SUBMISSION TO BILL C-32 LEGISLATIVE COMMITTEE

Founded in 1964, the Canadian Civil Liberties Association ("CCLA") is a national organization dedicated to the protection of civil liberties in Canada. The CCLA is supported by several thousand individual members across Canada, representing a wide variety of persons, occupations, and interests. The CCLA's principal mandate is to promote and protect fundamental rights and liberties. In keeping with its ongoing commitment to the protection of civil liberties, the CCLA is concerned about the maintenance of a society that provides adequate space for individuals to express their thoughts, beliefs and opinions as well as receive expressions and information from others.

Copyright is at the heart of information exchange and expressive freedom in the private domain. As expressed by the Supreme Court of Canada, "the purpose of copyright law [is] to balance the public interest in promoting the encouragement and dissemination of works of art and intellect and obtaining a just reward for the creator."[1] In a market-based democracy, ensuring fair compensation for creative and intellectual works is essential to ensuring the continued viability of these careers. At the same time, the public's ability to access, reshape and respond to intellectual creations is integral to education, debate, criticism, discussion, self-fulfilment and creativity. The critical nature of the public interest in producing, accessing, and responding to creative and intellectual works is underscored by the importance our society places on freedom of expression, which is enshrined within the *Canadian Charter* as one of our most fundamental rights.

The CCLA makes three principal submissions:

Freedom of Expression :

1. That the provisions dealing with fair dealing should be clarified and strengthened by adding the expression "such as", and adding language similar to the U.S. provisions. (See our submissions under pp 2 -6)

2. That provisions be added to ensure that digital locks not trump user's rights (Submissions pp. 6 – 7)

Equality

3. That the Copyright reforms should contemplate more clearly the needs of those with perceptual disabilities (pp. 7-8)

[1] ***CCH v. Law Society of Upper Canada.*** [2004] 1 SCR 339 at 23.

Privacy

4. That the Copyright Act respects better privacy rights of users (p.8)

Right to Information:

5. That the issue of the Crown copyright be moderately addressed (pp. 8-9)

1. Ensuring an expressive society: Meaningful and flexible protection for fair dealing user rights

a. In its current form, the *Copyright Act* (the "Act") recognizes some critical user rights that allow individuals and institutions to access, reproduce and distribute otherwise copyrighted work. The 'fair dealing' exceptions found under s. 29 of the *Act* state that using works fairly for research or private study do not violate copyright, and neither does criticism, review or news reporting so long as the work is properly cited. There are also additional exemptions for educational institutions,[2] libraries, archives and museums.[3] These fair dealing rights are essential to maintaining a healthy balance between an author's interests in compensation, and the public interest in maintaining an open, expressive and informed society. In order to maintain the delicate balance between expressive freedom and author compensation, any future amendments to the ***Copyright Act*** should fully respect user rights, and recognition of these rights should be incorporated into all aspects of copyright protection.

As the Supreme Court of Canada eloquently stated in the CCH decision in 2004, ""Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained, and is not limited to non-commercial or private contexts." The Court thus confirmed that fair dealing is a users' right and should not be interpreted restrictively against the purpose for which it was clearly intended.

Indeed, the very first copyright law in the world, the legendary English Statute of Anne of 1709 had, as a full title "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned". This title confirms that the very origin of copyright law was not so much for the purpose of the protection of publishers but rather for the purpose of education. This purpose is now under attack in at the Copyright Board and in the Courts by those who would prefer, in effect, to "tax"

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[2] ***Copyright Act*** R.S., 1985, c. C-42, ss. 29.4-30.
[3] ***Copyright Act*** R.S., 1985, c. C-42, ss. 29.4-30.

education in the name of copyright and to impose high costs, rigid restrictions and even privacy invasive record keeping obligations on Canada's educational institutions at all levels - especially at the post-secondary level.

The Canadian Civil Liberties Association is concerned that, notwithstanding the ***CCH*** decision, the Copyright Board and the Federal Court of Appeal, operating under the current legislation, have been interpreted the "fair dealing" provisions in a fixed and restrictive manner thereby preventing a meaningful balancing that can take into account a rapidly changing field. The Copyright Board has recently held, in the context of K-12 education, that multiple copies in a classroom and anything prescribed by a teacher cannot be fair dealing. This ruling has been upheld by the Federal Court of Appeal.[4] While the CCLA is hopeful that the decision will be reversed in the Supreme Court of Canada, at the date of submissions of this brief, we do not even know if the Supreme Court of Canada will grant leave to appeal.

In order to make 'fair dealing' more responsive to the purposes of the legislation, the CCLA joins with others in calling for the addition of the words "such as," to make the current list of fair dealing purposes suggestive rather than exhaustive.

b. **CCLA also supports the inclusion of the word "education" in section 29**. However, in view of the current jurisprudence from the Federal Court of Appeal, this word by itself may not be sufficient since that Court has confirmed the Copyright Board's interpretation that the use of multiple copies in a class room will not pass the "fairness" analysis. **CCLA suggests the inclusion of explicit language such as is found in the §107 of the US *Copyright Act* confirming that fair dealing for the purpose of education can include multiple copies for class room use and copies prescribed by a teacher**.

The US provision is as follows:

§ 107. Limitations on exclusive rights: Fair use40

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, ***teaching (including multiple copies for classroom use), scholarship,*** *or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —*

[4]Province of Alberta et al v. Access Copyright, 2010 FCA 198

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
(Emphasis added)

c. The CCLA was concerned that the existing fair dealing exceptions may not be expansive enough to allow for criticism in the form of parody and satire. Canada should celebrate intelligent, creative forms of social critique and commentary. However, our Courts have put a severe chill on such activity in the form of the controversial 1996 ***Michelin***[5] decision that is still on the books and has not been overruled. In this decision, the depiction by way of clear parody of the "Bibendum" Michelin character in the context of a union protest was held to infringe copyright. This is completely at odds with the 1994 decision of the US Supreme Court that permitted a blatantly commercial transformation into a raunch "rap" song by way of parody of the popular song "Pretty Woman" based on the American fair use doctrine.[6] **Thus, CCLA is pleased that Bill C-32 explicitly include parody and satire as examples of 'fair dealing' and we support the inclusion of such language in Bill C-32.**

d. Therefore, CCLA suggests the amendment of section 29 of the Act to read as follows:

29. Fair dealing for purposes such as scholarship, research, private study, parody, satire or education does not infringe copyright. For greater clarity, education may include teaching with the use of multiple copies, and the use of single or multiple copies as prescribed by an instructor.

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[5]***Compagnie Générale des Établissements Michelin--Michelin & Cie v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)*** (T.D.) [1997] 2 F.C. 306
[6]***Campbell v. Acuff-Rose Music***, 510 U.S. 569 (1994).

e. Bill C-32 does not contain a blanket immunization against statutory minimum damages for educational institutions acting on a good faith belief that their practices involve fair dealing. There is an equivalent provision in the USA - namely §504(c)(2). The "*ad terrorem"* implied and even explicit threat by certain parties to invoke statutory damages against educational institutions in Canada has been instrumental in the imposition of costs and restrictions that have no counterpart in the American educational system. The result is that Canada is at a considerable disadvantage in terms of excessive costs and, even more importantly, greatly restricted freedom on the part of teachers and students at all levels. **Section 46 of the Bill, which deals with section 38.1 of the Act, should be amended to include a provision implementing the foregoing principle.**

f. Finally, with respect to fair dealing and exceptions, the CCLA is concerned that the proposed educational exception for educational use of publicly available material on the internet is not only unnecessary but may actual prove to be seriously harmful. There is no reason why educators need any special exception, if principles of fair dealing and implied license are sufficient. Moreover, such a provision risks the creation of an "a contrario" implication that anyone outside of the educational framework cannot save, store, print, communicate or otherwise use publicly available material on the internet in the way in which such use is commonly undertaken and in respect of which certain educators seek a special exception. It is noted that this special exception is sought mainly by the K-12 sector and that there is little if any support in the post-secondary realm and, indeed, some active opposition. **Therefore, proposed section 30.04 of the Bill should be eliminated.**

2. <u>Digital Locks Must Not Trump Users' Rights</u>

It is clear that the anti-circumvention provisions of Bill C-32 will, as they presently stand, trump users' fair dealing rights and other users'. This was confirmed in testimony to this Committee by a senior official from the Department of Canadian Heritage. In the testimony of November 25, 2010, the following exchange took place:

> *Mr. Marc Garneau:*
> *Let me ask specifically about education. That's the one I brought up. Do digital locks trump the use of material, copyrighted material, for educational purposes under "fair dealing"?*
>
> *Mr. Jean-Pierre Blais:*
> *In the bill, as drafted, the answer is yes.*[7]

[7]House of Commons Committees - CC32 (40-3) - Edited Evidence - Number 003

As our culture and our essential information increasingly will be "born digital" and stay that way, the potential for crippling restrictions by means of digital locks, technical protection measures ("TPMs") and digital rights management looms large. There was recently an ironic event involving the mass erasure by Amazon of copies, ironically enough, of George Orwell's *1984* from customers' Kindle eBook readers.[8] Notwithstanding Amazon's profuse and immediate apology, this incident shows that remote control censorship and even revisionism can be readily undertaken by copyright owners, governments, and hackers. The earlier deployment by Sony of a destructive and privacy invasive "rootkit" malware program also confirms that large and prestigious copyright owners can perpetrate considerable harm in the name of copyright protection.

The recent waves of mass litigation in the USA and England against alleged file sharers, many of which proved to be innocent and who have ranged from children to a dead grandmother have shown, the provision of a potentially draconian remedy will inevitably and quickly lead not only to its use but its flagrant abuse.

Even the public domain could be at stake, since "born digital" works could easily be programmed to remain locked after they enter the public domain.

Citizens need to able to protect themselves against such threats. It is a completely insufficient answer to that Bill C-32 would allow for the implementation of exemptions by regulation. The regulation making process is slow, uncertain, and heavily prone to successful lobbying by those with the greatest financial resources.

Therefore, **CCLA calls upon this Committee to return to the 2005 Bill C-60 which made it possible to circumvent digital locks where the purpose is non-infringing.** It must also be possible for entrepreneurs to develop the tools and services to facilitate such circumvention, when such tools or services have substantial non-infringing uses. This doctrine is the heart of American copyright law, which allowed for the development of VCRs, personal computers, and countless other devices that we now take for granted - and all of which are more or less sophisticated copying machines.

Accordingly, the CCLA suggests inclusion of language such as the following in the Bill:

(Official Version) http://bit.ly/hYnMnZ

[8]Amazon Erases Orwell Books From Kindle Devices - NYTimes.com http://nyti.ms/gOj0zd

Notwithstanding any other provisions of this Act, any person may circumvent any technological protection measure for private, non-commercial and non-infringing purposes and any person may provide services and products to enable such circumvention, provided that such services and products are capable of substantial non-infringing use.

3. Ensuring an equal society: Copyright reforms should contemplate the needs of those with perceptual disabilities:

a. The right to equality, and equal treatment in Canadian society, is a fundamental right that is enshrined in the *Charter* and protected in the private sphere through Canada's human rights legislation.[9] Laws that do not sufficiently take into account the full diversity of Canadian society can often have unintended discriminatory effects on individuals based on sex, religion, disability, and a host of other factors. As a mature democracy, Canada should be proactive in examining the impact new legislation will have on diverse groups within our society.

b. During the last round of copyright reform, however, some organizations argued that the proposed changes did not adequately take into account the needs of those with perceptual disabilities. Marginalized groups should not be forced to launch lawsuits in order to achieve equal standing under Canadian law.

c. Many blind persons cherish and depend upon their independence. They do not wish to depend on bureaucratic solutions provided by third party organizations, however well intended. They should have the right to immediate access, preferably by using available tools and their own often considerable computer skills. Where this is inefficient or inadequate, they may need services and or products supplied by others In any case they should have the right o enjoy, as much as is technologically possible, the same rights of access as persons without perceptual difficulties.

d. While Bill C-32 makes a good start on progress in these respects, we believe that a significant improvement can be made to the language of proposed section 41.16, which presently reads as follows:

(*2) Paragraphs 41.1(1)(b) and (c) do not apply to a person who offers or provides services to persons or organizations referred to in subsection (1), or manufactures, imports or provides a technology, device or component, for the purposes of enabling those persons or organizations to circumvent a technological protection measure in accordance with that subsection,* ***to the extent that the services, technology, device or component do not unduly impair the technological protection measure.***

[9]Canadian Library Association, "Briefing Note on Bill C-61, Unlocking the Public Interest" (September 2008) online: http://www.cla.ca/copyright/Unlocking%20the%20public%20interest-Final.pdf.

e. CCLA is concerned that the concluding emphasized underlying words depend on how the word "unduly" will be misinterpreted by the Courts. We know that the Courts have rendered nugatory some provisions of the ***Competition Act*** that depend on the word "unduly" in the context of needing to prove the lessening of competition. We fear that the Courts, in this instance, would find that almost any weakening of a TPM would *ipso facto* "unduly impair" that TPM and may even require proving a negative. We propose that the emphasized wording simply be deleted.

4. Respecting Canadians' privacy: Copyright reforms must fully comply with existing privacy law

a. Although Bill C-32 ostensibly contains an exception to anti-circumvention measures ostensible enabling citizens to protect their own privacy by circumventing technical protection measures (proposedsection41.14), this safeguard is entire illusory for the following reasons:

i. Few if any individuals will have the knowledge, skill or patience to take affirmative measures to protect their own privacy.

ii. The provision ostensible allowing third parties to offer services or devices to individuals to protect their personal information is subject the requirement that it must "not unduly impair the technical protection measure." This will probably render the provision completely futile, since the word "unduly" has almost invariably proven troublesome in the Courts. Those who deploy the TPM will doubtlessly argue that any interference with it will self evidentiary "unduly impair"the TPM. This provision also appears to set up a reverse onus

iii. Therefore, the CCLA recommends that persons be permitted to take steps, provide services, or make or import and sell products primarily intended for the protection of personal information. This would be a reasonably bright line that would not "unduly" prejudice copyright owners.

5. Crown Copyright

a. The issue of crown copyright is a very old one that successive Governments have avoided. However, the issue should be dealt. The CCLA urges the government to reconsider its treatment of Crown copyright.

Canadians fund the production of government works, and they are presumably created in furtherance of the public interest. Public knowledge of the government's research, decisions, studies and history greatly enhances government transparency and democracy. While the Canadian government may

have a legitimate interest in ensuring its works are not wholly appropriated for profit without consent or acknowledgement, government-produced materials should not be treated in the same manner as private creative works.
Scholars have long argued for an orderly retreat ultimately leading up to a repeal of Crown copyright interests. This is the situation in the USA with respect to US Government works.

b. A modest and non-controversial first step could be taken by adding to Section 3 of the Act a provision that would state that any Crown copyright in Right of Canada in respect of enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, is limited solely to ensuring accuracy and the use of disclaimer of official status.

6. Conclusion

CCLA thanks the committee for its attention and interest and is available for further comments and precisions.

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