ARTICLE DE LA REVUE JURIDIQUE THÉMIS

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Some Observations on Crown Copyright

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First, a disclaimer — the mantra of a public servant appearing in a public forum. I probably shouldn't be here, except perhaps as a member of the audience. I am not responsible for Crown copyright within the Department of Justice ; nor am I an authorized departmental spokesperson on the subject of Crown copyright.

Moreover, I'm going to suggest that some of your concerns about Crown copyright would in fact be more properly directed at other policies of the federal government. The concern, in other words, is not solely about Crown copyright *per se*, but rather about policies governing access to and dissemination of government information which are, for the most part, the responsibility of the Treasury Board.

In the result, I'm doubly unqualified to appear here today : I'm not a departmental spokesperson on the subject of Crown copyright ; and I'm not authorized to speak to policies of the federal government that should, strictly speaking, be addressed by a representative of the Treasury Board.

Having said that, I have tried to follow both the government's information policies and the evolution of copyright law. What I propose to do, then, is to try to share with you some of my personal thoughts on the matter.

I. CROWN COPYRIGHT AS DISTRACTION

In reviewing the brochure for this conference, I made the observation that the brochure was, implicitly at least, critical of the Crown's monopoly over the distribution of legal materials — legislation, regulations, judicial decisions. It's not altogether clear what the argument is, but it seems to be that the Crown's monopoly is somehow compounded by the potential for electronic distribution. The materials ask rhetorically whether, in the context of Phase II of the copyright reform, Crown copyright is « in tune with the realities of the electronic highway ». Implicitly, the answer appears to be NO, but the conference organisers have shown admirable restraint in leaving the answer unspoken.

(Parenthetically, it should be noted that changes to Crown copyright are not, for the present, part of Phase II of the copyright reform. Nor, frankly, does Phase II deal with the issues presented by the electronic highway. That will be Phase III or perhaps IV of copyright reform.)

(A second parenthetical observation, on the state of play with respect to Crown copyright in legislation and judicial decisions. The Minister of Justice has received representations from the legal publishing industry, the import of which is that the Crown copyright regime, as it relates to legal information, should be replaced by a public domain regime. Mr. Rock has taken those representations to his Cabinet colleagues with an interest in Crown copyright and is at present awaiting their response.)

So back, then, to the « new reality of the electronic highway » ? What has changed, so that Crown copyright is now, implicitly at least, *out* of tune with contemporary realities ? (Privately, I wonder whether the legal publishing industry would accept the assumption buried in this question, i.e., that Crown copyright was once *in tune* with contemporary realities. As I recall the pre-digital era, there was a certain amount of friction, even though the federal Crown routinely and as a matter of policy gave permission to private Canadian publishers to publish these materials.)

So, what has changed, then ? Three things, at least, have changed :

(1) the *medium* : we're no longer talking about print publications ; we're talking about electronic publication ;

(2) *the potential for profit* : we're no longer talking about a money-losing paper burden ; we're talking about a potentially very profitable digital publishing enterprise ; and

(3) *the fact that the exploitation of the legal information market is a precursor to the exploitation of government information resources generally* : when we talk about the « new realities of the electronic highway », we're not really talking only about the legal information market ; we're talking about the exploitation of government information resources generally.

Briefly, then, my first point is this : the stakes are much higher than whether legal information should be subject to Crown copyright or accessible in the public domain. The government's information resources go well beyond its legal information — statutes, regulations, judicial decisions, etc. — so, in a way, we're rather artificially narrowing the debate when we confine it to « the legal information market ».

My second point is this : Crown copyright is just one of a constellation of federal policies that underpin access to and dissemination of government information and Crown copyright cannot therefre be viewed in isolation. Let's take a quick look at some of those other policies. I will leave it to you to determine whether they facilitate of inhibit access to and dissemination of government information.

II. FEDERAL INFORMATION MANAGEMENT POLICIES

I'm going to begin merely by listing the legislation and some of the policies. There is perhaps a message in their mere recitation. Remerber too that it is not uncommon for Treasury Board to publish guidelines to assist government officials in implementing the policies. In the result, the dissemination of government information is regulated not only by a small host of legislative instruments and policies, but also by Treasury Board guidelines that operate within that legislative and policy framework.

- Access to Information Act ;
- Policy on the Management of Government Information Holdings ;

- Government Communications Policy ;
- Materiel, Risk and Common Services Policy ;
- Government Security Policy ;
- Cost Recovery/User Pay Policy ;
- Policy on the Retention of Royalties and Fees from the Licensing of Crown-Owned Intellectual Property.

And in the category of guidelines, we have these Treasury Board documents, for example :

- Information Management : A Primer on Databases for Managers ;
- Disseminating Electronic Information : A Practical Guide on Databases for Managers ;
- Guidelines for Licensing Government Information ;
- Guide to Disseminating Government Information.

The point of this recitation is that it would be a mistake to focus exclusively on Crown copyright, which is what the program notes seem to do, if the concern is to improve access to legal information or, more generally, to government information resources. Arguably, that concern would translate into a challenge to the whole of the legal and administrative framework governing access to and dissemination of government information resources.

Without necessarily promoting that challenge, I think it’s safe to predict that the legal and administrative framework governing access to and dissemination of government information resources is going to be challenged — radically challenged — in the next few years, as federal departments are in turn challenged to « get it right » and ensure that their policies and operations facilitate, rather than impede, the development of a more competitive national economy.

What the staging of this conference represents, I suggest, is that one of the factors behind the challenge to the framework governing access to and dissemination of government information resources is digital technology. Like the rest of the world, the federal government is going through a publishing revolution — from print publications to database works on diskettes and CD-ROMS, and to interactive services on the Internet.

I think a second factor is the federal government’s commitment to facilitate the development of a more competitive private sector. One can expect therefore that the information management framework is going to be challenged from the perspective of whether it makes for a more or less competitive private sector ; from the perspective of whether it facilitates or impedes the competitiveness of Canadian Industry.

A third factor will probably be the recommendations of the Information Highway Advisory Council, chaired by David Johnston of McGill. The final Report

of the Copyright Subcommittee of the Information Highway Advisory Council rather ambiguously recommended that Crown copyright be retained, but, at the same time, that federal Crown copyrighted information resources relating to basic health, welfare and business (including statistics and legal information) should be put into the public domain and made accessible via the information highway. The Copyright Subcommittee also recommended that the licensing of potentially revenue-generating Crown copyrighted materials should be based on the principles of non-exclusivity and the recovery of marginal costs.

As I understand it, the Copyright Subcommittee is recommending that :

> *Crown copyright should be limited to a fairly narrow right, analogous to the moral right, in order for the government to assure the integrity and quality control of the reproduction of information products derived from government-owned works. Thus, Crown copyrighted information would be more accessible,*
>
> *(a) in terms of the administration of Crown copyright and the permissions and licensing regime ;*
>
> *(b) in terms of access to basic information around health, welfare and business, which should be available without permission and without payment ; and*
>
> *(c) in terms of not using Crown copyright materials as a source of government revenue beyond the recovery of the costs entailed in collecting the information ; put another way, the recommendation was that the government license the information — on a non-exclusive basis — for exploitation in the private sector, rather than attempting to become a profit-oriented information service provider in its own right.*

A fourth factor behind the pending challenge to the federal government's information management framework is the decision taken in the February '95 budget to privatise the Canada Communication Group. As it happens, the decision to privatise the Canada Communication Group was not a consequence of a decision by the government to transform its policies around access to and dissemination of government information resources. Rather, it was a consequence of a decision to privatise where privatisation was perceived as feasible. As a result of the decision to privatise, there will inevitably be a review of the legal and administrative framework governing the management of the government's information resources, and there is no obvious reason to think that such a review would not include the framework governing the federal government's *legal* information resources.

To conclude my remarks, then, I think we can safety anticipate a challenge to the federal government's information management policies and I think we can identify at least four of the sources of that challenge as including :

- the arrival of digital technology ;
- the federal government's emphasis on competitiveness ;

- the recommendations of the Information Highway Advisory Council ; and
- the privatisation of the Canada Communication Group.