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Questions and Answers – Bill C-32

For Ministers' appearance before the Legislative Committee

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ISSUES NOT ADDRESSED

GENERAL

Why didn't you address other issues in the Bill? (e.g., crown copyright, resale right, exhibition right, aboriginal traditional knowledge and folklore, etc.)

This Bill addresses the challenges and opportunities of the Internet and other digital technologies and brings Canada up to international standards.

Two previous attempts to amend the Copyright Act died on the Order Paper. This ambitious Bill proposes changes to the Copyright Act to ensure that Canada's copyright framework is balanced and modernized.

The proposed five-year review will provide the opportunity to address other existing copyright issues and those that may emerge in the future.

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Why does the government not support an extension of the private copying regime so that creators will be paid for the use of their work?

The Government cannot have a strategy of greater access to the Internet and to promote our digital economy, and at the same time support a policy that would increase the cost of new technologies that drive innovation.

The government is also concerned that imposing a levy on digital devices would encourage Canadians to buy these devices in the US, would do nothing to prevent piracy and would put a burden on the digital economy.

The private copying regime was put in place because copyright owners lacked the ability to control copying. In this Bill's new measures to protect TPMs, we are giving owners much greater control over how their works are used and copied. This is another reason why no further extension of the levy is warranted.

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How can the government say that this Bill is "technologically neutral" when it does not compensate creators for the use of their work on digital platforms?

The Bill will give both creators and users a set of rules that are practical, technology neutral and will remain relevant and stand the test of time.

It removes references to out-dated technologies like overhead projectors and flip charts. It allows certain consumer activities – recording TV shows, shifting content from one format to another – with no restriction on the format, medium or device used.

It does not extend the private copying levy to all mediums and devices. The government is concerned that imposing a levy on digital devices would encourage Canadians to buy these devices in the US, would do nothing to prevent piracy and would put a burden on the digital economy.

But it does give creators the ability to benefit from their work on digital platforms. The Bill provides new rights, protections and tools to encourage new business models, and certainty for artists and creators to engage in the global digital marketplace with confidence.

The Bill will implement the rights and protections set out in the WIPO Internet Treaties. For example, the Bill includes a "making available right" that will enable creators to control the release of copyrighted material on the Internet. The Bill also introduces a new civil liability that gives rights holders the tools to target those who wilfully and knowingly enable online piracy. Infringement on the Internet takes revenues away from creators and reduces the incentive to create. This measure sends a clear message that Canada does not welcome any sites that enable infringement.

These and other measures in the Bill will ensure that creators can benefit from their works in the digital age.

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CONSUMERS

CONSUMER AWARENESS

What does this Bill do for consumers?

This Bill makes copyright rules simpler for consumers, while at the same time legitimizing activities they do everyday. For example, this bill will allow consumers to:

- record television programs for later viewing;
- copy music from their CD to their mp3 player;
- back-up their media and data; and
- create non-commercial mash-ups and post them online.

In our consultations, Canadians told us they wanted a technology-neutral framework that would stand the test of time. That is why these provisions are technology neutral. They reflect the reality of an ever-evolving media and technological landscape.

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This Bill gives consumers new exceptions to copyright but they cannot use them because of digital locks. Why is the government pretending to give rights to consumers?

The new user exceptions will permit Canadians to legally undertake many activities that are currently not allowed. For example, an individual will be able to:

- upload music from CD that they bought to listen to it on their computer or MP3 player;
- make a back-up copying of a book or newspaper article on any medium; or
- record a broadcast program to enjoy at a later time.

In many cases, material is made available on the internet without TPM restrictions.

However, the Bill also recognizes that TPMs can be an important tool that creators and copyright owners may choose to use to protect their work as part of their business model. Software producers, video game developers, and movie distributors, for example, use TPMs because they wish to protect the significant investments they make in developing their products.

Canadian jobs depend on their ability to make a return on this investment. These industries need to have the protection of the law. Creators may decide whether to use a TPM, and consumers can then decide whether to buy the product. Ultimately, it will be up to the marketplace to determine the extent to which TPM-based business models succeed and which works are made available without them

Bill C-32 also includes regulation making powers that will allow the Government to introduce new exceptions to the TPM provisions if developments in the marketplace warrant.

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Why are you adopting a TPM-based legal approach that is losing relevance as a business model?

TPMs aren't losing relevance – they continue to be used by many creators and copyright owners to protect the significant investments they make in developing their products. The future of Canada's knowledge economy requires that we have strong protections for intellectual property.

For example, the Entertainment Software Association of Canada, also called ESAC, which represents Canada's video gaming industry and accounts for over 14,000 jobs across the country, use TPMs to protect the significant investments that they make in the development of new games.

TPMs are not only used for products. They underpin subscription-based online services like Netflix or Real Network's "Real Arcade Gamepass", that use passwords, which are TPMs, as part of their business models.

In these and other sectors of the digital economy, Canadian jobs depend on their ability to make a return on their investment. These industries and the TPMs they rely on need to have the protection of the law.

But the bill doesn't *require* businesses to use TPMs. Some other sectors such as the music industry have chosen not to use TPMs in light of consumer demands.

This is exactly how the marketplace is supposed to work. Creators may decide whether to use a TPM, and consumers can then decide whether to buy the product.

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Why is the Government taking this approach which goes way beyond what is required by the WIPO Internet Treaties?

The WIPO Treaties require adequate legal protections for TPMs, recognizing they are an important tool for creators and copyright owners to protect their work.

The Government believes the protections presented in this Bill represent the best policy for Canada and our creative industries.

Canadian jobs depend on the ability of creative industries to make a return on their investments. These industries need to have the protection of the law. Creators may decide whether to use a TPM, and consumers can then decide whether to buy the product.

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Why is the government not taking a "balanced approach" to TPMs by allowing circumvention for non-infringing purposes?

During the summer 2009 consultations, the issue of TPM protections and their role was highlighted by many participants.

A number of Canadian companies, including software producers and movie distributors, companies that employ thousands of Canadians in high value jobs, told us that they use TPMs to protect the significant investments they make to develop their products

So the debate over TPMs comes down to whether we should protect companies' ability to make a return on their investment and ultimately, protect Canadian jobs.

The Internet and digital technology provide copyright owners with new opportunities to increase their business.

However, they also carry a significant risk as they can also make copyright infringement easier. This is why some copyright owners choose sometimes to turn to TPMs to protect their content.

For those who decide to use TPMs to protect the significant investments each make to develop their products, they should have the protection of the law. Consumers can then decide whether to buy the product.

However, Bill C-32 recognizes the public interest and that there are situations where TPMs should not be used. For instance, TPMs should not be used to violate privacy, or to prevent users to change cellphone provider, among others.

In order to be flexible and forward-looking, Bill C-32 also includes regulation making powers that will allow the Government to introduce new exceptions to the TPM provisions, if they are used in anti-competitive ways or if developments in the marketplace warrant it.

This is all a question of balance.

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Why is the Government not ensuring that its TPM exceptions are in line with US exceptions? (e.g., 'Jailbreaking' of mobile phones is permitted in the U.S. but not in C-32)

This bill has been drafted to serve the interests of Canadians. As the Canadian marketplace is different from the US marketplace, the Government responds to Canadian issues with Canadian solutions.

Bill C-32 will ensure that TPM provisions will not prevent consumers from being able to unlock their wireless devices, such as a smart phone, in order to switch service providers.

Bill C-32 includes regulation making powers that will allow the Government to react to developments in the marketplace by introducing new exceptions to the TPM provisions.

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EPHEMERAL REPRODUCTIONS

Eliminating the ephemeral right for creators is taking revenues that creators have paid since 2001. Why is the government sanctioning this jack pot for broadcasters?

Broadcasters pay a tariff to copyright owners for the right to broadcast music. Currently, they also pay a tariff for making temporary, technical reproductions that are merely incidental of the broadcasting process.

This Bill would remove the requirement for broadcasters to pay the tariff for these reproductions, while retaining the requirement to pay for the right to broadcast.

Twenty years ago, with the technology of the time, these payments didn't exist. Radio stations would play the music directly from CDs, with no reproductions. But technology has changed. Radio stations now broadcast via computers, in a process that requires digital copies of songs to be made – and under current law, broadcasters are required to pay for these incidental copies.

Removing this payment requirement will promote the adoption of new technologies in broadcasting, and make the rules governing broadcasting technologically neutral. Radio stations and record labels determine their business arrangements in the delivery of song tracks to radio stations for broacasting. Copyright law, as marketplace framework law, is supposed to allow and promote these kinds of market solutions.

It will also treat Canadian broadcasters in line with those in the U.S., the U.K., Australia and Germany, to name just a few countries.

While this does change what revenues rights holders receive, you have to remember that this Bill also gives rights holders significant new rights provided for in the WIPO Internet treaties, and significant new tools to protect these rights and ensure they are appropriately compensated for the use of their creative work.

It is about balance -- you cannot look at one provision in isolation, you have to consider the entire Bill.

Note: *The Copyright Board estimated payments in respect of ephemeral reproductions by broadcasters at $8 million for 2007.*

For broadcasting music, commercial radio stations pay $85 million in royalties (Copyright Board estimate based on total station revenues of slightly over $1.5 billion in 2009).

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COPYRIGHT OWNERS

GENERAL CRITICISMS ABOUT BILL C-32'S APPROACH TO CREATORS

Why is this Bill good for creators?

The Bill provides strong measures to help creators protect their work in the digital environment and will ensure that Canada's creative communities will continue to thrive and produce the high-quality Canadian content of which we are all so proud.

The Bill implements the rights and protections set out in the WIPO Internet Treaties. These treaties represent an international consensus on the standard of copyright protection needed to respond to the challenges and opportunities of the Internet and other digital technologies.

Some of the key provisions include a "making available right" that will enable creators to control the release of copyrighted material on the Internet. This will protect against all making available of works without the authorization of the right holders.

The Bill prohibits, except under limited circumstances, the circumvention of technological protection measures used by some copyright owners to prevent unauthorized use of their work. These measures are used as part of the business model of some owners of copyright to prevent copying and unauthorized access to works. Providing protection for TPMs will support creators' ability to advance new digital business models and compete on the international stage.

The Bill allows creators to benefit from legal protections for "rights management information" which ensures that the identity of the creator and key information is always connected to the work. This protection benefits right holders because they can track legitimate copies of works, and it benefits users because they can be assured to have authentic copies of works.

The Bill introduces a new civil liability to target those who wilfully and knowingly enable online piracy. Infringement on the Internet takes revenues away from creators and reduces the incentive to create. This measure sends a clear message that Canada does not welcome any sites that enable infringement.

The Bill facilitates innovative forms of creation. It allows for the use of legitimately acquired material in user-generated content created for non-commercial purposes.

Finally, the bill will ensure the *Copyright Act* remains responsive to a changing environment by requiring a review of the Act by Parliament every five years.

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Copyright has always been about protecting creators' rights. Why does C-32 violate this core principle?

Copyright has always been about balancing the interests of creators and users. Copyright protections, like all other intellectual property protections, have always had built-in limits to balance the incentive to create and the significant public interest in ensuring access to the ideas that underlie all copyrighted works.

This Bill contains new rights and protections for creators and copyright owners, which are significant tools to encourage creativity and innovation, be competitive on the international scene and create jobs for Canadians.

At the same time, the Bill adapts the copyright exceptions, to ensure they reflect uses of copyrighted material that are reasonable and serve the public interest in a way that is responsive to the challenges and opportunities of the digital age.

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Shouldn't we take more action to help creators earn a fair return on their work? Isn't a fair return for creators ultimately in the best interest of Canadian consumers?

The Bill seeks to contribute to an environment which fosters creativity, innovation and economic growth, giving Canadian creators the tools they need to keep Canada competitive internationally.

Creators and copyright owners are being given important new rights that will allow them to develop business models that will work for them in a digital environment. One of the most significant is the "making available" right which will allow them to control how their works are made available online. Also, the new "distribution right" will enable them to prevent a retailer from "jumping the gun" in advance of the official release date of a work.

Recognizing the fact that the digital environment makes it very easy and virtually costless to create and disseminate copies of works, rights holders are also being given important new tools to combat copyright infringement online. The Bill gives them a new tool to target those who "enable" copyright infringement on-line. This will make it clear that those who knowingly facilitate infringement are liable in Canada. It also gives them stronger legal tools for protecting technological measures (such as encryption and passwords) that creators may choose to use to protect their works on the Internet.

They will also be able to benefit from legal protections for "rights management information," which will ensure that their identity and key information is always connected to the work.

In addition, performers will be given the same "moral rights" as other creators, which will ensure that their performance is not altered in a way that harms their reputation.

These are but a few of the new rights and protections in Bill C-32 which will update Canada's Copyright Act and its framework of rules so that creators can participate in the digital environment with confidence.

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Why is the government undermining creators and cultural businesses by undermining collective licensing?

The *Copyright Act* allows, and sometimes requires, the use of collective licensing, and this is not being changed in Bill C-32. Collective licensing can be an efficient way for rights holders to manage their rights and for users to be able to legally use material.

Alongside the collective management regime, Bill C-32 recognizes the commonplace uses that people make of technology, and provides clear rules that will better enable them to participate in the digital age. This means the Government is proposing some new exceptions to copyright to permit certain activities, and these exceptions have been carefully designed to ensure that they are restricted to the activities they were intended to permit. In some cases this affects the scope of rights that are currently being managed collectively, but collective licencing remains an important component of Canada's copyright regime.

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GENERAL CRITICISMS OF NEW EXCEPTIONS

The exceptions in this Bill are too broad and will drive creators to litigation to defend their rights. Why is the government leaving the real policy decisions to the courts?

Bill C-32 provides a technology neutral flexible framework aimed at standing the test of time. It recognizes the commonplace uses that people make of technology, and provides clear rules that will better enable them to participate in the digital age.

These exceptions were very carefully designed to ensure that they are restricted to the activities they were intended to permit.

The user-generated content provision is a clear example of how Bill C-32 recognizes new realities. It allows an individual to create a new work from existing works – such as a mash-up – and post it online. But it only allows this if:

- it is done for non-commercial purposes;
- the source and name of author are given if appropriate;
- the original work did not infringe copyright; and
- the new work does not have a substantial adverse effect or is not a substitute for the original work.

We believe that all Canadians, users and creators alike, will be well served by more clarity and more predictably, and sufficient flexibility to adapt to new technologies and take full advantage of them.

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The Speech from the Throne stated the government would strengthen intellectual property laws. Don't all these new exceptions mean "anything goes"?

No. The government believes that the overwhelming majority of Canadians are law abiding and will follow the rules.

The Bill includes new exceptions that legitimize commonplace activities, but at the same time introduces clear common-sense rules that must be respected in order for the activity to be legal.

For example:

- Consumers will be allowed to copy music to their portable media players, but not if it is a pirated copy.
- They can record a TV program, but not make a permanent library.
- They can post a family video with music playing in the background, but they can't try to profit from such "user-generated" content.

Anyone who does not respect the rules will be infringing copyright and subject to recourse by copyright owners.

Second, this Bill recognizes that the best way to stop illegal copyright infringement is to target those who profit from it. This Bill builds on the existing criminal regime in Canada, creating a new civil liability to allow copyright owners to pursue those who enable copyright infringement.

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The Youtube / mash-up exception opens another door to piracy. Why did the government create such a broad and undefined exception?

Increasingly, creators are users and users are creators.

Many people here probably will have, at one point in their lives, taken a video at a family party with music playing in the background. That video probably technically violates copyright.

Some may have encountered "fan fiction" – creative story-telling that builds off existing popular works. In many cases, this probably also technically violates copyright.

And people are sharing more and more of their lives on the Internet – photos, videos, stories, commentary – and much of this sharing will incorporate pictures, clips, and sounds that are subject to copyright.

This Bill is saying that creating and sharing material in this way is ok. If someone is not trying to profit, and is not causing significant harm to an existing holder of copyright, they should be allowed to create new works that incorporate existing works and share them.

Of course, while encouraging this kind of creativity, we also need limits so that it doesn't harm the legitimate interests of right holders or the markets for the original works.

That is why this activity has built-in safeguards.

First, anyone who intends to benefit commercially cannot rely on this exception and will be required to pay copyright owners to use their content.

Second, in order to ensure that private, non-published works are not disseminated through this exception, the material that is used must have already been made publicly available and be legitimately acquired.

Third, in order to protect the economic interests of right holders for source works, the user-generated work must not have a substantial adverse effect on the exploitation or potential exploitation of the source work. As part of this, it must not be a substitute for the existing material.

Finally, there are built-in safeguards already in the Copyright Act to ensure that reputation of the author and the integrity of their work – their "moral rights" – are protected.

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The User-Generated Content exception is too broad – won't it be exploited in illegitimate ways?

The government believes that the overwhelming majority of Canadians are law abiding and will follow the rules.

This provision, like all of the exceptions in the Bill, contains rules to ensure they don't protect those who make illegitimate use of copyrighted material. Anyone who does not respect these rules will be infringing copyright and subject to recourse by copyright owners.

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How can the Government justify expanding fair dealing to education?

Fair dealing is an essential part of copyright law in Canada -- this is recognized by the Supreme Court. In Canada and and many other countries -- the United States, the United Kingdom, Australia, New Zealand, Singapore, Israel and others -- variations of fair dealing are a critical piece of balanced copyright.

In Canada fair dealing can be invoked only for certain purposes -- this is different from the United States, for example, where "fair use" is open-ended. Fair dealing in Canada is what allows:

- A doctoral student to copy articles for use in developing published research;
- A writer to copy chapters of a borrowed book to study privately;
- A blogger to reproduce elements of copyright material in criticizing the policies of the government;
- A news reporter to reproduce images that are necessary to report the news; and
- A music retailer to offer a preview of part of a song prior to purchasing it.

As part of this bill, we are proposing to extend fair dealing to the purpose of parody -- which would mirror a number of other jurisdictions in the world -- and to satire, which plays an important role in a free society.

And we are proposing to likewise extend fair dealing to the purpose of "education". Why? The answer is simple: because we want a teacher to have the flexibility to weave in copyright material into his teaching.

Of course we don't want schools to photocopy entire textbooks rather than purchase them. That isn't fair, it isn't allowed now and it won't be allowed under the changes proposed in the Bill.

And this is because fair dealing is not a blank cheque -- the courts have made this clear. The Supreme Court has set out guidance for determining what is fair dealing, and what is not:

- The purpose and character of the activity need to be considered -- including whether it is commercial in nature or not.
- The amount of the work used should be considered, and alternatives to having used it.
- The nature of the work itself needs to be considered, and the effect of the use on the market of the copyright owner must be considered.

There are no doubt aspects of fair dealing that do not please all creators and right holders, nor all consumers and users, but that brings us back to the fundamental issue of balance. This bill recognizes that balance is what copyright is all about.

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Adding "education" to fair dealing will decimate the Canadian educational publishing industry? Why introduce this provision?

No. Fair dealing is a long standing feature of Canadian copyright law that permits certain uses of copyrighted material in ways that do not unduly threaten the interests of copyright owners, but which could have significant societal benefits.

Fair dealing is not a blank cheque. We don't want schools to photocopy textbooks rather than purchase them. That isn't fair, it isn't allowed now and it won't be allowed under the changes proposed in the Bill.

But we do want teachers to have the flexibility to weave in copyright material into his teaching.

Provinces spend hundreds of millions of dollars on textbooks, and nothing in the Bill would change that. Provincial governments want Canadian textbooks and learning materials so much that they even share in the development costs in some cases, providing subsidies and in-kind contributions. This is on top of their $20 million payments each year for photocopying for K-12 education.

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Won't the undefined and unclear addition of education to fair dealing result in vast amounts of litigation?

Whether or not to pursue litigation under the Copyright Act is a choice made by the parties concerned.

Fair dealing is not new territory – determinations of the courts are guided by considerable jurisprudence including a Supreme Court of Canada decision. There are precedents to draw upon when addressing interpretations of fair dealing provisions in the Copyright Act

In a 2004 Supreme Court decision, the court outlined six factors to evaluate fairness, which are as follows: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

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Won't adding education to fair dealing mean that teachers will be able to make any use they want of copyright material and put publishers out of business?

No absolutely not. This is a completely inaccurate claim made by some critics of the bill. Fair dealing does not allow users to make unlimited use of copyright material. It is a long-standing feature of Canadian copyright law that allows use of material for certain purposes – but only if they are fair.

Fair dealing is not a blank cheque -- the courts have made this clear. The Supreme Court has set out guidance for determining what is fair dealing, and what is not:

- The purpose and character of the activity need to be considered -- including whether it is commercial in nature or not.
- The amount of the work used should be considered, and alternatives to having used it.
- And the nature of the work itself needs to be considered, and the effect of the activity in question has on the work, including the commercial exploitation of it must be considered

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The education system pays for chairs, computers, and teachers. Why does it not have to pay authors and publishers for teaching material?

Schools currently pay, and will continue to have to pay, authors and publishers for teaching material. In fact, educational institutions are some of the biggest purchasers of copyright material in the country, and nothing in the Bill would change this.

Nothing in this Bill would allow schools to photocopy textbooks rather than purchase them. That isn't fair, it isn't allowed now and it won't be allowed under the changes proposed in the Bill.

And this is because fair dealing is not a blank cheque -- the courts have made this clear. The Supreme Court has set out guidance for determining what is fair dealing, and what is not:

- The purpose and character of the activity need to be considered -- including whether it is commercial in nature or not.
- The amount of the work used should be considered, and alternatives to having used it.
- And the nature of the work itself needs to be considered, and the effect of the activity in question has on the work, including the commercial exploitation of it must be considered

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Why does the government think that for-profit training institutions should not pay authors and publishers?

Education and skills development are just as important when done in private institutions as in public schools.

Private tutors, workplace training, and private institutions are all working toward the goal of sharing knowledge and developing skills. Much of the training in the skilled trades – a critical piece of the Canadian workforce – is done in for-profit training institutions.

These teachers and trainers, just like those in not for profit organizations and parents engaged in home schooling, should be given the same consideration as teachers in traditional schools.

Remember that fair dealing is not a blank cheque -- the courts have made this clear. The Supreme Court has set out guidance for determining what is fair dealing, and what is not:

- The purpose and character of the activity need to be considered -- including whether it is commercial in nature or not.

- The amount of the work used should be considered, and alternatives to having used it.

- And the nature of the work itself needs to be considered, and the effect of the activity in question has on the work, including the commercial exploitation of it must be considered

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Is this the "book burning" Bill? Why does the Bill make students detroy their notes and teachers destroy their lessons after 30 days? Why do people have to destroy inter-library loans after 5 days?

Bill C-32 proposes new exceptions that directly and significantly support the sharing of knowledge using today's technologies.

It allows for technology-enhanced distance learning, even incorporating allowable uses of copyright materials.

It allows for the digital delivery of inter-library loan material that is allowable under fair dealing. Both of these provisions are vitally important to promote learning in remote areas of a vast country like Canada.

As with all exceptions in the Bill, these activities are subject to clear common-sense rules to respect the interests of right holders, including limitations on how long digital copies can be kept.

These kinds of safeguards are an essential part of the balance between enabling uses and respecting the legitimate interests of copyright owners.

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ENABLERS

How will the "enablers" provision stop piracy?

This Bill recognizes that the most effective way to stop online copyright infringement is to target those who enable and profit from infringement

The new "enablers" provision, among the first of its kind in the world, if not the first, will allow rights holders to sue those who offer services that are primarily designed to enable copyright infringement.

In order to ensure that this provision is effectively targeted, courts are being provided with factors to consider in determining if someone is an "enabler", including how they marketed their service, what uses other than copyright infringement their service has, what knowledge they had of copyright infringements done using their service, and the economic viability of their service if it was not used to enable copyright infringement.

In this way, the Bill differentiates between those who support piracy and those who provide key services for the functioning of the Internet and the digital economy, such as ISPs and legitimate search engines.

By allowing copyright owners to pursue these "enablers", such as illegal peer-to-peer file sharing sites, this bill supports the development of significant legitimate markets for downloading and streaming in Canada.

This new targeted enabler provision will complement the already strong criminal penalties in place to prosecute pirates, including:

- the "aiding and abetting" provisions in the Criminal Code;
- the recently added "camcording" provisions in the Criminal Code; and
- the existing criminal penalties available under the Copyright Act, which provide for fines of up to $25,000 and jail terms of up to 6 months on summary conviction, and fines of up to $1,000,000 and jail terms of up to 5 years on conviction or indictment.

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Why didn't the government introduce stronger penalties, including statutory damages and criminal sanctions for internet pirates in Canada?

This Bill recognizes that the best way to stop illegal copyright infringement is to target those who profit from it. This Bill builds on the existing criminal regime in Canada, creating a new civil liability to allow copyright owners to pursue the pirates who enable copyright infringement online, such as illegal peer-to-peer file-sharing.

This new targeted enabler provision will complement the already strong criminal penalties in place to prosecute pirates, including:

- the "aiding and abetting" provisions in the Criminal Code;
- the recently added "camcording" provisions in the Criminal Code; and
- the existing criminal penalties available under the Copyright Act, which provide for fines of up to $25,000 and jail terms of up to 6 months on summary conviction, and fines of up to $1,000,000 and jail terms of up to 5 years on conviction or indictment.

In addition, all other remedies typically available in business litigation – including actual damages, accounting for profits and injunctions – would be available against enablers.

Statutory damages are a tool provided to rights holders to take legal action without the need of proving the amount of actual damages suffered, as this can sometimes be quite difficult to prove. The statutory damages provisions in the Act apply against copyright infringements.

Statutory damages apply against copyright infringement, so they were not extended to the enabling provision where only "enabling" needs to be proven.

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Will the Bill allow record labels to sue individuals and groups for large amounts like in the U.S.?

The Bill was designed to ensure that Canadians will not face disproportionate penalties for infringements of copyright by distinguishing between commercial and non-commercial infringement.

This Bill will dramatically reduce an individual's exposure in cases where they are not profiting or engaging in commercial infringement. In such cases, statutory damages will be reduced to a one-time payment of between $100 and $5000, for all infringements that took place prior to the lawsuit.

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Why has the Government reduced statutory damages for non-commercial infringers? Won't this encourage infringement and illegal file sharing?

The Government believes that the best way to stop illegal behaviour is to target those who profit from it.

Without in any way condoning infringement, the Bill ensures that Canadians will not face the threat of disproportionate penalties for copyright violations that were not carried out for commercial advantage or private gain. The Bill provides balance and flexibility by adding a direction to the courts to consider proportionality in determining the appropriate penalties based on the facts of each case.

The Bill preserves significant penalties for commercial infringers of copyright. Those who infringe copyright for commercial purposes will continue to face statutory damages of between $500 and $20,000 per work infringed.

It is important to remember that statutory damages are only one tool. Copyright owners also have – and will continue to have – the ability to seek actual damages in all cases – commercial and non-commercial -- where they feel it appropriate.

The Bill also introduces a new civil liability to target those who enable the large-scale infringement of copyright content online. This is yet another tool for rights holders to go after online piracy and protect their rights.

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Some activities that are non-commercial could still damage rights holders. Why should these non-commercial activities be subject to lower damages?

Digital technologies have changed how copyright material can be used and shared. Activities that were non-commercial activities such as using or sharing copyright material in a pre-digital world may have had no significant impact on a rights holder. Today, one email of a bootleg, unreleased film can cost millions of dollars.

Bill C-32 limits the amount of statutory damages that a person may be liable for, when the infringement is done for non-commercial purposes.

At the same time, nothing will prevent a right holder from pursuing actual damages and punitive damages where the level of harm warrants it.

While this will mean some additional work to establish amounts in Court, I am confident that copyright owners will not bear any greater burden than other plaintiffs in other business contexts in Canada.

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Once again, the government has presented a U.S.-style DMCA for Canada. Why has the Government caved to pressure from the U.S. instead of listening to Canadians?

This Bill has been designed to serve the interests of Canadians and make Canada a leader in the the digital economy.

During the summer 2009 consultations, the issue of TPM protections and their role was highlighted by many participants. A number of Canadian companies, including software producers and movie distributors that employ thousands of Canadians in high value jobs, told us that they use TPMs to protect the significant investments they make to develop their products

TPM protections are a requirement of the WIPO treaties, so it is not surprising that there would be some similarities with how some of our major trading partners, who have all ratified the treaties, have provided protection for TPMs.

Bill C-32 proposes changes that make copyright law fair, clear and predictable for both Canadian right holders and users. It presents a number of 'common sense' features that make it entirely different from the approach taken by the U.S. Government in the DMCA. Some examples include:

- Exceptions to the TPM prohibition that allow for the use of devices and services for effecting circumvention for certain purposes in the public interest;

- The adoption of a "notice and notice" regime for involving ISPs in combating infringement by their subscribers, as compared to U.S.-style "notice- and-takedown" which is less effective in combatting illicit peer-to-peer file sharing; and

- The approach to statutory damages for infringement for non-commercial purposes would not result in million dollar plus awards of damages as has occurred in the U.S. The Government believes that it is important that courts consider the actual harm caused when awarding statutory damages.

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Will these amendments get Canada off the U.S. Special 301 list?

This Bill is about modernizing Canada's copyright regime to respond to challenges presented by the Internet and new digital technologies. It is not, nor should it be seen as, addressing pressure from the United States or from any other country. It is about doing what's in the best interest of Canadians.

The Government of Canada is of course deeply disappointed with the United States' decision to put Canada on its Special 301 Report again this year. Canada does not recognize the validity of the Special 301 process and considers it to be flawed. The Report does not employ a clear methodology in its country ranking, as it relies on industry allegations rather than empirical evidence and analysis.

Canada's IP regime is fully compatible with its international obligations and we will continue to engage with the United States and our other international partners to deal with general IPR issues, including trade in counterfeit and pirated goods.

We trust that our US partners will see this Bill as yet another sign of our commitment to modernizing and strengthening Canada's copyright regime.

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What does this Bill do to address Canada's reputation as a haven for online pirates?

The Bill introduces a new civil liability to target those who wilfully and knowingly enable online piracy. Infringement on the Internet takes revenues away from creators and reduces the incentive to create. This measure sends a clear message that Canada does not welcome any sites that enable infringement, and gives rights holders the tools to shut these services down.

Canada is among the first jurisdictions in the world, if not the very first, to provide in its copyright legislation this extremely important tool in the fight against online piracy.

In addition, a new "notice and notice" regime would also assist rights holders in stopping piracy by compelling Internet service providers to communicate with their clients when they commit illegal activities, and to keep relevant records should they be required for court proceedings.

These provisions are on top of the wide array of legal protections already provided for under the Copyright Act that rights holders can use to assert their rights.

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The Berne Convention requires that limitations and exceptions to copyright should be for specific cases. How do all these broad exceptions meet that test?

I can assure you that the Government of Canada takes its international obligations very seriously. And we have clearly met our obligation here.

The Berne three-step test sets out the international legal standard for limitations and exceptions to copyright. The test requires that limitations and exceptions to exclusive rights be limited in scope. As a party to international treaties that incorporate this test, Canada must comply with it when introducing new copyright exceptions.

We have carefully designed the new exceptions to have appropriate conditions that ensure that they are appropriately targeted, limited in scope.

For instance, the new exception for user-generated content provision is a clear example of how Bill C-32 recognizes new realities. It states that an individual can create user-generated content and post it online.

However, it also contains key safeguards to ensure it is appropriately limited: the user-generated content can only be used for non-commercial purposes; the source and name of author must be given if appropriate; the original work must not be an infringing copy, in other words it must have been acquired legally; and the user-generated content cannot not have a substantial adverse effect and cannot be a substitute for the original work.

The other exceptions have similar conditions limiting their scope, ensuring that we have met our international obligations.

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INTERMEDIARIES

Why has the Government chosen a "notice and notice" approach rather than the U.S. "notice and takedown" approach for Internet service providers?

A "notice and takedown" regime typically requires an ISP to block access to material upon receiving a notice from a rights holder that alleges such material to be infringing. No court order is required.

A drawback of "notice and takedown" is that it typically applies only to material posted on Web sites where there is material to "take down". It is not well suited to files shared on peer-to-peer (P2P) networks, arguably the most prevalent source of infringing material, since the files are actually located on the computers of the persons engaged in sharing, so there is nothing to be "taken down"..

In contrast, the proposed "notice and notice" regime, which is the current Canadian industry practice, better addresses P2P file sharing. It obligates ISPs to forward to their subscribers a notice of any allegations of infringement they receive from rights holders.

If the "notice and notice" system does not stop an individual who is infringing copyright, the rights holder can seek an injunction so that the activity ceases or the material be taken down.

This Bill recognizes that the most effective way to stop illegal copyright infringement online and support thriving markets for digital content is to target those who knowingly enable copyright infringement, such as those that host websites which encourage piracy.

A new civil liability that build on existing criminal provisions against enablers is intended to give rights holders the tools to shut down the services that encourage illegal conduct by their users.

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Why should ISPs and their customers bear the costs of the notice and notice regime? Why shouldn't rights holders pay for that service?

As Internet intermediaries, ISPs need to play a role in curtailing online infringement. That is why this Bill implements the "notice and notice" regime, codifying a system that is already voluntary industry practice.

The Government believes that it is fair that ISPs bear their share of the costs of administering the system. That said, this Bill provides the Government with the flexibility to enable ISPs to recover costs from copyright owners, through regulation-making power to set fees should this be deemed necessary.

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Other countries have recognized that ISPs benefit from the content that they offer to consumers. Why is this government giving ISPs a free ride at the expense of artists and creators?

Digital technologies are critical to almost every business and social activity. A strong digital economy will be the backbone of Canada's future prosperity and success.

That's why we have recently conducted a consultation on the development of a strategy for Canada's digital economy, to once again be a world leader in this area.

While modern copyright laws are an important pillar of the Government of Canada's broader digital economy strategy, the Government of Canada does not believe that putting a levy on ISP accounts is the right approach.

Our goal is to see high speed Internet access be widely used all across Canada, to enable all Canadians wherever they live to be able to take advantage of the full potential of the digital economy, and that's' why we have put over $200 million into the rural Broadband initiative.

At the same time, in Bill C-32, creators and copyright owners are being given important new rights that will allow them to develop business models that will work for them in a digital environment.

One of the most significant is the "making available" right which will allow them to control how their works are made available online.

Rights holders are also being given important new tools to combat copyright infringement online.

The Bill gives them a new tool to target those who "enable" copyright infringement on-line.

It also gives them stronger legal tools for protecting technological measures (such as encryption and passwords) that creators may choose to use to protect their works on the Internet.

ISPs are not being given a free ride. As Internet intermediaries, ISPs need to play a role in curtailing online infringement. That is why this Bill implements the "notice and notice" regime, codifying a system that is already voluntary industry practice.

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PCH Q's & A's

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CUMULATIVE RECENT GOVERNMENT DECISIONS FOR ARTS SECTOR

1. Bill C-32 robs Quebec creators of an appreciable source of their income and, in doing so, directly undermines the survival of the creative community. How does the federal government intend to compensate artists for the elimination of programs such as Trade Routes and PromArt, and now the sabotage of their intellectual property rights?

- Our Government recognizes the importance of supporting Canadian creators at home and abroad.

- Since 2009, our Government has committed over a billion dollars in new and renewed investments over five years for arts, culture, heritage and tourism-related initiatives. Via Canadian Heritage, it continues to provide significant support to promote Canadian culture abroad via its portfolio agencies and delivery partners, such as the Canada Council, Telefilm Canada, the Association for the Export of Canadian Books, and FACTOR/ MUSICACTION.

- Bill C-32 is yet another concrete step taken by this government to better equip creators with the tools and the means they require to adapt to new realities, domestically and abroad.

- With Bill C-32, we are giving new rights to Canadian creators, recognizing new forms of creation, and supporting the wide dissemination of Canadian cultural content. At the same time, we are improving creators' ability to control the uses of their works to prevent widespread illicit use such as illegal downloading.

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IMPACT OF EDUCATIONAL EXCEPTIONS AND FAIR DEALING ON PUBLISHERS AND RELATED CREATIVE INDUSTRIES

2. How does the Conservative government intend to make up for the lost revenue educational publishers will suffer as a result of increasing educational exceptions and expanding fair dealing criteria? Does the Conservative government realize that French-language publishers, which is already a precarious market because of its size, and all creators who profit from or work in this industry will be hit hard by such a measure?

- Fair dealing is an important and long-standing feature of copyright law in Canada and many other countries. It permits the use or copying of copyrighted material in the public interest in ways that do not threaten the markets of copyright owners.

- "Fair" dealing is not "free" dealing. Precedents in Canadian jurisprudence are quite clear on what "fair" means.

- In 2004, in its CCH decision, the Supreme Court of Canada enunciated a number of factors to be considered in determining whether a dealing is "fair," which include the effect of the dealing on the work and whether the dealing had commercial purposes. This means that the fair dealing exception can only apply to uses that do not harm the legitimate interests of the copyright owner, taken in their particular context.

- Bill C-32 does not change these precedents.

- For example, in 2009 these criteria were used by the Copyright Board of Canada to formulate its judgement on a case involving tariff for photocopying in educational institutions, known as the "K to 12 Decision". In a July 23, 2010 ruling on an appeal of this

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decision, the Federal Court of Appeal judged that the Bill C-32 proposal to add "education" to fair dealing provisions would not affect how "fairness" was judged in this case.

- Claims that adding education will wipe out the Canadian book publishing industry, including French-language publishers, are exaggerated.

- Bill C-32 takes a balanced approach to copyright modernization, protecting the works while recognizing the interests of consumers and Canadian. We are confident that educators will use the provisions responsibly and that copyright owners too will be judicious and responsible.

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NOT SERIOUS ABOUT FIGHTING PIRACY

3. How does the Conservative government hope to seriously fight piracy if it only requires Internet service providers to notify offenders, and, what's more, reduces the damages these offenders are liable for?

- This Bill contains provisions that rights holders have asked for to improve their ability to control the uses of their works online to prevent widespread illicit use. We think the Bill will also allow for the promotion of legitimate business models.

- Legal protection for technological protection measures will help discourage circumvention of the measures, such as passwords, that rights holders use to ensure legitimate access to their works.

- The Bill recognizes that the most effective way to stop online infringement is to target those who enable and profit from the infringements of others, such as illegal peer-to-peer file sharing sites. That's why this Bill creates a new civil liability, giving rights holders a key tool to use to protect their works.

- Also, ISPs will be required to discourage infringing uses of their facilities by participating in a "notice and notice" regime. ISPs will be required to forward any notice they receive from a copyright owner to a subscriber who is alleged to be engaging in infringing activities online. This system, which has been in place voluntarily, quite frankly works. It is more effective in a peer-to-peer environment than a "notice and takedown" system as there would not be anything to "take down".

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NON-COMMERCIAL STATUTORY DAMAGES

4. Under statutory damages, the Bill introduces a new category for "non-commercial purposes". What happens when an act with a non-commercial purpose has a significant commercial effect on the rights holder?

- Digital technologies have changed how copyright material can be used and shared. Activities that were non-commercial activities such as using or sharing copyright material in a pre-digital world may have had no significant impact on a rights holder. Today, one email of a bootleg, unreleased film can cost millions of dollars.

- Without in any way condoning infringement, the Bill ensures that Canadians will not face the threat of disproportionate penalties for copyright violations that were not carried out for commercial advantage or private gain. The Bill provides balance and flexibility by adding a direction to the courts to consider proportionality in determining the appropriate penalties based on the facts of each case.

- The Bill preserves significant penalties for commercial infringers of copyright. Those who infringe copyright for commercial purposes will continue to face statutory damages of between $500 and $20,000 per work infringed.

- It is important to remember that statutory damages are only one tool. Copyright owners also have – and will continue to have – the ability to seek actual damages in all cases – commercial and non-commercial -- where they feel it appropriate.

- Bill C-32 provides for balance in limiting the amount of statutory damages that a person may be liable for, when the infringement is done for non-commercial purposes, while at the same time

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allowing rights holders to pursue actual damages and punitive damages where the level of harm warrants it. While this will mean some additional work to establish amounts in Court, I am confident that copyright owners will not bear any greater burden than other plaintiffs in other business contexts in Canada.

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REVENUE TAKEN FROM CREATORS

5. The many new exceptions in the Bill all take revenue – current or potential – away from creators. How does this support the cultural industries growing the digital economy?

- Bill C-32 is about modernizing Canada's Copyright Act to meet the challenges and opportunities of the digital environment, and bring Canada up to international standards.

- The Bill proposes a fair and balanced approach to create clear rules to support creativity, innovation, economic growth and jobs.

- The Bill provides rights holders and creators with new rights, protections and tools to encourage new business models, and certainty for artists and creators to engage in the global digital marketplace with confidence. For example:

  - The Bill implements the rights and protections set out in the WIPO Internet Treaties. These treaties represent an international consensus on the standard of copyright protection needed to respond to the challenges and opportunities of the Internet and other digital technologies.

  - The Bill gives creators a "making available right" that will enable them to control the release of copyrighted material on the Internet. This will protect against all making available of works without the authorization of the right holders.

  - The Bill prohibits, except under limited circumstances, the circumvention of technological protection measures used by some creators to prevent unauthorized use of their work. Providing protection for TPMs ensure that they are a viable choice for creators who choose to use them to advance new digital business models and compete on the international stage.

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- The Bill allows creators to benefit from legal protections for "rights management information" which ensures that the identity of the creator and key information is always connected to the work.

- The Bill introduces a new civil liability to target those who wilfully and knowingly enable online infringement. Infringement on the Internet takes revenues away from creators and reduces the incentive to create. This measure ends a clear message that Canada does not welcome any sites that enable infringement.

- Finally, the Bill will ensure the Copyright Act remains responsive to a changing environment by requiring a review of the Act by Parliament every five years.

- These rights and tools are important to incent and reward creativity and innovation.

- At the same time, the Bill does provide some exceptions for the everyday activities of consumers, and for education, research and learning. These exceptions are equally important for creativity and innovation.

- Copyright has always been about finding the balance between the rights of the creators of works, and the interests of those using them. This Bill, over all and within each provision, tries to strike that balance for the benefit of all Canadians.

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HOW DID YOU DECIDE TO DEPRIVE CREATORS

6. Artists are talking about the huge impact Bill C-32 will have on their incomes. What documents does the Government have to show that C-32 is good for creators? How did the Government decide to deprive artists of income without compensating creators?

- Bill C-32 includes strong measures to ensure that Canada's creative communities will continue to thrive and produce high-quality content.

- In Summer 2009, the Government held 8 weeks of national consultation on copyright.

- The consultations featured an interactive website, two public town hall meetings and multiple stakeholder round tables across Canada. Over 8000 submissions were reviewed in total, and are available for public viewing on the consultation website.

- During the consultations, artists and creators said they deserve to be fairly compensated for their creative work and investment. The Bill responds to this by providing new rights, protections and tools to encourage new business models, and certainty for artists and creators to engage in the global digital marketplace with confidence. For example:

  - The Bill implements the rights and protections set out in the WIPO Internet Treaties. These treaties represent an international consensus on the standard of copyright protection needed to respond to the challenges and opportunities of the Internet and other digital technologies.

  - The Bill gives creators a "making available right" that will enable them to control the release of copyrighted material on the

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Internet. This will protect against all making available of works without the authorization of the right holders.

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- The Bill allows creators to benefit from legal protections for "rights management information" which ensures that the identity of the creator and key information is always connected to the work.

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- These rights and tools are important to incent and reward creativity and innovation.

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WHY NOT OPEN-ENDED FAIR DEALING

7. There are many exceptions introduced in Bill C-32, and users are saying that implementing such specific exceptions will be confusing. Why is the Government choosing to introduce numerous exceptions instead of just adopting an open-ended approach to fair dealing?

- Creating specific exceptions provides greater certainty than an open-ended fair dealing. Each exception has its own specific conditions that have been carefully designed to balance the interests of rights holders and those who would make use of the exception. For instance, the exception for user generated content, commonly called "mash-ups", contains targeted conditions that, among others, require that the mash-up must be used only for non-commercial purposes and cannot have a substantial adverse effect on the market for the original work or works used to make the mash-up.

- Fair dealing is a long standing feature of Canadian copyright law that permits certain uses of copyrighted material in ways that do not unduly threaten the interests of copyright owners, but which could have significant societal benefits.

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