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After a lengthy period of consultation, the Government has introduced Bill C-32, an act to amend the *Copyright Act* (the “Bill”), formally referred to as the *Copyright Modernization Act*, on June 2, 2010. It appears from the preamble to the Bill that one of the primary purposes in introducing it, is compliance with Canada’s international obligations under the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty.

The Bill is in the First Reading stage and will progress through Parliament in the next few months. No doubt it will be subject to significant debate and potential changes.

The following is a summary of some of the proposed amendments:

A New Distribution Right

The Bill adds a new distribution right. Copyright will include the new sole right in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner.

Ownership of Copyright in Photographs and Portraits and Related Exception

The *Copyright Act* (the “Act”) will be amended by deleting section 10 and subsection 13(2) so that a photographer or painter of a commissioned work will now be the first owner of the copyright in that work.

At the same time a new exception will be added in favour of the individual who commissioned the work. It will not be an infringement of copyright for an individual to use for private or non-commercial purposes, or permit the use of for those purposes, a photograph or portrait that was commissioned by the individual for personal purposes and made for valuable consideration, unless the individual and the owner of the copyright in the photograph or portrait have agreed otherwise.

Extended Rights for Performer’s Performances and Sound Recordings

A performer’s copyright in a performer’s performance will be extended to include the sole right to make a sound recording of a performance available to the public by telecommunication and to sell or otherwise transfer ownership of the sound recording in the form of a tangible object. The same change will be made for a sound recording maker’s copyright in a sound recording.

Copyright Reform

Moral rights will be made available to a performer of a live aural performance or a performance fixed in a sound recording.

Extended Liability for Secondary Infringement

It will be an infringement of copyright for a person to provide, by means of the Internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

Subsection 27(2) of the Act dealing with secondary infringement will be amended to provide that for greater certainty, a copy made outside Canada does not infringe copyright under the subsection if, had it been made in Canada, it would have been made under a limitation or exception contained in the Act.

Broadened Fair Dealing Exception

The exception for fair dealing will be amended so that fair dealing for the purpose of education, parody or satire will not infringe copyright.

A New Exception for Non-commercial User-generated Content

A new exception for non-commercial user-generated content will be available. It will not be an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

- The use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
- The source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
- The individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
- The use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

Copyright Reform

A New Exception for Reproduction for Private Purposes

An exception relating to a reproduction for private purposes will be available. It will not be an infringement of copyright for an individual to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if

- The copy of the work or other subject matter from which the reproduction is made is not an infringing copy;
- The individual legally obtained the copy of the work or other subject-matter from which the reproduction is made, other than by borrowing it or renting it, and owns or is authorized to use the medium or device on which it is reproduced;
- The individual, in order to make the reproduction, did not circumvent, a technological protection measure or cause one to be circumvented;
- The individual does not give the reproduction away; and
- The reproduction is used only for private purposes.

The exception does not apply to the reproductions of musical work embodied in a sound recording, performance of a musical work embodied in a sound recording or a sound recording relating to the above, made onto an audio recording medium as defined by the Act. This existing exception continues to be in place.

A New Exception for Fixing Signals and Recording Programs for Later Listening or Viewing

An exception relating to time shifting will be available. It will not be an infringement of copyright for an individual to fix a communication signal, to reproduce a work or sound recording that is being broadcast or to fix or reproduce a performer's performance that is being broadcast, in order to record a program for the purpose of listening to or viewing it later, if

- The individual receives the program legally;
- The individual, in order to record the program, did not circumvent a technological protection measure or cause one to be circumvented;
- The individual makes no more than one recording of the program;
- The individual keeps the recording no longer than is reasonably necessary in order to listen to or view the program at a more convenient time;
- The individual does not give the recording away; and
- The recording is used only for private purposes.

Copyright Reform

A New Exception for Backup Copies

An exception relating to backup copies will be available. It will not be an infringement of copyright in a work or other subject-matter for a person who owns — or has a licence to use — a copy of the work or subject-matter (the “source copy”) to reproduce the source copy if

- The person does so solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable;
- The source copy is not an infringing copy;
- The person, in order to make the reproduction, did not circumvent a technological protection measure or cause one to be circumvented; and
- The person does not give any of the reproductions away.

Broadened Exceptions for Educational Institutions

Section 29.4 relating to reproduction for instruction will be broadened. It will not be an infringement of copyright for an educational institution or a person acting under its authority for the purposes of education or training on its premises to reproduce a work, or do any other necessary act, in order to display it.

A new exception will be made available for education over the Internet. It will not be an infringement of copyright for an educational institution or a person acting under its authority to communicate a lesson to the public by telecommunication for educational or training purposes, if that public consists only of students who are enrolled in a course of which the lesson forms a part or of other persons acting under the authority of the educational institution.

A related exemption will be available to an educational institution that has a reprographic reproduction licence under which the institution is authorized to make reprographic reproductions of works in a collective society’s repertoire for an educational or training purpose. It will not be an infringement of copyright for the institution to:

- Make a digital reproduction — of the same general nature and extent as the reprographic reproduction authorized under the licence — of a paper form of any of those works;
- Communicate the digital reproduction by telecommunication for an educational or training purpose to persons acting under the authority of the institution.

Finally, an educational institution may reproduce, communicate by telecommunication or perform to students for educational or training purposes, a work or other subject-matter that is available through the Internet. The exception does not apply unless the source is mentioned or if the work or other subject-matter — or the Internet site where it is posted — is protected by a technological protection measure that restricts access to the work or other

Copyright Reform

subject-matter or to the Internet site or a clearly visible notice — and not merely the copyright symbol — prohibiting that act is posted at the Internet site where the work is posted or on the work itself.

Extended Exceptions for Computer Programs

The existing exception in section 30.6 of the Act relating to the reproduction of computer programs will be amended to extend it to those who have a licence to use a copy of a computer program. In addition, exceptions will be added relating to reproductions for the purpose of making the program and any other computer program interoperable, encryption research or assessing the vulnerability of the computer, system or network or of correcting any security flaws.

A New Exception for Temporary Reproductions for Technological Processes

A new exemption for temporary reproductions for technological processes will be available. It will not be an infringement of copyright to make a reproduction of a work or other subject-matter if

- The reproduction forms an essential part of a technological process;
- The reproduction's only purpose is to facilitate a use that is not an infringement of copyright; and
- The reproduction exists only for the duration of the technological process.

New Exceptions for Network Services

Three new exceptions are to be available. First, a person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or digital network will not, solely by reason of providing those means, infringe copyright in that work or other subject-matter. The exception does not apply to a service that the person knows or should have known is designed primarily to enable acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or digital network as a result of the use of that service.

Second, a person described above, who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient will not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

Finally, a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital

Copyright Reform

memory in which another person stores the work or other subject-matter will not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

Notice Provisions for Providers of Network Services or Information Location Tools

A “notice and notice” system will be implemented relating to providers of network services, digital networks or information location tools. “Information location tool” means any tool that makes it possible to locate information that is available through the Internet or another digital network and presumably would include search engine operators.

An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides such services in proscribed form. A provider who receives the notice must

- Without delay forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and
- Retain records that will allow the identity of the person to whom the electronic location belongs to be determined and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.

The copyright owner’s only remedy against a person who fails to perform his or her obligations concerning the matters set out above will be statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.

In any proceedings for infringement of copyright, the owner of the copyright in a work or other subject-matter will not be entitled to any remedy other than an injunction against a provider of an information location tool that is found to have infringed copyright by making a reproduction of the work or other subject matter or by communicating that reproduction to the public by telecommunication.

A New Exception for the Benefit of Persons with Print Disabilities

An exception will be added for the benefit of persons with a print disability. A “print disability” is defined to mean a disability that prevents or inhibits a person from reading a literary, musical or dramatic work in its original format. Subject to limitations set out in the Act and proposed regulations, it will not be an infringement of copyright for a non-profit

Copyright Reform

organization acting for the benefit of persons with a print disability to make a copy, in a format specially designed for persons with a print disability, of a work and to send the copy to a nonprofit organization in another country for use by persons with print disabilities in that country.

Statutory Damages

The exposure to statutory damages for infringement for non-commercial purposes will be reduced. In this context the range of statutory damages will be in a sum of not less than \$100 and not more than \$5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter.

New Protection for Technological Protection Measures

Measures to provide protection and remedies against the circumvention of technological protection measures will be added to the Act. “Technological protection measure” means any effective technology, device or component that, in the ordinary course of its operation,

- Controls access to a work, to a performer’s performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or
- Restricts the doing — with respect to a work, to a performer’s performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.

No person shall circumvent a technological protection measure, offer services which are primarily for the purposes of circumventing a technological protection measure or manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component which is designed or produced primarily for the purposes of circumventing a technological protection measure.

The owner of the copyright in a work, a performer’s performance fixed in a sound recording or a sound recording, subject to exceptions set out in the Act and any regulations, will be entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against the person who contravened the above prohibition. However, the owner will not be entitled to recover statutory damages from an individual who circumvented a technological protection measure only for his or her own private purposes.

The prohibition will not apply if a technological protection measure is circumvented for:

- The purposes of an investigation related to the enforcement of any Act of Parliament or any Act of the legislature of a province, or for the purposes of activities related to the protection of national security;

Copyright Reform

- The sole purpose of obtaining information that would allow the person to make a computer program and any other computer program interoperable;
- Encryption research;
- The only purpose of circumventing the technological protection measure is to verify whether it permits the collection or communication of personal information and, if it does, to prevent it;
- The sole purpose of, with the consent of the owner or administrator of a computer, computer system or computer network, assessing the vulnerability of the computer, system or network or correcting any security flaws;
- The sole purpose of making a work, a performer's performance fixed in a sound recording or a sound recording perceptible to the person with a perceptual disability;
- By a broadcasting undertaking that circumvents a technological protection measure for the sole purpose of making an ephemeral reproduction of a work, a performer's performance fixed in a sound recording or a sound recording;
- The sole purpose of gaining access to a telecommunications service by means of the radio apparatus;

It is also proposed to add criminal remedies relating the circumvention of technological protection measures. Every person, except a person who is acting on behalf of a library, archive or museum or an educational institution, will be guilty of an offence if he knowingly and for commercial purposes contravenes section 41.1 and is liable

- On conviction on indictment, to a fine not exceeding \$1,000,000 or to imprisonment for a term not exceeding five years or to both; or
- On summary conviction, to a fine not exceeding \$25,000 or to imprisonment for a term not exceeding six months or to both.

New Protection for Rights Management Information

Measures to provide protection and remedies against the removal or altering of rights management information in electronic form will also be added to the Act. "Rights management information" means information that

- Is attached to or embodied in a copy of a work, a performer's performance fixed in a sound recording or a sound recording, or appears in connection with its communication to the public by telecommunication; and
- Identifies or permits the identification of the work or its author, the performance or its performer, the sound recording or its maker or the holder of any rights in the work, the performance or the sound recording, or concerns the terms or conditions of the work's, performance's or sound recording's use.

Copyright Reform

No person shall knowingly remove or alter any rights management information in electronic form without the consent of the owner of the copyright in the work, the performer's performance or the sound recording, if the person knows or should have known that the removal or alteration will facilitate or conceal any infringement of the owner's copyright or adversely affect the owner's right to remuneration under section 19 of the Act.

The owner will be, subject to the Act, entitled to all remedies — by way of injunction, damages, accounts, delivery up and otherwise — that are or may be conferred by law for the infringement of copyright against a person who contravenes the prohibition and those who subsequently deal with the protected subject matter who know or should have known that the rights management information has been removed or altered in a way that would give rise to a remedy under the prohibition.