30 Jan 2011

Members of the C-32 Legislative committee,

Thank you for the opportunity to provide my opinion on this important piece of legislation. I have been following the issue of copyright since 2001, when I attended the consultation in Vancouver. I am a software developer and have also taught at UBC and BCIT. I was the primary author of a petition for users' rights under copyright which has been signed by thousands of canadians and tabled in Parliament. I am also one of the founders of the vancouver Fair Copyright coalition, a group of citizens concerned about copyright. I also regularly use copyrighted . works of course, so I have seen this issue from many sides - creator, educator, and user - and I also have a very good understanding of the technologies involved in digital representations of works. AS such I was, of course, very interested to read Bill C-32 and to see how this government's approach differed from the previous two copyright bills.
copyright is a very difficult area of law. Until comparatively recently it was a law that only affected businesses and a few other organisations such as libraries and educational institutions. As technology has advanced, though, it has moved into the lives of everyday canadians. These days we all make copies of works all the time, often without even realising it. As such it becomes much more difficult to draft a sensible law. ordinary citizens cannot be expected to consult with their lawyer before turning on their DVD recorder, and the law will be disrespected if it doesn't reflect their expectations about what is and is not reasonable. This is very different from a law that affects businesses, which can be expected to hire lawyers to ensure that a complex law with many subtleties is being followed.
Bill C-32 does have some very positive aspects. In particular, bringing "fair dealing" into line with what canadians believe is reasonable is a very positive change, and adopting a "notice-and-notice" approach for taking down infringing content follows the principles are "innocent until proven guilty" and respects our rights to freedom of expression online.
unfortunately, it also has some major problems.
First of all, it makes the Act even more complex. I believe that property rights and freedom of speech are extremely important, so I often look at copyright as an exception to the general rule that I am free to express myself as I like and to do what I like with my property. If my property embodies a copyrighted work, that imposes some restrictions on what is permissible, and my freedom of expression may also be restricted by the copyright Act (this is particularly significant to people creating documentaries, remixes, mash-ups, and the like). It gets more complex when you consider "fair dealing", which creates exceptions to those restrictions, but this is still easy enough for everyday Canadians to understand and indeed fits their expectations that the government doesn't intrude into our family rooms and bedrooms.
unfortunately, c-32 adds two additional layers of complexity with its rules re~arding Technological Protection Measures (TPMs). By allowing TPMS to override falr dealing, you create additional exceptions to the fair dealing exceptions, and to make things worse there are then exceptions to those exceptions. This would make the law ridiculously complex - now I have freedom of expressions unless I want to express myself in a way that would intrude upon somebody's copyrights, unless it falls under fair dealing, unless the rightsholder has used a TPM to prevent my fair dealing, unless it falls under one of the exceptions where I'm allowed to bypass the TPM. At this point, even lawyers specialising in copyright are going to have difficulty figuring out whether an act is legitimate or not, and ordinary canadians have no chance. I believe that the government needs to make a simple choice - do you want the Act to affect ordinary canadians in their homes or not? If so, it needs to be vastly simplified so that it is very easy for them to know what they can and cannot do at home, with no need to consult a lawyer. Alternatively, change the Act so that it explicitly doesn't ~overn ordinary Canadians, in which case all the various subtleties and complexlties are more reasonable (they do, of course, impose a cost to businesses, but presumably you have taken that into account already).

Regarding TPMs specifically, I believe that the government has taken the wrong approach by not permitting bypassing TPMs for the purpose of fair dealing. First of all, this is contrary to people's expectations - if the ~overnment considers it legitimate for me to make a backup copy of my DVD, the rlghtsholder should not be allowed to take that right away from me by applying a TPM. Secondly, TPMS are, in fact, predominantly about controlling access to and use of a work, which are not rights that have been covered by copyright before. Rightsholders have never been allowed to tell me whether I can read a book that I buy in the bath, and so they shouldn't be allowed to tell me that I can only watch a DVD that I buy in the country where I bought it. Thirdly, the effect of these rules on fair dealing is not an unfortunate side effect, it is in fact the only effect. people who cannot bypass TPMs for some reason will clearly be unaffected by a change to make doing so illegal, but there's also no reason to believe that people who want to infringe copyright will be deterred by the fact that bypassing a TPM to do so is a breach of the Act. NO, the only people affected are those who are able to bypass TPMS and who want to do so for purposes that are legitimate. These are the people exercising the rights granted to them by the Act. By making it illegal to bypass TPMS in order to exercise your rights under the Act, you allow rightsholders to overrule parliament they get to write their own "fair dealing" rules and you give them the force of law. That's not democracy. For example, as one of many immigrants to canada, I own a number of DVDs purchased in Europe. TO play these in canada, I have to bypass the "region encoding" applied by the studios. If c-32 passes as it stands, doing so would become illegal (region encoding is clearly an "Access Control" as deflned by the Bill)- you will have taken away my right to watch my DVDs on my DVD player. I cannot believe that this is the intent of the government. I believe that the best way to implement the 1996 copyright treaties in this area is to make it illegal to bypass TPMs "for purposes that would otherwise be infringements of copyright' or similar language, to make it clear that parliament is the authority on what is and is not legal under the Act. Many other countries have taken this approach.

Although not part of C-32, there has been a lot of discussion about extending the private copying levy or imposing additional levies. I have mixed feelings about this. In general, I dislike levles - they feel like yet another tax, it is difficult to distribute them fairly, and a lot of the money gets siphoned off by the bureaucracy of collective societies (who ironically often end up using it to lobby to extend levies further). On the other hand, if the alternative is to allow rightsholders to write their own copyright law by giving TPMs the force of law, then I would definitely pick levies as the lesser of the two evils.

changing the rules for photographers is another area where c-32 doesn't make sense. These days, all professional photographers own their own equipment, and in photographers dealings with individual canadians, it is the photographers who provide the initial contract, which is generally accepted unchanged. These contracts frequently do include an assignment of copyright to the photographer. where cameras are loaned, this is generally by individual canadians. A common situation might be asking somebody to take your picture in front ofa landmark while on vacation. In this situation, it is ludicrous for the photographer to be the copyright holder. Most canadians would expect that they own all rights to the photos on their camera. Again, one shouldn't need to hire a lawyer or draft a contract to ensure that you have the right to print the photos on your camera when you return from vacation. In this case, the people lobbying for the change (professional photographers) get no benefit (as noted, these days they do own their equipment), but the effect on common practice would be absurd. This is not the way to engender respect for the copyright Act.

Finally, I would like to make a point about tools. AS a software developer, many of the tools I use in my day-to-day work (debuggers, logic analysers, ]TAG, and disassemblers, for example) are also the tools that are used to examine, analyse, and bypass TPMs. while I accept the concept that the use of these tools to bypass TPMs for purposes that would be copyright infringement needs to be restricted, it is important that the tools themselves, and the use of those tools for other purposes (including bypassing TPMS in order to exercise users' rights under the Act) remain entlrely legal.

I shall end with one observation- if TPMS worked, legal protection for them would be unnecessary. If businesses choose to spend money on tools that don't work, does it really make sense for the government to step in to help them, or would we be

better off leaving the market to reward or punish them as it sees fit?
I would be happy to discuss C-32 further with you, or to appear before the committee.