Brief by Russell McOrmond

Executive Summary

Over the past decade I have had an opportunity to speak with many fellow creators and other Canadians about copyright. I have come to form opinions on nearly all aspects of the Copyright Act, and the various commercial and non-commercial activities that are regulated by it. While I have commented on many of them in a set of Frequently Asked Questions (and answers)[1], for the purpose of this brief I must focus on the primary issue of technological protection measures.

I have been a self-employed technology consultant since 1995[2], working as a hardware repair person and system administrator before that. My technology experience starts in the early 1980's[3]. As part of my job I author software.

As a technical person I can translate marketing and brand terminology into real-world technology. I have found that much of the analysis and discussion of technical measures in the context of copyright has not included discussion of real-world technology. In nearly every case when the term "copy control", "use control" or "Digital Rights Management" is used, what is actually being discussed is a vendor-dependant content delivery platform.

The problem is that if non-technical people believe that "copy control" is something other than a marketing term, they will push forward laws which regulate these technology platforms as if they were something other than a technology platform.

How these technologies are regulated is critically important. If we treat these technology platforms as if they were a matter of copyright law, we are allowing the creators of these technology platforms to circumvent the traditional contours of contract, competition, consumer protection, copyright, e-commerce, privacy, property and trade law.

The current language of Bill C-32 offers legal protection for this circumvention of the traditional contours of these laws. It is critical that the committee take the time to learn how these technologies work, and regulate appropriately. Ideal is if technical measures are not mentioned in copyright law at all, but in the appropriate laws connected to the activities regulated by the technology (IE: contract law for TPMs protecting contracts including copyright licenses). A less ideal alternative is to ensure that anti-circumvention in copyright law is closely tied to infringing activities, as suggested in the 1996 WIPO internet treaties.

I believe it is better for creators, other copyright holders, the competitive technology sector and Canadians as a whole to not update copyright law at all than to pass a bill which legalizes technology platform providers circumventing copyright and other laws. I consider the current anti-circumvention rules in Bill C-32 to be a show-stopper that warrant rejecting the bill as a whole.

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1 Full FAQ in html and PDF form (for printing) is at http://BillC32.ca/faq
2 Work website and full contact information is at http://Flora.ca
3 Work experience published on my work website at http://www.flora.ca/experience.shtml

Introduction

I have been actively involved in the copyright file since the summer of 2001 when I was warned that Canada was contemplating passing a US Digital Millennium Copyright Act (DMCA)-like law in Canada. I was already very familiar with the unintended consequences of the anti-circumvention aspects of the US DMCA, and did not want this harm to be brought into Canada. I have attended many conferences over the near decade, and have had extensive conversations about copyright law with fellow creators as well as people who primarily consider themselves audiences of creative works. I have had multiple meetings with the bureaucrats at Copyright Policy Branch, Heritage Canada, and the Intellectual Property Policy Directorate, Industry Canada. I have had the opportunity to debate copyright law with lawyers in front of audiences.

I am the host for the Digital Copyright Canada forum[4] (which also uses the BillC32.ca domain), co-coordinator of the GOSLING (Getting Open Source Logic INto Governments) community[5], and policy coordinator for CLUE: Canada's association for Open Source[6].

I coordinate a few relevant petitions to federal parliament. The Petition for Users' Rights has seen nearly 3000 signatures, and the Petition to protect Information Technology property rights has seen nearly 400 signatures.

I do not envy you the job that is in front of you. Copyright is as complex as tax law, and like tax law there can be both too little and too much. I have often said that copyright is to creativity like water is to humans: too little and you dehydrate and die, too much and you drown and die.

A bill dedicated to the ratification of the 1996 WIPO treaties would have been complex enough. The bill before you is an omnibus bill that includes many unrelated topics, and it is unlikely you will have the time to adequately study the impacts of all of these topics. Even though the bill has been passed at second reading, topics that are outside the bill have continued to be included in presentations and questions.

I hope I will be given the opportunity to speak before the committee and answer your questions.

Tool for understanding Information Technology Property Rights[7]

I have been giving a presentation for many years to help people understand the issues behind IT property rights and so-called technical protection measures. I use some props for that presentation.

I say: I am holding 4 things in my hand.

In one hand I hold a DVD which represents two things: some copyrighted content, and the tangible medium it stored on. These two things can have two different owners, and the rights of each should be respected.

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4 URL is http://Digital-copyright.ca . Information on history is at http://www.digital-copyright.ca/about

5 URL is http://GOSLINGcommunity.org . We meet informally each Friday at the Parliament Pub in Ottawa.

6 Policy summary is published at http://cluecan.ca/policy AKA http://linux.ca/policy

7 More details can be seen at http://flora.ca/own which includes summaries, handouts and an audio recording of me presenting.

In my other hand I hold some digital technology[8] which represents two things: hardware and software, which can also have two different owners. The copyright holder of the software and the owner of the information technology.

While you have been told that technological measures are entirely a matter of copyrighted content, real world technology works quite differently. It is not possible to understand the impact of C-32 in real-world scenarios without better understanding that technology.

On the content side, it is possible to encrypt the content such that it can only be accessed if you have the right keys. This is one example of an access control. I discuss in my C-32 FAQ how access is a novel concept in copyright, and how protecting access and access controls effectively create an "opt out" of the rest of the copyright act for those who make use of access controls. I also discuss how legal protection for access controls in copyright law can be abused to circumvent the traditional contours of contract, e-commerce, privacy, trade, consumer protection and property law.

Content cannot itself make decisions, such as whether it can be copied, how many times, or any of the other things which copyright holders might like to encode in their license agreements. Content alone cannot make decisions any more than a paperback book is capable of reading itself out loud.

Any decisions that are to be made are encoded in software which runs on computing hardware. What are often called "use controls" in the context of copyright are nearly always software running on computing hardware. It is critical, therefore, to not only think about the interests of the copyright holders of content, but also the interests of software authors and the rights of owners of information technology.

I am a software author. Before copyright can offer me anything, I need to ensure that the owners of technology have the right to make their own software choices. If they are not able to make their own software choices, how can they possibly be able to choose my software? This means that IT property rights, including the right of owners to make their own software choices, is far more important to software authors than copyright.

Lets talk about some real-world technology examples. A DVD has an access control applied to it called the DVD Content Scramble System (CSS). The keys for this type of digital lock are managed by the DVD Copy Control association. It is important to not let the title of the organization confuse you into thinking that this is a copy control or a use control technical measure, as it is not.

The DVD CCA is an association made up of the major studios, major hardware manufacturers, and major software vendors. This organization negotiates what features will be allowed in hardware and software that will be given keys capable of unlocking the access control applied to the content. It is a contractual relationship between these major vendors, and not copyright, which this access control is protecting.

If you are a competitor to the members of the DVD CCA, or for any reason can not sign on to their contractual obligations, you will not receive keys to encode your own content or decode content. It should be reviewed by the competition bureau whether such contractual obligations should be allowed, given tieing the ability to access content encoded with DVD CCA keys requiring a DVD CCA approved access device seems like a textbook example of a Competition Act section 77 tied selling.

8 Most often my Google Nexus One smart-phone http://www.google.com/phone/detail/nexus-one , which contains a format and device shifted copy of the contents of the DVD.

Any time you hear the word "lock", you must always ask who manages the keys. It is not the owner that is in control, but the entity who manages the keys. In most real-world examples of technical measures, copyright holders do not control the keys to locked content. They are sometimes but not always given the choice about whether it is locked or not, but not much control beyond that.

In the case of locks on hardware and software, the keys are very specifically denied from the owners of the hardware. The purpose of the lock is to lock the owner out of what they own.

For no other type of property would this be considered. We would never legally protect non-owner locks to all guns in a country where many are uncomfortable with the mere registration of long guns. We would never legally protect non-owner locks on our homes, alleging this was necessary to protect the insurance industry from fraud. We would never legally protect non-owner locks on our cars, allegedly to ensure that automobiles could never be used as a getaway vehicle.

Some Answers to Frequently Asked Questions

I will offer a sampling of answers offered in the Bill C-32 FAQ. While that FAQ is 22 pages long, and thus too long to offer as a brief to the committee, I believe it would be useful to read. While I focus on the 1996 WIPO treaties and technical measures, I also offer commentary on each area hilighted in the summary of the bill, as well as the most common topics (such as expansions of the private copying regime) which were not mentioned in C-32.

Q: The government has indicated that C-32 offers a "balance between the interests of consumers and the rights of the creative community". Would you agree?

I think the government is using an incorrect scale for determining whether the bill is balanced, given the suggested separation between the interests of creators and audiences is largely an illusion. All creators are audiences of more content than they are creators of, and nearly all creators build on the works of past creativity in their new creations. An increasing number of people who would have only been audiences in the past are now creating their own works, and the activities of amateur creators are as regulated by copyright as those of professional creators.

In some areas such as photography, amateur photographers and machine automated photography represents the vast majority of photographs, with professional photography representing a tiny fraction.

It is also very inappropriate to claim that the creative community have rights, and all other Canadian citizens only have interests.

As a creators' rights advocate actively involved in copyright policy since 2001, most of my discussions and nearly all disagreements have been with fellow creators or non-creator copyright holders[9].

A more useful scale for determining whether a copyright bill were balanced is whether it protected the rights of all creators, past and current, amateur or professional, and not only historically successful

9 Two articles are useful for illustrating this point. *Differentiating allies and opponents in the Copyright debate* http://BillC32.ca/5162 and *Is there a copy left vs copy right?* http://BillC32.ca/5182

copyright holding companies. With this scale I believe it is obvious that Bill C-32 is excessively tilted in favour of historically successful copyright holding intermediaries.

Q: Many claim that Canadian Copyright is outdated. Is that true?

Here are three interesting dates:

- 1996: WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)[10]
- 1997: Most recently passed major overhaul of Canadian copyright (coincidentally also Bill C-32)[11]
- 1998: Most recently passed major overhaul of United States Copyright[12] (AKA: US DMCA)

In other words, it is silly to suggest that US law is modern and Canadian law is antiquated, or that the WIPO treaties from 1996 automatically serve as a way to modernize Canadian law.

I agree that Copyright law, both domestically and internationally, is in need of modernization. I believe this is why WIPO has been having meetings on Limitations and Exceptions[13], the aspect of copyright that is most out of date. Some other countries and NGOs have been suggesting that Canada has been obstructionist towards this modernization.

Later treaties often modernize older treaties, and I fully expect to see a future WIPO treaty that removes "technical measures" from the two 1996 WIPO treaties, as well as adding clarity to Rights Management Information and Making Available rights. I also expect clarification on things such as "formalities" given we don't still ride horses to get around, and now live in the computer age. Registration and renewal is now trivial, and would facilitate additional licensing by making it easier to locate copyright holders.

Q: Are the technical measures provisions of Bill C-32 simply an implication of that section of the 1996 WIPO treaties?

The following excerpts are useful in answering this question.

> WCT Article 11: Obligations concerning Technical Measures[14]
>
> > Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

10 WIPO treaties on Copyright and Related Rights http://wipo.int/copyright/en/treaties.htm
11 Chronology of Canadian Copyright Law http://www.digital-copyright.ca/chronology
12 Amendments to Title 17 since 1976 http://www.copyright.gov/title17/92preface.html
13 WIPO program activities, Copyright and related rights, Limitations and exceptions http://wipo.int/copyright/en/limitations/index.html
14 WIPO Copyright Treaty, Article 11 http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P87_12240

US Copyright Law (AKA: Digital Millennium Copyright Act - DMCA) § 1201. Circumvention of copyright protection systems[15]

> (a) Violations Regarding Circumvention of Technological Measures. — (1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title.

Liberal Bill C-60[16], tabled June 20, 2005

> “technological measure” means any technology, device or component that, in the ordinary course of its operation, restricts the doing — in respect of a material form of a work, a performer’s performance fixed in a sound recording or a sound recording — of any act that is mentioned in section 3, 15 or 18 or that could constitute an infringement of any applicable moral rights;

Conservative Bill C-61[17], tabled June 12, 2008, and Conservative Bill C-32[18], tabled June 2, 2010 (Note: The definition in C-32 is mildly different in that it adds the word "protection" to define "technological protection measure"

> “technological 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.

Quick observations:

- The WIPO treaties protect activities which are already infringements under existing WIPO treaties
- The DMCA protects access controls, and is largely unconnected to activities which would otherwise be infringements.
- Liberal Bill C-60 is effectively a translation of the WIPO treaty language into Canadian Copyright law language
- The two Conservative bills bring in both the Liberal Bill C-60 (AKA: WIPO language) and a translation into Canadian law of the DMCA language.

This makes the two Conservative bills not only an implementation of the WIPO treaties, but of the most controversial aspect of the US DMCA. This should also explain why some people are calling this and the previous bill a "made worse in Canada" DMCA.[19]

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15 http://www.copyright.gov/title17/92chap12.html#1201
16 Links to text of bill maintained at http://www.digital-copyright.ca/billc60
17 Links to text of bill maintained at http://www.digital-copyright.ca/billc61
18 Links to text of bill maintained at http://www.digital-copyright.ca/billc32 aka http://BillC32.ca/
19 See also: Michael Geist: Setting the Record Straight: 32 Questions and Answers on C-32's Digital Lock Provisions, Part One http://www.michaelgeist.ca/content/view/5097/125/

Q: Why is it a problem that "access controls" are protected by the DMCA and Bill C-32?

In its definition, Copyright is a series of activities which if done require the permission of the copyright holder. Some very specific activities have exceptions where permission is not needed, only a payment, as defined by a compulsory licensing system. There are other exceptions to listed activities that are still allowed without permission or payment, as documented under Fair Dealings. Other unlisted activities are not regulated by copyright at all.

In Canada, these activities are listed in section 3 for most works, section 15 and 26 for a performer's performance, section 18 for sound recordings, and section 21 for a communications signal. You will notice that the language of the recent bills list "section 3, 15 or 18 and any act for which remuneration is payable under section 19", referencing some of those activities.

Since the origins of copyright, the concept of "access" to a work has never been a copyright listed activity[20]. All the activities are things which you need to already have access to the work in order to do. The concept of access has always been left to other laws.

If you jump a gate and watch a movie without paying, you are not accused of copyright infringement, but trespass. The same is true of commerce (electronic or otherwise), where the concept of access to something you would purchase (copyrighted works or anything else) isn't governed by copyright law, but by other laws such as e-commerce and property law. If you walk out of a book store with a physical book without paying for it, it really is theft and not copyright infringement.

One of the laws intimately related to copyright law is contract law. If you go to court for violating an End User License Agreement (EULA), the court doesn't presume that you infringed copyright. There are many scenarios that are possible, including clauses of the EULA being struck down, the defendant being found in breach of contract, to the defendant being found guilty of copyright infringement, or combinations. It would be harmful to all parties if the balance of both copyright law and contract law was circumvented by suggesting that any unauthorized access to a work, or use of that work, was automatically an infringement.

If you think about it, if the concept of "access" is imported into copyright law, it makes nearly every other aspect of the law redundant. Copyright holders simply need to grant permission to access under any conditions they want, denying otherwise, and can rewrite any aspect of copyright law in those contracts. Without permission to access the content, none of the limitations or exceptions to copyright can exist.

I believe Canada must firmly reject adding the concept of "access" or "access controls" to Canadian Copyright law, thus preserving the traditional definition of Copyright.

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20 This point was also made by Osgood Hall Professor David Vaver http://www.osgoode.yorku.ca/faculty/Vaver_David.html in *Digital Locks, Circumvention and The Copyright Reforms Proposed By Bill C-32.* http://www.iposgoode.ca/2010/11/digital-locks-circumvention-and-the-copyright-reforms-proposed-by-bill-c-32/

Q: In order to enable new business models, I need legal protection for technical measures including access controls!

Whether this is true would make for an interesting debate, but that debate isn't critical for this answer.

The question isn't whether there should be legal protection for technical measures including access controls in Canadian law, but whether the Canadian *Copyright Act* is the right law to be changing.

If a technical measure is protecting contracting terms, including a copyright license agreement, then the legal protection should be in provincial contract law.

If a technical measure is protecting electronic commerce, then the legal protection should be in provincial e-commerce law.

And so on...

None of the justifications I have heard for legal protections for technical measures justify their addition to copyright law, but they quite often suggest a need to modernize various other laws to appropriately protect technical measures as they protect aspects of those laws. There is never a justification to allow a technical measure to circumvent the contours of any of the laws, which is something we always need to be careful of. We need to ensure that all the existing checks and balances in Canadian law are preserved as we add any legal protection for technical measures.

Q: Are there possible constitutional questions about technical measures in Copyright law?

University of Ottawa law professor Jeremy deBeer conducted a detailed analysis in an article titled *Constitutional Jurisdiction Over Paracopyright Laws*[21], which was a chapter in an Irwin Law book titled *In the Public Interest: The Future of Canadian Copyright Law*[22].

Similar arguments were made in the Journal of Information Law and Technology by Professor Emir Aly Crowne-Mohammed and Yonatan Rozenszajn[23], both from the University of Windsor.

> The DRM provisions of Bill C-61 represent a poorly veiled attempt by the Government to strengthen the contractual rights available to copyright owners, in the guise of copyright reform and the implementation of Canada's international obligations. Future iterations of Bill C-61 that do not take the fair dealing provisions of the *Copyright Act* (and the overall scheme of the Act) into account would also likely fail constitutional scrutiny.

I have written members of the Ontario provincial government, including my MPP, about this issue[24].

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21 This chapter is available free at http://www.irwinlaw.com/pages/content-commons/constitutional-jurisdiction-over-paracopy-laws---jeremy-f-debeer

22 Published 2005 by Irwin Law Inc. ISBN: 1-55221-113-4 . More information online at http://www.irwinlaw.com/store/product/120/in-the-public-interest--the-future-of-canadian-copyright-law

23 DRM Roll Please: Is Digital Rights Management Legislation Unconstitutional in Canada? http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2009_2/cmr

24 Federal Bill C-32 tramples areas of provincial jurisdiction http://BillC32.ca/5156

Q: Aren't all the new education institutional exceptions to copyright great for students?

I consider education institutional exceptions to copyright to be a government program, paid for on the backs of copyright holders, masquerading as copyright. Public education programs should be paid for out of general tax revenue, and managed by provincial governments. Inadequate funding for educational resources is an educational sector issue, has market based solutions (IE: Open Access publication), and is not a "copyright" issue.

I am very uncomfortable with having special rules that apply to educational institutions. This feels like mis-education to me, and harms our children's ability to interact in a lawful matter outside of that classroom and later in life. I consider copyright rules that are focused on institutions rather than students to be harmful to students.

Fair Dealings should be expanded to include phrases such as "including multiple copies for classroom use" as is done in the USA to clarify that educators can step into the shoes of students and do things which the students would be allowed to do alone. With that necessary clarification the education institutional exceptions to Copyright, as well as the related clauses in the bill, could be repealed.

This commentary applies equally to current Bill C-32 language, as well as the Access Copyright proposals to impose a compulsory license.

Q: What suggestions would you make for fair dealings reform?

The Fair Dealings proposals in Bill C-32 are unnecessarily complex, and will be out-of-date the moment the bill is passed. It is also quite likely that their complexity will lead to an increase in inadvertent infringement, yet another harmful unintended consequence from this excessively complex bill.

I believe we should be taking the lead from the United States in how their much simpler and easier to understand Fair Use regime works. One suggestion is to simply adopt the US language, providing both clarity and balance that is lacking in current Canadian law -- a problem made far worse with C-32.

A "made in Canada" proposal would be to do what the United States did, but use Canadian language. They set up a non-exhaustive list of categories that might qualify as fair uses, and then added to the copyright act the criteria use by the courts to determine fairness.

In Canada we would retain the C-32 expanded set of criteria, using the phrase "such as" so that it is clear that this is a set of examples and not an exhaustive list.

The Supreme Court of Canada has identified six non-exhaustive factors to assist a court in determining whether a specific use is fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. These factors should be added to the Copyright Act for additional clarity.

Q: Should the Private Copying Regime for recorded music be expanded to devices?

I believe the Private Copying regime has been a failure. It is widely misunderstood by lobbyist, lawyers, politicians, and the general public. Most people don't realize this compulsory license legalized activities in exchange for the levy, and for a wide variety of reasons (some quite legitimate) it is confused with a tax[25].

I believe that the Private Copying regime is yet another government program trying to masquerade as copyright. If you speak to musicians they would be happier with stable funding for programs such as FACTOR[26] than the small amount of money they receive from the CPCC. If you talk to the general public, some of the same people who find the private copying levy offensive are strong supporter of arts funding. Listening to politicians talk about the Private Copying regime, they nearly always speak about it as if it was an arts program rather than copyright.

I believe the solution is for politicians to provide stable funding to properly managed arts funding programs, and stop trying to add these programs to the Copyright Act. The CPCC should be abolished, replaced with an agency for recorded music similar to the Public Lending Right Commission[27]. Truly private activities such as time and device shifting, the creation of "mixed tapes" that are not distributed to someone else, and such from lawfully acquired recorded music should be carved out of copyright with an clear and easy to understand exemption.

Q: Can you clarify your proposal for monetizing non-commercial sharing of music online?

While I believe the Private Copying regime has been a failure, I feel there is a need for a compulsory licensing system for public activities such as non-commercial P2P distribution of music[28].

We have many forms of music distribution (streaming, P2P, etc) where composers and most performers wish to license under reasonable terms, but the major recording labels are refusing reasonable licensing.

Section 19 of the *Canadian Copyright Act* is a compulsory license applied to neighbouring rights holders (performers and makers of sound recordings) that applies to communication to the public by telecommunications (i.e. commercial radio). I believe this compulsory regime should be updated to clarify that P2P is an on-demand communication to the public, and be expanded to include non-commercial distribution (IE: mixed CDs or USB sticks given to other people). This regime doesn't apply to composers, who have shown a willingness and eagerness to license their music in appropriate ways. This proposal is compatible in most respects with the proposal from the Songwriters Association of Canada[29], but far simpler as it is an expansion of an existing compulsory license regime.

ISPs could expand their services by collecting and paying this levy on behalf of their clients.

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25 Is the private copying levy a tax? http://BillC32.ca/5237

26 The Foundation Assisting Canadian Talent on Recordings (FACTOR) http://factor.ca/

27 "Providing payments to Canadian authors for the presence of their books in public libraries" http://www.plr-dpp.ca/

28 I wrote two articles that may be helpful in understanding this issue: *Analyzing when copyright levies are a good idea, and when they are a very bad idea. http://BillC32.ca/4515* and *Is the private copying levy a tax? http://BillC32.ca/5237*

29 Proposal from the Songwriters Association of Canada http://www.songwriters.ca/proposalsummary.aspx