

International
Publishers
Association



TO:
The Honourable James Moore, Minister of Canadian Heritage and Official Languages
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AND TO:
The Honourable Tony Clement, Minister of Industry
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Email: minister.industry@ic.gc.ca

Sent by email

16 November 2010

Dear Minister Moore,
Dear Minister Clement,

**Re: Copyright Modernization Act (C-32)
Concerns regarding its compatibility with Canadian obligations under international law
Request for a focus of Bill C-32 on changes required by WCT and further detailed
consultations**

The International Publishers Association (IPA) would like to take this opportunity to comment on the proposed Copyright Modernization Act ("the Bill") intended to amend Canada's copyright law.

IPA is the international federation of trade associations representing book and journal publishers worldwide. Established in Paris in 1896, IPA now counts more than 60 national, regional and specialised publishers associations from 46 countries. This includes the Canadian Publishers' Council, the Association of Canadian Publishers and the Association nationale des éditeurs de livres. Overall, IPA represents the majority of publishing around the world, together generating world-wide sales exceeding CAD 90 billion. IPA is an accredited non-governmental organisation with observer status to United Nations organisations, including the World Intellectual Property Organisation WIPO and UNESCO. IPA's main goals are the promotion of literacy and reading, the defence of freedom of expression and the development of copyright as an effective instrument to promote publishing as a creative industry and a cultural sector.

IPA and its members are seriously concerned about some of the provisions of Bill C-32 - the Copyright Modernization Act. If enacted unchanged, these provisions would seriously prejudice

publishing, publishers, authors and rightsholders in Canada as well as publishers, authors and rightsholders in other countries who do business in Canada. In particular, these provisions would put Canada in conflict with its obligations under international copyright treaties. Furthermore a number of measures prescribed in the Bill are without precedent in nations with a developed publishing industry. They would severely disrupt the diverse and dynamic local education and trade publishing industry Canada is rightly proud of. We anticipate that the consequences of the proposed changes, especially the threat to Canada's cultural diversity and book culture, will be sweeping and should be carefully weighed.

IPA therefore asks, on behalf of its members, that the Bill be limited to those elements that are necessary to implement Canada's obligations under the WIPO Copyright Treaty.

The following points are of particular concern:

Copyright, education and international obligations

Canada is party to the Berne Convention and a member of the World Trade Organisation and as such has acceded to the TRIPS agreement. Furthermore, as a signatory of the WIPO WCT and WPPT treaties, Canada may take no action as to defeat the object or purpose of that treaty.

It is important to bear in mind that during the last Berne Convention revision the exceptions for education have been intensively discussed, negotiated and, finally, regulated in Articles 10 (2) and the – in the case of Canada inapplicable - Annex of the Berne convention. This means, however, that there is only limited space to use the default clause in Article 9(2), the "three-step-test".

This is, however, exactly what the Bill appears to be doing: the Bill introduces a radical change by expanding the fair dealing clause to "education", provided it is "fair", without guidance or clear limitations. It is uncertain what these two terms mean. The terms are, however, most certainly not sufficiently narrow for a "special case" in the sense of article 9 (2).

By introducing such a broad exception section 29 (1) of the Bill violates Canada's international obligations.

This deviation is troubling, worse it is unwarranted. Canada has a tradition of collective rights management which effectively and efficiently balances the interests of users and educational institutions alike. It is unclear why this mechanism, which has been able to achieve fair solutions in the past, should be undermined by passage of the Bill as drafted.

Copyright and Education

The Bill also demonstrates a lack of understanding of how educational publishing works. A brief IPA policy paper on this matter is attached. Educational publishing is the largest sector within the global publishing industry. Educational publishing requires complex skills, profound expertise and sophisticated collaboration among specialist teams — who ensure that the latest curriculum requirements can be taught using effective pedagogical tools tailored to the particular educational experience. Much investment is required to ensure effective learning materials are created to the exacting requirements of customized curricula and to keep track of on-going changes.

Educational publishers are, however, substantially affected by the reuse of their content, without compensation or authorisation. Allowing uncompensated photocopies and other reproductions of publisher's content to substitute for the *purchase* of content creates a severe threat to the diversity of up-to-date education material available and therefore to education itself.

International trends

Although copyright laws develop nationally at their own pace, there is a high degree of international alignment, supported by the international treaty framework. This is important because by ensuring broadly equal rights for creators and users of copyright works, regardless of where they live and regardless of where their works are purchased or used, there is little arbitraging so as to exploit differences between countries. The Bill departs from these norms in several key respects, including the inclusion of education as a fair dealing purpose, digital to end-user inter-library loan (ILL), the exceptions for publicly available material and user-generated content, and a defective definition of a legally acquired copy that will allow exceptions to be aggregated.

Inter-library loan (ILL)

A balanced approach to inter-library loan has challenged publishers and librarians since the term "loan" came to mean making additional copies of a work through photocopying, scanning or other digital communication. Current Canadian law, while far from ideal for publishers, nonetheless sets reasonable limits and conditions on document delivery. The Bill, though, would create conditions that could inflict serious damage on publishers.

The National Research Council of Canada, through CISTI, sends out more than 350,000 copies of articles each year, truly an enterprise of industrial scale, largely without compensation. The proposed changes will facilitate the delivery of articles in digital formats, which in all likelihood will increase volumes and will also compete with publishers who, as part of their normal exploitation of works, offer and deliver individual articles on a per-article/just-in-time basis. Safeguards against redistribution appear inadequate; they are likely to result in the further attrition of journal subscriptions.

IPA recommends retention of the current provisions of section 30.2(5) augmented by effective record-keeping requirements so that the extent of document supply can be made transparent, and the market impact assessed before consideration of any changes that might expand its reach.

Publicly available material exception

The proposal to create an exception allowing the unrestricted use of certain Internet content is well-intentioned, but unworkable as drafted. It imposes conditions on copyright owners if they wish to keep their online content outside the exception. Such obligations run counter to the Berne Convention, which affords copyright protection unconditionally. It also fails to distinguish between content available online in the expectation of unrestricted use and works available on the Internet because of how they are sold, or the particular business model followed by its creators. For instance, the proposed language in Bill C-32 could potentially extend to e-books purchased commercially on the Web.

As an alternative to this exception IPA suggests the use of collective licensing, with tariffs for those uses (primarily educational) outside fair dealing or other exceptions.

User-generated content

The proposed exception for copyright content to be appropriated to create new online works is far too broadly drawn. It fails to set clear limits on how much content can be used in this way; it extends to all of the copyright owners' exclusive rights; the drafting is insufficient to prevent unauthorized redistribution by third parties; and this possibility of aggregate downstream use will circumvent the provision intended to prevent "substantial adverse effect" on the commercial market.

IPA is not persuaded of the need for this unprecedented exception, but, if it is to be included, then at a minimum it requires significant revision to make it acceptable to publishers.

Compounding of exceptions

Exceptions are intended to be exactly that: exceptions to a general rule. In the Bill it appears possible to aggregate the proposed new exceptions. Clearly this cannot have been intended. The problem lies in the definition of "legal copy", for example in the "private copy" and the "back-up copy" exceptions, which precludes only "renting" and "borrowing" as means of acquisition. This is insufficient.

IPA recommends expanding this definition so that a copy made under fair dealing or any exception cannot be a legal copy for the purpose of any other exception.

Compulsory digital licences

The statutory extension of collective licensing schemes to include digital uses raises concern. Business models for selling content in digital formats are still evolving. It may be that these will in due course accommodate a broad variety of licensing and business models, but at this very early stage the market should be left to determine how best to respond to technological development.

As drafted, these proposals will allow publishers to exclude their content. They should not be compelled to take that route. Nor should they be barred from seeking appropriate damages for the unauthorized use of their content post-exclusion.

Format shifting

While acknowledging the impetus for this proposal, and that music is the primary target, we are concerned about the implications for print materials. Publishers typically make works available in a variety of formats, each priced according to the costs involved. Allowing unrestricted rights to transfer from one format to another may well interfere with how we monetize our publications and with our ability to guaranty for our readers the authenticity and the integrity of those publications. Additionally, there are defects in the drafting that fail to restrict the exception to source copies owned by the person wishing to transfer the content to another format, possibly allowing copying to be done for third parties. This may result in unlimited downstream copying because of the way in which the source copy is defined.

Notice-and-notice vs. notice-and-take-down

The proposed enactment of a regime to deal with online infringements is welcomed in principle. As drafted, however, there are two critical problems. First, certain activities are *ipso facto* harmful, irrespective of the intentions of the infringer. Unauthorized postings of books, movies, new albums and computer games can potentially destroy the commercial success of these products. In such situations, a notice-and-take-down option is essential. Second, there needs to be a graduated response so that successive infringements result in increasingly severe consequences. This is what is planned in several other countries, including the UK, New Zealand and France. The Bill, with its lowering of statutory damages, trivializes repeated breaches of the law.

Access for persons with print disability

As this issue is currently being reviewed by the WIPO Standing Committee on Copyright and Related Rights, IPA recommends that any regulation of this matter should await the establishment of an international consensus and cross-border mechanisms for file transfer.

Conclusion

In summary, the Bill shows that its drafters have a paradigm shift in mind. They see publishing, and the copyright law that enables its sustainability, as an obstacle to access to knowledge. However, in spite of a decade of free, collaborative, open or Creative-Commons content available on the Internet, the demand for compensable content in which publishers have invested remains strong. The fact that the marketplace recognizes great value in this content should give legislators reason to pause and consider how best to nurture and further develop

this great social value that authors and publishers create. If publishers are forced to reduce operations as a result of reduced revenue from the sale of their works, then correspondingly fewer new educational resources will be available.

We believe that some of the proposed amendments are incompatible with Canada's treaty obligations either because of how they are drafted or how they might work, in combination, to inflict extensive damage to the interests of copyright owners and the changing "normal exploitation" patterns for their works.

These comments are intended as a constructive contribution to the copyright reform debate in Canada. IPA fully recognizes the importance of moving ahead, in particular, for Canada to become WCT compliant, and, to the extent that the Bill seeks to achieve this, it is commendable. However, many of its proposed regulations are motivated by other policy considerations and run against both the letter and the spirit of those treaties, the ratification of which the Bill seeks to enable.

IPA would like to express its appreciation for your consideration of this submission. We would welcome any opportunity to support the government of Canada in its commitment to copyright law that would improve access to knowledge through the strengthening of a dynamic, entrepreneurial and diverse local publishing industry.

Yours sincerely,

Jens Bammel
Secretary General

Cc:

Prime Minister Stephen Harper
WIPO Director General Francis Gurry
WTO Director General Pascal Lamy
UNESCO Director-General Irina Bokova
European Commission Vice President Baroness Cathy Ashton
Canadian Publishers' Council
Association of Canadian Publishers
Association nationale des éditeurs de livres

[Annexe to follow]



Educational Publishing: Enabling the world to teach and learn

A healthy and sustainable educational publishing industry is an asset to any democratic society and essential for a competitive knowledge-based economy.

The **mission** of educational publishers is to provide continuously effective tools and services for teachers and learners, using whatever media are available.

Dynamic educational publishing brings a quality learning experience adapted to local needs.

Why choose professionally developed learning materials?

The reasons are compelling:

- ◆ Quality educational publishing:
 - Saves educators' time and **frees teachers** to focus on teaching
 - Will **engage, inspire, and explain**, giving every student the chance to **fulfil their potential**
 - **Raises standards** of attainment and delivers improved learning outcomes.
- ◆ Quality learning resources have been developed with the **coherence, structure, and scope** that learners need and their teachers expect.
 - Aligned to curricula, standards, grades and course requirements
 - Produced with readability in mind for every level of education
 - Based on internationally accepted scientific insights into teaching and learning
- ◆ Educational publishers are also developing a **new generation of educational services**:
 - Powerful technologies that integrate instruction, assessment and performance data into connected learning environments
 - Adaptive learning solutions that combine education, assessment and technology which allows teachers to dynamically adapt content based on individual performance and needs.
- ◆ Educational publishers work with teachers to craft **specialist, peer-reviewed learning solutions**. We bring:
 - Signposts to quality
 - High user functionality and usability in day-to-day teaching practice
 - Professional production values, for digital services as well as print.
- ◆ We deliver:
 - **Choice**, through competition in open markets
 - **Quality**, through the best of authorial skill, editorial refinement, and experience of user needs
 - The means to deliver **curriculum change** in the classroom
 - Value-added content that **empowers digital technologies**.
- ◆ In open markets publishers will:
 - **Innovate**, by striving to respond to new opportunities
 - **Sustain** quality learning material fit for purpose
 - **Adapt** to the changing needs of learners and their teachers
 - **Exploit** emerging technologies

All at our own risk

www.internationalpublishers.org

To enable publishers to develop and sustain high quality solutions, we ask that policy makers take account of the following principles before contemplating interventions in the provision of learning materials, especially digital:

- ◆ Bring quality, investment, diversity, and choice by stimulating an open market and applying sufficient funds to the demand side.
- ◆ Avoid subsidising digital projects that distort the competitive environment. This leads to a limited selection of incoherent material that is quickly out of date.
- ◆ Support teachers by encouraging experienced, professional publishers to develop the teaching tools they need.
- ◆ Implement curriculum change effectively by cooperating with content creators who are experienced in curriculum development, especially in digital form. This will ensure availability of up-to-date resources, at the time they are needed.
- ◆ Assess new technologies and teaching tools based on research and trials.
- ◆ Protect education from erosion by piracy. Uphold copyright law.

An open dialogue with all stakeholders will equip schools with the educational tools they need. It will enable educational publishers to help build a democratic society of literate educated citizens able to compete in the knowledge economies.