



DOCUMENTARY
ORGANIZATION OF CANADA
DOCUMENTARISTES
DU CANADA

215 Spadina Avenue
Suite / Bureau 126
Toronto, Ontario
M5T 2C7
416.599.3844
1.877.467.4485
www.docorg.ca

**A Brief for the Legislative Committee
on Bill C-32's Study of Bill C-32,
An Act to Amend the Copyright Act**

February 7th, 2011

February 7, 2011

Committees Directorate

Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Re: Study of Bill C-32, An Act to amend the Copyright Act

Dear Honourable Gordon Brown and members of the Legislative Committee on Bill C-32 (CC32),

The Documentary Organization of Canada/l'Association des documentaristes du Canada (DOC) appreciates the opportunity to submit this brief to the Legislative Committee on Bill C-32 (CC32) for its Study of Bill C-32, An Act to amend the Copyright Act.

DOC is the collective voice of independent documentary filmmakers across Canada. DOC is a national non-profit arts service association representing over 800 directors, producers and craftspeople in the documentary community, from all provinces and regions of our nation. DOC advocates on behalf of its members to foster an environment conducive to documentary production and strives to strengthen the sector within the broader film production industry.

As the Canadian government drafts policy to empower Canadians in a digital age, it is essential that it approach copyright legislation in a fair and balanced manner. Bill C-32, the Copyright Modernization Bill, is a good start to modifying copyright law so that it conforms with international standards, allows the Canadian public to use their digital content more freely, and maintains strong rights for creators.

DOC supports the foundational principles of the bill, but believes there is room for improvement. Our support for the bill is contingent on changes that we think would make it stronger, and would be beneficial to all the affected stakeholders.

Executive Summary

In this brief, DOC comments on, and proposes solutions about three major issues that affect the documentary industry:

1. the Bill's approach to copyright and educational institutions (specifically the impact of the elimination of public performance royalties);
2. fair dealing;
3. digital locks and technological protection mechanisms.

It is DOC's view that Bill C-32 requires modifications, so that it meets the needs of Canadian content creators and the Canadian public. We recommend that the legislative committee seriously consider:

1. reinstating all the public performance royalties provisions in the Bill;
2. eliminating or amending the provisions related to accessing materials publicly available online by educational institutions (provision 30.04, 1-6);
3. amending fair dealing for educational purposes by requiring due diligence and enforcement mechanisms provisions;
4. adding a fair dealing exception to the list of anti-circumvention exceptions for TPMs and digital locks.

Without these amendments, DOC argues that the revenues of documentary filmmakers and their current business model would be jeopardized. Furthermore, we believe that access to Canadian cultural content for legitimate purposes by documentary filmmakers would become increasingly difficult.

A principled approach to copyright

Copyright must balance two often competing purposes: enshrining the legal right for creators to exploit the value of their expressions, and providing exceptions and exclusions that balance the public interest for the sake of dissemination and incentivizing creativity. When updating copyright legislation, it is critical that a fair balance be maintained between the two purposes.

It is DOC's opinion that in its current form the bill fails to uphold the principles of fairness, balance, and clarity: it contains provisions that could unfairly tip the balance of copyright to favour the needs of some stakeholders more than others. However, if the bill maintains a principled approach to copyright, the bill can be modified in order to rectify this imbalance.

Some sections of Bill C-32 must be altered. Currently the alterations that have been made to the sections on educational institutions, fair dealing, and the addition of the digital locks provisions would be beneficial only to certain stakeholders, and detrimental to others. If the bill is passed in its current form, the documentary industry would be negatively impacted. DOC would like to provide its explanations why this is the case, and some possible revisions to the bill to rectify its deficiencies.

Documentary Filmmaking and Copyright

Documentary filmmakers have a multi-faceted and complex relationship with copyright. They are creators of a unique form of art that often relies on the use of copyrighted materials of others to create or illuminate a story. Yet at the same time, they depend on copyright to exploit the economic value of their work.

Let us first address the issue of compensation: a robust copyright regime is the foundation on which producers can exploit the economic value of their productions. No professional documentary can be produced or distributed to the public without the existence of copyright royalties and licences. These are negotiated with the copyright owner for use in different *contexts* (theatrical, home-video, and educational distribution), *territories* (Canada, and abroad), on different *platforms* (television, online, VOD), and for different *time periods* (5-7 year broadcast licences, 3-year online rights or in perpetuity).

Let us now address the issue of creative expression: when a documentary is providing a review, a commentary or a criticism of the material contained in copyrighted material of other creators, the producer may use a fair dealing defence, and be exempt from paying for the use of a given clip. DOC recognizes that fair dealing should never be used as an excuse not to pay a licence. Fair dealing is not *free* dealing.

Fair dealing cannot be applied in a haphazard way; it requires diligence and an understanding of when to use the defence. But how does one judge if a use is fair? In DOC's *guidelines to fair dealing and documentary filmmaking*¹, we support the 6 step fairness test described in SCC CCH Canadian Limited vs. the Law Society of Upper Canada as an appropriate measure of fairness.

However, documentary filmmakers do not apply this test without oversight from lawyers and other advisors. Because broadcasters and distributors fear legal action from other content owners, all producers must be insured for the errors and omissions that may occur in the gathering of materials and licencing of materials for their work. This insurance requires due diligence from the producer at all steps. It also reduces risk for broadcasters and distributors. Errors and Omissions insurance is a requirement for almost all broadcasters, funders and distributors. It ensures that content creators are protected from abuse or breach of copyright. This clearance chain offers built-in checks and balances within the production environment.

Documentaries and the Educational Market

By virtue of their subject matter, documentaries are a natural fit for use in an educational context. Educational institutions and documentaries share the goal of informing and communicating to Canadians thought provoking stories about Canada and the rest of the world for the improvement of Canadian society. As a result, Canadian documentary producers, educational distributors, and the educational institutions have created a market where the producers and distributors of these stories can be compensated for the value of their expression. This market is known as the non-theatrical educational (NT) market. DOC collected data pertaining to the educational distribution market and estimates the total revenues per year derived from documentaries to be approximately \$ 5 million a year.²

Documentary filmmakers licence their films to educational institutions through public performance licences (PPL). A PPL permits the licence holder to exhibit the film in a public setting for a non-paying audience (schools are a public setting). Without a PPL, it is illegal for an educational institution to screen a film in a learning environment. There is a marked difference between public use and private use of copyrighted material. The PPL addresses this difference through the creation of a specific licence granted to the institution, which is usually built into the purchase price and not immediately apparent to the public. Public performance royalties flow back to the producers and form the majority of the producers' compensation in the NT market.

Similar to other copyright licences, a PPL is negotiated between the rights holder and the licensee. Some distributors licence the PPL for the life of the copy, and offer nominal rates for

¹ <http://docorg.ca/sites/docorg.ca/files/DOC-FairDealing-EN-v2-web.pdf>

²20% of participants responded.

replacement. Other distributors require educational institutions to renew the PPL per year and calculate the PPL per capita, which is usually the case with digital streaming. The onus is put on the educational institutions to log the use of the film in the classroom and as institutions evolve, track their online usage as well.

The NT market is often referred to as the bread and butter of the documentary industry, because it is an essential revenue stream for the industry and the value chain of a documentary. DOC conducted a survey of its membership with the aim of understanding the impact of the educational market on the Canadian documentary community. As for individual producers, 87% of respondents sell materials to the educational market.³

Of the producers that sell materials to the NT market, the share of revenues derived from the NT market vary by producer.

- 74% of producers derive under 25% of their revenues from the NT market
- 15% of producers derive between 25% and 50% of their revenues from the NT market
- 5% of producers derive between 50% and 75% of their revenues from the NT Market
- 3% of producers derive over 75% of their revenues from the NT Market⁴

Producers often licence their films to educational institutions at their full length, but also repurpose their films by making educational versions -- breaking them down into shorter excerpts suitable for use in the classroom, compiling these excerpts into collections of specific subject matter or creating interactive content for offline and online use. The majority of producers surveyed licenced full films to the NT market, with the creation of educational versions as the second option.

Bill C-32's educational provisions

The proposed provisions in Bill C-32 allow for increased flexibility for educational institutions to use copyrighted material in the classroom. DOC will enumerate those provisions that impact the documentary industry:

1. The elimination of the requirement for educational institutions to pay public performance royalties, and the associated logging requirements
2. The proposed use of materials publicly available on the Internet to be used in a classroom setting.
3. The addition of education to the fair dealing provisions

³61 of 785 of the members responded

⁴DOC's NT market survey Jan 2011.

DOC understands that the intent of the bill is to provide increased flexibility for the use of copyrighted material by educational institutions. We support increased use of copyrighted materials in educational facilities in every media, and look forward to enabling the distribution of innovative interactive materials for educational use. However, the bill in its current form would gut the educational video distribution market, and by extension seriously compromise the revenues of the Canadian documentary film industry. In order to reverse this outcome certain provisions need to be amended and others put back into the bill.

First and foremost, Bill C-32 must re-instate the public performance royalty provisions that were removed. The potential loss of these royalties could bankrupt the educational distribution market, and by extension documentary filmmakers would face a major cut in revenues.

Second, Bill C-32 must amend or eliminate the added provision wherein educators would be allowed royalty-free use of publicly available material from the Internet. When materials are publicly available online for personal use there should be no inference that they can also be used in an educational or public context. The language of this provision is unclear and does not take into consideration the differences between types of usage.

Educational distributors licence films to stream content in the classroom, and a broadcaster makes materials available to watch in the home through an online portal. Both educational distributor and broadcaster compensate the producers for each licence. If educational institutions can access the material from the broadcaster's website when they don't have a public performance licence to stream the production, they are in effect infringing copyright. The result would be that the producers would not properly be compensated for their works.

Allowing schools to use publicly available video on the Internet without the condition that they require a PPL for that same material threatens the emerging market of educational streaming rights. The language of this provision must be changed to include the requirement of a PPL in order for an institution to use materials available on the Internet.

Third, Bill C-32 adds education as an exception for fair dealing. Fair dealing already contains specific exceptions that relate to the use of copyrighted material in an educational environment: private research and study. Education is a broad category to add to fair dealing and it must be qualified in order to assess how the application of the fair dealing defence is, in fact, fair. DOC recommends that if Bill C-32 is to include education as a category for fair dealing, the teachers and students applying the fair dealing defence will have to be subject to the same due diligence tests as producers.

Documentary filmmakers pay errors and omissions insurance and hire legal counsel before they apply a fair dealing defence. Educational institutions take plagiarism as a serious offence, and they should also take the application of fair dealing seriously as well. In congruity with our support of the 6 step test, DOC argues that fair dealing in an educational setting should be subject to the same test.

The application of a fair dealing defence should be straightforward, transparent and accountable. Similar to the public performance royalty payments accountability system, the fair dealing defences should be logged, reviewed, and there should be an onus on the educational institution to practice due diligence and create punitive measures for offenders (teachers and students).

Documentary filmmakers derive significant portions of their revenue from the NT market. They should not be denied these revenues because a school does not want to pay to licence the material. Compromising the revenue stream of one stakeholder to compensate another is not fair, nor is it balanced. Rights holders should be compensated for the use of their work according to the value of the work.

Documentary filmmakers use the educational market as a revenue stream to operate their companies. In fact, though, the majority of educational and other distribution revenue received by individual producers goes to recoupment -- return on investment (ROI) for the original funders who assisted in the creation of the documentary program or the derivative educational versions. NT market revenues allow for the production of documentaries as well as the growth of the industry. Without the revenues derived from the NT market, fewer documentaries would see the light of day, and fewer materials would be available for the educational market. The proposed amendments to Bill C-32 would eliminate the incentive for documentary producers to create materials for this market. They cannot expect compensation in a market where there are no exclusive licences or royalties.

If the Educational section of C-32 is not revised, DOC envisions a not-too-distant future in which children, teens and university students sit in classrooms watching materials produced elsewhere than in Canada, and participate in online courses that contain no Canadian-produced media.

Digital Locks: Censoring Canada's Digital Past, Present and Future

Copyright reform is part of Canada's national digital strategy. As the government develops policy for this digital strategy, copyright should work to promote access to digital media, not hinder it. The current digital locks provisions attempt to protect the rights of content creators, and bring Canada's copyright laws into conformity with international copyright law. DOC supports a creator's right to protect their work using a technological protection mechanisms, including digital locks.

However, we also believe that in order to follow a principled approach to copyright there should be exceptions for circumventing digital locks that serve the public interest. In Bill C-32, there are many exceptions that allow Canadians to bypass digital locks, but none that allow for Canadians to circumvent digital locks for the sake of fair dealing.

In addition, the bill contains provisions that outlaw the creation of tools that could be used to circumvent digital locks, as well as provisions that forbid the sale of such tools, and their dissemination. To prohibit the means to bypass digital locks renders all exceptions inapplicable, and ineffective -- in other words, totally useless.

As more and more Canadians use digital technology to create their expressions, the prevalence of digital locks used to protect digital media will increase. If Canada wishes its copyright law to foster innovation and creativity, access to Canadian content is required. Digital locks, technological protection mechanisms, and digital rights management software must not hinder Canada's digital future.

Canadians need access to digital content for the purposes of fair dealing.

- News reporters need to be able to access video clips for their broadcasts.
- Researchers need to be able to keep records of digital content.
- Commentary, criticism, and review of Canada's digital culture needs to be accessible and not locked down.
- Documentary filmmakers need to criticize, reflect on, and comment on Canada's past present and future.

Already documentary filmmakers are encountering problems when attempting to access content behind digital locks. Documentarians are experimenting with new media and interactive documentary content using digital media. In order to access this material, they may have to break digital locks, which under the proposed legislation is considered illegal. However, their use of the material under a fair dealing defence would be legal.

DOC considers this contradiction to be at odds with the purposes of copyright: it protects the rights holder, but it does not act in the interest of the public for dissemination nor does it foster creativity. The digital locks provisions lock up cultural objects so that they cannot be accessed even for legal purposes. Furthermore, the instruments by which one could access these materials are prohibited.

In order to rectify this contradiction, DOC recommends that the digital locks provisions be amended so that Canadians can circumvent digital locks for non-infringing purposes, and in particular under fair dealing. This can be done by adding an exception to section 41.11, where the bill outlines the other exceptions. In addition, the creation of tools to circumvent for this purpose should not be prohibited.

Conclusion

In summary, it is DOC's view that Bill C-32 requires modifications, so that it meets the needs of Canadian content creators and the Canadian public. We recommend that the legislative committee seriously consider:

1. reinstating all the public performance royalties provisions in the Bill;
2. eliminating or amending the provisions related to accessing materials publicly available online by educational institutions (provision 30.04, 1-6);
3. amending fair dealing for educational purposes by requiring due diligence and enforcement mechanisms provisions;
4. and adding a fair dealing exception to the list of anti-circumvention exceptions for TPMs and digital locks.

Without these amendments, DOC argues that the revenues of documentary filmmakers and their current business model would be jeopardized, and the access the Canadian cultural content for legitimate purposes by documentary filmmakers would become increasingly difficult.

DOC would like to thank the legislative committee for this opportunity to share our concerns regarding copyright reform. We hope that you find our comments helpful as you update an important piece of legislation that affects all Canadians and their future in the digital era.

In order for Canada's digital strategy to succeed, copyright law must be updated, but it should not be done at the expense of some players for the benefit of others. Copyright should be fair, balanced and clear.

Sincerely,

A handwritten signature in black ink, consisting of a horizontal line followed by a stylized, cursive signature.

John Christou
Chair