

SUBMISSION

TO

**LEGISLATIVE COMMITTEE ON BILL C-32
FEBRUARY 3, 2011**

PREPARED BY

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FEBRUARY 2011

About Retail Council of Canada

Retail Council of Canada (RCC) has been the Voice of Retail in Canada since 1963. We speak for an industry that touches the daily lives of Canadians in every corner of the country — by providing jobs, career opportunities, and by investing in the communities we serve.

RCC is a not-for-profit, industry-funded association representing more than 40,000 store fronts of all retail formats across Canada, including department, specialty, discount, and independent stores, and online merchants.

RCC is a strong advocate for retailing in Canada and works with all levels of government and other stakeholders to support employment growth and career opportunities in retail, to promote and sustain retail investments in communities from coast-to-coast, and to enhance consumer choice and industry competitiveness. RCC also provides its members with a full range of services and programs including education and training, benchmarking and best practices, networking, advocacy, and industry information.

Vision Statement:

Retail Council of Canada (RCC) is the leader in advancing and protecting the interests of the retail industry in Canada.

Mission Statement:

Retail Council of Canada's (RCC) mission is to be the Voice of Retail in Canada by providing advocacy, research, education and services that enhance opportunities for retail success, and increase awareness of retail's contribution to the communities and customers it serves.

Retailers succeed by knowing what the public wants and needs and serving such needs with the greatest possible efficiency. In many ways, retailers are the best proxy and representatives of the public interest because successful retailers get to be that way by understanding the public's needs and wishes. The RCC has also been involved successfully on behalf of the consumer interest in major court cases relating to two of the issues we will deal with today - namely levies and parallel imports.

1. Levies:

- a. The issue of levies is not dealt with in the Bill, although it has loomed large in the discussion about the Bill. We believe that any amendments dealing with attempts to create an "iPod" tax or anything similar would clearly be out of order, since Part VIII of the **Copyright Act** is not dealt with in the Bill. If Part VIII is opened up, it only should be for the purpose of repealing it. We note that the levy regime is all neatly contained in Part VIII. Accordingly, it is extremely simple to remove it. There are no other complications in terms of interconnections with other provisions of the Act. Since both responsible Ministers have repeatedly referred to the proposed iPod levy as a "tax", we too shall use this terminology.

- b. There are good reasons to avoid any consideration of an iPod tax. These include the following:
 - i. The economic effect of a "tax on technology" that would surely migrate to smart phones and other portable devices, and even tablets, laptops and desktop computers would be devastating. There is no such tax in the USA, Australia, or the UK. Nor is any such tax contemplated in these jurisdictions. Ironically, Australia had such a tax and it was struck down by their highest court because it was found to be legally a "tax" that was illegally enacted. That was the end of it.
 - ii. Although there is persistent denial by the iPod tax proponents, the fact is that in their most recent attempt at the Copyright Board to impose a levy on digital audio recorders, they asked for the amount of "\$75 for each recorder with more than 30 GB of memory". In other words, that would cover the ubiquitous iPod "Classic" and many other devices. This was published in the Canada Gazette on February 10, 2007 and further published by the Copyright Board. This fact cannot be denied.¹
 - iii. A levy on iPods and similar devices would also necessarily entail the "legalization" of private copying, irrespective of the source - including from "illegal" websites. The Copyright Board itself has ruled that it is legal for consumers to make copies for private use of any music - even from illegal sources - as long as the copies are made onto media that fits the definition of blank audio recording media, whether or not a levy has been sought for that particular

¹ <http://cb-cda.gc.ca/tariffs-tarifs/proposed-proposes/2007/20070210-c-b.pdf>

- medium.² We cannot tax an activity that we also deem to be illegal. We must choose either to fight piracy in other ways, or to legalize private copying and tax it. We cannot have it both ways.
- iv. If we have an iPod tax and we ratify the WIPO treaties, the amount would inevitably double and all of the additional proceeds will leave the country. This follows from the fact that payments would be required on account of sound recordings and performances that are currently not considered to be “eligible repertoire” due to the fact that Canadian law does not require that payments be made on a national treatment basis for foreign sound recordings and performers’ performances, in contrast with “works”, such as songs.
 - v. This, however, will change if Canada ratifies the 1996 WIPO WPPT (performances and phonograms) treaty. This would require a change in the legislation that would get rid of any “eligibility” requirement and provide simple national treatment to sound recordings and performers’ performances. In such a case, the formula and methodology repeatedly used by the Copyright Board would result in a levy calculation of almost precisely twice what the amount would be without such a change in legislation. This “doubling” conclusion is a matter of simple arithmetic and has not been seriously disputed by anyone. By definition, all of the extra money resulting from this doubling would leave Canada. RCC does not believe that any Canadian government would wish to be responsible for such an outcome, which could quickly result in a net outflow of hundreds of millions of dollars. The only certain way to avoid it is to either repeal Part VIII of the **Copyright Act**, or let the levy regime die out on its own, which is very likely to happen quite soon, given that sales of blank CDs are rapidly falling to zero.
 - vi. The constitutionality of an “iPod Tax” within the **Copyright Act** remains highly questionable. Although the RCC did not succeed in its 2004 effort in the Federal Court of Appeal to have Part VIII of the **Copyright Act** declared to be an illegally enacted and unconstitutional taxation scheme, there is a good argument that a future challenge to a “tax” on iPods and other similar digital audio recording devices might succeed.

² *Private Copying 2003-2004: Copying for Private Use* - December 12, 2003 <http://cb-cda.gc.ca/decisions/2003/20031212-c-b.pdf>

2. Parallel Imports:

- a. RCC is concerned that s. 4 of the Bill (which would amend s. 3(1) of the Act) and which is supposedly required to impalement the “distribution” right found in the WIPO treaties may inadvertently have a negative effect on the Canadian law with regard to "exhaustion". This principle holds that, once a tangible product has been legitimately put on the market anywhere in the world, that product can then be imported into Canada free of any intellectual property barriers. This is expressly permitted by the WIPO treaties and the WTO TRIPS agreement. Any rights to restrain trade in the tangible product are thus said to have been "exhausted".
- b. Such imports, which are by definition legitimate and not counterfeit, are often called “parallel imports” because they enter the country other through the so-called “exclusive” distribution channels. This principle is seen by consumers and most retailers as being indispensable to the maintenance of competition and the prevention of international price discrimination. Otherwise, we will see Canadians paying more for the same products than Americans, for example. RCC successfully intervened in the Supreme Court of Canada recently to fight for this principle and for consumers' rights and made the prevailing arguments in the case of ***Euro-Excellence Inc. v. Kraft Canada Inc.***, 2007 SCC 37, [2007] 3 S.C.R. 20. Above all, RCC wishes to make the point that any change to the principle of exhaustion should be fully considered and explored with all stakeholders.
- c. The current drafting is probably unnecessary because we effectively have a “distribution” right in place already. This can be found in the provisions of s. 27(2) generally and s. 27.1 with particular respect to books, as well in the basic elements of contract and, if necessary, criminal law. The example of a prematurely released and widely expected book is sometimes given to justify an explicit distribution right. However, it is obviously illegal to steal books from a warehouse or to deal with them if they are known to be stolen. Even if the books are not “stolen” but simply somehow released ahead of the contractually agreed date, existing principles of contract and/or copyright law and the power of the Courts to issue injunctions should suffice to deal with most if not all conceivable situations that would warrant a remedy. Thus, the example of a premature release of widely expected book or other work does not justify unnecessarily changing our copyright law.

- d. In any case, if we are to have such a provision, we must ensure that it does not have serious and unintended consequences. In the current draft, the wording would arguably limit the allowance of parallel imports to situations where there was an actual sale abroad. This might not cover many items that are now supposedly only licensed, even if the actual effect of the transaction is a sale. Moreover, it is not clear as to which copyright owner must provide “authorization”. We do not believe that a Canadian copyright owner should be able to block parallel imports of a legitimate product made abroad by another copyright owner. That is contrary to basic principles of free trade and competition.
- e. RCC believes that any wording on this issue should be consistent with the wording in s. 27(2)(e) of the **Copyright Act** and the reasoning of the prevailing opinion of the Supreme Court of Canada in the **Kraft** decision, namely that a copyright owner cannot infringe its own copyright. For example, we would not wish to see artificial segmentation of markets whereby copyright can be assigned in Canada to a Canadian entity for the sole purpose of excluding the importation of tangible goods legitimately made and sold into the market by a foreign rights owner, which would often (though not necessarily) be a related company.
- f. We also believe, along with Justice Bastarache and two other justices in the Supreme Court of Canada in their concurring opinion in the **Kraft** decision, that the “merely incidental” inclusion of a copyrighted work - such as a logo on a chocolate bar label - should not suffice to block free trade in the tangible legitimate object that is being imported. As Justice Binnie rhetorically asked in the **Kraft** hearing, does one buy the chocolate bar to keep the label and throw away the chocolate? We acknowledge that this is a separate though closely related issue to that of parallel importation. However, it is important to have clarification on both.
- g. Accordingly, here is RCC’s proposed wording, with our suggested change underlined:
- ...in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, provided that the work protected by copyright is not merely incidental to the tangible object or that the tangible object has not previously been put on the market anywhere in the world with authorization.*

3. Fair dealing and exceptions:

- a. The Federal Court of Appeal has recently ruled that the use of thirty second previews by iTunes for the purpose of consumer research is "fair dealing" under Canadian law. The Supreme Court of Canada will be hearing this case, probably later this year. Consistent with that ruling, we believe that the performance of music for the sole purpose of demonstrating any consumer electronics device or selling CDs or DVDs should also explicitly be included as an exception in the legislation to clarify what we believe is already the law. This would be perfectly consistent with long standing explicit American legislation that deals with this issue. At the present time, SOCAN and Re:Sound are demanding enormous sums of money for the use of music that is not actually "background" music because of inadequately worded tariffs from the Copyright Board and silence in the legislation.

- b. This needs to be addressed and clarified in the legislation in the provisions dealing with "fair dealing" and other exceptions. There is no need for Canada's retailers to be at a yet further disadvantage compared to their cross border cousins. We suggest that wording such as the following be added to s. 29 of the **Copyright Act**. This is similar to language that has long existed in s. 110(7) of the US **Copyright Act**:

It is not an infringement of copyright for any person to perform any work or other subject matter by means of recorded music in a vending establishment open to the public, where the sole purpose of the performance is to promote the retail sale of copies or sound recordings of the work or other subject matter, or of the audiovisual or any other devices utilized in such performance, and the performance is not communicated to the public by telecommunication beyond the place where the establishment is located and is within the immediate area where the sale is occurring.

4. Technical Protection Measures:

- a. We join the chorus of many manufacturers of consumer electronics and many artists themselves who believe that overly rigid technical protection measures are bad for artistic creativity, bad for innovation and last but not least, bad for retailers' business and business in general. If Bill C-32 as now exists had been on the books in 1980, we would not have had the VCR, the personal computer and countless other products that we have depended upon.

- b. There should be no prohibition of devices or services that have substantial non-infringing uses. Consumers should be free to do whatever they want with their hardware and software, as long as that use is for private purposes and is otherwise non-infringing. That is all that is required by the treaties and that is as far as Canada should go. We suggest the addition of wording such as the following in the introductory wording of the proposed section 41:

41. The following definitions apply in this section and in sections 41.1 to 41.21.
“circumvent” means,
*(a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition “technological protection measure” **and for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it**, to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner; and*
*(b) in respect of a technological protection measure within the meaning of paragraph (b) of the definition “technological protection measure”, **and for the purpose of an act that is an infringement of the copyright in it or the moral rights in respect of it**, to avoid, bypass, remove, deactivate or impair the technological protection measure.*

5. Photo Finishing:

- a. Today's inexpensive cameras, with their remarkable technology, if used by a creative person, can take pictures that look very professional. They may be of family, pets, scenery or just about anything. In fact, they may look so professional that some photo finishers are scared to make prints of them for fear of being sued for statutory minimum damages, which can be as high as \$20,000 for each photo. The Bill should include an explicit exception that immunizes any commercial photo finisher acting in good faith who relies on the written representation that the customer has the right to request the reproduction.

- b. Obviously, such a provision would not extend to the usual graduation, wedding or similar commercial photography that invariably includes a prominent copyright notice in any event. Suggested wording for inclusion in s. 29 of the **Copyright Act** is as follows:

It is not an infringement of copyright for any person, whether or not for commercial gain, to reproduce a photograph in tangible format provided that:

(a) The person making the reproduction has no actual notice or no reasonable grounds to believe that making the reproduction would infringe copyright; and

(b) The person requesting the reproduction provides reasonable identification and confirms in writing or by adequate electronic means that he or she is the owner of the copyright in the photograph or is authorized by such owner to request the reproduction.

6. **Conclusion:**

RCC thanks this Committee for its work on these very difficult issues upon which there are strongly held views by a wide variety of interest groups. RCC hopes that the Committee will view the above suggestions as a balanced and productive contribution to the public debate and in the public interest.

RCC will continue to follow this important Committee process. If we have further suggestions as to specific wording or if other important points should emerge, we hope to be of assistance by providing updated material and that you will find such material helpful.

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