

When in Rome ...

Amending Canada's Copyright Act

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La loi C-32 "An Act to Amend the Copyright Act" a reçu l'aval royal le 25 avril 1997. Ceci était connu sous l'appellation "Phase II" de la réforme des droits d'auteur qui est entré en vigueur en 1988. En plus d'amendements techniques, elle apporte de profonds changements à la loi sur les droits d'auteur: une clarification des exemptions pour les institutions charitables tels que les universités et bibliothèques; des règles plus sévères contre l'importation parallèle de livres; des droits sur les cassettes audio vierges dont les recettes iront aux collectivités des droits d'auteur; et des "droits de voisinage" pour les artistes du son ainsi que les producteurs. Il y a deux façons distinctes de penser à la loi sur les droits d'auteur. La première se concentre sur les droits naturel des créateurs au revenu généré par leurs travaux. L'autre se concentre sur le problème économique de conception d'un régime de droit d'auteur qui maximise le bien-être social. L'auteur suggère qu'alors même que les deux points de vue ont été mis de l'avant lors du débat sur la réforme, le point de vue sur les droits naturels a eu plus d'influence sur la conception de la loi C-32 que le point de vue économique.

Bill C-32, *An Act to Amend the Copyright Act*, received royal assent on 25 April 1997. This was known as "Phase II" of copyright reform, "Phase I" having been enacted in 1988. Along with a number of technical amendments, there are four substantial changes to copyright law in the bill: a clarification of exemptions for non-profit institutions such as universities and libraries; stronger rules against "parallel importation" of books; a levy on blank audio tapes, with proceeds to go to copyright collectives; and "neighbouring rights" for sound performers and their producers. There are two distinct ways of thinking about copyright law. One focuses on the natural rights of creators to the income generated by their works. The other focuses on the economic problem of designing a copyright regime which maximizes social welfare. The author suggests that while both views of copyright have been put forward in Canada throughout the debate over reform, the natural rights view had more influence on the design of Bill C-32 than the economic view.

Canada's *Copyright Act* came into effect in 1924, and was not substantially changed until 1988. The 1988 amendments, contained in Bill C-60, were described as "Phase I" of anticipated changes to copyright legislation. Eight years later, in April 1996, after a change in government and intensive lobbying from various parties, a proposed "Phase II" was given first reading in the House of Commons,

as Bill C-32. The bill was amended at the Commons committee stage, was passed by Senate on 24 April 1997 and received royal assent the following day. The weeks leading up to the passage of the bill were tense for its creators and for those with an interest in it, since an election call was widely (and correctly, as it turns out) expected in late April. The bill passed only days before the dissolution of Parliament.

Bill C-32 amends the *Copyright Act* in a number of ways. Exemptions for non-profit institutions such as universities and libraries are clarified. Rules against “parallel importation of books,” that is importing copies of books even though there is a domestic owner of the copyright, are strengthened.

There are also two key aspects of Bill C-32 which affect the music industry: a levy on blank audio tapes, with proceeds to go to copyright collectives, and “neighbouring rights” for performers and record producers. Each of these provisions brings copyright law in Canada into line with the “Rome Convention” of 1961, or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

Analysis of copyright divides into two streams of literature. The first establishes copyright in terms of its inherent morality, that authors have an entitlement to the income their works generate; this method of thinking about copyright, prevalent in civil law jurisdictions, is often called “droit d’auteur.” The second, associated with the law-and-economics method, itself often associated with the University of Chicago, considers copyright as a means to a particular end, namely efficiency, in the economist’s sense of the term. After a brief description of the law of copyright in Canada, two sections of the paper review the literature on these two methods of thinking about copyright. I then consider the provisions of Bill C-32 in more detail. The conclusion is that the “droit d’auteur” aspects of copyright had more influence in this bill than did economic efficiency.

COPYRIGHT

A *work* entitled to copyright protection can be literary, dramatic, musical, or artistic. It must be *original* and *fixed in some material form*. In Canada one need not apply for copyright protection of a work; it automatically exists for works covered. Copyright protects the *expression* of an idea, but not the idea

itself. While copyright prevents others from making unauthorized copies, it does not prevent others from selling similar works which they have created independently, without copying.

The exclusive interests of the owner of the copyright which are protected are production or reproduction in material form and public performance. There are two types of limits on the rights of the holders of copyright in a work, in other words, two types of rights held by users of works: compulsory licences and fair use. Compulsory licence allows one to use copyrighted material without the express written consent of the copyright owner, as long as a specified royalty is paid. Fair use allows users to copy works without consent or payment. In practice fair use entails exemptions for particular kinds of use (copies for the purpose of reporting, reviewing, or private study) or for particular users in specified circumstances.

Great Britain substantially rewrote its copyright law in 1911. Canada’s copyright law, which came into effect in 1924, was largely based on the British statutes. Given the changes in technology and media since 1924, it is perhaps surprising that it was not until 1988 that major changes were made in that law. The question of copyright reform was studied intensively in the interim; studies included the (Ilsley) Royal Commission on Patents, Copyright, Trademarks and Industrial Designs (1957), the Economic Council of Canada (1971), Keyes and Brunet (1977), and numerous research papers commissioned by the Department of Consumer and Corporate Affairs in the early 1980s. The Government of Canada produced the white paper *From Gutenberg to Telidon* in 1984, a House of Commons subcommittee reported with *A Charter of Rights for Creators* a year later (Canada 1985), and the act was amended soon after. The Phase I changes included the extension of copyright protection to computer programs, a strengthening of the “moral rights” of creators, an increase in the penalties for copyright infringement, and enabling provisions for copyright collectives.

Following the Phase I amendments there were some minor changes. The definition of "musical work" was made more inclusive. Mosher (1989-90) presents arguments in favour of this change. Also, as part of the Canada-US Free Trade Agreement, "retransmission rights," the copyright on transmission by television or radio of works beyond the initial telecommunications signal, were brought into effect (Gendreau 1989).

The *Copyright Act* was amended on 1 January 1996 to comply with the Trade Related Aspects of Intellectual Property Rights (TRIPs) of the World Trade Organization, strengthening copyrights in Canada for foreigners and for Canadians elsewhere. The Phase I amendments left for a later date some aspects in need of reform. For example, Phase I allowed for the creation of the copyright collective agency CANCOPY, which could collect royalties for photocopying on behalf of authors, yet did not deal with how exemptions should be set out for non-profit educational institutions. At the time these were promised for Phase II, and Bill C-32 does indeed deal with this question. Still to come, in a proposed Phase III of copyright reform, are issues related to the Internet and satellite broadcasting.

DROIT D'AUTEUR

The origins of copyright are entwined with a particular conceptualization of the author. We may imagine a literary work as an idea taken from nature, then transformed by the author's labour. If a literary work is

Nature to Advantage drest,
What oft was Thought, but ne'er so well Exprest¹

then one view of copyright is as a formal statement of the natural right of an author.

The idea that an author has a natural right to ownership, what we could call an "entitlement" theory of copyright, has always been controversial,

and economists have generally been dismissive of it. Hurt and Schuchman (1966) divide the entitlement theories of copyright into three types: "(1) the natural property right of a person to the fruits of his creation, (2) the moral right to have his creation protected as an extension of his personality, and (3) his right to a reward for his contribution to society" (pp. 421-22). Type 1 is generally attributed to the justification of private property in John Locke's *Second Treatise*. Its starting point is that each individual has ownership of his or her person, and thus should also have ownership of that which he or she has found in nature and transformed through his or her labour. Hurt and Schuchman claim that copyright is perhaps the most appropriate application of this doctrine since, while controversies may surround the justification of private ownership in land in that it necessarily deprives others from using that land, "copyright truly deprives others of nothing which they would have had in the absence of the owner's creative activity" (p. 422). However, it is also the case that copyright can prevent others from making use of materials which do not deprive anyone else of earnings. Frith (1993) describes the controversies surrounding "samplers," sound recordings which use very brief extracts from existing (copyrighted) recordings together with new sounds, to produce recordings. Samplers are in no way any kind of substitute for the recordings which provided the extracts, yet the large firms in the recording industry have used copyright laws to preclude samplers, which are typically made by small, independent artists and record companies.

The idea that creators should have a natural right in their works appeals to creators, but not everyone has been convinced. Breyer (1970), in his well-known critique of copyright, describes the natural right theory as "an intuitive, unanalysed feeling." He continues:

But why do we have such a feeling? An intellectual creation differs radically from land and chattels. Since ideas are infinitely divisible, property rights are not needed to prevent congestion,

interference, or strife. Nor does the fact that the book is the author's *creation* seem a sufficient reason for making it his *property*. We do not ordinarily create or modify property rights, nor even award compensation, solely on the basis of labour expended (pp. 288-9).

Still, there is no doubt that this "feeling" exists. It permeates the study by Keyes and Brunet (1977), and, although it is not stated explicitly, the Canadian government's *Charter of Rights for Creators*. Indeed, in comparing the natural right theory of copyright with the law-and-economics approach, Keyes and Brunet write:

The leading theory today is that of the "pragmatic school": copyright should be determined by statute law based on analysis of all the interests involved, with emphasis on the public interest. A pragmatic analysis of these interests leads one to express the rights granted in terms of exclusive rights of authors. Whether or not one considers those rights a property right or another kind of right is of no material consequence, if the results are the same. Concern with the underlying social philosophy of copyright law is unwarranted unless different theories lead to different conclusions. (p. 5)

It seems to be the case, however, that different theories do lead to different conclusions, hence the active debate in Canada.

Turning to the question of moral rights, the issue is that an artistic work is an extension of the personality of the artist, and so cannot be copied or altered by another without permission in the sense that doing so would be akin to an invasion of privacy. The origin of this argument is typically attributed to Kant, and is a part of copyright law in a number of European countries. The key aspects of the moral rights are (i) paternity, the right of an author to be identified as such; (ii) integrity, the right to prevent one's work from being distorted and misrepresented; and (iii) publication, the right of the

author to withhold publication. In the United States these rights have not become a part of copyright law since they are effectively protected by other aspects of law, such as the law of torts and the right of privacy. In general there has been little sympathy from economists for the case that copyright law needs to include these protections.²

Nevertheless, the trend in Canada has been a strengthening of the moral rights provisions in the copyright statutes,³ and this trend has been supported by almost all major studies in Canada. The Ilsely Commission (Royal Commission on Patents, Copyright, Trade Marks and Designs 1957), the Economic Council of Canada (1971), and Keyes and Brunet (1977) all recommended a broadening of the remedies available for authors whose moral rights had been infringed.

Finally, there is the argument that artists are entitled to a payment commensurate with their contribution to social welfare. Since it is fairly evident that cases of workers not being paid according to their social contribution (how measured?) are numerous in our economy, it would place an impossible burden on copyright law to assure that this particular notion of justice could apply to artists. Hurt and Schuchman (1966) point out that there are many more efficient means of ensuring creators are compensated than using copyright law. Breyer (1970) is particularly scathing on the entitlement theory:

There is nothing inherently immoral in the fact that many workers are paid less than the social value of what they produce, for much of the excess of social value over production cost is transferred to the consumer in the form of lower prices. It is not apparent that the producer has any stronger claim to the surplus than the consumer or that the author's claim is any stronger than that of other workers. In fact, why is the author's moral claim to be paid more than his production cost any stronger than the claim of others also responsible for producing his book: the publisher, the printer, the bookseller, and

those responsible for the literature of the past that inspired him? (p. 286)

But as I shall show later, the entitlement of artists, in terms of the property right and the compensation which they are due, has exerted a powerful force in the recent changes to copyright law.

THE LAW-AND-ECONOMICS APPROACH TO COPYRIGHT

The law-and-economics approach postulates that common law is best explained as a system for maximizing the wealth of society, in other words for promoting efficiency, and that statutory law, while not as efficient as the common law, is still guided to an important extent by economic considerations (Posner 1992a, p. 23). It remains a controversial method of studying law, although this is not the place to recount the debates over its merits.⁴ But the method has been applied extensively to the issues of intellectual property.⁵

Studies in this tradition, especially those dealing with property, draw their method from the famous essay by Coase (1960). Coase said that an efficient allocation of property rights was one which would maximize the wealth of the community (i.e., be efficient in the Kaldor-Hicks sense). Where there are no transaction costs, and property rights are all well-defined, trade in those rights, regardless of their initial allocation, would yield an efficient outcome. Further, that outcome, in terms of economic activity, would be independent of the initial allocation of property rights. However, where trade in property rights would be difficult, due to high transaction costs (most likely due to a large number of affected parties), then the outcome would be highly dependent on the initial allocation of property rights.

Applying Coase's theories to intellectual property, it would be said that since we are in a "high-transactions-costs" situation, we would look to the law to provide an allocation of property rights that

would promote efficiency. What system of copyright (or patent or trademark) law creates the greatest net benefit from the resources available?

"Striking the correct balance between access and incentives is the central problem in copyright law" (Landes and Posner 1989, p. 326). In all law-and-economics studies of copyright, the problem is to find a degree of copyright protection which balances the benefits of increased incentive to create works with the cost of restricting access to works. This balance is manifest from the very beginnings of copyright law. On 10 April 1710, "A Bill for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors, or Purchasers, of such Copies, during the Times therein Mentioned," now usually referred to as the Statute of Anne, went into effect. The very title of this first law of copyright makes reference to the point that there is a *public benefit* from conferring a property right on authors, that it will provide for the "encouragement of learning." And so from the beginning consideration was given to the question of payment to producers of artistic works and to the benefits the public might receive from them.⁶

It should be noted that copyright necessarily takes one into the world of second-best. The reason is that information, whether it be the text of a book or a score of a symphony, is a non-rival good. Note that the distinction is being made between the information and a specific copy of a recording of the information; using the distinction made by Koboldt (1995), Verdi's *Rigoletto* is different from a specific copy of a recording of *Rigoletto*. Generally we would assume that a non-rival good will not be provided efficiently by an unregulated market.⁷ Copyright deals with the inefficient provision of the non-rival good by creating a temporary, limited monopoly for the creator.

Landes and Posner (1989) can be taken as a representative model of the law-and-economics approach to copyright. Their model is designed as follows. It is assumed that there is a "cost of

expression,” namely the cost of creating the information in an artistic work, which is separate from the cost of making copies of the work. The return to artistic endeavor is completely from the sale of copies. Providing a work will be produced at all, copies will be produced to the point where the marginal cost of doing so equals the marginal revenue. The work will be produced as long as the expected total return exceeds the expected total cost. This will only be true if the price of copies exceeds marginal cost, since at least some surplus must be available to cover the cost of expression. If there is no copyright protection, and if various producers can take information and make copies of it at the same marginal cost as the creator of the information, then the price of copies will be driven down to marginal cost. But then no works would be produced.

More important than their specification of the model is the problem they set: what degree of copyright protection maximizes social welfare, which they define as the number of works created times the consumer and producer surplus per work, less the costs of creating works and administering the copyright system? There is no special status for income for creators; consumer and producer surplus are simply added together.

With this conception of social welfare, *the sole source of social benefit from an increase in the degree of copyright protection is the increase in the number of original works*. At the optimum, the marginal social benefit of copyright protection equals its marginal social cost. Landes and Posner’s results are summarized (pp. 343-4) as follows:

- The optimal degree of copyright protection is higher where the sum of consumer and producer surplus per work greatly exceeds the cost of creating works. This is because in that case there are greater social benefits from increasing the number of works created.
- The optimal degree of copyright protection is below the level that would maximize the number

of works created. This is so because of the increased costs of expression that occur with increases in copyright protection (authors must be able to read other authors, composers must be able to hear the works of other composers, and so on), together with the increased costs of making copies of works and the increased costs of enforcing the system, at some point begin to outweigh the benefits of increasing the number of original works.

- The optimal degree of copyright protection is higher the more creators respond to changes in remuneration.

An interesting possibility arises if original authors have a small cost advantage in making copies over those others who would make copies of their works. In this case it could well be that an increase in copyright protection increases social benefits by inspiring the creation of more works, but without an increase in social cost from the restriction in copies made by non-creators. The latter is possible if the price to consumers of copies made by authors is higher than copies made by non-authors, but the social cost of the author-made copies is lower. Because the increase in copyright protection may induce some consumers to shift to buying author-made copies instead of other copies, the total resource cost of making artistic works available to the public may fall. This possibility is generated in the models of Novos and Waldman (1984) and Koboldt (1995).

BILL C-32

Bill C-32 contains a number of technical amendments, including some updating of anachronistic language, some revisions in the terms of copyright (including the terms on photographs and on unpublished works), and changes to the means of seeking redress when copyright has been infringed, including the introduction of statutory damages. But there are four major changes to the *Copyright Act*: neighbouring rights on sound recordings, a levy on blank

audio tape, greater protection for exclusive book distributors, and rules regarding exceptions.

Neighbouring Rights

“Neighbouring rights” refers to protection within the copyright statutes for subject matter not usually defined as a “work.” In this case neighbouring rights refer to those attached to performances, sound recordings, and broadcasts. Bill C-32 redefines the word “copyright” in section 1 of the revised version of the *Copyright Act* (hereafter called simply “the act”), to include these neighbouring rights, and sections 15 to 26 of the act represent an entirely new section dealing with neighbouring rights. Section 19 (1) of the revised act states: “Where a sound recording has been published, the performer and maker are entitled, subject to section 20, to be paid equitable remuneration for its performance in public or its communication to the public by telecommunication, except for any retransmission.” This establishes a compulsory licence; the broadcasters or other users who publicly play the recording do not require authorization to do so, but they must pay for the use. Section 20 states that the entitlement is bestowed on Canadians or those from countries belonging to the Rome Convention. Other members of the Rome Convention will be required to make neighbouring rights payments to Canadian performers and producers. Section 22 of the act enables the Minister of Industry to enter into agreements with non-members of the Rome Convention on a basis of mutual reciprocity. Note that the United States is not a member of the Rome Convention, and it is anticipated that the US will argue vigorously against these changes.⁸ Section 19 (2) authorizes payment to be paid to the appropriate copyright collectives, and section 19 (3) states that payment to the performer and the maker of the recording will be split 50-50, except by mutual agreement between the performer and maker.

Bill C-32 provisions for the compulsory licence in recordings and the reciprocal agreements with other countries are similar to what is already in place for composers and their publishers.⁹

The rate of remuneration (called “tariff,” not “royalty,” in the act) is to be set by the Copyright Board. At the first reading of C-32, section 68 of the act would have had the board take into account “that some users, while using music to generate revenue, assist the sale of sound recordings through the playing of that music.” But this “statutory criterion” was removed from the bill at the committee stage, after protest by performers and makers of sound recordings.

Whatever rate is set by the Copyright Board, broadcasters earning less than \$1.25 million annually in advertising revenue would pay \$100 annually; this is expected to apply to approximately two-thirds of Canada’s private broadcasters. For larger broadcasters, the tariff has a three-year phase-in period (which, prior to the committee hearings, was to be a five-year phase-in).

The Economic Council of Canada (ECC) was firmly against neighbouring rights. Their report is very much in the law-and-economics tradition. In the introduction they write: “We ... believe that the recommendations in this Report will improve the dynamic allocation of resources in the Canadian economy” (1971, p. 3). It is worth quoting a part of their analysis of copyright at length:

It is sometimes implied that where cultural goals are important, economic analysis, with its base associations of the market place, should take a back seat. But this involves a serious misconception of the proper and useful role of economic analysis. It may well be true that in the *final* analysis, economics is much more concerned with means than with ends, and that the really fundamental “achievement goals” of a society are largely, if not wholly, noneconomic in nature. It is also true, however, that, in practice, means can have an enormous influence on ends, whether for good or ill, and that as a result the systematic analysis of economic means is indispensable both in the specification of social goals and the planning of how to achieve them. In the case of

cultural goals, among others, economic analysis can be of great help in bringing about a clearer identification of the goals in the first place, and then in planning for their attainment by the shortest, least costly and most perseverance-inducing route.

It is particularly important that the relevance of cultural goals in a policy-planning situation should not be used as a smoke screen behind which material interests and conflicts between private and social interests are allowed to shelter unexamined. (p. 139)

On neighbouring rights, the council is to the point: "We conclude that a proliferation or a 'layering' of secondary performing rights would be of dubious social benefit..." (p. 159). The council found that the basis of such rights in Europe were based on notions of "moral rights" (although the council is using this term more in the sense of an entitlement rather than the more limited meaning of moral rights used elsewhere in this paper), and such rights, in their eyes, have little basis:

Some countries have been persuaded by arguments for [neighbouring rights] in a sound recording, but we see no current shortage of recordings that would indicate inadequate incentives for their creation and justify what would be in effect a use fee on a physical good. (p. 158)

Keyes and Brunet were in favour of neighbouring rights, on two grounds. First, *contra* the ECC, they claimed "there is no reason to doubt that this would create a climate conducive to growth in the performing arts" (p. 116). Their second rationale is on fairness grounds: "Radio and television make repeated use of performances by performers. Such uses of performances presently entail payment to composers, and there seems to be no reason why they should not also entail payment to the performers." (p. 116)

Two economic studies on the question of neighbouring rights were commissioned by the

Government of Canada's Department of Consumer and Corporate Affairs. Keon (1980) found no justification for neighbouring rights. He notes that performers and makers of records are already protected by reproduction rights, and that from these rights (i) the recording industry is generally successful, and (ii) the recording industry benefits much more than composers. He suggests that the introduction of neighbouring rights would harm broadcasters and composers (since tariffs for performers might in the end reduce the amount of remuneration available for composers), which might reduce the number of works being created, and yet would not have a substantial effect on the amount of recording of works. Keon found that "there is no undercommitment of resources being devoted to the recording industry that would provide one with an argument for a new statutory right for record producers."

Of particular importance to Keon was the fact that broadcasts bring substantial benefits to record companies, since they represent a form of free advertising. This must be taken into account when asking whether there is an inequity in the system between the treatment of composers and their publishers on the one hand, and of performers and their recording companies on the other. If it is the case that the latter benefit much more from sales of recordings than the former, and if radio broadcast strongly influences sales, then it is not necessarily the case that it is inequitable to pay broadcast royalties to composers but not performers.¹⁰

Globerman and Rothman's (1981) conclusions were similar, in that they also recommend against neighbouring rights. Their model of the market in performances indicates that the number of broadcast performances might fall. This could reduce the returns to engaging in the activity, and so work against what is purported to be the rationale of the right. They also pay significant attention to administrative costs, as does the theoretical model of Landes and Posner (1989). They note that the overhead costs for what is now known as SOCAN, the collective which works on behalf of composers and

publishers, were about 15 percent of the royalties received.

Keon, and Globerman and Rothman, are each in the economics-and-law tradition. They are concerned with the issue of efficiency in the allocation of resources; what are the best means of achieving a particular end. Both studies conclude that there is not a justification for neighbouring rights.

The Government of Canada white paper *From Gutenberg to Telidon* (Canada. Consumer and Corporate Affairs Canada 1984) does not recommend neighbouring rights, relying on the argument that Canada is a net importer of recordings. It also found merit in broadcasters' claims that they benefit performers and producers by playing their works, which should exempt them from having to pay a tariff. But the following year the House sub-committee, in its *Charter of Rights for Creators* (Canada. House of Commons 1985) did recommend neighbouring rights, on a reciprocal basis with other countries which pay them; i.e., the Rome Convention. The reasoning is not on efficiency grounds, but rather that performers deserve the same treatment as composers: "The production of a sound recording is just as creative as other activities protected under the copyright law" (p. 50). On the question of whether the broadcast is of benefit to the performers, they wrote:

...the argument by the broadcasting industry regarding free advertising confuses purpose and result. The purpose for which broadcasters use sound recordings is to attract and maintain their audiences. It is this use that should be paid for regardless of the incidental beneficial effects of airplay on sales. The granting of rights must ultimately be considered in terms of principle. The use of someone's creativity without authorization and payment, in this case a sound recording, is contrary to the fundamental principles adopted by the Sub-Committee. (p. 51)

Smith (1988) takes the *Charter of Rights for Creators* to task for ignoring the economic studies:

"Contrary to [an] approach that considers the well-being of all Canadians, the *Charter* follows an approach that explicitly fails to consider the economic issues involved" (p. 184). How important is the balance of trade in recordings? Bill C-32 enters a reciprocal arrangement with Rome Convention countries, with the US conspicuous by its absence.

The Donner and Lazar (1994) study, commissioned by the Department of Canadian Heritage, considers the balance-of-trade implications for various tariff rates. Under some schemes there could result a net inflow from neighbouring rights. It is easy to imagine that the recent success of some Quebecois performers in the European market had some influence in the provisions of C-32.¹¹ Donner and Lazar take into account the economic impact on various "stakeholders," and in the end recommend a neighbouring rights scheme very similar to that established by the provisions of C-32. They note that the main rationale is not necessarily traditional AM/FM broadcasting; if that were all the future had in store the case for neighbouring rights is rather weak. But new technology may be such that sales of CDs drop by a large amount, as people "download" recordings through the Internet. In that situation, the case for increasing payments to performers gains strength. This possibility was also raised by Acheson and Maule (1994), although they do not go so far as to recommend neighbouring rights at this time. Nevertheless, it seems that each of the above papers with their references to new technology had some influence in government discussions.

The government's news release of 25 April 1996, the day the bill was tabled, reads, in part:

These amendments will help strengthen Canada's cultural industries.

... The legislation fulfills commitments...to bolster Canadian culture and create jobs for Canadians. These provisions to modernize the *Copyright Act* will help meet Canada's social and economic objectives.

If we think of an “economic” analysis of copyright as one which looks for a regime which maximizes social wealth by using a clearly defined objective function and a model of the industry, then no economic analysis has ever been conducted in Canada which would support the introduction of neighbouring rights, although there are such studies which oppose them. Even if we reduced the question of neighbouring rights to the simpler ones of “Will it increase the number of Canadian recordings?” or “Will it increase the broadcast of Canadian recordings?” (which is perhaps what is meant when one talks about strengthening Canada’s cultural industries) the evidence is not compelling.

Levy on Blank Audio Tape

Section 81 of the act states: “...eligible authors, eligible performers and eligible makers have a right to receive remuneration from manufacturers and importers of blank audio recording media in respect of the reproduction for private use of (a) a musical work embodied in a sound recording; (b) a performer’s performance of a musical work embodied in a sound recording....” Section 82 (1) states that manufacturers and importers of blank audio tapes will be liable to a levy, and section 83 states that the relevant collective societies will make applications to the Copyright Board as to the appropriate amount of the levy.

The revised act would make home copying for private use “fair use.” The levy would be paid to composers from virtually every country, including the US (by treaty), and performers and producers from Canada and other countries designated by the Minister of Industry. The levy only applies to *musical* works, and is to be determined by the Copyright Board. There is no provision for home copying through a computer, although Phase III of copyright reform will likely deal with that question.

Neither the Economic Council of Canada (1971) nor Keyes and Brunet (1977) raised the issue of a blank tape levy. In his economic analysis of the problem Keon (1982) states that the introduction of the

levy would be “premature.” He admits that home taping has a negative effect on the purchase of original recordings, but that this effect is very small. He recommends:

It ... seems premature to introduce a home taping compensation levy. The present prohibitions against home taping are, however, unenforceable. To have the Copyright Act constantly breached by people recording at home is obviously undesirable. ...the most equitable and legally pure solution would be immediately to legitimize home taping activity. Furthermore, the Act should clearly state that payments, in the form of a levy on blank tapes, for the activities that fall within this exemption may be introduced. A levy should be introduced only when the reduction in Canadian copyright owners’ revenues outweighs the costs and problems associated with the collection and distribution of funds from such a scheme. (from the executive summary)

The *Charter of Rights for Creators* advocated a blank tape levy. While its authors made no claim as to how high the losses might be to the creators and record makers, they wrote “...it is clear to the Sub-Committee that whatever the amount of damage being done, home copying is a reproduction of a work protected by copyright for which creators receive no compensation. The Sub-Committee is of the view that payment should be made” (Canada, House of Commons, p. 74). Although the Economic Council did not deal with the question of home taping, it did, in its general principles for the study of copyright, prescribe that analysts should enquire into the aims of copyright as something prior to what the current law of copyright might happen to be. In other words, that “home copying is a reproduction of a work protected by copyright” is true only if we choose a law which makes it so, instead of defining home copying as an exception.

Parallel Importation

Parallel importation occurs when books which have been legitimately published in another country are

imported into Canada without the consent of the Canadian rights owner. Canadian publishers and distributors do not currently have the right to prevent such importation (authors *do* have the right at present); C-32 would give them this right, and they could seek remedies akin to remedies available to other copyright owners.

Canadian distributors who wish to enforce such rights will have to provide an "acceptable level of service" to bookstores and libraries to be eligible for this protection. The law applies only where there is an exclusive Canadian distributor; otherwise imports of books are allowed without hindrance. Exceptions are non-profit libraries, archives, museums, educational institutions, and government, as well as two copies of any book for personal use. Used books are also exempt, except for textbooks (an exception introduced at committee). This provision is not really about copyright, since it concerns "books" rather than the author's expression contained therein. It is protection for distributors, who, while owning the Canadian distribution rights, may not be Canadian.

The ECC was against restricting imports, even by authors. Their complaint was that book prices in Canada were too high (this was 1971), and that the monopoly power of exclusive distributors was being exploited. An argument made at the time, which has resurfaced from supporters of the provision in C-32, is that the profits earned by Canadian distributors on popular works are used by them to cross-subsidize non-profitable works by Canadian authors. In response to this the ECC noted that (i) evidence in support of this claim is sketchy at best, and (ii) in any case, it was not clear whether using copyright law to prevent parallel imports was the most effective way to support Canadian authors. Finally, noting the fact that the creation of cultural goods requires access to works previously created, the council asked "How does it further the education of Canadian youth and the development of Canadian culture and civilization, which still depend on good informational links with their nearer foreign

relations, to place such a high private tax on an important segment of reading matter?" (p. 154).

An economic study of this issue was done as part of the series commissioned by Consumer and Corporate Affairs. Blomquist and Lim (1981) were against the prohibition of parallel imports; they found even the limited restrictions in place at the time caused significantly higher book prices in Canada, and that much of the return from those higher prices went to foreign nationals. Keyes (1996), a strong defender of creators' rights in his earlier report with Brunet, is on this issue in agreement with the economists; in his view it benefits neither creators nor readers.

Exceptions

Bill C-32 clarifies fair use for persons with perceptual disabilities, non-profit educational institutions, libraries, archives, and museums. The details of the exceptions are too numerous to be listed here; they were heavily amended at committee stage, generally in favour of creators' groups.

While it may have been expected that there would be some degree of "log-rolling" in the creation of the bill, with some aspects appealing to creators' representatives and some to users, it's not clear that this in fact took place. The creators who "win" on the issues of neighbouring rights and the blank tape levy are not the same creators who "lose" with the exceptions. For that reason the Writers' Union of Canada was very critical of the exceptions provision of the bill at committee stage. Spokesperson Margaret Atwood at the committee hearings said:

It is too often forgotten that intellectual property is property and that taking it without permission is theft. ...

In 1988 a previous government passed legislation to facilitate collective administration of copyright. Now Bill C-32 has introduced exceptions that will take away much of that benefit.¹²

The major representatives of the educational sector and libraries were pleased with the exceptions in Bill C-32 as originally drafted.

In committee stage the exceptions were reduced, especially regarding any reproduction or display of material that is "commercially available." This term now means that authorization for its use is available from the Collective Society, not that it is necessarily on the market. For example, prior to committee amendments, educational institutions would have been able to make copies for showing on an overhead projector *if* the work were not commercially available. But with the broadening of the meaning of that term, the exception can only be used in limited circumstances. In addition, copies will be exempt for *tests* or *examinations*, but not for *assignments*, which were exempt in the original draft.

CONCLUSION

The press release from the Government of Canada on the day Bill C-32 received first reading in the House of Commons was headed: "Copyright Reform Bolsters Canadian Culture." Does it?

The law-and-economics method seeks a regime which maximizes social wealth. Where studies in this mode were carried out in Canada, they were generally sceptical of provisions which appear in C-32: neighbouring rights, the levy on blank tape, and prohibition on parallel importation. The reason is that, in general, strengthening creators' rights in copyright increases social welfare only if it will translate into more works being created (and even then the increased protection is not necessarily justified). But no analysis has yet demonstrated that any provisions in Bill C-32 will lead to the creation of more works.

Even if we do not adopt the Chicago approach, but instead take the view that Canadian cultural industries are worth "bolstering" even at a net monetary loss to society, it is not at all clear that C-32 puts in place a system of copyright better designed to achieve that.

Phase III of copyright reform, which will deal with the pressing, and very complex, issue of the Internet, deserves systematic analysis of the ends and means of copyright law. In Bill C-32 what systematic analysis existed was ignored.

NOTES

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¹Alexander Pope, in 1711. Cited by Rose (1993, p. 6) from *The Poems of Alexander Pope*, ed. John Butt et al. (London: Methuen, 1938-68), volume 1, pp. 272-73. Cited by Rose (1993, p. 6).

²See, for example, Hurt and Schuchman (1966, pp. 423-24); Breyer (1970, pp. 289-91); or Burrows (1994, p. 100).

³The Phase I amendments give explicit protection to the rights of paternity and integrity, give the same term as that for economic interest (life of the author plus 50 years), and establish the same remedies for infringement as with violations of the economic interest.

⁴Hovenkamp (1995) provides a useful recent survey. See Baker (1975) or Coleman (1984) for criticism of this approach to legal analysis.

⁵See, for example, Besen and Kirby (1989); Besen, Kirby and Salop (1992); Besen and Raskind (1991); Burrows (1994); Dam (1995); Deardorff (1995); Hurt and Schuchman (1966); Johnson (1985); Koboldt (1995); Landes and Posner (1987; 1989); Novos and Waldman (1984); Posner (1992a and 1992b).

⁶Of course the influences on the first laws of copyright are more complex than those set out here. See Cornish (1995); Gordon (1989); Hammond (1991); and Rose (1993) for further discussion.

⁷This assumption can be challenged; Coase (1974) found that lighthouses once existed without the public

sector many textbooks would assume necessary for this classic example of a "public good," and Breyer (1970) seems to be making the case that copyright may just be another one of Coase's lighthouses.

⁸See "Copyright Law May Spark New Canada-U.S. Trade Fight," *Globe and Mail* (Toronto) 27 April 1996, p. B1.

⁹There are differences, however. Copyright for composers has a term of the life of the composer plus 50 years, while the term for performers' rights is only 50 years from the date of the recording. Also note that the United States is part of the treaty that covers composers.

¹⁰The extent to which airplay influences sales of recordings remains a point of contention between the recording companies and broadcasters, and has become a well-publicized dispute during the passage of C-32. See "Airplay Influential, Survey Finds," *Globe and Mail* (Toronto) 30 May 1996, p. C1.

¹¹Alexander and Lalonde (1996) discuss the problems of devising a national copyright policy when there are two languages, and performers who speak one or the other language tend to operate in very separate markets.

¹²Standing Committee on Canadian Heritage, meeting no. 39, 21 November 1996.

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