



BRIEF

To the Ministers of Industry and Heritage Regarding *The Copyright Modernization Act (Bill C-32)*

Who Are We?

A coalition of English-language national writers' organizations, including the Canadian Authors Association and the Canadian Society of Children's Authors, Illustrators and Performers, the League of Canadian Poets, the Literary Translators' Association of Canada, the Playwrights Guild of Canada, the Professional Writers Association of Canada and The Writers' Union of Canada has come together to make our views known about the *Copyright Modernization Act* currently before Parliament. We do not speak for Quebec francophone writers but we share concerns about Bill C-32.

Our Position on Copyright

Professional writers strongly support copyright reform. It is essential that Canada's copyright law reflects the new technological developments that are transforming the way that writing and other forms of cultural expression are created and distributed. However, Canadian writers have deep concerns about the impact of the long list of new exemptions in Bill C-32, particularly the expansion of fair dealing to include education, the exception for non-commercial "mash-ups", digital delivery of "interlibrary loans" and copying for "private purposes".

It is our view that these changes, in the current, rapidly changing digital environment in which new business models are evolving, encroach too much on the exclusive rights of authors – exceeding the limitations permitted by the Berne Convention. The Berne "3-step test" restricts permissible exceptions in national legislation to "certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author". There is a similar provision in NAFTA, in the TRIPs (the agreement on Trade-Related Aspects of Intellectual Property annexed to the WTO Agreement), and also in Article 10 of the WIPO Copyright Treaty concluded in 1996, which Canada signed but has so far failed to implement and ratify. Although Bill C-32 would implement important requirements of the WIPO Copyright Treaty, it will put Canada in breach

of its international obligations if it is passed without deletion or amendment of these four proposed changes to the *Copyright Act*.

Background

Until the 1960s the vast majority of books and poetry read by Canadians and plays performed in this country were authored by American or British writers, and the small numbers of Canadian writers who were writing at that time found it very difficult to reach an audience. Then, in the '60s, things began to change. A new generation of writers emerged, and book publishing houses, magazines and theatre companies were founded to bring the works of many more Canadian writers to the public. By the 1990s thousands of books were being published every year. Dozens of original Canadian plays were performed in every part of the country, and documentary and feature films were finding an audience. Today Canadian writers are recognized as being among the most creative voices and are being read around the world – Canadian works are being studied in other countries and Canadian writers contribute to the international discussion of issues of global concern. Even Canadian prime ministers have bragged about our authors.

There are many reasons for this, including the talent of Canadian authors and the strong support of writers, book and magazine publishers and theatre companies by the federal and provincial governments, and an essential factor has been copyright legislation that has provided protection for writers' works. It has been this creative mix of writers, publishers, producers, government support and copyright that has provided the foundation for the thriving publishing industry in this country.

But though writing has flourished in this country, it is still a risky and marginal business for those engaged in it. Most independent professional writers cannot live on the earnings from their writings. As a result, writers and the organizations that represent them are very concerned about protecting their income. Strong, clear copyright laws are an essential element of an environment that encourages writing.

Collective Societies

Writers are paid by upfront fees or by royalties when they write for publication in books, magazines and other periodicals. They also are paid for secondary uses of their works when these works or excerpts from them appear in subsequent publications. An important development over the past two decades has been the establishment of copyright collective societies with a mandate to license or set tariffs and collect payment for some new secondary uses of literary and artistic works and to distribute those funds to copyright holders.

Collective administration is authorized by the *Copyright Act* for two fundamental reasons:

- The copying and distribution of copyright works violates Canadian law unless those who hold the rights give permission and are paid.
- Collective administration by rights holders' collective societies is the only practical way for rights holders to obtain payment.

SOCAN, the music performing rights collective, is by far the oldest and largest collective society in Canada. SOCAN collects money from radio stations, bars, restaurants and a huge number of other organizations when copyright-protected music is played in public. For the past twenty years Access Copyright in English-speaking Canada and Copibec in Quebec have been fulfilling a similar role for writers, visual artists and publishers whose publications are copied, mostly by photocopying. They license the copying of published works and collect revenue for this secondary use, which they distribute to the rightsholders. Writers and publishers cannot respond to every query from a teacher or university professor who may wish to copy a poem or article to be distributed to students or stand at every photocopying machine in the country to give permission and receive payment. Unlike an individual rights holder, a collective society can monitor the use of copyright works, encourage users to comply with copyright and, if necessary, undertake enforcement proceedings to ensure that rights holders will be paid for the reproduction of their work.

Collective societies exist in many countries around the world. This means that some money flows to Canadian copyright holders when their works are reproduced in other countries, because Canadian collective societies have agreements with similar societies in other countries for the exchange of royalties.

To give a brief explanation of how collective administration works in the education sector: teachers and professors often ask students to study a poem, short story, well researched article from a periodical, or excerpt from a play or book. In elementary and high schools the teacher will photocopy this material and distribute it to students for study in the classroom or at home. In colleges and universities, "coursepacks" of readings selected by the professor are frequently assembled and sold to students as an alternative to having students borrow from the library or purchase the original publications from which this material is copied. Students also make their own copies of articles and other material recommended by their professors.

Under current Canadian copyright law this is legal as long as the provincial ministry of education, school board, college or university has a license from a collective society that has been filed with the Copyright Board or it copies under a tariff

certified by the Copyright Board. After the collective society deducts its administration costs, the money it collects from the license or tariff flows to the publishers and writers, and educational institutions save money because it costs less to photocopy excerpts than to purchase books and subscriptions to newspapers, magazines and journals.

Today most educational institutions in the country are covered by tariffs or signed licenses and the system works smoothly. Access Copyright collects more than \$30 million per year. Copibec operates a similar system in Quebec and collects about \$13 million per year. About 85% of the money collected by Access Copyright comes from the educational sector and the rest from government and corporations.

Collective Administration in the Digital Economy

We have entered the digital age. The book and periodical industry is undergoing enormous changes, but the most fundamental aspect of it remains unchanged. Writers continue to write articles, poems, plays, novels and other works, regardless of whether intended for publication in traditional forms or digital publication through the Internet or other new media. But digital copying is rapidly replacing photocopying, and digitized works are being disseminated on the Internet. When teachers want students to read material, it can be distributed digitally to students who will read it either on a computer screen or an electronic reader.

But what about the writers and publishers who own the copyright in these works that are copied and made available digitally? Will they be bypassed and lose significant income, just as the songwriters, music publishers and record companies are often being bypassed because of peer-to-peer copying, or will they and other rights holders be paid for the use of their work?

The answer lies with collective societies. If copyright legislation remains strong, a collective society can set tariffs or negotiate licenses under the supervision of the Copyright Board, much as they do today for photocopying, and payment for the use of works copied and communicated by new media will continue to flow to the rights holders just as it does now.

This is the promise of the new digital age. However, Bill C-32 on the one hand extends photocopying tariffs and licenses specifically to cover digital copying in educational institutions, but on the other hand leaves it to the courts to determine if or how these new exceptions are compatible with the expansion of fair dealing to cover education purposes. The bill needs to be amended in such a way as to recognize and respect the economic model for copying that has been developed over two decades and to allow it time to adapt. As it is, Bill C-32 fails to meet the objective

of technological neutrality it purports to uphold and threatens to cut short the development of new ways to do business in the digital environment.

Issues and Recommendations

1. Expansion of “Fair Dealing” to education

Issue Bill C-32 as drafted would expand the current purposes of “fair dealing” to include “education”. This appears to be an enormously broad exemption of uncertain scope, added to an existing “fair dealing” exemption in the current *Copyright Act* that already allows educators and students, as well as others outside educational institutions, to reproduce copyright material for research and private study. There are also many specific exemptions for educational institutions in the existing legislation – cost-saving provisions that permit the copying of materials that educational institutions might otherwise need or want to purchase. If this new, unstructured educational “fair dealing” exemption were to become law, educators would claim that most of the massive widespread copying that takes place in educational institutions is “fair dealing”. Business corporations would also benefit at the expense of rights holders, as “fair dealing” for the purpose of education is not restricted to non-commercial users, and there will be no lack of newly, self-styled “educators”. If courts were to interpret this proposed provision as broadly as its wording invites, Canada would be in breach of the Berne Convention and similar international obligations.

Potential Impact

- Because neither users nor rights holders will know the bounds of what can be copied as “fair dealing” for the purpose of “education”, the new fair dealing provision for education will encourage litigation to determine what can be copied without a license.
- Because educational uses represent approximately 85% of the revenues collected by Access Copyright, Canadian English-language writers will no longer receive significant payments from Access Copyright. Currently almost 9,000 writers are signed up with Access Copyright. In 2009, affiliated writers received about \$600 each, with a few receiving considerably more, for copying during 2008. Quebec writers affiliated with Copibec will also receive much less. This new free use would represent a significant loss to

independent professional writers, whose average annual income from their writing is under \$20,000.

- Because of reduced sales of their books as a result of widespread uncompensated copying, the educational publishing sector in Canada will contract dramatically. Educational publishers will receive less revenue and will cut back on the number of titles they produce. Lower revenues will make it impossible for some publishers to stay afloat and others will be forced to reduce their publishing programs. This will mean a significant loss of income for the writers whose work is included in books published for educational markets.
- Publishers of trade books, such as novels, poetry and non-fiction will also see their market shrink because of widespread copying. These publishers will lose income, make smaller royalty payments to writers and cut back on both staff and their lists of new books. Trade book publishing houses will shrink in size and some may not survive.
- Layoffs across the publishing sector in Canada will reduce Canadian-created content in schools, colleges and universities.
- Writers will see their markets for existing works shrink, and it will be more difficult to get new works published because of publisher cutbacks. This will detract from their professional contribution to Canadian society.
- Universities, colleges, ministries of education, school boards and other educational institutions will save a relatively tiny percentage of their annual expenditures but will be faced with a significant reduction in the number and quality of Canadian publications that reflect Canada's citizens and culture.

Recommendation Delete “education” from the list of purposes of “fair dealing”. Any exceptions should be clearly delineated to reduce uncertainty for both users and rights holders and the likelihood of prolonged and costly litigation.

2. Non-commercial user-generated content or “Mash-ups”

Issue

Bill C-32 as drafted allows anyone to incorporate entire existing works into a “new” work without permission or payment as long as the use is non-commercial, but there is nothing to ensure that any such new use will be fair. Professional writers may not object in principle to others incorporating reasonable excerpts from their works into new creative works as long as they are credited and the use is truly non-commercial and if the new work does not interfere with the market for the original work. However, distribution of these so-called “mash-ups” by commercial disseminators such as Facebook or YouTube without payment encroaches preemptorily and unfairly on writers’ rights. Whether there is “a substantial adverse effect” on the original work, which would result in an infringement, will not be known until too late and may depend on how many others create “mash-ups” using the same work. This feature of C-32 represents an erosion of rights that does not exist anywhere else in the world and that would certainly put Canada in breach of the Berne Convention and similar international obligations.

Potential Impact

- Without clear rules to ensure fairness to the creators of the works incorporated in “mash-ups”, the market for existing works and for sequels, films, games and other derivative works based on those existing works may be destroyed. For example, “fan fiction”, if widely disseminated on the Internet, could deter a publisher from subsequently publishing an author’s own sequel to his or her own novel. Or, a teacher could develop and post course materials on a website, such as a collection of articles or an anthology of poems, which other teachers could access freely and use in preference to a coursepack licensed by Access Copyright or an anthology made available commercially by a publisher.
- Writers will not be paid for these uses which piggyback on their work.

Recommendation

Delete the “mash-up” provision and engage in consultation with authors on how such a provision might be structured to allow reasonable use of another author’s work in a new work while ensuring “fairness” to that author whose work is used.

3. “Interlibrary Loans”

<u>Issue</u>	Bill C-32 expands the existing exception for “interlibrary loan” to allow digital delivery directly to the computer of a reader. One copy of a book, magazine, journal or newspaper purchased and held by a single library can be the source of material delivered directly to the computer of every library patron in Canada. It is already possible for a single library to provide material digitally to another non-profit library, archive or museum, but the copy must not be given to the person who has requested it in digital form. Free electronic delivery by these institutions will pre-empt rights holders’ sale of electronic books, magazines and other electronic materials that are in the holdings of a library and can be obtained without charge anywhere in Canada and also would preclude Access Copyright from ever authorizing electronic delivery to library patrons as part of its license or tariff for libraries, archives and museums. We are not aware of any other country that has a similar provision for legalized “sharing” of materials held by libraries, archives and museums that are open to the public and we believe it would breach Berne and other similar treaties.
<u>Potential Impact</u>	<ul style="list-style-type: none">▪ A source of revenue for writers and publishers will evaporate before other, long-overdue revisions to the <i>Copyright Act</i> are enacted to make the digital distribution by libraries more secure.▪ Royalty income from photocopying in libraries, now licensed by Access Copyright, is very modest but will decline as digital delivery becomes the norm, unless Access Copyright can license digital delivery.
<u>Recommendation</u>	Delete the amendment to the “interlibrary loan” exception that permits direct digital delivery to library patrons and allow collective societies an opportunity to offer a license to libraries, museums and archives that will include digital uses. The principle of copyright payment for reproduction of published works – formerly almost exclusively by photocopying and soon almost exclusively by electronic or digital means – must remain intact.

4. Reproduction for Private Purposes

<u>Issue</u>	Professional writers do not object in principle to reproduction of their works, if legally obtained, for the truly private use of individuals. There is not and has never been any problem with the lending of a work as embodied in a physical object. But when works are in digital form and downloaded or reproduced to make additional copies without payment for unspecified “private purposes”, writers are deprived of income. We are not aware of any other country that has such a broad provision for uncompensated use by individuals and believe that it will violate the Berne Convention if implemented without substantial amendment.
<u>Potential Impact</u>	The impact of this broad exception for reproduction for private purposes is unpredictable, but it will certainly deprive writers of income and result in greater use of technological protection by rights holders. More technological protection of works will further exacerbate the frustration of users and ultimately encourage “hacking” and a general disrespect for intellectual property.
<u>Recommendation</u>	Engage in consultation with rights holders and users specifically on the exception for reproduction for private purposes. It is premature to enact a broad exception that includes format shifting prior to ensuring adequate compensation for rights holders. Consider a copyright levy on Internet Service Provider (ISP) accounts.

Conclusion

The choices for parliamentarians are clear.

- If you support the exemption in Bill C-32 that extends “fair dealing” to education you will eliminate some financial obligations of school boards, colleges and universities, but at the same time you will damage the rights and reduce the incomes of Canadian novelists, non-fiction writers and freelance journalists, children’s authors, playwrights, poets and translators.
- If you support the exemption that allows “mash-ups” without some controls to ensure fairness to the creators of the works they incorporate, you may be destroying the market for existing works

and for sequels, films, games and other derivative works that authors of those existing works have written or authorized.

- If you support the exemption that allows digital delivery of “interlibrary loans”, you are depriving writers of a revenue stream from expanded collective licensing of libraries.
- If you support the exemption for reproduction for private purposes, you are supporting systems that will pay nothing to the creators of these materials.

For each of these issues, the current wording of Bill C-32 creates a new exception that will hurt those who use our works, not just Canadian writers and our international writing colleagues, because these exemptions from copyright will adversely affect Canada’s writing and publishing industry and Canadian culture. We believe that Canada will be seen to be in breach of its international obligations by its trading partners because these exemptions violate the Berne Convention, NAFTA and the TRIPs agreement, which restrict permissible exceptions in national legislation.

We have been waiting too long for revisions to the *Copyright Act*. Bill C-32 presents an opportunity to modernize Canada’s copyright policies to keep pace with advances in technology, and we respect the Government’s efforts to address the difficult copyright issues of the global digital economy, but its impact on the writing and publishing industry, if it is passed without amendments, will be severe. In the process of reviewing and amending Bill C-32, we respectfully urge you to address our concerns.

Respectfully Submitted by the Following:

Canadian Authors Association
Canadian Society of Children’s Authors, Illustrators and Performers
League of Canadian Poets
Literary Translators’ Association of Canada
Playwrights Guild of Canada
Professional Writers Association of Canada
The Writers’ Union of Canada

The **Canadian Authors Association** is national arts service organization providing resources, professional development, information, support services, networking opportunities and community to writers at all stages of their careers since 1921.

The **Canadian Society of Children's Authors, Illustrators and Performers** is a group of professionals in the field of children's culture with members from all parts of Canada. As a National Arts Service Organization (NASO), CANSCAIP supports and promotes children's literature through newsletters, workshops, meetings and other information programs for authors, illustrators, performers, parents, teachers, librarians, publishers and others.

Founded in 1966, the **League of Canadian Poets** is the national association of professional poets in Canada. Its purpose is to nurture a professional poetic community to facilitate the teaching of Canadian poetry at all levels and to develop the audience for poetry by encouraging recognition of Canadian poetry nationally and internationally.

The **Literary Translators' Association of Canada / Association des traducteurs et traductrices littéraires du Canada** represents professional literary translators throughout Canada.

Playwrights Guild of Canada is a national association mandated to advance the creative rights and interests of professional Canadian playwrights, promote Canadian plays nationally and internationally, and foster an active, evolving community of writers for the stage.

The **Professional Writers Association of Canada** represents freelance non-fiction writers who are published in newspapers and magazines across the country. We support professional development, standards and ethics and the economic and social interests of Canadian writers who contribute to diversity of opinion, freedom of expression and literacy for all Canadians.

The Writers' Union of Canada is a national organization representing professional authors of books. Founded in 1973, the Union is dedicated to fostering writing in Canada, and promoting the rights, freedoms, and economic well being of all writers.