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INTERNATIONAL TRADE AGREEMENTS SHIFT FROM CARS TO COPYRIGHT

As a trading nation, Canadians have considerable experience with negotiating trade agreements. From the Auto Pact in the 1960s, to the U.S. – Canada Free Trade Agreement in the 1980s, we have relied on trade deals to facilitate economic growth and to encourage exports of everything from cars to forestry.

In recent months, the world has been witness to a new priority in trade discussions – copyright. Although traditionally treated by many countries as a cultural issue not subject to negotiation, stronger copyright protections are now often included at the insistence of the United States. The move toward including copyright within trade negotiations deserves close scrutiny as it has significant ramifications for national copyright policy.

Although the General Agreement on Trade and Tariffs (GATT), the world's most important trade agreement, referenced intellectual property rights, it was not until recently with the emergence of the Agreement on Trade-Related Aspects of Intellectual Property Rights (better known as the TRIPS Agreement) in the 1990s that copyright and other intellectual property was clearly placed on the trade docket.

While the TRIPS Agreement includes important provisions governing the equal application of intellectual property protections between countries, it does not address the core concerns raised by the online environment such as technical protection measures (technology that can be used to “lock” copyright materials) and the role and responsibilities of Internet service providers in grappling with online copyright infringement.

Those issues are currently dealt with by the World Intellectual Property Organization's 1996 Copyright Treaties. While several countries, most prominently the U.S., have ratified the WIPO treaties, many others, including Canada, have moved slowly to alter their copyright laws to incorporate the provisions that may be needed to become “WIPO compliant”.

The reticence to adopt the WIPO standard is understandable. Many believe the U.S. experience illustrates the dangers of adopting copyright protections that may ultimately stifle innovation. The Digital Millennium Copyright Act, the U.S. statute that implements the WIPO standard, has led to scholars declining to publish their research out of fear of lawsuits, hundreds of individual Internet users having their privacy rights ignored, and copyright law being strangely applied to garage door openers and computer printers.

In fact, the Canadian Supreme Court identified many of those same concerns in a landmark case last year. Noting the importance of maintaining a fair copyright balance, the Court stated that “the proper balance...lies not only in recognizing the creator's rights but in giving due weight to their limited nature... excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”

The delay in spreading the WIPO standard throughout the world has frustrated the U.S., which as a major producer of movies, music, and books, has long promoted stronger copyright protections. In response, it has begun to demand inclusion of copyright protections akin to those found within the WIPO treaties when negotiating bi-lateral free trade agreements.

The strategy appears to be working as in recent months countries worldwide, including Singapore, Australia, and the Dominican Republic, have all indicated that they are receptive to including copyright within their trade agreements.

Developing countries such as the Dominican Republic view the inclusion of stronger copyright protections as a costless choice. For those countries, the harm that may result from excessive copyright controls pales in comparison to more fundamental development concerns and they are therefore willing to surrender copyright policy decisions in return for tangible benefits in other trade areas.

Developed countries such as Australia may recognize the importance of a balanced copyright policy to both their cultural and economic policies, but they are increasingly willing to treat intellectual property as little more than a bargaining chip as part of broader negotiation. Since most trade deals are judged by an analysis of the bottom-line, economic benefits that result from the agreement, and since quantifying the negative impact of excessive copyright controls is difficult, the policy implications of including copyright within trade agreements is often dismissed as inconsequential.

Although Canada has already concluded a free trade agreement with the United States, it is not spared from this latest trend. Current drafts of the Free Trade Area of the Americas Agreement, which would broaden the North American Free Trade Agreement to include countries such as Chile, feature provisions that mandate stronger copyright protections. If those provisions remain intact, copyright policy may be altered not through the traditional policy making process, but rather via international trade negotiations.

This week, a Canadian Heritage committee will commence hearings into Canada's copyright policy agenda for the next five years. While the committee will carefully consider dozens of submissions on every aspect of potential copyright reform, lurking in the background may be the realization that Canadian copyright concerns may ultimately amount to little more than an issue to be sacrificed at the negotiation table for gains to fisheries, forestry, and farmers.