

COMMENTS on the Copyright Modernization Act (Bill C-32)

presented to the members of the Legislative Committee

by the

SOCIÉTÉ QUÉBÉCOISE DE GESTION COLLECTIVE
DES DROITS DE REPRODUCTION
(COPIBEC)



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Thank you for your invitation to appear here.

Copibec is a collective society that represents over 25,000 Quebec authors and publishers. It administers the print-format and digital-format reproduction rights for published works (newspapers, books and magazines), including the artistic works appearing in them.

What is copyright? It is the right to reproduce a work or a substantial part thereof or perform such work or part thereof in public. This exclusive right belongs to the author. It includes the right whether or not to authorize the use of a work in consideration for the setting of certain conditions such as equitable remuneration. Those are the authors' economic rights. In addition to those rights, authors have moral rights, namely the right to the integrity of their works and the right of attribution. That essentially defines copyright as it exists in countries around the world.

Before technologies and mass media enabled works to be easily copied and shared, authors could manage the use and distribution of their works themselves. The image of a scribe meticulously reproducing a work immediately comes to mind. But radio, television and photocopying changed that reality. Authors as well as users no longer found the existing system satisfactory. Collective societies were created in order to meet the need for a solution to this situation. Organizations providing one-stop service were established all over the world so that users could have convenient access to a large number of works, while authors and other rightsholders could be assured that their rights would be professionally managed.

Bill C-32 undermines all the foundations underpinning copyright.

By introducing some forty new exceptions, the Bill removes authors' sole right to decide for themselves whether or not they authorize the use of their works. Apart from two of those exceptions, none provides for any remuneration. On the contrary, the exceptions deprive creators and other rightsholders of the compensation that they have already been receiving. This applies in the case of

reproduction for examinations or distance learning. The exceptions jeopardize considerable revenues by introducing the vague, unnecessary concept of fair dealing for the purpose of education. They compromise the development of new and existing markets, such as when a work is reproduced to display it for education or training purposes, when non-commercial user-generated content is produced or when a work is copied for private purposes.

What will remain of copyright's foundations if authors are denied the right to decide the use of their works and receive compensation? The right to put digital locks on their works?

The digital lock solution is not suitable for the rightsholders that Copibec represents. Why not? Because it is impossible to put a digital lock on a 200-page book or a magazine in a context when print is still the leading format for most published works. Moreover, rightsholders have in general decided to offer electronic books without locks in order to better meet consumers' needs by favouring format interoperability. Quebec publishers have preferred to integrate a watermark into the digital versions of their books so that they can be traced in the event of copyright infringement. Most importantly, the largest users of published works are institutions or individuals who almost always make copies for non-commercial purposes. In those cases, the Bill sets out statutory damages ranging from \$100 to \$5,000, which is significantly less than what it costs to take legal action.

Bill C-32 also erodes another foundation of copyright: collective administration. By eliminating or jeopardizing substantial payments to creators, the Bill helps weaken the collective societies that retain a percentage of the royalties collected in order to cover their operating costs (13% in Copibec's case). But those societies are an essential component of copyright administration. UNESCO has stated that collective societies are "one of the most appropriate means of assuring respect for exploited works and a fair remuneration for creative effort of

cultural wealth, while permitting rapid access by the public to the constantly enriched living culture¹.”

The existing Copyright Act actually recognizes this principle in its definition of “commercially available” (section 2), which covers works purchased on the market as well as those obtained by means of a licence from a collective society. In both cases, works must be accessible within a reasonable time and for a reasonable price. It is interesting to note that whenever Bill C-32 mentions a commercially available work – for example, in the context of displaying a work for education or training purposes or using a work for tests or examinations – all references to collective administration have quietly been removed.

If access to works is assured, in particular through collective societies, why are so many new exceptions proposed in the Bill? Exceptions, most notably when they are not accompanied by equitable remuneration, must be granted sparingly and with great care². In any case, this is an expropriation of authors’ rights, at the very least their sole right whether or not to authorize the use of their works but sometimes even their right to equitable remuneration.

That is why the international community has set strict rules in that regard and has integrated them into the Berne Convention, which Canada signed in 1928, and later into the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and into World Intellectual Property Organization (WIPO) treaties, which are in fact the reason for this modernization of the *Copyright Act*. Canada is a signatory to all those treaties. It is therefore surprising that the three-step test described in them was not taken into consideration when the Bill was developed. The test specifies that exceptions must be limited to special cases that do not conflict with a normal exploitation of

¹United Nations Educational, Scientific and Cultural Organization. *Guide to the Collective Administration of Authors’ Rights (The Administration Society at the Service of Authors and Users)*, Paula SCHEPENS, 2000, p. 9.

²Especially in the Canadian context of the *CCH Canadian Limited v. Law Society of Upper Canada*[2004] ruling since exceptions will be interpreted broadly, to the detriment of creators and other rightsholders.

the work and do not unreasonably prejudice the legitimate interests of the author³.

Let's take the example of the proposal to expand fair dealing to include education. A provision such as that one, which endangers the collection of over \$10 million in Quebec alone, is certain to cause material prejudice to rightsholders and probably contravenes Canada's international commitments. That point of view is shared by the International Federation of Reproduction Rights Organisations (IFRRO), the International Association of Scientific, Technical and Medical Publishers (STM Publishers), the International Publishers Association (IPA), Professor Ysolde Gendreau from *Université de Montréal* and President of ALAI Canada, Professor Georges Azzaria from *Université Laval*, and the Quebec Bar, to name but a few.

Teachers will also be affected by the uncertainty resulting from that provision, whose scope will only be defined over the years as long and costly court cases are decided. The provision is unnecessary because access to the works is already available through collective societies across Canada. Last November, Christine Saint-Pierre, Quebec's minister of culture, stated that she believed that certain provisions of Bill C-32 should be cancelled or at least amended. She referred specifically to expanding the fair dealing concept to include education purposes, not updating the private copying regime, and the role of Internet service providers⁴. Line Beauchamp, Quebec's minister of education, recreation and sports, in a letter to the president of the *Association nationale des éditeurs de livres*, also indicated that she disagreed with the educational exception proposed in Bill C-32⁵.

³Berne Convention, Art. 9; TRIPS, Art. 13; WCT, Art. 10 and WPPT, Art. 16.

⁴Speech at the *Grande Bibliothèque* in Montreal on November 8, 2010, available in French at:<http://www.cultureequitable.org/non-classe/304/>

⁵Letter dated December 9, 2010, available in French at:
http://www.anel.qc.ca/Fichiers/reponse_Line_Beauchamp_105.pdf

More recently, two associations representing users expressed the same opinion. I will use their words to conclude my remarks today.

In their media release issued in French on February 4, 2011, the *Association des libraires du Québec*, which represents booksellers, stated:

... by introducing the concept of “fair dealing for the purpose of education” without defining its framework, the government is exposing itself to interminable legal proceedings between rightsholders and users, in addition to contravening the various international agreements signed by Canada. In other words, relying solely on the justification of fair dealing for education purposes, “pirates” as well as the education sector could use works without having to pay royalties to rightsholders. Creators also deserve to be fairly compensated for their work.

In addition, the various players in the book publishing sector devote considerable efforts to adapting, promoting and marketing our literature in the digital world while respecting everyone’s rights. Although new technologies will enable authors to benefit from wider distribution, Bill C-32 will deprive them of a large share of their incomes. Every link in the chain – but more significantly, the creators – is essential to this fragile balance on which our cultural diversity and the viability of our publishing sector depend⁶.

In its position paper issued in French on February 1, 2011, the *Fédération des commissions scolaires du Québec*, which represents all the French-language school boards in the province, indicated that it was opposed to expanding the concept of fair dealing:

The adoption of that change would not only have negative impacts on the right of authors whether or not to authorize the use of their works, it would also have negative impacts on their right to receive equitable remuneration.

We understand that the government wants to facilitate access to copyrighted works, but in our opinion accessibility must respect the rights of the work’s author. Accepting the principle that access to works is synonymous with no-cost availability would deny the importance of authors’ contributions to our children’s education and would weaken the

⁶<http://www.alq.qc.ca/nouvelles/2011/02/l-alq-donne-son-appui-aux-signataires-de-culture-equitable-unis-contre-le-projet-de-loi-c-32.html>

educational publishing industry. Moreover, the concept of fair dealing for the purpose of education is imprecise and would not enable educational institutions to apply clear rules for managing copyright, which is what the agreements with the copyright societies currently do⁷.

Hélène Messier, Executive Director

⁷Fédération des commissions scolaires du Québec, *Position de la FCSQ sur le projet de loi C-32 intitulé Loi modifiant la Loi sur le droit d'auteur*, p. 4. <http://www.fcsq.qc.ca/Publications/Memoires/2011/Memoire-FCSQ-Loi-C-32.pdf>

The *Société québécoise de gestion collective des droits de reproduction*, commonly referred to as Copibec, is a collective society as defined in section 70.1 of the *Copyright Act*. Founded on November 25, 1997, it manages print-format and digital-format reproduction rights for published works (newspapers, books and periodicals), including the artistic works appearing in them. Its primary role is to:

- Ensure recognition of the rights of authors and publishers, defend and promote those rights and encourage respect for intellectual property.
- Represent authors and publishers as well as their associations for the purpose of collectively managing the reproduction rights to their works or any other rights they may assign.
- Collectively control, manage and ensure payment for the rights to make copies of works by means of photocopying, mechanical or electronic processes, communication by telecommunication or any other technology or method. For those purposes, issue any licence and collect related royalties on behalf of authors and publishers and remit the royalties to rightsholders.
- Ensure greater control of the use of works and defend the interests of authors and publishers with respect to any type of copying of works among the public and government authorities and in any present or future circumstances.
- On behalf of copyright owners or other rightsholders, collect royalties and compensation owed for any type of use of their works and distribute the funds to them.
- Study, promote and develop copyright as it relates to the reproduction of works.

Copibec's membership consists of organizations representing authors and publishers:

- *Association des journalistes indépendants du Québec*
- *Association nationale des éditeurs de livres*
- *Fédération professionnelle des journalistes du Québec*
- *Les Hebdos du Québec*
- *Les Quotidiens du Québec*
- *Regroupement des artistes en arts visuels du Québec*
- *Société de développement des périodiques culturels québécois*
- *Union des écrivaines et écrivains québécois*

Copibec represents more than 25,000 Quebec authors and publishers. Its repertoire also includes foreign works. Copibec is a member of the International Federation of Reproduction Rights Organisations (IFRRO), which has 127 members from approximately 60 countries. IFRRO, which was established to support the application of the international copyright principles set out in the Berne Convention, favours the conclusion of bilateral agreements among members and promotes national treatment for all foreign copyright owners.

To date, Copibec has concluded 25 bilateral agreements with reproduction rights organizations in the following countries: Argentina, Australia, Belgium, Brazil, Canada (Access Copyright), Denmark, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Jamaica, Japan, Mauritius, Mexico, Netherlands, New Zealand, Norway, Singapore, Spain, Switzerland, United Kingdom and United States. Through those agreements, Copibec ensures that the reproduction rights of Quebec copyright owners are respected outside the province and it makes a commitment to ensure that the rights of foreign copyright owners are respected in Quebec.