

I write to you as a concerned citizen, former documentary film archival researcher, and soon-to-be legal practitioner who is gladdened by the Committee's invitation to hear from regular Canadians regarding Bill C-32. Copyright is a highly politicized issue that will affect a variety of stakeholders; while striking a balance is no easy feat, I nevertheless have misgivings with the fine print of the bill as-is.

### **1) Digital locks: rendering illegal what is already legal**

As is, Bill C-32 permits digital locks to trump copyright rights such as fair dealing and other user rights. One example from the world of film making: currently, a filmmaker may legally use a short excerpt from another film under "fair dealing" in his or her own film for the purposes of criticism and/or review. Please see sections 29, 29.1 and 29.2 of the Copyright Act. But under Bill C-32, breaking a digital lock to access the excerpt (from a DVD, for instance), constitutes breaking a section of the Copyright Act even though the ultimate use of the clip is permissible under the same Copyright Act. This is one example of how the bill makes some of its own balancing provisions irrelevant. *There is a fairly straightforward way to reconcile legal protection for digital locks with the preservation of user and consumer rights afforded under the Copyright Act: clarify in law that it is only a violation to circumvent a digital lock where the underlying purpose is to infringe copyright.*

### **2) Fair dealing: education, parody, and satire provisions a welcome compromise**

The Supreme Court of Canada has characterized the fair dealing exception in the Copyright Act as a "user's right" in its 2004 decision *CCH v. Law Society of Upper Canada*. However, the Court also cautions that, "in order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively." While the fair dealing provisions in the Copyright Act appear to provide the necessary balance between owners and users, in practice, however, content industries tend to use aggressive litigation tactics to dissuade users from being aware of, and utilizing the fair dealing exception established in law to defend themselves. As expressed by scholars Laura J. Murray and Samuel E. Trosow: "Aggressive litigation on the part of an overreaching content industry recognizes that risk-averse users will probably back down before taking on a well-financed lawsuit from a corporate entity." *The fair dealing exception in Canadian copyright law is a "good thing" though it must be reinforced by statutory revision to indicate clearly that it is a legitimate and integral part of maintaining a balance of diverse interests between content owners and users.*

*The extension of fair dealing to education, parody, and satire is a much needed and welcome compromise* between those who argued against any modification to fair dealing and those who argued for a more U.S.-style fair use provision. While these modifications speak to step 1 of the fair dealing test (*does the use or dealing qualify for one of the fair dealing exceptions?*), the law should also reflect step 2 of the fair dealing test (*is the use or dealing fair?*). On this point, *the six non-exhaustive factors identified by the Supreme Court of Canada in CCH v. Law Society of Upper Canada to assist a court's fairness inquiry should be codified:* (1) the purpose of the dealing; (2) the

character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work.

### **3) Fair dealing is not a protective umbrella for those who engage in piracy**

Lastly, a clear fair dealing exception in copyright law will enable legitimate users of copyrighted material such as educators, universities and colleges, libraries, archives, documentary filmmakers, and members of the news media and public to access copyrighted material, when necessary and in accordance with the law, without detracting from the separate, and equally legitimate concern, of combating piracy. Fair dealing does not protect the pirate. We must be mindful not to lump together legitimate users and uses of copyrighted material with those who pirate and profit for commercial gain.

Thank you for the opportunity to participate in this process.

Sincerely,

Mark Faassen