

September 28th, 2010

The Honourable James Moore, Minister of Canadian Heritage and Official Languages
Canadian Heritage and Official Languages
House of Commons
Ottawa, Ontario K1A 0A6
CANADA
Email: moorej@parl.gc.ca

AND TO:

The Honourable Tony Clement, Minister of Industry
Industry Canada
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235 Queen Street
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Email: minister.industry@ic.gc.ca

With a copy to:

Office of the Prime Minister
80 Wellington Street
Ottawa, Ontario K1A 0A2
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Dear Ministers Moore and Clement:

Re: Bill C-32 - the Copyright Modernization Act

1. Introduction

The International Association of Scientific, Technical and Medical Publishers ("**STM**") includes approximately 90 publishers, collectively responsible for more than 60% of the global annual output of research articles and publications of tens of thousands of print and electronic books, references works and databases. Apart from publishing in print, STM publishers originate and disseminate online, books, journals databases and individual articles and contributions of a multitude of Canadian and international scientific, medical and technical authors and scholars.

STM publishers prepare and distribute their materials (scholarly and scientific journals, books and databases) for and into the research and education communities, communities that therefore constitute their most significant audiences and markets. Thus, selling and licensing, including to not-for-profit organizations, is and continues to be one of the major markets for STM publishers.

STM is making this submission to you, as STM and its members are seriously concerned about some of the provisions of Bill C-32 - the Copyright Modernization Act ("**the Bill**"). If enacted, these provisions would seriously prejudice STM publishing, Canadian publishers, authors and rightsholders generally. Moreover, these provisions, if enacted, would violate Canada's international copyright obligations.

STM sets out below comments on the impact of the proposed changes on STM publishers and the market for STM materials and thereafter discusses the specific exceptions proposed by the Bill.

2. Proposed Changes

2.1 Impact of the proposed changes on STM publishers and the market for STM materials

Scientific and medical publishing has embraced technology and innovation. Like other publishers, STM publishers have made significant investments in developing textbooks, technical and scientific material, both in analog and digital formats, with an enormous number of STM journal articles available online.

In this process, rightsholders and users have developed a large variety of licensing options, carefully maintaining a balance between the need to encourage creativity and its dissemination, and meeting users' interests. In STM's view, licensing is the most efficient approach to provide access to knowledge and preferred over exceptions and limitations.

Bill C-32 will through the introduction of too broad or general exceptions or limitations erode or cause to fall away distinct markets pertaining to the educational community. In this process Bill C-32 will also substantially alter existing licensing options in the market for STM materials and interfere with the existing normal exploitation of STM materials.

If implemented, the proposed changes will seriously affect the existing and future sales market for STM educational materials in Canada by significantly reducing sales and royalties paid to STM publishers by local collecting agencies such as Access Copyright and Copibec for the reproduction of content for education. STM estimates that around \$40 million dollars may be at stake in Canada in the immediate future. The changes will also impact the publishing industry outside Canada since they will allow copies of copyright-protected works to circulate widely through interlibrary loans, e-learning or commercial online distributors without appropriate compensation to rightsholders. These changes may accordingly act as a disincentive for authors to create works, for publishers to publish them for the educational community and be to the detriment of Canadian users.

2.2 Specific exceptions

Fair Dealing for the Purposes of Education [s. 29]

STM suggests that the public interest of education is best served by encouraging the creation of new publications and information services targeted at this sector. For example, journal articles, academic treatises and textbooks are published by STM publishers for the very purpose of contributing to scholarly communication and education. Libraries for non-commercial research or non-commercial educational institutions are the primary purchasers of (or licensees for) STM publisher materials and services. Further, STM publishers have embraced digital technology and offer much of their material online or in digital form (almost all journal and database content, and an increasingly large number of books) and provide online services such as individual article purchase and access. STM publishers are also actively engaged with other agents and distributors to distribute or provide access to or copies of such materials. Offering publications and information services to non-commercial communities, e.g. by way of subscription or individual journal article supply, is the very essence of "normal exploitation" which must be left free of exceptions that prejudice the legitimate interests of rightsholders unreasonably.

STM submits that the proposed change in s. 29 fails to meet Canada's obligations under international copyright treaties¹.

¹ Berne Convention, S.9(2), Art. 13 TRIPS, Art. 10 WIPO Copyright Treaty (WCT). The Berne three-step test (the "three-step test") states that members shall confine limitations and exceptions to exclusive rights to (1) certain special cases which (2) do not conflict with a normal exploitation of the work and (3) do not unreasonably prejudice the legitimate interests of the rightsholder.

Firstly, STM notes that “education” is not clearly defined in the Bill which makes the scope of the exception overly broad and therefore fails to define a special case under the three-step test.

Secondly, even should “education” be defined, STM submits that STM materials should not form part of any fair dealing exception. It is sometimes stated that because education is in the public interest, it constitutes a “certain special case” on which any copyright exception is premised. The presumed non-commercial nature of many educational activities is frequently cited as a strong indicator that the use should be legitimised under an exception and does not “interfere with the normal exploitation”, i.e. the market, of the rightsholder, or is not “unreasonably prejudicial” to his/her interests.

These arguments do not however apply to STM materials as these are prepared specifically for the educational market and including an exception in respect of “education” for STM materials would not constitute a “certain special case”. An unqualified exception that includes all STM materials would also interfere with the normal exploitation of the work and unreasonably prejudice the legitimate interests of STM rightsholders².

Complementary to the primary sales process of copyright-protected works, STM supports collective management as a practical solution to offer secondary access to protected works from a legal source. This solution benefits both rightsholders and users, including the educational community, and ensures that rightsholders are fairly compensated when their works are used.

Therefore, STM submits that “education” should not be included as part of fair dealing under the *Canadian Copyright Act*.

Display Exception [s. 29.4(1)]; Tests and Examination Exception [s. 29.4(2)] and the Publicly Available Material on the Internet (the “PAM Exception”) [s. 30.04]

The changes to the Display Exception and the Tests and Examination Exception conflict with the normal exploitation of works in Canada by removing the relevance of the availability of a collective license. This contrasts to the current provisions in the *Copyright Act*, which allows for the exception to be trumped by the availability of a licence from a collective society to reproduce, perform in public or communicate to the public by telecommunication. The PAM Exception may also interfere with the normal exploitation of works as eighteen collective management organizations around the world are licensing the use of material from the Internet. These exceptions therefore do not meet the requirements of the three-step test. It is arguable that this requirement would also violate Article 5(2) of the Berne Convention³ as to avoid the exception the copyright owner, including foreign copyright owners with a real and substantial connection to Canada would have to post a clearly visible notice prohibiting use (not just the copyright symbol) or be forced to use TPMs on works made available over the Internet⁴.

STM notes that in respect of the Display Exception, s. 29.4 includes the right to reproduce a work in a suitable format to display it. STM believes that this right may have a negative impact on the development of material to be used in conjunction with smart boards or intended to be displayed on computers or by means of other electronic devices.

Non-Commercial User Generated Content Provision [s. 29.21]

We are of the view that the language of the proposed exception is too broad and could have a significant negative effect on rightsholders.

² Recognising this, a number of international copyright laws recognise exceptions and limitations pertaining to research and education to exclude STM materials designed for such markets, i.e. an “exception from a more general exception”, as one of a number of specific qualifiers to the exception or limitation.

³ This provision states: “The enjoyment and the exercise of these rights shall not be subject to any formality”.

⁴ See s. 30.04(4)(b).

We note in particular that Bill C-32 permits the use of any published work in order to create a new work for non-commercial purposes as long as the use does not have a “substantial adverse effect, financial or otherwise” on the exploitation of the original work. This requirement appears to introduce a more stringent test than the “normal exploitation” requirement provided for in the three-step test. The inclusion of such a more stringent requirement will exempt certain uses of copyrighted material for which the consent of rightsholders would otherwise have been required and this provision accordingly deprives rightsholders of potential and actual economic gains and therefore conflicts with the normal exploitation of the work. The suggested provision will also authorize activities which may not individually have a substantial adverse effect but which will do so in the aggregate. For example, entire copyrighted works are today posted in small segments on “UGC” websites, where they are aggregated into replacement copies. STM suggests the removal of this proposed provision. Ultimately, STM suggests that rightsholders and user communities are best served by electronically facilitated rights-clearance.

Interlibrary Loan Exception [s. 30.2(5)]

This exception would conflict with the normal, well-established market for the exploitation of STM materials by significantly reducing the size of the library market in Canada and unreasonably prejudice the legitimate interests of rightsholders and therefore does not meet the requirements of the three-step test.

The traditional underlying reason for library copying exceptions has been that, in an environment dependent on print production and distribution, a given library would not necessarily subscribe to or purchase all relevant materials, but would rely instead on the collections of other institutions (perhaps more specialized institutions) to fulfil the library’s patrons’ needs. This would be especially applicable for materials not deemed to be central or essential for that particular library’s collection. It is understood in most jurisdictions where this legal and procedural tradition has developed for such “lending-and-borrowing”, that an essential issue would be to ensure that such lending-and-borrowing would not be likely to substitute for the potential purchase of such material.

We note that with the advent of the Internet and STM publishers’ innovations, the availability of digital STM content is ubiquitous in a world that is by now close to borderless. Moreover, STM journal content is now not only available to potential journal subscribers, but to everyone: individual articles are instantly and globally available for purchase and access. Our view is that the rationale for permitting interlibrary copying and supply is thus much reduced, almost to the point of being irrelevant, in the digital environment.

STM does accept that there may be a scholarly need for a non-commercial and educational library to make a digital copy of unique and rare scholarly material for another non-commercial and educational institution, but for in-copyright works this must be limited to material which is not commercially available in the geographic territory of the “requesting” institution. Such copying cannot be done systematically for the purpose of substituting for the normal purchase or licence of STM material (including the supply of individual journal articles) for the requesting library’s collection. Libraries should be obliged to keep records of materials copied for such purposes and their requests from other libraries for such copies.

It is worth noting that many publishers have agreements with customers which allow digital copies to be shared with requesters. There are a variety of robust business models which support these licenses. The proposed changes are therefore unnecessary.

In addition to the general concerns expressed above in respect of digital ILL, STM notes the following:

- The Bill does not specify the “measures” the fulfilling library has to take to ensure compliance with 5.02(a), (b) and (c) and does not require that the measures be effective. There is also no provision for the inclusion for regulations that would prescribe such “measures.” This leaves the scope of the provision uncertain with its dimensions to be potentially determined by litigation. STM notes for example that because the legality of the copying depends entirely on what would be fair dealing on the part of the patron, there is nothing to prevent a library from making ILL requests that in effect substitute for a subscription to a journal.

- The Bill would apply not only to a library's print collections but also to its digital collections – including any digital material to which the library has access online. The proposed statutory provision may create a situation that conflicts with existing digital rights agreements between rightsholders and users that may contain clauses that prevent digital ILL or that contain clauses that prescribe how digital ILL is allowed. This may cause uncertainty for many rightsholders and users and lead to unnecessary litigation. It may be appropriate to specify that obligations expressed in agreements supersede the exceptions.

Lessons Exception (sec. 30.01)

In sec. 30.01(5), although there are certain conditions for use of a “lesson” by students, a review of practices of students may be impossible since there are no record keeping requirements, no restrictions on frequency of requests and no immediately obvious way to control that the digital copy is not distributed or copied further.

In addition, Canada is known as one of the prime destinations for international students to enrol and benefit from the Canada's rich learning and studying environment. For this reason, the issue of cross-border access by students of a “lesson” is a real one now and even more so in the imminent future, as Canada's higher learning institutions seek to expand their market share in the field of distance learning. As such, the policing of the use of a “lesson” by students outside of Canada should be given further thought, and in addition, it should be ensured that the use of a “lesson” by foreign students does not interfere with the normal exploitation of the copyright works subsisting in the “lesson” in the countries in which the foreign students are actually situated.

In contrast to the proposed exception, in many European countries, authors and publishers are entitled to fair remuneration for any uses of rights covered by the exception. Also, in the United States, authors and publishers make these rights available on a voluntary collective basis through collective rights organizations. The proposed legislation is not only inconsistent with these trends, but will jeopardize the ability of Canadian authors and publishers to collect their shares of revenues collected abroad.

STM also notes that the conditions in sec. 30.01(6)(b)(c) are subject to a requirement that the educational institution and any person acting under its authority must take measures that can reasonably be expected to limit the communication by telecommunication of the lesson to authorized persons or take, in relation to the communication by telecommunication of the lesson in digital form, measures that can reasonably be expected to prevent the students from fixing, reproducing or communicating the lesson other than as they may do under sec. 30. STM is concerned that incorporating a reasonability requirement in respect of these obligations does not place an absolute and clear obligation on the educational institutional and the person acting under its authority to adhere to these provisions. STM urges the government to tighten this wording up particularly in a digital age where proper monitoring and supervision of digital copying is important.

STM suggests that these issues be addressed in the proposed provision or through regulations.

Reproduction in Alternate Format (Section 32.1/Section 32.01)

STM recognizes the need to provide specialized exceptions for persons with a disability. STM suggests that users with visual disabilities should register with or otherwise be certified by relevant local or national authorities or organisations that specialise in such disabilities. We note in particular that the Standing Committee on Copyright and Related Rights at WIPO is considering appropriate exceptions and limitations for certain categories of disabled, including the use of the concept “trusted intermediary”. The Committee has acknowledged the special needs of visually impaired persons (VIP) and stressed the importance of dealing, without delay and with appropriate deliberation, with those needs of the blind, visually impaired, and other reading disabled persons, including discussions at the national and international level on possible ways and means of facilitating and enhancing access to protected works, against the background of an analysis of limitations and exceptions.⁵

⁵ See for example: http://visionip.org/stakeholders/en/trusted_intermediary_guidelines.html; a “trusted intermediary” is referred to as “...an entity that facilitates interactions between two parties who both trust the

Statutory Damages [Subsections 38.1(1) to (3)]

STM is concerned that the proposed changes would considerably weaken the statutory damages that could be awarded under the *Copyright Act*. We note that the Bill significantly reduces the scope and availability of statutory damages for non-commercial infringements. STM is concerned that such a reduction in statutory damages for non-commercial infringement significantly reduces the incentives that many licensees (both corporate and educational) have to enter into licensing agreements. The provisions may also lead to increased litigation costs to parties seeking to enforce their copyrights with low damages awards.

Notice and Notice [s. 41.25 and 41.26]

We welcome the introduction of these provisions to deal with online infringements. We suggest that the provisions could be improved by recognizing that certain activities are indisputably infringing on a piratical scale. Postings of books, movies, new albums and computer games can potentially destroy the viability of these products. For these activities a notice-and-takedown option, albeit essential, does not go far enough. To combat piratical business models, which are hiding behind limitations and safe havens intended for bona fide actors, some form of filtering obligation is needed. To educate members of the public, who post copyright-protected content, a series of warning notices should be served. If this does not lead to compliance, penalties should then culminate in a temporary suspension, or, in the case of egregious abuses, in permanent termination of internet access. When imposing such measures, the balance of convenience must be weighed and the principle of proportionality adhered to. However, for the worst offenders, a system of graduated response on the "information highway" will encourage responsible "driving", just as the suspension and withdrawal of driver licenses fosters respect for the rules of the road among motorists in a proportionate manner.

Finally, STM is concerned that Bill C-32, with its proposed lowering of the quantum of statutory damages, effectively reduces the penalties for repeated breaches of the law and sends the wrong message to infringers.

Conclusion

The Bill introduces a myriad of new exceptions without any compensation for authors and publishers. If passed, the Bill will deprive rightsholders of important revenues, and we fear suppresses the creation of new works. We also feel that the proposed "notice and notice" regime will make Canada a haven for piratical business models. The Bill impacts authors and publishers not only in Canada but worldwide because Canadian collectives, through reciprocal agreements, represent works published in numerous foreign countries.

We applaud your government's commitment to updating Canada's copyright laws, and sincerely hope that your government will initiate changes to Bill C-32 in Committee that will ensure that Canada's copyright regime is not detrimental to authors and publishers and in line with international obligations.

third party. The objective of a TI is to facilitate the traffic between an indeterminate number of rightsholders as content providers and print-disabled persons as end users in a controlled manner"; and www.wipo.int/edocs/mdocs/copyright/en/sccr_20/sccr_20_10.doc.

STM is grateful for the opportunity to being able to make this submission and stands ready to amplify or otherwise assist in any way that would be appropriate and conducive to sound Canadian copyright legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Mabe", with a long horizontal flourish extending to the right.

Michael Mabe
Chief Executive Officer, STM

Cc: Francis Gurry, Director General, World Intellectual Property Organisation (WIPO);
Karel de Gucht, European Commissioner, DG Trade, European Union;
Michel Barnier, European Commissioner, DG Internal Market, European Union;
Don Stephenson, Assistant Deputy Minister, Trade Policy and Negotiations Foreign Affairs
and International Trade Canada;
Jean-Pierre Blais, Assistant Deputy Minister, Cultural Affairs Canadian Heritage Office of the
Assistant Deputy Minister;
Marta Morgan, Assistant Deputy Minister Industry Canada, Strategic Policy Sector;
Jens Bammel, Secretary General, International Publishers Association (IPA);
Olav Stokkmo, Chief Executive, International Federation of Reproduction Rights Organisations
(IFRRO).