Convention Ð the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (1961).

TRIPs Ð *Agreement on Trade-Related Aspects of Intellectual Property Rights*.

WIPO Ð World Intellectual Property Organisation which administers many of the international copyright treaties including *Berne* and *Rome*.

WIPO Treaties Ð refers to all of the copyright treaties administered by WIPO including Berne and Rome; the "two new WIPO treaties" refers to the treaties adopted in December 1996 in relation to copyright and performers' rights in digital media.

WTO Ð World Trade Organisation.

IV. PURPOSE OF THIS REPORT

The purpose of this Report is to examine the following:

1. The role of intellectual property, particularly copyright, in trade agreements;
2. The interplay between copyright provisions in trade agreements and copyright treaties;
3. The copyright provisions in FTA, NAFTA, WTO (including TRIPs) and MAI. This section of the Report includes commentary on the benefits of the copyright provisions in each of these agreements on Canadian creators of copyright protected materials, as well as any outstanding issues arising from each agreement.[1]

In accomplishing the above, this Report has a unique perspective. It examines the impact of the above mentioned trade agreements on the economic and moral rights of individual creators under copyright law. The term "creators" is used in the broad sense to include all authors, artists, performers, producers and others who create copyright works under the Canadian *Copyright Act* (referred to as "the *Act*.") In some circumstances, the term "creators" refers to creators who are not currently protected by Canadian copyright law in all or certain respects but who might be included in further amendments to the *Act*, for instance, performers in audio-visual works, or who are or might be protected under foreign copyright laws, copyright treaties and trade agreements.

Limitations

This Report does not systematically examine the wording in each of the trade agreements in comparison with the revised and/or current wording of the Canadian *Copyright Act*. However, it does undertake such comparisons in appropriate situations in addition to examining the broader copyright policy implications of the contents of each trade agreement on individual creators and owners of copyright protected materials.

This Report does not intend to provide any legal advice or opinions and proper advice should be sought where required.

PART 2

V. INTRODUCTION

Until relatively recently, there was little interplay between copyright treaties and free trade agreements, but they have now begun to coalesce into a novel and more unified and global approach to the protection of intellectual property rights. This is evident from the chapters and provisions relating to intellectual property in various recent trade agreements. Canada has been active in negotiating and adhering to such agreements and to date has adopted the FTA (in 1989), the NAFTA (in 1994) and the WTO including TRIPs (in 1996.) Canada is also currently involved in negotiations with respect to the MAI.

Both the number of the adhering states and quantity of relevant substantive provisions covered by such agreements have taken an incremental approach, beginning with provisions for the retransmission right in the FTA between Canada and the U.S., followed by many diverse provisions relating to copyright between the numerous member countries in the WTO.

In general, the trade agreements build upon the foundation of existing copyright treaties and obligate member states to adopt a certain minimum level of copyright protection, either by including provisions in the trade agreements themselves and/or by reference to the copyright treaties. This international "pressure" attempts to increase the level of protection available to creators in one's own country and to foreign creators, to prevent distortions in international trade, to promote effective protection for IPRs, and to ensure that trade policy measures aimed at dealing with pirate activities do not interfere with legitimate trade. This Report examines the protection of intellectual property in trade agreements and the benefits of the copyright provisions in these agreements, as well as any outstanding issues arising from each agreement, for Canadian creators.

VI. THE ROLE OF INTELLECTUAL PROPERTY, PARTICULARLY COPYRIGHT, IN TRADE AGREEMENTS

Traditionally, "trade" in intellectual property was not seen as a trade issue, as intellectual property itself was not generally considered a product. Today, however, as intellectual property is increasingly seen as contributing more and more to economies around the world, international discussions relating to trade include patents and information technology (which potentially have great value when subject to the proper protection and licensing arrangements). Even more recently, these discussions have extended to copyright protection which relates to all of our cultural industries as well as to most of the content now existing on that formidable networks of computer networks, the Internet.

Provisions relating to copyright law and the protection of the economic and moral rights of creators, as well as neighbouring rights, are included in trade agreements for a number and variety of reasons, as outlined below.

- to strengthen IPRs and encourage foreign investment.
- to address the needs of creators and owners of IPRs in a global and digital economy and the reality of the marketplace which means that a greater number of copyright works will be distributed globally via the Internet and other means.

- to address the fact that the licensing of IPRs is significant economically and socially and that most important licensing arrangements made today are international in scope. Standards for licensing intellectual property derive in part from laws and cultures in which intellectual property is distributed and greater similarity amongst domestic laws allows for a smoother system of licensing and distributing intellectual property around the world.
- to address the fact that intellectual property is in many cases more easily "stolen" or used without the permission of its owners than other forms of property.
- to meet the fact that "packaged information" is quickly becoming the basis of the (new world) economy. Intellectual property accounts for more than twenty percent of world trade, which equals approximately $740 billion U.S. In Canada, intellectual property may be one of the fastest growing export items. In 1996, royalties and licence fees resulted in $500 million coming into the country. This figure includes the money Canadians earn from their intellectual property. However, this figure must be read in the context of our simultaneous payments to foreigners for using intellectual property, that are increasing even more rapidly (than payments to Canadians.) In 1996, Canadians paid $2.7 billion to use intellectual property created by foreigners[2]. As Canada and other countries recognise the value of intangibles like intellectual property, and the special protection required of such intangibles, the significance of protecting them becomes an important trade issue.
- to provide a basis for future copyright treaties.[3]
- to help ensure that all creators are protected similarly around the world, notwithstanding their citizenship or residency, as well as to ensure that creators are protected at a similar level in foreign countries where their works are used. Ultimately, a single system of norms and practises for the protection and enforcement of copyright would be the goal.
- to support and encourage the copyright treaties which already provide an international basis of minimum protection for IPRs.
- to encourage countries which are already members of a copyright treaty (like Berne) to join that treaty at the highest level (i.e., the most current revisions of the treaty.) For example, *Berne* is a relatively old treaty, first negotiated near the end of the previous century and renewed and revised several times since that time, and different members currently adhere to different versions of Berne. In order for Berne to be most effective, all of its members would have to adhere to its highest, most recent, standards. (In other words, "laggards" are forced to modernise the level of copyright protection they provide.)
- to broaden the application of copyright treaties by obligating countries which are not party to any or some of the treaties to join them. In other words, "stragglers" are swept up into the expanding net of international copyright protection through the trade agreements.
- to provide an additional or alternative forum for countries which are dissatisfied with provisions in WIPO treaties.[4]
- to provide dispute mechanisms for conflicts arising out of international agreements relating to copyright.

As is evident, the rationale behind the inclusion of intellectual property provisions in trade agreements benefits individual creators. The next section of this Report describes in general how these provisions benefit creators, while the subsequent section examines how four specific trade agreements accomplish this.

VII. THE INTERPLAY BETWEEN COPYRIGHT PROVISIONS IN TRADE AGREEMENTS AND COPYRIGHT TREATIES

Whereas the above section deals with *why* IPRs are dealt with in trade agreements, this section of this Report examines *how* it is done.

As mentioned above, until recently, international copyright relations were through international copyright treaties and bilateral agreements. However, in the past several years, Canada has signed three international trade agreements that have provisions for IPRs and is already involved with a further such agreement. **These trade agreements are separate from the copyright treaties and are not intended to replace the copyright treaties.** In fact, trade agreements sometimes require that countries provide as a minimum, the protection required by the copyright treaties (examples are provided below) and that members of the trade agreements adhere to certain copyright treaties. In some cases, the trade agreements go beyond Berne and other treaties and provide protection for creators that is not covered by other treaties, thereby increasing protection around the world. As a specific example, at first blush it may seem that TRIPs[5] supplants Berne and other treaties and renders them fairly irrelevant. But this is not true. Berne, is incorporated, sometimes with changes, into TRIPs, so that it is subsumed within it, rather than supplanted by it. Without the precedents of *Berne*, etc, over a hundred years of gradually increasing international intellectual property and copyright protection, TRIPs could not have emerged, at least in its present form.

Trade agreements must work on many levels and take into account the policies and goals of intellectual property laws that exist around the world, the existing international copyright treaties, and the practical aspects and future development of the marketplace for intellectual property.

Trade agreements deal with IPRs in a number of ways. The remainder of this Report examines four different trade agreements and explains their provisions relating to IPRs. **In general, what is seen is that individual creators and owners of copyright protected materials benefit from any increased protection required by trade agreements in Canada, as well as in all of the countries which adhere to the agreements, as it ensures that Canadian creators are granted the same (and sometimes even greater) protection in foreign countries which adhere to the trade agreements.** Foreign investment is encouraged by stronger mechanisms to combat piracy both internally and across borders of illegal uses of copyright works which in turn ensures that investors who create and distribute copyright materials are compensated for their efforts. Outstanding issues stemming from the trade agreements include copyright protection that does not always go far enough, as well as an outflow of royalties in certain circumstances to foreign copyright holders that may be larger the royalties earned by Canadian creators from that same right.

Further, the trade agreements discussed in this Report "repeat" the obligations set out in the existing copyright treaties and thereby provides some "teeth" to the treaties. There is no mechanism under the WIPO copyright treaties to ensure that countries have provisions in their laws that provide the minimum copyright protection provided by these treaties. "An inherent deficiency plagues enforcement of Berne Convention strictures, inasmuch as the mechanism to enforce that treaty is limited to actions brought by one country against another country in the International Court of Justice, a cumbersome procedure that has

never been invoked. [Indeed] the lack of effective enforcement mechanisms in the Berne Convention rendered it insufficiently potent to safeguard authors' rights. For that reason, the option of protecting copyright within the framework of international trade came to the fore."[6] Conversely, agreements like the WTO provide countries with the legal recourses and mechanisms to ensure that other countries are complying with their obligations.

Although we see a greater interplay between trade agreements and copyright treaties, trade agreements are not assuming the primary role of international instruments to deal with copyright. This is evident by the WIPO convened Diplomatic Conference in December 1996 where two new copyright treaties were negotiated and adopted by some 160 countries, as well as the numerous meetings convened by WIPO since that time to discuss further copyright protection treaties under its auspices.

VIII. CANADA'S CURRENT OBLIGATIONS

As stated above, in terms of trade agreements that contain copyright related provisions, Canada belongs to FTA, NAFTA and WTO and is currently negotiating MAI.

In terms of copyright treaties, Canada adheres to two international copyright treaties, the *Berne Convention* (Berne) and the *Universal Copyright Convention* (UCC). These treaties are not per se part of Canada's *Copyright Act*, but because Canada adhered to them, she was obligated to amend the Act to comply with them. Because of these treaties, many portions of Canada's copyright law protects creators in over 100 countries around the world when their works are used in Canada, and Canadian creators are likewise protected in these countries when their works are used in those countries.[7]

Note again that the above noted and other copyright treaties have many different levels or versions agreed upon over the years. For example, Canada belongs to the substantive provisions of the 1928 version of *Berne*, and not at the 1971 level which contains the latest set of revisions.

Canadian copyright amendment Bill C-32 requires the Governor in Council to take steps to secure the adherence of Canada to the latest level of *Berne* and to the *Rome Convention*.[8]

The next section of this Report examines the copyright provisions in four different trade agreements. These agreements also deal with trade aspects affecting the cultural industries and therefore creators of copyright protected materials which go beyond the scope of this Report and are not discussed herein.

PART 3

EXAMINATION OF THE COPYRIGHT PROVISIONS IN FTA, NAFTA, WTO AND MAI

IX. FTA

Analysis

The Canada-U.S. Free Trade Agreement was signed on January 2, 1988 and the necessary legislation to implement its provisions was passed by both Canada and the U.S. on January 1, 1989. Articles 2004 and 2006 of the FTA deal with copyright matters.

Article 2004 states generally in relation to intellectual property that "The Parties shall cooperate in the Uruguay Round of multilateral trade negotiations and in other international forums to improve protection of intellectual property." To date, Canada may be seen as meeting this obligation in relation to her participation in NAFTA, TRIPs and MAI.

Article 2006 deals with retransmission rights. In summary, this article establishes a compulsory licensing regime for the retransmission rights of copyright holders of programs carried in distant signals and intended for free, over-the-air reception by the general public.[9]

Prior to the revision of the Canadian *Copyright Act* designed to implement the FTA, there was no provision for compensating owners of television programming subject to cable retransmission.[10] To the contrary, the U.S. *Copyright Act* of 1976 provided for retransmission royalties, and one of the major objectives for the U.S. negotiators during the FTA negotiating process was to include retransmission compensation in the FTA. Their concern stemmed from the fact that the U.S. is a major net exporter of programming to Canada. In reply to their concerns, Canada agreed in the FTA to provide a regime of "equitable and non-discriminatory" remuneration for the retransmission of distant broadcast signals emanating from Canada and the U.S.

Due to amendments to the Canadian *Copyright Act* resulting from the FTA, cable companies are now required to compensate rights owners for the retransmission of distant Canadian and U.S. radio and television signals. The retransmission of local broadcast signals is exempt from payment because rights owners are already compensated by local broadcasters for use of their products in local markets.

In Canada, the responsibility for paying the retransmission royalties lies with the "retransmitters" in Canada of "distant signals." All cable television companies are retransmitters; a master antenna system, a Low Power Television Station and a direct-to-home system delivering television signals by satellite may also be retransmitters. In any given community, a distant signal in Canada or the U.S. is one that cannot normally be received off-air, because the community is located well beyond that signal's good quality reception area, and the definition of distant signal is set by the Governor in Council. Local signals are excluded because the CRTC requires most cable systems to carry Canadian local signals and it is convenient for their subscribers to receive all signals through their cable hook-up.

The *Copyright Act* now mandates for the payment for retransmission royalties by a compulsory licence. This means that retransmitters do not need permission from the copyright holders to retransmit signals, provided certain conditions are met, including payment of royalties set by the Copyright Board.

Retransmitters make their payments to "collecting bodies" representing specific interests of copyright owners. The collecting bodies distribute the payments among the copyright owners whom they represent. Non-members of collectives can claim royalties from a collecting body designated by the Copyright Board, subject to the same conditions applied to its members.

At the current time, there are 11 retransmission collectives which represent the following types of rights holders entitled to receive the retransmission royalties: producers and distributors of U.S. independent motion picture and television production for all drama and comedy programming (for example, companies represented by the Motion Picture Association of America Inc. (MPAA)); producers of PBS and TVOntario programs and owners of motion pictures and television drama and comedy programs produced outside the U.S. (i.e., Canada and other countries); authors, composers and choreographers of dramatic works and audio-visual works including ballet, operas, televised mini-series, motion pictures and made for television movies; broadcasters who create programs broadcast on their facilities or on other distant stations as syndicated programs; teams in major professional sporting leagues whose games are regularly telecast in Canada and the U.S., including the National Hockey League, the National Basketball Association and the Canadian, National and American Football Leagues; teams in playing Major League Baseball games in Canada; composers, authors and music publishers;

The first royalty tariffs set by the Copyright Board were effective as of January 1, 1990. On October 2, 1990, the Copyright Board announced that the total tariff was set at approximately $50.9 million per year for 1990 and 1991, retroactive to January 1, 1990. This money was shared among the 11 collectives with 57% going to the Copyright Collective of Canada, the largest collective representing mainly producers of U.S. motion pictures and syndicated programming. Last year, approximately $40-42 million was collected from retransmitters.

According to press materials distributed by the Copyright Board in October 1990, approximately 85% of the royalties were expected to be collected by copyright owners of programming produced outside Canada. This distribution closely reflects the amount of Canadian and non-Canadian programming viewed in Canada on distant signals. It is likely that 80-85% of royalties collected are currently leaving the country and being distributed to Americans.

Benefits Flowing from the FTA:

- it encourages Canada to participate in further international discussions on copyright protection for its creators.
- it provides additional rights and royalties to certain Canadian creators, thereby strengthening copyright protection.
- It maintains the principle that creators and owners of copyright materials should be equally protected by copyright laws notwithstanding their residency or citizenship.

Outstanding Issues Stemming from the FTA:

- it creates a compulsory licence which means that creators cannot prevent the use of their copyright protected works, and are forced to administer their rights in the manner set out in the Canadian *Copyright Act* and accept the fees set by the Copyright Board.
- the notion of this compulsory licence for the retransmission right is against the general government policy with respect to revising Canada's copyright statute. Where possible, the government has been attempting to abolish existing provisions which mandate compulsory licences and to avoid adding new ones.
- there is a much greater outflow of moneys from this right to the U.S. than moneys collected on behalf of Canadians.[11]

X. NAFTA

Introduction

The North American Free-Trade Agreement between the U.S., Mexico and Canada came into force in Canada on January 1, 1994 with the proclamation of Bill C-115. In general, the agreement committed Canada to change her *Copyright Act* to improve the standard of protection provided to copyright owners of all types of protected works, and whether for Canadians or for copyright owners from other countries. As such, a number of amendments were made to Canada's copyright statute to meet these obligations under NAFTA. The majority of these changes evolve from the general obligation under Article 1701(1) of NAFTA which states that each Party "provide in its territory to the nationals of another Party adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade."

Commitment Regarding Copyright Treaties

In providing adequate and effective protection and enforcement of IPRs, Article 1701(2) of NAFTA states that the Parties must give effect to the substantive provisions of two copyright treaties, Berne (at the 1971 level) and the *Geneva Convention* (at the 1971 level.) However, NAFTA does not make it mandatory to accede to certain levels of these treaties. Rather, it states that "If a Party has not acceded to the specified text of any such Conventions on or before the date of entry into force of this Agreement, it shall make every effort to accede."

In fact, many of the amendments made to Canada's *Copyright Ac*t because of NAFTA were done with a view to conforming to the 1971 version of Berne, as opposed to meeting specific demands in NAFTA itself. Only a small number of changes were required specifically in order to meet NAFTA requirement. Thus, minor amendments regarding new definitions and modifying certain terminology were made to the Act; other changes made to the Canadian statute are set out below.

Rental Rights

Canada's *Copyright Act* was amended to provide for a rental right for owners of certain copyright works, namely sound recordings such as CDs, tapes, etc. as well as computer software.

Until January 1, 1994, once a copyright work such as a sound recording had been purchased, the copyright owner had no further rights in that "physical" property. In other words, although the copyright owner could prevent the reproduction of music on that sound recording, he could not prevent the renting of it. Copyright owners, therefore, were not receiving any royalties from the rental of any CDs or computer programs. Due to NAFTA and since January 1, 1994, a new right exists in the *Copyright Act* for the commercial rental of sound recordings and computer programs (regardless of when they were created or produced.) Because of this new right, we have seen rental stores shut their doors as opposed to obtaining the required permission from all copyright holders whose works they were renting.[12] Violation of this right is subject to civil, but not criminal, remedies.

Unlawful Importation

Changes were made to the customs related remedies provisions of the *Copyright Act* to prevent the importation of pirated works. This was necessary because, for the most part, these provisions were considered ineffective due to their inconsistency with wording found in Canada's Customs Tariff. These border enforcement measures enable the owner or exclusive licensee of a copyright work in Canada to apply to the court for a restraining order to prevent the importation of an unauthorized version of the work.

In order to grant the application, a court must first be satisfied that the work was about to be imported, or, if imported, had not yet been released in Canada; that the work had been made in the exporting jurisdiction without the consent of the rightful copyright owner, or that the work was made elsewhere than in Her Majesty's Realms and Territories or in a foreign country to which the *Act* applied; and that to the knowledge of the importer, the work would have infringed copyright if it had been made in Canada by the importer. In addition, the court could require that the applicant post security to cover the various duties, handling and storage charges, and to answer any damages that might, because of the order, be incurred by the owner, importer or consignee of the work.

Where an order is obtained, the Minister of National Revenue must take all reasonable measures to detain the work(s) in question and to notify the applicant and the importer of the detention and reasons thereof. Unless specified otherwise by court order, the Minister must release the detained goods two weeks after having notified the applicant of the detention, unless within that period the applicant initiates a court action for a final determination of the issue. If the applicant succeeds in such a court action, the court is empowered to make any order considered appropriate in the circumstances, including an order mandating that the goods be destroyed or delivered up to the plaintiff as his property absolutely.

Term of Copyright Protection

The *life-plus-fifty* rule is restated; however duration is extended to the end of the calendar year fifty years after the author's death. This extension also applies to the term for anonymous, pseudonymous, posthumous, Crown and joint works, and to the term of copyright in photographs[13], films and videos.

Benefits Flowing from the NAFTA

- in many circumstances, the need to make changes due to NAFTA helped expedite the copyright revision process in Canada. At the time that the NAFTA implementation bill came into effect, Canada was still between phase I and Phase II of copyright reform and certain copyright issues that were awaiting Phase II (which was finally tabled in Parliament in 1996 and passed in 1997) were addressed in the NAFTA implementation legislation.
- the new rental rights bring greater control and possible compensation to certain rights holders in relation to sound recordings and computer software.
- it provides copyright owners with stronger control over pirated works crossing the border.
- it provides a "small" increase in the duration of protection for copyright works and, by extending protection to the calendar year end in which the author died, makes it easier for consumers of copyright materials to calculate when copyright protection actually expires. The easier it is for consumers to obtain copyright permission, the more likely they will do so as opposed to using copyright protected works without the permission of the copyright owner.

Outstanding Issues Stemming from the NAFTA

- the rental rights could have been extended to protect other rights holders, such as owners of audio-visual works, and possibly books that are now sometimes lent from "private" libraries.
- in essence, since the rights apply to rentals of "physical" goods, it is unclear whether it also applies to the "rental" of sound recordings and computer software available on the Internet. These are questions which creators may need to examine, which the Canadian government may need to address in future amendments (and in their studies relating to such amendments), and which trade agreements and copyright treaties may have to take into address.[14]
- since the rental rights are subject only to civil remedies, copyright holders must themselves bear the burden of instituting any legal actions as opposed to relying on government assistance, which is available through criminal remedies applicable to the violation of copyright in other circumstances.[15]
- in some circumstances, the government used the NAFTA implementation bill as an opportunity to make certain amendments to the Canadian *Copyright Act* that were not specifically mandated by the NAFTA. This caused some controversy in the copyright community especially since only some of these "additional" amendments were supposedly passed by Parliament.
- certain consumers negatively perceived the closing of rental stores (for sound recordings and computer software) following the enactment of the rental rights.

XI. WTO

Introduction

In order to understand IPRs in relation to the WTO, this section of the Report is prefaced by a section describing the terms, GATT, WTO and TRIPs.

GATT: Together with the International Monetary Fund (IMF) and the World Bank, the General Agreement on Tariffs and Trade (GATT) comprised the third pillar of the Bretton Woods System, instituted after World War Two to regulate the international monetary and trading systems. Because the anticipated treaty designed to implement the world body regulating trade was rejected by the United States, the project lapsed and Chapter IV of that failed treaty became the GATT. The GATT, therefore, is merely "A multi-lateral international agreement that requires foreign products to be accorded no less favorable treatment under the laws than that accorded domestic products."[16] The WTO grew out of the seventh (or Uruguay) round of the GATT and has replaced it as the main vehicle of liberalising trade around the world.

WTO: The World Trade Organisation came into effect on January 1, 1995 following the implementation of the Uruguay Round Agreements of the GATT. The WTO, unlike the GATT, is an independent world body designed to regulate trade; it is administered by a Secretariat and has dispute settlement powers wherein panels of experts are appointed whose decisions must be respected. The WTO replaces the GATT and is the vehicle through which it's trade liberalising efforts will continue. Over 100 countries are members of the WTO, making it the most comprehensive international trade agreement.

TRIPs: In addition to the WTO, the Uruguay Round Agreements of the GATT generated the protocol on Trade-Related Aspects of Intellectual Property Rights. TRIPs follows the Berne approach to protecting intellectual property and compels WTO members to accept basic Berne principles such as national treatment. It deals with trademarks, industrial designs, patents, the protection of undisclosed information and geographical indications, and copyright and related rights. It also has general provisions relating to the acquisition, maintenance and enforcement of IPRs and dispute prevention and settlement. Enforcement, however, is administered pursuant to the Understanding on Rules and Procedures Governing the Settlement of Disputes (or Annex 2 to the Agreement Establishing the World Trade Organisation).[17]

The Contents of TRIPs

The TRIPs Agreement also came into effect on January 1, 1995 and is to date the most comprehensive multilateral agreement on intellectual property. It contains a number of provisions on copyright and related rights (i.e., the rights of performers, producers of sound recordings and broadcasting organisations.)[18] In order to meet Canada's obligations under TRIPs, the WTO Agreement Implementation Act was passed by Parliament and proclaimed into force on January 1, 1996. The TRIPs text overlaps to a great degree with NAFTA obligations and significant changes were not needed in Canada to meet the minimum requirements in TRIPs.

TRIPs provides, in a trade agreement, comprehensive global protection for creators and owners of intellectual property. At the time of the TRIPs negotiations, WIPO had already provided a forum for the negotiation of substantive obligations regarding IP for over one hundred years and TRIPs negotiators were able to draw upon this experience of multilateral cooperation in the IP field. The purpose of TRIPs is to fill some of the gaps left open by the WIPO treaties. Two areas which were initially recognised as lacking in the WIPO treaties were: (1) membership in WIPO was not universal; and (2) WIPO lacked an adequate enforcement/dispute settlement mechanism for disputes relating to the treaties under its jurisdiction.

More specifically, the goals of TRIPs are set out in its preamble and include reducing distortions and impediments to international trade, promoting effective and adequate protection of IPRs, and ensuring that measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade. The goals should be read with Article 7, Objectives, which states that the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, so as to benefit producers and users of technological knowledge and to enhance social and economic welfare, and to balance various rights and obligations. In addition, Article 8, Principles, recognises the rights of copyright owners to prevent the abuse of intellectual property rights, provided that such measures are consistent with TRIPs.

Substantive Standards of Protection

There are three main features of TRIPs, described below, for which details are specified in relation to copyright and not necessarily other IPRs.

1. Standards

Regarding each of the applicable areas of intellectual property, TRIPs sets out minimum standards of protection to be provided by each member country. The elements of protection relate to subject-matter to be protected, rights to be conferred and permissible exceptions to those rights, and to the minimum duration of protection. TRIPs sets these standards in two manners:

> (i) TRIPs requires that the substantive obligations of Berne in its most recent version (i.e., 1971), be complied with. There is one exception to this requirement relating to *Berne*'s provisions on moral rights. Otherwise, all the substantive provisions of *Berne* are incorporated by reference and thus become obligations under the TRIPs.[19]
>
> (ii) Secondly, TRIPs adds a substantial number of additional obligations on matters omitted or inadequately addressed in *Berne*.

Similar to *Berne*, TRIPs is a "minimum standards" agreement. This means that member countries may provide more extensive protection than that set out in TRIPs. Also, members are free to determine the appropriate method of implementing TRIPs within their own legal systems.

2. Enforcement

TRIPs deals with domestic procedures and remedies for the enforcement of IPRs. It sets out general principles in relation to all IPR enforcement procedures, and contains provisions on civil and administrative procedures and remedies. As well, it sets out special requirements for border measures and criminal procedures, which specify the procedures and remedies that must be available so that rights holders can effectively enforce their rights.

3. Dispute Settlement

TRIPs requires disputes about TRIPs obligations between WTO members to be subject to the WTO's dispute settlement procedures. Further, it provides for certain basic principles, such as national treatment (as in *Berne*) and most-favoured-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the agreement. The obligations under TRIPs apply equally to all member countries, but developing countries have a longer period to

phase them in.

Copyright Provisions

During the negotiations leading to TRIPs, it was recognised that Berne already and for the most part provided sufficient basic standards of copyright protection. It was therefore decided that TRIPs should enhance international copyright protection by obligating its members to comply with the substantive provisions of the latest version of *Berne*.[20]

One important derogation, however, is that TRIPs members are not required to include provisions relating to moral rights under *Berne*.[21] Article 6bis of Berne protects creators' moral rights to claim authorship of copyright protected works and to object to any derogatory action in relation to works which would be prejudicial to their honour or reputation), or to their rights derived therefrom.

As with the WIPO copyright treaties, all member countries are protected based on the principle of national treatment, that is, as nationals under the laws of the country where their work is being used. Also similar to the WIPO treaties, national treatment in certain specified circumstances can be replaced by "reciprocal protection", whereby each country provides the same protection only to reciprocating countries.

In addition to requiring compliance with the basic standards in *Berne*, TRIPs clarifies and enhances certain specific points in relation to copyright protected works. Highlights of the TRIPs provisions on copyright are set out below.

Protection of Expressions

TRIPs confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. This is a basic copyright law principle which is explicitly stated in the domestic legislation of many countries.

Computer Programs

TRIPs provides that computer programs, whether in source or object code, shall be protected as literary works under the *Berne Convention* (1971). This provision confirms that computer programs must be protected under copyright as literary works. Canada did not require an amendment to meet this obligation.

Databases

TRIPs clarifies that databases and other compilations of data or other material shall be protected as such under copyright even where the databases or other compilations include data that by themselves are not protected by copyright. In Canada and elsewhere, databases are usually eligible for copyright protection if they are created with skill, labour and a certain selection or arrangement of their contents. The provision also confirms that databases must be protected regardless of the form they are in, whether machine-readable or some other form. Furthermore, the provision clarifies that the protection shall not extend to the data or material itself, and that it shall be without prejudice to any copyright

subsisting in the data or material itself. These are important principles in light of the upcoming WIPO debates, EU Directive and U.S. legislation on the protection of databases.

Rental Rights

TRIPs provides authors of computer programs and, in certain circumstances, of cinematographic works, the right to authorise or prohibit the commercial rental to the public of originals or copies of such works. Regarding cinematographic works, the exclusive rental right is subject to the so-called impairment test. This means that a country is excepted from the obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that member country on authors and their successors. In respect of computer programs, the obligation (similar to what exists in the Canadian *Copyright Act*) does not apply to rentals where the program itself is not the essential object of the rental.

As discussed above under NAFTA, Canada has a rental right in sound recordings and computer programs. However, Canada has not introduced a rental right in audio-visual works because it claims that unauthorised copying is not materially impairing the right of reproduction in such works.

Limitations on Rights

TRIPs requires members to confine limitations or exceptions to exclusive rights to certain special cases which neither conflict with a normal exploitation of the work nor unreasonably prejudice the legitimate interests of the rights holders. This provision also applies to all limitations and exceptions permitted under the provisions of *Berne* and its appendix as incorporated into TRIPs.

Neighbouring Rights

TRIPs provides for the protection of performers, producers of phonograms and broadcasting organisations. Performers shall have the possibility of preventing the unauthorised fixation of their performance on a phonogram (e.g., the recording of a live musical performance). The fixation right covers only aural, not audio-visual fixations. Performers must also be able to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorised broadcasting by wireless means and the communication to the public of their live performance. Further, member countries must grant producers of phonograms an exclusive reproduction right, as well as an exclusive rental right.

The TRIPs provisions on rental rights apply also to any other right holders in phonograms as determined by national law. This right has the same scope as the rental right in respect of computer programs. Therefore, while it is not subject to the impairment test as in respect of cinematographic works, it is limited by a so-called grand-fathering clause, according to which member countries may maintain any systems of equitable remuneration of rights holders in respect of the rental of phonograms which were in effect on April 15, 1994 (i.e., the date of the signature of the Marrakesh Agreement), provided that the commercial rental of phonograms is not materially impairing the exclusive rights of reproduction of right holders.

Lastly, broadcasting organisations must have the right to prohibit the unauthorised fixations, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public, of their television broadcasts. However, it is not necessary to grant such rights to broadcasting organisations if owners of copyright in the subject matter of such broadcasts are granted the possibility of preventing these acts, subject to the provisions of *Berne*.

The term of protection for these rights is at least 50 years for performers and producers of phonograms, and 20 years for broadcasting organisations. Also, any country may, regarding the protection of performers, producers of phonograms and broadcasting organisations, provide for conditions, limitations, exceptions and reservations to the extent permitted by *Rome*.

In Canada, due to TRIPs, as of January 1, 1996, certain live performances or "performer's performances" are protected as a new category of copyright protected subject matter (even if they took place prior to January 1, 1996). The protection extends to a live performance of a copyright work, folklore and works in the public domain. It does not matter if the live performance is of a work not protected by copyright and is not fixed.[22] This protection is only against audio fixations and not audio-visual fixations.

Note that certain U.S. performers' performances are protected in Canada but not in the U.S. This is because U.S. law applies in the U.S., and the only type of live performances protected in the U.S. are live *musical* performances. Accordingly, a bootleg recording of an U.S. dramatic reading would be infringing in Canada but not in the U.S. Conversely, U.S. law protects against audio and video recordings, whereas Canadian law only protects against audio recordings of live performances. Thus, a bootleg video recording of a musical performance would be infringing in the U.S. but not in Canada.

There are also comprehensive rules for enforcing IPRs within the territory of each member country and for gaining access to the dispute-settlement provisions of the new WTO.

Benefits Flowing from the WTO

- as is true with the FTA and NAFTA, TRIPs ensures that Canadian creators can be confident that their works will be better protected by copyright and their rights more easily enforced.
- it obligated Canada to make certain amendments to her *Copyright Act*.
- it extends the TRIPs protection of copyright to the nationals of all WTO member countries.
- by including comprehensive rules for enforcing IPRs, it strengthens the enforcement of those rights both internally and at borders (i.e., prohibiting the importation of infringing materials.)
- it makes Canada a more attractive venue for investment and technological development, leading to more work for creators of intellectual property.
- it provides rental rights to many countries that are not members of NAFTA.
- it provides greater protection against software piracy.
- it provides limited protection against the unauthorised recording of live performances.
- it provides limited retroactive protection for works created and performances performed before the WTO came into effect.

- the discriminatory aspects of U.S. administrative border-enforcement measures will be curtailed.[23]
- by requiring member countries to meet the substantive requirements in the most recent version of *Berne*, it helps to prevent the possibility that there could be two copyright instruments developing in differing directions.

Outstanding Issues Stemming from the WTO

- one important issue omitted from TRIPs is the protection of moral rights. This is an extremely important area for individual creators as moral rights benefit the authors of copyright works and not necessarily the owners. As well, moral rights become much more relevant in light of sampling, scanning and morphing and the ease, speed and inexpensive of doing so on the Internet and through other new media.
- although rental rights are dealt with in TRIPs, the "out" provision allows many countries, including Canada, not to provide such a right in her copyright statute.
- TRIPs does not specifically deal with digital copyright issues. Note that this is an outstanding issue stemming from all of the trade agreements however with each more recent agreement and the growth of digital media, this issue becomes a greater one.

Agreement Between WIPO and WTO

Although WIPO and WTO are distinct entities, there exists an agreement between these two organisations.[24] The purpose of the Agreement is, according to its preamble, to establish a mutually supportive relationship and appropriate arrangements for cooperation between them. Towards this end the Agreement provides that:

1. The WIPO and WTO bureaucracies will cooperate by facilitating the exchange of texts and translations of laws, regulations and data between themselves. This will also include TRIPs related items pertaining to their various obligations under section 68 of the TRIPs agreement.
2. The bureaucracies will cooperate by facilitating the availability of texts and translations of laws and regulations for their respective member countries.
3. The parties to the Agreement shall enhance, and make available to developing countries which are member states of the opposite party only, in the case of WIPO the same legal-technical assistance, and in the case of the WTO the same technical cooperation, relating to TRIPs that they make available to their own developing country member states. In order to do so the parties shall keep in regular contact and exchange non-confidential information.

The agreement entered into force on January 1, 1996, may be amended by common agreement of the parties, and shall terminate either one year after receipt by one party of the other's written notice to terminate, or after some other longer or shorter period agreed to by the parties.

In summary, it seems that the agreement is designed to foster cooperation and a mutually supportive relationship between the two organisations by instituting mechanisms whereby each can keep track of the other's work and maintain records on such work in light of the overlapping issues with which they deal.

XII. MAI

Analysis

The Multilateral Agreement on Investment is a new international economic agreement currently being negotiated by 29 countries including Canada and the U.S. through the Organisation for Economic Co-operation and Development (OECD). Its purpose is to facilitate the movement of capital, including money and production facilities, across international borders by limiting the power of governments to restrict and regulate foreign investment. Other goals of the MAI are to eliminate discriminatory practices related to IPRs in the U.S., and to analyse the expanding U.S.-EU IPRs agenda. The MAI is based, and expands, upon investment provisions in NAFTA and TRIMs (the investment agreement which is part of the GATT), and applies them worldwide.

The current draft of the MAI (dated May 1997) contains a subject heading, "Intellectual Property", but has no accompanying text under this section. The discussion in this Report is therefore based upon speculation and the discussions reported in Part II to the MAI, entitled "Commentary".

The definition of "investment" in section 2(2) of the MAI is defined to include, amongst other things, intellectual property rights; the Commentary states that all forms of intellectual property are intended to be included therein. Specifically, this would include copyrights and related rights, patents, industrial designs, rights in semiconductor layout designs, technical processes, trade secrets, including know-how and confidential business information, trade and service marks, and trade names and goodwill. Supposedly, negotiators debated whether it was necessary to specify each type of intellectual property. Some delegations did not want to include "literary and artistic property rights" (i.e., the essence of copyright protected works), and Mexico prefers to cover IPRs only when acquired in the expectation of economic benefit or other business purposes. The result of negotiations is that additional study and discussions are required to clarify the relationship of the MAI to other international agreements relating to intellectual property, especially those requiring different standards of treatment or which provide their own dispute settlement mechanisms.

The definition of investment to include intellectual property can indirectly impact on many other provisions of the MAI. In this context, the Commentary queries whether the status of a rights holder raises issues that must be addressed with respect to the MAI provision on key personnel, and whether the MAI will contain provisions on corporate practices that might give rise to intellectual property concerns. It also states that further study is required to determine whether this definition of investment will affect the definition of investor, and if so how to address it.

Under the MAI heading "Special Topics - Intellectual Property", it is stated that delegations recognised the need for further examination of the concept of intellectual property in the definition of investment, but could not agree on a number of issues, including: whether there should be an open or closed definition and, if closed, whether it should include only those rights specified in TRIPs or other existing rights as well; whether the definition should exclude copyright, neighbouring rights and databases; whether the definition should include future as well as existing intellectual property rights; and whether for an asset to qualify as an investment, it must have the traditional characteristics of an investment, such as the

commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. There was also a lack of consensus concerning when an intellectual property right takes on the characteristics of an investment.

A large number of the delegations felt that restrictions on performance requirements should not cover use of IPRs without the authorisation of rights holders, to the extent that such use is consistent with TRIPs. There was also some concern about the meaning of "proprietary knowledge". Further study was recognised as necessary to determine whether the various alternative definitions of "monopoly" pose problems respecting intellectual property and, if so, how to solve them.

All delegations agreed that the formulation of national treatment and most favoured nation treatment in the MAI goes beyond existing national and international practice for intellectual property. These concepts, therefore, and perhaps general treatment as well, could: apply to intellectual property without qualification, derogations being addressed through country-specific reservations (hardly supported at all); have no application to intellectual property; or apply to intellectual property, but a party could derogate from them in a manner consistent with TRIPs and, perhaps, other intellectual property agreements. The Commentary further stated that it may be appropriate that the "use" and "enjoyment" concepts in national treatment, most favoured nation treatment and general treatment not apply to intellectual property.

The Commentary stated that the MAI could significantly improve existing international law on intellectual property through its investment protection provisions. However, additional clarification on "value added" would be helpful, and the concepts of direct and indirect expropriation and measures having an equivalent effect to expropriation should perhaps not cover certain intellectual property practices, such as the issuance of compulsory licenses or the revocation, limitation or creation of IPRs permissible under TRIPs and perhaps other intellectual property agreements. Therefore, concerning these practices, MAI could: make no specific provision, on the assumption the MAI provision on expropriation would not be interpreted to cover them; refine the concepts of "equivalent effect" and "indirect expropriation" to ensure they do not apply to them; or state that the concepts of expropriation and measure having equivalent effect shall not apply to practices consistent with TRIPs and perhaps other international agreements.

Further study was recognised as necessary to determine whether the MAI provisions on transfers will impact on intellectual property practices, for example, by forcing some parties to ensure that certain payments are freely transferable in a manner inconsistent with their intellectual property collective management regimes.

Lastly, the Commentary stated that the MAI's dispute settlement provisions may pose special problems for intellectual property due to conflicting panel decisions on TRIPs provisions, the applicability of investor to state dispute settlement to intellectual property, and possible forum shopping. Further study is required.

Benefits Flowing from the MAI

- being designed to lessen restrictions on and hence facilitate the movement of capital between nations by limiting the power of governments to restrict and regulate foreign investment, the MAI may encourage investment in intellectual property and

create new opportunities for creators and owners of intellectual property.

- unlike TRIPS, NAFTA (i.e., portions of it), and the WIPO copyright treaties, the MAI is not designed to deal with intellectual property matters directly. As such, it could be said that the MAI maintains the status quo with respect to IPRs. Also see bullet point below. (This may be considered a benefit in that it does not "interfere" with copyright protection which may be best left to agreements and sections of agreements that are specifically designed for this purpose.)
- since the Commentary recommends that the MAI be drafted to conform to TRIPs and other international intellectual property agreements, it is likely that its IPRs provisions will conform to IPRs obligations in pre-existing agreements. This would solidify the IPRs provisions in other international agreements. While this may render its impact less obvious and tangible for Canadian creators, the impact may nevertheless be real and significant.

Outstanding Issues Stemming from the MAI

- any comments herein are highly speculative since they are not based on actual draft wording but merely on commentary accompanying the May 1997 draft of the MAI. Therefore, it is difficult to provide any concrete analysis at this point in time. However, it could potentially affect a whole range of IPRs issues. Much depends on how IPRs are dealt with in the MAI. If the MAI's IPRs obligations merely repeat those in TRIPs and NAFTA, there would likely be few new outstanding issues stemming from the MAI. However, if IPRs are defined very broadly, it could pose problems and obligate Canada to protect foreigners more broadly than it currently does.

PART 4

XIII. CONCLUSIONS

Although current developments respecting the protection of intellectual property in international trade agreements seems a relatively new trend, it has in fact accelerated in a short period of time. In 1989, as the economy had already begun to switch from an industrial to a knowledge-based one, the role and value of intellectual property began assuming greater prominence internationally. In 1989, the United States both deserted its 100-year opposition to joining the *Berne Convention* and adopted the FTA, which also represented Canada's first involvement with a trade agreement dealing with IPRs. Since then, NAFTA, and even more significantly TRIPs has contained numerous intellectual property provisions and has provided some teeth for the existing copyright treaties. As intellectual property continues to take the forefront in the new economy of the digital world, it is likely that the interplay between the protection of intellectual property and trade agreements will increase.

As Canada participates in further international trade and copyright discussions, she will have to keep in mind a number of factors which were not discussed in detail in this Report, such as the following:

- whether new instruments may be required to protect traditional and digital (see next bullet point) copyright works and whether they would be more suitable in the form of trade agreements or copyright treaties, or both.
- the role of trade agreements and copyright treaties and their effectiveness in dealing with evolving technologies. In many respects, existing trade agreements already pre-date the digital content which is being created and distributed by Canadian and foreigners and discussions may have to focus on whether existing instruments do in fact adequately address the protection of digital content, or whether new instruments are necessary as was thought with respect to the two new WIPO treaties.
- European Union (EU) developments and the influence they may have on trade agreements and copyright treaties, as well as their direct influence on Canadian copyright reform. For example, the EU Database Directive may have some influence on database protection in Canada. Further, in Phase III of copyright reform, Canada will examine the duration of copyright protection in light of the European move to a life-plus-seventy from a life-plus-fifty duration.

In conclusion, intellectual property provisions are becoming more important in trade agreements, as the areas of intellectual property and international trade begin to converge in the economic relations between states. This serves to modernise, enhance and broaden the protection of intellectual property around the world. Nevertheless, the growing importance of intellectual property provisions in trade agreements does not mean that the copyright treaties, which used to be the primary means of governing issues relating to the international protection and enforcement of copyright, will lose significance. Indeed, they are and will remain a crucial component in the integrated system of global protection of intellectual property rights.

Endnotes

1. It was agreed upon between the author of this Report and the Canadian Conference of the Arts that this Report would not include a section on the numerous existing and possible future international copyright treaties, except to the extent necessary to discuss the interplay between the trade agreements discussed herein and the copyright treaties. Further research may be undertaken in the future to address the copyright treaties more comprehensively.

2. "The noticeable export gains of ´invisibles´" *The Globe and Mail*, August 11, 1997, page unknown.

3. The opposite is also true, that the copyright treaties may provide a basis for future international trade agreements, a trend we are already seeing.

4. For instance, the U.S. would like to see its domestic rules on authorship reflected in foreign jurisdictions.

5. See below for further details on TRIPs.

6. Nimmer, Melville and Nimmer, David, *Nimmer on Copyright* (New York: Matthew Bender,

1997) at 18-35.

7. National treatment, however, does not apply to all provisions in the *Act*. As a result, since the tabling of Bill C-32, U.S. trade officials have voiced complaints over certain provisions in the Bill which they perceive as being against U.S. interests. See "Ottawa's protection of publishing angers U.S." *The Financial Post*, April 26, 1996, page 3. Also see: "Copyright Act raises U.S. ire" *The Globe and Mail*, May 3, 1997, page B5, where it is reported that Americans are extremely concerned about certain provisions in Bill C-32 relating to the blank tape levy and performers' performances in which Americans will not be compensated under the Canadian *Copyright Act*. The U.S. claims that it is entitled to such compensation under the national treatment standards in NAFTA and in the WTO; however the Canadian government posits that there is an exception for cultural industries under NAFTA and there are no national treatment obligations in this area at the WTO. As of May 29, 1997, U.S. Trade Representative Charlene Barshefsky stated that it was still undetermined whether a case, if filed, would be brought under NAFTA or in the WTO.

8. The Canadian government continues to discuss the existing and possibly new instruments dealing with copyright and related rights at the international level and agreed in principle to the two new WIPO treaties relating to digital issues which were adopted in December 1996.

9. A detailed analysis of the inclusion of the retransmission right in the FTA is in: Kyle, Rodney C., "Proposed Amendments to Canada's Copyright Act in the Act to Implement the Canada-United States Free Trade Agreement", 21 C.I.P.R. at 161.

10. Since 1954, the retransmission of conventional off-radio and television signals by cable and other distribution systems has been held by the courts as not being protected under the *Copyright Act*. Thus, cable companies have been exempt from any obligation to compensate rights owners for programs retransmitted by cable.

11. Although research was not undertaken on this point, it is likely that the inflow into Canada of retransmission royalties is also relatively low in comparison to the amounts of moneys Americans collect on behalf of American rights holders of the retransmission rights.

12. For details on how and when the rental rights apply, see Harris, Lesley Ellen, *Canadian Copyright Law* (Toronto: McGrawHill-Ryerson: 1995) at 113-114.

13. Bill C-32 amended the duration of copyright protection in photographs.

14. Because of the parameters of this Report, this question was not further explored but it is suggested it first be examined in light of the new WIPO copyright treaties.

15. *Supra* 12 at 171-182.

16. Black, Henry, *Black's Law Dictionary* (St. Paul: West Publishing Co., 1979).

17. *Supra* 6, at 18-50 and 71.

18. It deals with other IPRs such as trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the

protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.

19. The relevant provisions are in Article 9.1 of the TRIPs Agreement.

20. Specifically, articles 1 through 21 of the *Berne Convention* (1971) and the Appendix thereto.

21. The appendix to TRIPs also allows developing countries, under certain conditions, to make some limitations to the right of translation and the right of reproduction.

22. See *supra* 12 at 63 for the circumstances in which a performer's performance is protected.

23. Government of Canada, *Canada and the Uruguay Round, Information Kit* (April 1994).

24. A copy of this Agreement is at http://www.wipo.int/eng/iplex/wo_wto0_.htm/.