

BILL C-32 CANADIAN COPYRIGHT REFORM BILL

The CCMIA is formulating its position with respect to the pending reforms to Canada's Copyright Act. We would like to provide an opportunity for our individual members to provide input into our formalized position. Due to the complexity of the issues and the multitude of opinions however we have found that many of our members are having difficulty in following all of the nuances of the numerous positions. Consequently, what follows is a summary of the major issues written in a manner that clearly and objectively identifies the ongoing debate. We would ask that if you have any questions or comments with respect to these issues that you provide a written response to your respective Music Industry Association (MIA) prior to January 21st 2011. All responses will be considered in the formulation of the CCMIA position.

Purpose of Copyright protection

At its core, Copyright protection gives the holders the right to control how their works are used and to receive compensation for such use. As copyright has evolved, this right has been extended to include re-use of works under license by television, radio and in public spaces. The act governing copyright in Canada is a federal statute called the *Copyright Act* that was last amended in 1997.

CANADA'S INTERNATIONAL OBLIGATIONS

In 1996 Canada became a signatory to the [WIPO Copyright Treaty](#) (WCT) and the [WIPO Performances and Phonograms Treaty](#) (WPPT). Quite simply, these treaties set an agreement on protecting digital copyrights with particular focus on the Internet. It is interesting to note that while these treaties were signed, the Canadian government has never ratified them. Therefore, while the treaties are certainly guidelines for Canadian legislation, they are not legally binding. That said, many signatories to the treaties have enacted legislation protecting digital copyrights.

The USA enacted the *Digital Millennium Act* ("DMA") in 1998 in response to WIPO treaties. Some critics have stated that the DMA along with its European counterparts are flawed in that they give protection to Internet service providers ("ISPs") for allowing copyright infringement. The DMA does create significant criminal and civil penalties for copyright infringement of digital copyrights that have been viewed by some as heavy handed. The hardline "notice and take down" provisions of the DMA (putting the onus on websites to take down alleged infringements) has also been criticized as making it too easy for creators to force take down of unproven infringements. In some ways, the Canadian version of the DMA is a kinder and perhaps more "Canadian" version of the DMA. There are many organizations however that believe by swinging too far the other way, Bill C-32 (if enacted as currently written) may hurt the rights of copyright owners.

Bill C-32 Objectives

The stated objectives of Bill C-32 are to:

- Update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards;
- Clarify ISPs' liability and make the enabling of online copyright infringement itself an infringement of copyright;
- Permit businesses, educators and libraries to make greater use of copyright material in digital form;
- Allow educators and students to make greater use of copyright material;
- Permit certain uses of copyright material by consumers;
- Give photographers the same rights as other creators;
- Ensure that the *Copyright Act* remains technologically neutral; and
- Mandate a review of the *Copyright Act* by Parliament every five years.

Issues surrounding Bill C-32 provisions for music industry

1) Digital Locks (Technological Protection Measures)

Excerpt from the Federal government backgrounder:

"Copyright owners who choose to apply technological protection measures (TPMs), such as digital locks, to prevent unauthorized access to copyrighted material will benefit from new protection against circumvention, or breaking locks. New rules will also prevent the manufacture, importation and sale of devices that can break digital locks."

This is a controversial measure in the Bill. Those who advocate for an unrestricted, free Internet are firmly against TPMs. Those trying to protect their intellectual property from piracy are for TPMs. Copyright owners argue that they should have the right to determine whether copyrighted materials are available freely or with locks to prevent unauthorized multiple uses. If a copyright owner employs a digital lock then the proposed legal measures against lock breaking will be required in order to provide some enforcement protection for those locks.

The use of TPMs is not new as that technology has been used on products such as software programs (to limit the number of computers a specific program can be installed on) for several years.

2) User Generated Content “fair dealing” exception.

The so-called “YouTube” exception would allow individuals to post home movies using copyrighted music as background music. Individuals may also create and post “mash-ups” of copyrighted materials without compensation to the creators. Companies like “YouTube” can leverage this exception to make profit on the backs of creators. Canada would be the only country in the world to authorize this exception.

3) Education “fair dealing” Exceptions

Another exception is allowing broadly defined “educational institutions” to use copyrighted materials including audio-visual materials with no compensation to copyright holders. This is contrary to the existing practice of purchasing and licensing educational materials in Canada. One critic argues that the authors of educational materials will stop creating them if there is no chance of reasonable compensation for their work. This may in turn significantly impact on the quality of education in Canada.

4) Private Purposes (and copying levy)

Format shifting and back-up copies by individuals would be authorized under this Act. While the intent may be to allow individuals to copy their private collections, the Bill may still allow side loading and sharing of files over networks. With consumers switching to hard drives and mobile devices and away from CDs and DVDs the existing copying levy on blank CDs (and the revenue it produces) is being seriously eroded. A levy on MP3 players would update the existing copying levy to be effective in today’s markets.

5) Broadcaster exceptions

With the current (and growing) practice of automated broadcasting music is stored on servers for easy access of broadcast. These electronic copies are referred to as “ephemeral” copies. As copyright owners control the right to copy their music there has been a collective licensing payment for the use of these ephemeral copies for over 10 years. Bill C-32 would effectively remove the collective licensing provision by granting broadcasters a 30-day exemption consequently extinguishing the historical payments.

6) Statutory Damages

“Statutory damages” are pre-established damages for copyright infringement. Bill C-32 proposes new limits on statutory damages that are significantly lower than the current cost of litigation in Canada. As the cost of litigation would outweigh the possible remedies infringers could infringe with the knowledge that litigation is probably not realistic. Also, by failing to make a distinction between individuals and companies in terms of infringement, the Bill could provide companies a business case for infringement. It is argued that the lower statutory damages as currently proposed may simply become the “cost of doing business”.

7) ISP liability and anti-piracy provisions

As with its cousin, the American *DMA*, Bill C-32 protects ISPs from liability for infringement through their Internet services. The Canadian Bill however only provides for a “notice and notice” procedure in the case of infringement as opposed to the American “notice and take-down provision”. In simple terms, the American model put the onus on websites to take down offending infringements upon receiving notice, but the Canadian model would only mean that websites would have to give notice of an alleged infringement to the infringer. The onus in the Canada would thus be shifted onto the copyright owners to go to court to remove an infringing post. Thus although there are some provisions in the proposed act to combat piracy the use of a notice and notice system may reduce the ability to enforce those provisions.

In this scenario the lower Statutory Damages as outlined above would come into play and thus it is argued that most creators would not have the financial ability to protect their copyrights.

Overall results of exceptions, limitations on statutory damages and ISP protections

The cumulative affect of the new exceptions, the Statutory Damages limitations and ISP protection is to reverse the onus onto copyright owners to prove infringement. This may provide impunity for continued infringement, as copyright owners would be forced into unrealistic enforcement actions with the final result being a reduction in income for those who create original works. (Summary by Bob D'Eith for the CCMIA)