Copyright Bill C-32 Submission

By: Rachel Gold and Tamara Winegust

Introduction

The essence of Copyright law is balance. As stated in *Therberge* and unanimously re-affirmed by the Supreme Court of Canada in *CCH Canadian v. LSUC* , this balance, between the rights of the creator and the rights of the user, serves to protect works of intellectual creation in literature and the arts from unauthorized use as a reward for their creation, while permitting those works to serve as inspiration for original creative endeavors. The recognition that prior creative works form the foundation for subsequent productions requires that these foundations remain accessible to the public. Legislative mechanisms can ensure such access. In enacting laws that provide for such access, users of copyrighted works — everyday Canadians — may employ those works for personal enjoyment and education. Most importantly, the copyrighted work produced today will become the building blocks for the creative productions of future generations. This creative cycle of use and reuse facilitates the evolution of all musical, dramatic, literary and artistic works. It has produced those works that have come to form an essential part of our identities as Canadians and as human beings.

The *Copyright Act* must balance the competing interests of creators (protection) and users (access) if it is to be effective legislation. It is clear that these two groups are not mutually exclusive – many users are creators and vice versa. Recognizing that individuals may hold such mixed interests in protection and access, the reforms proposed in Bill C-32 can have numerous implications.

What is good about the Bill?

Bill C-32 contains several new features that inject balance into Copyright law, three of which are of particular interest to user groups:

First, the Bill recognizes and protects a number of user exceptions/rights. These include time and format shifting, back-up copying and the user-generated content exception. The most notable user right is the expansion of Fair Dealing to include parody, satire and education. These allowable purposes provide users with legal protection to employ works under copyright in the creation of new works that would, in turn, be copyrightable by its creator. Providing for access to copyrighted works while protecting the new productions that employ such works, these exceptions implicate the rights of both users and creators.

Second, the provisions relating to use by “intermediaries,” such as web hosting services and internet service providers, also address mixed user/creator interests. By imposing a reasonable level of responsibility for copyright infringing material on their networks, these provisions grant broadcast intermediaries “safe harbour” for certain types of use. For example, the mandatory “notice and notice” system requires that the intermediary forward a complainants notice of infringement to their subscriber

rather than taking down the content altogether. This ensures intermediaries have some role in infringement prevention on their networks, but limits their role to prevent an abusive exercise of power. While attempting to ensure the integrity of internet access, this provision places control of online content into the hands of third party subscribers, thus alleviating intermediaries of the onerous burden of monitoring and moderating content on their networks.

Last, the proposed Bill creates a "two-tiered" system of statutory damages that depend on whether the use is for commercial or non-commercial purposes. Splitting the previously harmonized damages into two categories, this Bill would reduce the maximum amount of damages for all non-commercial infringements to $5000. Although reducing the level of available damages, this provision balances the interests of users and creators by maintaining a level of damages significant enough to deter non-commercial infringers, while recognizing that those who infringe copyright for no commercial gain need not be subject to the same level of damages as one who infringes in a commercial context.

What needs to be changed and Why?

There are several provisions in Bill C-32 that shift the Copyright balance significantly in favour of creators who seek to capitalize on their copyrighted works. Specifically, those provisions relating to the implementation of technological protection measures (TPMs) risk creating a copyright regime that will stifle the creativity of Canadians. Although intended to implement our international obligations under the WIPO internet treaties, these provisions prohibit the circumvention on TPMs, which control access to and copying of a work, even if that work would be used for a purpose and in a way permitted by the legislation. In addition, the proposed provisions also prohibit the renting or selling of services, software and devices that would circumvent TPMs. To achieve proper balance, these provisions must be modified to achieve a balanced piece of legislation, lest they tip the scales towards the rights of creators at the expense of users.

The TPM provisions of Bill C-32 are problematic for three reasons:

First, the provisions fail to allow the circumvention of TPMs for non-infringing activities. This will incentivize the "locking-down" of information by creators and "locking-out" of users from that information. For example, a student gathering research for their dissertation would be prohibited from copying passages of an electronic book protected by a TPM, although such use would constitute fair dealing under the *Copyright Act*. The TPM provisions would thus render those activities that are deemed to not be infringing by the legislation to be infringing, making otherwise legal use of a work illegal and prosecutable. Not only does this inherent contradiction between the grant of rights undermine the purposes of the Fair Dealing provisions, it does so by allowing creators, not legislators, to institute the conditions necessary to facilitate infringement.

Second, although the Bill has a list of enumerated exceptions for circumventing TPMs, such as for encryption research, it lacks an exception for purchasing or accessing the software, devices or services to circumvent a TPM. Thus, even if one fell within an exception that sanctioned the legal circumvention of a TPM, the ability to circumvent the TPM and exercise one's legal right would remain prohibited. This catch-22 demonstrates a lack of thoroughness and thoughtfulness in the drafters that can be effectively addressed with minimal modifications to the existing proposed provisions.

Last, similar anti-circumvention provisions found in the United States' Digital Millennium Copyright Act (DMCA) have complicated the implementation and administration of copy rights. For example, Chamberlain Group, a garage door opener manufacturer, invoked the DMCA against Skylink, another garage door manufacturer, that made universal remote openers. Chamberlain claimed that Skylink's universal opener circumvented Chamberlain's mounted garage door receiver unit technology to work. One wouldn't think that a garage door manufacturer would be subjected to months of copyright litigation against them. These provisions have proven to bring a variety of matters into the realm of copyright law which are intuitively unrelated to copyright protection, complicating a regime that legislative reforms are intended to clarify.

These three provisions are overshadowed by the overarching problem relating to the TPM regime as is currently proposed: that where there is a TPM over the work, no users' rights will apply. Thus, an otherwise legal act, such as time or format shifting, or the use of a work for parody, education, research or criticism, will be rendered an act of infringement and therefore illegal if accessing or copying the work employed in that activity involves the circumvention of a TPM.

Concluding Remarks

The Supreme Court has been clear that the Copyright Act guarantees certain rights to users of copyrighted works. These rights should not be undermined. The current incarnation of Bill C-32 ignores these rights, subjecting creative producers and ordinary Canadians to a TPM regime that would criminalize their otherwise protected uses.

To implement the WIPO Internet Treaties and bring Canadian copyright legislation in line with our international obligations, the government should maintain the TPM provisions but add provisions specifying that they shall only apply in circumstances of actual infringement. This would address the contradictions in the provisions relating to allowable circumvention and restore balance to the Bill by ensuring that users rights, as embodied in the Fair Dealing and specific exceptions provisions, remain an integral and animated element of the Canadian copyright regime.