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## Bill C-32: New Proposal to Reform Canadian Copyright Act A Detailed Review

On June 2, 2010, the Canadian government tabled Bill C-32, which will substantially change copyright as we know it today. A large number of industries, beginning with cultural industries, will be affected by this bill.

One of the purposes of the amendments made to the *Copyright Act* (the "Act") is for Canada to ratify two treaties of the World Intellectual Property Organization (WIPO) dating back to 1996. The treaties aimed mainly to address new challenges created by the explosion of new digital technologies (the "WIPO Treaties"). Canada signed the treaties at the time but, despite several attempts (including Bill C-61, which died on the order paper), had not been able to ratify them.

### Proposed Amendments under Bill C-32

Bill C-32 does more than just meet the minimum standards of these international treaties. The multitude of amendments often affect other aspects so that overall, and as stated in the preamble of Bill C-32, the Act will strike a balance between the expectations of users and those who exploit works and other content protected by copyright ("protected content"). The several public consultations held since the treaties were signed in 1996, the most recent of which took place in 2009, brought to light quite a broad range of concerns from each of these groups.

The bill proposes amendments which will:

- provide protection for the "digital locks", or technological protection measures, that record companies, movie studios, software companies and other content distributors use to protect the creative content they produce and sell;
- establish new exclusive rights for authors, performers and record companies, including the right to make sound recordings available on the Internet;
- grant copyright protection to authors of photographs while allowing individuals who commission these works to use them for private or non-commercial purposes;
- create new "personal use" exceptions which will allow individuals to record television programs, make digital copies of music, and move content from one format to another without infringing copyright;
- set out new exceptions respecting the use of material accessible on the Internet for the purposes of education or training;
- set out new exceptions respecting the use of protected material for the purpose of education, satire and parody;
- allow temporary reproductions for technological processes;
- limit the ability of holders of rights in music to collect royalties for the making of ephemeral recordings by broadcasting undertakings for copies kept for less than 30 days;
- clarify the role of Internet Services Providers (ISPs) with respect to copyright infringement by limiting their liability and requiring them to forward notices of alleged copyright infringement to subscribers and to retain the records necessary to determine the subscribers' identity;
- create new provisions to allow copyright holders to sue those who facilitate pirating, such as peer-to-peer file sharing sites which act as "system enablers";
- reduce the maximum amount of statutory damages which may be awarded against an individual who infringes copyright for private use to a global amount per claim.

### The 2009 Consultations

Not all the suggestions gathered during the consultations held in 2009 were retained. Several of the suggestions that were rejected involved the problem of the sharing of protected works on the Internet, such as for example persons operating trackers used to enable peer-to-peer exchanges with the BitTorrent protocol.

Several companies had asked the Canadian government to set up a regime which would prohibit people who illegally share protected works from using the Internet. Laws allowing access to be cut off after three acts of infringement have been passed in France and a public consultation is currently being held in the United Kingdom. A similar rule has recently begun to be applied in Ireland pursuant to an out-of-court settlement between some important members of the recording industry and Ireland's largest Internet providers. An Irish court held in May 2010 that the settlement complied with Irish law, and in particular privacy laws.

### Bill C-32

This is the third bill relating to proposed amendments to the Act introduced by a Canadian government during the last five years. Paul Martin's Liberal minority government introduced similar legislation in June 2005, but the legislation died when the Government fell in November 2005 after losing a confidence motion in the House of Commons. On June 12, 2008, Stephen Harper's minority Conservative Government also tabled a Bill (Bill C-61) to amend the Act.

The following is a summary of several of the amendments to the Act proposed by Bill C-32.

### The right to "make available to the public"

The WIPO treaties require member countries to give copyright owners an exclusive right to make available protected content to the public in a way that allows a member of the public to have access to the sound recording from a place and at a time individually chosen by that member of the public. This right would cover, among other things, the uploading of sound recordings to the Internet so that other people can download them or share them using peer-to-peer file sharing applications. To comply with international treaties, Canada must abide by these standards.

Bill C-32 does not create a right to "make available to the public" for the benefit of authors and composers. The Act already gives authors an exclusive right to communicate their works to the public by telecommunication. During proceedings involving ringtones, the Copyright Board held that this right to communicate a work to the public by telecommunication already covers that which is covered by the right to make a work available to the public. The Federal Court of Appeal<sup>[1]</sup> confirmed this decision of the Copyright Board. The new Bill codifies this case law by amending the definition of "communication to the public by telecommunication".

Unlike authors, record companies and performers cannot currently rely on an exclusive right to communicate to the public by telecommunication. Instead, they have the right to receive "equitable" remuneration in consideration for such communications to the public by telecommunication and the performance in public of their sound recordings. Bill C-32 would amend the Act to create a new exclusive right to "make available to the public" intended for producers of sound recordings and performers separate from their right to equitable remuneration. The right to be paid set out in the Act would be amended to provide that it no longer covers making available to the public. This new right of making available would be subject to the Copyright Board's tariff-setting process.

### Distribution Right

Bill C-32 would introduce into Canadian law a right to distribute works, i.e. the right to control the first transfer of ownership of each copy of a work such as a book, a compact disk or a dvd. This right is granted to authors of works, as well as to performers with respect to copies of sound recordings containing their performances.

This right will apply to all types of works, including works which already exist when the Act comes into force. Rules are provided to protect people who have incurred expenses or made commitments before the new Act comes into force and who are likely to be affected by the new right.

### Technological protection measures ("digital locks")

Of all the changes to the Act proposed in Bill C-32 to benefit rights holders, the new provisions relating to the circumvention of technological protection measures (TPMs), or "digital locks", that rights owners use to prevent the unauthorized use of their works and other subject-matter are probably amongst the most significant. TPMs are used, for example, by web sites which provide on-line subscription services, software and video games. The use of such techniques varies from one industry to another, and several industries,

such as the music industry, offer certain files without protection. Bill C-32 will not require that rightsholders use digital locks; that will be a business decision to be made by each rightsholder.

TPMs fall into two general classes – "access control" and "copy control". Examples of access-control TPMs include the password protection of a website to restrict access to authorized users, and the encryption systems that cable and satellite companies use to limit access to channels to those individuals who have subscribed to the channels and paid the applicable fees. An example of a copy-control TPM is the encryption used to prevent an individual from copying a movie from a DVD to a home computer.

Bill C-32 would amend the Act to prohibit the circumventing of both access-control TPMs and copy-control TPMs. The Bill would also amend the Act to prohibit the offer of services that are provided primarily for the purpose of circumventing a TPM. It would also prohibit the manufacture, importation or provision of any technology, device or component produced primarily for the purpose of circumventing a TPM. Any person who contravenes this rule could be sued and be liable to criminal sanctions. An individual who circumvents a digital lock could not, however, be ordered to pay statutory damages; the holder would have to prove his damages.

There are statutory exceptions to the prohibition against the circumventing of TPMs, including where the circumvention is for the purpose of:

- an investigation related to the enforcement of any Act of Parliament or any Act of the legislature of a province, or for the purposes of activities related to the protection of national security;
- making a computer program interoperable with another computer program;
- encryption research if certain conditions are met, including informing the owner of the copyright in advance;
- determining whether a technological protection measure allows personal information to be gathered, unless the work is accompanied by a notice indicating that the collection is taking place;
- testing and correcting computer system security, with the consent of the owner or administrator of the computer system;
- making content perceptible to a person with perceptual disabilities; and
- circumventing the technological protection measure on a radio apparatus for the sole purpose of gaining access to a telecommunications service by means of the radio apparatus (which could apply to cell phones).

The Bill does not allow the circumventing of technological measures in order to engage in the activities covered by existing and new exceptions under the Act. Instead, it would create a regulatory power through which the government may create new exceptions to the TPM regime under certain circumstances, for example if the TPM could adversely affect a use authorized by the holder, or could adversely affect criticism, review, news reporting, commentary, parody, satire, teaching, scholarship or research that could be made or done in respect of the work, the performance or the sound recording.

### **Moral rights for performers**

Bill C-32 would extend to performers moral rights in their performances currently only recognized for authors. These rights would include the right to the integrity of the performance and the right, when it is reasonable in the circumstances, to be associated with the performance as its performer and the right to remain anonymous. This new right would only apply to performances made after the entry into force of the Bill.

### **Photographs**

The Act currently contains disparities between photographic works and other works. The Bill is designed to eliminate several of them. For example, the Bill would eliminate section 10 of the Act which grants the status of author to the person who owns the original medium on which the photograph was fixed. The Bill would also remove another provision of the Act, subsection 13(2), which currently attributes ownership of the copyright to an engraving, photograph or portrait to the person who commissioned and paid for it, in the absence of any agreement to the contrary. The Bill's transitional provisions ensure that the amendment of the Act will not have the effect of modifying the ownership of works or the length of time works created before it came into force are protected.

On the other hand, a person who commissions a portrait or photograph for private or non-commercial purposes could use it for personal purposes under a new exception provided for in the Bill, in the absence of any agreement to the contrary.

### **Infringement relating to the provision of Internet services**

Bill C-32 would create a new type of infringing act which consists of offering services on the Internet or other digital networks that facilitate copyright infringement so long as the person offering it knows or should have known that this would occur and that the actual infringing behaviour by third parties exists. The Bill includes a number of factors a Court can consider to determine if facilitation of infringement exists:

- whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;
- whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
- whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
- the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;
- any benefits the person received as a result of enabling the acts of copyright infringement; and
- the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

### **Non-commercial user-generated content**

The Bill allows individuals to use works and other subject-matter protected by copyright (such as performances and sound recordings) in the creation of a new work or other subject-matter in which copyright subsists and to authorize an intermediary to disseminate it. This exception could apply to home-made productions intended for certain sites video-sharing websites. Certain conditions must be met to benefit from this exception:

- the use of, or the authorization to disseminate, the new work or other subject-matter must be done solely for non-commercial purposes;
- the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it must be mentioned, if it is reasonable in the circumstances to do so;
- the individual had reasonable grounds to believe that the copy used as a source did not infringe copyright;
- the use of the new creation would not have a substantial adverse effect on the exploitation or potential exploitation of the existing work or other subject-matter of the copyright which was used as the source (whether the market for it is existing or potential); and
- the authorization to disseminate it is given to a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public.

### **Transfer of works to another medium or device**

Bill C-32 would amend the Act to permit individuals to make copies of any work, including photographs, books, newspapers, magazines, films and television programs onto another medium or device, as long as the following conditions are met:

- the copy of the work from which the reproduction is made is not an infringing copy;
- the individual legally obtained the material otherwise than by borrowing or renting it and owns the medium or device on which it is being reproduced;
- the individual did not circumvent a technological protection measure, or "digital lock", in order to make the reproduction;
- the individual does not give the reproduction away; and
- the reproduction is used only for private purposes.

The Bill does not indicate a maximum number of copies which may be made under this exception but, as the copies can only be used for private purposes, this limits the practical interest in making a large number. This is an exception which does not give rise to remuneration being paid to the holders of rights in the protected content. The equivalent provision in Bill C-61 was limited to certain types of products (photographs, books, newspapers, etc.) whereas the new version applies to all works and subject-matter protected by copyright.

This new exception would not end the private copying regime for musical works and sound recordings, which leads to the payment of amounts set by the Copyright Board when blank audio recording media, such as compact disks, are manufactured or imported. The Federal Court of Appeal has ruled twice, in 2005 and in 2008, that the definition of "audio recording medium" in Part VIII of the Act (which

defines the private copying regime) does not include devices such as iPods and MP3 players. Reproduction on these devices could therefore be covered by the new exception.

The previous Bill C-61 provided that, when a person has legally downloaded material from the Internet and the downloading is authorized by contract, any stipulation of that contract would take precedence over these new exceptions. Bill C-32 does not contain such a provision.

### **Time-shifting**

The Act currently does not contain a specific provision allowing individuals to legally record television programs on a VCR or personal video recorder (PVR) to view at a later time, even though the practice is widespread among Canadians. Bill C-32 would create a "time-shifting" exception to permit individuals to make copies of television or radio programs for viewing or listening at a more convenient time subject to the following conditions:

- the individual receives the program legally;
- the individual did not circumvent a technological protection measure, or "digital lock" in order to record the program;
- the individual makes no more than one recording of the program;
- the individual keeps the recording no longer than is necessary to listen to or watch the program at a more convenient time (i.e. the exception does not allow individuals to create a permanent library of time-shifted programs);
- the individual does not give the recording away; and
- the recording is only used for private purposes.

The "time-shifting" exception does not apply if the individual receives the work under an on-demand service, but any other form of telecommunication of a program intended to be received by the public may be covered (cable television, airwave broadcasting, webcasting).

### **Security and encryption research**

Bill C-32 contains security and encryption research exceptions. The previous bill, Bill C-61, did not have a similar exception.

The purpose of the encryption research exception is to protect from liability a person who reproduces a work or other subject-matter provided it would not be practical to carry out the research without making the copy, the person has lawfully obtained the work or other subject-matter and the person has informed the owner of the copyright of his intentions.

The security exception is intended to protect from liability a person who reproduces a work or other subject-matter for the sole purpose, with the consent of the owner or administrator of a computer, computer system or computer network, of assessing the vulnerability of the computer, system or network or of correcting any security flaws.

### **Educational uses of copyright-protected material**

Bill C-32 would introduce into the Act two new exceptions to the rights granted to authors, performers, producers of sound recordings and broadcasters covering educational uses.

First, the Bill would add a new type of fair dealing allowed by law: fair dealing for educational or training purposes. Specific guidelines are not given for this exception and it is in addition to other types of fair dealing allowed, including fair dealing for research, criticism, review and private study. The courts will decide on a case-by-case basis whether or not the nature and scope of each use constitutes fair dealing.

Bill C-32 also provides a series of new exceptions covering education which are defined in much more specific terms. A first exception is intended to facilitate the use of the Internet and other means of long-distance communication for teaching purposes by providing an exception for "lessons", allowing them to be communicated to the public by telecommunication for educational or training purposes, if that public consists only of students who are enrolled in a course (and other persons acting under the authority of the educational institution) and to fix the lesson for the purpose of a new communication covered by the exception. However, the exception does not allow the use of works or subject-matter protected by copyright in communicating the lesson to the public without consent.

If an educational institution holds a reprographic reproduction licence from a collective society allowing it to make reprographic reproductions of works in its repertoire, the establishment would be authorized to not only make digital reproductions of the works but also to print one copy of the work when it has been received by telecommunication for educational or training purposes. This exception is subject to the payment of an additional royalty to the collective society for each digital reproduction at the rate for the reproduction of hard copies. A member of a collective society can prevent the application of this exception if he informs the society that he refuses to authorize

the collective society to enter into a digital reproduction agreement. The exception does not apply if a digital reproduction agreement has been entered into or if the Copyright Board has certified a tariff.

The Bill would also permit teachers to use material found on the Internet for educational or training purposes. The teacher must mention the source of the material, including the name of the author in the case of a work, the name of the performer in the case of the performer's performance, the name of the record company in the case of a sound recording, and the name of the broadcaster in the case of a communication signal. The right to use material available on the Internet does not apply if the material, or the web site where it is posted, is protected by a TPM, or there is a clearly visible notice on the web site where the material is posted prohibiting the use of the material. This exception also does not apply if the educational institution knew or should have known that the material was made available on the Internet without the copyright owner's authorization.

Teaching establishments may also record programs or news reports for presentation in the classroom. Inter-library digital loans will also be allowed if measures are taken to avoid the secondary distribution of such protected works.

### **Satire or parody exception**

In addition to the cases of "fair dealing" mentioned above, the new Bill would authorize "fair dealing" of copyrighted works for the purpose of satire or parody. This provision follows the broadening of the "fair dealing" use requested during the 2009 public consultations. The Act currently does not include an exception specifically covering satire or parody, but certain forms of satire or parody could be covered by the exception covering fair dealing for purposes of criticism.

### **Temporary reproductions for technological processes**

Temporary reproductions for technological processes will not constitute infringements under the new Bill. However, certain conditions will have to be met:

- the reproduction must form an essential part of a technological process;
- the reproduction's only purpose must be to facilitate a use that is not an infringement of copyright; and;
- the reproduction must exist only for the duration of the technological process.

Bill C-32 does not define "technological process" so it will be up to the courts and the Copyright Board to do so.

### **Ephemeral recordings**

The Act currently provides two exceptions covering ephemeral reproductions. Both of these exceptions would be amended by Bill C-32.

A first ephemeral exception enables programming undertakings holding a license from the CRTC (television and radio broadcasters and many cable distribution undertakings for example) to reproduce a live performance of a work (save a cinematographic work). This enables the time shifted rebroadcast within thirty days. The Bill would expand the number of businesses that can claim this exception, since the proposed amendments would extend the scope to programming undertakings that are exempted by the CRTC from the requirement to hold a license (for example smaller cable distribution undertakings and perhaps webcasters).

The second ephemeral exception existing in the Act aims to permit broadcasting undertakings licensed by the CRTC (notably radio broadcasters) to make copies of sound recordings or works fixed in a sound recording only for purposes of transferring them to a medium used to broadcast them. Many conditions must be met to claim the benefit of this exception. This exception currently does not apply if a collective society offers a license for such reproductions. The Bill would eliminate this and the exception would apply without regard to the interest that copyright collectives may or may not have in licensing such reproductions.

### **Network services**

Bill C-32 contains a general provision which would limit the liability of persons who, in providing services related to the operation of the Internet or another digital network, provide any means for the telecommunication or the reproduction of a work. Such persons would not infringe copyright merely by providing such means. This exception would complement the existing exception protecting entities providing telecommunications means, when their services are limited to providing only those means that are necessary for third parties to communicate protected content to one another.

ISPs would not be liable for infringements by their subscribers provided they remain neutral intermediaries and do not take part in the infringing acts. This principle also applies to search engines. No exemption will apply if the service is designed primarily to enable acts of copyright infringement and the person knows or should have known it.

Bill C-32 would give special treatment to two types of activity: providing cached content and the supply of digital memory. Cached ephemeral versions will not be considered infringements, but only if certain conditions are met (for example, not modify the content, other than for technical reasons). Undertakings which host third party content are also exempt unless they are aware of a court order declaring that the reproduction by the third party is illegal.

Providers of information location tools for Internet content are also exempt from liability, although they must comply with any injunctions issued by the Courts. However, they must meet a series of conditions, including that any reproduction must be made in an automated manner for the purpose of providing the information location tool. Here again, no exemption will apply if the service provided is designed primarily to enable acts of copyright infringement and the person knew or should have known it.

Nonetheless, certain ISPs (including those offering hosting services) as well as providers of information location tools would be required to comply with a mandatory "notice and notice" regime (which has only applied voluntarily to date) in response to complaints from rights holders about allegedly infringing activity by end users. A provider that receives a notice from a rights holder alleging that one of the provider's subscribers is engaged in infringing activity would have to forward that notice to the subscriber who is the subject of the complaint. However, it may charge a fee for doing so. The provider would not be required to disclose the identity of the subscriber to the complainant, but would have to retain the data necessary to determine the identity of the subscriber for 6 months. If the notice is not sent, the providers in question could be liable toward copyright holders for between \$5,000 and \$10,000.

### Possible sanctions and statutory damages

The Bill would reduce the minimum and maximum statutory damages in the case of non commercial copyright infringement by individuals. The courts would have the discretion to impose statutory damages ranging from \$100 and \$5,000 (rather than \$500 to \$20,000) regardless of the number of works infringed and the quantity of infringing acts (reproductions, downloads). The courts will assess each case according to its seriousness. If a plaintiff has elected statutory damages in such a case, no other plaintiff may elect statutory damages in respect of the defendant's infringements that were done for private purposes before the commencement of the original proceedings in which the election of statutory damages was made. These limits to statutory damages do not apply if the defendant circumvented a TPM for the purpose of infringing copyright.

The provisions setting forth the damages granted for breach for commercial purposes are unchanged.

For further details about this bulletin, please contact one of the following members of our Intellectual Property and Communications Law Group.

[1] *Canadian Wireless Telecommunications Association v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, motion for leave to appeal to the S.C.C. denied.

## Contacts

### VANCOUVER

**David Wotherspoon**  
604 631 3179  
[dwotherspoon@fasken.com](mailto:dwotherspoon@fasken.com)

### OTTAWA

**Gerald (Jay) Kerr-Wilson**  
613 236 3882  
[jkerrwilson@fasken.com](mailto:jkerrwilson@fasken.com)

### MONTRÉAL

**Stéphane Gilker**  
514 397 7608  
[sgilker@fasken.com](mailto:sgilker@fasken.com)

### QUÉBEC CITY

**Sébastien Roy**  
418 640 2073  
[sroy@fasken.com](mailto:sroy@fasken.com)

### TORONTO

**May M. Cheng**  
416 865 4547  
[mcheng@fasken.com](mailto:mcheng@fasken.com)

### J. Aidan O'Neill

613 236 3882  
[aoneill@fasken.com](mailto:aoneill@fasken.com)

### Jean-Philippe Mikus

514 397 5176  
[jpmikus@fasken.com](mailto:jpmikus@fasken.com)

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