

# **Understanding Bill C-32: *Copyright Modernization Act***

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## **Introduction**

On June 2, 2010 after a lengthy period of consultation, the Federal Government introduced Bill C-32, An act to amend the *Copyright Act*, formally referred to as the *Copyright Modernization Act*.

Bill C-32 will likely go to second reading and a parliamentary committee this fall. This is the third attempt at reform as two other attempts died on the order paper in 2006 and 2008 when elections were called. It is difficult to predict whether the Bill will get to third reading before another election is called.

The preamble to Bill C-32 refers to the following relevant factors which have led to its introduction:

- a) the *Copyright Act* is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy;
- b) advancements in and convergence of the information and communications technologies that link communities around the world

present opportunities and challenges that are global in scope for the creation and use of copyright works or other subject-matter;

c) in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms;

d) these norms are reflected in the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, adopted in Geneva in 1996;

e) the norms are not wholly reflected in the *Copyright Act*;

f) the exclusive rights in the *Copyright Act* provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on those rights exist to further enhance users' access to copyright works or other subject-matter;

g) the Government is committed to enhancing the protection of copyright works or other subject-matter, including through the recognition of technological protection measures, in a manner that promotes culture and innovation, competition and investment in the Canadian economy;

h) Canada's ability to participate in a knowledge economy driven by innovation and network connectivity is fostered by encouraging the use of digital technologies for research and education.

While the Government has indicated its intention to strengthen laws governing intellectual property and copyright in the Speech from the Throne, given in

March 2010, there are other outside issues driving the changes. These issues include the international harmonization of copyright reflected in the treaties described above and the negotiations for the Anti-Counterfeiting Trade Agreement (ACTA).

### **The International Harmonization of Copyright**

In 1996, the World Intellectual Property Organization (“WIPO”), which is responsible, for among other things, administrative tasks under the Berne Convention, held a diplomatic conference which resulted in the adoption of two treaties: the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”). These treaties include provisions directed at digital technology, particularly on the Internet.

In broad terms, the changes to the *Copyright Act*, (the “Act”) that were made to comply with these treaties include the following:

- (a) clarifying that the existing exclusive communication right of authors includes the right to make their works available to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them;
- (b) granting to sound recording makers and performers a similar right to control the making available of their material;
- (c) providing for adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by rights owners in connection with the exercise of their rights under the Act and that restrict acts, in

respect of their works, which are not authorized by the authors concerned or permitted by law;

(d) providing for adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by the Act:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority;

(e) granting to rights holders 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;

(f) granting to performers moral rights in their live and fixed performances consistent with the moral rights already provided to authors in relation to their works;

(g) granting a reproduction right in relation to a performer's sound recordings;

- (h) adjusting the term of protection provided to sound recording makers in respect of their sound recordings so that it would be 50 years from publication in most cases;
- (i) adjusting the term of protection provided to performers in respect of their recorded performance in a similar fashion.

### **Anti-Counterfeiting Trade Agreement (ACTA)**

ACTA is a plurilateral treaty that aims to establish a comprehensive, first-time, international framework that will assist parties to the agreement in their efforts to effectively combat the infringement of intellectual property rights, in particular the proliferation of counterfeiting and piracy, which undermines legitimate trade and the sustainable development of the world economy. Preliminary talks about such a treaty took place throughout 2006 and 2007 among an initial group of countries and subsequently with a broader group.

The 11th and final round of the negotiations concluded successfully in Tokyo, Japan on October 2, 2010. Participants in the negotiations have resolved nearly all substantive issues and produced a consolidated and largely finalized text of the proposed agreement, which will be submitted to their respective authorities. The participants agreed to work expeditiously to resolve the small number of outstanding issues that require further examination,<sup>1</sup> with a view to finalizing the text of the agreement as promptly as possible.<sup>2</sup>

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<sup>1.</sup> Shown in italic letters in the draft text.

<sup>2.</sup> *Joint Statement: ACTA Final Round*, Foreign Affairs and International Trade Canada at [http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/joint\\_statement-finale-declaration\\_commune.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/joint_statement-finale-declaration_commune.aspx?lang=eng).

On October 6, 2010 the US Trade representative released the text of the ACTA. The text includes the following paragraphs concerning technological measures and rights management information:

5. Each Party shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights in, and that restrict acts in respect of, their works, performances, and phonograms, which are not authorized by the authors, the performers or the producers of phonograms concerned or permitted by law.

6. In order to provide such adequate legal protection and effective legal remedies, each Party shall provide protection at least against:

(a) to the extent provided by its law:

(i) the unauthorized circumvention of an effective technological measure carried out knowingly or with reasonable grounds to know; and

(ii) the offering to the public by marketing of a device or product, including computer programs, or a service, as a means of circumventing an effective technological measure; and

(b) the manufacture, importation, or distribution of a device or product, including computer programs, or provision of a service that:

(i) is primarily designed or produced for the purpose of circumventing an effective technological measure; or

(ii) has only a limited commercially significant purpose other than circumventing an effective technological measure.

7. To protect electronic rights management information, each Party shall provide adequate legal protection and effective legal remedies against any person knowingly performing without authority any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any copyright or related right:

(a) to remove or alter any electronic right management information

(b) to distribute, import for distribution, broadcast, communicate, or make available to the public copies of works, performances, or phonograms, knowing that electronic rights management information has been removed or altered without authority.

8. In providing adequate legal protection and effective legal remedies pursuant to paragraphs 5 and 7, each Party may adopt or maintain appropriate limitations or exceptions to measures implementing paragraphs 5, 6 and 7. Further, the obligations in paragraphs 5, 6 and 7 are without prejudice to the rights, limitations, exceptions, or defenses to copyright or related rights infringement under a Party's law.

The text also contains the following non-mandatory provision concerning disclosure by ISPs:

4. Each Party may provide, in accordance with its laws and regulations, its competent authorities with the authority to order an online service provider to disclose expeditiously to a right holder information sufficient to identify a subscriber whose account was allegedly used for infringement, where that right holder has filed a legally sufficient claim of infringement of *at least trademark and* copyrights or related rights and where such information is being sought for the purpose of protecting or enforcing *at least the right holder's trademark and* copyright or related rights. These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and, consistent with each Party's law, preserves fundamental principles such as freedom of expression, fair process, and privacy.

### **The Proposed Amendments to the Act**

The following is a summary of the proposed amendments that will be discussed today.

#### **I. File Sharing and Secondary Infringement**

It is proposed to amend the Act to provide that 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.<sup>3</sup> A list of specific factors that a court may consider is included.<sup>4</sup>

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<sup>3.</sup> Bill C-32 , section 18 adding subsection 27(2.3).

<sup>4.</sup> Bill C-32 , section 18 adding subsection 27(2.4).

The Government has suggested that this amendment will help those who have created content protect their works by targeting online “enablers”. The Government also has indicated that their intention was to create a claim of infringement that is broad and flexible as well as technologically neutral.

It is proposed to clarify subsection 27(2) of the Act by providing that for greater certainty, a copy made outside Canada does not infringe copyright under the subsection if, had it been made in Canada, it would have been made under a limitation or exception contained in the Act.<sup>5</sup>

## **II. Network Services/Internet Service Providers’ Liability for Copyright Infringement**

It is proposed to create a “notice and notice” system relating to providers of Internet services, digital networks or information location tools. “information location tool” means any tool that makes it possible to locate information that is available through the Internet or another digital network and presumably includes search engine operators.<sup>6</sup>

An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides such services in proscribed form.<sup>7</sup> A provider who receives a notice shall

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

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<sup>5.</sup> Bill C-32 , section 18.

<sup>6.</sup> Bill C-32 , section 47 adding subsection 41.27(5).

<sup>7.</sup> Bill C-32 , section 47 adding subsection 41.25.

(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.<sup>8</sup>

A claimant's only remedy against a person who fails to perform his or her obligations concerning the matters set out above is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.<sup>9</sup>

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.<sup>10</sup>

The Government has suggested that this amendment will help those who have created content protect their works. They say the regime will ensure that ISPs will help curb piracy by requiring them to notify their subscribers when copyright owners detect infringing activities. The amendment is much less aggressive than the current US "notice and take down" system.

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<sup>8</sup>. Bill C-32 , section 47 adding subsection 41.26(1).

<sup>9</sup>. Bill C-32 , section 47 adding subsection 41.26(3).

<sup>10</sup>. Bill C-32 , section 47 adding subsection 41.27 and see the conditions relating to this provision 41.27(2).

### **III. New Rights for Performers and Makers of Sound Recordings**

It is proposed to extend a performer's copyright in a performer's performance to include the sole right to make a sound recording of it available to the public by telecommunication<sup>11</sup> and to sell or otherwise transfer ownership of the sound recording in the form of a tangible object.<sup>12</sup> Similar changes are proposed relating to a sound recording maker's copyright in a sound recording.<sup>13</sup>

It is also proposed to extend moral rights to a performer of a live aural performance or a performance fixed in a sound recording.<sup>14</sup>

The term of protection provided to performers and sound recording makers in respect of their works would be adjusted so that it would be 50 years from publication in most cases.<sup>15</sup>

The Government has suggested that these new rights and protections will put the performers and sound recording makers on an equal footing with other creators.

### **IV. Online Learning and Related Exceptions to Infringement for Educational Institutions**

A new exemption is proposed for educational institutions. It would not be an infringement of copyright for an educational institution or a person acting under its authority to communicate a lesson to the public by telecommunication for

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<sup>11</sup> . Bill C-32 , section 9. This right is included within the right to communicate a work to the public by telecommunication, Bill C-32 , section 3 and subject to collective administration Bill C-32 , section 52 and 54. A sound recording that is made available to the public is deemed to have been published, Bill C-32 , section 13.

<sup>12</sup> . Bill C-32 , section 9.

<sup>13</sup> . Bill C-32 , section 11.

<sup>14</sup> . Bill C-32 , section 10.

<sup>15</sup> . Bill C-32 , section 17.

educational or training purposes, if that public consists only of students who are enrolled in a course of which the lesson forms a part or of other persons acting under the authority of the educational institution.<sup>16</sup> The exception is subject to a number of conditions.<sup>17</sup>

A related exemption would allow an educational institution that has a reprographic reproduction licence under which the institution is authorized to make reprographic reproductions of works in a collective society's repertoire for an educational or training purpose

(a) to make a digital reproduction — of the same general nature and extent as the reprographic reproduction authorized under the licence— of a paper form of any of those works;

(b) to communicate the digital reproduction by telecommunication for an educational or training purpose to persons acting under the authority of the institution.<sup>18</sup>

The exception is subject to a number of conditions.<sup>19</sup>

An additional exception would allow an educational institution to reproduce, communicate by telecommunication or perform to students for educational or training purposes, a work or other subject-matter that is available through the Internet.<sup>20</sup> The exception does not apply unless the source is mentioned<sup>21</sup> or if the work or other subject-matter — or the Internet site where it is posted — is

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<sup>16.</sup> Bill C-32 , section 27 adding section 30.01.

<sup>17.</sup> Bill C-32 , section 27 and see section 30.01 (6).

<sup>18.</sup> Bill C-32 , section 27 and see section 30.02.

<sup>19.</sup> Bill C-32 , section 27 and see section 30.02.

<sup>20.</sup> Bill C-32 , section 27 and see section 30.04.

<sup>21.</sup> Bill C-32 , section 27 and see section 30.04(2).

protected by a technological protection measure that restricts access to the work or other subject-matter or to the Internet site<sup>22</sup> or a clearly visible notice — and not merely the copyright symbol — prohibiting that act is posted at the Internet site where the work is posted or on the work itself.<sup>23</sup>

Finally, it is proposed to amend section 29.4 to broaden the scope of the exemption. It would not be 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.<sup>24</sup> It is also proposed to amend sections 29.5<sup>25</sup> and 29.6.<sup>26</sup>

The Government says these amendments are a key part of Bill C-32 that will support education and skills development.

## **V. Changes Affecting Ownership of Copyright in Photographs and Commissioned Artwork**

It is proposed to repeal sections 10 and 13(2) of the Act so that the photographer or painter of a commissioned work will be the first owner of the copyright in the work.<sup>27</sup>

It is also proposed to add a new exception for the individual who commissioned the work. It would not be an infringement of copyright 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

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22. Bill C-32 , section 27 and see section 30.04(3).

23. Bill C-32 , section 27 and see section 30.04(4).

24. Bill C-32 , section 23.

25. Bill C-32 , section 24.

26. Bill C-32 , section 25.

27. Bill C-32 , section 6 and 7.

purposes and made for valuable consideration, unless the individual and the owner of the copyright in the photograph or portrait have agreed otherwise.<sup>28</sup>

The Government has said that these amendments will harmonize the rights of photographers with other creators.

## **VI. Fair Dealing and Related New Exceptions**

### **A. Fair Dealing**

It is proposed to amend the exception for fair dealing to extend it so that fair dealing for the purpose of education, parody or satire will not infringe copyright.<sup>29</sup> The Government says that the amendment concerning “parody or satire” recognizes the interests of consumers and Canadians. As previously noted, the amendment concerning “education” is said to support education and skills development.

### **B. Non-commercial User-generated Content**

It is proposed to add an exception relating to non-commercial user-generated content. It would not be 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

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<sup>28</sup>. Bill C-32 , section 38.

<sup>29</sup>. Bill C-32 , section 21.

(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.<sup>30</sup>

The Government says that the amendments recognize the interests of Canadians who will not face unreasonable penalties for minor infringements of copyright.

### **C. Reproduction for Private Purposes**

It is proposed to add an exception relating to a reproduction for private purposes. It would 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

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<sup>30</sup>. Bill C-32 , section 22 adding section 29.21.

(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 a technological protection measure 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.<sup>31</sup>

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, the proposed exception does not apply if the reproduction is made onto an audio recording medium as defined in section 79 of the Act.<sup>32</sup>

#### **D. Fixing Signals and Recording Programs for Later Listening or Viewing**

It is proposed to add an exception relating to time shifting. It would not be 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

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<sup>31</sup>. Bill C-32 , section 22 adding section 29.22.

<sup>32</sup>. Bill C-32 , section 22 adding section 29.22(3).

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 a technological protection measure 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.<sup>33</sup>

The Government says that the exception recognizes the interests of consumers and Canadians who will not face unreasonable penalties for what would otherwise be minor infringements of copyright.

### **E. Backup Copies**

It is proposed to add an exception relating to backup copies. It would not be 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 ( the "Source Copy") to reproduce the Source Copy if

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<sup>33</sup>. Bill C-32 , section 22 adding section 29.23.

- (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 a technological protection measure or cause one to be circumvented; and
- (d) the person does not give any of the reproductions away.<sup>34</sup>

The Government says that the exception recognizes the interests of consumers and Canadians who will not face unreasonable penalties for minor infringements of copyright.

#### **F. Libraries, Archives and Museums**

It is proposed that a library, archive or museum, or a person acting under the authority of one, may, under the fair dealing exceptions of sections 29 and 29.1 provide a copy in digital form to a person who has requested it through another library, archive or museum if the providing library, archive or museum or person takes measures to prevent the person who has requested it from

- (a) making any reproduction of the digital copy, including any paper copies, other than printing one copy of it;
- (b) communicating the digital copy to any other person; and

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<sup>34</sup>. Bill C-32 , section 22 adding section 29.24.

(c) using the digital copy for more than five business days from the day on which the person first uses it.<sup>35</sup>

### **G. Computer Programs**

It is proposed to amend the existing exception in section 30.6 of the Act to extend it to those who have a licence to use a copy of a computer program.<sup>36</sup> In addition it is proposed to add exceptions relating to reproductions for the purpose of making the program and any other computer program interoperable,<sup>37</sup> encryption research<sup>38</sup> assessing the vulnerability of the computer, system or network or correcting any security flaws.<sup>39</sup>

### **H. Temporary Reproductions for Technological Processes**

A new exemption is proposed for temporary reproductions for technological processes. It would not be 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;
- (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.<sup>40</sup>

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<sup>35.</sup> Bill C-32 , section 29.

<sup>36.</sup> Bill C-32 , section 31.

<sup>37.</sup> Bill C-32 , section 31 adding section 30.61.

<sup>38.</sup> Bill C-32 , section 31 adding section 30.62.

<sup>39.</sup> Bill C-32 , section 31 adding section 30.63.

<sup>40.</sup> Bill C-32 , section 32 adding section 30.71.

The Government says this exception will support innovation, such as enabling content to be viewed on a smartphone.

### **I. Ephemeral Recordings**

Amendments of a technical nature are proposed and the current limitation that the exception is not applicable if a licence is available from a collective society is to be removed.<sup>41</sup> The Government says this will support broadcasters' development of digital operations.

### **J. Network Services**

It is proposed to add three new exceptions. First, it is proposed that 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 digital network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.<sup>42</sup> The exception does not apply to 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 digital network as a result of the use of that service.<sup>43</sup>

Second, it is proposed that a person described above, who caches the work or other subject-matter, or does any similar act in relation to it, to make the

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<sup>41.</sup> Bill C-32 , section 34.

<sup>42.</sup> Bill C-32 , section 35 adding subsection 31.1.

<sup>43.</sup> Bill C-32 , section 18 adding subsection 27 (2.3). A list of specific factors that a court may consider is provided see section 18 adding subsection 27(2.4).

telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.<sup>44</sup>

Finally, it is proposed that 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.<sup>45</sup>

The Government says these changes will foster the growth of the Internet.

### **K. Persons with Print Disabilities**

It is proposed to add an exception relating to a “print disability” which is defined to mean a disability that prevents or inhibits a person from reading a literary, musical or dramatic work in its original format.<sup>46</sup> Subject to limitations set out in the Act and proposed regulations, it would not an infringement of copyright for a non-profit organization acting for the benefit of persons with a print disability to make a copy, in a format specially designed for persons with a print disability, of a work and to send the copy to a nonprofit organization in another country for use by persons with print disabilities in that country.<sup>47</sup>

The Government says this exception will help the perceptually disabled gain access to adapted works.

## **VII. Availability of Statutory Damages**

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<sup>44.</sup> Bill C-32 , section 35 adding subsection 31.1(3). The exception is subject to the conditions set out in subsection 31.1(4) .

<sup>45.</sup> Bill C-32 , section 35 adding subsection 31.1(5). The exception is subject to the condition set out in subsection 31.1(6) .

<sup>46.</sup> Bill C-32 , section 37 adding subsection 32.01 (8).

<sup>47.</sup> Bill C-32 , section 37 adding subsection 32.01.

It is proposed to reduce the exposure to statutory damages for infringement for non-commercial purposes. In this context the range of statutory damages would be 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.<sup>48</sup>

The Government says that the exception recognizes the interests of consumers and Canadians who will not face unreasonable penalties for minor infringements of copyright. The central policy decision was the balance between “commercial” and “non-commercial”.

### **VIII. Technological Protection Measures and Rights Management Information**

It is proposed to introduce measures to provide protection and remedies against the circumvention of technological protection measures. The following definition is proposed: “technological protection 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.<sup>49</sup>

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<sup>48</sup>. Bill C-32, section 46.

<sup>49</sup>. Bill C-32, section 47 adding section 41.

No person shall circumvent a technological protection measure, offer services which are primarily for the purposes of circumventing a technological protection measure or manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component which is designed or produced primarily for the purposes of circumventing a technological protection measure.<sup>50</sup>

The owner of the copyright in a work, a performer's performance fixed in a sound recording or a sound recording would be, subject to exceptions set out in the Act and any regulations, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against the person who contravened the above prohibition.<sup>51</sup> However the owner would not be entitled to recover statutory damages from an individual who circumvented a technological protection measure only for his or her own private purposes.<sup>52</sup>

The prohibition would not apply if a technological protection measure is circumvented for:

(a) the purposes of an investigation related to the enforcement of any Act of Parliament or any Act of the legislature of a province, or for the purposes of activities related to the protection of national security;<sup>53</sup>

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<sup>50.</sup> Bill C-32 , section 47 adding section 41.1.

<sup>51.</sup> Bill C-32 , section 47 adding section 41.1. Sections 41.19 and 41.2 contain limits relating to lack of knowledge on the part of the defendant.

<sup>52.</sup> Bill C-32 , section 47 adding section 41.1(3).

<sup>53.</sup> Bill C-32 , section 47 adding section 41.11.

(b) for the sole purpose of obtaining information that would allow the person to make a computer program and any other computer program interoperable;<sup>54</sup>

(c) for encryption research;<sup>55</sup>

(d) the only purpose of circumventing the technological protection measure is to verify whether it permits the collection or communication of personal information and, if it does, to prevent it;<sup>56</sup>

(e) for the sole purpose of, with the consent of the owner or administrator of a computer, computer system or computer network, assessing the vulnerability of the computer, system or network or correcting any security flaws;<sup>57</sup>

(f) for the sole purpose of making a work, a performer's performance fixed in a sound recording or a sound recording perceptible to the person with a perceptual disability;<sup>58</sup>

(g) by a broadcasting undertaking that circumvents a technological protection measure for the sole purpose of making an ephemeral reproduction of a work, a performer's performance fixed in a sound recording or a sound recording;<sup>59</sup>

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<sup>54</sup>. Bill C-32 , section 47 adding section 41.12.

<sup>55</sup>. Bill C-32 , section 47 adding section 41.13.

<sup>56</sup>. Bill C-32 , section 47 adding section 41.14.

<sup>57</sup>. Bill C-32 , section 47 adding section 41.15.

<sup>58</sup>. Bill C-32 , section 47 adding section 41.16.

<sup>59</sup>. Bill C-32 , section 47 adding section 41.17.

(h) for the sole purpose of gaining access to a telecommunications service by means of the radio apparatus;<sup>60</sup>

It is also proposed to introduce measures to provide protection and remedies against the removal or altering of rights management information in electronic form. The following definition is proposed: “rights management information” means information that

(a) is attached to or embodied in a copy of a work, a performer’s performance fixed in a sound recording or a sound recording, or appears in connection with its communication to the public by telecommunication; and

(b) identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker or the holder of any rights in the work, the performance or the sound recording, or concerns the terms or conditions of the work’s, performance’s or sound recording’s use.<sup>61</sup>

No person shall knowingly remove or alter any rights management information in electronic form without the consent of the owner of the copyright in the work, the performer’s performance or the sound recording, if the person knows or should have known that the removal or alteration will facilitate or conceal any infringement of the owner’s copyright or adversely affect the owner’s right to remuneration under section 19 of the Act.<sup>62</sup> The owner would be, subject to the Act entitled to all remedies — by way of injunction, damages, accounts, delivery

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<sup>60.</sup> Bill C-32 , section 47 adding section 41.18.

<sup>61.</sup> Bill C-32 , section 47 adding section 41.22(4).

<sup>62.</sup> Bill C-32 , section 47 adding section 41.22(1).

up and otherwise — that are or may be conferred by law for the infringement of copyright against a person who contravenes the prohibition<sup>63</sup> and those who subsequently deal with the protected subject matter who know or should have known that the rights management information has been removed or altered in a way that would give rise to a remedy under the prohibition.<sup>64</sup>

It is also proposed to add criminal remedies relating to the circumvention of technological protection measures. Every person, except a person who is acting on behalf of a library, archive or museum or an educational institution, would be guilty of an offence who knowingly and for commercial purposes contravenes section 41.1 and is liable

(a) on conviction on indictment, to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding six months or to both.<sup>65</sup>

The Government says these amendments will protect creators' ability to advance new digital business models while the carve outs will allow software companies to undertake reverse engineering, security testing and encryption research in order to develop new products and software solutions.

## **IX. Distribution Right**

It is proposed to amend section 3 of the Act to add a distribution right. Copyright would include the sole right in the case of a work that is in the form of

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<sup>63</sup>. Bill C-32 , section 47 adding section 41.22(2).

<sup>64</sup>. Bill C-32 , section 47 adding section 41.22(3).

<sup>65</sup>. Bill C-32 , section 48.

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.<sup>66</sup> The Government says this new right will control the unauthorized distribution of copyright material.

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<sup>66</sup> . Bill C-32 , section 4.