

New Copyright Exception For Political Advertising

**Presentation by
the Minister of Canadian Heritage**

Summary

- Cabinet authority to create this exception is required in order to include the *Copyright Act* amendment in the *Budget Implementation Act*.
- The exception will provide greater certainty for political actors who wish to use “news” content in their political advertisement without being bound by rights holder authorization.
- The proposed exception is narrow, and carries a low legal risk.
- Given its legal and political complexity, and the speed with which the exception was developed, there may be unforeseen circumstances that create unintended consequences.
- A strong communication plan will be required to manage vocal stakeholder reactions.

Context

- **Copyright Act is federal marketplace framework law / cultural policy instrument that maintains balance between:**
 - Control and fair remuneration for creators, and
 - Serving the public interest by promoting content creation, broad access to knowledge, innovation, freedom of expression, and economic efficiency
- **An important part of this balance comes from having exceptions to copyright - where users do not have to ask permission and/or pay for the use of copyright material**
- **All exceptions have conditions that limit what users can do in order to minimize the adverse effects on rights holders**

Proposed exception

- Would allow free use of “news” content in political advertisements intended to promote or oppose a politician or political party, or a position on a related issue
- Would be available to “political actors” (i.e. publicly elected officials, party leaders, and those who intend to seek such positions; and registered political parties.
- Would also extend to a political actor’s agents and those who distribute the political advertisement (e.g., broadcasters, Youtube, etc.)
- Source material would have to :
 - *Be already published or made available (e.g., television broadcast, YouTube video);*
 - *Be obtained from a news source (e.g. a news program, news commentary program, newspaper or news periodical);*
 - *Feature the political actor in their capacity as a politician or relate to a political issue*

Proposed exception, cont.

- Would not apply to documentaries or fictional works
- Would not capture most music and photographs, unless incorporated into news content
- Would not apply to fundraising activities or to a use that could have a significant effect on the market of the source material
- Would not affect the moral rights of the content creator (i.e. a creator could oppose the use of their content if they feel it negatively affects the integrity of their work or reputation)
 - Corporations (e.g. broadcasters) cannot hold moral rights; however, their employees (e.g. news director) may, if they have not waived them
- Would not allow for use of copyright content protected by a digital lock

Analysis

- Creators of news (i.e. broadcasters, newspaper and periodical publishers, and “news” photographers), will vehemently claim that their work is being unfairly targeted for the benefit of political parties.
- Other rights holders (e.g. documentary films, TV and movies) may welcome the exclusions of their work. Musicians and photographers may be concerned about possibility of being associated with a political party.
- User community may interpret the exception as supporting “political expression”, but will likely call for it to be broadened to include other political players.
- A move to amend the *Copyright Act* before the 2017 Parliamentary review will create pressure to address other copyright issues now, especially given the Government’s public position to wait for this review before opening the Act again.

Analysis, cont.

- The exception removes the need for broadcasters to authorize the use of their “news” content; but it does not affect their discretion to generally pick and choose what they broadcast (including advertisements).
- However, during an election, broadcasters must provide a certain amount of advertising time to political parties.
 - Interpreted by a court as requiring broadcasters to air political advertisements unless they have a clear legal reason for refusing.
 - Whether this would apply in a future circumstance would depend on the specific facts of the case.

Key outcomes/Recommendation

- Seeking Cabinet authority to amend the *Copyright Act* to create an exception for the use of « news » in political advertisements without authorization of the rights holder.
- The exception means greater certainty for « political actors » who want to use copyright content in their advertisements
 - E.g. clips from radio and television broadcast news, footage capturing political debate or events, a newspaper or magazine article, etc.
 - Could be used by all politicians and registered political parties at any level of government
- If supported, the amendment would be incorporated into the Budget Implementation Act and enter into force upon Royal Assent