



Canadian Library Association
Association canadienne des bibliothèques

Protecting the Public Interest in the Digital World

The views of the Canadian Library Association / Association canadienne des bibliothèques on Bill C-32, *An Act to Amend the Copyright Act*

July 29, 2010

Preamble

This analysis of Bill C-32, *An Act to Amend the Copyright Act*, has been prepared by the Canadian Library Association / Association canadienne des bibliothèques (CLA) for its members, the Canadian library and information community, and all those interested in the creation, dissemination and preservation of Canadian culture. It identifies the provisions of the legislation that would appear to be of most direct interest to librarians, libraries, and others in the information community; and provides some analysis of those provisions from this perspective.

CLA is Canada's largest national library association, representing the interests of public, academic, school and special libraries, professional librarians, library workers, library trustees, and all those concerned about enhancing the quality of life of Canadians through access to knowledge and literacy.

CLA represents the interests of approximately 57,000 library staff and thousands of libraries of all kinds across Canada on a range of public policy issues. None is more critical at this time than copyright.

But more importantly, libraries and librarians speak on behalf of our users: millions of students, educators, scholars, researchers, lifelong learners, special library users and recreational readers, from children to seniors. Library users **are** the Canadian public: they are not members of a "special interest group" when it comes to copyright. The majority of CLA members work in publicly funded institutions serving the citizens of this country. The public interest is at the core of our work and it is on behalf of the millions of Canadians who regularly access our collections, services (tangible and virtual) and buildings that CLA presents its analysis of Bill C-32, *An Act to Amend the Copyright Act*.

The Government has stated its intent to provide copyright legislation which is both balanced and technologically neutral. While CLA applauds significant improvements to Canada's copyright regime introduced in Bill C-32, we note that changes are required if the legislation is to ultimately succeed in its objectives.

General Comments

As an instrument of public policy, the *Copyright Act* (the Act) has two primary objectives: to encourage the creation and dissemination of original works, and to promote access to knowledge for the benefit of Canadian society as a whole. It is essential, therefore, that copyright reform respect the underlying principle of balance and equity among the content industries, the creators and the users of the content.

CLA applauds the addition of education, parody and satire in the fair dealing section of the Act. However the Government's insistence on reintroducing unnecessarily proscriptive protections for digital locks undermines this improvement along with other new and existing user rights to the extent that they are seriously undermined. Legislation which does not include the right to bypass digital locks for non-infringing purposes is fundamentally flawed.

CLA urges the government to address the copyright implications of the Internet and digital content with a balanced and thoughtful public policy-based approach that upholds and protects Canadian values and culture and user rights as reinforced by the Supreme Court of Canada. Technology and the content provision industries are rapidly evolving and legislative attempts to force existing business models on Canadians by placing constraints on their use of technology are both wrong and ultimately quixotic. The core principles in the WIPO Copyright treaties not already recognized in Canadian law do not require such a maximalist approach and can be incorporated without resorting to the type of barriers on the use of technology found in Bill C-32.

The Bill does not go far enough to amend existing library, archive and museum exceptions and limitations made redundant by the fundamental principle of user fair dealing rights as clearly outlined in the unanimous Supreme Court of Canada judgment in *CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13* (the CCH case); instead it introduces significant constraints on the ability of individuals and libraries to exercise their rights in the digital environment.

Canadians will not – and should not – accept digital locks and imposed contracts that interfere with their statutory rights under fair dealing for any format of content, nor limits on how long legally acquired content may be retained by users for research and private study. Bill C-32's silence on the issue of imposed contracts overriding user legislated rights combined with the overarching protections given digital locks undermine the progressive sections of the legislation.

Copyright issues most relevant to libraries and Bill C-32

1) Fair Dealing

CLA applauds and strongly supports Bill C-32's proposed inclusion of education, parody and satire into the fair dealing provisions in Section 29 of the Act. Although a more flexible approach would be to include the words "such as" before the purposes enumerated in this section, the proposed amendment is a positive step towards reflecting the CCH case's recognition of this fundamental user right. Education, parody and satire are appropriate purposes for fair dealing and are in line with similar provisions in other countries. CLA urges the Government not to bow to the pressure of commercial and economic interests that would seek to limit this fundamental user right.

CLA also strongly believes that fair dealing as a fundamental user right must not be superseded by a copyright holder's use of technological protection measures, as more fully outlined below.

CLA notes Bill C-32 proposes the addition of Sections 29.21 to 29.24 to the Fair Dealing provisions of the Act. These sections properly attempt to recognize various emerging uses of new technology and are a step in the right direction. However, these uses contain various limitations and counter exceptions which would not necessarily preclude a full fair dealing analysis. Rather than legislate specific limits or counter exceptions, these would be better dealt with as part of the entire fair dealing analysis. We are also concerned that these provisions may be read as substitutive rather than additive to Section 29, and therefore suggest that these specific sections be moved to a different sub-heading.

In particular: while Section 29.21 is a positive recognition of the growing importance of user generated content, the language is too restrictive and does not take into account the importance of this emerging form of creativity. Section 29.22 not only contains the fundamental flaw of being superseded by digital locks and the inclusion of overly broad destruction requirements, but it also excludes typical lawful uses of library materials. Section 29.24 is similarly flawed.

2) Digital Locks

[also known as Digital Rights Management (DRM) or Technological Measures (TMs) or Technical Protection Measures (TPMs)]

The prohibitions on the circumvention of digital locks in Bill C-32 exceed Canada's obligations under WIPO copyright treaties. Canada agreed to distinctive wording and flexibilities inherent in WIPO Internet Treaties. WCT art.11 and WPPT art. 18 both protect the right holders but also allow flexibility in national laws for permitted legal uses. Bill C-32 gives a new right to copyright owners negating the flexibilities in the Internet Treaties and directly contravening the basic, longstanding individual rights sanctioned in Canadian copyright law. With this provision, Canada is allowing a technical feature to override a nuanced information policy, permitting owners' rights to overreach their legitimate limits, and impinging on users' rights.

Bill C-32 makes it illegal to circumvent digital locks for most legal purposes including quotation, parody and satire (fair dealing uses), library preservation, and the copying of content for which there is no copyright (facts and information) or copyright has expired. The Government's attempt to exempt persons with perceptual disabilities from the constraints of digital locks (Section 41.16(1)) is nullified by the condition "to not unduly impair the technological protection measure." There is no efficient way to remove the TPMs and restore them after an alternate format has been created.

CLA believes Canadians deserve regard for their statutory rights in the digital environment. Section 41 of Bill C-32 can be simply amended. The definition of "circumvent" in Section 41 (a) and (b) must include the words "for any infringing use" thus insuring Canadians' ability to invoke their full rights as information users.

CLA appreciates the Government's special treatment of libraries, archives, museums and educational institutions in Section 41.2. However, we note this section could be strengthened by the creation of an exception to deal with this issue rather than relying on the section as a mere defence.

3) Exceptions for the print disabled

CLA notes that Bill C-32 has made improvements to clarify and extend user rights relating to exceptions for people with perceptual disabilities. There is an explicit right for a "person with a perceptual disability, for a person acting at the request of such a person, or for a non-profit organization acting for the benefit of such a person to make a copy of a work for the purpose of creating an alternate format." There is a conditional exception to the prohibition of circumventing technological protection measures for the "sole purpose of making a work, a performer's performance fixed in a sound recording or a sound recording perceptible to the person with a perceptual disability." (Section 41.16(1)). Sending copies of alternate formats outside Canada is permitted under specific conditions (Section 32.0.1.1) The Bill preserves the continued

exemption from the Blank Audio Recording Media levy for societies, associations or corporations that represent persons with a perceptual disability. (Section 82).

However, CLA believes the Bill as drafted has the potential to significantly constrain or render Section 32 (1) moot or inoperable. For example, despite the Government's intent that the Bill be technologically neutral, it does not provide a generic exception for all alternate format materials for people with print disabilities. CLA strongly suggests the Bill provide that "it is not an infringement of copyright for a person with a perceptual disability, for a person acting at the request of such a person, or for a non-profit organization acting for the benefit of such a person, to make a copy of a work, and sound recording or another format suitable for persons with a perceptual disability provided that the item is not commercially available in the appropriate format." There should be no prohibition on sign language or captioning of cinematographic works (motion pictures) by a non-profit organization.

If Bill C-32 maintains its overreaching prohibition on the circumvention of digital locks, it should be made clear that the proposed requirement "to not unduly impair the technological protection measure" does not operationally hinder the exercise of the exception for people with print disabilities. Further, Bill C-32 should clarify the jurisdiction, royalties and reporting requirements for alternate formats related to collective societies.

CLA urges the Government to review all of the sections in the Bill that affect access for people with perceptual disabilities to ensure they do not make equitable access more difficult, or indeed impossible. The main point is to "do no harm" to any access available to users with print disabilities.

4) Libraries, Archives and Museums: Exceptions for Research and Private Study

Bill C-32 falls short of what is required for libraries to provide effective reference and interlibrary loan services in the digital era. The constraints it seeks to impose protect economic interests that are not threatened by the limited amount of "private research and study" materials copied by Canadian libraries for their patrons or for interlibrary loan. CLA proposes that the library, archive and museum exceptions for research and private study be truly format-neutral and allow these institutions to do anything on behalf of a patron, both directly and through interlibrary loan, that patrons can do for themselves.

The current exception for research and private study in Section 30.2(1) of the Act allows library staff to do anything on behalf of any person that the person may do personally under the fair dealing provisions in Sections 29 and 29.1.

There is a further exception in Section 30.2(2) that allows library staff to reproduce by reprographic means a work published in a scholarly, scientific or technical periodical, or a work (other than a work of fiction, or poetry or a dramatic or musical work) published in a newspaper or in any other type of periodical that was published more than one year before the copy is made. In order to exercise the exception in Section 30.2(2), Bill C-32 proposes an amendment to Section 30.2(4) that would require the library to inform the person making the request that the copy is to be used for research or private study and that use of the copy for another purpose may require the authorization of the copyright owner.

Currently, there is a restriction placed on the exercise of the exceptions provided in Sections 30.2(1) and 30.2(2) when the request is made by a patron of another library, archive or museum, as section 30.2(5) stipulates that the copy given to the patron in that case must not be in digital form. The amendments to Section 30.2(5), (5.01) and (5.02) proposed in Bill C-32 lift this restriction by allowing library staff to provide a digital copy of a work for interlibrary loan purposes. However under Section 30.2(5.02), the library must take measures to prevent the requesting patron from: a) making any reproduction of the digital copy (other than a single print copy), b) communicating the digital copy to anyone, and c) using the digital copy for more than five business days from the day on which it is first used.

CLA believes the restrictions on library copying for users in the present and proposed Sections 30.2(2), 30.2(3) and 30.2(5) are unworkable and overly restrictive. These provisions are unworkable, as existing interlibrary loan software does not allow libraries to apply the unreasonable restrictions required under the proposed Section 30.2(5.02). Further, these provisions are overly restrictive when considering the liberal interpretation of research and private study set out in the CCH case, which, provided the dealing is fair, does not restrict the reproduction of single copies of works to the publications enumerated in Section 30.2(2) or only to print copies as provided in the current Section 30.2(5).

Bill C-32 continues the practice of segregating important Canadian institutions according to whether they are owned by non-profit organizations or not. This seems inconsistent with the federal Government's support in other initiatives for Private-Public Partnerships and is also completely inappropriate when the Government says that it is making the amendments to "permit ... educators and libraries to make greater use of copyright material in digital form" and "allow educators and students to make greater use of copyright material" ((c) and (d) from the Summary). In fact the Government in Bill C-32 is only allowing certain select libraries, educational institutions, archives and museums to have increased use. Users should have equitable access in all environments.

CLA calls upon the Government to extend the exceptions now reserved for defined groups of institutions (i.e. a "Library, Archive or Museum" or "Educational Institution" as defined in Section 2 of the Act) to all users making educational uses of material or serving the needs of users of information or, at least, to broaden the definitions in Section 2 of the Act to encompass all educational institutions, both public and private, and all libraries, archives and museums, both public and private, regardless of whether a library, archive or museum holds a collection open to researchers or the public. Recent restructuring of the federal government's own Health Canada Library has recently caused it to be closed to "outsiders," likely disqualifying it for the "Libraries, Archives and Museums" exceptions in the Act.

5) Preservation: Exceptions for Management and Maintenance of Collections

Restrictions within the current exceptions in Section 30.1 of the Act, many of which are linked to older technologies, make it increasingly difficult for libraries to meet the challenges of preserving and making accessible the materials in their collections and to use digital technologies to provide the services their users need. Libraries find they need to "refresh" or "migrate" content to match the evolution and availability of current technology and not have to wait until the older format technology is obsolete. Bill C-32 seeks to deal with this by changing wording to allow for the preservation of material the library considers is becoming obsolete or where the technology required to use that material is becoming unavailable. CLA applauds this positive step but notes

that its application would be undermined unless the provisions for digital locks proposed in other parts of Bill C-32 can be circumvented for non-infringing purposes.

6) Educational Issues

Bill C-32 contains several new provisions that would create limited exemptions available to educational institutions as defined in the *Act* and to those acting on their behalf or under their authority. As indicated above, CLA strongly supports the proposed inclusion of education in section 29 of the Act. As also outlined above, we believe that the definition of "Educational Institution" in Section 2 of the Act should be broadened to include all such institutions, regardless of their ownership and, therefore, that the extensions of rights to "educational institutions" proposed in Bill C-32 would extend to all Canadian educational institutions.

CLA welcomes the amendments to section 29.4 as a move toward technological neutrality and recognition of the continuing advancement in classroom display technology. Similarly we see the additions of 29.5 as positive reflections of the importance of multimedia in the classroom. We support section 29.6 and 29.9(1)(a) and suggest the same treatment be afforded to section 29.7.

However, the provisions proposed for Sections 30.01 and 30.04 add unacceptable levels of complexity and will encourage an over-reliance on licensing. Any limited benefits for teachers and learners given in these sections quickly evaporate in the face of counter-limitations and requirements. As we have indicated above, we do not support digital locks that prohibit legitimate acts of circumvention or otherwise restrict existing user's rights. As drafted, these educational exceptions are vitiated where a technological protection measure has been employed. Even worse, they contain requirements for academic staff to impose and enforce these measures.

Although it does not explicitly mandate any particular level of record keeping, the effect of 30.03 would impose burdensome new record keeping requirements for institutions, contrary to the direction taken in sections 29.6 and 29.9(1)(a). We oppose sections 30.02 and 30.03 as the relationship between licensing collectives and institutions should not be unduly disrupted by legislation which favours one side.

7) Statutory Damages

CLA supports the proposed amendments in Bill C-32 to the statutory damages provisions in Section 38.1 and elsewhere in the Act.

8) Internet Service Provider (ISP) Liability

CLA supports the proposed requirement in Section 41.23 of Bill C-32 that ISPs notify a user of their network that a complaint has been received regarding the legality of content the user has mounted, rather than requiring them to remove the content ("notice and notice" versus "notice and takedown"). Placing the onus on the ISP to remove content on a network on the basis of unsubstantiated allegations from a self-declared rights owner would place the ISP in an untenable position: it is best left to the network user to determine and be liable for their actions. It is worth pointing out that in addition to the commercial ISPs there are many non-profit

organizations that serve as ISPs including many public libraries, school boards, universities and colleges.

Summary

CLA acknowledges the complexity of copyright in the 21st century and applauds the Government's attempt to define the balance between the concerns of creators, content providers and users as a key goal of continuing copyright reform. While sections of Bill C-32 indicate that the concerns expressed by thousands of Canadians during the recent copyright consultations were heard, taken as a whole, the Bill does not achieve an acceptable balance from the user rights perspective.

CLA will be pleased to continue to work with the Government to develop balanced copyright legislation in the public interest. As the Bill moves through the legislative process, CLA and its members will join with our users and a wide range of other institutions and organizations to vigorously support the progressive sections of the Bill and seek amendments to address the deficiencies outlined in this analysis