

**David Zitzerman
Goodmans LLP**

Bill C-32 – Proposed Amendments to the Copyright Act

On June 2, 2010, the Minister of Industry, the Honorable Tony Clement, and the Minister of Canadian Heritage and Official Languages, the Honorable James Moore, introduced Bill C-32 (also known as the Copyright Modernization Act) which proposes several amendments to the *Copyright Act* (the “Act”). The amendments are intended to balance the interests of users and the rights of artists while adapting the *Act* to the digital age.

Background

There have been several attempts at copyright reform in Canada since the country became a signatory in 1997 to the World Intellectual Property Organization (“WIPO”) Copyright Treaty and WIPO Performance and Phonograms Treaty (together, the “WIPO Internet Treaties”). The WIPO Internet Treaties, however, have never been implemented in Canada and there have been continuing advances in Internet and digital technologies since the *Act* was last substantially revised in 1997. The Canadian Government’s previous attempts at copyright reform, Bill C-60 in 2006 and Bill C-61 in 2008, each failed to pass when Parliaments were dissolved.

Bill C-32 was in part the result of a consultation process, which took place in the summer of 2009, during which time the Canadian Government heard from numerous key stakeholders, including groups representing both content owners and users. Bill C-32 addresses a wide variety of issues, such as time and format shifting, the expansion of fair dealing, the protection of technological protection measures (“TPMs”) such as “digital locks” and rights management information (“RMI”) in compliance with the WIPO Internet Treaties, the non-commercial use of copyright works, and the liability of

Internet service providers (“ISPs”) and search engines (such as Google or Microsoft Bing) for infringements.

Highlights of the Bill

Bill C-32 had its Second Reading in Parliament on November 5, 2010 and has not yet been passed into law. Set out below is a brief description of the highlights of the Bill:

Implications for Copyright Owners

Prohibition of TPM Circumvention

Bill C-32 implements the anti-circumvention provisions in the WIPO Internet Treaties respecting TPMs. Specifically, Bill C-32 creates legal protection for TPMs by prohibiting, except under limited circumstances, the following:

- the circumvention of TPMs (including “digital locks” such as passwords, encryption software, or access codes);
- the offering of services to the public if the services are offered primarily for the purpose of circumventing TPMs; and
- the manufacture, sale or distribution of devices that are primarily designed to circumvent TPMs.

Persons who circumvent TPMs in the aforementioned ways in order to access or duplicate copyright material, even for personal use, are subject to civil remedies and criminal penalties. The following is a list of legitimate “public interest” purposes for which the circumvention of TPMs is not prohibited:

- law enforcement and national security activities;
- reverse engineering for software compatibility;
- security testing of systems;
- encryption research;
- personal information protection;
- temporary recordings made by broadcast undertakings;

- access for persons with perceptual disabilities; and
- unlocking a wireless device.

Prohibition on Removing RMI

RMI, such as digital watermarks, identify copyright owners and key information relating to their works, and enable copyright owners to police the terms and conditions of copyright use and users to verify the authenticity of works. Bill C-32 prohibits the removal of RMI and subjects anyone who does so to civil remedies and criminal penalties.

New “Making Available” and “Distribution” Rights

Bill C-32 grants copyright owners and performers new “making available” and “distribution” rights in respect of their works and performers’ performances, respectively. A copyright owner is granted the exclusive right “to make a work available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public”. In addition, where a work is in the form of a tangible object, the copyright owner is granted the exclusive “distribution right” to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner. Similarly, in the case of a performers’ performance, the Bill provides that a performer is granted the exclusive right to make available a sound recording of the applicable performance to the public by telecommunication in a way that permits members of the public to access it where and when they desire. If the performers’ performance is fixed in a sound recording that is in the form of a tangible object, the performer also has the exclusive right to sell or otherwise transfer ownership of the sound recording and to authorize the same, if the ownership has never previously been transferred in or

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outside Canada with the authority of the owner of the performers' performance.

Implications for Artists

New Moral Rights for Performers

Bill C-32 grants performers moral rights in their performances for a period of 50 years from the time of publication. At present, under the *Act*, authors of works enjoy such moral rights but not performers.

New Rights for Photographers

Bill C-32 grants photographers the same authorship and ownership rights as other creators. Photographers will become the authors and therefore the first owners of copyright in their photographs, reversing the current provision of the *Act* which deems the person who commissions a photograph to be its first copyright owner. While a photographer, absent an agreement to the contrary, will now own the copyright in commissioned photographs, the person who commissions the photographs will be permitted to make private, non-commercial use of the commissioned photographs unless the contract with the photographer specifies otherwise.

Implications for Internet Intermediaries

Limited Liability for ISPs

Bill C-32 limits the liability for copyright infringement of ISPs when the ISP is acting solely as an intermediary. The ISP may not modify the material, other than for technical reasons, and may not interfere with the lawful use of technology to obtain data on how the material is used. In order for an ISP to ensure that it will not be held liable for copyright infringement, it must meet the requirements of the "notice-and-notice" regime described below. A claimant's only remedy against an ISP which fails to comply with the "notice-and-notice" regime is statutory damages in an amount between C\$5,000 and C\$10,000

per infringement as determined in the court's discretion.

Introduction of the "Notice-and-Notice" Regime

Bill C-32 entitles a copyright owner to send a notice of claimed infringement, in prescribed form, to an ISP. The ISP is then obliged to forward the notice electronically "without delay" to the person allegedly infringing the copyright. The ISP must retain records on its network, for a prescribed period, which allow the identity and electronic location of the alleged infringer to be determined. However, the ISP is only obliged to reveal the identity of the alleged infringer pursuant to a court order. This requirement is different from a "notice and takedown" regime, such as that in the United States, which requires the ISP to immediately block access to the material on receipt of notice from the copyright owner with no court order.

Limited Liability for Search Engines

If a search engine (referred to in Bill C-32 as a "provider of an information location tool") is found to have infringed copyright, by either making a reproduction of the work or by communicating that reproduction to the public by telecommunication, the only remedy available to a copyright owner against the search engine is an injunction prohibiting further use of the copyrighted material by the search engine, provided that the search engine meets certain prescribed criteria designed to ensure that it is a legitimate business.

Implications for Users

New Exceptions for Consumers

Bill C-32 provides consumers with the following additional exceptions to copyright infringement:

- *Format Shifting*: subject to certain limitations, a consumer may reproduce legitimately acquired copyrighted

works, such as music from CDs, for personal purposes on a digital medium or device, such as an MP3 player. For the purposes of the *Act*, a digital "medium or device" includes digital memory in which a work may be stored for the purpose of allowing the telecommunication of the work through the Internet. Reproductions are only permitted if no TPMs are circumvented, the reproduction is used for private non-commercial purposes and is not given away.

- *Time Shifting*: a consumer may fix a communication signal or record a program or performance for later listening or viewing as long as the program is received legally, no TPMs are circumvented, only one recording is made and held for a reasonable period of time, and the recording is held for private purposes only and not given away.
- *Backup Copying*: a consumer, business or institution may create backup copies of legally acquired content for personal use in order to protect against damage or loss.

New Categories of Fair Dealing

Bill C-32 expands the existing categories of "fair dealing" in the *Act* to include fair dealing for the purpose of education, parody, and satire.

Exception for Non-Commercial User-Generated Content

Dubbed by some as the "YouTube clause", Bill C-32 would permit an individual to use a legitimately acquired existing copyrighted work as source material in the creation of a new work ("mash-ups", for example) in certain prescribed circumstances. This new work may be used or disseminated as long as:

- the use of the work is solely for non-commercial purposes;
- if reasonable in the circumstances, the source material is mentioned;

- the individual had reasonable grounds to believe the source material was not infringing copyright; and
- the use of the new work does not have a substantial adverse effect on the exploitation of the existing source material.

Reduced Penalties for Non-Commercial Copyright Violations

Bill C-32 reduces penalties for copyright infringements that are for non-commercial purposes. Under the *Act*, copyright owners currently can sue for statutory damages for copyright infringement, whether commercial or non-commercial, of C\$500 to C\$20,000 for each act of infringement. Bill C-32 dramatically reduces the statutory damages for non-commercial infringement to a one-time payment of between C\$100 and C\$5,000 for all infringements that take place before the lawsuit. There is no change to the current statutory damages in the *Act* in the case of commercial infringements.

Implications for Educational Institutions

In addition to the new fair dealing exception for education mentioned above, Bill C-32 removes the current references to specific technologies, such as flip charts and overhead projectors, from provisions of the *Act* relating to educational use of copyrighted works, in order to allow for new digital technologies. Bill C-32 also provides for a number of other changes relating to the educational use of copyright works, including infringement exceptions for the following:

- publicly available material on the Internet that has been legitimately posted for free use by copyright owners for educational purposes;
- the digital delivery of course materials, such as digital course “packs”, subject to fair compensation to copyright owners;
- the use of copyright material in online learning; and
- the ability of libraries to send digital interlibrary loans.

Additional Proposed Amendments

In addition to the above, Bill C-32 also addresses the following matters among others:

- the creation of a new exception for broadcasters to permit them to copy music for their own operations,
- the creation of a new category of civil liability for enablers of online piracy;
- measures to enable activities of technology companies relating to reverse engineering for software interoperability and security testing and encryption research; and
- the establishment of a periodic “sunset” review of the *Act* every five years.

The Canadian Government has created a website entitled “Balanced Copyright”, which describes Bill C-32 in detail, sets out a copy of the bill and addresses various questions and concerns that members of the public may have with regard to the bill. Balanced Copyright can be accessed at: www.balancedcopyright.gc.ca. ■



David Zitzerman, Goodmans LLP

Tel: (416) 597-4172 • Fax: (416) 979-1234 • E-mail: dzitzerman@goodmans.ca

Partner. Focuses on film, TV and new media industries in Canada and US. Represents independent producers, Hollywood studios, broadcasters, distributors, cable and game companies, talent guilds, agencies, writers and performers. Co-author, *Entertainment Law in Canada* (Butterworths). Clients include MTV, CTV, Corus, SFA, Nelson, TNT, Insight, HBO, Oxygen, Discovery, Endemol, Disney ABC, CBS, E!, Starz, LOGO, THE N, Smithsonian Network, NBC Universal, Tornante, VH1, Comcast, RHI, OMERS, Temple Street, NGS, Random House, Showtime, Scholastic, Nickelodeon and the Writers Guild of Canada. Identified as a leading entertainment lawyer by Euromoney’s *The Best of the Best*, 2002 and 2009 (top 25 entertainment lawyers in world); *The Canadian Legal Lexpert® Directory*; *The Lexpert®/American Lawyer Guide to the Leading 500 Lawyers in Canada*; PLC; and *The Best Lawyers in Canada* (“2010 Toronto Entertainment Lawyer of the Year”). Has lectured at University of Toronto and Osgoode Hall, CBA, ABA, UCLA, and Cannes Film Festival. Frequent Speaker at industry events. Director of Canadian Film Centre. Member, Film Ontario, the CFTPA, Academy of Canadian Cinema and Television and the Canadian Association of Recording Artists. BA, Gold Medal, University of Manitoba, 1978. JD, University of Toronto, 1981.