

1 March 2012

The Legislative Committee on Bill-C-11
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
CANADA

Attention: The Clerk of the Committee, Ms CH David
BY COURIER AND BY EMAIL TO C11@parl.gc.ca

Dear Member of the Legislative Committee

Canadian Copyright Modernization Bill, Bill C-11

We are writing to you in connection with your Committee's consideration of Bill C-11.

Our association, the International Association of Scientific, Technical and Medical Publishers ("STM"), is the leading global trade association for academic and professional publishers. It has over 110 members in 21 countries, who each year collectively publish nearly two thirds of the global annual output of research articles and tens of thousands of print and electronic books and references works. STM publishers originate and disseminate books, journals databases and individual articles and contributions of a multitude of Canadian and international scientific, medical and technical authors and scholars, both online and in print. STM publishers distribute their scholarly and scientific journals, books and databases for and to the research and education communities, communities that therefore constitute their most significant audiences and markets.

STM has already commented on the previous Copyright Modernization Bill, Bill C-32, which had met with broad-based criticism from the creative and publishing communities due to the very many exceptions proposed to be made to the rights of copyright. We note that the content of the new Copyright Modernization Bill, Bill C-11, is, to all intents and purposes, identical to the previous Bill.

1. Basic Position:

Bill C-11 introduces a myriad of new exceptions without any compensation for authors and publishers. If passed, the Bill will:

- deprive rightsholders, both Canadian and internationally, of important revenues;
- discourage investment in the publishing industry and harm trade in publishing goods and services;
- reduce cultural diversity and suppress the creation of new works;
- position Canada as an attractive haven for piratical business models;
- put Canada in violation of its existing obligations under both the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) by seriously affecting the existing and future sales and licensing market for educational, academic, professional and STM copyright-protected works;
- instantly and artificially reduce sales and royalties paid to publishers for the reproduction of content for education. Current estimates of the immediate reduction of royalties amount to over CAD \$ 30 million, not counting immeasurable, but probably much larger, losses due to the pirating opportunities for unprotected postings.

2. Detailed Position:

2.1 Fair Dealing for the Purposes of “Education” [s. 29]

The Bill will extend the fair dealing exception to “education.” This term is undefined and therefore very broad in its application, particularly in light of Canada’s Supreme Court decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, which has ruled that fair dealing purposes must be given a “large and liberal” interpretation. It is therefore hardly likely to qualify as a “special case” under the Berne Convention’s three-step test,¹ and its adoption would therefore be contrary to Canada’s obligations under Article 9(2) of the Berne Convention and Article 13 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Journal articles, academic treatises and textbooks are published by educational, academic and STM publishers for the very purpose of contributing to education and scholarly communication. Universities and libraries for non-commercial research or non-commercial educational institutions are the primary purchasers of (or licensees for) these publications and services. They are therefore as much a supply to an educational institution as are its fixtures and equipment.

Copyright works that are available for sale or under license for education or to educational institutions must not be reproduced or made available under exceptions free of charge, as this would constitute interference and a conflict with the normal exploitation of these works.

¹ The Berne Convention’s three-step test (the “**three-step test**”) states that members shall confine limitations and exceptions to exclusive rights to (1) certain special cases which (2) do not conflict with a normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the rightsholder.

2.2 Non-Commercial User Generated Content Provision [s. 29.21]

Bill C-11 permits the use of any published work in order to create a new work for non-commercial purposes as long as the use does not have a “substantial adverse effect, financial or otherwise” on the exploitation of the original work. This requirement appears to introduce a more stringent test than the “normal exploitation” requirement provided for in the three-step test. The inclusion of such a more stringent requirement will exempt certain uses of copyrighted material for which the consent of rightsholders would otherwise have been required and this provision accordingly deprives rightsholders of potential and actual economic gains and therefore conflicts with the normal exploitation of the work.

2.3 Display Exception and Tests and Examination Exception, and Limitations on these Exceptions [s. 29.4]

These exceptions turn on a limited application definition of “commercial availability” of a work in the exceptions concerned. Currently, the availability of a license from a collecting society to reproduce, perform in public or communicate to the public by telecommunication counts as commercial availability. By excluding this form of availability from these exemptions and therefore allowing a user to reproduce copyright material without remunerating rightsholders, the rightsholders’ legitimate interests will be interfered with, in conflict with the three-step test.

2.4 Exception concerning Publicly Available Material on the Internet (the “PAM Exception”) [s. 30.04]

Material which is available on the internet could still be subject to copyright. To the extent that material which is freely available on the internet is subject to copyright, the PAM Exception will interfere with the normal exploitation of works and therefore not meet the requirements of the three-step test.

In order to avoid the PAM exception, the copyright owner is required either to apply technological protective measures or to place a notice in addition to the copyright notice. This is contrary to Article 5(2) of the Berne Convention.²

2.5 Interlibrary Loan Exception [s. 30.2(5)]

This exception conflicts with the normal, well-established market for the exploitation of scholarly and professional publications. It will significantly reduce the size of the library market in Canada and thereby unreasonably prejudice the legitimate interests of rightsholders. As a result, this exception does not meet the requirements of the three-step test.

² This provision states: “The enjoyment and the exercise of these rights shall not be subject to any formality”.

2.6 Lessons Exception [s. 30.01]

Canada is known as one of the prime destinations for international students to enroll and benefit from Canada's rich learning and studying environment. For this reason, the concern of unauthorized cross-border access by students of a "lesson" is a real one now and even more so in the imminent future, as Canada's higher learning institutions seek to expand their market share in the field of distance learning. As such, the policing of the use of a "lesson" by students outside of Canada should be given further thought, and in addition, it should be ensured that the use of a "lesson" by foreign students does neither interfere with the normal exploitation of the copyright works subsisting in the "lesson" in the countries in which the foreign students are actually situated, nor undermine a level playing field between Canadian and overseas learning institutions. In contrast to the proposed exception, in the U.S. and in many European countries, authors and publishers are entitled to fair remuneration for any uses of rights covered by the exception.

2.7 Statutory Damages [s. 38.1(1) to (3)]

STM is concerned that the proposed changes would considerably weaken the statutory damages that could be awarded under the *Copyright Act*. We note that the Bill significantly reduces the scope and availability of statutory damages for non-commercial infringements. STM is concerned that such a reduction in statutory damages for non-commercial infringement significantly reduces the incentives that many licensees (both corporate and educational) have to enter into licensing agreements. The provisions may also lead to increased litigation costs to parties seeking to enforce their copyrights with low damages awards.

2.8 "Notice and Notice" [s. 41.25 and 41.26] – instead of "Notice and Take/Stay Down"

The provisions introducing "notice and notice" should be drastically improved by recognizing that certain activities are indisputably infringing on a piratical scale. Postings of books, movies, new albums and computer games can potentially destroy the viability of these products. For these activities a notice-and-takedown option, albeit essential, does not go far enough. To combat piratical business models, which are hiding behind limitations and safe havens intended for bona fide actors, some form of filtering obligation is needed. To educate members of the public, who post copyright-protected content, a series of warning notices should be served. If this does not lead to compliance, penalties should then culminate in a temporary suspension, or, in the case of egregious abuses, in permanent termination of internet access. When imposing such measures, the balance of convenience must be weighed and the principle of proportionality adhered to. However, for the worst offenders, a system of graduated response on the "information highway" will encourage responsible "driving", just as the suspension and withdrawal of driver licenses fosters respect for the rules of the road among motorists in a proportionate manner.

Moreover, Bill C-11, with its proposed lowering of the quantum of statutory damages, effectively reduces the penalties for repeated breaches of the law and sends the wrong message to infringers.

3. Conclusion:

Bill C-11 neglects the fact that diversity of knowledge and in culture is the result of a strong copyright and intellectual property law. The incentive to engage in creativity and to invest in ideas and intangible values has to be ensured.

Instead, Bill C-11 introduces a myriad of new exceptions without any compensation for authors and publishers. If passed, the Bill will deprive rightsholders of important revenues, and we fear suppresses the creation of new works. We also feel that the proposed “notice and notice” regime will make Canada a haven for piratical business models. The Bill impacts authors and publishers not only in Canada but also abroad, because Canadian collectives, through reciprocal agreements, represent works published in numerous foreign countries.

We applaud your government’s commitment to updating Canada’s copyright laws. We sincerely hope that your Committee will initiate changes to Bill C-11 that will ensure that Canada’s copyright regime is not detrimental to authors and publishers and in line with international obligations.

STM stands ready to amplify or otherwise assist in any way that would be appropriate and conducive to sound Canadian copyright legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Mabe", with a stylized flourish at the end.

Michael Mabe
Chief Executive Officer, STM