Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

Brief to the House of Commons Legislative Committee on C-32

Presented by:

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I. Introduction and Summary

The Canadian Association of University Teachers (CAUT) represents over 65,000 university and college teachers, academic librarians, researchers and professional and general staff at more than 120 universities and colleges from every province. We are committed to improving the accessibility and quality of post-secondary education and to defending academic freedom.

Our members both create and use copyright material; they require copyright law that protects their interests as authors and provides them strong rights as users of work. User rights are particularly important because successful teaching and research depends on sharing and transforming existing works. If access to existing material is restricted by unreasonable barriers, whether legal, economic, or technological, then the cycle of knowledge creation is undermined and the prosperity of Canada is diminished.

The current Bill C-32, the *Copyright Modernization Act*, contains a number of reasonable elements, but also several serious flaws. The most serious of these flaws are: 1) the prohibition on the circumvention of digital locks; and 2) the limited nature of fair dealing.

CAUT seeks the following two key changes to the Bill in its current form:

- **Allow the circumvention of digital locks if the purpose of the circumvention does not infringe copyright**: The current proposed prohibition on the circumvention of technological measures and the devices that facilitate that purpose render meaningless not only the rights of the education community but of the rights of access enjoyed by Canadians at large. To avoid this regime of unreasonable owner control, the *Act* must be amended to allow the circumvention of technological protection measures (TPMs) for non-infringing purposes.

- **Expand the categories of fair dealing**: The proposed *Act* needs to be amended to require fair dealing be permitted for purposes "SUCH AS" research, private study, criticism, review or news reporting, education, parody or satire. To introduce clarity, Bill C-32 should also be amended to include the following definition of fair dealing. Other issues for the post-secondary education and library community are the following:

  > *Fair dealing is the user right to reproduce a substantial amount of a work without permission or payment as determined by the following factors: the purpose of the use; the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the original work; and the effect of the dealing on the work*

In addition, CAUT recommends the following:

- **Remove the "self-destruction" requirements for digitally loaned copies and distance learning materials**: These requirements bear no relation to the realities of teaching, research, and learning.

- **Limit statutory damages to instances of commercial copyright infringement**: The proposed legislation reduces the ceiling on statutory damages for non-commercial infringement from a maximum of $20,000 per work to $5,000 in total damages. As the courts have given greater clarity to fair dealing, statutory damages should not be available against those who act with a good faith belief that their actions with respect to a work are justified by fair dealing.

- **Retain the "notice and notice" approach**: CAUT is pleased to see that the proposed legislation retains the approach already in place.

II. Reform of Bill C-32

A. Digital Locks

While one of the main objectives of Bill C-32 was to allow educators, libraries and students to make greater use of copyright material, the prohibition on the circumvention of technological protection measures undermines that objective completely. It means, for example, that material that is in a paper format and can be legally copied now under fair dealing, cannot be copied for educational or research purposes, if it is in electronic format and digitally encrypted. The current Bill thereby fails to ensure that the *Copyright Act* remains electronically neutral, another objective for this copyright reform.

This unnecessarily restrictive approach to dealing with technological protective measures negates the benefits provided by the expansion of fair dealing rights. By allowing rights holders to prevent their duplication for purposes such as fair dealing, C-32 destroys a fundamental statutory right essential to free expression, scholarly work, and the learning process. The ban would also prevent the legitimate disabling of technological measures used by copyright owners to infringe on the privacy rights of users. It would even go as far as preventing librarians from correcting Rights Management Information (digital identification "tags" attached to a work) that was incorrect, out-of-date, or not applicable in Canada.

The circumvention of TPMs is not just a consumer issue, but it is critical to the advancement of knowledge and innovation in Canada. The foundation for this advancement is the past creative work of others. Social and economic progress depends on people being able to access, share, and transform this work. By locking down vast amounts of information, the legislation will prevent research, education and innovation in Canada.

If the current prohibition on breaking digital locks is retained, then this will put Canada among the most stringent copyright regimes in the world. If the intent for C-32 was to put the Canadian copyright regime on par with the United States, then it should be noted that there is no equivalent in Canada to the Librarian of Congress to review and mandate exemptions every three years to the Digital Copyright Millennium Act's anti-circumvention powers. While imperfect, this gives the US federal government some capacity and flexibility to adjust to rapidly changing technologies and educational needs, which is not available in Canada. The list of exemptions has been growing with university professors allowed to show some clips from a 'circumvented' DVD, breaking video or computer games for purposes of research or investigation, circumventing TPMs for purposes of documentary filmmaking and creating

original non-commercial videos. Even with this limited flexibility for adjustment, the US Federal Court has rejected the stringent DCMA anti-circumvention provision in a July 2010 ruling: "Merely bypassing a technological protection that restricts a user from viewing or using a work is insufficient to trigger the anti-circumvention provision." (US Court of Appeals for the Fifth Circuit, *MGE UPS vs. GE*)

We can learn from the US experience by reforming the anti-circumvention provision in C-32 with a simple, elegant solution that strikes a balance between rights holders and users: only prohibit circumventing digital locks if the purpose of the circumvention is to infringe copyright. C32's treatment of circumvention tools and services should mirror this rule: permit their distribution by third party providers to those with the right to use them.

B. Fair Dealing

Fair dealing is the right, within limits, to reproduce a substantial amount of the copyrighted work without permission from, or payment to, the copyright owner. Its purpose is to facilitate creativity and free expression by ensuring reasonable access to existing knowledge while at the same time protecting the interests of copyright owners.

C-32 clarifies the ambit of fair dealing to include "education, parody or satire". This is a good step. It will provide more explicit rights for artists to engage in parody and collage, for teachers to display and reproduce material in the classroom, for scientists to engage in reverse engineering, and the larger public to copy material into different formats to facilitate time-shifting and device interoperability. Of course, all of these rights are dependent on the way that the legislation deals with anti-circumvention measures.

While C-32 is a step in the right direction on fair dealing our position is that a better approach would be for the legislation to state that fair dealing be permitted for purposes "SUCH AS" the existing delineated rights (research, private study, criticism, review and news reporting). This amendment would better serve the needs of users and creators of works, and reflect recent court decisions favouring an expansive understanding of fair dealing. The two words clarify that fair dealing is a broad and open-ended right and they would empower educators, researchers, librarians, students, and artists and the general public to fully engage in the practice. This is also consistent with the United States, where the open-ended "such as" provision has been adopted. This legislation, and even allowable practices of making multiple copies for a classroom, has not prevented or diminished a flourishing publishing industry to exist in the U.S.

To introduce further clarity, Bill C-32 should be amended to include the following definition:

> *Fair dealing is the user right to reproduce a substantial amount of a work without permission or payment as determined by the following factors: the purpose of the use; the character of the dealing; the amount of the dealing; alternatives to the dealing; the nature of the original work; and the effect of the dealing on the work.*

This enshrines the criteria articulated by the Supreme Court of Canada in its decision in *CCH Canadian Ltd v. Law Society of Upper Canada* (2004) and avoids confusion and potential

litigation issues. It is also consistent with the four criteria for "fair use" articulated in the United States. The US experience with fair use also demonstrates that there has not been a watershed of litigation cases, as some fear would happen in Canada if the expansive definition of fair dealing is adopted.

C. Other recommendations

Remove the "self-destruction" requirements for digitally loaned copies and distance learning materials

These requirements bear no relation to the realities of teaching, research, and learning. For libraries, the Supreme Court's decision in *CCH* emphasized that even though a library does not itself engage in research or private study, for the purposes of reproducing a work it may stand in the shoes of a patron who is engaging in research and private study. The current proposal in C-32 that requires libraries to destroy digitally loaned copies after five days, as well as the requirement to place digital locks on digital library loans, runs counter to this interpretation.

Long distance learning is an important and growing component of post-secondary education in Canada. As the career trajectories of many Canadians are marked by transitions, and many seek to balance work and family with life-long learning, the demand for long distance learning will only increase. The proposed legislation seeks to impose a draconian requirement to force the deletion of digital learning materials within 30 days after the end of a course. For students, this means that they could not refer back to this knowledge either for courses or in their work. One could think of a wide range of occupations where preventing this kind of referencing would have serious consequences, such as nursing, firefighting, engineering. More generally, the learning process is not linear but iterative and taking away previous "building blocks", as for example in mathematics, will hamper understanding and development in later courses, For teachers, this also poses particular kinds of problems. By taking away course materials, it will make it more difficult to improve on existing courses and teach them more effectively. Lastly, there is also a fundamental element of unfairness in the proposed legislation, as those who attend classes in person would be able to retain their course notes, while long distance learners would not.

Limit statutory damages to instances of commercial copyright infringement

The proposed legislation reduces the ceiling on statutory damages for non-commercial infringement from a maximum of $20,000 per work to $5,000 in total damages. As the courts have given greater clarity to fair dealing, statutory damages should not be available against those who act with a good faith belief that their actions with respect to a work are justified by fair dealing.

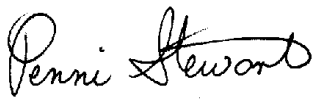
Retain the "notice and notice" approach

CAUT is pleased to see that the proposed legislation retains the approach already in place in Canada.

III. Conclusion

As C-32 is the latest attempt in a decade of copyright reform, it is crucial to get it right. C-32 includes a number of reasonable elements but takes a disastrous turn in its overbroad prohibition of circumventing digital locks, which undermines the statutory rights of Canadians to privacy and fair dealing in digital works and will inhibit research, education and broader social and economic progress. C-32 strikes a compromise for fair dealing, but a better approach would be for the legislation to state that fair dealing be permitted for purposes "SUCH AS" the existing rights delineated in the *Copyright Act* (research, private study, criticism, review and news reporting). This would be consistent with the expansive understanding of Canadian court decisions and the approach adopted in the United States.

This document is respectfully submitted by the Canadian Association of University Teachers:



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