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Submission on Bill C-32, *Copyright Modernization Act*

**NATIONAL INTELLECTUAL PROPERTY & NATIONAL
PRIVACY AND ACCESS LAW SECTIONS
CANADIAN BAR ASSOCIATION**

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Copyright Working Group for the National Intellectual Property and Privacy and Access Law Sections of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Intellectual Property and the Privacy and Access Law Sections of the Canadian Bar Association.

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Submission on Bill C-32

Copyright Modernization Act

I. EXECUTIVE SUMMARY

Copyright is a controversial subject, which engages the interests of a wide cross-section of Canadians. The copyright bar, similarly, holds a multiplicity of perspectives on copyright. Because of the diversity of perspectives, the CBA Intellectual Property Section and Privacy and Access Law Section (CBA Sections) have chosen, in their submission, to summarize the legal contours of the various policy perspectives on copyright, to assist Parliamentarians in their study of Bill C-32. The goal of any new copyright legislation must be to strike the appropriate balance in the rights of all parties, while recognizing the value of the intellectual property in copyright.

In reviewing Bill C-32, the CBA Sections assembled a working group of CBA members with expertise in copyright law and privacy law to develop the submission (the Working Group). The Working Group was often unable to agree upon an assessment of specific provisions from a policy perspective. Therefore, in lieu of specific recommendations, it adopted a format wherein it identified potential issues with each provision, noted the diversity of perspectives with respect to these issues, and developed a chart summarizing relevant commentary from creators/owners' and users' perspectives.

The Working Group produced commentary under the headings: Technological Protection Measures, Exceptions to Copyright Infringement, ISP and Search Engine Liability, Making Available and Distribution Rights, and Statutory Damages, and ends each section with the aforementioned chart.

Technological Protection Measures

One of the stated goals of Bill C-32 is to position Canada to ratify the World Intellectual Property Organization's Copyright Treaty and Performances and Phonograms Treaty (the WIPO Internet Treaties) and enhance the protection of copyrighted works and other subject-matter through the recognition of technical protection measures (TPMs). The Working Group supports this goal, and the need to have TPM provisions in the *Copyright Act*, but some questioned whether Bill C-32 goes

beyond what is required by these treaties. Some members of the Working Group believe that the Bill should not apply to circumvention devices, since improper use of these devices would be covered by the anti-circumvention provisions, and there is no need to restrict devices to ratify the WIPO Internet Treaties. Others believe that the restrictions on devices are needed to protect creator and owner rights for copyright works.

The scope of the exceptions was also flagged as an issue that merits consideration. The Bill includes several exceptions to the application of TPM protection that relieve copyright users of potential liabilities. It also creates a regulatory power to enact new exceptions if necessary. Some members of the Working Group thought that many of these proposed exceptions are overly complex or unworkable. For instance, the requirement under the encryption research exception to inform the target of the plans for circumvention may be unworkable, and the exception may not permit peer reviewers to circumvent to test the research. Similarly, the limitations of the research exceptions may not meet the needs of those who require circumvention to access content for research related to media criticism, search technologies, and network content distribution, among other subjects. Last, the efficacy of the exceptions to permit circumvention to protect personal information or to make copyrighted material perceptible to those with perceptual disabilities may be questioned, due to the fact the Bill places restrictions on those who provide technical assistance to individuals with perceptual disabilities. In addition, some members of the Working Group were concerned with the restriction that the measures employed must not “unduly impair” the TPM. It is difficult to conceive of a circumstance where this assistance would not result in impairment of a TPM.

Some members of the Working Group also raised additional possible exceptions to TPM circumvention that could be included in new copyright legislation: fair dealing; digital archiving; personal uses; protection of minors; filtering programs; and obsolete or broken digital locks. Some Working Group members also believe there is the need for a general provision (as there was in Bill C-60)¹ that allows users to circumvent a TPM for legitimate purposes. Other members reject the need for a general provision, as the Bill could permit, through regulation, a TPM to be circumvented for a legitimate purpose not otherwise specified.

¹ [Bill C-60, An Act to amend the Copyright Act](#), 1st Session, 38th Parliament.

Exceptions to Copyright Infringement

Bill C-32 includes a number of exceptions to copyright infringement, covering a number of sub-topics including fair dealing, time and format shifting, non-commercial uses, and educational exceptions. With respect to Bill C-32's proposed amendment to s.29 of the *Copyright Act*, the current "fair dealing" provision, the Working Group agreed that further definition and elaboration may be required for the proposed additions of parody, satire, and education, though there was no agreement on the direction or content of any change. The main issue pertaining to parody and satire was whether there should be compensation for commercial use of the subject work of a satire or parody. With respect to education, further definition of the scope of the educational exception is required to create certainty and clarity for creators and educational users, to attempt to limit litigation, and to address potential inconsistencies within the legislation (specifically, how the fair dealing provision interacts with the many specific exemptions for education in Bill C-32).

Regarding non-commercial user generated content (UGC), there was significant debate within the Working Group regarding the scope of the exception. First, there was the question of active versus passive use. For example, if a website allows its users to upload content, and then places advertising adjacent to (or even embeds an ad in) the content, some members of the Working Group considered the website to be using the content for a commercial purpose. Others believed that the website was simply serving as an intermediary and did not "actively" distribute content which, it was argued, should not incur liability. Creators and owners of copyright want to ensure that the exception does not apply to intermediaries or other services that actively reproduce or communicate UGC for commercial purposes, and some Working Group members thought some clarification may be required in the section. Others were of the view that the section is not problematic in light of the "safe harbour" provisions for websites or service providers providing hosting services.

The central question addressed by the Working Group regarding format shifting and time shifting was whether creators can and should be compensated for such actions. There is currently a scheme allowing for creators of musical works to be compensated for the sales of blank audio recording media. However, digital audio recorders (such as iPods), cellular phones, computers and other media are not covered. Under Bill C-32, there would be no compensation for personal copying (time and format shifting), but a creator or owner could protect a work using a TPM. The question for legislators is whether the appropriate balance between users and owners has been achieved.

The Bill also proposes educational amendments which would grant additional, exempted uses of copyrighted material by educational institutions without payment to the copyright owner, for the Internet delivery of lessons, digitally reproduced materials, and use of Internet materials. Some Working Group members suggested that these new exceptions need to be extended (by removing the “delete or destroy before” dates), while others believed that compensation, in the form of a tariff requirement, would be beneficial in this context for all Internet uses.

Section 31 of Bill C-32 would exempt uses of copyrighted works for the purposes of making computer programs interoperable, encryption research, security, and “temporary reproduction for technological processes.” The latter exception may have unforeseen consequences. The Working Group was of the view that the exemption proposed for “temporary reproduction for technological purposes” should be examined to ensure that it matches the policy purpose for which it will be enacted (presumably, to exempt transient uses in network transmissions), and to ensure that the scope of the exemption is not overly broad.

ISP and Search Engine Liability/Obligations Including Notice and Notice

Bill C-32 adds s. 27(2.3) to the *Copyright Act*, to ensure that the provision of services designed primarily for the infringement of copyright are themselves deemed an infringement of copyright. This section accords with the principle that the Act be made technologically neutral by adding a new kind of infringement that is required in light of technological developments. The issue is whether the words “designed primarily” to enable acts of copyright infringement capture the offensive providers (P2Ps and Torrents, among others), without unduly fettering use of the Internet. Some in the Working Group thought the words create unnecessary ambiguity that would work in favour of infringing service providers, and encourage litigation. On the other hand, some in the Working Group believe that language such as “designed primarily” is the appropriate language to ensure innovation and efficient use of the Internet, while creating a prohibition against infringement.

Bill C-32 would add s. 31.1 to the Act, which exempts network services from liability for infringement, subject to certain limitations. Section 31.1 would be considered a “safe harbour” provision in Canada, through which ISPs cannot be held liable for the actions of their users. One of the main concerns discussed by the Working Group was that proposed safe harbour provisions did not require compliance with one of the other requirements of the Bill, namely the “notice and notice provision” (a mechanism through which copyright owners could notify an ISP or search engine about a potential infringement, and the ISP or search engine would have to notify the

“owner” of the allegedly infringing content of the claim). Some members of the Working Group believed that a direct reference to the “notice and notice” provisions should be considered for inclusion in section 31.1, so ISPs who wish to benefit from the safe harbour provisions are required to comply with the notice and notice requirements.

With respect to the “notice and notice” provisions themselves, some members of the Working Group thought that the proposed regime may be inadequate for copyright owners because it is not accompanied by effective enforcement or identification provisions. A suggested amendment would compel an ISP or search engine to identify an alleged infringer so that a copyright owner could pursue the infringer through a civil claim. Others believe a court order should be required for disclosure in order to protect privacy, among other interests. Still other members thought the existing de facto “notice and notice” regime in Canada has functioned well for over a decade and should be explicitly sanctioned in the statute.

Making Available and Distribution Rights

Bill C-32 amends s. 3(1) of the *Copyright Act* to address the right of distribution, again to permit ratification of the WIPO Internet Treaties. The Bill would make distribution of legitimate copies of a work an infringement in certain circumstances (sales or transfers of ownership after the first authorized sale or transfer if the work is a “tangible object”). Some members of the Working Group had concerns about parallel (or grey market) importation of legitimate goods manufactured abroad with the consent of the copyright owner. Some members also questioned whether this provision could be interpreted to negate the principle of “exhaustion” in Canada (a right to restrain the importation of a tangible product no longer exists once it has been put on the market anywhere in the world with the consent of the appropriate intellectual property rights holders in that jurisdiction). Care should be taken that the existing law relating to “exhaustion” and “parallel imports” is not inadvertently changed.

Section 3 of Bill C-32 would amend the Act to address the “making available” right (the exclusive right of creators to authorize any communication to the public of their works) in the WIPO Copyright Treaty. The provision addresses the widespread use of peer-to-peer file sharing. Some members of the Working Group believe the provision is unnecessary, since the “making available” right is recognized in Canada (at least for authors) and may have unintended, negative consequences on legitimate Internet activity. Other members believe the provision clarifies the right and is necessary to ratify the WIPO Internet Treaties.

Statutory Damages

Bill C-32 provides for changes to the existing regime of statutory damages (minimum damages that copyright owners can elect to pursue in lieu of actual damages). Bill C-32 would limit the maximum award that is potentially available against individuals who infringe “if the infringements are for non-commercial purposes,” and allows for the reduction of statutory damages below the new minimum of \$100 per infringement for individuals in certain circumstances. Some members of the Working Group thought that the proposed changes to the statutory damages regime are consistent with Canadian values, and avoid punitive justice. Others believe that the statutory damages regime is an essential part of Canadian copyright enforcement, and should continue to apply without amendment, as there are existing safeguards to ensure individuals are not subject to disproportionate awards.

Conclusion

All Working Group members agreed that copyright law is in need of reform to bring Canada into the digital era. Despite the differences of opinion amongst members, it was able to reach agreement about the following matters:

- The Act should include provisions concerning the circumvention of TPMs in order to ratify the WIPO Internet Treaties;
- The scope of TPM exceptions in Bill C-32 merits close review to ensure they will operate as intended and are not unduly complex or underinclusive;
- Further refinement of the provision including parody and satire to the “fair dealing” exception should be considered in order to clarify whether compensation is required for commercial use of a work that is the subject of a satire or parody; and
- Further refinement of the provision including education as a fair dealing exception is required to create certainty and clarity for creators and educational users, and to address internal inconsistencies within the Act.

The CBA Sections hope that the commentary in this submission provides some clarity to the policy issues that arise in the context of Bill C-32, and that it assists Parliament in its deliberations on the Bill.

II. INTRODUCTION

The Intellectual Property and the Privacy and Access Law Sections of the Canadian Bar Association (CBA Sections) are pleased to comment on Bill C-32, the *Copyright Modernization Act*. Copyright is a controversial subject and engages the interests of a wide cross-section of Canadians. This includes copyright owners, who run the gamut from large entertainment conglomerates to self-employed artists, and copyright users, who include everyone from broadcasting corporations to teenagers downloading music in their parents' basements. The copyright bar, similarly, holds a multiplicity of perspectives on copyright.

In order to develop its submission, the Sections established a copyright working group (the Working Group) composed of CBA members with expertise in copyright law and privacy law to develop this submission. The submission is not a comprehensive analysis of the Bill. The Working Group addressed what it believes are the most important topics concerning Bill C-32: Technological Protection Measures; Exceptions to Copyright Infringement; ISP and Search Engine Liability; Making Available and Distribution Rights; and Statutory Damages.

The Working Group was often unable to agree upon an assessment of specific provisions from a policy perspective. Therefore, in lieu of specific recommendations, it has chosen to summarize the legal contours of the various perspectives on copyright. It adopted a format wherein it identified potential issues with each provision, noted the diversity of perspectives with respect to these issues within the Working Group, and developed a chart summarizing relevant commentary from creators/owners and users perspectives.

The goal of any new copyright legislation must be to strike the appropriate balance of all parties' rights, while recognizing the value of intellectual property in copyright. We trust that our submission will assist Parliamentarians in their study of Bill C-32, as they strive to achieve this goal.

III. TECHNOLOGICAL PROTECTION MEASURES (TPMS)

The World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT), collectively referred to as the WIPO Internet Treaties – which Canada signed in 1997 but has yet to ratify – have had an important impact on the copyright debate in Canada. The WIPO Internet Treaties require, among other things,

“adequate legal protection and effective legal measures” against the circumvention of effective technological protection measures (TPMs). Countries that ratify the WIPO Internet Treaties are required to establish legislation that protects against the circumvention of the TPMs used by copyright-protected content owners to restrict access to or use of digital content.

One of the stated goals of Bill C-32 is to position Canada to ratify the WIPO Internet Treaties and enhance the protection of copyrighted works and other subject matter through the recognition of TPMs. The government has also recognized that protection for TPMs may be required to support some innovative business models:

The Bill recognizes that certain protections, such as restricted content on news websites or locked video games, are important tools for copyright owners to protect their digital works and are often an important part of online and digital business models. While the music industry has moved away from digital locks on CDs, they continue to be used in many online music services. Software producers, the video game industry and movie distributors also continue to use digital locks to protect their investments. Canadian jobs depend on their ability to make a return on their investment. Businesses that choose to use digital locks as part of their business models will have the protection of the law.²

However, some commentators, as well as some members of the Working Group, believe that the WIPO Internet Treaties contain inherent flexibilities and that Bill C-32 goes beyond what is required for their ratification.³

A. Bill C-32 Approach to TPMs

The Bill C-32 approach is very similar to that in the U.S. *Digital Millennium Copyright Act* (DMCA). Like the DMCA and some other nations' laws,⁴ Bill C-32 creates three main prohibitions:

1. Circumventing a TPM;
2. Offering services to the public or providing services to circumvent; and,

² Industry Canada, Fact Sheet, “What the New Copyright Modernization Act Says about Digital Locks,” (June 2, 2010), online: <<http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/rp01182.html>>.

³ See Michael Geist, “The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements,” in *“Radical Extremism” to “Balanced Copyright”: Canadian Copyright and the Digital Agenda*, Irwin Law, 2010 [Radical Extremism].

⁴ For example, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, [2001] O.J.L. 167/10.

3. Manufacturing, importing, distributing, offering for sale or providing a technology, device or component designed or produced primarily for circumventing a TPM.

Bill C-32 also includes a handful of exceptions to these general prohibitions including law enforcement and national security, interoperability of computer programs, encryption research, personal information, security; persons with perceptual disabilities, broadcasting undertakings and radio apparatus.

The TPM provisions, virtually unchanged from the former Bill C-60, are a highly contentious aspect of Bill C-32. Bill C-32 would make it an infringement to circumvent a TPM even if the intended use of the underlying work would not constitute copyright infringement. This is somewhat tempered by the fact that the remedies are restricted to the copyright owner. Moreover, some members of the Working Group point out that recent appellate case law⁵ and rulings by the Librarian of Congress⁶ in the U.S. show that Bill C-32 may go farther to protect TPMs and restrict users' rights than the DMCA.

B. Anti-circumvention and Devices

One of the contentious issues in Bill C-32 is the decision to focus the TPM anti-circumvention provisions on devices.⁷ The TPM provisions ban circumvention devices that can be used to facilitate illegal circumvention. From a WIPO ratification perspective, there is no requirement for a device prohibition. Indeed, Bill C-60, which died on the order paper in 2006, provided a model that did not address devices themselves, choosing instead to target conduct involving circumvention for the purposes of copyright infringement.

Some members of the Working Group had concerns about the ban on devices, especially considering that many devices that can be used to circumvent TPMs have other legitimate uses, and may be used to protect individual privacy rights. Many believe that banning devices makes no more sense than banning photocopiers, VCRs or computers – all of which can be used for both legitimate and illegitimate purposes. These members of the Working Group believe that the law

⁵ *MGE UPS Systems, Inc. v. GE Consumer and Indus., Inc* 612 F.3d 760. Result confirmed en banc for different reasons, September 29, 2010.

⁶ Federal Register /Vol. 75, No. 143 /Tuesday, July 27, 2010 /Rules and Regulations, p. 4382.

⁷ See the proposed amended s. 41 *et seq.*

should not operate so as to ban any device that has a substantial non-infringing use. This is a doctrine long recognized in both copyright and patent law.

C. Access Control versus Copy Control

The Working Group took note of the intense debate between those who believe that the WIPO Internet Treaties require protection of “access control” measures and those who argue they require merely the protection of “copy control” measures. An example of access control measures would be regional coding, which prevents North American consumers from viewing DVD or BlueRay discs from Asia or Europe. Copy control measures are more limited and protect against copying of protected material, but not access. An example would be video cassettes encoded with Macrovision, which can be viewed anywhere but incorporate technology to inhibit or prevent copying. Another common example is the use of PDF security restrictions to prevent copying an electronic document’s content.

While Bill C-32 embraces the broader concept of “access control,” some members of the Working Group believe that this is not required by the WIPO Internet Treaties and it would be counterproductive and harmful to Canadians. They question, for example, why legitimate DVDs and BlueRay discs purchased abroad or sent as gifts should not be accessible in Canada, since the restriction has clearly negative effects on cultural diversity and even freedom of expression.

D. Exceptions for Circumvention

The Bill includes several exceptions to the application of TPM protection that relieve copyright users of potential liabilities and creates a regulatory power to enact new exceptions if necessary.

Some members of the Working Group thought that several of these proposed exceptions are overly complex or unworkable. Specific concerns include:

Encryption Research Exception – This exception requires the researcher to inform the target about plans for circumvention for research purposes, which may be impractical or impossible, depending on the nature of the research.

The encryption research exception also potentially creates a restriction on peer review, an essential part of the scientific process, which is often required for publication of results. Unless peer reviewers are considered “collaborators,” proposed s. 41.13(3) restricts the ability of peer reviewers to circumvent to test the research.

Privacy exception – There is a well-established global concern about the privacy implications of TPMs. A number of Canada’s privacy commissioners have written to past governments to express concern regarding the privacy

implications of past copyright bills, including concerns regarding TPMs.⁸ While PIPEDA and other private sector privacy laws of general application will apply to many (but not all) situations where organizations collect, use and disclose personal information using TPMs, Bill C-32 proposes additional privacy protections that are tailored to the copyright context. In the context of the anti-circumvention provisions, this takes the form of an exception to protect personal information (proposed s.41.14).

The efficacy of the exception is questionable because individuals will typically not have the knowledge or means to circumvent TPMs for the purpose of protecting their privacy. Individuals will require technical assistance to enable them to do so. Although proposed s. 41.14(2) contains an exception for those who provide technical assistance to enable circumvention for the protection of privacy, again, whether individuals will be able to make use of the exception is questionable. The exception is available only “to the extent that the services, technology, device or component do not unduly impair the technological protection measure.” Once most technological measures are circumvented, the protected content will be in the clear. In other words, it is difficult to conceive of a service or device that would permit circumvention of a TPM for the purpose of protecting privacy but would not unduly impair the TPM.

Research exception – Bill C-32 includes two exceptions relevant to researchers: Proposed s. 41.13 for encryption research and proposed s. 41.15 for security testing. The impact of the anti-circumvention provisions in the “research” context will reach well beyond encryption research and security testing. Researchers consist of a broad section of people who may need to circumvent in order to access content for media criticism, search technologies, network content distribution, etc. Many researchers may find themselves unable to conduct their research with the limited exceptions.

Exception for Canadians with perceptual disabilities – Digital Rights Management (DRM) can be used to limit or eliminate the use of technologies to read text aloud, thereby rendering it inaccessible for those with print disabilities. Proposed s. 41.16(1) provides an exception for those with a perceptual disability who circumvent for the sole purpose of making the copyrighted material perceptible. It thus suffers from the same shortcoming as the privacy exception, as does the similar exception in subsection (2) applying to a person who provides circumvention technical assistance to those with perceptual disabilities. The whole point of circumventing is to provide access to the content for those with perceptual disabilities. The

⁸ See, for example, the letter from Jennifer Stoddart, Privacy Commissioner of Canada, to Ministers Prentice and Verner (18 January 2008), online: <http://www.privcom.gc.ca/parl/2008/let_080118_e.asp>; letter from Jennifer Stoddart, Privacy Commissioner of Canada, to Ministers Oda and Bernier (17 May, 2006), online: <http://www.privcom.gc.ca/media/let/let_ca_060517_e.asp>; letter from David Loukidelis, Information and Privacy Commissioner of British Columbia, to Ministers Oda and Bernier (17 May, 2006), online: <http://oipc.bc.ca/publications/Comm_Public_Comments/F06-28751.pdf>; open letter from Ann Cavoukian, Information and Privacy Commissioner of Ontario, to Ministers Oda and Bernier (12 May, 2006), online: <http://www.ipc.on.ca/images/Resources/up-drm_letter.pdf>; and letter from Frank Work, Information and Privacy Commissioner of Alberta, to Ministers Oda and Bernier (26 May, 2006), online: <http://www.oipc.ab.ca/ims/client/upload/Copyright_ltr_May_26_06.pdf>.

content will obviously be in the clear since that is what is needed to provide the necessary access. It is difficult to envision circumstances where such device or services would not “unduly impair” the TPM.

The Bill also gives the government the right to enact by regulation new exceptions and specifies the criteria under which this may occur. Some members of the Working Group believe that it should include an administrative structure to conduct periodic reviews of the use of this power. Others believe that proposed s. 41.21 sets out a flexible process that will allow the government to consider new exceptions if and when it sees fit.

Some members of the Working Group raised additional possible exceptions not currently in the Bill:

Fair dealing – The anti-circumvention provision does not contain an express exception for fair dealing, so Canadians who circumvent a TPM for research, private study, news reporting, or criticism (or parody, satire, or education, if the changes to fair dealing are enacted) may violate the law even if their intended use of the copyrighted work is otherwise permitted.

Digital archiving – Bill C-32 leaves the issue of obstacles created by DRM to the preservation of digital materials virtually untouched, potentially impeding archives from preserving Canadian history in digital form. The Bill includes a limitation on archives’ liability for circumvention and lists archival interests as a potential factor for new exceptions, yet nothing ensures that digital archiving is not inhibited by the anti-circumvention provisions.

Personal uses – Many Canadians believe they should have the right to fair, personal use of their property without the law painting them as infringers. Distinguishing between commercial and personal uses of copyrighted materials would have the benefit of not only preserving personal uses, but also placing the obligation on those that use TPMs to ensure that the public retains its rights. Note, however, that some non-commercial uses are already protected under copyright law.

Protection of minors – Bill C-32’s anti-circumvention provisions do not include an explicit exception for the protection of minors. One obvious example where this arises is when parents wish to prevent their children from watching certain scenes in a movie. Under Bill C-32, a parent who wants to shield their children by using services such as ClearPlay to edit content could be in violation of the law. Taiwan’s anti-circumvention provisions include a blanket exception to protect minors, and Singapore’s *Copyright Act* features an exception to the anti-circumvention provision where circumvention is “to prevent access by minors to any material on the Internet.” Services such as ClearPlay would benefit from such an exception.

Filtering programs – Filtering programs can be used to filter or block inappropriate or infringing material, yet the same programs have been subject to considerable criticism over concerns that they may be overbroad and block perfectly legitimate material. The only way for a party to ascertain whether

their site is included on the block list is to access the lists contained in the software program – a process that typically requires circumvention. In 2000, the U.S. Copyright Office found that an exception for filtering programs was needed. It reaffirmed the decision in 2003.

Obsolete or broken digital locks – Bill C-32 does not address the issue of circumventing broken or obsolete TPMs. The U.S. Registrar of Copyrights has included a specific exception that addresses this situation since 2000.

In addition, some members of the Working Group believe there ought to be a general provision in Bill C-32 (as there was in Bill C-60) that allows users to circumvent a TPM for legitimate purposes. These members believe it would be consistent with the WIPO Internet Treaties, while others question this. Still other members reject the need for a general provision, as circumvention of TPMs for legitimate purposes not otherwise specified could be excepted by regulation.

E. Balancing User Rights and TPMs

Many countries have recognized that a combination of DRM and anti-circumvention legislation may effectively eliminate user rights or copyright exceptions in the digital environment. Italy, Norway and Denmark are among the countries that have adopted a "with rights come responsibilities" approach. In this case, if companies are going to obtain new legal rights for DRM, they must also shoulder the responsibility of unlocking their content when requested to do so by users for lawful purposes.

Further, one of the ongoing concerns with anti-circumvention provisions is the prospect that the legal rules create incentives to use – and possibly misuse – TPMs. France's copyright law establishes a DRM authority which is charged with ensuring interoperability. The authority is an independent administrative body focused on TPMs. The creation of a specific body to address these issues is an acknowledgement of the need for regular review of concerns arising from the use of TPMs supported by anti-circumvention legislation. Bill C-32 contains no safeguard against unintended consequences from the anti-circumvention provisions.

In sum, the Working Group concluded that it is important to have TPM provisions in the *Copyright Act*, in order to ratify the WIPO Internet Treaties, but no agreement was reached on the scope of the protection, the inclusion of devices and the scope of exceptions for TPMs. Some members of the Working Group believe that the Bill should be amended to remove the restrictions on circumvention devices, since improper use would be covered by the anti-circumvention provisions, and there is no need to restrict devices in order to ratify the WIPO Internet Treaties.

Others believe that the restrictions on circumvention devices are needed to protect creator and owner rights for copyright[ed] works. The scope of the exceptions was also flagged as an issue that merits review. The Working Group commented on certain aspects of the existing exceptions, and outlined some additional exceptions that could be included, including fair dealing and the protection of minors.

For greater clarity, the Working Group has drafted tables outlining the contours of the TPM debate from the copyright owner perspective and the copyright user perspective (and for all subsequent issues addressed in this submission).

Owner/Creator Perspective	User Perspective
<p>The TPM provisions will presumably allow Canada to ratify the WIPO Internet Treaties. While copyright owners who wish to use TPMs can do so, there are still concerns that the circumvention exceptions may not allow copyright owners adequate protection if users can – in certain circumstances – circumvent TPMs with impunity.</p> <p>Owners recognize that there may be legitimate reasons why TPMs can and should be circumvented in specified circumstances. Subsection 41.21 even allows for the enactment by regulation of other kinds of exceptions for which there is no specific provision in the Bill. However, circumvention without adequate protection is not palatable for owners.</p>	<p>The TPM provisions will presumably allow Canada to ratify the WIPO Internet Treaties, but users believe the protection in Bill C-32 goes too far. Most users believe that the WIPO Internet Treaties require protection only for “copy control” TPMs and not “access control” measures. Bill C-32 takes the latter course, which they believe is excessive.</p> <p>Many users believe that protection is needed not only for TPMs but from them. A better compromise is found in Bill C-60 from 2005, in which circumvention is permitted for otherwise lawful purposes, such as fair dealing, and there is no inherent prohibition on devices. The prohibition on circumvention devices goes too far, and well beyond the requirements of the WIPO Internet Treaties.</p> <p>Banning devices that have substantial non-infringing uses would be counterproductive to innovation and inconsistent with fundamental principles of intellectual property law.</p>
<p>A scheme is required to prevent abuse of exceptions allowing circumvention, especially if a broad “lawful purpose” exception, such as the one contained in Bill C-60, is reintroduced through regulation.</p>	<p>Bill C-32 would supersede the fair dealing provisions of the <i>Copyright Act</i> with the proposed TPM protections, and allow for no circumvention to prevent this result. Users believe that circumvention for fair dealing and other legal purposes should be permitted, and clarified under the Act.</p>

<p>Creators and owners want to ensure the copyright owner has a viable right of action if a TPM is hacked or cracked, and that there are valid and enforceable penalties. There is no need to specify that TPM protection is limited to works protected by copyright, as only a copyright owner has the power to enforce the anti-circumvention provisions.</p>	<p>The Bill appears not to limit TPM protection to works protected by copyright. It could extend to works in the public domain, if such works are included in a TPM-protected compilation or other “value added” format. Circumvention of TPMs should be permitted in such circumstances to ensure the right to access and copy such public domain material.</p>
<p>Statutory damages should be available for the circumvention of a TPM.</p>	<p>There should be no statutory damages for TPM circumvention by any person for a non-commercial purpose.</p>

IV. EXCEPTIONS TO COPYRIGHT INFRINGEMENT

Bill C-32 includes a number of exceptions to copyright infringement, including fair dealing, time and format shifting, non-commercial uses, and educational exceptions.

A. Fair Dealing (s. 29)

1. General

Bill C-32 includes a proposed amendment to s. 29, the “fair dealing” provision of the current legislation. Until the *CCH* decision⁹ of the Supreme Court of Canada in 2004, s. 29 had been read restrictively and it was generally believed that exceptions for users should be viewed narrowly. In *CCH*, the Supreme Court, through Chief Justice McLachlin, stated that exceptions such as that provided for research, are users’ rights that should be given a large and liberal interpretation. This followed shortly on the heels of another important Supreme Court decision, *Théberge v. Galerie d’Art du Petit Champlain inc.* (2002) in which Binnie, J. outlined the need to ascertain the “proper balance” in copyright law:

Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization. This is reflected in the exceptions to copyright infringement enumerated in ss. 29 to 32.2...¹⁰

In contrast, advocates for creators and owners question whether a liberal interpretation of users’ rights adequately respects the origin of intellectual property rights as providing necessary encouragement to the production of creative works by ensuring that the creator/owner still has

⁹ *CCH Canada Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, para. 32.

¹⁰ *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 at para 32.

the ability to retain certain economic and moral rights to control the works even with public dissemination.

Bill C-32 would expand fair dealing to include parody, satire and education. Working Group members disagreed on the necessity and impact of the proposed changes. Some believed that current jurisprudence has gone far enough in expanding the concept of fair dealing, or “users’ rights,” while others welcomed the changes. Some even believed that certain changes to the exceptions do not go far enough. In addition, some members of the Working Group believe that recent U.S. appellate case law¹¹ and rulings by the U.S. Librarian of Congress¹² show that Bill C-32 would leave Canadians short of users’ fair dealing rights in comparison to their American counterparts, including the overall right to legally circumvent for legitimate, fair dealing purposes.

Some members of the Working Group believe that there must be a so-called “balance of interests” between creators and users, however. Others disagree, suggesting that the concept of balance in copyright law,

... has limits as an interpretive tool in that: 1) it oversimplifies the policy dimensions of the Copyright Act, particularly where balance is conceived as an equilibrium between two competing interests; and, 2) it suggests some sort of equality between user and creator interests that is not reflected in the statute.¹³

This is why some members of the Working Group believe that it is important that Bill C-32 incorporate the language of the “three step test” in order to ensure that the Courts confine exceptions to certain special cases that do not conflict with the normal exploitation of the work and that do not unreasonably prejudice the legitimate interests of the author, including the right to equitable remuneration.¹⁴

¹¹ *MGE UPS Systems, Inc. v. GE Consumer and Indus., Inc*, supra note 5.

¹² *Supra* note 6.

¹³ “Overbalancing: The Supreme Court of Canada and the Purpose of Canada’s Copyright Act” *Canadian Intellectual Property Review* Vol.25, No. 2 December 2009.

¹⁴ The three step test arises out of the Berne Convention for the Protection of Literary and Artistic Works (1967), and requires that any “exceptions” under copyright law are limited to (1) special cases (2) which do not conflict with the normal exploitation of a work, and (3) which do not prejudice the legitimate interests of the rights holder. This test may not apply to educational exceptions, or at least teaching exceptions, which are covered under a separate Article of the Berne Convention (Article 10(2), which allows teaching exceptions for fair purposes to the extent required for teaching).

The Working Group, as a whole, agreed that there is a need to clarify some of the proposed changes.

2. Parody, Satire and Education as Fair Dealing

Bill C-32's exception for satire and parody is likely meant to address the much-criticized Federal Court trial decision, *Cie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada et al.* (1996) that is viewed by some to have limited freedom of expression in Canada.¹⁵ It is argued by users that the proposed satire and parody exception would not deprive copyright owners of any significant source of revenue and would enable the work of creators in Canada. The exception would be consistent with the law of Australia¹⁶ and the U.S.¹⁷

Some copyright owners oppose this exception on the basis that it would give some control over the copyrighted work to other creators and users. This might result in a dilution of the strength or character of the original work. They are also concerned that the exception would diminish the possibility of licensing a work for parody purposes. It was unclear to the Working Group whether the fair dealing exception would negate the need for a license with respect to a commercial work (i.e. a parody of a musical work).

While it is in the interest of society to allow parody and satire (and for the parodist or satirist to benefit from the use of their parody or satire), the Working Group considered whether it is fair to allow them to benefit financially from the exploitation of another creator's work, if that work is used, in whole or in part, without compensation. In the U.S., the Supreme Court established in the 1994 "Pretty Woman" decision¹⁸ that even a blatantly commercial parody can be fair use, as long as it is sufficiently transformative. If so, it would require neither permission nor payment for the right to make the parody, although payment would be required for the performing right to a parodied song. Some members of the Working Group thought further elaboration may be required in Bill C-32 to define the scope of the parody and satire exception, including whether the exception applies to parody and satire created for commercial purposes.

¹⁵ *Cie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada et al.* (1996), 71 C.P.R. (3d) 348. This decision held that a parody drawing of the "Michelin Man" stomping on unionized protesters constituted copyright infringement. Arguments concerning freedom of expression were of no avail.

¹⁶ *Copyright Act* (1968), s. 41A (Australia).

¹⁷ *Campbell v. Acuff-Rose Music* (92-1292), 510 U.S. 569 (1994).

¹⁸ *Campbell v. Acuff-Rose Music* (92-1292), 510 U.S. 569 (1994).

There was also a concern raised by some members of the Working Group with respect to moral rights, specifically the right to the integrity of a work, set out in s.14.1(1) of the *Copyright Act*. Some members of the Working Group questioned whether the parody and satire rights under fair dealing would trump the creator's moral rights. Certain members of the Working Group believe that moral rights are deserving of specific consideration with respect to parody and satire, while others believed that coexistence without further elaboration was possible, as in other countries such as Australia.¹⁹

The proposed addition of "education" as a fair dealing exception has been welcomed by many in the educational sector and decried by others, such as creators and those who collectively license copyright. Copyright user groups are seeking greater clarity on the scope of the educational exception, while copyright owners would prefer for it to be removed completely.

Both the current and proposed legislation contain detailed provisions allowing educational institutions and libraries to engage in certain activity that might otherwise be considered to be infringing. However, in *CCH*, the Supreme Court of Canada looked beyond the specific exception applicable to libraries. The Court held that a library need not rely on a specific exception where it can instead rely on the more general s. 29 fair dealing exception, which is always available to justify copying portions of or even entire works, where warranted for the research needs of practising lawyers and their clients. It also found that "research" could be for commercial purposes and could even entail making multiple copies, as long as the "fairness" test is met. By contrast, a recent decision of the Federal Court of Appeal held that copies made by a K-12 teacher for classroom use did not constitute fair dealing under the *CCH* test.²⁰ Thus, we are left with uncertainty about fair dealing for libraries and educational institutions.

The government has stated that fair dealing permits individuals and businesses to use copyrighted material in certain ways that do not unduly threaten the legitimate interests of copyright owners, but which could have important economic, societal and cultural benefits, and that by extending the fair dealing provision to include "education," administrative and financial costs will be reduced for use of copyrighted materials that enrich the educational environment.

¹⁹ *Copyright Act 1968* (as amended), s. 41(a) (Australia).

²⁰ *Alberta (Education) v. Access Copyright*, 2010 FCA 198 (FCA).

Increased access by educators to copyright works, given budgetary problems in the education system, will undoubtedly have significant societal benefits. From the standpoint of copyright owners, however, the proposed exemption is so broad that it could have a major impact on revenues, thereby reducing the incentive to create a supply of educational materials.

One concern raised by the Working Group is that the scope of the proposed exception for “education” is unclear, creating uncertainty and encouraging litigation. Without a more concise definition of education in the Bill, it would be up to the courts to decide the scope of the exception. The Working Group considered revising the exception to replace the word “education” with “teaching,” but agreed that there would still be problems with clarity.

The Working Group also noted that the *Copyright Act* and the Bill already contain many specific exceptions for education, which allow educational institutions to use certain copyrighted works in certain contexts. This may lead to confusion in determining the application of the proposed fair dealing exception. The Working Group examined the U.S. statute, bearing in mind that the U.S. experience with copyright is very different from the Canadian experience. The U.S. statute (17 USC §107) provides that “teaching (including multiple copies for classroom use), scholarship, or research” would be considered fair use.

To summarize, further definition and elaboration may be required for the proposed additions of parody, satire and education to the fair dealing provision. With respect to parody and satire, the main issue the Working Group considered was whether there should be compensation for commercial use of a work that is the subject of a satire or parody. With respect to education, further definition of the scope of the exception is required to create certainty and clarity for creators and educational users, and to address potential inconsistencies within the *Act*.

Owner/Creator Perspective	User Perspective
The satire and parody exceptions are fine, so long as the creator or owner of the original subject work receives compensation for the use of the subject work.	Inclusion of satire, parody and education in s. 29 would be useful and at least a step toward conforming to the Supreme Court of Canada’s articulation of users rights and harmonizing with the law of other countries, such as Australia, France and the U.S.A.

Inclusion of the word “education” is problematic, especially without a definition or further clarification.	Addition of the word “education” is beneficial, as it provides educational users and educational institutions with a broad fair dealing right that has economic, financial and cultural benefits.
Certain copyright collective societies see the inclusion of education in fair dealing as a complete erosion of creators’ and owners’ rights, and even see a potential elimination of collective societies.	The educational exception may reduce administrative and financial costs for educational institutions, allowing institutions to invest more in teaching and students, rather than in administrative costs.
The rights of educational institutions and educational uses are already covered under research and private study exceptions, so the word “education” need not be added.	The word “education” requires further definition, for educational institutions to understand the application of the fair dealing right. The right to make multiple copies for classroom use should also be clarified, as in the U.S. statute.

B. Non-commercial User Generated Content (UGC)

Proposed s. 29.21 of Bill C-32 would grant certain exceptions to infringement with respect to non-commercial user generated content (UGC).²¹ The intent of the section is to allow people to share UGC by posting the copyrighted works of others as “new works.”

The UGC provision was the subject of significant debate within the Working Group. First, they questioned what constituted “active” versus “passive” use of UGC for commercial purposes. For example, if a website allows its users to upload content, and then places advertising adjacent to (or even embeds an ad in) the content, some members of the Working Group said the website would be actively using the content for a commercial purpose. Others believed that the website was serving as a “passive” intermediary, which did not “actively” distribute content, and therefore should not incur liability. Creators and owners of copyright want to ensure that the exception does not apply to intermediaries or other services that actively reproduce or communicate UGC for commercial purposes, while users want to ensure that the safe harbour protections for “passive” intermediaries (such as ISP’s, discussed below) are maintained.

In light of this debate, some members of the Working Group believe that the section may have unintended consequences. For example, certain websites could claim that the UGC they host does

²¹ Examples of UGC include YouTube, Wikipedia, and comments posted by a reader of an online news article.

not require a license, despite the financial benefits from online traffic attracted to the site for a myriad of reasons, including access to copyright protected works of third parties posted by non-owners. Some members of the Working Group were concerned that the wording of the Bill opened the door to such websites successfully relying on the UGC exception, while others did not view this as problematic, particularly in light of the “safe harbour” provisions.

The “safe harbour” provisions created by the Bill would apply where a website or service provider is a hosting service rather than an active disseminator. The Bill would create a system where service providers and search engines can avoid liability by implementing certain procedures to deal with potential infringement of copyright. Some members of the Working Group believe that the essential purpose of this provision is to immunize intermediaries hosting UGC that serves a useful and transformative purpose with no harmful effects on content owners. The “safe harbour” provision is discussed further under “Network Services and Hosting Services,” below.

Concerns were also raised about the application of this section to works other than audio-visual works. Some members believe that this section might permit mash ups (combining two or more works) and postings of computer programs, websites and other kinds of works that could create significant legal issues not contemplated by the drafters.

Owner/Creator Perspective	User Perspective
The UGC exception is fine, so long as it does not extend to third party intermediaries who generate revenue from the use of UGC. The scope of the UGC exception therefore needs to be clarified.	The UGC exception promotes creativity with no economic downside to content owners. Taking it away for intermediaries will render it nugatory.
There needs to be a distinction between active and passive use for intermediaries. An active intermediary (one who, directly or indirectly, derives a financial benefit from “active” use of UGC) should be required to compensate the copyright owner.	Safe harbour provisions maintain that an intermediary who simply provides a platform should benefit from the UGC provisions, whether or not advertising revenue or other revenue is generated by that intermediary.

C. Time and Format Shifting

The Bill would add sections 29.22 and 29.33, which concern format shifting and time shifting, and allow reproduction of a work for private purposes, so long as the original work was legally

obtained by the individual making the private copy, and no TPM is circumvented. On the one hand, these users' rights will be welcomed as a step towards legitimizing what consumers are already doing (though the benefit might be substantially circumscribed depending on copyright owners' use of TPMs). On the other hand, copyright owners believe that a user's right to make a copy should be accompanied by an owner's right to compensation.

The goal of the time and format shifting provisions is to allow Canadian consumers to make reasonable use of content that they have legally acquired. Bill C-32 legitimizes time shifting of such things as television programs to allow consumers to record them for enjoyment at a later time. It also allows consumers to copy legitimately-acquired content onto devices they own, such as MP3 players, provided that it is for private, noncommercial purposes and the user does not break a digital lock in the process. Time shifting of television programs has been legal in the U.S. since the landmark 1984 U.S. Supreme Court "Betamax" decision.²² The U.S. recording industry has recognized the consumers' right to format shift legally acquired CDs to devices such as iPods. In these cases, compensation is not required.

Many content owners believe that the private copying levy scheme in Part VIII of the *Copyright Act* should be extended to provide for a levy on digital audio recorders, such as iPods. However, many users disagree on the basis that levies are a highly inefficient and ineffective way of rewarding actual creators and would impose a harmful "tax" on technology that would sweep in smart phones and other devices used for multiple purposes, as well as users who do not use the technology to make private copies of sound recording, or who do so only incidentally. Opponents of a so-called "iPod tax" note that levies are being curtailed in Europe and are non-existent in the U.S., Australia and the U.K. They note that most of the proceeds of a levy would go to the U.S., and there would be no reciprocal payments. In any event, those opposed to extending levies believe that, given that Part VIII of the *Act* has not been amended by Bill C-32, a proposed amendment after second reading would be out of order according to the procedures and rules of the House of Commons. Some members of the Working Group believe that the inevitable serious legal and political controversy that would ensue from opening up this issue would result in the death of Bill C-32.

²²*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

There is currently a scheme allowing creators of musical works to be compensated for the sales of blank audio recording media. Under Bill C-32, there would be no compensation for personal copying (time and format shifting), but a creator or owner could protect a work using a TPM. The question for legislators is whether this provides an appropriate balance between users and owners.

Owner/Creator Perspective	User Perspective
<p>Creators and owners should be compensated for uses in which only the copyright owner would otherwise be permitted to engage, including the making of copies. Even if the copies are made for personal use, compensation should still be paid as is currently the case with cassettes and CDs.</p>	<p>Format shifting for non-commercial personal use is beneficial for user, and for society as a whole. The right to time shift and format shift content for personal non-commercial use is essential for all lawfully acquired content.</p>
<p>There should be consideration to including digital audio recorders in the levy set out in the <i>Copyright Act</i> private copying regime.</p>	<p>The ability of owners or creators to restrict the right to format shift through the use of a TPM should be limited or eliminated, since use is limited to personal non-commercial uses.</p>
<p>Compensation for copying is a royalty, not a "tax." Taxes are amounts imposed by governments on its citizens. Royalty regimes exist throughout the world with the notable exceptions of the U.S., U.K. and Australia.</p>	<p>Compensation should not be required for copies that are made for personal use format shifting. Levy systems are inefficient, ineffective and obsolete and are a "tax" on technology. There is no corresponding levy system in Australia, the U.S. or the U.K.</p>

D. Educational Exception for Internet Delivery of Lessons, Digital Reproduction and Use of Internet Materials

The *Copyright Act* currently allows certain limited uses of copyrighted works by educational institutions without payment to the copyright owner. The proposed amendments would grant additional uses for copyrighted material by teachers, students and schools, in addition to the general fair dealing exception noted above. The proposed amendments would create exceptions to infringement in several areas:

- Distance education (Internet delivery of lessons), allowing schools to transmit lessons that include copyrighted sections (i.e., digital course packs), provided use of the copyrighted sections in the lesson are not otherwise infringing.
- The statutory extension of reprographic licenses to digital copies; and

- The educational use of the Internet, to allow teachers and students to use publicly available Internet material that has been legitimately posted without technological protection or notice of restriction by copyright owners for the purposes of teaching and education. For example, a teacher could make handouts that include an illustration from a website that is freely accessible.

While those in the K-12 sector seek a special exception for use of publicly available material on the Internet, many others in the educational sector, particularly at the post secondary level, believe that a special exception is both unnecessary and harmful. They believe that the current scheme of fair dealing and implied license is sufficient. They also believe that a special exception could create an *a contrario* implication that everyone outside the educational community is infringing when they engage in free use of publicly available material on the Internet.

Once again, the Working Group had varied opinions about this provision. Certain members suggested that the new exceptions need to be extended (by removing the “delete or destroy before” dates), while others believed that compensation, in the form of a tariff requirement, would be beneficial in this context for all Internet uses. There was also a question raised regarding the interplay between the specific educational exceptions and the proposed educational fair dealing exception, which should be considered and clarified.

Owner/Creator Perspective	User Perspective
Creators and owners should be compensated for Internet use and digital reproduction in the educational context.	While the K-12 community welcomes the educational exception, most other users, including many at the post secondary level, believe it is unnecessary and even harmful. The danger is that the courts would interpret the provision in an <i>a contrario</i> manner.
The provision allowing a website owner or copyright owner to restrict further use of copyright protected material without permission is appropriate.	There does not need to be a requirement for compensation for any use of publicly available material on the Internet.
Creators are unsure of the interplay between this section and educational fair dealing.	Users are unsure of the interplay between this section and educational fair dealing.

<p>The Internet delivery exception extends existing exceptions, without any compensation to owners.</p>	<p>The permitted exception mandates the destruction of lesson material within 30 days after the course is over, if such material is used. Users question the need for this destruction provision, especially if the use will continue for subsequent years of the course.</p>
<p>The digital reproduction provision reduces the rights holders' freedom to pursue greater compensation for digital reproduction than paper, unless a new agreement or tariff is reached. A rights holder that chooses to exclude itself from the statutory licensing regime would be limited to damages that would have been available in royalties under a non-digital license.</p>	<p>It is beneficial that educational use of material on the Internet will be permitted, but there are concerns that an owner can limit the use by providing specific notice to the user or imposing a TPM.</p>
<p>Requiring restrictive notices and TPMs in order to protect Internet content imposes an additional burden on content owners.</p>	<p>Acknowledgement of source for Internet works may cause logistical problems where the source is not readily discernable.</p>

E. Interoperability of Computer Programs, Encryption Research, Security, Temporary Reproduction for Technological Processes

Section 31 of Bill C-32 would exempt use of copyrighted works for the purposes of making computer programs interoperable, encryption research, security, and “temporary reproduction for technological processes.” These exemptions appear to be intended, at least in part, to address areas in the DMCA that have come under criticism. The specific exemptions are:

- A person who owns a computer program can reproduce it for the sole purpose of obtaining information that would allow the person to make the program and any other computer program interoperable, permitting reverse engineering.
- A person can reproduce a work for the sole purpose of assessing the vulnerability of the computer, system or network or of correcting any security flaws, as long as there is consent of the owner or administrator of a computer, computer system or computer network.
- A person can reproduce a work if the reproduction forms an essential part of a technological process, the reproduction's only purpose is to facilitate a use that is not an infringement of copyright, and the reproduction exists only for the duration of the technological process.

The purpose of these amendments is to support the growth of a competitive third-party software market in Canada by providing innovative companies, such as video game developers, with the tools they need to innovate by allowing temporary, technical and incidental reproductions of

copyrighted material. This would allow companies to conduct security testing, encryption research, compatibility testing and reverse engineering. It would also, for example, allow smart phone providers to perform certain activities that ensure the usefulness of their products for consumers, such as reformatting a webpage so it can be better read on a smart phone.

The first exception, for the purposes of making computer programs interoperable, seems to extend the existing exemption in a way that benefits users. In some cases, it may benefit copyright owners by increasing the market for the copyright owner's product. If the copyright owner is opposed to the creation of interoperable programs, it can deny the availability of source code to developers, which will make the exercise more difficult and perhaps impossible for the developers despite the provision.

The second exemption, for encryption research and security, would in some cases fall under the current fair dealing exemption for research and so does not extend the user's rights in a way harmful to owners. Further, it reflects existing exemptions in the DMCA but extends them to copyright infringement as opposed to the anti-circumvention provision, thereby providing a broader, more meaningful exemption.

The third exemption, for "temporary reproduction for technological processes" is drafted in a way that may have unforeseen consequences. The corresponding European language is much narrower and restricted to transient uses in network transmissions. The problem is illustrated by the following example. Consider an industrial process which requires proprietary computer software to control it. A party wishes to operate the process without purchasing the proprietary software. If it can reproduce the control software from another source, then the proposed exemption would arguably allow the party to use the copy of the software to control the process (i.e., to facilitate the operation of the process, which itself is not an infringement of copyright) for its duration. The language of the proposed amendment, which does not appear to be based on statutory provisions in any other jurisdiction, requires examination to ensure it meets the policy objective and is not overly broad.

Some members of the Working Group also believe that appropriate exceptions are needed to allow for platform shifting of computer programs and other digitized content that have been legitimately acquired. This need arises because of the breakdown or obsolescence of hardware.

Owner/Creator Perspective	User Perspective
The provisions regarding temporary reproduction for technological purposes exemption may have unforeseen consequences, and needs to be reviewed before it is enacted.	The provisions regarding interoperability of computer programs, encryption research, security, and temporary reproduction for technological processes are useful and should not be altered.
Consideration should be given to creating remuneration regimes when works – such as those currently covered by the private copying regime - can be copied in ways that new technology can exploit.	<p>Amendments are needed to provide for the right of consumers and users of copyrighted software and other content to engage in:</p> <ul style="list-style-type: none"> • Time shifting; • Format shifting; • Space shifting; and, • Platform shifting <p>of material they have lawfully acquired but cannot conveniently use or cannot use at all for various practical reasons.</p>

V. ISP AND SEARCH ENGINE LIABILITY/OBLIGATIONS INCLUDING NOTICE AND NOTICE

A. Infringement – Provision of Services

Bill C-32 adds s. 27(2.3) to the *Copyright Act*, which concerns the provision of services designed primarily for the infringement of copyright:

It is an infringement of copyright for a person to provide, by means of the Internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

This section accords with the principle that the *Act* should be made technologically neutral,²³ by adding a new kind of infringement that recognizes technological developments. However, some members of the Working Group were concerned that the words “designed primarily” create unnecessary ambiguity that would work in favour of infringing service providers. The suggested remedy was to substitute the word “used” or “operated” for “designed primarily.”

²³

See the reference to this principle in the legislative summary of Bill C-32.

However, other members believe that the proposed substitution would make the provision far too broad, such that it would capture any website that allowed for comments or any form of user generated content. They believe that language such as “designed primarily” is necessary to ensure innovation and efficient use of the Internet. There is nothing intrinsically wrong with P2P, bit-torrent technology, or other technologies that can be used for both legitimate and illegitimate purposes. Consistent with the *CCH* case, the law should presume that technology that has substantial non-infringing uses will be used legally and not presume otherwise.

The issue is whether the words “designed primarily” capture the infringing providers (P2Ps and Torrents, among others), without unduly fettering use of the Internet.

Owner/Creator Perspective	User Perspective
The drafting of the provision of services section provides too many loopholes for infringers. Specifically, the words “designed” and “primarily” may prevent meaningful and effective enforcement.	Any technology and any service that has or provides substantial non-infringing uses and is beyond the immediate control of the provider should be legal. To legislate otherwise would impede useful innovation, running contrary to the <i>CCH</i> decision.
The words “used” or “operated” should be substituted for the word “designed” or “designed primarily.”	The words “designed” and “primarily” are important and should be left in the draft section.
Ambiguities in the section will lead to litigation.	Ambiguities in the section will lead to litigation.
Statutory damages do not apply to this section, limiting copyright owners’ ability to enforce equally against all infringers. Creators believe that statutory damages are an important mechanism that allows a creator or an owner to protect works, with the requirement of proving infringement, but without the requirement of proving specific damages. Statutory damages are meant to act as a deterrent to copyright infringement. Creators believe that there is no reason to exempt enablers of infringement from the application of statutory damages.	Statutory damages should not apply to this section. There is no reason why copyright owners should be exempt from the general rule of law that damages should be proven in the context of online service providers. The potential liability of a service provider subject to statutory minimum damages is immense. Users believe that extending the application of statutory damages would inhibit all kinds of innovative and useful services.

B. Network Services and Hosting Services

The proposed legislation recognizes that Internet Service Providers (ISPs) and others should play a role in reducing online copyright infringement. The Working Group was divided on whether the proposed sections go far enough to assist copyright owners with this challenge.

Bill C-32 would add s. 31.1 to the *Act*, which exempts network services from liability for infringement, subject to certain limitations. Section 31.1 would be considered a “safe harbour” provision in Canada, through which ISPs cannot be held liable for the actions of their users. Some members of the Working Group believe that s. 31.1 creates unnecessary duplication if s. 2.4(1)(b) in the existing law is not deleted.²⁴ Other members point out that s. 2.4(1)(b) is similar to proposed s. 31.1, but the latter is limited to “Internet and digital networks,” while 2.4(1)(b) applies to anyone that “provides a means of telecommunication.” There may be overlap, but there may also be telecommunication service providers who do not fall into “Internet or digital networks.”

One of the concerns raised by the Working Group was that the proposed safe harbour provisions do not require compliance with one of the other requirements of the Bill, namely the “notice and notice” provision. A “notice and notice” provision is a mechanism through which copyright owners could notify an ISP or a search engine about a potential infringement, and the ISP or search engine would have to notify the “owner” of the allegedly infringing content of the claim. The “owner” of the content could then decide whether to take down the content, or claim that there is no infringement. The notice and notice system is distinctly different from the U.S. “notice and takedown” system, where an ISP or search engine is required to take down allegedly infringing content upon receipt of a notice from a copyright owner.

Some members of the Working Group had concerns that the safe harbour provision does not explicitly refer to the notice and notice provisions. There was a concern that s. 31.1 should state that the ISP must comply with the requirements provided in the notice and notice sections in

²⁴ The clause reads:

2.4 (1) For the purposes of communication to the public by telecommunication,
...

(b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public.

order to take advantage of the provision and be classified as a “non-infringer.” There were concerns among the members of the Working Group that s. 31.1, as drafted, may not provide enough of an incentive for network services to assist copyright owners in preventing infringement.

Owner/Creator Perspective	User Perspective
There should be a link between the “safe harbour” and the “notice and notice” provisions, to require network and hosting services to comply with the latter in order to benefit from the former.	No link between the safe harbour and notice-and-notice provisions is required, as each provision can stand on its own.
Section 2.4(1)(b) overlaps with s. 31.1. The overlap between s. 2.4(1)(b) and s. 31.1 would best be dealt with by deleting s. 2.4(1)(b).	Section 2.4(1)(b) provides an important right to telecommunications service providers, which is not covered by proposed s. 31.1, and both sections should be in the revised <i>Act</i> .

C. Notice of Claimed Infringement (“Notice and Notice”)

Sections 41.25, 41.26, and 41.27 of Bill C-32 add a regime of “notice and notice” for network service providers (for example ISPs) and search engines, whereby a copyright owner can provide notice to a service provider or search engine of alleged infringement, and the notice must be passed on either to the account holder or party responsible for posting the content referred to in the notice.

Some members of the Working Group think that the proposed “notice and notice” regime may be inadequate for copyright owners because it is not accompanied by effective enforcement provisions. Infringers can receive an unlimited number of notices without consequences and the infringing material will continue to be available on the Internet for other infringers. A suggested amendment would compel an ISP or search engine to identify an alleged infringer so that a copyright owner can pursue the infringer through a civil claim. Others believe that a court order should be required for disclosure in order to protect privacy, among other interests. Still other members thought that the existing *de facto* “notice and notice” regime in Canada has functioned well for over a decade and should be explicitly sanctioned in the statute.

Owner/Creator Perspective	User Perspective
The proposed notice and notice provisions may not be effective to prevent, stop or deter infringement.	The notice and notice provisions, as drafted, are sufficient to protect network and service providers with allegedly infringing content.
Additional provisions could be considered for a more effective enforcement regime, including compelling the ISP to provide the copyright owner with information about an alleged infringer. The provision could also include negative and escalating consequences if an infringer or an enabler continues to engage in, or enable, copyright infringement after repeated notices.	The existing <i>de facto</i> “notice and notice” regime in Canada has functioned well for over a decade and should be explicitly sanctioned in the statute. Any extension of the status quo would lead to abuse and intolerable invasions of privacy if it permitted disclosure without a court order.

VI. MAKING AVAILABLE AND DISTRIBUTION RIGHTS

A. Right of Distribution

Bill C-32 amends s. 3(1) of the *Copyright Act* to address the right of distribution. This amendment is required to ratify the WIPO Internet Treaties. Currently under the *Act*, the distribution of legitimate copies of a work is generally not an infringement.²⁵ Bill C-32 would make it so in certain circumstances. The proposed amendment is restricted to “tangible objects” (which would presumably exclude digital copies of works distributed online), and excludes sales or transfers of ownership after the first authorized sale or transfer.

Some members of the Working Group expressed concern that this provision could inadvertently affect the law with respect to parallel imports of legitimate goods manufactured abroad with the consent of the copyright owner. The provision may be unnecessary for purposes of WIPO ratification or any other reason, since Canadian appellate jurisprudence has repeatedly confirmed a “communication,”²⁶ “reproduction” and “distribution” right.

Moreover, some Working Group members believe that the provision as drafted could be interpreted to negate the principle of exhaustion in Canada. This principle, which is expressly permitted by the WIPO Internet Treaties, holds that once a tangible product has been put on the market anywhere in the world with the consent of the appropriate intellectual property rights

²⁵ Per s. 27(2)(b).

²⁶ *Canadian Wireless Telecommunications Association v. SOCAN*, 2008 FCA 6; *Shaw et al v. SOCAN*, 2010 FCA 220.

holder(s) in that jurisdiction, the tangible product can thereafter be imported into Canada free of any intellectual property barriers. Any rights to restrain trade in the tangible product are thus said to have been “exhausted.” This principle is seen by consumers and most retailers as being essential to the maintenance of competition and the prevention of international price discrimination, which may result in Canadians paying more for the same products than others. Some members of the Working Group believe that the Bill should not include any language that could inadvertently change the law on “exhaustion” and “parallel imports,” which was recently upheld by the Supreme Court of Canada,²⁷ since this is a complex and controversial debate in copyright law, with potentially significant economic ramifications.

Owner/Creator Perspective	User Perspective
The amendments in Bill C-32 are required to clarify rights of distribution.	This provision is unnecessary and may have unintended effects. It should be dropped, as it is already covered by existing law.
	This provision may have an inadvertent and serious effect on legitimate goods, which are legally purchased and brought into Canada (parallel imports). It could negative the well established “exhaustion” doctrine.

B. Making Available

Article 8 of the WCT, Right of Communication to the Public, provides that:

... authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Section 3 of Bill C-32 would amend s. 2.4 of the *Act* to address the “making available” right and the widespread problem of peer-to-peer file sharing. It adopts the language of the WCT, though it improves it by substituting “telecommunication” for “wire or wireless means.” Without such a right, where a shared work is legitimately obtained, the copyright owners may be required to prove authorization of infringement by the uploader, which may be difficult.²⁸ Adding this further

²⁷ *Euro Excellence Inc. v. Kraft Canada Inc.*, [2007] 3 S.C.R. 20, 2007 SCC 37.

²⁸ See *BMG Canada Inc. v. John Doe* 2004 FC 488.

right for the copyright owner would seem to both satisfy Canada’s obligation under the WCT and add a needed provision to address the problem of infringement by peer-to-peer distribution.

Some members of the Working Group believe that this provision is unnecessary, since the “making available” right is recognized in Canada (at least for authors), and may have unintended and negative consequences with respect to potentially legitimate Internet activity. These members pointed out that the addition of a “making available” right could catch one-to-one communications over the Internet and even fax transmissions, which have been found not to be communications to the public by the Supreme Court of Canada in the *CCH* case.

Other members of the Working Group are of the view that the provisions in Bill C-32 that introduce the “making available” right for performances and phonograms and clarify the right for authors, is absolutely necessary in order to ratify the WCT. Two cases concerning royalties²⁹ have held that “communication to the public by telecommunication” includes transmission to the public over the Internet for the purposes of a download. However, the application for leave to appeal at the Supreme Court of Canada for the second case is pending.³⁰ Thus, it remains an outstanding issue as to whether “communication to the public” would capture Internet downloads. These Working Group members believe that the provision is necessary to enshrine this principle into law.

Owner/Creator Perspective	User Perspective
The making available right is necessary for Canada to ratify both WIPO Internet Treaties treaty. Bill C-32 explicitly provides this right for performers and makers of phonograms and since the right already exists for authors, it has been clarified in the Bill.	This provision may be unnecessary in light of established case law and even counterproductive with respect to potentially legitimate use of P2P technology.
The making available provision should cover off some of the concerns with the distribution right – making available is a positive addition to the Act, which provides clarity for owners and is necessary for ratification of the WIPO Internet Treaties.	

²⁹ *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, [2008] 3 F.C.R. 539 and *Canadian Wireless Telecommunications Association, Bell Mobility Inc. and Telus Communications Company v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 220.

³⁰ *Bell Canada v. Society of Composers, Authors and Music Publishers of Canada*, 2008 CanLII 46984 (S.C.C.) SCC Court File No. 32516.

VII. STATUTORY DAMAGES

The concept of statutory minimum damages enables copyright owners to elect to seek minimum damages normally ranging between \$500 to \$20,000 in lieu of actual damages, which are often difficult to prove or nominal in the case of a single act of copyright infringement. The availability of such damages is useful in many cases, such as against commercial “flea market” infringers, who are prone to not keeping records, and against others who resist compliance because actual damages may be minimal and lawsuits are therefore not economical.

The scope of damages applicable to individuals for infringing activities such as file-sharing is controversial. Some believe that statutory damages can lead to extremely large and excessive judgments against ordinary individuals, while others believe that the courts in Canada already have sufficient discretion under existing law to reduce claims for statutory minimum damages where the amount claimed “would result in a total award that, in the court’s opinion, is grossly out of proportion to the infringement.”³¹

Bill C-32 seeks to limit the maximum award of statutory damages potentially available against individuals who infringe “if the infringements are for non-commercial purposes.”³² The Bill would provide an upper limit of \$5,000 in statutory damages available from an individual, for that individual’s non-commercial infringements at any point in time. The Bill also allows for statutory damages to be reduced below the new minimum of \$100 per infringement in certain limited circumstances, such as an individual acting for “non-commercial purposes.”

Some members of the Working Group believe that the proposed changes to the statutory damages regime are consistent with Canadian values, and avoid punitive justice. Others believe that the statutory damages regime is an essential part of Canadian copyright enforcement, and should continue to apply, while ensuring that individuals are not subject to disproportionate awards.

³¹ S. 38.1(3)(b) of the current *Copyright Act*.

³² The term “non-commercial purposes” is not defined in the Bill or the *Copyright Act*.

Owner/Creator Perspective	User Perspective
Statutory damages are a valuable and effective mechanism for encouraging compliance with the law, and deterring infringers.	Limitation and attenuation of the potentially punitive aspects of statutory minimum damage awards against individuals is essential in light of Canadian values. This principle should be extended to educational institutions acting in a good faith belief that they are engaged in fair dealing, consistent with U.S. law.
Statutory damages should not be reduced, or limited against any infringer, as they provide sound economic ground for appropriate action against copyright infringers, and can be reduced in a court's discretion if disproportionate against individuals.	Limiting statutory damages against individuals, for non-commercial purposes, is consistent with the purpose and intent of the Bill and of the Act.
Statutory damages will not be disproportionate as noted for the reasons above.	Statutory damages can lead to disproportionately high awards. Bill C-32 would prevent similar awards in Canada.

VIII. CONCLUSION

Copyright law is completely out of date. It is a Gutenberg artifact. Since it is a reactive process, it will probably have to break down completely before it is corrected.

-Nicolas Negroponte, founding director of MIT MediaLab³³

While the state of copyright law in Canada is not quite so perilous, the *Copyright Act* is showing its age. All Working Group members agreed that the *Copyright Act* is in need of reform to bring Canada into the digital era. The time to act is now.

The Working Group has endeavoured to provide a balanced commentary on Bill C-32 from the perspective of lawyers with significant experience in copyright and privacy law. Despite the differences of opinion within the Working Group, it was able to reach agreement about the following matters:

- The Act should include provisions concerning the circumvention of TPMs in order to ratify the WIPO Internet Treaties;
- The scope of TPM exceptions in Bill C-32 merits close review to ensure they will operate as intended and are not unduly complex or underinclusive;

- Further refinement of the provision including parody and satire to the “fair dealing” exception should be considered in order to clarify whether compensation is required for commercial use of a work that is the subject of a satire or parody; and
- Further refinement of the provision including education as a fair dealing exception is required to create certainty and clarity for creators and educational users, and to address internal inconsistencies within the Act.

The CBA Sections hope that the commentary above provides some clarity to the policy issues that arise in the context of Bill C-32, and that it assists Parliament in its deliberations on the Bill.