



Submission on Bill C-32: An Act to Amend the Copyright Act

12 November 2010

The Association of Canadian Publishers (ACP) is the voice of Canada's independent English-language book publishing industry. Founded in 1976 as a successor to the Independent Publishers' Association (1972-1976), the ACP represents 127 Canadian-owned and -controlled companies. Our members are small- and medium-sized independent businesses, located in every province and Nunavut. Ours is truly a national voice.

Introduction

The ACP applauds the government for tabling this long-awaited legislation. We wish to acknowledge the significant progress represented by many of its provisions, and also to express our concerns over others that could prove damaging to the revenues of small- and medium-sized publishers and, ultimately, to their viability. We look forward to discussing ways in which the bill can be clarified and amended to ensure a positive climate for the production and dissemination of Canadian cultural and educational content.

The Copyright Act balances the rights of creators to receive remuneration for their work with the needs of consumers to have access to that work. Finding the right balance is an immense challenge, both as a matter of policy and in practice. This new bill reflects a genuine effort to reflect the breadth of interests at stake in copyright in a new era, an era of proliferating means of both production and access that were unimagined when the Act was last amended.

As a community, Canadian-owned publishers value strong rights for creators and producers, but they also recognize that reading and writing are social activities that are fundamental to our society. We hope that the copyright reform process will lead to a legislative regime that will allow publishers to effectively protect their authors' rights and livelihoods and give them the confidence to offer their books through digital platforms, but we also seek a legislative framework that doesn't create undue difficulties for readers who simply wish to enjoy the books they have purchased, students and scholars who want to pursue their research endeavors, and librarians who strive to make the world's literary legacy accessible to the public.

The creative potential of digital technology for individuals is immense. Copyright policy should enable the harnessing of this potential, but it must do so while protecting and enabling the commercial delivery of digital content via the same means.

The ACP is pleased with the bill's extension of authorship rights for photographers, and its recognition of performers' moral rights. As members of Canada's cultural sector, we acknowledge the importance of these measures in reinforcing respect for the rights of creators.

As leaders in promoting freedom of expression, we applaud the bill's extension of fair dealing to parody and satire. We recognize the contribution that these two forms of commentary make to civil discourse and artistic expression, and we support their inclusion in the category of fair dealing.

As an industry built on the right of creators and producers to safeguard their intellectual property, we endorse the bill's acknowledgment of the appropriateness of technological protection measures (TPMs).

As key partners in the education of children and students of all ages, we understand the government's interest in making educational materials more widely available. We believe, however, that the extension of the fair dealing exception to education as articulated in the bill, as well as the provisions for digital interlibrary loan, will result in minimal benefit to the education system in the short term and perhaps a detrimental effect over the longer term if educational publishers are no longer willing to produce content in the face of inadequate compensation. In both instances, the effect would be disproportionately severe damage to authors and publishers, both by reducing their revenues and by eroding respect for intellectual property in the education system.

Education and Fair Dealing

With a blanket expansion of fair dealing to include education, the bill casts into doubt the operation of the more specific educational exceptions provided in the Act and in the bill itself. It reflects a conscious move away from support for collective licensing in favour of exceptions. We believe the cumulative effect of the consumer exceptions, coupled with the bill's significant softening of key remedies for infringement for non-commercial purposes, would endanger the developing retail online market for digital works. This would be a result in direct opposition to the Government's stated goals.

In the Government's website explanation of copyright modernization, fair dealing is defined as permitting certain uses "that do not unduly threaten the interests of copyright owners." An unrestricted exemption for education, in any context, would undermine the basis for collective licensing of works for reproduction in schools, universities, colleges and even private businesses. It would also, over time, reinforce a creeping disrespect for the principle that creative work has value and that creators have a claim to remuneration for the use of their work. Educators pay for the supplies they purchase and the teachers they employ. They should also pay for the intellectual property they use.

Collective Licensing

A balanced solution to publishers' and authors' need for compensation, and educators' and students' need for access has been available for the last two decades: authors, publishers

and consumers have benefited from the activities of Access Copyright (previously CANCOPY) and Copibec operating as collectives in licensing educational institutions to make photocopies of copyright works for use in education. The Copyright Act has long recognized that access to works can be facilitated, and rights-holders justly remunerated, through collective licensing.

We estimate that the small- and medium-sized companies that make up the ACP collectively receive approximately \$2,000,000 per year from licensing for reproduction of our materials in the education system. This is a significant amount of revenue to Canadian publishers, but a very small fraction of the approximately \$40 billion dollars spent in education each year in Canada. By removing the presence of a collective license as a standard in determining fairness, the bill undermines the very fair and effective system now in place.

Digital Interlibrary Loans

ACP remains concerned about the digital interlibrary loan (ILL) provision. While it may not significantly affect the institutional market for Canadian books, it could significantly change the market for scholarly journals. Many academic presses are members of the ACP and will be seriously affected.

Indeed, the earlier ILL provision in Bill C-61 has been appreciably expanded. Where it would have given any library the right to make digital copies from printed matter only, Bill C-32 removes this restriction, opening ILL to works and other subject matters in all formats, including 'born digital' works.

Under this provision, libraries may deliver complete articles not only from printed scholarly journals, but potentially from digital journals as well (presumably subject to contractual terms), to anyone in Canada (provided the digital copy is made available for only five days from time of first use and may not be otherwise distributed), and the recipient of the digital copy is entitled to make a permanent hardcopy.

This provision would mean that significantly fewer libraries would need to subscribe to print journals, as it would be a very simple matter for a single library to provide that journal to users nationwide. This provision mandates an open-access regime for all scholarly journals, albeit a limited and cumbersome one. In this situation, publishers would have to choose between two courses of action, neither of which is likely to stimulate scholarly publication: cease publication of print journals altogether and migrate journal distribution to a digital-only model, or substantially raise the price of their offerings to offset the reduced number of subscribers. Our concern is that ILL has the potential to significantly damage the market for periodicals in Canada.

Some Possible Solutions

Our members do not have access to large funds to underwrite legal challenges to their rights and we fear that, as the bill is written, the educational community will use an expanded fair dealing for education aggressively. Until settled by the courts, fair dealing claims will result in an unsettled copyright law in the education sector. For this reason, we think that problems with the bill need to be addressed through amendments before the bill is passed.

1. The bill does not define or limit the term “education”. We believe that the intent of the Government was to limit this term to education “in a structured context” – that is, a school, university or college – and we recommend that the bill be amended accordingly. This would prevent private businesses whose mandate is not education from claiming, for example, that staff training qualifies as education, and therefore entitles them to free use of copyrighted works. This definition of education is specifically mentioned in the Government’s website explaining copyright modernization, but the amended bill does not include the all-important words “in a structured context”.
2. Damage to the market for a work is not given sufficient force in limiting the fair dealing exception. We believe that market damage and harm to the legitimate rights-holder must be given priority in the bill as a limitation to the fair dealing exception for education. The reduction of statutory damages compounds this problem. The bill seeks to limit statutory damages for infringement for non-commercial use to \$5,000. We believe that such a low penalty will encourage abuse and discourage recovery. A large institution, such as a bank or a university, will not be deterred by such a paltry potential penalty. On the other side, publishers whose work has been infringed will not be able to afford to mount any legal initiative for such a modest return.
3. The existence of a license should be added as a consideration in deciding if a dealing is fair. This will help protect the principle of collective licensing, which provides revenue on which our members depend, and which serves to reinforce respect for the principle of intellectual property.
4. Any system of digital interlibrary loan should be recognized as a scale of reproduction that falls beyond the scope of fair dealing, and should be subjected to a license administered by Access Copyright. This would allow libraries to continue to digitally distribute material without depriving authors and publishers of their right to derive revenue from their investment.

We believe that simple amendments such as these can go a long way towards satisfying our members concerns about the fair dealing exemption.

Conclusion

As publishers, we acknowledge dual motivations with respect to the use of material we publish. Our role, our mission, is to make the material we publish known – to persuade readers to read it and use it. We want to see our books read. In other words, we want to see copyright material being circulated, used, referred to. On the other hand, we must earn enough from the use of the books and journals we publish to be able to carry on producing them.

In that spirit, many of us welcome some “fair use” of our publications for educational purposes. We don’t need or expect to be paid every time one of our books is read, or every time a journal is cited. Today, that doesn’t happen. We don’t need it to happen tomorrow either.

What we do need is to insure the ongoing stability of the foundations on which our businesses are built: respect for the value of copyright, and fair compensation for use of the works to which it applies.

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