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# Canada Proposes Major Changes to Copyright Law

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Far-reaching changes to Canada's copyright regime are proposed by the new Bill C-32, which was introduced in Parliament on June 2. The bill will affect many different aspects of copyright and has been designed to deal with the rapid technological changes of the past 20 years, particularly in the areas of information technology, digital media and, of course, the Internet. The bill also significantly enhances the concept of "user rights" in an attempt to balance the needs of large copyright owners (which tend to be concentrated in a few industries, such as media, entertainment and technology) and needs of users of copyrighted works (i.e., everyone, including both consumers and businesses). However, user rights come at a legislative cost, which is reflected in the U.S.-style anti-circumvention measures for digital-rights-management technology.

## Internet Copyright

It has long been apparent that copyright law needs to catch up with the Internet's mass-copying capability, for three related reasons. First, the Internet has rendered copyright-intensive industries vulnerable to large-scale infringements through file sharing. Second, it has turned otherwise honest and law-abiding users of the Internet into (sometimes unwitting) copyright infringers. Third, it has put pressure on Internet service providers (ISPs) to be copyright "gatekeepers," when their business model largely relies on content neutrality (i.e., providing the "wires" but staying out of what those wires carry). The proposed revisions to the *Copyright Act* deal with all these issues in varying ways.

## Liability for Digital Network Providers

Traditionally copyright infringement requires proof of some sort of copying. Copyright holders have therefore had to rely on secondary liability to pursue people or companies that enable copying but do not actually engage in it themselves. The proposed revisions change that, making it an infringement (under section 27(2.3)) of copyright 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...." This will help avoid endless fighting about what does and does not constitute "authorizing" copyright infringement, although it is worthwhile asking whether the solution is worse than the disease: the revised section 27(2.4) contains six factors that a court "may" consider in determining whether someone has infringed section 27(2.3), and they all look a lot like factors that a court "might" have considered in determining the question of secondary infringement.

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## Exemption for Service Providers and "Notice and Notice" Regime

The new section 27(2.3) is clearly intended to target file-sharing software or networks (such as the now-defunct Napster or BitTorrent). However, the proposed revisions also contain section 31.1, which makes clear that merely providing the means for telecommunication or reproduction of the work does not infringe (unless those means are designed to enable acts of copyright infringement under section 27(2.3). Section 31.1 also exempts caching or providing memory on a server.

However, these exemptions from infringement come at a price to service providers. Proposed section 4.25 sets out a "notice and notice" regime. Under the proposed section, if a provider receives a proper notice regarding a third party's infringement of copyright, the provider is required to forward the notice electronically to the third party and retain any records that could identify the third party for a fixed period of time. A provider that fails to abide by this section is subject to statutory damages of between $5,000 and $10,000. Although this amount is relatively high, particularly for ISPs who may receive dozens or more of these requests each day, the section does inoculate providers from any other types of damage awards for failing to abide by their obligations.

## Expanded User Rights

There is no doubt that the proposed bill expands user rights. However, the expanded user rights created by the bill are circumscribed by various limitations that make them less than entirely user-friendly. For example, users of social media will be able to use publicly available works for non-commercial purposes without infringing copyright. However, to take advantage of this right (i) the user must reasonably believe that the work does not infringe copyright and must identify the source of the copyrighted work, if it is reasonable to do so; and (ii) the use must not have a substantial adverse effect, financial or otherwise, on the exploitation of the work or on an existing or potential market for it.

It is fair to suggest that the average user knows too little about the arcane ins and outs of copyright law to ever have a reasonable belief on point (i), and will rarely have much information to become comfortable on point (ii). Perhaps more to the point, if the problem that the revisions are attempting to solve is to avoid burdening the general population with massive civil liability for activities that they are going to engage in regardless of the law, these requirements will make it difficult for the revisions to accomplish their goal.

Other more specific user rights may prove more useful. Users will also be explicitly permitted to record programs (other than those received through on-demand services) for time-shifted private viewing/listening as long as no more than one recording is made and kept no longer than is reasonably necessary to view or listen to the program later. Additional user rights will permit copying of legitimately acquired works onto any device or medium, such as an MP3 player, for private use and will authorize the making of backup copies of these works. Finally, the fair dealing provisions will be amended to create exemptions from infringement if a copyrighted work is used for the purpose of education, parody or satire, thereby expanding the existing exemptions for research and private study.

The major limitation to all these expanded user rights is that, in every case, the new rights cannot be exercised by circumventing a technological measure. This is perhaps the most notable feature of the new law, and is discussed below.

## Prohibition on Picking Digital Locks

One of the most controversial elements of the bill is a general prohibition on circumventing or breaking "digital locks" or "technological protection measures." These TPMs are a form of digital rights

management often used by copyright owners to prevent unauthorized access or copying of protected works, such as digital music, DVDs and software. The bill also forbids making, importing and selling devices that could circumvent TPMs.

The controversy results from the fact that the ban on circumventing TPMs may well prevent users from exercising their rights (including the expanded user rights outlined above), such as the right to copy music to an MP3 player or the right to make backup copies of licensed software.

The bill permits breaking TPMs for a limited number of activities, such as to permit a company to reverse-engineer licensed software to make it compatible with the company's other software or systems; for law enforcement; to conduct encryption research; to test computer network security and to determine if a technology permits the collection of personal information and, if so, to prevent such collection; and to permit adapting materials to make a work accessible to persons with perceptual disabilities. The government can also create new exceptions to the blanket rule through future regulations.

## Reduced Statutory Damages for Non-Commercial Infringements

Damages for breach of copyright can be difficult to prove. As a result, the *Copyright Act* permits a court to award arbitrary amounts as "statutory damages." Currently, the range of statutory damages is between $500 and $20,000 per work, with the court having discretion to reduce the amount to $200 per work if the infringement is unintentional (or even lower amounts if there are several works reproduced in the same media). The proposed amendments to the Act would restrict the $500–$20,000 range to reproductions made for a commercial purpose, and use a lower range of $100–$5,000 for reproductions made for a non-commercial purpose. As it has become easier to engage in (even unintentional) copyright infringement by virtue of information technology, statutory damages can be a harsh remedy. While one might have preferred to see Parliament give the courts more latitude to dispense with damages altogether in certain types of cases, the bottom end of the "non-commercial" range is now more consistent with the commercial (or non-commercial) reality of the value of many copyrighted works or infringements.