



The Creators' Copyright Coalition

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December 6, 2010

The Creators' Copyright Coalition's Position on Bill C-32, the *Copyright Modernization Act*

Who We Are

The Creators Copyright Coalition (CCC) is an alliance of 16 professional associations of individual creators, and copyright collective societies active in theatre, visual arts, applied arts, literature, music, recording and audiovisual sectors (radio, television, film, digital media and commercials). Together we represent more than 100,000 professional creators who are the first owners of copyright and neighbouring rights. This paper reflects the common position of CCC members on Bill C-32. The individual members making up the CCC (as listed below) may provide their own respective submissions on the Bill and copyright reform as part of the Committee review process now underway.

Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)
Canadian Federation of Musicians (CFM)
Canadian Actors' Equity Association (Equity)
Canadian Artists Representation (CARFAC)
Canadian Artists Representation Copyright Collective (CARCC)
Canadian Music Centre
Screen Composers Guild of Canada (SCGC)
Directors Guild of Canada
League of Canadian Poets
Literary Translators Association of Canada
Playwrights Guild of Canada
Professional Writers Association of Canada (PWAC)
Songwriters Association of Canada (SAC)
Society of Composers, Authors and Music Publishers of Canada (SOCAN)
Writers Guild of Canada (WGC)
The Writers' Union of Canada (TWUC)

Introduction

“As the creators of Flashpoint, we are pleased that audiences want to see and share our work. And we believe they want to see us paid so we can keep creating.”

Mark Ellis and Stephanie Morgenstern, screenwriters

“I want my fans to have access to my music, and I want to be compensated for that access. That's the point of being a professional creator. But as new media distribution and platforms replace historic ones, the creator's ability to make even a modest living is being seriously eroded. There must be an acknowledgement that our work has value to the consumer and to society.”

Marvin Dolgay, composer,
President, Screen Composers Guild of Canada

"Copyright legislation is supposed to protect the rights of creators. But C-32 does just the opposite. Most alarming, the proposed new “education” exception under “fair dealing” promises endless costly litigation. What’s 'fair' about a cost saving for schools that eats into the incomes of writers?"

Alan Cumyn, novelist, Chair, The Writers’ Union of Canada

“Content creation is at the heart of a thriving digital economy. If our Canadian cultural industries are to keep producing films, TV programs, video games, we need to find compromises that balance the interests of Canadians who consume our works with the reality that creators can’t work for free. “

Yannick Bisson, actor, star of *Murdoch Mysteries*

Bill C-32 proposes, in many unprecedented respects, to weaken both copyright and the collective licensing mechanisms upon which the livelihoods of Canadian professional creators rely. The Bill, if passed into law without revision, threatens to marginalize creators. C-32 dismisses the importance of revenues from secondary markets for a creator’s work and will seriously erode existing incomes by taking these away. Indeed, the Government’s introduction of numerous broad exceptions and the failure to adapt the private copying regime to present and future technologies, or to strengthen

collective licensing to give both ease of access to cultural works to consumers and appropriate remuneration to creators, foreshadow a Canadian digital economy in which many creators are seriously disadvantaged, or worse, left behind. This prospect is, of course, entirely inconsistent with the Government's stated digital economy policy objectives to engage with creators and to drive innovation.

While many of the proposed new exceptions in the Bill are meant to modernize consumers' access and use of copyright-protected works, the Bill contains little to ensure that creators of those works receive appropriate compensation. The Government's legislative plan has to change if the essential investments that Canadian musicians, composers and lyricists, book and magazine writers, poets, playwrights, screenwriters, visual artists and other authors and performers need to make in our digital economy are to be encouraged. C-32 must be amended to make it truly technology neutral and so that, without hardship to consumers, Canada's creators suffer no hardship either. In a nutshell, the CCC believes that collective licensing is the way to achieve this balance while helping to build Canada's digital economy.

The CCC is also concerned that Bill C-32 introduces a plethora of exceptions into Canadian copyright law, especially vague ones like fair dealing for the purpose of "education". Without clarity and conformity with the 'Berne three-step test', such exceptions appear destined to invite litigation and to put Canada offside with its international treaty obligations. To avoid such eventuality, the CCC believes the Bill should be amended to include the following interpretive provision: *"In interpreting limitations or exceptions to copyright under Part III of the Act, the court shall ensure that such limitations or exceptions are confined to certain special cases, do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the author, including the author's right to equitable remuneration."* Any exception the Government proposes to add to the Act through Bill C-32 needs to meet this basic international standard, of course.

This position paper provides the CCC's non-exhaustive analysis of six major issues raised by the Bill that affect the creators its member organizations represent. Where appropriate, the CCC's recommendations for amendment or solutions to these issues are provided.

Six Solutions for Six Issues

Issue #1 – Reproduction for Private Purposes

Bill C-32 proposes to grant to consumers new private copying rights at the expense of creators. Creators want consumers to have an expanded ability to legally copy works of all types in a wide variety

of formats and to a wide variety of storage devices, provided that appropriate compensation is provided to creators. The scope of the new exception also undercuts existing primary revenues of creators by expanding legal copying to such an extent as to impact sales of original works. By creating this very broad exception without also providing for a royalty stream to creators, Bill C-32 has failed to provide a balanced approach to copyright.

A model for appropriate remuneration of private copying of copyright works is found in Part VIII (Private Copying) of the Copyright Act. Over the past decade recorded music rights-holders have been paid a royalty in respect of private copies made by individuals onto blank audio recording media. This private copying regime reflects the fact that such copies have value to users, and that fair remuneration for that value, as determined by the Copyright Board of Canada, is essential to the livelihood and work of creators. However, the media to which the regime currently applies – for example CDs -- are rapidly becoming obsolete. While Bill C-32 purports to be “technologically neutral”, it does not provide for much needed expansion and updating of the private copying regime to allow for the new technologies that consumers use to copy works for private use in the same way that the proposed Reproduction for Private Purposes would.

The proposed exception will pre-emptively eliminate sources of private copying revenue for recorded music and reduce or cut off current and potential revenue streams available to creators of all types of works.

Solution

The existing private copying regime applicable to sound recording media such as blank CDs is an integral part of the Copyright Act. It must be extended so that it also applies to digital audio recorders in order to be technology neutral.

The Government should encourage greater access to cultural works and appropriate compensation for creators. To maintain the balance between consumers and creators, copyright law must build on existing collective licensing and levies and develop new ones so that income flows to artists regardless of how digital media develop. Reproduction for Private Purposes must be balanced by a copyright levy to compensate creators of all types of works for private copying to any personal device or medium ordinarily used by consumers.

Issue #2 – User-Generated Content (UGC)

Bill C-32 proposes to shrink existing and potential markets for creators, cutting off revenue flowing to creators and copyright owners, all the while rewarding commercial intermediaries. The Bill stands to introduce a ‘mash-up’ exception which would permit consumers to use existing copyright-protected works to create new works, which can be disseminated through an intermediary. Should this

exception become law it will be at the expense of rights-holders of existing copyright-protected works and largely to the financial benefit of commercial intermediaries such as YouTube. Because this proposed provision conflicts with rights-holders' normal exploitation of their existing copyright-protected works, it runs afoul of the Berne three- step test and Canada's international treaty obligations.

Solution

Remove the UGC provision. So as to ensure that creators of existing works rightfully benefit from this manner of exploitation, any future UGC provision should make UGC works subject to "fairness" criteria and collective licensing.

Issue #3 – Fair Dealing and other Exceptions for Education

The proposed expansion of fair dealing to include 'education' – and the addition of many more exceptions for educational purposes – subsidizes education at the expense of creators. Educational institutions pay the full cost of desks, computers and teacher salaries, why would they not pay for content valuable enough to use in teaching? Copyright material should not be free simply because it is used in schools – Bill C-32 unfairly discriminates against content creators. The addition of ill-defined exceptions will create legal uncertainty, increasing the potential for litigation. Furthermore it is not at all clear how the addition of "education" would not lead to conflict with already existing licensing arrangements and other normal exploitations of works, all in violation of Canada's international obligations. The same applies, for example, to the Bill's proposed replacement of sections 30.2(4) and (5) of the Act, which would remove the ability of collective societies to license the digital delivery of copyright-protected material by libraries, archives and museums to patrons.

Solution

Amend Bill C-32 to ensure that creators receive fair compensation for the use of their works. All new exceptions need to comply with the Berne three-step test.

Issue #4 – Statutory Damages

The Bill proposes to drastically reduce the statutory damages available to rights-holders in a court proceeding to a range between \$100 and \$5,000 in respect of all works and all infringements for

non-commercial purposes. The CCC believes in strong deterrents for those who facilitate, induce and encourage copyright infringement to the detriment of creators who do not want to work for free. While the CCC supports strong deterrents for all infringers, it is aware that some damage awards might be considered to be disproportionate in the case of some – but not all individuals. For that reason it continues to support providing courts with the discretion to reduce damage awards in circumstances where they may be disproportionate. Unauthorized file sharing/downloading/streaming is online theft which robs creators and negatively impacts employment in the creative industries. In combating copyright infringement, the CCC encourages the Government to focus on copyright reforms that facilitate legal access for consumers and fair compensation for creators. The CCC does not support the proposed statutory distinction between commercial and non-commercial infringement in so far as it stands for the notion that the latter is not harmful to rights-holders. Moreover, the CCC does not believe that the Copyright Act should contain an exemption for copyright infringement enablers from statutory damages (e.g. BitTorrent sites which primarily enable acts of copyright infringement).

Solution

Do not introduce the proposed distinction between commercial and non-commercial infringement, but ensure that the courts continue to have the discretion to reduce damages in appropriate circumstances. Do not exempt copyright infringement enablers from statutory damages: delete proposed exemption 38.1(6)(d).

Issue #5 - ISP Liability

Bill C-32 provides for a ‘notice and notice’ regime under which ISPs would be obligated to send a notice to potential copyright infringers after receiving a notice of alleged infringement. ISPs would also be required to retain information identifying the alleged infringer for a prescribed period of time. The notice and notice regime is contrasted with a ‘notice and takedown’ regime prevalent in the United States, Europe and many other jurisdictions. The CCC questions the efficacy of the proposed notice and notice regime.

Solution

Implement a ‘graduated response’ or another collaborative system in co-operation with ISPs that relies on educating alleged infringers before more stringent measures are imposed. This could include limiting an infringer’s internet connection speed or capacity, blocking access to particular material or sites, or suspending access to specific sites, all after due process. Additional measures could also include escalating consequences after due process if an infringer or an enabler continues to engage in copyright infringement notwithstanding repeated warnings. In short, ISPs and other “intermediaries” should lose their “immunity status” if they fail to act reasonably to deter copyright infringement.

Issue #6 – Proposed Elimination of Collective Licensing Mechanisms

The proposed amendment to negate the broadcast mechanical licence is another example where collective licensing would be weakened under the Bill. Collective licensing mechanisms promote legal use of works and fair compensation for creators. Such mechanisms should be encouraged, not eliminated.

This proposed broadcast mechanical amendment would eliminate subsection 30.9(6) of the *Act*, which provides that the ephemeral recording exception does not apply if a licence is available from a collective society. Accordingly if made law, the proposed amendment would reduce royalties payable to rights-holders. Other proposed exceptions would have a direct impact on other collectives, including Access Copyright, Canadian Private Copying Collective, CMRRA/SODRAC Inc., and the Educational Rights Collective of Canada.

Solution

Don't eliminate 30.9(6) of the Copyright Act. Look for ways to strengthen collective licensing mechanisms, rather than weaken or eliminate them.

Conclusion

The professional creators represented by the CCC support the modernization of the *Copyright Act* but Bill C-32 does not achieve that goal. Adding a multitude of exceptions to the Act is simply regressive, not modern, and the violation of our international treaty obligations by sections of the Bill will lead to lengthy litigation that will be harmful to everyone. Creators want their works distributed as widely as possible, but it is only fair that they be appropriately compensated for their efforts. Collective licensing is the way to achieve those twin goals while at the same time helping to build the digital economy.

The CCC looks forward to the Government implementing the provisions of the World Intellectual Property Organization 'Internet Treaties' as soon as possible so that in the next round of copyright reform it may move onto other issues of importance to Canada's professional creators. For example, implementing The Artist Resale Right for visual artists, and defining in the *Copyright Act* the author of a cinematographic work as its credited writer(s) and director. These are but two issues which, when addressed, will meaningfully improve creators' livelihoods by allowing them to take advantage of reciprocal trade agreements with many countries around the world where these rights currently exist as well as improving their rights in Canada. It is therefore imperative that the Government begin the review process as soon as possible.

Creators are the engine that drives Canada's \$46 billion arts and cultural industries. They are at the heart of Canada's knowledge-based digital economy, and copyright is the legal foundation of their work. Modernized copyright legislation should ensure that creators can continue to survive and thrive in a constantly changing environment. In many respects Bill C-32 fails to do so and needs to be fixed.