ASSOCIATION DES PRODUCTEURS DE FILMS ET DE TÉLÉVISION DU QUÉBEC

APFTQ Technical Recommendations

On Bill C-11

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March 2012

As spokesman for more than 140 independent film and television production companies, the Association des producteurs de films et de télévision du Québec (APFTQ) represents the vast majority of Quebec companies producing for all screens in either French or English. In 2010-2011, film and television production in Canada brought in close to $5.5 billion all told and, directly and indirectly, produced more than 128,000 full-time equivalent jobs.

On February 15, 2012, the federal government referred Bill C-11—an Act to Modernize the *Copyright Act* (CA) to a legislative committee for review. The APFTQ had previously made comments and recommendations during the review of Bill C-32 and today is submitting an addendum for its technical recommendations.

Here is a brief summary of our technical recommendations:

1) *New performers' rights*

Bill C-11 provides for new rights for performers. Under the WPPT, these rights cannot be exercised when the performances are embodied in audiovisual works. The current Act provides for this in subsection 17(1), but the bill, which adds new rights, fails to adjust the subsection accordingly.

2) *Piracy*

We believe that Bill C-11 must be adjusted to make illegal all services enabling piracy. Among other things, the new exception allowing reproduction for private purposes would legalize mass piracy on the part of consumers, thus making services enabling piracy legal. The bill should also ensure that such services can be held liable to pay deterrent damages, and that they are not allowed to escape liability under any circumstances.

The technological protection measures, which Bill C-11 would make it illegal to circumvent, are only measures that control access to works. The bill contains no provisions preventing consumers from circumventing measures to control reproduction. The bill must continue to make it illegal to circumvent measures protecting access to works but must cover all cases.

3) *The new exemptions*

We feel that the text on the new exemptions should be revised to ensure that they apply only to the acts and individuals that the government really has in mind. As they stand, the exemptions are very broad and thus would have unintended, harmful consequences for the copyright owners.

4) *Remuneration of copyright owners*

As you are no doubt aware, it is difficult to finance the production of cultural content for digital use and even more so to remunerate copyright owners for digital use. Bill C-11 will make the situation worse. Therefore, we suggest that the government create a new system for digital use of cultural content in order to finance its production and compensate for its digital use.

Our technical recommendations, highlighted in yellow, are set out at the end of each heading in this addendum. We have also used boxes for suggested changes in a text in the bill. In the boxed text and the quotations, the section numbers in bold refer to sections in Bill C-11, and the others to sections in the *Copyright Act.* Finally, some parts are underlined for greater emphasis.

We wish to thank the legislative committee for giving us the opportunity to submit our technical recommendations on Bill C-11.

N.B. *This document is a translation of the original version in French. It simplifies, revises and updates the technical recommendations we chosen to focus on as priorities, among the ones set forth in our memorandum on Bill C-32.*

You will find changes at various places in the text and the recommendations. In particular, we wish to draw your attention to the adjustments made to the boxed text in section 1, where the correction is highlighted in green, to the boxed text in section 2.A.i, which is in two parts instead of one, to the text of the recommendation in section 3.i, where the change is highlighted in green and, lastly, to section 4, which has been substantially revised.

1) NEW PERFORMERS' RIGHTS

Bill C-11 sets out new rights for performing artists in order to comply with the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT) of 1996. It should be noted that this treaty pertains to sound performances by artists on line or fixed in phonograms and does not include performances fixed or embodied in audiovisual works[1].

In 1997, when the CA was amended to include certain rights for performers, section 17 was added to ensure that when a performance is embodied in an audiovisual work, the performer may no longer exercise the copyright in relation to the work, in order to comply with the scope of the WPPT.

Subsection 9(1) of Bill C-11 sets out new economical rights for performers by the addition of subsection 15(1.1) to the CA. It then adds a moral right in reference to performers by creating sections 17.1 and 17.2, and by amending subsections 28.1 and 28.2(1) of the CA. However, the bill fails to adjust section 17 of the CA accordingly. As a result, the new rights would apply to a performance embodied in an audiovisual work, contrary to the existing rights and in violation of the WPPT. We feel that this omission also violates the content of the diplomatic conference on the protection of audiovisual performances held in Geneva from December 7 to 20, 2000. In fact, at the end of this diplomatic conference, the WIPO member states, one of which is Canada, concluded a provisional agreement on a number of items, the preamble of which reads as follows:

> Recognizing that the WIPO Performances and Phonograms Treaty done in Geneva, December 20, 1996, does not extend protection to performers in respect of their audiovisual performances,[2]

This is still in the proposal submitted for review at the next diplomatic conference, to be held in Beijing from June 20 to 26, 2012.[3] The APFTQ believes that the legislative committee must make the following adjustments to subsection 17 (1) to bring Bill C-11 into line with the WPPT and its non-application to audiovisual works.

Our recommendations:

10. (1) Subsection 17 (1) of the Act is replaced by the following:

Cinematographic works

17. (1) Where the performer authorizes the embodiment of the performer's performance in a cinematographic work, the performer may no longer exercise, in relation to the performance where embodied in that cinematographic work, the copyright referred to in section 15 or the moral rights set out in subsections 17.1, 17.2 and 28.2(1).

[1] http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf, subsection 2(b)
[2] http://www.wipo.int/meetings/en/html.jsp?file=/redocs/mdocs/copyright/en/iavp_dc/iavp_dc_3.html
[3] http://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_3.pdf

2) PIRACY

Here are our recommendations for aligning Bill C-11 with the government's intention, which is to combat mass piracy in Canada.

A. Services enabling piracy

Steps must be taken to marginalize this new type of consumption, mass piracy. To achieve this, the bill must provide copyright owners with these three tools:

i) Make all services enabling piracy illegal;
ii) Require payment of damages to deter such services; and
iii) Ensure that such services are under no circumstances free from liability.

i) Make all services enabling piracy illegal

Under "Infringement of Copyright", section 18 of the bill adds subsection 27 (2.3) to the CA whereby services enabling the infringement of copyright would be made illegal. In our view, the text as written could too easily be circumvented and fail in its intent. Here is the text of C-11's section 18:

> **18.** Section 27 of the Act is amended by adding the following after subsection (2):
>
> 27 (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. [Our emphasis]

Most piracy services are found on websites in which consumers are offered a variety of components, for example data storage or search tools. The criterion whereby a service must be "designed primarily" to enable piracy would thus be met with difficulty, or even rarely, in most cases. Moreover, it is to be expected that the services enabling piracy would maintain that copyright does not apply to a large portion of the content being exchanged (we do not agree with this), and their service was designed primarily to enable legal acts. Finally, concerning the remainder of the illegally exchanged content, they would maintain that they could not control the content exchanged among their subscribers (which is not the case), and that their service was not designed to promote this kind of exchange in any case.

Finally, the requirement that a service must be "designed" to enable acts of infringement does not correspond to the need. A tool can be designed for one thing but be used for something else. In our view, what counts is not the design so much as the actual use. The purpose is to counter real, not hypothetical piracy.

It should be noted that a person must commit a violation of copyright while using the service in order for it to be illegal. As we will show in section B, Individual Piracy, the new exception allowing reproduction for private purposes legalizes acts of piracy committed by

consumers, with the result that final criterion of subsection 27(2.3), “if another person commits such a violation,” would never be met.

Our recommendation if those on reproduction for private purposes are also adopted:

> **18.** Section 27 of the Act is amended by adding the following after subsection (2):
>
> 27 (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 especially designed, operated or used 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. [Our emphasis]

Our recommendation otherwise:

> **18.** Section 27 of the Act is amended by adding the following after subsection (2):
>
> 27 (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 especially designed, operated or used to enable acts of copyright infringement if another person uses that service.

ii) Require payment of damages to deter such services

The CA as it now stands states that where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright and, in addition, such part of the profits that the infringer has made from the infringement (section 35 (1)). Since it may be difficult to establish proof, the copyright owner is given the option of choosing statutory damages, as set out in section 38.1(1) of the current CA.

Subsection 46(1) of the bill retains this option, but adds that services enabling piracy are not subject to statutory damages (see new paragraph (d), subsection 38.1(6) of the CA amended by subsection 46(3) of the bill).

It can be difficult for a copyright owner to establish proof of damages sustained, but it is almost impossible to do so in a case of mass piracy. Services enabling piracy must not be exempted from the options made available to the copyright owner, since to do so would be injurious to him or her alone.

Moreover, subsection 46(1) of Bill C-11 revisits the section on statutory damages by adding to it a major element of relief for all violations committed "for non-commercial purposes". Here are the sections in the amended CA:

> 38.1(1) (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;

> 38.1(1) (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; [Our emphasis]

The intent in providing this measure of relief is to protect consumers from the risk of incurring large penalties if they are prosecuted. But in providing relief in all "non-commercial" cases, favourable treatment is given to many non-commercial businesses like services enabling piracy that would not meet all the criteria of the new CA subsection 27(2.3) (e.g., “services not primarily designed for piracy”). This new regime of penalties is so non-punitive that the companies or services in question would not even consider ending their illegal activities.

Whether a service enabling piracy is operated by a student or by a business, whether it is commercial or non-commercial, it is still illegal and must stop. We feel that the bill must confine relief of damages to violations made for private purposes. The non-commercial area is too broad and could include many businesses, services and products available now and in the future that would violate copyright with relative impunity.

Our recommendations:

Subsection 46(1) in C-11 must draw a distinction between violations "for non-private purposes" and violations "for private purposes".

Moreover, the exception set out in section 46(3) of the bill where paragraph (d) is added to subsection 38.1(6) of the CA, where “a person who infringes copyright under subsection 27(2.3)” cannot be ordered to pay the statutory damages, must be stricken from the bill. In its place, the bill must stipulate that all piracy services are subject to the most severe penalties by adding the following paragraph 38.1(1) (c):

> **46(1)** Subsections 38.1(1) to (3) of the Act are replaced by the following:
> […]
> 38.1(1) (c) paragraph (a) of this subsection applies to a person who infringes copyright under subsection 27(2.3).

iii) Ensure that such services are under no circumstances free from liability

Section 35 of C-11 sets out a new regime of exemption from liability for suppliers of network services in cases where the supplier is only providing means of telecommunication or reproduction for telecommunication purposes, except where the service is being used to enable piracy under subsection 27(2.3) of the amended CA. The intention is good, but the exception must cover all exemptions from liability added by the bill.

In effect, only suppliers who provide services accessing the Internet (or another network) could not benefit from the exemption from liability when they also provide services enabling piracy. Thus a service enabling piracy that is provided by a supplier who places protected works in cache storage, for example, could nevertheless be exempted from liability under the new subsection 31.1(4). Moreover, under subsections (5) and (6) of the same section, a person who provides a hosting service for pirates, as is often the case, would be liable only if he knew that a competent tribunal had rendered a copyright violation decision against the person who had stored the work. Copyright owners would therefore have to obtain a decision from a court against consumers in order to make accountable a service enabling piracy and storing works for these consumers. But how such a decision could be obtained, since the new exception on reproduction for private purposes legalizes cache storage! And is it not paradoxical to require a legal ruling, given that Bill C-11 aims to protect consumers from prosecution?

In no case should the liability exemptions apply if the supplier of services is also providing a service enabling piracy or if it knows that a competent court has handed down a decision to the effect that the person using its services infringes copyright.

Our recommendations:

35. The Act is amended by adding the following after section 31 :

31.1(1) […]

(2) Subsections (1), (3) and (5) do not apply in respect of a service provided by the person if the provision of that service also constitutes an infringement of copyright under subsection 27(2.3).

[…]

(6) Subsections (1), (3) and (5) do not apply in respect of a work or other subject-matter if the person providing the service knows of a decision of a court of competent jurisdiction to the effect that the person who has used the service infringes copyright by using the work or other subject-matter or the way in which he or she uses the work or other subject-matter.

B. *Individual piracy*

The new exception on reproduction for private purposes added by C-11 legalizes, among other things, individual acts on the part of consumers who commit mass piracy:

- An individual who purchases a musical work could copy it onto the digital memory of a site offering storage services ("clouding"), since the criteria of the amended CA would have been fulfilled:
  - paragraph 29.22(1) (a) – non-infringing work
  - paragraph 29.22(1) (b) – copies legally obtained and reproduced on a medium that the individual is authorized to use

  - paragraph 29.22(1) (c) – the individual is not circumventing any technical measures protecting access to the work
  - definition of 29.22(2) – a medium or device includes digital memory in which a work may be stored

- It may be made available to other individuals from this digital memory, since the definition in 29.22(2) of the amended CA allows telecommunication (which includes being made available to the public, according to subsection 2.4 (1.1) of the amended CA). The only actual infringement would be giving the production away [paragraph 29.22(1) (d)].
- In addition, another person may reproduce this copy on a digital memory by virtue of the same exception, because the source copy was not an infringing copy and was obtained legally; he or she can also make it available to other individuals who can copy it in turn, and so on.
- All reproductions are done for private purposes [paragraph 29.22(1) (e)].
- The source work could also be a recording from a television series made under the new exception for later listening or viewing.

In order to correct this unintended outcome, the "reproduction for private purposes" exception must be tightened up as follows:

- The person who does the copying must be the owner of the original copy or have a licence allowing him to reproduce the work for private purposes;
- The copy must be made on a medium or piece of equipment that belongs to him or to someone who is a member of his household (not the one that he is authorized to use, as in the digital memory provided by an Internet storage service, since this can open the way for uploading and future piracy—see emphasized portions in the following box);
- Not only must the individual doing the copying be prohibited from giving the reproduction away; there must be other prohibited acts as well.

Our recommendations:

22. The Act is amended by adding the following after section 29.2:

Reproduction for private purposes

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) either the individual is the owner of the copy or has a licence allowing reproduction, and owns the medium or device on which it is reproduced, or the owner is a member of his or her household;

> (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 reproductions away, and does not perform any other act that only the copyright owner is entitled to perform, such as selling, renting, distributing, telecommunicating or making it available to the public for access or reproduction; 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. […] [Our emphasis]

C. *Technological protection measures*

The APFTQ feels that it should not be possible to legally circumvent any of the protection measures at any time. The technological protection measures represent the digital right to authorize or prohibit the use of a work. In addition, technological protection measures are the basis of many new models for digital business (video on demand, iTunes sales, digital rental, etc.).

Looking at the bill as it now stands and the significant opposition to the illegality of circumventing the technological protection measures, we feel that at least the circumventing of the measures protecting access to works must be made illegal, with no exception to this principle.

3) THE NEW EXCEPTIONS

We have examined the new "reproduction for private purposes" exception in the preceding section. We will now look at the other exceptions that affect the audiovisual industry.

i) Research or private study

Section 21 of Bill C-11 contains amendments to CA section 29 on private study or research. This section improves the exception for fair dealing in relation to education, parody or satire. We feel that the bill must define or circumscribe what is meant by fair dealing for the purpose of education, since it can have a very broad scope. It is also essential that the use of this exception be restricted to educational institutions as defined in CA section 2.

ii) Non-commercial user-generated content (UGC)

Here are our recommendations:

- There must be fair dealing (this must be specified even though the exception is under the "Fair Dealing" section in the CA) as determined by the courts;
- Authorization granted to a disseminator of UGC must specify that the dissemination must be digital only and the disseminator must pay the applicable royalties, as indicated in the current CA;
- This use must be for private purposes only, not for non-commercial purposes, because it is too easy for digital media companies to claim that the use is not commercial on the basis that, often, no revenues are involved;
- UGC use or dissemination must pass the three-step test of the WIPO treaties, which confines “any limitations of or exceptions to rights provided for therein 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 ";[4]
- The UGC must be a real transformation of the existing work or must incorporate the latter in the UGC only incidentally. Canada must avoid the possibility of someone simply translating a work or modifying an insignificant aspect of it and then exploiting it; and
- The exception must be subject to the legal remedies against circumventing measures controlling access to the existing work, as is the case with the other exceptions.

[4] For works: http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf, subsection 10(2) and for other subject-matters: http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf, subsection 16(2).

Our recommendations:

22. The Act is amended by adding the following after section 29.2:

Non-commercial User-generated Content for private purposes

29.21 (1) It is not an infringement of copyright for an individual to use fairly 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 digitally, if

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

(b) the authorization to disseminate does not exempt the intermediary from the obligation to pay whatever fees are attached;

(c) the new work or the new subject-matter created is a real transformation of the existing work or incorporates it incidentally;

(d) 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;

(e) 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

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

(g) the use of, or the authorization to disseminate, the new work or other subject-matter does not have an adverse effect on the normal existing 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, and does not unreasonably prejudice the legitimate interests of the author, the performer or the maker. […]

iii) Later listening

The APFTQ feels that this exception should be accompanied by additional restrictions.

Our recommendations:

22. The Act is amended by adding the following after section 29.2

Fixing Signals and Recording Programs for Later Listening or Viewing

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 is the owner of the medium or device on which the recording is made;

(e) 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;

(f) the individual does not give the recording away, and does not perform any other act that only the rights owner may perform, such as reproducing the recording, selling, renting, distributing, telecommunicating and making it available to the public for access or reproduction; and

(g) the recording is made only for private use. […]

[Our emphasis]

iv) Backup copies

This exception must include an additional specification, i.e., the list of the acts prohibited in relation to backup copies, as we have recommended for the other exceptions.

4) Remuneration of Copyright Owners

A corollary to the exceptions to the Act would be for the government to ensure that the copyright owners have access to sufficient funding to produce content, and that they obtain fair remuneration for the digital uses made of their works.

At present, in the television sector, outside the government, only broadcasting distribution undertakings (cable operators, satellite, etc.) have to contribute to creating televised content, be it conventional or digital.[5] We have already maintained in the past that Internet access providers and mobile service providers should also be required to contribute in order to balance a system that is deteriorating because it seeks to fund audiovisual works on all platforms but places the full financial burden on conventional television alone. Today, it is imperative that all intermediaries be called upon to contribute to the production and use of cultural content, since they, like the broadcasting distribution undertakings, deliver digital content to their subscribers and greatly benefit from its use.

Creation of the Canadian Digital Cultural Fund (CDCF)

Canadian cultural content is clearly valued by Canadians. In order to produce our own cultural content and encourage its digital use while adequately compensating copyright owners, we recommend creating the Canadian Digital Cultural Fund (CDCF), which would be established to fund digitally exploitable Canadian cultural content.

Funding: We see two funders: the government and the intermediaries.

1. The government could contribute part of the money raised from future Canadian spectrum auctions, in particular the 700-MHz spectrum sale planned for 2012. The last auction, in 2008, rose over $4 billion; the next auction(s) would conceivably raise at least that much. For each auction, consideration could be given to investing into the CDCF. For example, the investment could be large enough that only the interest would be used to fund the programs each year.

2. The intermediaries, i.e., providers of Internet access, hosting, mobile, data storage and search engine services, as well as any other digital network service providers, must be required to contribute a percentage of their annual revenues to this fund, similar to the contributions broadcasting distribution undertakings make to the Canada Media Fund (CMF). In this way, all beneficiaries of the widespread digital use of Canadian cultural content by consumers would contribute to funding its production and use.

Programs: Two key components should be developed, one to fund production of Canadian cultural content, and another to compensate for digital use.

1. The first component would fund project development, the production, marketing and promotion of digitally exploitable Canadian cultural content, and the maintenance of digital content. It could be administered like the CMF funding programs, for example,

[5] See Canada Media Fund (www.cmf-fmc.ca)

to determine whether an applicant and the cultural content qualify, to analyze and approve budgets, and to track exploitation of the produced content in order to recoup any investments. It bears noting that, rather than create the CDCF, there is nothing to prevent modifying the scope, funding and existing programs of the CMF to meet the requirements of this component.

2. The second component would compensate copyright owners for the digital use of their works. The compensation could be established by the government or administered by the Copyright Board, which would set the applicable tariffs for the digital use of works and determine the distribution of royalties among copyright owners based on the amounts allocated to this component.