

Dear Sirs:

Re: Bill C-32

The current federal copyright bill, Bill C-32, has the aim of updating Canadian copyright legislation to deal with the widespread popularity of digital devices. It contains a number of pro-consumer provisions in that regard, especially in respect of interoperability. However, the anti-circumvention provisions of the Bill override the pro-consumer aspects, in some cases to the point of making them meaningless.

The following describes some amendments that would make the Bill substantially more palatable to Canadians, without damaging the commercial interests of rights holders by opening the door to widespread piracy. All of the suggested amendments below relate only to the case in which a copy of the digital work has already been legally acquired, not to the case in which it has been illegally downloaded.

The suggested changes have the potential to simplify the legislation, improve compliance, and provide a better balance between the rights under the law of consumers and rights holders.

Broadening the Scope of the Bill - Backup Copies

The Bill already recognizes that if a consumer has legally acquired a recording of a musical performance, then he or she can make a backup copy of the recording. This ability is especially relevant if the recording has been delivered digitally over the Internet, since there's no physical medium to recover from in the event of a disk crash. However, the Bill does not recognize an equivalent ability for DVD purchases, because commercially available DVD's have an anti-circumvention measure as defined in the Bill - CSS, or Content Scrambling System.

There is no reason for content distributed via DVD to be treated differently from content distributed by other means. Consumers have just as much interest in being able to recover video content in the event of a disk crash as they do audio content.

The obvious remedy is to broaden the scope of the Bill to allow one backup copy of a digital work to be made, regardless of the format or whether an anti-circumvention measure has been employed in making the backup. This remedy is simple to state and understand, and would allow the Copyright Act to keep pace easily with format changes and other technological innovations.

Broadening the Scope of the Bill - Playback Devices

The Bill already recognizes that if a consumer has legally acquired a recording of a musical performance, then it is reasonable for the

consumer to be able to copy this recording to an MP3 player or other digital playback device so that it can be listened to. Indeed, this is one of the main reasons for the popularity of digital music players such as iPod's.

Once again, the Bill does not recognize an equivalent ability for DVD purchases, because commercially available DVD's have an anti-circumvention measure as defined in the Bill. And once again, the solution is straightforward: to allow a digital work to be copied to a digital player for personal, noncommercial use.

Broadening the Scope of the Bill - Format Shifting

The Bill already permits format shifting. The rights holder has already been paid for the recording of the performance, and there is no economic justification to limit the formats available to the consumer from that point on, so long as the format shifting is from a legally obtained recording and is for personal noncommercial use only.

However, in the current draft of the Bill, the ability to shift formats is overridden by the provisions with respect to anti-circumvention measures. In fact, the Bill, as it stands currently, creates a perverse incentive for entertainment companies to re-issue the same performance on new, incompatible media with anti-circumvention measures, merely in order to re-sell their existing catalog.

A bill encouraging such pointless, uneconomic behavior could easily be amended to explicitly permit format shifting with no economic damage to rights holders.

Suggested Drafting Changes

Two drafting changes are required to implement the amendments described above:

* Deleting clauses 29.22(1)(c), 29.23(1)(b), and 29.24(1)(c) of the Bill,

* Modifying 41.1(1) of the Bill to begin: "No person shall, other than to enable data backup, movement to a playback device, or format shifting:"

Cryptography and Interoperability Research

The interoperability provisions have the potential to avoid some of the misuses to which the American DMCA (Digital Millennium Copyright Act) has been put. An extreme example of how copyright legislation could be misused was provided by Lexmark's attempt to use the DMCA to anti-competitively restrict toner cartridge sales:

<http://news.cnet.com/2100-1023-979791.html>

However, the Bill as currently drafted would unduly restrict competition because of the notice requirement contained in 30.62(c). Existing patent and trademark legislation already safeguards intellectual property against infringement. The notice requirement is redundant and would make it easier for existing companies to engage in anti-competitive behavior by threatening legal action when notified. Deleting clause 30.62(c) would remedy this situation.

Conclusion

Copyright law balances the interests of right holders in being compensated for their work, the interests of the public in accessing their work, and the long run viability of the publishing, recording, and movie industries.

It is worth noting that during the 20th century copyright law was amended multiple times to increase the length of the term of copyright protection. While this was clearly in the interests of existing copyright holders, it amounted to a windfall gain for those copyright holders (and their descendants) - it would be hard to argue that content creators were retroactively motivated by copyright extensions to bring works to the marketplace! The extensions provided no countervailing gain to the public.

The current treatment of anti-circumvention measures in the Bill shifts the balance too far in favor of rights holders by limiting fair dealing with digital content and disallowing backups of digital data. Amending the Bill as described above will better balance the interests the public and rights holders. It will not damage the legitimate economic interests of rights holders and will better support the growth of the digital marketplace.

Regards,

Richard C. Payne