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The Copyright Regime and Data Protection Legislation

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Margaret Ann Wilkinson

Résumé

Dans cet article, Mᵐᵉ Wilkinson explore la relation entre le droit d'auteur et le régime canadien de protection des données personnelles. Dans son étude, Mᵐᵉ Wilkinson explique comment le contrôle de l'information que crée le régime de droit d'auteur se différencie du régime créé par la législation sur la protection des données personnelles et comment le contrôle qui s'est développé à la suite des recours de common law pour bris de confiance se distingue lui aussi du régime créé par la législation sur la protection des données personnelles. Mᵐᵉ Wilkinson présente aussi les règles dégagées par la Loi sur le droit d'auteur qui gouverne les organismes administratifs responsables de contrôler l'accès et la protection des données personnelles, ainsi que les organismes responsables de l'administration du droit d'auteur et de la gestion collective des œuvres. Dans la deuxième partie de son article, Mᵐᵉ Wilkinson explore quelques-unes des inquiétudes liées à la Commission du droit d'auteur, telles que l'accès et la protection des données ainsi que sa gestion des données qu'elle reçoit de tiers, notamment lorsqu'elles visent des personnes identifiables. Mᵐᵉ Wilkinson identifie ensuite les activités de la Commission qui pourrait profiter d'une exemption dans l'application de la réglementation concernant l'accès et la protection des renseignements personnels et elle tente de déterminer si ces activités profitant d'une exemption pourraient être contestées d'une autre manière.

\(^1\) The author would like to thank both Jonathan Mesiano-Crookston and Marcella Smit, law students funded under the Law Foundation of Ontario, for their timely assistance in the preparation of this paper.
Summary

In this paper, Ms. Wilkinson covers the relationship between the copyright and the data protection regimes in Canada. In her study of the question, Ms. Wilkinson explains how the control over information created under copyright regime contrasted with the control created under data protection legislation and how the control over information created by the common law action for breach of confidence contrasted with the control created under data protection regimes. She also presents the rules stated by the Copyright Act that governed the access and data protection administration, the copyright administration and the collective societies. In the second section of her paper, Ms. Wilkinson explores some specific concerns related to the Copyright Board, such as the question of the Board and the access and personal data protection, the Board and its management of the information received from third parties and the information about identifiable individuals. She then identifies the activities of the Copyright Board which may be exempt from access and data protection regulation and she tries to predict if the activities of the Copyright Board which are exempt from the access and data protection regimes are open to challenge on any other grounds.

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PART I - GENERAL CONCERNS

1. The relationship between the copyright and data protection regimes in Canada

Section 32.1(1) of the Copyright Act provides, inter alia,

It is not an infringement of copyright for any person

(a) to disclose, pursuant to the Access to Information Act, a record within the meaning of that Act, or to disclose, pursuant to any like Act or legislation of a province, like material;

(b) to disclose, pursuant to the Privacy Act, personal information within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like information;...

This is the only guidance given by Parliament about the intended relationship between two very disparate areas of the law affecting information in Canada.

Access and data protection legislation in Canada is a phenomenon of the last quarter of the 20th century. Every jurisdiction in Canada, with the sole exception of Prince Edward Island, now has legislation in place governing the right of access to government-held information. This legislation is intended to provide those outside

2. Copyright Act, R.S. 1985, c. C-42.
4. C.H. McNAIRN and C.D. WOODBURY (n.d.), Government Information: Access and Privacy, Scarborough, Carswell (in looseleaf service published continuously since 1989). It must be noted that the New Brunswick and Newfoundland acts are primarily access regimes and do not contain the extensive administrative provisions for personal data protection that have been created in other Canadian jurisdictions, including the three territories (see Right to Information Act, S.N.B. 1978, c. R-10.3, as amended, and The Freedom of Information Act, R.S.N. 1980, c. F-23, as amended). They do, however, contain exemptions from the right of
government with a right of access to all the records held by government, no matter how received or by whom created. Indeed, the legislation in this area does not directly mention the question of the intellectual property rights vested in the records held by the government bodies that are subject to the legislation.

The legislation gives those who apply the right to view records or to receive one copy of them. It is the right to make that one copy which Parliament has exempted from the Copyright Act from rights that the work's copyright holder may exercise, as quoted above. Further discussion about the work by the information requester would be subject to the full rights of the copyright holder. It was not contemplated that this exception would have demonstrable economic consequences for the copyright holder, and, if this were the only potential interaction between these two statutory regimes, then this would instead be a short paper.

2. The control over information created under copyright contrasted with the control created under data protection legislation

However, there are at least two other large areas of possible overlap between the intellectual property regime and the access and data protection regimes.

As David Vaver has pointed out, the owner's of copyright has historically given the holder a power to censor. The steady accretion of access which create, in effect, data protection. Such exceptions exist, for example, in each jurisdiction for both personally identifiable data and third party information (see Right to Information Act (New Brunswick) ss. 6(b) and 6(c) and The Freedom of Information Act (Newfoundland) ss. 11(1) and 11(1) respectively). It must also be noted, however, that all exemptions under the New Brunswick legislation are discretionary, rather than mandatory.

5. See, for example, s. 10(1) read together with the definition of "record" in s. 2 of the Freedom of Information and Protection of Privacy Act (PIIPPA), R.S.O. 1990, c. F.21.
6. See, for example, s. 11(1) of the New Brunswick Access to Information Act, R.S.B. 1985, c. A-1 and s. 17(1) of the federal Privacy Act, R.S.O. 1985, c. P.21.
7. As Richard Gold has pointed out, copyright is a negative. In and of itself, it does not entitle the copyright holder to do anything with the work which he or she could not already do. Rather, copyright permits the copyright holder to exclude others from doing those same things. R. GOLD, "Partial copyright assignments: safeguarding software licenses against the bankruptcy of licensors," (2000) 33 Canadian Business Law Journal 103-229.
8. Indeed, as quoted below, Canada has no international trade obligation not to interfere unduly with the normal exploitation of intellectual property rights.

by government of the power to require organizations to transmit information into government since the 19th century has increasingly eroded the right of business to absolutely control further dissemination of information contained in works created by business since many such works are required to be disseminated by businesses to government. However, historically, government could not, as of right, reproduce or publish works created by others that held in its custody or control. The access legislation marks a change in that it does require the copying of records (which may also be works in copyright) and dissemination of those copies to individuals beyond government and outside the copyright holder's control. There is no requirement that the holders of copyright in works thus disseminated by government necessarily be notified of the dissemination.

Perhaps it is symbolic of the inattention often given to copyright and the more dominant presence of concern over industrial property rights that the drafters of the access legislation appear to have turned their attention specifically to concerns about the effects of the access process on areas that are connected to intellectual property rights other than copyright but do not seem to have been concerned in the same way with the rights of copyright holders.

3. The control over information created by the common law action for breach of confidence contrasted with the control created under data protection regimes

In every piece of access legislation, there is an exception to the right of access created for records that contain information that has been supplied to government by businesses outside government (the "third party exemptions"). If records contain information of this

11. Notice is only required for third parties or identifiable individuals. See, for example, s. 28 of PIIPPA.
13. The exact parameters of each exemption differ slightly from jurisdiction to jurisdiction; examples will be discussed further below. Moreover, in some jurisdictions, protection is also given to information about third parties created by the government itself (for example, in Newfoundland). In various jurisdictions,
character, then the general requirement placed upon the government institution involved is that it not release those portions of the records involved that contain information so received.\(^{13}\)

The characteristics necessary for records to receive protection from dissemination under the third party exemptions are redolent of the terminology of industrial property.\(^{14}\) Section 17 of the Ontario

the requirement that the third party information be withheld from disclosure may be overridden in various special circumstances: see further McNaIrF and Woodbury, supra, at 4-2.

14. Government institutions are required to analyze the elements of information contained within any given record and release elements where possible, while severing elements either required not to be released or which the government has decided to exercise a discretion not to release. See, for example, s. 10(2) of FOIPPA.

15. Again, it must be recalled that all the exemptions to the right of access under the New Brunswick legislation are framed as discretionary, including the third party exemption, cited above. The Newfoundland third party exemption, cited above, is also discretionary.

16. The federal, Quebec and Manitoba acts have a wider ambit of protection for third party information, see, for example, the Federal Access Act, supra, at 29, quoted in a later section of this paper, see An Act respecting Access to documents held by public bodies and the Protection of Personal Information, R.S.Q., c. A-2.11, as amended, s. 23, 24, 27, 29-1, and see The Freedom of Information and Protection of Privacy Act, S.M. 1984, c. 50 (C.C.S.M., s. 175), as amended, s. 160(1). See Montreal Board of Education v. Minister of Indian Affairs and Northern Development (1988), 51 D.L.R. (4th) 506 (Fed. T.D.).

17. The provinces of Nova Scotia, Saskatchewan, Alberta and British Columbia have followed the narrower approach taken by the Ontario legislation, quoted above see Freedom of Information and Protection of Privacy Act, S.S. 1997, c. 2, s. 3(1); Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. P-2.01, as amended, s. 19; and Local Authority Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. L-27.1, as amended, s. 18; Freedom of Information and Protection of Privacy Act, S.A. 1994, c. P. 18.8, as amended, s. 15; and Freedom of Information and Protection of Personal Information Act, R.S.B.C. 1996, c. 166, s. 21(1). These latter requirements more closely resemble the common test for establishing the action for breach of confidence that the information must be secret; that it must be imparted in confidence; and that it be information which would confer a benefit to the party obtaining it. An example of the latter is freedom of information (as defined in the Freedom of Information and Protection of Privacy Act, supra, at 1, provides the following statutory definition of a "trade secret":

Information, including a formula, pattern, compilation, program, device, product, method, process, technique or process

(i) that is used, or may be used, in business or for any commercial purpose,
(ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its use or sale,
(iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and

Freedom of Information and Protection of Privacy Act,\(^{12}\) for example, provides:

(i) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly,\(^{16}\) where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position\(^{19}\) or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be supplied;

(iv) the disclosure of which would result in significant harm or undue financial loss or gain.

The definition of "trade secret" in the British Columbia and Nova Scotia Acts, supra, at 2, Schedule 1 and ss. 3, respectively, are identical to each other and very similar to this Alberta one.


18. "Trade secrets" is not a term used in intellectual property legislation. However, it is used in cases law and by commentators has sometimes given it a meaning overlapping with the concept of "confidential information" and sometimes a meaning significantly distinguishing it from confidential information. Generally speaking, it is considered to be at least broad enough to encompass subject matter which any machine manufacture or composition of matter from the definition of "invention" in the Patent Act, R.S.O. 1985, c. P.4, as amended, s. 2. Null, L.J., speaking for the English Court of Appeal in Fynddal v. The Second World War, 1 All E.R. 977, distinguished "secret processes of manufacture such as chemical which is of a sufficiently high degree of confidentiality as to amount to a trade secret" from "information which is only "confidential in the sense that an unauthorized disclosure of such information to a third party while the employment subsisted would be a breach of the duty of good faith" (at 929, for the Court of Appeal (at 929, for the Court of Appeal of Canada case).

19. The first part of the test for breach of confidence at common law, set out above, would be wide enough to encompass any of these subjects, provided the information was secret. As Binnie, J., notes, in speaking for a unanimous Supreme Court of Canada in Cadbury Schweppes Inc. v. F.B.B. Foods Ltd., whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust-like nature and is not for the purpose of which is the appropriate remedy but does not limit the court's jurisdiction to grant it" (1990), 167 D.L.R. (4th) 777 at para. 28.

20. Foore which recasts the second part of the common law test to establish breach of confidence, set out above.

21. A concept which appears to parallel the third part of the common law test for breach of confidence, set out above.
with government, organizations can choose to forgo the “bargain” of copyright in favour of maintaining their works within the organization. Once the copyrighted works leave the organization, then the bargain inherent in the copyright statute means that only certain uses of the expression of the information can be monopolized by the organization as copyright holder, while the underlying facts and ideas must circulate freely in society. Again, absent any requirement that organizations submit information to government, organizations control the choice whether to take advantage of their copyright controls or the controls offered by maintaining organizational boundaries of confidentiality. On the other hand, the control afforded to organizations once information has been given into the hands of government, whether voluntarily or because of legal requirements, has been legislated in the access and data protection schemes without specific regard to the common law breach of confidence action – and the control over such information has been taken from the organization by the legislation from the organizations and replaced by statutory control.

Unless records which fall outside the third party exemption provisions of the various access and data protection regimes are entitled to another exemption within those same regimes,26 such records will be disseminated to requesters.

4. The control over information created under the personal data protection regime contrasted with the controls created in the intellectual property arena

One of the areas of exemption to the rights of access established under these regimes is in the area of personal data protection. Indeed, in over three quarters of Canada’s jurisdictions, there is an entire administrative apparatus legislated to protect personally identifiable information as a companion to the legislation in the area of accessing government-held records.27 In the access regimes of New Brunswick and Newfoundland, on the other hand, as noted above, the area of personal data protection is simply left as an exception to the requirement that government provide access to the records it holds

22. Ibid. It is interesting to note the parallels between this language and Canada’s international trade commitment under the Trade-Related Aspects of Intellectual Rights (TRIPS) Agreement (1994), 33 I.L.M. 1167, Section 7, Article 6.

23. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:
(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
(b) has commercial value because it is secret; and
(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

24. Although it is interesting that the statutory definitions of trade secret in Alberta, Nova Scotia, and British Columbia, already cited, do explicitly include compilations and programs, works that also, of course, are already entitled to copyright protection: see the Copyright Act, supra, s. 5, and the definitions of “literary work,” “computer program,” and “compilation” in s. 2.

25. As evidenced by the number of court cases that have arisen in the various Canadian jurisdictions covered by access legislation which have involved the third party exemption provisions.

26. Including exemptions for information involving law enforcement, solicitor-client privilege, defence and security, and so on, as legislated in each jurisdiction.

27. At the federal level and in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, the Yukon, the Northwest Territories, and Nunavut.
(and, it may be recalled, Prince Edward Island has no legislation dealing with personal data protection or access at all).29

Personally identifiable data in the access and data protection arena is defined by the subject matter of the records. Again, this legislation makes no reference to the creator of the records or the possibility of intellectual property rights in the information (referring neither to confidential information rights nor copyrights).

Where there is a full personal data protection regime legislated, the individual who is the subject of recorded information held by government bodies is vested with certain rights over it. Included among those rights is the right to have the records corrected and/or to append a statement of correction.30 At least theoretically, these rights could interfere with the copyright interests of the creators of the record who have, under the Copyright Act, the sole right to make such changes to the work31 and the moral rights to the integrity of the work.32 The data protection legislation gives no recognition to those rights of the author and/or the copyright holder.

Robert Howell (1998) has recognized the possibilities for conflict in these areas when, in an extensive study of database protection in Canada, he pointed out that “the balancing of database protection and users’ rights of access to data may need ongoing attention. Generally, the more extensive the proprietary right, the greater the need for exceptions to be created. This is particularly so with any proprietary right in the data itself.”33

It is doubtful that the fundamental question of the relationship between the rights of the individuals who are the subjects of information and the rights of creators of information can be ignored, skirted or minimized much longer. The clash of systems is becoming more visible and is affecting more institutions and larger segments of society.

32. New Brunswick, Protection of Personal Information Act, c. P-19, s. 6(b); Newfoundland, Privacy Act, c. P-22, s. 10(1).
33. For example, in the federal Privacy Act, supra, s. 12(2).
34. Copyright Act, supra, s. 3(1).
35. Ibid., s. 14(3)(1).

The federal Personal Information Protection and Electronic Documents Act [PIPEDA],34 has recently intruded dramatically into the private sector in the common law jurisdictions of Canada, although Quebec has had legislation governing personal data held in the private sector since 1994.35 Just as the confidential information held by business becomes a more widely recognized financial asset, customer information becomes a much more valuable commodity because of the control now given by this legislation to the individual who is the subject of the information.36

Such information as customer databases and consumer habits may be valuable to organizations internally. As such, organizations may well benefit from the extensions of Canadian law to recognize breach of confidence with respect to such information.37 It is not clear how this area of developing jurisprudence will be affected by the control given to the database by the personal data protection legislation now emerging in the private sector, as well as in the public sector.

However, as soon as an organization tries to derive value from such customer and consumer information by circulating it more widely, the reward for creating the database may no longer lie in its value as confidential information but rather may be found only in copyright.38 Here again, if that database can be materially altered by those who are the subject of the records contained in the database,39

32. S.C. 2000, c. 5.
33. An Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q. c. P-38.1 [the Quebec Private Sector Act].
34. For an interesting critique of the extent to which the Canadian personal data protection regimes have extended individual’s rights, see Elizabeth NELL, Rites of Privacy and the Privacy Trade: On the Limits of Protection for the Self, Montreal & Kingston, McGill-Queen’s University Press, 2001, especially at 137, 140, 141.
35. LAC Minerals Ltd. v. International Corona Resources Ltd., supra; Cudahy Schoeppeps Inc. v. FBI Foods Ltd., supra.
36. The right to control the uses of the expression of the compilation as a work under copyright is not dependent upon keeping the information secret—whereas, with a wider circulation, the possibility of keeping the necessary degree of secrecy and confidentiality about the information may make maintaining enough confidentiality to maintain an action for breach of confidence a virtual impossibility.
37. Under the new federal private sector Personal Information Protection and Electronic Documents Act, supra. If an individual about whom an organization holds records can demonstrate that the information or an element of the information is inaccurate, the organization must appropriately add, delete, or correct the record. See Clause 4.9 of Schedule 1. Similar obligations for
then the copyright "work" which is the compiled information becomes inherently unstable and therefore, presumably, of less value.\(^39\)

5. Access and data protection administration, copyright administration and the collectives governed by the Copyright Act

It is interesting that the Copyright Act itself already imposes disclosure provisions on the collective organizations over which it has jurisdiction.\(^40\) Such a collective society "must answer within a reasonable time all reasonable requests from the public for information about its repertoire of works, performer's performances or sound recordings, that are in current use." (\(^a\) 67).\(^41\)

These organizations, as entities carrying on an enterprise in Québec,\(^42\) would also have already been subject to the Québec data protection legislation\(^43\) and now will be subject to PIPEDA, as entities engaged in commercial activities.\(^44\) These statutes require organizations to respect an entire range of data handling requirements including providing access to those who are the subject of the records.\(^45\)

6. Concluding general observations

The United States has not yet embraced personal data protection for private sector organizations through law.\(^46\) The inherent tension between the access and privacy regimes and the copyright regime may therefore be less obvious in the current American context because the copyright holders whose works are held in the private sector will not experience the effects of data protection legislation in respect of those works.\(^47\) On the other hand, in the American sector where there is experience of data protection, particularly as incorporated as an area of exception to access legislation,\(^48\) in government — there is much less experience of copyright since there is no copyright held by the American federal government in works which it has created.\(^49\)

As Canada moves further into the arena of personal data protection in both the public and private sectors, the tensions between the economic rights of creators and the personal rights of those who are the subject of information can be expected to become more pronounced.\(^50\)

In the Aubry case,\(^51\) the Supreme Court of Canada decided a dispute involving the publication of a photograph without ever explicitly considering the intellectual property rights of the holder of copyright in the photo. The Québec Charter of Human Rights and Freedoms,\(^52\) which was at issue, was enacted by the Québec legislature and articulated program, operated through the American Department of Commerce, allows such organizations to adhere to the "International Safe Harbor Privacy Principles." See www.ita.doc.gov/dcom/Principles1199.html.


50. James Rule and Lawrence Hunter suggest creating a property right in personal data, but do not discuss the relationship of this proposed right with the existing intellectual property rights in information. See "Towards Property Rights in Personal Data," in Colin J. BENNETT and Rebecca GRAFF (eds.), Wastes of Privacy: Policy Choices for the Digital Age, Toronto, University of Toronto Press, 1999, pp. 183-185.


52. R.S.Q. c. C-12.
lates two sets of principles involving the flow of information: on the one hand, "Every person has a right to the safeguard of his dignity, honour and reputation (s. 4)" and "every person has a right to respect for his private life (s. 5)" whereas, on the other hand, s. 5 guarantees freedom of expression and s. 49 guarantees the public’s right to information. The Supreme Court in Aubrey directed itself to a reconciliation of the apparent conflict between these principles in the context of the incident before it. However, this reconciliation seems to have led inexorably to an economic conflict, if not a legal one, between the personal rights legislated by the Quebec legislature and the intellectual property rights created pursuant to the federal Copyright Act which converge in the same subject matter.53

In resolving the tension, moreover, it will be necessary for Canada to bear in mind its obligations pursuant to Article 13 of TRIPS54 which provides that

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

The challenge of maintaining this obligation while still satisfying the expectations of the European Union’s Directive on the Protection of Personal Data will be challenging,55 whatever Canada’s own independent view of the balance to be achieved between these two areas of interest may be.

PART II - SPECIFIC CONCERNS

1. The Copyright Board and the access and personal data protection regimes

The copyright administration itself, as a government body included under both the Access and Privacy schedules to the federal

54. Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), supra.

legislation,56 is subject to both those pieces of legislation while carrying out its duties under the Copyright Act.57

The Copyright Board is increasingly coming into the public consciousness because of its statutorily mandated involvement in various aspects of the new economy.58 Moreover, the business community is becoming as active in copyright issues as the "cultural" community has traditionally been because of the increasing recognition of value-added in copyright works arising, often, as incidental to the main production of the organization.59

2. The Copyright Board and information received from third parties

Because of the nature of the duties imposed upon the Copyright Board, it becomes the recipient of masses of records submitted by third parties in support of proceedings before the Board.60 Under s. 4 of the Access Act, the Board must implement the general right of access to the recorded information it holds:

Subject to this Act, but not notwithstanding any other Act of Parliament, every person has a right to and shall, on request, be given access to any record under the control of a government institution.

56. The Access Act applies to "government institutions" which are defined in s. 2 as "any department or ministry of state of the Government of Canada listed in Schedule 1 or any body or office listed in Schedule 1. The Copyright Board is so listed. Similarly, the Privacy Act is drafted to apply to "government institutions," again defined in s. 2 as "any department or ministry of state listed in the schedule or any body or office listed in the schedule," and, again, the Copyright Board is so listed.
57. See Part VII of the Copyright Act, ss. 68 ff.
60. I am greatly indebted to Mario Bouchard, Counsel to the Copyright Board, for conversations describing the role and function of the Board.
On the other hand, as outlined in the previous part, the economic interests of those providing information to government agencies such as the Board have been balanced in the legislation in specific sections exempting such information from automatic disclosure to requesters. Under the federal Access Act, the provision providing an exception for government institutions in respect of information supplied to government by third parties is s. 20 which provides that certain information must not be released to requesters, except with the consent of the third party.\(^1\)

(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains...

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently as confidential by the third party;

(c) information, the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information, the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party.

But are these provisions adequate to safeguard the interests of those who submit material to the administration of the Copyright regime?

3. The Copyright Board and information about identifiable individuals

As mentioned, the Copyright Board is also subject to the federal Privacy Act, which requires it not collect information about identifiable individuals except in relation to its mandated activities and programs (s. 4). Where information is collected about identifiable individuals by the Board, it must be collected directly from them if it is to be used in a decision making process that directly affects that individual\(^2\) – unless the individual has authorized otherwise (s. 5(1)).

There may be a technical conflict between that provision and s. 76(4) of the Copyright Act which enables the Board to

(a) require a collective society to file with the Board, information relating to payments of royalties collected by it to the persons who have authorized it to collect those royalties.

The definition of "personal information" under the Privacy Act, s. 2, includes "information relating to financial transactions in which the individual has been involved." If indeed the collectives do not already have the authority of their rights holders to make such disclosures to the Board, it might be argued that requiring the Board to comply with s. 5(1) of the Privacy Act, rather than exercising its discretion under s. 76(4) of the Copyright Act, would defeat the purpose of the efficiencies of the collective administration of copyright. This would take this indirect collection of personal information out of the requirements of the Privacy Act provisions just discussed because s. 5(3) of the Privacy Act provides that they do not apply "where compliance therewith would..." (b) defeat the purpose or prejudice the use for which information is being collected." This interpretation would avoid the apparent conflict between the Copyright Act and the Privacy Act in this area of the Copyright Board's activities.

Where the Board is dealing with aggregate data about people, however, these requirements of the Privacy Act clearly do not apply to such aggregate data and the thrust of the Access Act would mean that this data would be generally available to requesters (unless exempt under another provision such as the third party exemption just discussed). However, with respect to information about individuals who can be identified from the records held by the Board, the full data handling regime mandated under the Privacy Act (collection, organization, use, dissemination, and retention) is incumbent upon the Copyright Board.

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\(^1\) Access to Information Act, supra. Third party information can be disclosed on consent of the third party (s. 20(3)).

\(^2\) From the definition of an "administrative purpose" in s. 2 of the Privacy Act. The term "administrative purpose" is used in s. 5(1) which is being paraphrased at this point in the discussions.
In particular, this personally identifiable data on individuals cannot be disseminated beyond the confines of the Board except as expressly permitted under the Privacy Act (s. 8(1)). Among the expressly permitted disclosures is s. 8(2)(b): "for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure".

Thus, except as permitted under s. 8 of the Privacy Act, or with permission of the subject, or where the information concerned is already publicly available, the Copyright Board cannot disclose any information it holds about personally identifiable individuals (Access Act, s. 19(1) and (2)).

Therefore, in general, all records held by the Copyright Board will be publicly accessible upon request unless they contain information about personally identifiable individuals (the Board will be required to excuse any such information from the records before it releases them) or there is information in the records supplied by third parties that is exempt under the provision set out above (which the Board must similarly excuse before it releases the records).

4. Activities of the Copyright Board which may be exempt from access and data protection regulation

The Copyright Board may produce studies pursuant to the Copyright Act, s. 66.8. To the extent that it does so, these studies may be internal only and therefore may not be available to requesters under the Access Act, Section 21(1) provides:

The head of a government institution may refuse to disclose any record requested under this Act that contains:

(a) advice or recommendations developed by or for a government institution or minister of the Crown,

(b) an account of advice or consultations or deliberations involving officers or employees of a government institution, ... [but]

(2) Subsection (1) does not apply in respect of a record that contains:

(a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power of an adjudicative function and that affects the rights of a person...

In addition to these records of the Copyright Board which may not be made available to requesters pursuant to the Access Act, there may be records held by the Board that are not subject to the Access Act at all. The entire Access Act has no application to material that is published or available for purchase by the public (s. 68). In keeping with that provision, s. 26 of the Access Act provides that the Head of a government institution may decline to release records under the Act if the material in it will be published within 90 days or as soon thereafter as reasonable given translating and printing requirements.

The Copyright Board is bound under the Copyright Act to publish a proposed tariff filed with it (s. 67.16(1)). Nothing in the tariff itself could therefore be claimed successfully by the collective society (a "third party" in the terminology of the Access Act) to be exempt from release by the Board.

The objections to the proposed tariff which are anticipated under the Copyright Act, however, are not necessarily to be published by the Board but are to be sent to the collective society concerned (s. 68(1)(d)) and similarly any reply to the objections is to be sent to the objecting parties (s. 68(1)(b)). These materials therefore would be covered by the provisions of the Access Act and, to the extent that they contained third party or personally identifiable information, would not be available to requesters other than the collecting society or the objecting parties.

Under s. 70.5(2) of the Copyright Act, provisions are made for collective societies or those with whom they have made agreements to voluntarily file those agreements with the Copyright Board. If this is done, then the Director of Investigation and Research appointed under the Competition Act "may have access to the copy of the agreement [so filed]" (s. 70.5(4)). The Director may then initiate a process.
of examination of the agreement by the Copyright Board (s. 70.5(5)) in which the Director may participate, but the decision whether to subsequently alter the agreement lies with the Board (s. 70.6(1)). Section 45 of the Competition Act is specifically made inapplicable to this process (s. 70.5(3)). This entire process, therefore, remains part of the administration of the Copyright Board, which is governed by the Access Act, rather than the process under the Competition Act. This may be important because s. 24 of the Access Act provides that:

"The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule B of the Competition Act. That section prohibits those administering and enforcing the Competition Act from divulging certain information enumerated under the section. Information received from the Copyright Board pursuant to s. 70.5(4) of the Copyright Act would not come within that section — and therefore, the Access Act will apply to this information."  

The Board has decided to make the agreements filed under s. 70.5 public. Having published these agreements, it would appear that s. 68 of the Access Act operates to take these records beyond the reach of the Access Act. In that case, should any of the parties to the agreements so published be opposed to the "disclosure" of their information, it would appear that they cannot rely upon the third party non-disclosure provisions of the Access Act because these are triggered only when the Institution is responding to a request for access framed under the Act — and these records would no longer come within the Act.

60. I am indebted to Professor Emeritus W.T. Stanbury in his paper "On the Relationship between Competition Policy and the Copyright Act in Canada" for pointing out that the Director has never yet exercised his discretion to initiate this process.

67. Competition Act, R.S.C. 1985, c. C-34, s. 22(1): No person shall communicate: 

(a) the identity of any person from whom information was obtained pursuant to this Act;

(b) any information obtained pursuant to investigative powers under the Competition Act;

(c) whether notice has been given of or information supplied (pursuant to certain requirements in the Competition Act);

(d) any information obtained from a person requesting a certificate under section 152 of the Competition Act.

This section does not apply in respect of any information that has been made public.

This may seem a paradoxical outcome: information which a third party might be able to require the government not to disclose to a requester if held by government unpublished, the third party cannot prevent the government from publishing. However, the paradox may be explained by the purpose of the Access Act, set out in s. 2 and providing in part

(b) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

5. Are the activities of the Copyright Board which are exempt from the access and data protection regimes open to challenge on any other grounds?

The provisions of s. 20 of the Access Act may not satisfy third parties as complete protection for the information which they submit to the Copyright Board. In particular, if the Copyright Board publishes information received from third parties, it would appear that the third parties cannot even rely upon the provisions of Access Act at all because there is nothing in the Access Act that legally precludes the government from taking action with respect to government held information other than personally identifiable information: rather the Act sets out the conditions under which the government must respond to requests for information.

On the other hand, as Canadian law respecting the protection of information held by organizations from breach of confidence matures in Canada, it will be interesting to see whether a third party organization can eventually maintain an action for breach of confidence against a government institution such as the Copyright Board in a

68. Given the unusual character of the action for breach of confidentiality, it appears problematic whether the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-60, as amended, s. 3 would render a Crown agency such as the Copyright Board liable in such a civil proceeding. "The Crown is liable for the damages for which, if it were a person, it would be liable... (b) in any other province (than Quebec), in respect of (i) a tort committed by a servant of the Crown, or (ii) a breach of duty attaching to the ownership, occupation, possession or control of property." While it may be evident from s. 3 that the property referred to in s. 3 may be only property which the Crown itself owns — and the confidential information which would be at issue in this case would be the property of the third party organization submitting to government — the Supreme Court of Canada has made it clear that the action for breach of confidence is not necessarily rooted in
situation where information which had been erstwhile treated in confidence by the organization, and had been transmitted in confidence to the government institution, has been made public by that government institution. 69

In our consideration of more specific concerns raised by the relationship between the copyright regime in Canada and the data protection regimes that are emerging, we have come full circle. While many consider data protection only in terms of the protection of personally identifiable data, there is other data protection extended in the access regimes in Canada. Specifically, there are provisions in the access regimes that protect economically valuable business data from disclosure to requesters. However, this data protection is not an absolute barrier to further dissemination of valuable commercial information.

In the case of a government decision to publish information received from a third party, it would appear that a third party wishing to oppose this dissemination will have to rely on grounds other than the access legislation exceptions. Consideration might be given to suing the government and/or the eventual recipient of the information for breach of confidentiality, in appropriate circumstances. On the other hand, if the "record" or "agreement" involved constitutes a "literary work"... and copyright is not held by the government... then on what grounds can the government publish without violating the copyright holder's rights?

69. It might also be possible for the confider organization to sue, not necessarily the confidante government body, but either instead or, perhaps, in addition, the subsequent third party private sector competitor recipient of the confidential information in order to recover from the breach of confidentiality occasioned. In Cadbury Schweppes Inc. v. FBI Foods, supra, the Supreme Court of Canada clearly recognized the right of a confider to recover from the eventual third party beneficiary of the confidential information (with notice) even though the intermediary confidante in the information transaction, Caesar Canning, was bankrupt and not a party to the proceedings.