

TO: All MUNFA Members

FROM: The MUNFA Executive Committee

DATE: September 8, 2010

SUBJECT: Intellectual Property Advisory - Bill C-32, the *Copyright Modernization Act*

This memo is an advisory prepared by CAUT that provides an overview of the federal government's Bill C-32, the *Copyright Modernization Act*. If passed into law, C-32 will have a profound impact on the college and university sector. The advisory identifies the Bill's positive and negative aspects and discusses what the education /library community can do over the coming months to improve the legislation.

Copies of the advisory are available online at:

http://www.caut.ca/uploads/IP_advisory4_en.pdf

If you have any questions, please contact the MUNFA office at ext. 8642 or e-mail: munfa@mun.ca

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Part I. Introduction

Bill C-32, the *Copyright Modernization Act*, received first reading in Parliament on June 2, 2010. The legislation contains reasonable elements, but also a serious flaw. It must not become law in its current form. This Intellectual Property Advisory provides an overview of C-32, identifies its positive and negative aspects and discusses what the education/library community can do over the coming months to improve the legislation.

Part II. Amending the *Copyright Act*

Copyright law sets the rules governing expressive “works” such as literature, film and music. Its purpose is to encourage advancements in the arts and sciences by ensuring a fair balance between the rights of creators, users and owners of works. The federal *Copyright Act* is the foundation of copyright law in Canada.

C-32 is the latest government attempt to amend the *Copyright Act* to reflect developments in digital technology, particularly the technology’s ability to copy and distribute works at low cost and with great speed.

The international entertainment industry, Canada’s arts community and the American Trade Representative have played an influential role in the Canadian copyright reform process. In the past their lobbying efforts have resulted in legislative restrictions limiting the ability of the education/library community to access, share and build upon works.

More recently, public interest groups have begun to effectively organize at a grass roots level, counter private industry’s perspective, and make their voices heard. The positive components in Bill C-32 reflect this success.

Issues for Academic Staff

As creators, owners and users of copyright works (such as journal articles, textbooks, films and music) academic staff have a particular interest in balanced copyright law. CAUT has consistently advocated a series of copyright proposals that ensure the interests of all parties are respected. The most important of these proposals are:

- 1) expanding fair dealing,
- 2) limiting anti-circumvention measures to copyright infringements,
- 3) enacting a “notice and notice” system for Internet Service Providers (ISPs), and
- 4) restricting entitlement to statutory damages.

1) Expand the categories of fair dealing

Issue: Fair dealing is the right, in certain circumstances, to copy a work without receiving permission from, or providing payment to, its owner. Currently the *Copyright Act* allows fair dealing for purposes of research, private study, criticism, review and news reporting.

CAUT’s position: CAUT advocated that the *Act* be amended to require fair dealing be permitted for purposes “SUCH AS”



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research, private study, criticism, review or news reporting. This amendment would better serve the needs of users and creators of works, and reflect recent court decisions favouring an expansive understanding of fair dealing. These two words clarify that fair dealing is a broad and open-ended right and they would empower educators, researchers, librarians, students, artists and the general public to fully engage in the practice.

Bill C-32: C-32 does not adopt the “such as” approach but more narrowly expands fair dealing’s ambit to include “education, parody or satire”.

CAUT Response: This is not CAUT’s preferred language. Nonetheless it is apparent that the government has heard, understood and addressed in a reasonable manner a very important concern of the education/library community.

2) Allow the circumvention of digital locks if the purpose of the circumvention does not infringe copyright

Issue: Some copyright owners are attaching technological measures to their works that prevent unauthorized copying and can track a purchaser’s use of the material. These digital locks can hinder efforts at commercial piracy but they can also prevent legitimate activities such as fair dealing.

CAUT Position: CAUT advocated that any restrictions on circumventing digital locks must only apply to copyright infringement (such as commercial piracy) and not limit the public’s ability to defeat measures that undermine personal privacy or statutory rights of access such as fair dealing. Further, the *Act* must not prohibit tools and services capable of bypassing digital locks, as such devices and services may be used for non-infringing purposes.

Bill C-32: C-32 provides for a blanket restriction on circumventing digital locks (with a few narrow exceptions). C-32 also outlaws importing or distributing circumvention tools and services.

CAUT response: C-32’s restrictions negates the benefits provided by the expansion of fair dealing as well as existing user rights and cannot be allowed to become law. Literary and artistic works are increasingly disseminated in digital form. By allowing rights holders to prevent their duplication for purposes such as fair dealing, C-32 destroys a fundamental statutory right essential to free expression, scholarly work and the learning process. The government’s approach is particularly disappointing because a simple, elegant solution addresses any reasonable concerns of copyright owners: only prohibit circumventing digital locks if the purpose of the circumvention is to infringe copyright. C-32’s treatment of circumvention tools and services should mirror this rule: permit their distribution by third party providers to those with the right to use them.

3) Ensure that untested allegations of copyright infringement do not result in the removal of material from the Internet

Issue: Right-holders often seek immediate removal of infringing content from the Internet. Those who value freedom of expression oppose laws that censor internet content on the basis of unproven allegations of infringement. Internet Service Providers (ISP) seek immunity from liability for the infringing actions of their customers. The government of Canada has to choose between two models: the American “notice and takedown” regime, whereby a copyright owner may demand on the basis of unproven allegations that an ISP

remove material from a customer's website, and the "notice and notice" system currently in place in Canada in which ISPs pass on to their customers any rights-holder allegation of infringement.

CAUT position: CAUT advocated for the "notice and notice" system as most consistent with Canadian values.

Bill C-32: C-32 contains the preferred "notice and notice" approach.

CAUT response: This is a good result. Those championing the American "notice and take-down" regime have not been able to show that the "notice and notice" approach already in place in Canada is inadequate. The unilateral removal of content from a web page based on untested allegations is deeply offensive to academic freedom specifically and the freedom of expression more broadly.

4) Limit statutory damages to instances of commercial copyright infringement

Issue: Defendants found liable for copyright infringement usually have to pay monetary "damages" to the owner of the copyright. The owner may elect to receive a payment equal to the actual amount of money lost or, if that amount is small, statutory damages. Statutory damages currently run from \$500 to \$20,000 for each work infringed and their very existence acts as a constraint against the exercise of legal but imprecise uses of copyrighted works (such as fair dealing).

CAUT Position: CAUT advocated that statutory damages not be available against those who act with a good faith belief that their actions with respect to a work are justified by fair dealing or other limitations. Fair dealing and other user rights should be protected.

Bill C-32: C-32 reduces the ceiling on statutory damages for non-commercial infringement from a maximum of \$20,000

per work to \$5,000 in total damages.

CAUT Response: This is less than the reform sought by the education/library community, but it is a step in the right direction and a legislative compromise that CAUT can support.

The verdict on Bill C-32

C-32 offers reasonable amendments on three of the main concerns of the education/library community (fair dealing, ISP liability and statutory damages). Sadly, with respect to the fourth major concern, digital locks, C-32 takes a disastrous turn. In its overbroad prohibition of circumvention, the bill undermines the statutory rights of Canadians to privacy and fair dealing in digital works. The damage caused by the provision is profound and makes it impossible to support the legislation in its current form. Fortunately, there is reason to believe that C-32 can be amended to correct the problem. The Bill, despite the mistake with respect to digital locks, still reflects a nuanced understanding of the policy and political dynamics of copyright reform and a willingness to listen to and address the concerns of the education/library community. Academic staff, if they actively participate in the legislative process as it unfolds over the coming months, can tap into this goodwill and secure balanced copyright reform.

Part III. Process and Political Action

Process

C-32's progress through the formal legislative process resumes when parliament reconvenes on September 20, 2010. There are reports that the Bill will be referred to a Parliamentary Committee after

first reading. If this happens the legislation will be open for sweeping amendments. If instead the Bill is referred to a Committee after second reading, Members of Parliament may make only more limited amendments as second reading means the Bill is approved in principle. When this process is complete, the Committee will report its recommendations, including possible amendments, back to Parliament. The bill will then receive third reading, another round of voting and be sent onto the Senate.

Historically, the best formulation of new copyright legislation (from the perspective of the education/library community) has been the version presented at first reading. As the legislation proceeds through the committee process, the power and influence of rights-holder lobbyists has always weakened access-oriented provisions and strengthened elements sought by commercial rights-holders.

For this reason the education/library community must make its voice loudly heard on the Bill. As in the past, CAUT and other organizations will request ministerial meetings, file submissions and appear before the Parliamentary Committee. While this work is necessary it is even more important for individual academic staff members, and the public at large, to engage in the legislative process. In the past, discussion of copyright policy consisted largely of technical exchanges amongst experts. More recently, in part as a result of the spread of digital information technology, there has been growing popular engagement with copyright issues and copyright reform. It is this foundation of public participation that caught government attention and resulted in advances on fair dealing, notice and notice, and statutory damages. This same mobilization can produce a better, not worse, version of C-32 as it proceeds through the legislative process.

Action

The easiest and most effective way for individuals to influence the legislative process is to write a letter to their Member of Parliament. Politicians consider it significant to receive even a dozen letters on a particular issue. No postage is required to write your MP; the mailing address is:

(Your Member of Parliament)
House of Commons
Ottawa, Ontario
K1A 0A6

Letters should also be copied to The Minister of Heritage (The Honourable James Moore) and The Minister of Industry (The Honourable Tony Clement) at the same address.

Personal messages to MPs have much greater impact than form letters. Elements you may want to spontaneously include in a letter are:

- a personal introduction of yourself;
- an indication that copyright is an important issue to you and that you have been following the progress of C-32 carefully;
- approval of the Bill's fair dealing, notice and notice, and statutory damages provisions; and,
- complete rejection of the anti-circumvention/digital locks section.

Descriptions of how unnecessary copyright restrictions limit your ability to teach and conduct research would also be helpful.

Legislative Trade-Offs

C-32 contains additional provisions nominally directed at assisting the

education/library community. Two of these sections purportedly assist inter-library loan and distance education but they require that digitally loaned copies self-destruct within five days of receipt and distance learning materials implode 30 days after the conclusion of a course; requirements that bear no relation to the realities of teaching and research. The third “education” provision confirms the obvious by allowing educational institutions to freely use publically available material over the internet. As the Bill moves through Parliament and further compromises are suggested and possibly enacted, it is important that the education/library community does not sacrifice achievements in the areas of fair dealing, notice and

notice, and statutory damages to protect these dubious inter-library loan, distance education and Internet provisions.

Part IV. Conclusion

The education/library community can take justifiable pride in its grass roots mobilization to pressure the government on copyright reform. This effort has resulted in surprisingly positive elements in Bill C-32. Further effort is now required to defend these advances and correct the legislation’s most egregious mistake the blanket ban on circumventing digital locks. As part of this process it is very important that you write a letter to your MP and encourage your colleagues to do the same. ■

Resources

Fair Dealing (CAUT Intellectual Property Advisory No.3, Dec 2008)
<http://www.caut.ca/uploads/IP-Advisory3-en.pdf>

The *Copyright Act* and Academic Staff (CAUT Education Review, Feb 2008)
<http://www.caut.ca/uploads/EducationReviewvol10no1-en.pdf>

Canadian Internet Policy and Public Interest Clinic (CIPPIC) - <http://www.cippic.ca/en/> and
<http://www.digitalagenda.ca>

Sam Trosow - Blog - <http://samtrosow.ca/>

Michael Geist - Blog - <http://www.michaelgeist.ca/>

Howard Knopf - Blog - <http://excesscopyright.blogspot.com/>