

COPYRIGHT MODERNIZATION ACT: BILL C-32

After two failed attempts to amend copyright law in 2005 and 2008, the federal government embarked on its most recent attempt to rewrite copyright for the digital era on June 2, with Bill C-32: the *Copyright Modernization Act*. Despite a general consensus in the government that the *Copyright Act* is due for an overhaul, public backlash and the instability of minority governments have prevented any changes from moving forward.

BACKGROUND

The purpose of the Copyright Act is to encourage the creation of artistic and literary works. The Act does this by balancing the interests of creators, owners and users of copyrighted works, including songs, videos, books and other original creations.

The Copyright Act was last amended in 1997, before many of the communication and other digital technologies existing today had emerged. The need for an updated Act prompted the government to undertake formal review of the Act in 2001, with the primary purpose to consider the impact of digital technology on copyright.

In recent years the content production industries and the United States government have exerted significant pressure on the Canadian government to pass legislation that significantly restricts users' access to and use of copyrighted materials. Two Bills were proposed to amend the Act, C-60 in 2006 and C-61 in June 2008, both of which died on the order paper.

With this latest bill, the government has framed the amendments as necessary updates to address the impact of new technology. While the current act is out of date, the changes proposed in C-32 go far beyond simply updating the Act.

The Bill was sent to a Special Legislative Committee in November 2010, composed largely of members from the House of Commons Industry and Heritage Committees.

2009 CONSULTATIONS

When Bill C-61 was tabled, one of the sharpest criticisms was that the government had not conducted public consultations before tabling the Bill. Following the death of C-61, the government held a mix of public and invitation-only consultations during the summer of 2009. Students from coast-to-coast participated in large numbers in the public town hall meetings and students' representatives contributed to several of the invitation-only round-table discussions. It was apparent by the end of the consultations that Canadians widely held the view that future amendments to the Copyright Act must not follow the model of the United States Digital Millennium Copyright Act ("DMCA") and its close Canadian relative, Bill C-61. In particular, the vast majority of Canadians strongly opposed the legal protection of "digital locks", and supported a flexible definition of fair dealing.

The Canadian Federation of Students' submission called for:

- The inclusion of a flexible and inclusive definition of fair dealing;
- The careful regulation of technological protection measures (digital locks);
- A notice-and-notice regime for internet service providers;
- The removal of statutory damages;
- The elimination of crown copyright; and
- Stronger protection for the integrity of creators.

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THE COPYRIGHT MODERNIZATION ACT

Fair dealing

Fair dealing is the right to limited and good-faith use of copyrighted works in certain circumstances without permission or payment. The Act currently provides that the reasonable use of copyrighted materials for the purpose of research, private study, and (if certain requirements are met) criticism, review, and news reporting, is considered fair dealing and does not infringe copyright. In a 2004 Supreme Court ruling (*CCH Canadian Ltd. vs. the Law Society of Upper Canada*) the court found that fair dealing must be given a broad and liberal interpretation with a focus on users' rights.

Many in the educational community have argued that, when viewed through the lens of the 2004 ruling, the current definition of fair dealing affords broad rights to those in the educational community. While this view is widely held amongst copyright experts, risk-averse post-secondary institutions have often taken a very conservative approach to relying on fair dealing to justify uses of copyrighted works.

The Federation has called for a flexible and open-ended definition of fair dealing, rather than the exhaustive list currently included in the Act. Such a definition would reflect the principles set by the Supreme Court and would give the flexibility necessary in a rapidly evolving technological landscape. This view was explicitly supported by almost 6,000 of the more than 8,300 submissions to the 2009 copyright consultations.

Instead of moving to an open-ended definition of fair dealing, C-32 maintains a closed definition, but includes a reasonable expansion, adding parody, satire and education to the categories already contained within the Act. The inclusion of education in the definition of fair dealing would represent an expansion of students' user-rights and would make explicitly legal the fair use of copyrighted works in an educational context. In addition, the broad and expansive wording proposed in C-32 would indicate that any use related to education *can* be considered fair dealing, whether or not it takes place in a formal educational setting.

The expansion will clarify that educational uses of copyrighted books, articles, songs and other works *can* be fair dealing; it will not mean that any

use *is* fair dealing. To qualify for the exception the use will have to be fair, meaning it does not undermine the legitimate market for the work, amongst other things. Students will still have to buy textbooks, and libraries will still have to license journals and purchase books.

A recent decision by the Federal Court of Appeal directly addresses the impact that the expansion of fair dealing proposed in C-32 would have. The decision resulted from a six year legal battle over what fees had to be paid for the use of copyrighted works in K-12 education. All of the different uses contemplated in the case, including multiple copies for classroom use, qualified for fair dealing under the first part of the test, as research or private study. Where they were deficient was on the second part of the test, the fairness analysis. Justice Johanne Trudel, writing for the Court, specifically addressed the expansion proposed in C-32, stating it "serves only to create additional allowable purposes; it does not affect the fairness analysis." In other words, expanding fair dealing will not allow copyrighted works to be used in a way that is not fair. Amongst other things, this decision makes clear the status of coursepacks often used in post-secondary education. While these copies currently qualify for the first part of the test as research or private study, they fail the second part as they are not fair. This should go a great distance to allaying fears expressed by some in the publishing and creative industry that the expansion will undermine their ability to be compensated for the use of their works in education.

Arguably the bigger impact of the expansion will be emboldening students, teachers and educational institutions to exercise the fair dealing rights they already enjoy. Fearing litigation by often litigious rights-holders, many members of the education sector have been reluctant to use their fair dealing rights for fear that their use may fall in the small space between research and private study. The addition of 'education' will reassure these members that they can exercise their fair dealing rights.

While this falls short of what the Federation seeks, at the very least, the inclusion of an educational exemption would represent a clear recognition of fair dealing rights in education and embolden the post-secondary education community to exercise their rights.

Anti-Circumvention

The most controversial element of C-32 is the inclusion of blanket anti-circumvention provisions. They would make it illegal to bypass digital encryption or “locks”—also known as technological protection measures (TPMs) or digital rights management (“DRM”)—that many copyright owners place on digital media. These provisions would effectively override the rights of Canadian users and creators, as they would make bypassing digital locks illegal, regardless of whether the use is legal.

These provisions are very similar to what was included in C-61 and the United States DMCA. While the Bill contains a handful of exceptions allowing circumvention in particular instances, they are too narrow and fail to account for the wide range of legitimate reasons why a user might circumvent a technological protection measure. The Bill also includes a ban on the distribution and marketing of any device that could be used to break a digital lock, and a blanket presumption that any circumvention is an act of copyright infringement. Breaking or otherwise circumventing a digital lock, even for personal use, could result in fines of up to \$5,000.

While the Bill proposes a welcome expansion of fair dealing, the anti-circumvention provisions would strip away any rights provided to users through the Act. Instead, it would grant corporate copyright owners the ability to bypass users’ rights and exercise absolute control over how and what users are able to do with copyrighted works.

This provision is especially concerning for members of the educational community. As institutions increase their use of digital resources, including electronic course packs, students could be faced with the possibility of having their rights, including those granted under fair dealing, stripped away through the imposition of digital locks.

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The Federation opposes the inclusion of provisions protecting digital locks, and takes the position that the government should actually be regulating the

implementation of digital locks so that they are not used to deny users’ rights. Within the current Bill, a reasonable compromise would be to add a general exemption for bypassing digital locks for non-infringing purposes, and to eliminate the overly broad device and service prohibitions.

ISP Liability

C-32 is the third straight Bill to include a notice-and-notice regime for Internet service providers, a position supported by the Federation. Under this regime, an Internet service provider (ISP) would be required to pass on a notice of infringement to the alleged infringer, upon the receipt of a notice from a copyright owner that a user of its service is infringing copyright. This is in stark contrast to the regime established by the DMCA, which turns ISPs into the “copyright police”, requiring them to remove any work identified as infringing by a copyright owner.

Statutory Damages

If a person is found liable for copyright infringement, the owner of the infringed work is entitled to “actual” or “statutory” damages. Actual damages are based either on the losses suffered by the owner or the gains obtained by the infringer. Statutory damages are set out in legislation and can result in substantially larger payments for each infringement.

C-32 proposes the reduction of statutory damages for non-commercial infringement, from a maximum of \$20,000 per work, to a ceiling of \$5,000 in total damages. While this falls short of the elimination of statutory damages called for by the Federation, it is a major step in the right direction.

Other Educational Provisions

The Bill offers a small number of other educational provisions that would update the law to reflect current practices in digital learning. The new provisions provide explicit permission for the use of copyrighted materials for online courses and would allow students to reproduce course materials received through telecommunications. Unfortunately, a provision has been brought back from C-61 that would require teachers and educational institutions to destroy any digital course materials containing copyrighted works within 30 days of the end of a course, regardless of

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whether the institution intends to offer the course again.

The Bill also contains a new section for “works available through the internet”. This section would allow teachers to use or reproduce copyrighted material posted publicly on the internet. However, the provision “does not apply if the work or other subject-matter – or the Internet site where it is posted – is protected by a technological protection measure that restricts access to the work or other subject-matter or to the Internet site”.

With the broad expansion of educational fair dealing in Section 29, it is unclear why these provisions are even necessary and, as drafted, could do more harm than good.

Other Provisions

C-32 contains a number of other changes designed to address the concerns of specific audiences or to make the Bill more consumer friendly, in most cases by legalising practices that are already common. These changes include:

- format shifting: copying of copyrighted content from one device to another, such as from a computer to an iPod;
- time shifting: recording and temporary storage of a program for later viewing;
- back-ups: making a back-up copy of content to protect against loss or damage;
- mash-ups: explicitly allowing the mixing of media under certain circumstances and not for commercial gain;
- new moral and other rights for performers and photographers; and
- an exemption for the temporary copying of copyrighted material for certain technological processes.

It is also worth noting that the Bill would require a mandatory review of the Copyright Act every five years.

CONCLUSION

The Copyright Modernization Act is a reasonable attempt at creating a balanced Copyright Act, however, it is fundamentally undermined by its blanket protections for digital locks. Despite this major flaw, the Bill contains a set of reasonable compromises including a welcome expansion of fair dealing, the limitation of statutory damages, and a notice and notice regime for Internet service providers. Should the opposition parties amend the Bill to include more reasonable anti-circumvention measures, Bill C-32 would represent a step forward and a bill students could support.

