Brief

Submitted by the

Société des auteurs de radio, télévision et cinéma

on Bill C-32, An Act to amend the Copyright Act

January 2011

SARTEC is a professional union representing more than 1,250 authors working in the audiovisual industry. It is recognized under provincial legislation (1989) and federal legislation (1996) on the status of the artist and has signed collective agreements with the Association des producteurs de films et de télévision du Québec (APFTQ), Société Radio-Canada, Groupe TVA, the National File Board (NFB), Télé-Québec, TFO and TV5. SARTEC is a member of the International Affiliation of Writers Guilds (IAWG) and the International Confederation of Authors and Composers Societies (ICACS).

Generally speaking, Bill C-32 contains a number of worthwhile points. Incorporating the WIPO treaties in our legislation, very late though it is, and recognizing ownership of the rights in photographs on commissioned works, also late, are welcome provisions. Making it easier to bring action against people who patronize illegal file-sharing sites is also a desirable initiative if it contributes to strengthening the legal supply.

The anti-circumvention measures for digital locks will primarily benefit certain major rights holders, and, as in 2007 when the government made haste to combat pirating in movie theatres, it demonstrates that it is sometimes easier for an American film producer than for a creator from here at home to have their rights protected by our legislation.

It must be admitted that there are far fewer measures for strengthening copyright than for limiting or restricting it. And while the government is being rather timid when it comes, for example, to holding Internet service suppliers accountable, it is going more boldly when it comes to new exceptions to copyright.

Unfortunately, there is nothing new under the sun. In August 1996, in response to a bill to amend the *Copyright Act*, that by bad luck was also called Bill C-32, SARTEC also complained at the parliamentary committee that [TRANSLATION] “the introduction of a whole new set of exceptions (adulterated) the *Copyright Act*, who seems no longer to have protecting works as its objective, and rather has become a legal grab-bag where users’ rights will now take precedence over creators’ rights.”

In fact, each revision brings its own share of new exceptions and the present Bill C-32 falls right into line, showing generosity at the expense of educational institutions, libraries, broadcasters, consumers and so on. Consider the extension of the concept of fair dealing for the purpose of education, the extension of photocopying licences to the digital realm, the provisions relating to ephemeral recording. Consider the exceptions being added even when collective societies exist or money has already been collected from users, thus causing a net loss of income for creators. Consider the exceptions that may lead to confusion in interpreting them, and thus to more litigation and the resulting higher management costs and lower incomes.

While we believe that every new exception goes a little farther to undermining the foundation of the rights of all creators, we will leave it to our colleagues in other sectors to address the ones that affect them more directly and focus on our field, the audiovisual industry.

An end to private copying announced

The private copying regime currently applies only to audio recordings. It allows the reproduction of works for private use and compensates rights holders for that use. The advent of digital recording promotes access to and reproduction of works, and so it seems to us to be desirable for that regime to be extended to books, films, television series, etc., and thus to protect the economic value of works of any nature.

Instead, the government has chosen to pronounce the death sentence for private copying by limiting the existing compensation scheme to blank audio media, rather than extending it to the various media or devices used. Little by little, the royalties paid to the present rights holders will disappear at the same rate as the use of cassettes or CDs.

Moreover, by creating new exceptions for later viewing of television programs and to change to alternate formats, Parliament at the same time sounds the death knell for any eventual extension of private copying to audiovisual and other sectors.

By recording a work for later viewing or reproducing it on another medium, a consumer is using copyright. That practice is widespread and is not currently compensated in Canada (except for audio recording) and it would be just as pointless to try to stamp it out as it would be ridiculous to make it a criminal offence. Certainly, in the bill, a reproduction made for private purposes cannot be given to any one, nor the reproduced copy, unless the reproductions have been destroyed, but that restriction will be unenforceable in practice. How can the user be prevented from making the work available for private purposes? Given access to friends and family members for private purposes?

In any event, the private copying regime appears precisely to be in exchange for an exception. It allows for a violation of the law to be regularized and a common practice made legal, without penalizing authors. While that approach has been implemented by a number of countries around the world, Canada is on the outside by doing so at the expense of rights holders.

To include uses that are already permitted in the audio realm and uses that the bill adds in the audiovisual realm, Parliament should have extended the regime to the apparatus, such as digital audio recorders, but also digital video recorders and other integrated hard disk decoders, telephone devices, and so on, to ensure adequate remuneration for rights holders for what is still a reproduction of their work, an act formerly protected by the Act.

That applies equally to the permission the consumer is given to copy content, even if acquired legally, onto another medium. Previously, if a musical work was transferred from vinyl to CD, or a film from videocassette to DVD, rights holders could benefit from the change of medium. Now, once the works are digitized, it will be possible to recopy them more than once on new devices without the rights holder receiving anything at all. The fact that the consumer pays $200 or $300 or $400 for a device that will rapidly become obsolete is of no concern to Parliament, but if the consumer has to spend a few

dollars to transfer the content, Parliament hastens to eliminate the right. Market forces operate only for manufacturers of the devices, not for those whose content is expropriated; and yet otherwise the devices would hold little attraction. Parliament thus promotes the sale of goods that are often manufactured abroad, by giving free and perpetual access to domestic content that it is becoming harder and harder to finance. Parliament is not doing the consumer any favours, it is doing that industry one.

Unfortunately, in striving to meet the needs of the big corporations and of consumers, in creating more and more exceptions for the benefit of just about everyone, in the fact that the bill "legitimizes activities that Canadians do every day" **without any consideration in exchange**, the government has failed to understand that in order for creators to supply the digital economy with their works, they must be able to get something out of it. That is a prerequisite for the existence of quality domestic content on the various digital networks.

User-generated content

As pointed out in the government's introductory documents, the bill permits "the use of legitimately acquired material in user-generated content created for non-commercial purposes". However, that measure is to apply only to "creations that do not affect the market for the original material" like making a home video or a "mash-up" of video clips. That exception is allegedly justified because "more and more, Canadians are using content in ways that contribute to the cultural fabric of our society [and] it is important for Canadians to be able to fully participate in the digital economy".

It is difficult to fully participate in the digital economy by and avoid any commercial aim. Certainly, some examples given may seem innocuous (home videos), but that exception could be much broader in application and difficult to interpret when we examine potential uses. Using an existing work without authorization and distributing that "new work" free of charge, to become known: commercial use, or not?

Using a work to make another work amounts to disregarding the author's moral right, the integrity of their work. To demonstrate this, can Parliament authorize anyone at all to appropriate the product of the author's talent? This new exception opens the door to a range of uses that it will be impossible to control. Certainly, the bill provides that use of the new work must have no substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the work. That will have to be proved and will undoubtedly involve hours and hours of fun in the courts for authors who want to assert their rights.

Expansion of the concept of fair dealing for the purpose of parody and satire

We have nothing against parody and satire. Our authors write them. As an association, we will both defend the right of authors to write them and refuse to allow works to be appropriated simply to ride on the coattails of their success and celebrity.

Satire and parody are not new genres and many authors have used them without being sued. In fact, one of the rare trials where the defendants used the parody defence is *La petite vite* which was intended as a pornographic version of *La petite vie*.

The Court of Appeal's judgment[1] examined the case from the standpoint of fair dealing for the purpose of criticism and the standpoint of the originality of the new work, and held that fair dealing could be argued only if the new work was intended as criticism of the first and was original.

When the question has been addressed by the courts and the defence of parody has been defined, why does Parliament think it wise to amend the Act? It is difficult to understand who is meant to benefit by expanding the concept of fair dealing for parody and satire. In the government documents, it appears in the section "What the New *Copyright Modernization Act* Means for Consumers", and is presented in the Frequently Asked Questions as a measure to foster creativity and innovation because "for entertainers and commentators, this bill includes parody and satire as purpose to which fair dealing applies." Are we seeing a new exception for consumers or a new right for authors?

When the Court of Appeal has said that parodies must be "critical" and "original", does including parody and satire in fair dealing not run the risk of pointlessly expanding the scope, opening the door to a more permissive interpretation and opening the way to more trials? At the time, if the producer of *La petite vite* had succeeded, he was considering using a number of other successful series. It would be somewhat ironic for a Conservative government to contribute to an escalating number of pornographic versions of our television series.

Exceptions for educational institutions

[1] The Court of Appeal stated that parody could be seen: [TRANSLATION] "from two angles: an exception to copyright infringement under section 27(1) (now 29) of the Act or an original work in itself. In the first scenario, clearly the Act is restrictive and the exception applies only in the cases it defines, in particular for purposes of criticism. As we know, criticism of an intellectual or artistic work is not always serious or learnèd; it can also be humorous or funny, by amplifying, distorting or exaggerating the work in question; in a word, it adopts the techniques of caricature; it will often be even more biting. In that sense, it may comprise an exemption, provided that the requirements of the Act are met. But that is generally not the situation being referred to; it is usually the second, in which parody is seen as a work in itself, original, separate and independent of the work parodied, that it takes hard work, imagination and talent to create, which distinguishes it from a fraudulent imitation."

"… The fact that there has been no formal decision on this point in Canada, at least not according to my and the parties' research, may result from the fact that in reality, this view of things is the commonly accepted one, and genuine parody is recognized. That means that if a creator produces a genuine parody and thereby creates a new work that imitates or ridicules another work or that draws on another work to mock or criticize a social or political event … *there will be no copyright infringement*. In my opinion, two criteria are met: the purpose of taking from the other work and the originality of the new work. … Parody and farce are literary and dramatic genres. Their purpose is to criticize a work, a situation or individuals through ridicule. When the work has been characterized as such, it has its own life. However, parody must not be a screen for avoiding intellectual work and benefiting from the renown of the parodied work.

The bill expands the concept of fair dealing for educational purpose while at the same time creating a large number of new exceptions for that sector. When it is plainly so difficult for collective rights societies to collect royalties from educational institutions, this extension of the concept of fair dealing helps to weaken their footings and runs the risk that it will lead to more proceedings in the courts to define its scope. In the case of audiovisual works, the bill emphasizes the free of charge aspect by eliminating the obligation to pay copyright holders to present films or recordings for pedagogical purposes, on the pretext that it is promoting access to the works.

Whether the exceptions affect the audiovisual or book industry, educational institutions, libraries or consumers, whether they come from the current bill or past revisions, they are generally based on the same argument.

Fallacious effort to strike a balance

As always, the exceptions are presented as the result of some alleged effort to strike a balance between rights holders and users. Certainly, legislative action is often desirable when the individual consumer is facing an imposing corporation that is in a position to dictate the rules of the game. But there is basis for saying that this is the case in relation to copyright; the opposite is true.

First, digitization has made the reproduction of and access to works increasingly easy, but it has complicated remuneration for that. The imbalance therefore tilts against rights holders, who must either negotiate with users or secure measures to compensate them for the losses incurred.

On this point, the pendulum once again swings against rights holders. Who can seriously argue that education ministries, whose budgets run to the billions of dollars, are in a position of weakness when they come up against that collective rights societies that collect a few million dollars a year? Some of the new exceptions are already the subject of agreements with or payments to collective rights societies, and the royalties paid to them represent only an infinitesimal portion of the budgets of the various ministries across the country.

In its argument as set out in the fact sheet entitled *What the New* Copyright Modernization Act *Means for Teachers and Students*, the government states: “The proposed bill builds on the existing *Copyright Act* to grant a larger range of uses for copyrighted material by teachers, students and schools, as their pursuits promote the broader public good. In light of this contribution, the *Copyright Act* already recognizes certain uses by educational institutions that are permitted, in many cases, without payment to the copyright holder.” (emphasis added)

The reasoning seems specious to us, to say the least. Does the fact that copyright works are useful to teachers mean that they should be free of charge? Must we conclude that only people whose activities do not promote the broader public good should be paid for the use of their copyright works?

Later, the government justifies the extension of the concept of fair dealing to teaching, saying: “Extending this provision to education will reduce administrative and financial costs for users of copyrighted materials that enrich the educational environment.” We must then conclude that anything that enriches the educational environment must automatically impoverish its author.

Still referring to fair dealing and exceptions, the government concludes: “The *Copyright Act* must adapt to new and emerging technologies. These changes will enhance the traditional classroom experience and facilitate new models for education outside of the physical classroom. The new bill reinforces and complements the Government of Canada's significant investments in Internet infrastructure, education and skills development.” Must we conclude from this that expropriating authors’ rights is considered to be a government investment for educational purposes?

The government has shown nowhere how the new exceptions are necessary for a new balance of power between rights holders and institutional users. It simply comes down on the side of educational purposes at the expense of the cultural element.

As well, there is nothing to suggest an imbalance that tilts against the consumer. The new exception for consumers’ benefit are also a gift from Parliament, funded by authors. The government wants to legitimize activities that Canadians do every day; fine. Must it do so at the expense of rights holders? How does giving free access to works contribute to the balance between rights holders and users?

The present Act did, however, contain the necessary guidance to promote this balance. First, the existence of collective rights societies makes it easier to access works and negotiate the appropriate tariffs with users. Second, the Copyright Board is in a position to intervene and set the tariffs, taking the parties involved into account.

A damaged right

The government seems to be taking copyright quite lightly when it expropriates rights holders’ rights this way. Has it forgotten that article 27(2) of the Universal Declaration of Human Rights states: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”?

Is it also forgetting that there are international treaties, as well, that govern the exceptions to copyright? Under article 13 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) or article 9 of the Berne Convention, exceptions shall normally be confined to “special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder”. And there is generally consideration for those exceptions when they are introduced. For example, private copying is an exception to the right to authorize or prohibit the reproduction of a work, but the exception generally carries a right to royalties with it. Here again, is the bill consistent with these treaties?

But copyright is also a property right, in property that has the misfortune of being intellectual. In the cultural industry, we may sometimes think that intellectual property is the only property that is not respected in this country. That is not entirely true. In fact, it depends on the owner.

Undoubtedly this intangible property is better understood when the product in question is a patented drug or belongs to a big corporation. Should we be surprised at the little respect this property gets when the ministries of education in Canada, with the exception of Quebec, believe that intellectual works used in the schools to enrich the content of their instruction do not deserve to be paid for and take malicious pleasure in conflating access to works and access free of charge, disregarding the fact that without remuneration, that content will be increasingly difficult to produce and they will undoubtedly have to look for content outside the borders for teaching?

Expropriating the rights of rights holders because users do not want to pay is a bizarre precedent. Why then not set the prices of all goods and services by survey? Why does the government not consult consumers to set the price of gas, for example? Is it easier to take on artists and creators than others?

Copyright is also the foundation of their remuneration. In its consultation paper on Canada's Digital Strategy last summer, the government stated that to create Canada's advantage in relation to digital content, it had to strengthen the laws governing intellectual property and copyright. The document carefully stated that "Canada's copyright regime is the mechanism by which much of the economic value flows through the networks of creation-production-distribution-consumption. The *Copyright Act* is an important marketplace framework law and cultural policy instrument".

Here again, as the consultation document states: "Copyright laws that give creators and consumers the tools they need to engage with trust and confidence in the digital marketplace are critical to a successful digital economy."

The government had clearly identified the challenges in relation to the digital world when it wrote in *Improving Canada's Digital Advantage* that "there are growing possibilities for new forms of content and new channels of distribution and access to current and emerging markets works" and on the other hand that "new technologies have disturbed existing means of control or appropriate compensation for the use and copying of their works". While observing that "new business models are developing (and) some complement while some compete directly with more established copyright industries", the government reaffirmed that "fair and appropriate remuneration for creators … is essential to the growth of digital media content in Canada".

Creators do not want to limit access to their works. They are linked to the economic life of the works and it is ordinarily entirely in their interests that the works circulate among as large an audience as possible. But the new distribution spaces have jeopardized the economic model that applied until now. Rather than benefiting from this wider

distribution, creators and other rights holders have often paid the cost of the burgeoning numbers of platforms and had their incomes decline.

The digital transition has hit the music industry, a large portion of whose revenue depended on the sale of disks, with full force. And while in the case of television, for example, the primary market is still the “small screen”, the rising numbers of platforms has hurt the royalties system. We need only think of television reruns, for which the authors were paid and which are increasingly less common since works became available in the Internet.

So we are witnessing a loss of value for the traditional methods of remuneration in a situation where the new media are still looking for their own economic model.

Bu legislating to authorize certain uses without consideration, the government has helped to move us away from this “fair and appropriate remuneration for creators [which is essential] to the growth of digital media content in Canada” it says it wants. The Copyright Act must remunerate rights holders adequately for the various uses of their works, whether or not they are part of the “activities that Canadians do every day”. Modernization of the Copyright Act should have served to guarantee that income will follow uses.

Every author assumes the risk of creation. They may sometimes work for months or even years on a work in the hope it will be published, played or produced. Some works never find a buyer. The risk then assumed by the author will never be paid off. And no one can predict the success of a work. A song may sell a few copies or become an international success. A book might be found in every bookstore or be quickly pulped. The author’s remuneration depends on the fortunes of their work. It is often fragmented, coming from various sources, composed of several sometimes modest sums that add up. Any new exception, even a delay in modernizing the Act to reflect the new uses, increases the risk of creation. To increase authors’ incomes, to develop the pool of professional creators, efforts have been made to expand the base of rights, to reflect the various exploitations better. Parliament is taking an axe to these efforts. What other group’s rights are expropriated without compensation? What other group’s remuneration is determined by unilateral decree?

Bill C-32 drafts rights holders into the service of schools, consumers, libraries. It demands much of them, and at the same time demands little in return, for example from Internet service suppliers.

Copyright is also a cultural development tool, since it helps to ensure the funding for or viability of works. How do we ensure that domestic production will be available on the various platforms, if Parliament grants free access to works every time the Act is revised? How will they finance themselves?

By expropriating a part of authors’ rights, the government is certainly reducing the costs of buying works, for the benefit of institutions and consumers and even all the businesses that use those rights directly or indirectly (digital device manufacturers,

ISPs, etc.), but it is also reducing the viability of the works and the rights holders' incomes and capacity to create and produce domestic content.

Does Canada want to build its digital advantage on the wealth of content offered or on the low remuneration paid to rights holders?