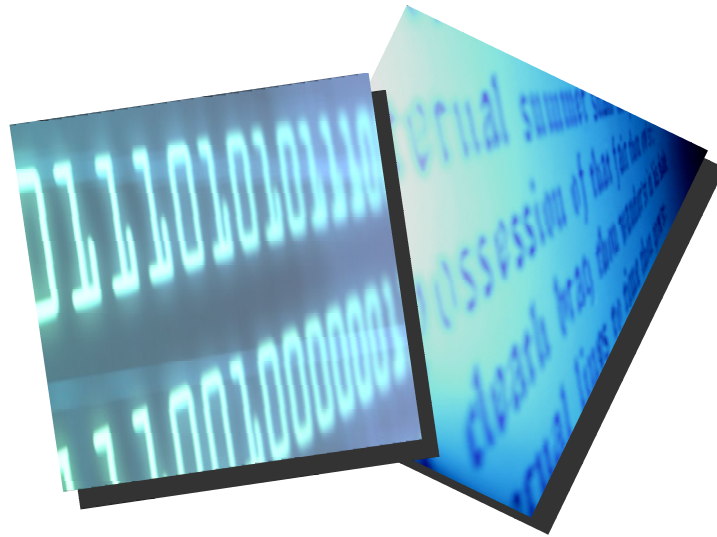


**Brief of the
Intellectual Property Institute of Canada
Copyright Legislation Technical Committee
On Bill C-32
*An Act to Amend the Copyright Act***

January 6, 2011



**INTELLECTUAL PROPERTY INSTITUTE OF CANADA
INSTITUT DE LA PROPRIÉTÉ INTELLECTUELLE DU CANADA**

The IPIC Copyright Legislation Committee (Technical) has reviewed Bill C-32 and in this brief we provide comments on technical issues that are raised by Bill C-32. This brief was reviewed and approved by IPIC Council.

The Intellectual Property Institute of Canada (IPIC) is the professional association of patent agents, trade-mark agents, and lawyers practicing in all areas of intellectual property law. Our membership exceeds 1,700 individuals, consisting of practitioners in law firms and agencies of all sizes, sole practitioners, in-house corporate intellectual property professionals, Government personnel, and academics.

This brief contains the views of the IPIC Copyright Legislation Committee (Technical) and does not necessarily reflect the views of individual members of the IPIC Committee who may wish to express their own opinions on matters referred to in the brief even if such opinions are contrary to the views expressed herein.

In preparing this brief, the IPIC Committee has confined its comments to technical issues. The IPIC Committee takes no position with respect to the policy decisions that stand behind Bill C-32. The IPIC Committee welcomes the opportunity to participate in the legislative process.

The IPIC Committee understands from its discussions with Government representatives that, with the exception of technological measures, the matter of the extent to which Bill C-32 implements Canada's obligations under the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT) is considered to be a policy matter. However, this is not the case with respect to technological measures. Consequently, the IPIC Committee does not comment in the present brief on treaty implementation, save in the context of technological measures.

TABLE OF CONTENTS

A. MAKING AVAILABLE RIGHT (MAR) (SECTIONS 2.4(1.1), 15(1.1) AND 18(1.1)(A))	1
B. DISTRIBUTION RIGHTS (SECTIONS 3(1)(J), 15(1.1)(E) AND 18(1.1)(A))	5
C. PHOTOGRAPHY	10
D. PERFORMERS' MORAL RIGHTS (SECTIONS 17.1 AND 17.2)	13
E. DEEMED PUBLICATION AND PUBLICATION OF SOUND RECORDING (SECTIONS 19.1 AND 19.2)	16
F. EQUITABLE REMUNERATION FOR PERFORMERS AND MAKERS OF SOUND RECORDINGS (SECTION 20)	20
G. ENABLERS OF ONLINE INFRINGEMENT (SECTIONS 27 (2.3) AND (2.4))	23
H. EXCEPTIONS	25
(a) FAIR DEALING FOR THE PURPOSES OF EDUCATION, PARODY AND SATIRE (SECTION 29)	25
(b) USER-GENERATED CONTENT ("UGC") EXCEPTION (SECTION 29.21)	26
(c) REPRODUCTION FOR PRIVATE PURPOSES (SECTION 29.22)	31
(d) TIME SHIFTING: FIXING AND RECORDING PROGRAMS FOR LATER LISTENING OR VIEWING (SECTION 29.23)	34
(e) BACKUP COPIES (SECTION 29.24)	37
(f) REPRODUCTION FOR SOFTWARE COMPATIBILITY, INTEROPERABILITY, ENCRYPTION, AND SECURITY (SECTION 30.6-30.63)	38
(g) TEMPORARY REPRODUCTIONS FOR TECHNOLOGICAL PROCESSES (SECTION 30.71)	41
I. RESEARCH AND EDUCATION ISSUES (SECTIONS 29 AND 30)	43
J. LIABILITY OF INTERNET SERVICE PROVIDERS ("ISPS") (SECTIONS 31.1 AND 41.27)	47
K. NOTICE AND NOTICE REGIME (SECTION 41.25 AND 41.26)	57
L. STATUTORY DAMAGES (SECTION 38.1)	60
M. TECHNOLOGICAL PROTECTION MEASURES ("TPMs") (SECTIONS 41 TO 44.2)	64

A. MAKING AVAILABLE RIGHT (MAR) (SECTIONS 2.4(1.1), 15(1.1) AND 18(1.1)(a))

Authors

Article 8 of WCT reads as follows:

8. Without prejudice to [enumerated provisions] of the Berne Convention, 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 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 2.4(1.1)

To implement MAR for authors, Bill C-32 would add section 2.4(1.1) to the *Copyright Act*, (the “Act”) marginally noted as a “Clarification”:

(1.1) For the purposes of this *Act*, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

(1.1) Pour l'application de la présente loi, constitue notamment une communication au public par télécommunication le fait de mettre à la disposition du public par télécommunication une oeuvre ou un autre objet du droit d'auteur de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement.

This section is the only provision in C-32 for extending MAR to an author in respect of his work (the rights for which are set out in Part I of the *Act*). However, on its wording (“*communication of a work or other subject-matter to the public by telecommunication*”), the new section would also have application to the rights in Part II, namely, communication of performers’ performances under section 15 of the *Act* and of makers’ rights in sound recordings under section 18 of the *Act*. See further references, below, to this in the context of Bill C-32 sections 15 and 18(1.1)(a).

Technical Issues

1. If, as a matter of policy, the government intention is that MAR is to be a new right, then it appears that section (1.1) effectively establishes that right for authors. Henceforth, the right of communication to the public by telecommunication in section 3(1)(f) of the *Act* would be construed in accordance with new section 2.4(1.1).

2. However, this can give rise to problems in various situations where copyright in a work has been previously assigned, at a time when the right did not exist. Among questions that arise

are: who owns the right in the case of existing contracts where copyright has been assigned but without direct reference to such a new right; who owns the right in cases where various aspects of copyright are owned or controlled by different persons; will this spawn a proliferation of new collectives to administer the new right; what is the effect on collective administration based on previous contracts; will the new right apply only as part of the communication right or also as part of the reproduction right. Other similar issues may become relevant depending on the language of any clarifying provision(s). It is recommended that the government consider transitional provisions to obviate such problems, if MAR is intended to be a new right for authors.

3. If the government intention is that MAR for authors is to be retroactive, that is, that section 3(1)(f) is to be construed as having always included MAR, then the new section 2.4(1.1) does not appear sufficient to establish that. Existing jurisprudence in the Tariff 22 case (Copyright Board, Federal Court of Appeal, Supreme Court of Canada) as well as Federal Court pronouncements in other cases has interpreted the communication right in section 3(1)(f) as not including MAR. More explicit wording is needed than section 2.4(1.1) to avoid resort to courts on the issue. The outcome of court proceedings is at best uncertain. It is recommended that appropriate provisions be added to C-32 to make it clear that the new definition of communication to the public by telecommunication is deemed to have always included MAR, if that is the intended result.

Performers

Article 10 of WPPT provides that:

10. Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Section 15(1.1)

Bill C-32 brings in the new right as part of new section 15(1.1). This is added after existing section 15(1), which remains unchanged. The relevant provisions of new section 15(1.1) read as follows:

15. (1.1) Subject to subsections (2.1) and (2.2), a performer's copyright in the performer's performance consists of the sole right to do the following acts in relation to the performer's performance or any substantial part of it and to authorize any of those acts:

(a) if it is not fixed,

(i) to communicate it to the public by telecommunication,

(ii) to perform it in public, if it is communicated to the public by telecommunication otherwise than by communication signal,

...

(d) to make a sound recording of it available to the public by telecommunication in a way that allows a member of the public to have access to the sound recording from a place and at a time individually chosen by that member of the public and to communicate the sound recording to the public by telecommunication in that way;

15. (1.1) Sous réserve des paragraphes (2.1) et (2.2), l'artiste-interprète a un droit d'auteur qui comporte le droit exclusif, à l'égard de sa prestation ou de toute partie importante de celle-ci:

(a) si elle n'est pas déjà fixée:

(i) de la communiquer au public par télécommunication,

(ii) de l'exécuter en public lorsqu'elle est ainsi communiquée autrement que par signal de communication,

...

(d) d'en mettre l'enregistrement sonore à la disposition du public et de le lui communiquer, par télécommunication, de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement;

Technical Issues

1. The coming into force of the section 15(1.1) provisions will have retroactive effect. Therefore the issues and considerations referred to in paragraph 2 under **Authors**, above, apply here.

2. As a drafting issue, retention of section 15(1) in its present wording and adding proposed section 15(1.1) results in the separate sections covering the same ground, in part. Section 15(1.1)(a) covers subject matter identical to that in existing section 15(1)(a) – *communicate to the public by telecommunication*. In both sections, the term now includes MAR by virtue of the new definitional provision in section 2.4(1.1) which applies, in its terms, to *other subject matter*, i.e., rights in Part II of the *Act*. This raises a question as to whether something different is intended in one section compared to the other.

3. Another issue arises within the wording of the new section 15(1.1)(d). The section spells out the right in two elements, firstly, making the sound recording available (in words tracking the WPPT) and, secondly, additionally requiring a communication of the sound recording. This is unlike MAR applicable to authors as set out in section 2.4(1.1). Arguably, this could be interpreted as importing MAR for performer's performances on a basis different from that for authors. Again arguably, this could be construed as requiring not just the posting (which is all we understand the WCT and WPPT to require) but also a further transmission from a website before the right is infringed (as is currently necessary for the communication right as construed in the Tariff 22 case). Is it the policy that MAR for performer's performances is different from that for authors?

4. The words "and to communicate the sound recording to the public by telecommunication in that way" raises a question as to whether the sound recording must be transmitted in order for there to have been a making available. Perhaps what is intended is that by making the sound recording available it is "thereby" communicated to the public by telecommunication in that way. Consideration might be given as to whether the following wording would more accurately reflect the policy intent behind section 15(1.1)(d):

to make a sound recording of it available to the public by telecommunication in a way that allows a member of the public to have access to the sound recording from a place and at a time individually chosen by that member of the public *thereby* communicating the sound recording to the public by telecommunication in that way;

Makers

Article 14 of WPPT reads as follows:

14. Producers shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Section 18(1.1)(a)

Bill C-32 would bring in MAR for makers by adding section 18(1.1)(a). The relevant part reads as follows:

18. (1.1) Subject to subsections (2.1) and (2.2), a sound recording maker's copyright in the sound recording also includes the sole right to do the following acts in relation to the sound recording or any substantial part of it and to authorize any of those acts:

(a) to make it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public and to communicate it to the public by telecommunication in that way;

18. (1.1) Sous réserve des paragraphes (2.1) et (2.2), le droit d'auteur du producteur d'un enregistrement sonore comporte également le droit exclusif, à l'égard de la totalité ou de toute partie importante de celui-ci:

(a) de le mettre à la disposition du public et de le lui communiquer, par télécommunication, de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement;...

Technical Issues

- 1.** The coming into force of the Bill provisions will have retroactive effect. Therefore the issues and considerations referred to in paragraph 2 under **Authors**, above, apply here.
- 2.** The comments set out in paragraph 3 of the Technical Issues under **Performers** apply here.
- 3.** The comments set out in paragraph 4 of the Technical Issues under **Performers** apply here.
- 4.** The WPPT requires that the new MAR be an exclusive right. However, sections 67.1(4)(b) and 68.2(2)(b) could be construed as reducing that right to a mere collection remuneration.

B. DISTRIBUTION RIGHTS (SECTIONS 3(1)(j), 15(1.1)(e) AND 18(1.1)(b))

Authors

Article 6 of WCT reads as follows:

6. Authors shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

... freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right ... applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author. (emphasis added)

Section 3(1)(j)

The distribution right for authors is to be brought into the *Act* by adding section (j) to section 3(1).

The proposed section reads:

3. (1)(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner,

3. (1)(j) s'il s'agit d'une oeuvre sous forme d'un objet tangible, d'effectuer le transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du droit d'auteur.

Technical Issues

1. Section 3(i)(j) tracks the language of the treaty with “*to sell or otherwise transfer ownership*”. The phrase seems to imply that “to sell” and “otherwise transfer” are two different modes of alienation of ownership of a work. The WCT wording suggests that two different modes of alienation are contemplated, for instance sale, on the one hand, and on the other, such modes of transfer as gifting, inheriting, etc. To close a potential loophole, it is recommended that the terminology in the section be consistently “*to sell or otherwise transfer*” instead of using that only where it first appears and then switching to “transfer” only. Further, is it the intention that transfer of rights by licence, particularly by exclusive licence, is included in “*otherwise transfer*” (for example, where rights are given by way of exclusive licence for exploitation in another country)?

2. The right is granted in relation to a “*work in the form of a tangible object*”. “*Tangible object*” is not used in the WCT, nor is it defined in the *Act* or *Bill C-32*; so the common dictionary meaning would apply. “*Work in the form of a tangible object*” would describe the plastic arts (e.g. sculpture) and paintings, but query whether it describes, e.g., musical works, computer programs, or any work which exists apart from the tangible medium in which it may be embodied.

If the intent is that the new right will apply where a work is embodied in a tangible object and the tangible object is put into circulation, consideration might be given as to whether the following wording would more accurately reflect the policy intent:

(j) in the case of a tangible object that is put into circulation in which a work is embodied, to sell or otherwise transfer ownership of that tangible object, as long as the ownership of that tangible object has never previously been sold or otherwise transferred
...

3. The new distribution right will have retrospective effect. The right will extend to works in which copyright subsists as of the coming into force of section 3(1)(j). All of the copyright in such a work may not be owned by the same person and it is unclear which owner of copyright would be entitled to exercise the new distribution right. For example, the author of an existing musical work may have assigned one right of copyright in the work, e.g. the communication

right, to a collective society, and another right, e.g. the publication right, to a music publisher, and have retained all other rights of copyright in the work. Bill C-32 does not specify which of the author, the collective society or the music publisher acquires the new distribution right on the coming into force of section 3(1)(j). Consideration should be given as to whether a provision should be added to Bill C-32 to address, for works in which copyright subsists as of the date of coming into force of section 3(1)(j), who would own the new distribution right.

4. We recommend that, subject to government policy objectives in this regard, consideration be given to whether, or to what extent, proposed section 3(1)(j), as proposed in Bill C-32 or as it may be amended, is compatible with existing sections 27.1, 44, 44.2 and 45 of the *Copyright Act*.

Performers

Article 8 of WPPT reads as follows:

8. Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms through sale or other transfer of ownership.

... freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right ... applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer. (emphasis added)

The right is limited to performances fixed in a “phonogram” which is defined as “*the fixation of the sounds of a performance or of other sounds, or a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work*”. Thus, “phonogram” is essentially the same as “sound recording” as defined in the *Act*, and so the right is in relation to performances fixed in sound recordings.

Section 15(1.1)(e)

Bill C-32 proposes to include the new right in the *Act* by adding to section 15 a new paragraph (1.1)(e) which reads:

15. (1.1) ... a performer’s copyright in the performer’s performance consists of the sole right to do the following acts in relation to the performer’s performance or any substantial part of it and to authorize any of those acts:

(e) if it is fixed in a sound recording that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the owner of the copyright in the performer’s performance.

15. (1.1) ... l'artiste-interprète a un droit d'auteur qui comporte le droit exclusif, à l'égard de sa prestation ou de toute partie importante de celle-ci:

(e) lorsque la prestation est fixée au moyen d'un enregistrement sonore sous forme d'un objet tangible, d'effectuer le transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du droit d'auteur sur la prestation.

Technical Issues

1. Same issues with regard to "*transfer*" as discussed in paragraph 1, and the ownership of the new right in respect of existing performances as discussed in paragraph 4 under **Authors**, above.

2. Consideration might be given as to whether the following wording would more accurately reflect the policy intent behind section 15(1.1)(e):

(e) to sell or otherwise transfer ownership of a sound recording of it that is put into circulation as a tangible object and whose ownership has never previously been sold or otherwise transferred ...

3. We recommend that, subject to government policy objectives in this regard, consideration be given to whether, or to what extent, proposed section 15(1.1)(e), as proposed in Bill C-32 or as it may be amended, is compatible with existing sections 27.1, 44, 44.2 and 45 of the *Act*.

Makers

Article 12 of WPPT reads as follows:

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

(2) ... freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right ... applies after the first sale or other transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of the phonogram. (emphasis added)

Section 18(1.1)(b)

Bill C-32 introduces the right into the *Act* by adding section 18(1.1)(b), the operative part of which reads:

18. (1.1) ... a sound recording maker's copyright in the sound recording also includes the sole right to do the following acts in relation to the sound recording or any substantial part of it to authorize any of those acts:

(b) if it is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the owner of the copyright in the sound recording.

18. (1.1) ... le droit d'auteur du producteur d'un enregistrement sonore comporte également le droit exclusif, à l'égard de la totalité ou de toute partie importante de celui-ci:

(b) lorsque l'enregistrement sonore est sous forme d'un objet tangible, d'effectuer le transfert de propriété, notamment par vente, de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du droit d'auteur sur l'enregistrement sonore.

Technical Issues

1. Same issues with regard to "*transfer*" as discussed in paragraph 1, and the ownership of the new right in respect of existing performances as discussed in paragraph 4 under **Authors**, above.

2. Consideration might be given as to whether the following wording would more accurately reflect the policy intent behind section 18(1.1)(b):

(b) to sell or otherwise transfer ownership of a sound recording that is put into circulation as a tangible object and whose ownership has never previously been sold or otherwise transferred ...

3. We recommend that, subject to government policy objectives in this regard, considerations be given to whether, or to what extent, proposed section 18(1.1)(b), as proposed in Bill C-32 or as it may be amended, is compatible with existing sections 27.1, 44, 44.2 and 45 of the *Act*.

C. PHOTOGRAPHY

We understand the intent of the changes is to harmonize the treatment of photographers with the treatment of other creators in Canada.

Clause 6 repeals section 10 of the *Act*. Section 10 reads as follows:

10. (1) Where the owner referred to in subsection (2) is a corporation, the term for which copyright subsists in a photograph shall be the remainder of the year of the making of the initial negative or plate from which the photograph was derived or, if there is no negative or plate, of the initial photograph, plus a period of fifty years.

(1.1) Where the owner is a corporation, the majority of the voting shares of which are owned by a natural person who would have qualified as the author of the photograph except for subsection (2), the term of copyright is the term set out in section 6.

(2) The person who

(a) was the owner of the initial negative or other plate at the time when that negative or other plate was made, or

(b) was the owner of the initial photograph at the time when that photograph was made, where there was no negative or other plate,

is deemed to be the author of the photograph and, where that owner is a body corporate, the body corporate is deemed for the purposes of this *Act* to be ordinarily resident in a treaty country if it has established a place of business therein.

10. (1) Dans les cas où le propriétaire visé au paragraphe (2) est une personne morale, le droit d'auteur sur la photographie subsiste jusqu'à la fin de la cinquantième année suivant celle de la confection du cliché initial ou de la planche dont la photographie a été directement ou indirectement tirée, ou de l'original lorsqu'il n'y a pas de cliché ou de planche.

(1.1) Toutefois, l'article 6 s'applique dans les cas où le propriétaire est une personne morale dont la majorité des actions avec droit de vote sont détenues par une personne physique qui, sauf pour le paragraphe (2), aurait été considérée l'auteur de la photographie.

(2) Le propriétaire, au moment de la confection du cliché initial ou de la planche ou, lorsqu'il n'y a pas de cliché ou de planche, de l'original est considéré comme l'auteur de la photographie, et si ce propriétaire est une personne morale, celle-ci est réputée, pour l'application de la

présente loi, être un résident habituel d'un pays signataire, si elle y a fondé un établissement commercial.

Clause 7 repeals section 13(2) of the *Act* regarding the ownership of copyright. Section 13(2) reads as follows:

13. (2) Where, in the case of an engraving, photograph or portrait, the plate or other original was ordered by some other person and was made for valuable consideration, and the consideration was paid, in pursuance of that order, in the absence of any agreement to the contrary, the person by whom the plate or other original was ordered shall be the first owner of the copyright.

13. (2) Lorsqu'il s'agit d'une gravure, d'une photographie ou d'un portrait et que la planche ou autre production originale a été commandée par une tierce personne et confectionnée contre rémunération et la rémunération a été payée en vertu de cette commande, celui qui a donné la commande est, à moins de stipulation contraire, le premier titulaire du droit d'auteur.

Section 32.2(1) regarding permitted acts is to be added:

(f) for an individual to use for private or non-commercial purposes, or permit the use of for those purposes, a photograph or portrait that was commissioned by the individual for personal purposes and made for valuable consideration, unless the individual and the owner of the copyright in the photograph or portrait have agreed otherwise.

(f) le fait pour une personne physique d'utiliser à des fins non commerciales ou privées – ou de permettre d'utiliser à de telles fins – la photographie ou le portrait qu'elle a commandé à des fins personnelles et qui a été confectionné contre rémunération, à moins que la personne physique et le titulaire du droit d'auteur sur la photographie ou le portrait n'aient conclu une entente à l'effet contraire.

Finally, clauses 59 and 60 in the Transitional Provisions provide as follows:

59. (1) The repeal of section 10 of the *Copyright Act* by section 6 does not have the effect of reviving copyright in any photograph in which, on the coming into force of that section 6, copyright had expired.

(2) In any case in which, immediately before the coming into force of section 6, a corporation is deemed, by virtue of subsection 10(2) of the *Copyright Act* as it read before the coming into force of that section 6, to be the author of a photograph in which copyright subsists at that time, the copyright in that photograph continues to subsist for the term determined in accordance with sections 6, 6.1, 6.2, 9, 11.1 or 12 of the *Copyright Act*

as if its author were the individual who would have been considered the author of the photograph apart from that subsection 10(2).

(3) In any case in which an individual is deemed to be the author of a photograph by virtue of subsection 10(2) of the *Copyright Act* as it read before the coming into force of section 6, the individual continues, after the coming into force of that section 6, to be the author of that photograph for the purposes of the *Copyright Act*.

60. Subsection 13(2) of the *Copyright Act*, as it read immediately before the coming into force of section 7, continues to apply with respect to any engraving, photograph or portrait, the plate or original of which was commissioned before that coming into force of that section 7.

59. (1) L'abrogation de l'article 10 de la Loi sur le droit d'auteur par l'article 6 n'a pas pour effet de réactiver le droit d'auteur sur une photographie éteint à la date d'entrée en vigueur de cet article 6.

(2) Si une personne morale est, en vertu du paragraphe 10(2) de la Loi sur le droit d'auteur dans sa version antérieure à l'entrée en vigueur de l'article 6, considérée comme l'auteur d'une photographie sur laquelle existe un droit d'auteur à l'entrée en vigueur de cet article 6, le droit d'auteur sur la photographie subsiste pour la période déterminée en conformité avec les articles 6, 6.1, 6.2, 9, 11.1 et 12 de la Loi sur le droit d'auteur comme si l'auteur était la personne physique qui aurait été considérée comme l'auteur de la photographie n'eût été ce paragraphe 10(2).

(3) Si une personne physique est, en vertu du paragraphe 10(2) de la Loi sur le droit d'auteur dans sa version antérieure à l'entrée en vigueur de l'article 6, considérée comme l'auteur d'une photographie, elle continue de l'être pour l'application de la Loi sur le droit d'auteur à l'entrée en vigueur de cet article 6.

60. Le paragraphe 13(2) de la Loi sur le droit d'auteur, dans sa version antérieure à l'entrée en vigueur de l'article 7, continue de s'appliquer à l'égard des gravures, photographies et portraits dont la planche ou toute autre production originale a été commandée avant l'entrée en vigueur de cet article 7.

Technical Issues

1. Nature of Applicable Works - Section 13(2), which is being deleted, applied to more than just photographs. It also applied to portraits, whether created by a photograph or sketch

artist, and to engravings. The words “photograph” and “portrait” have been retained in the new section 32.2(1)(f), but the word “engraving” has not been retained.

A GOOGLE search will reveal that there is still a very active engraving industry supplying items that are often ordered for personal purposes, such as trophies, photo frames, plaques, beer glasses, wine glasses, giftware, etc.

Consideration should be given to changing the phrase “photograph or portrait” to “photograph, engraving or portrait” in the two places in the proposed section 32.2(1)(f) where such phrase is used.

2. Requirement for Valuable Consideration

The existing section 13(2) requires that the work must have been made for valuable consideration and the consideration must have been paid. The proposed section has retained only half of that requirement. The result may be that the commissioning party may be entitled to rely on the exception without having paid the agreed compensation. Consideration should be given, depending on the intent, to rewording the requirement to read “and made for valuable consideration that was paid”.

Consideration should be given to either removing the requirement that the work be “made for valuable consideration”, or that the requirement be changed to read “and if made for valuable consideration, such consideration has been paid”.

The exception in the proposed section 32.2(1)(f) is only available if the work was (a) “commissioned for personal purposes”, and (b) “made for valuable consideration”. This results in the exception not being available if the commissioned work was made and given as a gift.

3. Section 32.2(1)(f) might be simplified if it were to be reworded to provide “for an individual to use or permit the use of, for private or non-commercial purposes, a photograph ...”.

D. PERFORMERS’ MORAL RIGHTS (SECTIONS 17.1 AND 17.2)

Introduction

Bill C-32 inserts sections 17.1 and 17.2 after section 17. The sections read as follows:

17.1 (1) In the cases referred to in subsections 15(2.1) and (2.2), a performer of a live aural performance or a performance fixed in a sound recording has, subject to subsection 28.2(1), the right to the integrity of the performance, and — in connection with an act mentioned in subsection 15(1.1) or one for which the performer has a right to remuneration under section 19 — the right, if it is reasonable in the circumstances, to be associated with the performance as its performer by name or under a pseudonym and the right to remain anonymous.

(2) Moral rights may not be assigned but may be waived in whole or in part.

(3) An assignment of copyright in a performer's performance does not by itself constitute a waiver of any moral rights.

(4) If a waiver of any moral right is made in favour of an owner or a licensee of a copyright, it may be invoked by any person authorized by the owner or licensee to use the performer's performance, unless there is an indication to the contrary in the waiver.

17.2 (1) Subsection 17.1(1) applies only in respect of a performer's performance that occurs after the coming into force of that subsection. The moral rights subsist for the same term as the copyright in that performer's performance.

(2) The moral rights in respect of a performer's performance pass, on the performer's death, to

(a) the person to whom those rights are specifically bequeathed;

(b) if there is not a specific bequest of those moral rights and the performer dies testate in respect of the copyright in the performer's performance, the person to whom that copyright is bequeathed; or

(c) if there is not a person as described in paragraph (a) or (b), the person entitled to any other property in respect of which the performer dies intestate.

(3) Subsection (2) applies, with any modifications that the circumstances require, on the death of any person who holds moral rights.

17.1 (1) Dans les cas visés aux paragraphes 15(2.1) et (2.2), l'artiste-interprète a, sous réserve du paragraphe 28.2(1), le droit à l'intégrité de sa prestation sonore exécutée en direct ou de sa prestation fixée au moyen d'un enregistrement sonore et, à l'égard de tout acte mentionné au paragraphe 15(1.1) ou pour lequel il a droit à une rémunération en vertu de l'article 19, le droit, compte tenu des usages raisonnables, de revendiquer la création de la prestation, même sous pseudonyme, ainsi que le droit à l'anonymat.

(2) Les droits moraux sont incessibles; ils sont toutefois susceptibles de renonciation, en tout ou en partie.

(3) La cession du droit d'auteur sur la prestation de l'artiste-interprète n'emporte pas renonciation automatique aux droits moraux.

(4) La renonciation au bénéfice du titulaire du droit d'auteur ou du détenteur d'une licence peut, à moins d'une stipulation contraire, être invoquée par quiconque est autorisé par l'un ou l'autre à utiliser la prestation.

17.2 (1) Le paragraphe 17.1(1) s'applique uniquement dans le cas d'une prestation exécutée après son entrée en vigueur. Les droits moraux sur la prestation ont la même durée que le droit d'auteur sur celle-ci.

(2) Au décès de l'artiste-interprète, les droits moraux sont dévolus au légataire de ces droits ou, à défaut de disposition testamentaire expresse, soit au légataire du droit d'auteur, soit, en l'absence d'un tel légataire, aux héritiers légaux de l'artiste-interprète.

(3) Le paragraphe (2) s'applique, avec les adaptations nécessaires, à toute dévolution subséquente.

Technical Issues

1. Issue of Multiple Performers - Section 17.1(1) provides, to a performer, the right of integrity in the performance and the right to be associated as the performer of a performance, if such association is reasonable in the circumstances. Also, section 17.1(2) provides that moral rights may not be assigned, but that they may be waived in whole or in part. Presumably, every performer of a performance possesses moral rights in that performance. However, section 17.1, as currently drafted, is silent on the issue of moral rights and the waiver of those rights in situations where waivers are required from multiple performers of a single performance.

This issue may arise, for example, where a licensee of a sound recording of a popular song wishes to use the sound recording in connection with advertising for a product. Notably, section 28.2(1), which essentially defines situations where a performer's right to the integrity of their performance is infringed, specifies in section (b) that such infringement may occur where the performance is "used in association with a product, service, cause or institution" to the prejudice of the performer's reputation. In our hypothetical situation of using a popular song in connection with advertising a product, there is potential for infringement of each performer's right to integrity of the performance embodied on the sound recording. Is it the Government's intention that the waiver of moral rights is required from every individual performer of a performance embodied, for example, on a sound recording, before the sound recording may be used in connection with advertising a product?

2. Implied Waiver of Moral Rights - Section 17.1(2) allows performers to waive moral rights in their performance, in whole or in part. However, the section, as currently drafted, does

not specify the requirements for a waiver to be effective. For example, must the waiver be an express waiver, or is it the Government's intention to also allow implied waivers of moral rights? Additionally, is it the Government's intention to give effect to an oral waiver of moral rights in a performance, or must the waiver be in written form in order to be effective? Section 17.1(2), as currently drafted, is silent on the form of waiver required in order for that waiver of moral rights to be effective.

Also, section 17.1(3) provides that "an assignment of copyright in a performer's performance does not by itself constitute a waiver of any moral rights". This section has at least two possible interpretations, and it is not clear which interpretation is intended by the Government. One possible interpretation is that this section merely specifies that an assignment of copyright in a performance does not constitute a waiver of the performer's moral rights, and therefore that a performer must expressly waive their moral rights in the performance. Another possible interpretation, however, is that an implied waiver of moral rights may be effected by an assignment of copyright in a performer's rights in addition to some other form of conduct by the performer, besides an express waiver, which evidences the performer's waiver of their moral rights. However, because section 17.1 as a whole is silent as to whether a waiver of moral rights may be implied, it is ambiguous as to what other conduct by the performer, in addition to the assignment of the performer's copyright, would constitute a waiver of the performer's moral rights. Is it the intention of the Government to allow the implied waiver of a performer's moral rights, where the performer's conduct, in addition to the assignment of the performer's copyright, implies that these moral rights have been waived? Or, is it the Government's intention to require an express waiver of a performer's moral rights in order for that waiver to be effective?

3. In the event that amendments are made to sections 17.1 and 17.2 consideration should be given as to whether comparable amendments should be made to the sections of the *Act* that relate to the moral rights of authors.

E. DEEMED PUBLICATION AND PUBLICATION OF SOUND RECORDING (SECTIONS 19.1 AND 19.2)

Section 19.1 and 19.2, to be added to the *Act* by Bill C-32, provide that a sound recording that has been "made available" by telecommunication to individuals at times and places of their own choosing is considered to be "published", notwithstanding the definition of "publication" in section 2.2.

Section 19.1 (with respect to Canada) reads as follows:

19.1 Despite subsection 2.2(1), a sound recording that has been made available to the public by telecommunication in a way that allows a member of the public to access it from a place and at a time individually chosen by that member of the public, or that has been communicated to

the public in that way, is deemed to have been published for the purposes of subsection 19(1).

19.1 Malgré le paragraphe 2.2(1), s'il a été mis à la disposition du public ou lui a été communiqué, par télécommunication, de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement, l'enregistrement sonore est réputé, pour l'application du paragraphe 19(1), avoir été publié.

Section 19.2 (with respect to WPPT countries) reads as follows:

19.2 Despite subsection 2.2(1), a sound recording that has been made available to the public by telecommunication in a way that allows a member of the public to access it from a place and at a time individually chosen by that member of the public, or that has been communicated to the public by telecommunication in that way, is deemed to have been published for the purposes of subsection 19(1.2).

19.2 Malgré le paragraphe 2.2(1), s'il a été mis à la disposition du public ou lui a été communiqué, par télécommunication, de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement, l'enregistrement sonore est réputé, pour l'application du paragraphe 19(1.2), avoir été publié.

The definition of "publication" is found in section 2.2 which reads as follows:

2.2. Definition of "Publication"

(1) For the purposes of this *Act*, "publication" means

(a) in relation to works,

(i) making copies of a work available to the public,

...

(b) in relation to sound recordings, making copies of a sound recording available to the public,

but does not include:

(c) the performance in public, or the communication to the public by telecommunication, of a literary, dramatic, musical or artistic work or a sound recording, or

(d) the exhibition in public of an artistic work.

The purpose of new section 19.1 is to clarify what sound recordings made available online are eligible for equitable remuneration under section 19(1).

Technical Issues

1. The deeming provision in proposed sections 19.1 and 19.2 imply that making a sound recording available does not constitute publication except for the purposes of the section that is specifically referred to. It therefore becomes difficult to interpret – or to continue to interpret? - the exclusions in section 2.2 in a less restrictive manner and to look at whether the maker of the sound recording had the intent to make the sound recording available to the public in reasonable quantities. Can section 2.2 be understood - or still understood? - to mean that “telecommunication to the public” on its own does not constitute “publication”? If accompanied by a price list or marketing, would telecommunication to the public not constitute “publication” for the purposes of the *Act*?
2. Has consideration been given to a general deeming provision with respect to the “publication” of sound recordings made available to individual members of the public?
3. **Publication of Works** - The concept of “deemed publication” in sections 19.1 and 19.2 triggers a similar question of interpretation of the section 2.2. definition of “publication” as it affects works.

Section 2.4(1.1), to be added to the *Act* by Bill C-32, reads:

2.4 (1.1) For the purposes of this *Act*, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public.

2.4 (1.1) Pour l'application de la présente loi, constitue notamment une communication au public par télécommunication le fait de mettre à la disposition du public par télécommunication une oeuvre ou un autre objet du droit d'auteur de manière que chacun puisse y avoir accès de l'endroit et au moment qu'il choisit individuellement.

Today, more and more people access copyright works through the Internet. Electronic books are becoming popular. Some books and other material appear in electronic form and not in print form. Some electronic books can be purchased as a disk in a bricks-and-mortar bookstore but the most common method of purchase is now by an electronic download from an online bookstore. From the perspective of the book publishing industry and the consuming public, this online release is “publication” in the ordinary sense. However, because of section 2.2 it seems that books accessed online may remain “unpublished” for the purpose of the *Copyright Act*, regardless of the intent of the work’s author to disseminate gratuitously or to distribute the work commercially.

Should consideration be given to a provision that would deem such works (or works and sound recordings) that are made available to the public by telecommunication on an individual basis to be “published”?

Alternatively, should consideration be given to amending section 2.2 to clarify that “communication to the public by telecommunication” is not by itself sufficient to constitute “publication” for the purposes of the *Act*? On its face this section invites a restricted interpretation of “publication”, but it may be helpful to note that in a House of Lords case, *Infabrics Ltd. v. Jaytex Ltd.*, [1981] 1 All E.R. 1057 (H.L.), Lord Wilberforce commented that “publishing” and “publication” are fundamental expressions meaning making available to the public, and it would take a great deal of contextual restraint to force them into a narrower and special meaning.

4. General Comments on “publication” - Section 2.2 echoes Article 3(3) of the Berne Convention, which is repeated in TRIPs and incorporated into the WCT, despite efforts to amend the latter. Any amendment to modernize the definition of “publication” in section 2.2 for the digital environment would need to avoid direct conflict with Article 3(3) of the Berne Convention, which reads:

3(3) The expression “published works” means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

5. The specific exclusion of “communication to the public by telecommunication” of “a literary, dramatic, musical or artistic work or a sound recording” from “publication” for the purposes of the *Copyright Act* – if it is to be interpreted literally - raises a number of practical issues:

- (a) The rights included in copyright in relation to a work include the sole right to publish an unpublished work.
- (b) When and where a work has been “first published” has significance with respect to its protection in Canada and in foreign jurisdictions. “First publication” is similarly a “connecting factor” with respect to international copyright protection in a sound recording, which may also constitute first publication of a performer’s performance or a work not previously fixed or published.
- (c) Release to the public only in electronic form by wire or wireless means will continue to result in “unpublished” works and sound recordings. This could affect the term of copyright in the following instances:

- Literary, dramatic and musical works or an engraving that were “unpublished” at the time of the author’s death though posthumously made available to the public prior to December 31, 1998, being protected for a shorter period of protection than if “published”;
 - A cinematographic work (without a dramatic character) never released in theatres or sold in video stores, though made available to the public, being protected for 100 years;
 - Government works, for which the term of copyright for Government measures from the end of the year of publication, made available on Government websites but not as print copies, enjoying perpetual copyright; and
 - Anonymous and pseudonymous works made available but never “published” being protected for an uncertain period if the date of the making of the work is unknown.
- (e) Whether or not a work or sound recording has been published may be a factor to be considered in assessing the “fairness” of a fair dealing defence.
- (f) There are exceptions in the *Act* that apply only to published literary works, e.g. section 30 (literary collections for educational institutions) and 32.2 (reading or reciting from a published work).
- (g) There are exceptions in the *Act* that apply only to unpublished works, e.g. section 30.21 (copying works deposited in an archive).

F. EQUITABLE REMUNERATION FOR PERFORMERS AND MAKERS OF SOUND RECORDINGS (SECTION 20)

Bill C-32 would replace existing section 20 with the following:

20. (1) The right to remuneration conferred by subsection 19(1) applies only if

(a) the maker was, at the date of the first fixation, a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* or, if a corporation, had its headquarters in Canada; or

(b) all the fixations done for the sound recording occurred in Canada.

(1.1) The right to remuneration conferred by subsection 19(1.1) applies only if

(a) the maker was, at the date of the first fixation, a citizen or permanent resident of a Rome Convention country or, if a corporation, had its headquarters in a Rome Convention country; or

(b) all the fixations done for the sound recording occurred in a Rome Convention country.

(1.2) The right to remuneration conferred by subsection 19(1.2) applies only if

(a) the maker was, at the date of the first fixation, a citizen or permanent resident of a WPPT country or, if a corporation, had its headquarters in a WPPT country; or

(b) all the fixations done for the sound recording occurred in a WPPT country.

(2) Despite subsection (1.1), if the Minister is of the opinion that a Rome Convention country does not grant a right to remuneration, similar in scope and duration to that provided by subsection 19(1.1), for the performance in public or the communication to the public of a sound recording whose maker, at the date of its first fixation, was a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* or, if a corporation, had its headquarters in Canada, the Minister may, by a statement published in the *Canada Gazette*, limit the scope and duration of the protection for sound recordings whose first fixation is done by a maker who is a citizen or permanent resident of that country or, if a corporation, has its headquarters in that country.

(2.1) Despite subsection (1.2), if the Minister is of the opinion that a WPPT country does not grant a right to remuneration, similar in scope and duration to that provided by subsection 19(1.2), for the performance in public or the communication to the public of a sound recording whose maker, at the date of its first fixation, was a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* or, if a corporation, had its headquarters in Canada, the Minister may, by a statement published in the *Canada Gazette*, limit the scope and duration of the protection for sound recordings whose first fixation is done by a maker who is a citizen or permanent resident of that country or, if a corporation, has its headquarters in that country.

(3) If so requested by a country that is a party to the North American Free Trade Agreement, the Minister may, by a statement published in the *Canada Gazette*, grant the right to remuneration conferred by subsection 19(1.1) to performers or makers who are nationals of that country and whose sound recordings embody dramatic or literary works.

20. (1) Le droit à rémunération conféré par le paragraphe 19(1) ne peut être exercé que si, selon le cas:

(a) le producteur, à la date de la première fixation, soit est un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés, soit, s'il s'agit d'une personne morale, a son siège social au Canada;

(b) toutes les fixations réalisées en vue de la confection de l'enregistrement sonore ont eu lieu au Canada.

(1.1) Le droit à rémunération conféré par le paragraphe 19(1.1) ne peut être exercé que si, selon le cas:

(a) le producteur, à la date de la première fixation, soit est un citoyen ou un résident permanent d'un pays partie à la Convention de Rome, soit, s'il s'agit d'une personne morale, a son siège social dans un tel pays;

(b) toutes les fixations réalisées en vue de la confection de l'enregistrement sonore ont eu lieu dans un pays partie à la Convention de Rome.

(1.2) Le droit à rémunération conféré par le paragraphe 19(1.2) ne peut être exercé que si, selon le cas :

(a) le producteur, à la date de la première fixation, soit est un citoyen ou un résident permanent d'un pays partie au traité de l'OIEP, soit, s'il s'agit d'une personne morale, a son siège social dans un tel pays;

(b) toutes les fixations réalisées en vue de la confection de l'enregistrement sonore ont eu lieu dans un pays partie au traité de l'OIEP.

(2) Malgré le paragraphe (1.1), s'il est d'avis qu'un pays partie à la Convention de Rome n'accorde pas de droit à rémunération semblable, en ce qui concerne l'étendue et la durée, à celui prévu au paragraphe 19(1.1), pour l'exécution en public ou la communication au public d'un enregistrement sonore dont le producteur, à la date de la première fixation, soit est un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés, soit, s'il s'agit d'une personne morale, a son siège social au Canada, le ministre peut, en publiant une déclaration dans la Gazette du Canada, limiter l'étendue et la durée de la protection qui sera accordée dans le cas des enregistrements sonores dont la première fixation est effectuée par un producteur citoyen ou résident permanent de ce pays ou, s'il s'agit d'une personne morale, ayant son siège social dans ce pays.

(2.1) Malgré le paragraphe (1.2), s'il est d'avis qu'un pays partie au traité de l'OIEP n'accorde pas de droit à rémunération semblable, en ce qui concerne l'étendue et la durée, à celui prévu au paragraphe 19(1.2),

pour l'exécution en public ou la communication au public d'un enregistrement sonore dont le producteur, à la date de la première fixation, soit est un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés, soit, s'il s'agit d'une personne morale, a son siège social au Canada, le ministre peut, en publiant une déclaration dans la Gazette du Canada, limiter l'étendue et la durée de la protection qui sera accordée dans le cas des enregistrements sonores dont la première fixation est effectuée par un producteur citoyen ou résident permanent de ce pays ou, s'il s'agit d'une personne morale, ayant son siège social dans ce pays.

(3) Sur demande d'un pays partie à l'Accord de libre-échange nord-américain, le ministre peut, en publiant une déclaration dans la Gazette du Canada, accorder les avantages conférés par le paragraphe 19(1.1) aux artistes-interprètes ou producteurs ressortissants de ce pays dont les enregistrements sonores sont constitués d'oeuvres dramatiques ou littéraires.

Technical Issues

1. Under section 20 of the *Act* as currently drafted, the right to remuneration conferred by section 19 is available to sound recordings for which some of the fixations occurred in Canada and others occurred in a Rome Convention country. By separating both the remuneration right and the conditions for its application into separate sections, Bill C-32 appears to require that all fixations involved in a particular sound recording occur in either Canada, a Rome Convention country or a WPPT country; it does not seem to contemplate recordings for which some fixations are made in a country that is a Rome Convention member but not a WPPT member, while others are made in a country that is a WPPT member but not a Rome Convention member. Was this the Government's intention?

G. ENABLERS OF ONLINE INFRINGEMENT (SECTIONS 27 (2.3) AND (2.4))

Section 27(2.3) and (2.4) read as follows:

(2.3) 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.

(2.4) In determining whether a person has infringed copyright under subsection (2.3), the court may consider

(a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;

(b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;

(c) whether the service has significant uses other than to enable acts of copyright infringement;

(d) the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;

(e) any benefits the person received as a result of enabling the acts of copyright infringement; and

(f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

(2.3) Constitue une violation du droit d'auteur le fait pour une personne de fournir sur Internet ou tout autre réseau numérique un service dont elle sait ou devrait savoir qu'il est principalement destiné à faciliter l'accomplissement d'actes qui constituent une violation du droit d'auteur, si une autre personne commet une telle violation sur Internet ou tout autre réseau numérique en utilisant ce service.

(2.4) Lorsqu'il s'agit de décider si une personne a commis une violation du droit d'auteur prévue au paragraphe (2.3), le tribunal peut prendre en compte les facteurs suivants:

a) le fait que la personne a fait valoir, même implicitement, dans le cadre de la commercialisation du service ou de la publicité relative à celui-ci, qu'il pouvait faciliter l'accomplissement d'actes qui constituent une violation du droit d'auteur;

b) le fait que la personne savait que le service était utilisé pour faciliter l'accomplissement d'un nombre important de ces actes;

(c) le fait que le service a des utilisations importantes, autres que celle de faciliter l'accomplissement de ces actes;

(d) la capacité de la personne, dans le cadre de la fourniture du service, de limiter la possibilité d'accomplir ces actes et les mesures qu'elle a prises à cette fin;

(e) les avantages que la personne a tirés en facilitant l'accomplissement de ces actes;

(f) la viabilité économique de la fourniture du service si celui-ci n'était pas utilisé pour faciliter l'accomplissement de ces actes.

Technical Issues

1. “*designed*” *primarily* – Section 27(2.3) would not apply where the service was not designed primarily to be used to enable infringement. Would the use of “induces or is primarily designed, used or operated” instead of “designed primarily” better achieve the policy intent?
2. Section 27(2.4) requires courts to consider, among other things, whether the person offering the service “had knowledge that the service was used to enable a significant number of acts of copyright infringement”. Was it the Government’s intention that infringement of this provision would require *actual* knowledge of a significant number of infringing acts, or was it intended that it would be sufficient that the person knew of *some* infringing acts and/or *should have known* of a “significant number” of infringing acts? Was consideration given to whether the reference to a “significant number” is sufficiently clear to enable the section to be interpreted consistently?

H. EXCEPTIONS

(a) *FAIR DEALING FOR THE PURPOSES OF EDUCATION, PARODY AND SATIRE (SECTION 29)*

Section 29, which currently deals with fair dealing only for research and private study, is to be expanded to include education and parody or satire. As revised by Bill C-32, it will read as follows:

29. Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

29. L'utilisation équitable d'une oeuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée, de recherche, d'éducation, de parodie ou de satire ne constitue pas une violation du droit d'auteur.

Technical Issues

1. The Government has stated its intention that the fair dealing exception for education be limited to education in a “structured context”.¹ The existing exceptions for education apply only to educational institutions, as those are defined in the *Act*. Given the new exception is not so limited it may be inferred that the exception has no such limits. The recent Federal Court decision in *MacKay v. Canada*, 2010 FC 856 has construed the term “educational text book” to

¹ Backgrounder: http://www.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01151.html

include a thesaurus even though the thesaurus was not required reading in a course offered by or approved by an institution.

2. Is it intended that “parody or satire” includes “pastiche”? If so, consideration should be given to specifically enumerating “pastiche”.

3. Should consideration be given as to whether the purposes set out in section 41.21(2)(iii) should correlate to the fair dealing purposes of proposed section 29 and existing sections 29.1 and 29.2?

(b) USER-GENERATED CONTENT (“UGC”) EXCEPTION (SECTION 29.21)

Section 29.21, reads as follows:

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual – or, with the individual’s authorization, a member of their household – to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source – and, if given in the source, the name, of the author, performer, maker or broadcaster – of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter – or copy of it – or on an existing or potential market for it, including that the new work or other subject –matter is not a substitute for the existing one.

(2) The following definitions apply in subsection (1)

“intermediary” means a person or entity who regularly provides space or means for works or other subject-matter to be enjoyed by the public.

“use” means to do anything that by this *Act* the owner of the copyright has the sole right to do, other than the right to authorize anything.

29.21 (1) Ne constitue pas une violation du droit d’auteur le fait, pour une personne physique, d’utiliser une oeuvre ou tout autre objet du droit d’auteur ou une copie de ceux-ci — déjà publiés ou mis à la disposition du public — pour créer une autre oeuvre ou un autre objet du droit d’auteur protégés et, pour cette personne de même que, si elle les y autorise, celles qui résident habituellement avec elle, d’utiliser la nouvelle oeuvre ou le nouvel objet ou d’autoriser un intermédiaire à le diffuser, si les conditions suivantes sont réunies :

(a) la nouvelle oeuvre ou le nouvel objet n’est utilisé qu’à des fins non commerciales, ou l’autorisation de le diffuser n’est donnée qu’à de telles fins;

(b) si cela est possible dans les circonstances, la source de l’oeuvre ou de l’autre objet ou de la copie de ceux-ci et, si ces renseignements figurent dans la source, les noms de l’auteur, de l’artiste-interprète, du producteur ou du radiodiffuseur sont mentionnés;

(c) la personne croit, pour des motifs raisonnables, que l’oeuvre ou l’objet ou la copie de ceux-ci, ayant servi à la création n’était pas contrefait;

(d) l’utilisation de la nouvelle oeuvre ou du nouvel objet, ou l’autorisation de le diffuser, n’a aucun effet négatif important, pécuniaire ou autre, sur l’exploitation — actuelle ou éventuelle — de l’oeuvre ou autre objet ou de la copie de ceux-ci ayant servi à la création ou sur tout marché actuel ou éventuel à son égard, notamment parce que l’oeuvre ou l’objet nouvellement créé ne peut s’y substituer.

(2) Les définitions qui suivent s’appliquent au paragraphe (1).

« intermédiaire » Personne ou entité qui fournit régulièrement un espace ou des moyens pour permettre au public de voir ou d’écouter des oeuvres ou d’autres objets du droit d’auteur.

« utiliser » S’entend du fait d’accomplir tous actes qu’en vertu de la présente loi seul le titulaire du droit d’auteur a la faculté d’accomplir, sauf celui d’en autoriser l’accomplissement.

Technical Issues

1. Application – From various statements by the Government, it has become generally understood that the UGC exception is intended to apply to new works distributed online, in digital formats. However, this limitation does not appear in the language of the section itself. Was the Government’s intention that the exception also apply to works distributed in a physical format, such as (for example) print anthologies of literary works or CD compilations of sound recordings embodying musical works? Would section 29.21 better reflect the policy intent if it were redrafted to read as follows:

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual – or, with the individual’s authorization, a member of their household – to use the new work or other subject-matter or to authorize an intermediary to disseminate it in digital format, through the Internet or other digital network, if ...

(2) The following definitions apply in subsection (1).

“intermediary” means a person or entity who regularly provides digital memory or other similar means for works or other subject-matter to be enjoyed by the public through the Internet or other digital network.

2. Member of Household – As currently drafted, the section 29.21 exception states that it is not an infringement for the individual who created the UGC work – or a member of their household, with permission from the individual – to use the UGC work or to authorize an intermediary to disseminate the UGC work. As a matter of grammar, the phrase in section (1) “or, with the individual’s authorization, a member of *their* household” should be amended to read: “or, with the individual’s authorization, a member of the *individual’s* household.”

3. Defined term “use” - The term “use” appears in several new provisions of the Bill (for example, Reproduction for Private Purposes, in section 29.22; the Time-shifting provision in section 29.23, Conditions for provision by libraries or articles to patrons in section 30.2(4) and Commissioned photographs in section 32.2 (f)), for the narrow purpose of limiting “use” to private/personal/research or private study purposes.

Under the UGC exception, the defined term “use” means “to do anything that by this *Act* the owner of the copyright has the sole right to do, other than the right to authorize anything.” This term is utilized for two different purposes in the section 29.21: first, the “use” of an existing work to create a new work; and second, the “use” of the new UGC work for non-commercial purposes. The first “use” would focus largely on the making of derivative works or adaptations of the original work in any material form whatever. The second “use” would focus on the acts of reproducing, publishing, communicating to the public by telecommunication, and public performance.

As defined, “use” does not include the right to authorize anything. However individuals are expressly permitted in section 29.21(1) to authorize a member of their household to use, and an intermediary to *disseminate*, their new work. This creates a minor logical inconsistency between how the term is defined and how it is employed in the section. This may arise because of the two different ways in which the term “use” is utilized in the section, as described above. Is the restriction against authorizing primarily intended to restrict the scope of the use that may be made of an existing work? Is it also intended to prevent a UGC creator from authorizing others to use his/her new work, apart from the express right to authorize members of his/her household to use and intermediaries to disseminate that new work?

4. The term “existing work or other subject matter” would include purely utilitarian works such as computer programs and other technical materials. It would also extend to websites. Was it intended that these works could be the subject of the new exception?

5. Terms “disseminate” and “intermediary” - These terms - *disseminate* and *intermediary* - are not anchored to the rest of the *Act*. Although each of these new terms would incorporate activities or authorized parties that are already included in existing terms, the inter-relationship of *disseminate* and *intermediary* with such existing terms is unclear. *Disseminate* and *intermediary* depart from the framework of existing copyright law, resulting in a meaning that, in the case of disseminate, is undefined and in both cases, is unpredictable. We suggest consideration be given to using existing terminology of the Act, or defining these terms with reference to existing terminology to clarify the intended scope of the exception.

6. Standard to qualify as a “new work” - The UGC need only demonstrate the minimum standard of originality required to merit copyright protection; that is, the exercise of skill and judgment, involving some intellectual effort. This excludes a merely mechanical exercise, such as changing fonts, but is nonetheless a very low standard that is easily satisfied. There is also no requirement that the new work be the result of any substantial transformative activities.

Under this standard, compilations and collective works, which could potentially include collections of whole, unaltered works, could qualify as “new works” which individuals would be entitled to use and to authorize intermediaries to disseminate. In view of this, consideration should be given as to whether the combined effect of the UGC exception and the “private purposes” exception under section 29.22 would permit file sharing, and if so, whether this result was intended.

7. Non-Commercial Purposes - The exception allows for dissemination to the public for “non-commercial purposes” rather than for “private purposes” or “personal purposes”. However, non-commercial purposes may go beyond strictly private or personal purposes, extending, possibly, to educational, charitable, library, archive and museum uses.

Is the exception in section 29.21 intended to be confined to *private* non-commercial purposes, or to *personal* non-commercial purposes? “Personal purposes” is a standard introduced in the new photography provisions (section 32.2(1)). If different standards are intended between “personal” and “private” then that should be clarified; if not, one term should be used.

As we discuss further in the context of Statutory Damages section K, paragraph 1 the term “non-commercial purposes” adds to a list of similar concepts already found in the Act, including “profit”, “private profit”, “not-for-profit” and “motive of gain”. Consideration should be given to limiting the proliferation of similar terms by using a pre-existing term.

The condition in paragraph (a) does not require that the use of the existing work also be for non-commercial purposes. Is the intention that all uses of the existing work and the new work be for such purposes?

8. Reasonable grounds to believe work non-infringing - Section 29.21(1)(c) limits the availability of the exception to where “the individual *had* reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright.” Should that be in the present tense? If it is subsequently brought to the individual’s attention that the existing work did in fact infringe copyright, is it the intention that there be any obligation to remove the UGC?

The condition in paragraph (c) does not address whether the user can use and disseminate new works where the use of the work would violate a law. For example, if a person had access to a work that contained a trade secret, e.g. the technical details of a new product or a pre-release of a new work, that person could still use the work to create a new work and post that new work on the Internet. Once posted the trade secret would become public.

9. Market/Exploitation damage limitation evidentiary standard - The UGC exception contains the conditions that: (1) there be no substantial adverse effect on the market for, or the exploitation of, the existing work and (2) that the new work not be a substitute for the original. These conditions appear to reflect key “fairness” factors similar to those articulated by the Supreme Court of Canada in the *CCH* case. But in fact, the provision sets an evidentiary standard – which is very different from a factor for evaluating fairness – requiring evidence of substantial market damage due to the individual instance of creating a UGC work.

Was it intended that the evidentiary requirements for a plaintiff, when contesting whether a use of their copyright work falls within the UGC exception, be in excess of what is normally considered by the Court when conducting a fair dealing evaluation?

It is unclear whether the standard takes into account the effect of the use of the individual or the intermediary. If “use” does not extend to the use by the intermediary and if the dissemination of the work causes substantial adverse effects, this would not necessarily have to be considered. Consideration should be given as to whether such market damage due to actual dissemination be considered an effect of the *authorization* to disseminate.

We note that the exception does not expressly address any unreasonable prejudice to the author of the work, which is a requirement of the third step in the three step test.

10. Substitution - It is not clear whether the new work must not substitute for the original work or whether the new work must not have a substantial adverse affect on the original work

through substitution. If the former, consideration might be given to including the prohibition against substitution in a separate paragraph, e.g. “(e) the use of, or the authorization to disseminate, the new work or other subject matter, must not substitute for the existing work in any market or potential market or in any exploitation or potential exploitation”.

11. Non-commercial use where the individual authorizes dissemination by a commercial intermediary – Is it intended that commercial entities be entitled to use amateur UGC for profit?

It is unclear whether intermediaries authorized by the UGC author to disseminate the UGC will be legally entitled to profit from the UGC or not. As a matter of English usage, section 29.21(2)(a) is ambiguous if the intended meaning is, as in the French version, that authorization may not be for a commercial purpose.

The UGC exception requires that the use of or authorization to disseminate a new work must be solely for a non-commercial purpose. If the individual’s purpose is non-commercial, but the authorized intermediary seeks to make profits from the UGC - say, by posting ads against it for commercial benefit - is the UGC author exceeding the scope of the exception by posting with that intermediary? Does the exception require that an individual only post with an intermediary who does NOT engage in profit-seeking activity with that the UGC? In other words, is it intended that commercial intermediaries will be entitled to make use of the UGC for profit?

12. Meaning of published. It is unclear whether the consent of the owner of the copyright is required before the work will be considered to be published. Section 2.2(3) suggests that publication occurs (at least for copyright subsistence purposes) when a work is made available to the public with the consent of the copyright holder.

(c) REPRODUCTION FOR PRIVATE PURPOSES (SECTION 29.22)

The format shifting exception is intended to allow consumers to copy legally acquired works or other subject matter onto devices that they own, provided that it is for private, non-commercial purposes and does not break a digital lock.

The section reads as follows:

29.22 (1) It is not an infringement of copyright for an individual to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if

(a) the copy of the work or other subject-matter from which the reproduction is made is not an infringing copy;

(b) the individual legally obtained the copy of the work or other subject-matter from which the reproduction is made, other than by borrowing it or renting it, and owns or is authorized to use the medium or device on which it is reproduced;

(c) the individual, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented;

(d) the individual does not give the reproduction away; and

(e) the reproduction is used only for private purposes.

(2) For the purposes of paragraph (1)(b), a “medium or device” includes digital memory in which a work or subject-matter may be stored for the purpose of allowing the telecommunication of the work or other subject-matter through the Internet or other digital network.

(4) Subsection (1) does not apply if the individual gives away, rents or sells the copy of the work or other subject-matter from which the reproduction is made without first destroying all reproductions of that copy that the individual has made under that subsection.

29.22 (1) Ne constitue pas une violation du droit d’auteur le fait, pour une personne physique, de reproduire l’intégralité ou toute partie importante d’une oeuvre ou d’un autre objet du droit d’auteur si les conditions suivantes sont réunies :

(a) la copie de l’oeuvre ou de l’autre objet du droit d’auteur reproduite n’est pas contrefaite;

(b) la personne a obtenu la copie légalement, autrement que par emprunt ou location, et soit est propriétaire du support ou de l’appareil sur lequel elle est reproduite, soit est autorisée à l’utiliser;

(c) elle ne contourne pas ni ne fait contourner une mesure technique de protection, au sens de ces termes à l’article 41, pour faire la reproduction;

(d) elle ne donne la reproduction à personne;

(e) la reproduction n’est utilisée qu’à des fins privées.

(2) À l’alinéa (1)b), la mention « du support ou de l’appareil » s’entend notamment de la mémoire numérique dans laquelle il est possible de stocker une oeuvre ou un autre objet du droit d’auteur pour en permettre la communication par télécommunication sur Internet ou tout autre réseau numérique.

(4) Le paragraphe (1) ne s’applique pas si la personne donne, loue ou vend la copie reproduite sans en avoir au préalable détruit toutes les reproductions faites au titre de ce paragraphe.

Technical Issues

1. Is the exception “for private purposes” intended to be limited to copying for only format shifting purposes? Is it intended that any work or other subject matter be copied without any requirement that it be for format shifting purposes?
2. Must the copying be only for the person that made the copy? The wording is different from the wording in section 80 which could suggest that section 29.22 would permit copying on behalf of others.
3. The exception applies as long as the copy has been legally obtained. This would appear to permit the exception to be used in conjunction with other exceptions. For example, a copy recorded under the time shifting exception would be legally obtained. So would a lesson under the distance learning exception. But, making new copies under the format shifting exception might inadvertently undermine the limitations under the other exceptions. Was this intended?
4. The exception also does not have the prohibitions against secondary dealings that are in section 80 of the Act. It may therefore be argued that such restrictions were not intended. This is particularly important as the defined term “medium or device” includes making a work available on a hosting site.
5. The limitation in subsection (3) is intended to preclude format shifting of musical works onto an audio recording medium. But it does not prevent making copies from works copied onto such medium under the private copying exception. Consideration may be given to the following amendment if this was not intended:
 - (3) In the case of a work or other subject-matter that is a musical work embodied in a sound recording, a performer’s performance of a musical work embodied in a sound recording or a sound recording in which a musical work or a performer’s performance of a musical work is embodied, subsection (1) does not apply if the reproduction is made onto an audio recording medium as defined in section 79 *or from a reproduction that is non-infringing by virtue of subsection 80(1)*.
6. Subparagraph (d) requires that the individual, in order to qualify for the exception, not “give the reproduction away”. Is the Government’s intention that the individual be permitted to transfer ownership of the reproduction in other ways? If not, should consideration be given to rewording subparagraph (d) to require that the individual not “give away or otherwise transfer ownership of the reproduction”? Is it the Government’s intention that the individual be permitted to transfer ownership by making copies directly onto media or devices? Could lending, distributing or even renting of the reproduction to another be arguably a private purpose? Could the sharing of the reproduction with another by telecommunication be for a “private purpose”?
7. Can an individual be a person who does an act in the course of his/her employment?

(d) TIME SHIFTING: FIXING AND RECORDING PROGRAMS FOR LATER LISTENING OR VIEWING (SECTION 29.23)

A similar section was contained in Bill C-61 as section 29.23.

In Bill C-32, the section reads as follows:

29.23 (1) It is not an infringement of copyright for an individual to fix a communication signal, to reproduce a work or sound recording that is being broadcast or to fix or reproduce a performer's performance that is being broadcast, in order to record a program for the purpose of listening to or viewing it later, if

- (a) the individual receives the program legally;
- (b) the individual, in order to record the program, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented;
- (c) the individual makes no more than one recording of the program;
- (d) the individual keeps the recording no longer than is reasonably necessary in order to listen to or view the program at a more convenient time;
- (e) the individual does not give the recording away; and
- (f) the recording is used only for private purposes.

(2) Subsection (1) does not apply if the individual receives the work, performer's performance or sound recording under an on-demand service.

(3) The following definitions apply in this section.

"broadcast" means any transmission of a work or other subject-matter by telecommunication for reception by the public, but does not include a transmission that is made solely for performance in public.

"on-demand service" means a service that allows a person to receive works, performer's performances and sound recordings at times of their choosing.

29.23 (1) Ne constitue pas une violation du droit d'auteur le fait, pour une personne physique, de fixer un signal de communication, de

reproduire une oeuvre ou un enregistrement sonore lorsqu'il est communiqué par radiodiffusion ou de fixer ou de reproduire une prestation lorsqu'elle est ainsi communiquée, afin d'enregistrer une émission pour l'écouter ou la regarder en différé, si les conditions suivantes sont réunies :

- (a) la personne reçoit l'émission de façon licite;
- (b) elle ne contourne pas ni ne fait contourner une mesure technique de protection, au sens de ces termes à l'article 41, pour enregistrer l'émission;
- (c) elle ne fait pas plus d'un enregistrement de l'émission;
- (d) elle ne conserve l'enregistrement que le temps vraisemblablement nécessaire pour écouter ou regarder l'émission à un moment plus opportun;
- (e) elle ne donne l'enregistrement à personne;
- (f) l'enregistrement n'est utilisé qu'à des fins privées.

(2) Le paragraphe (1) ne s'applique pas si la personne reçoit l'oeuvre, la prestation ou l'enregistrement sonore dans le cadre de la fourniture d'un service sur demande.

(3) Les définitions qui suivent s'appliquent au présent article.

« radiodiffusion » Transmission par télécommunication d'une oeuvre ou de tout autre objet du droit d'auteur et destinée à être reçue par le public, à l'exception de celle qui est faite uniquement à l'occasion d'une exécution en public.

« service sur demande » Service qui permet à la personne de recevoir une oeuvre, une prestation ou un enregistrement sonore au moment qui lui convient.

Technical Issues

1. Prior Bill C-61 section 29.23 contained the following additional paragraph not contained in the current section 29.23:

(4) Subsection (1) does not apply if the program is recorded for the purpose of doing any of the following in relation to the program: (a) selling or renting out, or by way of trade exposing or offering for sale or rental; (b) distributing, whether or not for the purpose of trade; (c)

communication to the public by telecommunication; or (d) performing, or causing to be performed in public.

Currently the only limitation is that the recording be used for “private purposes” and not be given away. “Private purposes” is not a term of art in the *Act* and has no clear meaning. Could lending, distributing or even renting of the program to another be arguably a “private purpose”? Could the sharing of the program with another by telecommunication be for a “private purpose”? Did the Government intend to allow for this by removing the previous section referred to above?

2. Section 29.23 in Bill C-61 provided that the section did not authorize copying onto a “network personal video recorder service”. However currently the section seems to allow such copying which would allow a person to store recordings of programs in a service provider’s networked facility. In other words the current wording appears to suggest that a commercial copying service that is copying and storing at a central facility is available to a person for time shifting. Such a facility would presumably not be subject to the conditions and limitations set out in section 29.23. Is this the Government’s intention?

3. It is unclear as to whether a person can make a copy of a recording under the format shifting exception? Does the prohibition of making a single recording extend to prohibiting making further copies? Otherwise, an individual may be able to make a permanent copy under the format shifting exception. Is this intended?

4. The term “program” is undefined and its meaning is unclear. As drafted, it is arguable that the term could be interpreted to include single works, rather than programs consisting of multiple works (as that term is more commonly understood). Was this the Government’s intention? If not, the Government might consider adopting the following definition, which is based closely on the definition of the same term in the *Broadcasting Act*.

“program” means sounds or visual images or a combination of sounds and visual images, containing more than one work or other subject-matter.

Consequential revisions to the proposed definitions of “broadcast” and “on-demand service” would also be required in order to achieve the suggested limitation. The following definitions are recommended:

“broadcast” means any transmission of a program by telecommunication for reception by the public, but does not include a transmission that is made solely for performance in public.

“on-demand service” means a service that allows a person to receive works, performers’ performances and sound recordings, or programs containing works, performers’ performances and sound recordings, at times of their choosing.

(e) BACKUP COPIES (SECTION 29.24)

This new section permits an exception from copyright infringement for back-up copying. The section provides as follows:

29.24 (1) It is not an infringement of copyright in a work or other subject-matter for a person who owns — or has a licence to use — a copy of the work or subject-matter (in this section referred to as the “source copy”) to reproduce the source copy if

(a) the person does so solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable;

(b) the source copy is not an infringing copy;

(c) the person, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented; and

(d) the person does not give any of the reproductions away.

(2) If the source copy is lost, damaged or otherwise rendered unusable, one of the reproductions made under subsection (1) becomes the source copy.

(3) The person shall immediately destroy all reproductions made under subsection (1) after the person ceases to own, or to have a licence to use, the source copy.

29.24 (1) Ne constitue pas une violation du droit d’auteur le fait, pour la personne qui est propriétaire de la copie (au présent article appelée « copie originale ») d’une oeuvre ou de tout autre objet du droit d’auteur, ou qui est titulaire d’une licence en autorisant l’utilisation, de la reproduire si les conditions ci-après sont réunies :

(a) la reproduction est effectuée exclusivement à des fins de sauvegarde au cas où il serait impossible d’utiliser la copie originale, notamment en raison de perte ou de dommage;

(b) la copie originale n’est pas contrefaite;

(c) la personne ne contourne pas ni ne fait contourner une mesure technique de protection, au sens de ces termes à l’article 41, pour faire la reproduction;

(d) elle ne donne aucune reproduction à personne.

(2) Une des reproductions faites au titre du paragraphe (1) est assimilée à la copie originale en cas d'impossibilité d'utiliser celle-ci, notamment en raison de perte ou de dommage.

(3) La personne est tenue de détruire toutes les reproductions faites au titre du paragraphe (1) dès qu'elle cesse d'être propriétaire de la copie originale ou d'être titulaire de la licence qui en autorise l'utilisation.

Technical Issues

1. Does this exception apply where a person has legal possession of the work or other subject matter, as for example, a bailee of goods or an escrow agent of software?
2. To what extent must the source copy become unusable for section 29.24(2) to apply? For example, what if the work is not usable for the original purpose or in the case of computer software, part of the software is not usable but other parts can be used?
3. Is the exception intended to permit the making of an unlimited number of backup copies – unlike the existing subsection 30.6(b), which permits the making of a *single* backup copy of a computer program?

(f) REPRODUCTION FOR SOFTWARE COMPATIBILITY, INTEROPERABILITY, ENCRYPTION, AND SECURITY (SECTIONS 30.6-30.63)

Section 30.6 reads as follows:

30.6 It is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorized by the owner of the copyright, or has a licence to use a copy of the computer program, to

(a) reproduce the copy by adapting, modifying or converting it, or translating it into another computer language, if the person proves that the reproduced copy

(i) is essential for the compatibility of the computer program with a particular computer,

(ii) is solely for the person's own use, and

(iii) was destroyed immediately after the person ceased to be the owner of the copy of the computer program or to have a licence to use it; or

(b) reproduce for backup purposes the copy or a reproduced copy referred to in paragraph (a) if the person proves that the reproduction for backup purposes was destroyed immediately after the person ceased to be the owner of the copy of the computer program or to have a licence to use it.

30.61 It is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorized by the owner of the copyright, or has a licence to use a copy of the computer program, to reproduce the copy for the sole purpose of obtaining information that would allow the person to make the program and any other computer program interoperable.

30.62 It is not an infringement of copyright for a person to reproduce a work or other subject-matter for the purposes of encryption research if

(a) it would not be practical to carry out the research without making the copy;

(b) the person has lawfully obtained the work or other subject-matter; and

(c) the person has informed the owner of the copyright in the work or other subject-matter.

30.63 It is not an infringement of copyright for a person to reproduce a work or other subject-matter for the sole purpose, with the consent of the owner or administrator of a computer, computer system or computer network, of assessing the vulnerability of the computer, system or network or of correcting any security flaws.

30.6 Ne constitue pas une violation du droit d'auteur le fait, pour le propriétaire d'un exemplaire — autorisé par le titulaire du droit d'auteur — d'un programme d'ordinateur, ou pour le titulaire d'une licence permettant l'utilisation d'un exemplaire d'un tel programme :

(a) de reproduire l'exemplaire par adaptation, modification ou conversion, ou par traduction en un autre langage informatique, s'il établit que la copie est destinée à assurer la compatibilité du programme avec un ordinateur donné, qu'elle ne sert qu'à son propre usage et qu'elle a été détruite dès qu'il a cessé d'être propriétaire de l'exemplaire ou titulaire de la licence, selon le cas;

(b) de reproduire à des fins de sauvegarde l'exemplaire ou la copie visée à l'alinéa a) s'il établit que la reproduction a été détruite dès

qu'il a cessé d'être propriétaire de l'exemplaire ou titulaire de la licence, selon le cas.

30.61 Ne constitue pas une violation du droit d'auteur le fait, pour le propriétaire d'un exemplaire — autorisé par le titulaire du droit d'auteur — d'un programme d'ordinateur, ou pour le titulaire d'une licence permettant l'utilisation d'un exemplaire d'un tel programme, de le reproduire dans le seul but d'obtenir de l'information lui permettant de rendre ce programme et un autre programme d'ordinateur interopérables.

30.62 Ne constitue pas une violation du droit d'auteur le fait, pour une personne, en vue de faire une recherche sur le chiffrement, de reproduire une oeuvre ou tout autre objet du droit d'auteur si les conditions suivantes sont réunies :

- (a) la recherche est difficilement réalisable autrement;
- (b) l'oeuvre ou autre objet a été obtenu légalement;
- (c) la personne en a informé le titulaire du droit d'auteur sur l'oeuvre ou autre objet.

30.63 Ne constitue pas une violation du droit d'auteur le fait, pour une personne, de reproduire une oeuvre ou tout autre objet du droit d'auteur dans le seul but d'évaluer la vulnérabilité d'un ordinateur, d'un système informatique ou d'un réseau d'ordinateurs ou de corriger tout défaut de sécurité, dans le cas où l'évaluation ou la correction sont autorisées par le propriétaire ou l'administrateur de ceux-ci.

Technical issues

1. In section 30.6, the requirement for the reproduced copy to be solely for the use of the person appears redundant. If the reproduced copy is used by anyone else, such use is without licence.
2. Why is there a difference between the owner of a copy and a licensee such that the former needs authorization by the copyright owner to reproduce a copy under section 30.61? The suggestion is to remove the requirement for authorization.
3. There is a missing connection between the work or other subject matter and the computer, system or network under section 30.63. Would this encompass the situation where a person reproduces computer software owned by a third party for the purpose of testing a network (regardless of whether the software is installed as part of the network)?

4. Can a person avail himself of the exception in section 30.61 even when the information is already available to the person? The words “for the sole purpose of obtaining information that would allow the person to make the program and any other computer program interoperable” does not clearly cover this, although it may be the intent of the wording.
5. The exceptions in sections 30.61 and 30.62 could be used by hackers to reverse engineer encryption used to protect public networks and communications and to post means to undermine the encryption. Was this intended?
6. Sections 30.61 and 30.62 also do not have the same limitations as the comparable provisions with respect to TPMs in section 41.15. Was it intended that these similar exceptions have different conditions associated with them?
7. Would section 30.61 better achieve the policy intent if the section limited the copying of computer programs only to parts of the program needed to establish interoperability and prohibited any other usage other than interoperability, including distribution to another person or the development of another computer program of substantially similar functionality?

(g) ***TEMPORARY REPRODUCTIONS FOR TECHNOLOGICAL PROCESSES
(SECTION 30.71)***

Section 30.71 reads as follows:

30.71 It is not an infringement of copyright to make a reproduction of a work or other subject-matter if

- (a) the reproduction forms an essential part of a technological process; or
- (b) the reproduction’s only purpose is to facilitate a use that is not an infringement of copyright; and
- (c) the reproduction exists only for the duration of the technological process.

30.71 Ne constitue pas une violation du droit d’auteur le fait de reproduire une oeuvre ou tout autre objet du droit d’auteur si les conditions suivantes sont réunies :

- (a) la reproduction est un élément essentiel d’un processus technologique;
- (b) elle a pour seul but de faciliter une utilisation qui ne constitue pas une violation du droit d’auteur;
- (c) elle n’existe que pour la durée du processus technologique.

Technical Issues

1. The meaning of the undefined term “technological process” is unclear. In the FAQ document released with Bill C-32, the Government indicated that the Bill would “provide companies with the tools they need to innovate by allowing temporary, technical and incidental reproductions of copyrighted material.” However, “technological process” could refer – especially in a networked or other digital environment – to virtually any of a myriad of different types of processes, each serving very different purposes. The effect may be that the proposed section invites litigation to determine the nature and character of the “technological processes” to which it applies. Should consideration be given to defining “technological process”?

2. Similarly, the question of what makes a particular reproduction “essential” to a technical process seems likely to lead to confusion. In existing section 2.4(1)(b), the *Act* stipulates that “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” (emphasis added). In that context, the Supreme Court of Canada has given a broad interpretation to the word “necessary,” holding that the requirement is satisfied if the means in question are “reasonably useful and proper to achieve the benefits of enhanced economy and efficiency.”² This seems consistent with the Court’s generally “large and liberal” approach to interpreting exceptions to copyright infringement, first adopted in *CCH Canadian Ltd. v. Law Society of Upper Canada*³ and applied consistently since then. In the drafting of proposed section 30.71, did the Government consider using the word “essential” as opposed to “necessary,” which is already used in the *Act* and has been judicially interpreted? Was it intended that “essential” would have a different meaning than “necessary”?

3. Over the years, the Copyright Board has determined that copies made in a digital environment, whether via the Internet or on a server using an electronic device, have useful, specific and distinct functions. The Copyright Board has likewise established a series of benchmarks to distinguish between copies that are only of a temporary or transitory nature, and thus have little or no independent economic value, and those which have a more substantial purpose and are therefore seen to have greater value. It is unclear whether proposed section 30.71 is intended to draw the same type of distinction, or, if so, what the basis for the distinction might be. Is the Government’s intention to limit the exception to reproductions that have no or insignificant economic value to the user, or does it intend to extend the exception to reproductions that do have more than an insignificant economic value?

4. Similarly, it is unclear whether the section is intended to apply only to reproductions that form an essential part of a transitory technological process – for example, buffer copies made strictly for the purpose of facilitating uninterrupted listening to an authorized copy or stream – or a more extensive technological process. The Copyright Board’s recent analysis of the manner in

² *SOCAN v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427, at para. 91.

³ [2004] 1 S.C.R. 339.

which commercial radio stations acquire and disseminate musical works and sound recordings makes clear that, in the digital environment, there are a number of separate “technological processes” – downloading a digital music file from a commercial music provider’s computer server, selecting files for broadcast, editing or digitally manipulating those files for various purposes, updating and refreshing the station’s digital library of music, and others – each of which may involve a substantial number of reproductions that, while perhaps necessary for the process, are far from transitory and have independent economic value.⁴ Was consideration given to distinguishing among these various processes, some of which are undoubtedly of a “duration” that is substantially more than transitory?

5. The intended relationship between proposed section 30.71 and existing sections 30.8 and 30.9 is likewise unclear. Specifically, it appears likely that, as drafted, a reproduction for which a license might otherwise be required pursuant to section 30.8 or 30.9 would nonetheless be exempted from liability by section 30.71 if it is deemed “an essential part of a technological process.” Is section 30.71 intended to operate as an additional qualification on sections 30.8 and 30.9?

I. RESEARCH AND EDUCATION ISSUES (SECTIONS 29 AND 30)

Reproduction for Instruction (Section 29.4)

Section 29.4(1) reads as follows:

29.4(1) It is not an infringement of copyright for an educational institution or a person acting under its authority for the purposes of education or training on its premises to reproduce a work, or do any other necessary act, in order to display it.

29.4(1) Ne constitue pas une violation du droit d’auteur le fait, pour un établissement d’enseignement ou une personne agissant sous l’autorité de celui-ci, de reproduire une oeuvre pour la présenter visuellement à des fins pédagogiques et dans les locaux de l’établissement et d’accomplir tout autre acte nécessaire pour la présenter à ces fins.

Technical Issues

1. Section 29.4(1) applies to the reproduction of the work on the premises of an educational institution in order to display the work. It would appear that the display of the work could be on the premises of the institution, e.g. posting the reproduction on a website on a server located on the premises of the institution and accessed by a distance education student off the premises of the institution. Was this intended?

⁴ *Re: Commercial Radio Stations (2008-2011)*, July 9, 2010, Copyright Board (Canada).

2. It would appear that the display would include display on a public website and not only a website restricted to students of the institution. Was this intended?
3. It would appear that the display could be through a network of computers, e.g. through a network of computers that services an entire school board. Was this intended?

“Lesson” (Section 30.01)

1. Section 30.01(1) defines “lesson” to mean a lesson, test or examination, or part of one, in which, or during the course of which, an act is done in respect of a work or other subject-matter by an educational institution or a person acting under its authority that would otherwise be an infringement of copyright but is permitted under a limitation or exception under the *Act*. The term “lesson” as such is undefined. It only takes its meaning by referring to works that can be used under other sections without infringement.
2. Section 30.01(2) is a clarification section. Consider whether it would be clearer if the clarification in section 30.01(2) (“application” or “limit”) were to follow section 30.01(3) establishing the lesson exception and to be renumbered as 30.01(3). Switching the order of 30.01(2) and (3) would be consistent with the drafting style of existing exception sections of the *Act* that have limited application, including sections 29.4, 30.8, 32, and Bill C-32’s proposed section 30.04.
3. Wherever it is placed, the English version of what is now section 30.01(2) needs rewording to avoid the ungrammatical use of “whose” in referring to a work or other subject-matter.

Digital Reproduction of Works (Sections 30.02 and 30.03)

1. Under section 30.02(3)(b), the educational institution must only “take measures to prevent....” This is also the language used with respect to the interlibrary loan exception in section 30.2(5.02). In the distance learning exception in subsection (6)(b), however, the educational institution must take measures that can “reasonably be expected to prevent....” Is there an intent to create a different standard between these sections?
2. The section effectively creates a compulsory licence for digital copying and transmission of works (where there is a reprographic reproduction license in place) because the only damages for infringement are the amounts that would have been payable for such copying under a license. Is this the intent behind the section?
3. Under section 30.02(3) the obligation is to pay a royalty with respect to all persons to whom copies are communicated by telecommunication. However, no royalties appear to be

payable for digital copies made, or for copies that are delivered by other means, for example, no royalties are payable for copies made onto CDs or DVDs and delivered to students. Is this intended? Would any royalties be payable under the reprographic license for such digital copies?

4. Section 30.02(7) establishes the maximum amount of damages that may be recovered by a copyright owner against an educational institution for digital reproduction of works pursuant to section 30.02. As in the existing section 38.2, the collective society is not similarly protected by this limitation on damages. Is this limitation, which only benefits educational institutions and not collective societies, intended as a matter of policy or is it an oversight?

5. In section 30.02(7), we recommend that “largest” be substituted for “greatest” for consistency with the language in section 38.2. The same language should be used if there is no difference in meaning.

Downloading from the Internet (the Publicly-Available Materials (“PAM”) exception) (Section 30.04)

1. The exception in section 30.04, the PAM exception, appears to apply to all works or other subject matter available over the Internet. This could conceivably include software, computer databases, compilations of works, entire websites, physical objects, e.g. books sold over the Internet, etc. Is the Government’s intent to create an exception that would include all works or other subject matter on a website? Is the Government’s intent to create an exception that would include the entire website itself?

2. Section 30.04(5) provides that the educational use of the Internet amendment does not apply if the educational institution, or a person under its authority such as a student or teacher, “knows or should have known that the material was made available through the Internet without the consent of the copyright owner”⁵.

3. Although the standard of knowledge in section 30.4(5), “knows or should have known” is the same as the standard of knowledge set out in section 27(2) (Secondary Infringement), it is different from the standard of knowledge set out in other sections of Bill C-32 and the existing *Act*. For example:

- section 38.14(2)⁶ (Statutory Damages) and section 41.19⁷ (Reduction of Damages for Circumvention of TMs) specify a standard of knowledge requiring that “the defendant was not aware and had no reasonable grounds to believe”

⁵ Clause 18, section 30.04(5)

⁶ Clause 30, section 38.14(2).

⁷ Clause 31, section 41.18.

- section 41(1)(a) (Limitation Period for Civil Remedies) of the *Act* specifies a standard of knowledge that requires that the “plaintiff knew or could reasonably have been expected to know”.

4. The difference between these standards is unclear. There a need for consistency in the wording of knowledge standards in the *Act*. The rule of statutory interpretation known as the “presumption of consistent expression” would be applied by a court interpreting the *Act*. This presumption holds that, where a different form of expression is used in a statute, it is presumed that a different meaning must have been intended by the legislature:

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings.⁸

5. We recommend, both generally and with respect to section 30.04 in particular, that consideration be given to having Bill C-32 address this inconsistency in knowledge standards throughout the *Act*.

The Inter-Library Loan Exception (Section 30.2(5))

1. The current inter-library loan exemption, section 30.2(5), permits distribution of a copy to another library on behalf of that library’s patron but only in printed format. Under the proposed expanded exception section 30.2(5.02), libraries could deliver digital copies directly to the person who has requested it as long as the providing library, archive or museum or person takes measures to prevent the person who has requested it from making any reproduction of the digital copy. The obligation is to “take measures.” There is no requirement that these measures be reasonable or effective or, as in the distance learning exception, be “reasonably expected to prevent” the recipient from doing certain acts (see comment above under Digital Reproduction of Works). Is this intended?

2. The meaning of “using” in section 30.2(5.02)(c) is unclear. If intended, should this be clarified to refer to “keeping” the copy (cf. section 29.7(b) on broadcast reproductions) and “from the day on which the person first chooses to access it” (cf. new 2.4(1.1) on making available)?

3. It seems possible that a single library could furnish all other libraries with digital copies of a technical or scholarly journal. Is this intended?

⁸ Driedger on the Construction of Statutes, Third Edition, by Ruth Sullivan, Butterworths, 1994, at page 163.

J. LIABILITY OF INTERNET SERVICE PROVIDERS (“ISPs”) (SECTIONS 31.1 AND 41.27)

Bill C-32 introduces four new circumstances in which the Government seeks to create safe harbours for ISPs as Internet intermediaries:

- a. a network services exception (section 31.1(1) and (2));
- b. a caching exception (section 31.1(3) and (4));
- c. a hosting exception (section 31.1(5) and (6)); and
- d. an exemption for information location tools (search engines) (section 41.27 (1), (2), (3) and (4))

The questions, listed below, are posed so that policy makers may confirm that the scope of these provisions of Bill C-32 conforms with the policy intent.

(a) The Network Services Exception (Sections 31.1 (1) and (2))

Section 31.1(1) protects intermediaries who act as conduits in relation to the Internet. The stated Government intention is to support entities that promote or facilitate connectivity in line with the reasons of the Supreme Court of Canada in the *Tariff 22* case.⁹ Section 31.1(1) reads as follows:

31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter. (emphasis added)

31.1 (1) La personne qui, dans le cadre de la prestation de services liés à l'exploitation d'Internet ou d'un autre réseau numérique, fournit des moyens permettant la télécommunication ou la reproduction d'une oeuvre ou de tout autre objet du droit d'auteur par l'intermédiaire d'Internet ou d'un autre réseau ne viole pas le droit d'auteur sur l'oeuvre ou l'autre objet du seul fait qu'elle fournit ces moyens.

- Why does the section use different wording than that of section 2.4(1)(b)? In particular, why not use the phrase “whose only act”, a term construed by the Supreme Court of Canada in the *Tariff 22* case? Also the section uses different wording than the caching section and the hosting section (“does not by virtue of that act alone”). Is a different meaning intended in section 2.4(1)(b), and the other exceptions?

⁹ See Government FAQs, Q10, June 12, 2008.

- Also, if the section is intended to apply to conduit intermediaries why doesn't the section include the words "means of telecommunication necessary for another person to so communicate the work" which were authoritatively construed by the Supreme Court. The wording could be harmonized with this wording in section 2.4(1)(b) by the following:

31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides *the means of telecommunication necessary for another person to so telecommunicate the work* or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

- Can the phrase "providing services related to the operation of the Internet or other digital networks" be interpreted to benefit ISPs that are not true conduits?
- Is the term "Internet or another digital network" intended to be limited to lower level services or protocols or any aspect of the Internet or any network including any website or node on the Internet? It appears to cover all aspects.
- Can the phrase "Internet or another digital network" be interpreted to include a publicly accessible pirate site such as a P2P file share network?¹⁰
- Can the phrase "providing services" be interpreted to include providing connections and routing services as well as hosting, caching, indexing, searching, tracking, telecommunication (uploading, downloading, streaming, transmitting, etc.) and other services performed by a publicly accessible pirate site, such as a P2P file share network?
- The phrase "any means for the telecommunication or the reproduction of a work" also gives rise to questions of interpretation.
- Is the phrase "any means for the telecommunication or the reproduction of a work" intended to include routers and hardware and "all software connection equipment, connectivity services, hosting and other facilities and services" without which such communications or reproductions would not occur?¹¹

¹⁰ See, Telecom *Decision* CRTC 2008-108 (P2P file sharing applications are applications that use P2P networks, where multiple nodes (e.g. the computers of end users) connect to form a network, in order to distribute files over the Internet. Unlike the traditional network distribution model, where multiple end-users download content from a central server, P2P applications allow end-users to download a single file from multiple end-users simultaneously, thus creating the potential for faster download speeds.)

¹¹ *SOCAN v CAIP* [2004] 2 S.C.R. 427 (*Tariff 22*) at para. 92

- Is the phrase “or the reproduction of a work” intended to be at the end of the section to prevent infringement of the reproduction right where there is a transmission through the network provider’s facilities or does the exception apply to network providers to immunize them whenever they provide a means to enable others to reproduce works?
- Can the same phrase be interpreted to include activities that facilitate online file sharing, such as providing hosting, caching, indexing, searching, tracking, telecommunication (uploading, downloading, streaming, transmitting, etc.) and other services performed by a publicly accessible pirate site?
- Can the same phrase be interpreted as including sites providing search, indexing and tracking functions and means to facilitate/manage file sharing by services related to the operation of the Internet or to networks of peers and seeders (a digital network) and “means for the telecommunication or the reproduction of works”?
- Can the network services exception be interpreted to cover websites that enable users to upload and download infringing files and provide a means to accomplish this?
- Can the network services exception be interpreted to cover sites that deep link to protected content hosted on other servers?
- Can the network services exception be interpreted to mean that providing hyperlinks is a service related to the operation of the Internet?
- Was it intended that the network services exception be limited in a manner similar to the “common carrier” exception in section 2.4(1)(b) in that section 2.4(1)(b) is limited to “providing the means of telecommunication *necessary for another person* to so communicate the work”?

Subsection (2) reads as follows:

(2) Subsection (1) does not apply in respect of a service provided by the person if the provision of that service constitutes an infringement of copyright under subsection 27(2.3).

- Would the new enablement section cover Internet or network service providers whose systems are being operated in an infringing manner or where the operators induce infringement, if the network is not designed to primarily infringe copyright?

(b) *The System Caching Exception (Sections 31.1 (3) and (4))*

Sections 31.1(3) and (4) seek to exempt the act of caching where necessary to make a telecommunication more efficient. Sections 31.1(3) and (4) read as follows:

(3) Subject to subsection (4), a person referred to in subsection (1) who caches the work or other subject-matter to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

(4) Subsection (3) does not apply unless the person, in respect of the work or other subject matter,

(a) does not modify it, other than for technical reasons;

(b) ensures that any directions related to its caching that are established by whoever made it available for telecommunication through the Internet or another digital network, and that lend themselves to automated reading and execution, are read and executed, and

(c) does not interfere with the lawful use of technology to obtain data on its use.

(3) Sous réserve du paragraphe (4), si la personne met l'oeuvre ou l'autre objet du droit d'auteur en antémémoire ou effectue toute autre opération similaire à leur égard en vue de rendre la télécommunication plus efficace, elle ne viole pas le droit d'auteur sur l'oeuvre ou l'autre objet du seul fait qu'elle accomplit un tel acte.

(4) Le paragraphe (3) ne s'applique que si la personne respecte les conditions ci-après en ce qui a trait à l'oeuvre ou à l'autre objet du droit d'auteur :

(a) elle ne les modifie pas, sauf pour des raisons techniques;

(b) elle veille à ce que les directives relatives à leur mise en antémémoire ou à l'exécution à leur égard d'une opération similaire, selon le cas, qui ont été établies par quiconque les a mis à disposition pour télécommunication par l'intermédiaire d'Internet ou d'un autre réseau numérique soient lues et exécutées automatiquement si elles s'y prêtent;

(c) elle n'entrave pas l'usage licite de la technologie pour l'obtention de données sur leur utilisation.

- Who qualifies for the exception? Is the "person" a person who provides services related to the operation of the Internet or another digital network or a person that has the benefit of the exception in subsection (1)? If the intent is to limit the exception

only to those persons who have the benefit of the network services exception, the subsection could be amended as follows:

Subject to subsection (3), *a person who qualifies for the exception* referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

- Did the Government intend that the proposed system caching exception not be limited to ISPs or to caching which is performed in the course of enabling or facilitating connectivity to the Internet?
- Can the systems caching exception be interpreted as applying to any person who provides “services related to the operation of the Internet or another digital network” and who provides “any means for the telecommunication or the reproduction of a work or other subject-matter” through the Internet?
- Can subsection (3) be interpreted as applying to services that do not really serve a conduit function because the nature of the telecommunication that is made “more efficient” is not identified or defined?
- Is it intended that the proposed caching exception not be limited to temporary and intermediate reproductions of works of third parties that are made automatically by the service provider on its own network for the purpose of onward transmissions to other subscribers of the service provider?
- Can the caching exception be interpreted to permit pirate sites and services to make and store permanent and other copies of a work in server (a cache memory) as an element of the infrastructure used by them (“any means for the telecommunication or the reproduction of a work”) to make the transmission of works to the public more efficient?
- Can the caching exception when read together with subsection (1) permit file sharing services to take a more centralized role in enabling infringing transmissions?
- Can the caching exception be interpreted so that the caching activity under the exception must be ancillary to an automatic process that is part-and-parcel of the character of a conduit and *not* of the character of a service initiating *new* transmissions?
- Can the exception as presently drafted be interpreted as permitting the caching of works even in contravention of the terms of access established by the provider of the works at the originating site?

- Is clarification required as to what activities would be considered as “modifying” a work and which would not? For example, do encoding, encryption, conversion to different file formats and file compression render a telecommunication “more efficient”?
- Is it intended and clear in subsection 4(c) whether “usage data” is traffic data compiled by or on behalf of the person who made available the work, subject-matter or reproduction, traffic data related to the cache of the work, subject-matter or reproduction, or both?
- Is it intended that the service provider has no obligation to remove or disable access to infringing files even when it acquires actual knowledge that the file has been removed from the originating site or has been ordered to be removed?
- This exception is not subject to the enablement condition like the network services and ILT exceptions? Is it intended that a person could enable infringement and obtain the benefit of the exception? One might imply this is Parliament’s intention given the presence of the enablement condition in two exceptions and not in the caching and hosting exceptions.

(c) **Hosting Exception (Sections 31.1 (5) and (6))**

Section 31.1(5) is intended to create an exception from infringement for ISPs that host websites for subscribers.¹² The section reads as follows:

(5) Subject to subsection (6), a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

(6) Subsection (5) does not apply in respect of a work or other subject-matter if the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter.

(5) Sous réserve du paragraphe (6), quiconque fournit à une personne une mémoire numérique pour qu’elle y stocke une oeuvre ou tout autre objet du droit d’auteur en vue de permettre leur télécommunication par l’intermédiaire d’Internet ou d’un autre réseau numérique ne viole pas le

¹² Government of Canada Fact Sheet Internet Service Providers: Copyright Liability (June 2008).

droit d'auteur sur l'oeuvre ou l'autre objet du seul fait qu'il fournit cette mémoire.

(6) Le paragraphe (5) ne s'applique pas à l'égard d'une oeuvre ou de tout autre objet du droit d'auteur si la personne qui fournit la mémoire numérique sait qu'un tribunal compétent a rendu une décision portant que la personne qui y a stocké l'oeuvre ou l'autre objet viole le droit d'auteur du fait de leur reproduction ou en raison de la manière dont elle les utilise.

- Is the hosting exception intended to be limited to ISPs or on-line service providers that host files at the direction of a user, or to “any person” who does so?
- Can the hosting exception be interpreted as immunizing any entity that makes available any type of networked connected server or online site (a digital memory) for third parties to store and make available infringing files for file sharing purposes?
- Is the exception intended to apply even where the service provider has actual or constructive knowledge of infringing activities; has control over the users who use the site to infringe; and takes no steps to disable or remove access to the infringing materials?
- Subsection (6) renders the exception inoperative where the ISP has knowledge of a decision of a court. Must the decision be a final decision or would an interlocutory decision qualify? The nature of the infringing conduct is not clear. What is intended?
- Is the new exception intended to overrule the decision of the Supreme Court of Canada in the *Tariff 22* case which held that a hosting provider can be liable for authorization for failing to takedown or disable access to infringing conduct once it has the requisite knowledge of it?
- Is it correct that the ISP has no need to act until it has notice of a decision?
- Would an ISP be able to encode or transcode files for making them accessible to the public under the wording “provides digital memory”?¹³
- This exception is not subject to the enablement condition like the network services and information location tools exceptions. Is it intended that a person could enable infringement and obtain the benefit of the exception? One might infer this is

¹³ See *UMG Recordings inc. v Veoh Networks, Inc.* 2008 WL 5423841 (C.D.Ca. Dec. 29, 2008); *IO Group, Inc. v Veoh networks, Inc.* 2008 WL 6065872 (N.D.Cal. Aug. 27, 2008)

Parliament's intention given the presence of the enablement condition in two exceptions and not in the caching and hosting exceptions.

(d) Exception for Information Location Tools (Sections 41.27 (1), (2), (3) and (4))

Sections 41.27(1), (2), (3) and (4) are intended to clarify that information location tools, such as search engines (GOOGLE, YAHOO, etc.) are not liable to pay damages for reproductions made in the course of providing such tools, unless they ignore a notice requesting the removal of alleged infringing material.¹⁴ The section reads as follows:

(1) In any proceedings for infringement of copyright, the owner of the copyright in a work or other subject-matter is not entitled to any remedy other than an injunction against a provider of an information location tool that is found to have infringed copyright by making a reproduction of the work or other subject-matter or by communicating that reproduction to the public by telecommunication.

(2) Subsection (1) applies only if the provider, in respect of the work or other subject-matter,

(a) makes and caches the reproduction in an automated manner for the purpose of providing the information location tool;

(b) communicates that reproduction to the public by telecommunication for the purpose of providing the information that has been located by the information location tool;

(c) does not modify the reproduction;

(d) complies with any conditions relating to the making or caching of reproductions of the work or other subject-matter, or to the communication of the reproduction to the public by telecommunication, that were established by whoever made the work or other subject-matter available through the Internet or another digital network and that lend themselves to automated reading and execution; and

(e) does not interfere with the lawful use of technology to obtain data on the use of the work or other subject-matter.

(3) In this section, "information location tool" means any tool that makes it possible to locate information that is available through the Internet or another digital network.

¹⁴ *Backgrounder*

(1) Dans les procédures pour violation du droit d'auteur, le titulaire du droit d'auteur ne peut obtenir qu'une injonction comme recours contre le fournisseur d'un outil de repérage en cas de détermination de responsabilité pour violation du droit d'auteur découlant de la reproduction de l'oeuvre ou de l'autre objet du droit d'auteur ou de la communication de la reproduction au public par télécommunication.

(2) Le paragraphe (1) ne s'applique que si le fournisseur respecte les conditions ci-après en ce qui a trait à l'oeuvre ou à l'autre objet du droit d'auteur :

(a) il reproduit l'oeuvre ou l'objet et met cette reproduction en antémémoire ou effectue à son égard toute autre opération similaire, de façon automatique, et ce en vue de fournir l'outil de repérage;

(b) il communique cette reproduction au public par télécommunication, et ce en vue de fournir l'information repérée par l'outil de repérage;

(c) il ne modifie pas la reproduction, sauf pour des raisons techniques;

(d) il se conforme aux conditions relatives à la reproduction, à la mise en antémémoire de cette reproduction ou à l'exécution à son égard de toute autre opération similaire, ou à la communication au public par télécommunication de la reproduction, qui ont été établies par la personne ayant rendu l'oeuvre ou l'objet accessibles sur Internet ou un autre réseau numérique et qui se prêtent à une lecture ou à une exécution automatique;

(e) il n'entrave pas l'usage licite de la technologie pour l'obtention de données sur l'utilisation de l'oeuvre ou de l'objet.

(3) Dans le cas où le fournisseur reçoit un avis de prétendue violation conforme au paragraphe 41.25(2) à l'égard d'une oeuvre ou d'un autre objet du droit d'auteur après le retrait de celui-ci de l'emplacement électronique mentionné dans l'avis, le paragraphe (1) ne s'applique, à l'égard des reproductions faites à partir de cet emplacement, qu'aux violations commises avant l'expiration de trente jours — ou toute autre période prévue par règlement — suivant la réception de l'avis.

Subsection (1) does not contain the words used in section 2.4(1)(b) or in the other ISP exceptions which ensure that the exception only applies where the ISP's acts are content neutral e.g. the exception does not contain any wording similar "whose only act" or "does not by virtue of that act alone". Is the intent to confer a limitation on an information location tool where it is not

acting in a neutral manner? If not, a consistent drafting approach to the hosting and caching exceptions would be to reword subsection (1) as follows:

41.27 (1) In any proceedings for infringement of copyright, the owner of the copyright in a work or other subject-matter is not entitled to any remedy other than an injunction against a provider of an information location tool *who, solely by virtue of providing that tool, has been* found to have infringed copyright by making a reproduction of the work or other subject-matter, or by communicating that reproduction to the public by telecommunication.

Is it intended that the following activities be permitted under the provision on information location tools:

- the provision of links connecting users to remote locations on the Internet and other digital networks;
- the “spidering” or “indexing” of copyright materials on the Internet and other digital networks in order to compile databases facilitating the location of materials online;
- the creation of “cached versions” of Internet pages;
- the creation of low or high resolution images of visual or other content; and
- the transmission, reproduction, or communication of indexed materials or cached versions to the public.
- Also, is there any intended restriction on the scope of the caching, making of reproductions, and communications to the public to limit these activities to fair dealings with works and other subject matter for research or private study purposes?
- Is the exception intended to legalize piracy search sites that predominantly index, cache, reproduce and communicate infringing copies of works to the public?
- Is the exception intended to immunize content aggregators like GOOGLE news who could reproduce, cache and communicate content of third parties?
- Would a search engine be able to claim the exception where it has actual or constructive notice that files it caches, reproduces and communicates to the public are infringing unless it has a notice of claimed infringement in the form specified in subsection 2(f)? An inference might be drawn that this is the legislative intent.
- Has consideration been given as to how a rights holder could prevent a search engine from continuing to distribute or link to infringing files that are hosted on servers outside of Canada when the only exception for the search engine is that the infringing file be removed from its original location?

Subsection (4) reads as follows:

(4) Subsection (1) does not apply to the provision of the information location tool if the provision of that tool constitutes an infringement of copyright under subsection 27(2.3).

(4) Le paragraphe (1) ne s'applique pas à l'égard de la fourniture de l'outil de repérage si celle-ci constitue une violation du droit d'auteur prévue au paragraphe 27(2.3).

- Would the new enablement section cover search engines whose systems are being operated in an infringing manner or where the operators induce infringement, if the search engine is not designed to infringe copyright primarily?

K. NOTICE AND NOTICE REGIME (SECTIONS 41.25 AND 41.26)

Section 41.25 provides for a notice and notice regime and reads as follows:

41.25 (1) An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides

(a) the means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network;

(b) the digital memory referred to in subsection 31.1(5) that is used for the electronic location to which the claim of infringement relates; or

(c) an information location tool as defined in subsection 41.27(5).

(2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall

(a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;

(b) identify the work or other subject-matter to which the claimed infringement relates;

(c) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;

(d) specify the location data for the electronic location to which the claimed infringement relates;

(e) specify the infringement that is claimed;

(f) specify the date and time of the commission of the claimed infringement; and

(g) contain any other information that may be prescribed by regulation.

41.26 (1) A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,

(a) without delay forward the notice electronically to the person that the electronic location identified by the location data specified in the notice belongs to and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and

(b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.

(2) The Minister may, by regulation, fix the maximum fee that a person may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection.

(3) A claimant's only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.

41.25 (1) Le titulaire d'un droit d'auteur sur une oeuvre ou tout autre objet du droit d'auteur peut envoyer un avis de prétendue violation à la personne qui fournit, selon le cas :

(a) dans le cadre de la prestation de services liés à l'exploitation d'Internet ou d'un autre réseau numérique, les moyens de télécommunication par lesquels l'emplacement électronique qui fait l'objet de la prétendue violation est connecté à Internet ou à tout autre réseau numérique;

(b) en vue du stockage visé au paragraphe 31.1(5), la mémoire numérique qui est utilisée pour l'emplacement électronique en cause;

(c) un outil de repérage au sens du paragraphe 41.27(5).

(2) L'avis de prétendue violation est établi par écrit, en la forme éventuellement prévue par règlement, et, en outre :

(a) précise les nom et adresse du demandeur et contient tout autre renseignement prévu par règlement qui permet la communication avec lui;

(b) identifie l'oeuvre ou l'autre objet du droit d'auteur auquel la prétendue violation se rapporte;

(c) déclare les intérêts ou droits du demandeur à l'égard de l'oeuvre ou de l'autre objet visé;

(d) précise les données de localisation de l'emplacement électronique qui fait l'objet de la prétendue violation;

(e) précise la prétendue violation;

(f) précise la date et l'heure de la commission de la prétendue violation;

(g) contient, le cas échéant, tout autre renseignement prévu par règlement.

41.26 (1) La personne visée aux alinéas 41.25(1)a) ou b) qui reçoit un avis conforme au paragraphe 41.25(2) a l'obligation d'accomplir les actes ci-après, moyennant paiement des droits qu'elle peut exiger :

(a) transmettre sans délai par voie électronique une copie de l'avis à la personne à qui appartient l'emplacement électronique identifié par les données de localisation qui sont précisées dans l'avis et informer sans délai le demandeur de cette transmission ou, le cas échéant, des raisons pour lesquelles elle n'a pas pu l'effectuer;

(b) conserver, pour une période de six mois à compter de la date de réception de l'avis de prétendue violation, un registre permettant d'identifier la personne à qui appartient l'emplacement électronique et, dans le cas où, avant la fin de cette période, une procédure est engagée par le titulaire du droit d'auteur à l'égard de la prétendue violation et qu'elle en a reçu avis, conserver le registre pour une période d'un an suivant la date de la réception de l'avis de prétendue violation.

(2) Le ministre peut, par règlement, fixer le montant maximal des droits qui peuvent être exigés pour les actes prévus au paragraphe (1). À défaut de règlement à cet effet, le montant de ces droits est nul.

(3) Le seul recours dont dispose le demandeur contre la personne qui n'exécute pas les obligations que lui impose le paragraphe (1) est le recouvrement des dommages-intérêts préétablis dont le montant est, selon ce que le tribunal estime équitable en l'occurrence, d'au moins 5 000 \$ et d'au plus 10 000 \$.

- Is clarification needed regarding whether one notice is sufficient for multiple claims or whether separate notices are required for each claim of infringement?
- Must the person giving the notice also retain records that the notice was sent to the specified IP address? Section 41.26(b) does not appear to address this.
- Does the Government intend that this section apply to (1) any and all failures to comply with the notice and notice section, (2) a failure to do any and all acts in relation to a single notice sent by a rights holder, or (3) a failure to do each act in relation to a single notice sent by a rights holder?

L. STATUTORY DAMAGES (SECTION 38.1)

Section 38.1(1) to (3) reads as follows:

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally,

(a) in a sum of not less than \$500 and not more than \$20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes; and

(b) in a sum of not less than \$100 and not more than \$5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes.

(1.1) If the copyright owner has made an election under subsection (1) with respect to a defendant's infringements that are for non-commercial purposes, they are barred from recovering statutory damages under this section from that defendant with respect to any other of the defendant's infringements that were done for non-commercial purposes before the institution of the proceedings in which the election was made.

(1.2) If a copyright owner has made an election under subsection (1) with respect to a defendant's infringements that are for non-commercial purposes, every other copyright owner is barred from electing to recover statutory damages under this section in respect of that defendant for any of the defendant's infringements that were done for non-commercial purposes before the institution of the proceedings in which the election was made.

(2) If a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award under paragraph (1)(a) to less than \$500, but not less than \$200.

(3) In awarding statutory damages under paragraph (1)(a) or subsection (2), the court may award, with respect to each work or other subject-matter, a lower amount than \$500 or \$200, as the case may be, that the court considers just, if

(a) there is more than one work or other subject-matter in a single medium; and

(b) the awarding of even the minimum amount referred to in that paragraph or that subsection would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement.

38.1 (1) Sous réserve des autres dispositions du présent article, le titulaire du droit d'auteur, en sa qualité de demandeur, peut, avant le jugement ou l'ordonnance qui met fin au litige, choisir de recouvrer, au lieu des dommages-intérêts et des profits visés au paragraphe 35(1), les dommages-intérêts préétablis ci-après pour les violations reprochées en l'instance à un même défendeur ou à plusieurs défendeurs solidairement responsables :

(a) dans le cas des violations commises à des fins commerciales, pour toutes les violations — relatives à une oeuvre donnée ou à un autre objet donné du droit d'auteur —, des dommages-intérêts dont le montant, d'au moins 500 \$ et d'au plus 20 000 \$, est déterminé selon ce que le tribunal estime équitable en l'occurrence;

(b) dans le cas des violations commises à des fins non commerciales, pour toutes les violations — relatives à toutes les oeuvres données ou tous les autres objets donnés du droit d'auteur —, des dommages-intérêts, d'au moins 100 \$ et d'au plus 5 000 \$, dont le montant est déterminé selon ce que le tribunal estime équitable en l'occurrence.

(1.1) Toutefois, le titulaire du droit d'auteur qui a choisi de recouvrer des dommages-intérêts préétablis auprès de la personne visée au paragraphe (1) pour des violations qu'elle a commises à des fins non commerciales ne pourra pas recouvrer auprès d'elle de tels dommages-intérêts au titre du présent article pour les violations commises à ces fins avant la date de l'introduction de l'instance et qu'il ne lui a pas reprochées dans le cadre de celle-ci.

(1.2) Si un titulaire du droit d'auteur a choisi de recouvrer des dommages-intérêts préétablis auprès de la personne visée au paragraphe (1) pour des violations qu'elle a commises à des fins non commerciales, aucun autre titulaire du droit d'auteur ne pourra recouvrer auprès d'elle de tels dommages-intérêts au titre du présent article pour les violations commises à ces fins avant la date de l'introduction de l'instance.

(2) Dans les cas où le défendeur convainc le tribunal qu'il ne savait pas et n'avait aucun motif raisonnable de croire qu'il avait violé le droit d'auteur, le tribunal peut réduire le montant des dommages-intérêts visés à l'alinéa (1)a) jusqu'à 200 \$.

(3) Dans les cas où plus d'une oeuvre ou d'un autre objet du droit d'auteur sont incorporés dans un même support matériel, le tribunal peut, selon ce qu'il estime équitable en l'occurrence, réduire, à l'égard de chaque oeuvre ou autre objet du droit d'auteur, le montant minimal visé à l'alinéa (1)a) ou au paragraphe (2), selon le cas, s'il est d'avis que même s'il accordait le montant minimal de dommages-intérêts préétablis le montant total de ces dommages-intérêts serait extrêmement disproportionné à la violation.

Technical Issues

1. Meaning of “commercial purposes” and “non-commercial purposes” – These expressions add to the list of similar concepts already found in the *Act*, namely “*profit*”, “*private profit*”, “*not for profit*”, “*non-profit*” and “*motive of gain*” (the latter being the only one defined in sections 2.5 (2) and 29.3 (1) of the *Act* by referring to the recovery of “*no more than the costs, including overhead costs, associated with doing*” the relevant activity).

Consider whether these expressions “commercial purposes” and “non-commercial purposes” are intended to have a meaning different from that of a term or expression already existing in the *Act*. If not, such preexisting term or expression should be used instead. If so, consider defining the expression “commercial purposes”.

2. 38.1(1.1) - We assume that there is a typo in line 3 of that provision and that the words “*they are*” should instead read “*the copyright owner is*”.

3. Construction of 38.1(1.2) - As currently drafted, this provision may be read (and construed) in two different ways:

The first interpretation would allow only the first copyright owner who asks for statutory damages (“A”) who sues a given defendant (“X”) for non-commercial infringements made before the start of the lawsuit (“Y”) from recovering statutory damages for any and all non-commercial infringements made by X until day Y in respect of *any work or other subject-matter* (implied words are placed within the brackets which have been added to the text in Bill C-32):

(1.2) If a copyright owner [<i>in a work or other subject-matter</i>] has made an election under subsection (1) with respect to a defendant’s infringements that are for non-commercial purposes, every other copyright owner [<i>in any work or other subject-matter</i>] is barred from electing to recover statutory damages under this section in respect of that defendant for any of the defendant’s infringements that were done for non-commercial purposes before the institution of the proceedings in which the election was made.	(1.2) Si un titulaire du droit d’auteur [<i>sur une œuvre ou un autre objet du droit d’auteur</i>] a choisi de recouvrer des dommages-intérêts préétablis auprès de la personne visée au paragraphe (1) pour des violations qu’elle a commises à des fins non commerciales, aucun autre titulaire du droit d’auteur [<i>sur toute œuvre ou tout objet du droit d’auteur</i>] ne pourra recouvrer auprès d’elle de tels dommages-intérêts au titre du présent article pour les violations commises à ces fins avant la date de l’introduction de l’instance.
---	---

Hence, any other copyright owners (e.g. B, C and D) whose works or other subject-matters may also have been infringed by X before day Y would all be barred from claiming statutory damages from X for such infringements.

Another possible interpretation of this provision would apply the bar against claiming statutory damages to other *owner(s) of copyright* in the *works or other subject-matters in respect of which an infringement claim is actually made in the proceeding initiated by A* (implied words are placed within the added brackets):

(1.2) If a copyright owner [<i>in a work or other subject-matter</i>] has made an election under subsection (1) with respect to a defendant’s infringements that are for non-commercial purposes, every other copyright owner [<i>in such work or other subject-matter</i>] is barred from electing to recover statutory damages under this section in respect of that defendant for any of the defendant’s infringements that were done for non-commercial purposes before the institution of the proceedings in which the election was made.	(1.2) Si un titulaire du droit d’auteur [<i>sur une œuvre ou un autre objet du droit d’auteur</i>] a choisi de recouvrer des dommages-intérêts préétablis auprès de la personne visée au paragraphe (1) pour des violations qu’elle a commises à des fins non commerciales, aucun autre titulaire du droit d’auteur [<i>sur cette œuvre ou cet autre objet du droit d’auteur</i>] ne pourra recouvrer auprès d’elle de tels dommages-intérêts au titre du présent article pour les violations commises à ces fins avant la date de l’introduction de l’instance.
--	--

According to the second interpretation, the only copyright owners affected by this new provision would be the *other(s) co-owner(s) of copyrights* in the work(s) or other subject matter(s) in respect of which the first of such co-owners having initiated the proceedings would have claimed.

To the extent that the Government's intention is more adequately reflected in one or other of the two preceding possible interpretations of that provision, it may want to clarify its drafting to make such intention clearer, such as proposed above.

Subsection 38.1(6) prevents recovery of statutory damages against a person liable for enablement. We assume this is the Government's intention. There is a question however as to whether the section prevents recovery only of statutory damages for enablement liability or extends to preventing recovery of statutory damage for other causes of action as well, e.g. does it apply to prevent recovery of statutory damages against a person, or only to the cause of action for enablement?

M. TECHNOLOGICAL PROTECTION MEASURES ("TPMs") (SECTIONS 41 TO 44.2)

Both the WCT and WPPT contain obligations on member states concerning technological protection measures ("TPMs"). These obligations are as follows:

WCT - Article 11 reads as follows:

11. Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

WPPT - Article 18 reads as follows:

18. Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

It is our understanding that the Government of Canada intends to consider whether to implement the WCT and the WPPT upon ratification of Bill C-32. This raises the question as to whether Bill C-32 provides both (a) adequate legal protection; and (b) effective legal remedies, against the circumvention of TPMs.

Sections 41 to 44.2 and section 42(3.1) of Bill C-32 concern the TPMs. Section 41 contains a broad definition of a TPM. It provides as follows:

41. “Technological protective measure” means any effective technology, device or component that, in the ordinary course of its operation,

(a) controls access to a work, to a performer’s performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or

(b) restricts the doing - with respect to a work, to a performer’s performance fixed in a sound recording or to a sound recording - of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.

41. « mesure technique de protection » Toute technologie ou tout dispositif ou composant qui, dans le cadre normal de son fonctionnement:

(a) soit contrôle efficacement l’accès à une oeuvre, à une prestation fixée au moyen d’un enregistrement sonore ou à un enregistrement sonore et est autorisé par le titulaire du droit d’auteur;

(b) soit restreint efficacement l’accomplissement, à l’égard d’une oeuvre, d’une prestation fixée au moyen d’un enregistrement sonore ou d’un enregistrement sonore, d’un acte visé aux articles 3, 15 ou 18 ou pour lequel l’article 19 prévoit le versement d’une rémunération.

Through the definition, a TPM includes both a measure that controls access and a measure that restricts the doing of an act within the rights of a copyright owner.

Section 41.1(1) would prohibit the circumvention of a TPM. The prohibition applies regardless of what the person who circumvents the TPM intends to do with the work or other subject matter accessed.

Section 41.1(1)(b) would prohibit offering of services primarily for the purpose of circumventing a TPM.

Section 41.1(1)(c) would prohibit the manufacture or importation, offering for sale or rental, or distribution of any circumvention device designed or produced primarily for the purpose of circumventing a TPM.

By reason of section 41.1(2), the owner of copyright in a work or other subject matter in respect of which a TPM was circumvented is entitled to all remedies conferred by law for the infringement of copyright, with the exception of statutory damages from an individual who circumvented the TPM for his or her private purposes.

There are a number of exceptions to the prohibitions against circumvention of a TPM, providing circumvention services and trafficking in circumvention devices. These are set out in sections 41.11 to 41.17. They apply in respect of law enforcement activities, encryption research, in certain circumstances where there is no option to prevent the collection and communication of personal information, certain activities conducted by a person with a perceptual disability, a broadcasting undertaking making an ephemeral reproduction for use in its business requirements, undertaking an act for the purpose of making a computer program or any other computer program interoperable, and assessing the vulnerability of a computer system or network or correcting any security flaws. Section 41.2 would give the Governor-in-Council broad regulation-making power to prescribe additional circumstances in which the prohibition against circumvention does not apply.

Certain of the exceptions for making computer programs interoperable (section 41.12) and for assessing the vulnerability of a computer system or network or correcting any security flaw (section 41.15), have a limitation on the application of the exception. The limitation is that the exception does not apply if the person claiming the exception commits an act that constitutes copyright infringement.

Section 42(3.1) would provide a criminal sanction for the circumvention of a TPM, providing circumvention services or trafficking in circumvention devices. On indictment, the maximum fine would be \$1,000,000 and, on summary conviction, the maximum fine would be \$25,000.

By establishing prohibitions against both a measure that controls access and restricts the doing of an act within the rights of a copyright owner, it would appear that Bill C-32 would provide adequate legal protection for TPMs. By extending all legal remedies conferred by law for infringement of copyright, with a limited exception concerning statutory damages, and by creating criminal sanctions, it would appear that Bill C-32 would provide effective legal remedies against the circumvention of TPMs. We are therefore of the view that Bill C-32 is compliant with the obligations concerning TPMs in Article 11 of the WCT and Article 18 of the WPPT. We express no view as to whether a lower threshold of protection for TPMs or fewer legal remedies for the circumvention of TPMs would, or would not, also be compliant with the WIPO treaties.

With respect to the definition of circumvent in section 41(b), “circumvent” means, in relation to a copy control TPM, to avoid, bypass, remove, deactivate or impair the technological measure”. In relation to an access control TPM, the concepts of “descrambling” and “decrypting” are added to “avoid, bypass, remove, deactivate or impair”.

These provisions seem to be intended to apply to works, sound recordings and performers’ performances, but there is a drafting flaw that reads all three kinds of subject-matter into the

definition of “technological measure”, but only works into part (a) of the definition of “circumvent”. This flaw should be corrected to avoid the inadvertent denial of protection to sound recordings and performers’ performances.

The Bill defines a TPM in section 41 as “any effective technology, device or component that, in the ordinary course of its operation” operates as an access control or copyright control TPM. This language suggests that the measures must actually be effective in the ordinary course of their operation to perform their intended objects.

Note, the DMCA defines the term “effectively controls access to a work” by requiring only that “the measure, in the ordinary course of its operation, requires the application of information, or a process or treatment, with the authority of the copyright owner, to gain access to the work”. This is a much weaker standard.

To be an access control TPM, its use must be authorized by the copyright owner. Since TPMs can be used by others e.g. exclusive licensees, many TPMs would not be protected given this requirement. Under the WIPO Treaties, all TPMs should enjoy protection whether applied by the owners of copyrights or by others who are entitled to control the exploitation rights. (It is unclear whether the use requirement refers to the work or to the TPM.)

Section 41.14 of the Bill contains the following exception dealing with TPMs:

41.14(1) Paragraph 41.1(1)(a) does not apply to a person who circumvents a technological measure if (a) the work, performer’s performance fixed in a sound recording or sound recording that is protected by the technological measure is not accompanied by a notice indicating that its use will permit a third party to collect and communicate personal information relating to the user or, in the case where it is accompanied by such a notice, the user is not provided with the option to prevent the collection and communication of personal information without the user’s use of it being restricted; and (b) the only purpose of circumventing the technological measure is to verify whether it permits the collection or communication of personal information and, if it does, to prevent it.

(2) Paragraphs 41.1(1)(b) and (c) do not apply to a person who offers services to the public or provides services, or manufactures, imports or provides a technology, device or component, for the purposes of circumventing a technological measure in accordance with section (1), to the extent that the services, technology, device or component do not unduly impair the technological measure.

41.14 (1) L’alinéa 41.1(1)a) ne s’applique pas à la personne qui contourne la mesure technique de protection d’une oeuvre, d’une prestation fixée au moyen d’un enregistrement sonore ou d’un enregistrement sonore si les conditions suivantes sont réunies:

(a) l’oeuvre, la prestation ou l’enregistrement n’est pas accompagné d’un avertissement indiquant que son utilisation permet à un tiers de collecter et de communiquer des renseignements personnels sur l’utilisateur ou, s’il l’est,

l'utilisateur ne peut empêcher la collecte et la communication de ces renseignements sans que l'utilisation ne soit restreinte;

(b) le contournement a uniquement pour objet de vérifier si la mesure technique de protection ou l'oeuvre, la prestation ou l'enregistrement permet la collecte ou la communication de renseignements personnels ou, le cas échéant, de les empêcher.

(2) Les alinéas 41.1(1)b) et c) ne s'appliquent pas à la personne qui offre au public ou fournit des services, ou qui fabrique, importe ou fournit une technologie ou un dispositif ou composant, en vue du contournement d'une mesure technique de protection en conformité avec le paragraphe (1) dans la mesure où les services, la technologie ou le dispositif ou composant ne nuisent pas indûment au fonctionnement de la mesure technique de protection.

Technical Issues

1. The exception is quite broad and could permit circumvention of a TPM to enable an individual to access non-public databases such as databases (which are either collective works or compilations) on websites (which can also be original works). These non-public databases could contain confidential information or personal information of third parties.
2. We understand it is possible that this exception was designed to address the situation raised by the Sony RootKit case¹⁵. This situation involved an individual circumventing a TPM on a personal information device that contained only that individual's personal information and no information of a third party.
3. Is it the Government's intent to limit the circumvention of a technological measure only in the situation where the information is on an individual's personal device and where only that person's personal information is accessible and not any other personal information, confidential information or non-public information of third parties?

¹⁵ The 2005 Sony Rootkit case involved copyright protection software that automatically installed on Windows desktop computers when consumers played CDs produced by Sony. That software created a vulnerability in the Windows operating system and introduced weaknesses that other malware was able to exploit. After public attention was drawn to the matter, Sony was the subject of several class action lawsuits in both the United States and Canada. Sony eventually reached settlement agreements in both countries. Geist, Michael. (2006, September 18). Sony Rootkit Settlement Leaves Canadian Consumers Unsettled. Posted to <http://www.michaelgeist.ca/content/view/1443/159/>.

Thank you again for the opportunity to comment on the technical aspects of Bill C-32. We would be pleased to review any of these points in more detail and look forward to future discussions on this initiative.

If we may be of further assistance, please do not hesitate to contact our executive director, Michel Gérin, at 613-234-0516 or mgerin@ipic.ca.