DRAFT ONLY - Please do not circulate.

**WIPO's "Making Available Right" and its Implementation in the Canadian Copyright Regime: At the Intersection of Internet Governance and Intellectual Property Policy**

Michael Dick, *University of Toronto*
E-mail: michaelh.dick@utoronto.ca

Balancing the rights of content creators and content consumers in the global online environment was a key goal behind modernizing Canada's Copyright Act. In 2012, the government passed Bill C-11 (the Copyright Modernization Act), following several consultation phases and failed bills over the prior decade. In particular, a joint Canadian Heritage-Industry Canada standing committee kicked off the process of legislative reform in 2001, which was followed by subsequent standing committees in 2003 and 2004 and an extensive consultation phase in 2009. Additionally, the House of Commons and Senate committees pertaining to Bill C-11, and to one predecessor bill (C-32), afford key opportunities to review consultative material. Taken together, all of this represents a wealth of data on public and industry sentiment towards copyright reform, an unusually large archive of material that can be viewed collectively within the context of the resulting implementation of the country's new Copyright Act and within broader debates on the ability for rights holders to control access to Internet-based objects. With this archive now constructed as part of an ongoing research agenda on copyright reform and public policy discourse, the purpose of this paper is to present the results of a documentary analysis (leveraging coding structures in limited instances) of selected materials and to frame this discussion within the literature on intellectual property, technology, online governance, and corresponding debates on the impact of policymaking regarding copyright reform on the online public sphere.

The specific research questions that guide this work relate to the augmentation and alteration of existing copyrights and, even more specifically, the introduction of a "making available right" (MAR) within Bill C-11. The MAR is notable because it has the potential to give rights holders increased control over the Internet-based communication of their work to the public and, more generally, because it permits rights holders to manage access to their intellectual property through technologies never anticipated under previous copyright regimes. On the one hand, with respect to digital and Internet-facilitated content distribution, the MAR could prevent material from being made available (i.e. communicated to the public) by a peer-to-peer file sharing service (i.e. to prevent or otherwise deal with piracy); on the other hand, it could also allow someone to collect royalties for doing the same (i.e. to more optimally monetize content streaming and Internet downloads). It provides further opportunities to both ameliorate the rights of content creators, while also potentially restricting the freedoms of content users. To that end, it also raises questions regarding the treatment of Internet Protocol technologies (as content delivery channels) in law and policy.

The key findings of this work will show that, as per the initial consultation papers of 2001-2002, the MAR's presence can be partly explained by the then-government's goal to engage both the general public and the creative industries in a discussion as to how

recommendations from a separate committee, the Information Highway Advisory Council (IHAC), regarding the management of intellectual property in the online environment could be implemented. Preliminary research also reveals the economic imperative that was inherent in the copyright reform process, given that the MAR is codified in two World Intellectual Property Organization (WIPO) treaties to which Canada is signatory and anti-piracy measures are of global political economic concern to rights holders. It is this interplay between national and supranational interests that presents an especially notable challenge.* Indeed, implementing the MAR in a way that balances the local aspects of Canadian law with the usage of communication platforms that are decidedly online and global in nature is the subject of ongoing hearings at economic regulatory bodies, notably at the Copyright Board of Canada.

But what impact has IP reform and the MAR had on the larger discussion of Internet governance within a country whose broadcast and telecommunications regulator has consistently expressed a desire not to regulate Internet content?** Accordingly, the key contribution of this paper is to provide an analysis of the copyright consultation phase materials that will advance an understanding of the origins of the MAR and its treatment within the processes of policy reform and governance. This work also draws conclusions as to how the MAR's codification in the resulting legislation may impact the balanced approach to copyright that was sought when the consultations were launched more than a decade ago. In all, this proposed paper will advance this research agenda by presenting a discursive analysis of the MAR, and its supranational origins within the context of its national implementation as part of Canada's new copyright regime, through a close reading of historical documents related to both Bill C-11 and its consultation phase and the WIPO treaties that impelled this reform. The key findings will show that the MAR remains, even after its coming-into-force, a largely unimplemented and malleable policy instrument, lesser known among the bevy of public controversies that surrounded the debates over copyright modernization and online content regulation in Canada, but assuredly no less impactful to the economic and social landscape of intellectual property in this country; accordingly, the paper will also provide the necessary material to contextualize the intersections between Internet governance and intellectual property within the broader discourse concerning the shaping of state communication policy by supranational entities, and with respect to the underlying shift from object-centric rights that once protected the copyright vested in physical media to access-centric rights that protect the ways in which access to online media is regulated and otherwise governed.

* These treaties are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), both of which were adopted in 1996 and ratified within Canada through Bill C-11. The full text of both treaties is available via wipo.int.

** This regulator, the Canadian Radio-television and Telecommunications Commission (CRTC), has adopted a position of forbearance on "new media" and Internet regulation (in respect of content delivered via online networks) as early as 1999, and has reaffirmed this position on several subsequent occasions.

Keywords: Canada, copyright, intellectual property policy, online content, technology.