

**Submission to the
Legislative Committee on Bill C-32**

Entertainment Software Association of Canada

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Introduction

The Entertainment Software Association of Canada (ESAC) welcomes the opportunity to make a formal submission to the special Legislative Committee on Bill C-32, *the Copyright Modernization Act* (the “Bill”).



ESAC is the voice of the dynamic and growing video and computer game industry in Canada which employs over 14,000 people nationwide. Association members include the nation’s leading entertainment software developers and publishers including **Electronic Arts, Ubisoft, Activision Blizzard, Microsoft Canada, Nintendo of Canada, Sony Computer Entertainment Canada, Disney Interactive Studios, THQ, Warner Brothers Interactive Entertainment** and **Take Two Interactive**, as well as distributors such as **Solutions2Go** and **Team One Marketing**. In 2009, Canada’s video game industry accounted for more than \$2 billion in retail sales of entertainment software and hardware (and billions more worldwide) and contributed over \$1.7 billion in direct economic activity to the Canadian economy.



***Modernizing Copyright:
Effectively protecting the cornerstone of the digital economy***

Modernizing Canada’s aging copyright regime for the digital age is critical to the development of a successful market-driven digital economy. For content creators, the current lack of clarity and certainty with regard to the protection of intellectual property is tantamount to operating in the digital Wild West.

A robust regime that provides adequate and effective protection for creative works in the digital environment benefits both businesses and consumers by providing greater certainty in digital marketplace and permitting market forces to operate properly. By protecting the considerable time, money, labour and creativity that creators and companies invest in innovative and creative new digital works, a modern copyright regime will spur investment in the development of new digital products, services and distribution methods and support a diverse range of new and innovative digital business models, fostering legitimate competition, more consumer choice and lower prices.

“Canadians deserve an equal chance to compete in this increasingly global marketplace and should be permitted to benefit from intellectual property protections that are at least as rigorous as those enjoyed by our major trading partners.”

Ultimately, a strong copyright protection regime allows businesses to choose the best way to make their own content available, and contribute to the development of a vibrant, healthy, market-driven digital economy. Canadians deserve an equal chance to compete in this increasingly global marketplace and should be permitted to benefit from intellectual property protections that are at least as rigorous as those enjoyed by our major trading partners.

The video game industry strongly supports Bill C-32, *the Copyright Modernization Act*, subject to certain technical changes

The Canadian video and computer game industry strongly supports the Bill, subject to certain technical changes intended to give effect to the principles and policy enunciated in the Bill and that are discussed in greater detail below. In our view, the Bill is an important step towards the modernization of Canada’s *Copyright Act* for the digital age and proposes measures that will bring the *Act* in line with advances in technology and current international standards of intellectual property protection, which, in turn, will protect and foster job creation, promote innovation and attract new investment to Canada.

Technological Protection Measures

In particular, the Bill affords strong protection against the circumvention of Technological Protection Measures (TPMs) used to protect copyrighted works, specifically prohibiting (a) the act of circumventing an access control (but not a copy control), (b) trafficking in circumvention devices (such as modchips or game copiers), and (c) offering circumvention services.

The video game industry makes extensive use of sophisticated TPMs to protect its works which are fundamentally undermined by the widespread availability of circumvention devices and services in Canada. The Bill provides urgently needed measures to pursue those who facilitate piracy by trafficking in circumvention

devices and services, and we applaud and very strongly support these provisions. However, we are concerned that the breadth of the new exceptions for circumvention may undermine the effectiveness of the trafficking and services provisions.

TPM - Quick Facts

- TPMs are dismissively characterized as "digital locks" and considered solely in the context of music CDs or movie DVDs
- For the video game industry TPMs play an increasing critical role in new and emerging platforms and distribution channels for content online
- TPMs facilitate the development new products, services and distribution methods for media in a digital environment
- Examples of services that use TPMs: Spotify (streaming radio and music services), Hulu or Netflix (film and television platforms) and Xbox Live, Playstation Network and Steam

TPMs and the video game industry

While often dismissively characterized as "digital locks" and considered solely in the context of music CDs or movie DVDs, in actual fact TPMs play an increasing critical role in new and emerging platforms and distribution channels for content online. From new streaming radio and music services such as Spotify, to film and television platforms such as Hulu or Netflix, to gaming platforms such as Xbox Live, Playstation Network and Steam, all of these services are supported by a wide range of TPMs that not only help prevent piracy and provide viable revenue streams for creators, but also enable a range of value-added features (eg rental vs purchase).

In this manner TPMs actively facilitate the development new products, services and distribution methods for media in a digital environment, allowing creators to determine how their works will be exploited and providing consumers with a wide array of differentiated products to choose from that are tailored to consumer preferences.

Strong anti-circumvention measures such as those contained in the Bill are essential, not only to prevent piracy and allow creators to determine how their works will be exploited, but also to maintain the integrity of the nascent digital marketplace



Firm but Fair TPM Provisions

It has been suggested that the strong measures contained in the Bill are one of the most "restrictive" or "draconian" implementations of anti-circumvention legislation worldwide. This is simply not true.

First, while the Bill does contain robust TPM provisions, it also includes a range of exceptions to the prohibitions on circumvention to allow for certain generally accepted activities, such as interoperability, encryption research, privacy and for persons with perceptual disabilities. Unlike many other jurisdictions these exceptions generally apply not just the act of circumvention but also to trafficking in circumvention devices and offering circumvention services, which makes them considerably broader than those available elsewhere (to an extent which raises certain concerns, discussed below).

The Bill also permits the Government to add new exceptions by regulation, which is a far more flexible approach than a mandatory formal hearing process.

Furthermore, the Bill limits the liability of persons engaging in certain types of circumvention. For instance, the Bill provides that no statutory damages are available against an individual who circumvents "for his or her own private purposes", thus limiting potential liability to actual, provable harm caused by the circumvention activity.

In combination, these exceptions and liability limitations provide much greater flexibility than equivalent legislation in many jurisdictions, including our major trading partners

Circumvention of TPMs

Some have also argued that circumvention should only be prohibited if it is for the purposes of infringement. While this may sound attractive on the surface, it is important to know that this type of limited prohibition will not allow rights holders to "go after the bad guys" and would be of virtually no assistance in our ongoing efforts to stem the flow of video game piracy and support emerging models and platforms.

Simply put, lax anti-circumvention prohibitions create massive loopholes and make it extremely difficult for either rights holders or law enforcement to pursue legal action against those "wealth-destroyers" who traffic in circumvention devices (such as mod chips or game copiers) or offer circumvention services, it permits offenders to escape liability by simply denying their intention to infringe a copyright. This poses massive problems for rights holders in terms of level of proof required to overcome such a claim, thus calling the effectiveness of such an anti-circumvention provision into question.

"Lax anti-circumvention prohibitions create massive loopholes and make it extremely difficult for either rights holders or law enforcement to pursue legal action against those "wealth-destroyers" who traffic in circumvention devices"

Furthermore, it would be an open question of whether such a limited anti-circumvention provision would even apply to traffickers or service providers, as the very nature of "modding" is such that the act of circumventing TPMs and the act of copyright infringement may be distinct acts performed by separate individuals.

Finally, it is also worth noting that it is debateable as to whether such limited protection for TPMs would actually satisfy our international treaty obligations or alleviate concerns raised by our major trading partners.

We are concerned that the broad nature of some of the circumvention exceptions contained in the Bill may have a similar impact on the effectiveness of the trafficking and services prohibitions and impair our ability to pursue those facilitating piracy.

Accordingly, we strongly support the TPM provisions contained in the Bill, and urge the Committee not to weaken them in a manner that would render them unusable and to tighten exceptions to prevent bad actors from escaping liability



Enabling Infringement

The Bill also permits rights holders to pursue legal action against those who facilitate online piracy through the “enabling infringement” provision, making it an infringement to provide a service that the person knows or should know is “designed primarily to enable acts of copyright infringement”. **The video game industry strongly supports provisions that allow rights holders to pursue legal action against online pirate sites and services who knowingly facilitate, encourage or contribute to infringement (such as illicit file-sharing services or cyberlockers)**, and supports the provision contained in the Bill subject to minor changes that give effect to its intent.

ISP Responsibility

We are disappointed that the Bill does not contain further measures to address online piracy that we have advocated for, such as a “notice-and-take down” regime for infringing content and additional incentives for ISPs to co-operate with copyright owners in addressing repeat infringers, and remain concerned that the “notice-and-notice” regime proposed in the Bill will not effectively address the rapidly growing problem of online piracy in Canada. However, we recognize that the Bill reflects a difficult compromise between the diverse interests of many stakeholders, and in light of the critical tools the Bill does provide against those who enable and facilitate piracy, and in the interests of moving forward with this urgently needed legislation, we do not intend to raise this matter further with the Committee.

Suggested Amendments

However, the Bill is not perfect and in our view is in need of tightening in order to give full effect to the policy and principles underlying the Bill, avoid clearly unintended consequences and protect the rights of Canadian creators to control access to their work. That said, we believe that most of these issues can be easily remedied with fairly narrow, technical changes to the Bill.

To that end, ESAC proposes specific changes to following provisions:

- 1. Interoperability Exception (41.12)**
- 2. Enabling Infringement (27(2.3))**
- 3. User Generated Content Exception (29.21)**
- 4. Private Copying (29.22) and Back up Copying Exceptions (29.24 & 30.6),**
- 5. Statutory Damages (38.1)**

1. Interoperability Exception (41.12)

Summary

The Bill contains both strong protection against the circumvention of TPMs, and a range of exceptions, including an exception for "interoperability". The "interoperability" exception permits (a) circumvention of a TPM for the "sole purpose of obtaining information that would allow the person to make the program and any other program interoperable", (b) offering services for the purpose of "making a computer program and another computer program interoperable", and (c) manufacturing, importing or providing a technology, device or component for the purpose of "making the computer program and any other computer program interoperable", provided that (i) they use or provide the technology, device or component only for that purpose and (ii) that the person to whom it is provided uses it only for that purpose. However, the exception does not apply "if, for the purposes of making the computer program and any other computer program interoperable, the person does an act that constitutes an infringement of copyright".

Issues

- The current language of this exception (and others) is overly broad and could easily be abused by hackers who offer circumvention devices and services to the public, rationalize their piracy-enabling activities by claiming that their circumvention devices and services permit the use of non-infringing software on consoles, handhelds, and other closed platforms, and deny any knowledge of or responsibility for the widespread piracy that results.
- The application of this exception (and others) to the act of circumvention as well as trafficking in circumvention devices and offering circumvention services is inconsistent with the approach adopted in most other jurisdictions. Generally, exceptions only apply to the act of circumvention in order to avoid abuse by those facilitating piracy.

Recommendation

i. Avoid abuse by those trafficking in circumvention devices and offering circumvention services by limiting the exceptions to the act of circumvention

ii. Ensure that the interoperability exception will not apply if a computer program made interoperable by virtue of the exception is an infringing copy



2. Enabling Infringement (27(2.3))

Summary

In order to permit rights holders to pursue legal action against those who facilitate online piracy, the Bill makes it an infringement of copyright to provide a service that the person knows or should know is “designed primarily to enable acts of copyright infringement” if an infringement occurs as a result of use of the service. The Bill also includes an open-ended set of factors in order to guide courts in determining when this new form of "enabling" liability will apply.

Issue

- In the current language, the provision *only* applies to services that are *designed primarily* to enable online piracy. Not only would it be very difficult to establish if a given online service was deliberately designed for the purpose of enabling piracy, but services that are clearly operated to enable piracy but may not have been designed for this purpose would not be captured.
- While it is clear that any "network services provider" (ISP) or "information location tool" (search engine) would be liable for enabling infringement, it is not clear that those who provide hosting services or caching services would similarly be liable. This appears inconsistent with the purpose and framework of the Bill.
- The Bill does not allow copyright owners to recover statutory damages against enablers, and enablers would only be liable for the actual economic harm that it causes, which the copyright owner would have to prove. Establishing actual harm for copyright infringement is extremely difficult (which is precisely why we have statutory damages) and this severely undermines the effectiveness of the provision.

Recommendation

i. **Amend the enabling provision to ensure that it applies to services that are "designed or operated" primarily to enable acts of infringement**

ii. **Amend to clarify that the enabling provision applies to hosting and caching service providers, and to ensure that copyright owners can elect to obtain the full range of legal remedies against enablers, including statutory damages**

3. User Generated Content Exception (29.21)

Summary

The Bill includes a new exception to infringement for “user-generated content” such as mash-ups. This exception would permit individuals to use any existing works to create new works, provided that the use of the new work (a) is for "non-commercial purposes" and (b) does not have "a substantial adverse effect" on the market for the existing work.

Issues

- While the video game industry generally takes a permissive approach to user-generated content, this exception is so broad that it essentially permits widespread appropriation of existing works.
- It would allow anyone to copy all of the designs, art assets and even programming code from a game and release a "copycat" game for free on the Internet. This would be particularly damaging for casual, mobile and social games, which are easier to replicate than traditional console games.
- Similarly, the exception would essentially allow anyone to reverse engineer and extract the underlying technologies and code from a game (such as a game engine) and offer it for free on the Internet. This would be particularly damaging for online games, as it would permit hackers to copy the online elements of a game and offer equivalent online services for free (referred to as "server piracy").
- It is unclear what would qualify as a non-commercial purpose. Many new and emerging methods of exploiting works online might not be considered "commercial" (thus would gain the benefit of the exception). Moreover, while the user is not permitted to distribute for "commercial purposes", this limitation does not extend to platforms or services hosting the new work and they would be permitted to exploit it for commercial purposes (e.g. sell advertising).
- In order to disqualify a copycat from the exception, a copyright owner would have to prove that the dissemination of that specific new work is having "a substantial adverse effect" on the market for their existing work. This will be highly prejudicial to copyright owners, as it will turn most copyright infringement claims into a dispute over the economic impact of the infringing work on the market, and it will be virtually impossible for the copyright owner to establish the harm caused.



Recommendation

i. Amend to ensure that user-generated content provision is significantly narrowed in order to avoid unintended consequences

ii. Apply the secondary infringement standard, and use and dissemination should only be permitted when it does not affect prejudicially the copyright owner

iii. Limit factors such as the "fairness" factors under fair dealing and a requirement that the new work be "transformative" should be added to avoid permitting wholesale appropriation

4. Private Copying (29.22) and Back up Copying Exceptions (29.24 & 30.6)

Summary

The Bill includes several new overlapping exceptions. The Bill allows making copies for "private purposes", provided that (a) the source is legally obtained and not infringing, (b) no TPM is circumvented, and (c) the copy is not given away. The Bill also permits making copies "solely for back-up purposes", subject to similar limitations. Finally, the Bill also expands the existing back-up copy exception for computer programs, which permits making a copy of a computer program for to adapt, modify, convert or translate the computer program or for "back-up purposes" provided they destroy the back-up copy when they cease to own the source copy.

Issue

- Making a back-up copy for personal use would appear to qualify as a "private purpose". Given this, it is unclear why back-up copies require their own, distinct exception, and implies that making a back-up copy would not be a "private purpose".
- Both the new private copying and back-up copy exceptions apply to all classes of works, including computer programs. Computer programs are also subject to a second back-up copy exception that are not subject to the same limitations. Consequently, computer programs are subject to two distinct exceptions with inconsistent requirements.
- Both the new private copying and back-up copying exceptions specify that the copy cannot be given away, but do not restrict other methods of transfer (selling, leasing, renting, lending, etc.)

Recommendations

i. Amend to clarify the application of exceptions, avoid unnecessary and redundant overlap, and ensure that similar conditions apply to all classes of works and that computer programs obtain the same level of protection as other classes of works

- This can most easily be accomplished by clarifying the new private copying and eliminating the back-up copying exceptions as redundant

ii. Narrow the private copying exception, and clarify what would qualify as a "private purpose"



5. Statutory Damages (38.1)

Summary

Under current Canadian copyright law, copyright owners may elect to obtain "statutory damages" against an infringer, which is an amount set by the court within a range of \$200 to \$20,000 per infringement. The Bill will significantly reduce statutory damages where individuals infringe copyright for "non-commercial purposes". For these types of infringements, statutory damages can be a range between \$100 and \$5000, which apply for all infringements involved in the proceedings. Furthermore, if a plaintiff elects statutory damages, that plaintiff is barred from obtaining statutory damages for any "non-commercial" infringements that are not at issue in the proceedings and that were done before proceedings commenced, and all other plaintiffs are barred from electing statutory damages for those infringements.

To further limit the amount of damages, the provisions also sets out a series of factors courts are to consider when setting the amount, such as the need for an award to be proportionate, the hardship of the award on the defendant, whether the infringement was for private purposes and the impact on the plaintiff.

Issue

This new multi-tiered approach to statutory damages will significantly undermine the ability of copyright owners to pursue legal action for online infringements:

- While clearly intended to limit damages payable by private individuals who infringe copyright for personal purposes, the provision applies to all who infringe for "non-commercial purposes", including those who traffic in circumvention technologies or offer circumvention services. Most hackers, "warez" groups and other enablers of online piracy do not do so for commercial gain, but for non-commercial benefits such as reputation, and would also get the benefit of limited damages regardless of the willfulness of their activities or level of harm they cause.
- The damage award applies to all infringements, so it creates a perverse incentive to infringe as much as possible in order to obtain the full benefits of the cap on damages.
- Similarly, as only the first plaintiff is permitted to claim statutory damages for all infringements, it creates a perverse incentive for copyright owners to commence lawsuits as early and as often as possible to maximize the potential damage award.
- Historically, it is extremely rare for courts to award the maximum statutory damages, so it is unlikely that the maximum of \$5000 will be awarded. Moreover, the amount of the award is subject to additional limiting factors that will further reduce it.
- To protect private individuals from significant damage awards where appropriate, the Bill already contains various factors that courts will be required to consider when determining the amount of the award and the court has discretion to lower the award below the statutory minimum in

appropriate circumstances. This will protect private individuals from significant damage awards where appropriate.

Recommendation

i. Amend to eliminate the separation of damages into "commercial" and "non-commercial" tiers. Emphasis should be placed on the factors the court must consider when determining the amount of the award to ensure private individuals are properly protected

ii. Alternatively, if it is necessary to impose a pre-determined cap on statutory damages, it should apply only to individuals who infringe copyright for "personal purposes"

iii. Apply the damage award on a per infringement basis and not apply to *all* infringements in order to avoid the perverse incentives created by this system

