

Regulatory Proposals

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Intellectual Property Policy Directorate

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Book Importation Regulations

Description

Bill C-32, an Act to amend the Copyright Act, received Royal Assent on April 25, 1997. This bill introduced additional restrictions on the parallel importation of printed books. Parallel importation refers to books which were legitimately produced in their country of origin but which have been imported into Canada without the consent of the rights owner in Canada. Bill C-32 contains provisions which greatly increase the ability of rights holders in Canada to protect their exclusive distribution rights in the Canadian market. Previously, the Act allowed only copyright owners and exclusive licensees to limit the parallel importation of printed books. Bill C-32 extends this right to exclusive distributors. Exclusive distributors are those who have received acquired rights of exclusive distribution in Canada but who do not have property right in the book, e.g. they do not have a right to authorize the reproduction of the book.

As a result of the amendments made in Bill C-32, there are two new provisions in the Copyright Act which allow rights holders in Canada to protect their exclusive distribution rights in the Canadian market. One gives the rights holder certain abilities to sue persons after a book has been imported without authorization. The other allows the rights holder and the exclusive distributor to obtain a court order requiring the detention of particular shipments of parallel imports by customs officials.

In order to protect booksellers, libraries and consumers against the possibility that increased market exclusivity will result in excessive book prices or lower standards of service, the Copyright Act confers specific regulatory power to the Governor in Council to establish the criteria or standards exclusive distributors are required to adhere to in order to benefit from the additional protection they have under the regime. The Regulations set out these standards which include: the form of the notice stating that there is an exclusive distributor for a particular book, confirmation time for orders, delivery time which the exclusive distributor must meet, and price differential. In addition, there are rules for remaindered books, damaged books, books intended for re-export, special orders and leased books. It was decided that these criteria and standards could be best dealt with through regulations so that they can be easily modified and also, because they necessarily contain extensive details.

The Regulations specify the categories of books to be partially or wholly excluded from the parallel importation provisions. The Regulations allow for the importation of used textbooks. If restrictions on the importation of used textbooks are ever warranted, the government will consult with all interested parties before amending the Regulations to implement any such restrictions.

These Regulations have been developed to reflect, as closely as possible, competitive market conditions for the distribution of imported books, consistent with voluntary industry guidelines that were negotiated by industry stakeholders. Recourse to the provisions in the Copyright Act against parallel importations of books will only be made available to exclusive distributors in those circumstances where mark-up beyond the list price of a book is no greater than a prescribed percentage, which varies according to whether the books are

imported from one of three areas: the U.S., Europe or the rest of the world. These percentages correspond to the average actual costs currently paid by book importers for transportation and related expenses -- including shipping, handling and receiving, inventory, financial reporting, general overhead and sales and marketing -- for imports from each of the three areas. These simple percentage marks-ups ensure that importers, libraries and book retailers will have a straightforward mechanism with which to evaluate costs and that they will thereby be protected against unfair pricing practices.

Alternatives

The Act requires regulations in order to extend parallel importation provisions to exclusive distributors. Without these regulations, no person could qualify as an "exclusive distributor", and exclusive distributors would not be entitled to the new protection against parallel imports provided in the amendments made by Bill C-32.

Benefits and Costs

Exclusive distributors pay for the right to distribute books in Canada, and the amount of the payment may be based on an expectation of a certain volume of sales. The provisions in the Act limiting parallel importation give exclusive distributors greater commercial certainty with respect to the rights they have purchased. Without these regulations, the parallel importation provisions of the Act would be ineffective, and those with exclusive distribution contracts would not in all cases derive the full benefits of their distribution contracts. This would be detrimental to the Canadian publishing sector, as a whole.

As a result of the regulations, there may be additional costs to retailers and institutional buyers. To protect against excessive prices, the regulation requires that exclusive distributors meet certain standards with regard to pricing, and these are based on mark-ups reflecting prevailing market conditions.

There will be no additional costs to the government due to the implementation of these regulations.

Consultation

Consultations with the major interested parties (The Association of Canadian Publishers, The Canadian Publishers' Council, Canadian Booksellers Association, Canadian Library Association, Book and Periodical Council, Wholesalers, Canadian Telebook Agency, Association Nationale des Editeurs de Livres, Association des Libraires du Québec) have taken place over the last two years. These parties met on a number of occasions to negotiate the terms of the Regulations and were provided with different drafts of these Regulations.

In addition, there were consultations with Western Canadian College Stores Association, Eastern Campus Booksellers, Canadian Federation of Students, Canadian Alliance of Student Associations and Follett

Campus Resources on the issue of used textbooks.

These Regulations and accompanying Regulatory Impact Analysis Statement (RIAS) were republished in the January 30, 1999 issue of the Canada Gazette, Part I. Interested parties were invited to make any representations concerning these Regulations within 45 days of the date of republication.

Comments were received from The Canadian Publishers' Council, the Association of Canadian Publishers, l'Association des distributeurs exclusifs de livres en langue française, The Writers' Union of Canada, Canadian Library Association, Book Depot, The Ontario Library Association, McNally Robinson, and Lang Michener (for Follett Campus Resources).

While views remained divergent on certain issues, the resulting regulations represent a reasonable compromise.

Minor modifications (drafting issues) were made to the Regulations in order to better reflect the agreement reached by the parties during the consultations or to clarify the intention of the Government:

Notice of exclusive distributor: section 27.1(5) states that no exclusive distributor is entitled to a remedy unless, before the infringement occurred, notice has been given within the prescribed time and in the prescribed manner described in the Regulations. Section 4 of the Regulations states that the exclusive distributor shall give this notice (in the case of a bookseller, library or other institution) by setting out the fact that there is an exclusive distributor of the book in the publications mentioned in paragraph (I), a catalogue (paragraph (ii)) or the Banque de titres de langue française (par.(iii)). In response to concerns expressed by publishers and libraries, section 4 was modified to clarify that the catalogue mentioned in par (ii) will be supplied at the request of a bookseller, library or other institution.

Notice of exclusive distributor: the title "Canadian Telebook Agency Microfiche and Ordering System" and "Books in Print Plus on Disc- Canadian Edition" were changed to their official titles "Canadian Telebook Agency Microfiche" and "Books in Print Plus - Canadian Edition".

Application: section 5(5) and 6(3) stated: "for greater certainty, this section shall not be constructed as authorizing anyone to do or to omit to do an act that would constitute an infringement of copyright under subsection 27(2) of the Act". As this statement applies to the regulation in its entirety, it was moved to the "application" section.

Imported books: in section 5(1)(iii) the words "minus any applicable discounts" should have appeared in paragraph (B) as it does in paragraph (A), and was therefore added to paragraph (B).

Imported books: section 5(1)(iii) was also modified in order to better reflect the intention of the government not to interfere with laws of any province with respect to prices concerning the distribution of books.

Canadian edition: in section 6(1)(b) the phrase "before an order can be placed" is replaced by "before an order is placed" to reflect the intention of the parties.

Remaindered and other books: in response to concerns expressed by Book Depot to the effect that there is no incentive for a foreign publisher to respect the conditions set in the Regulations, the word "or" was added in section 7(a) between "...marked as a remaindered book" and "the original foreign publisher has given notice...". For the same reason, it is specified in paragraph (b) that the book is marked as damaged book "by the importer or the retailer".

Special orders: in section 9(2), the calculation of the 24 hours is from the receipt of the special order rather than from the time the special order is placed as previously stated. This is to conform to the intention of the parties and to other calculations of time stated in the Regulations.

These modifications do not in any way change the policy formulated by Industry Canada and Canadian Heritage.

Other comments were received from stakeholders; however, after careful consideration, they did not result in any changes in the Regulations for the following reasons:

- they were drafting issues not required for better understanding of the Regulations.
- they exceeded the regulatory power stated in Copyright Act.
- they were contrary to the policy developed by Industry Canada and Canadian Heritage, in consultation with the stakeholders.

Compliance and Enforcement

Compliance and enforcement mechanisms are not required. The exclusive distributor who does not respect the standards prescribed in these regulations will not benefit from the additional protection offered by the parallel importation regime. On the other hand, it is an infringement of copyright in a book for any person to import a book in a manner contrary to what is stipulated in the Copyright Act and these Regulations.

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This regulation was prepublished in the Canada Gazette on January 30, 1999 and will come into force in the second half of 1999.

Ephemeral Recordings Regulations

Description

Bill C-32, an Act to amend the Copyright Act, received Royal assent on April 25, 1997. Among the measures put in place by this bill are two exceptions related to ephemeral recordings which take into account the need of both radio and television broadcasters to make temporary copies of performances so as to facilitate their programming and broadcasting operations:

(a) section 30.8 of the Copyright Act, as enacted by section 18(1) of Bill C-32, allows a programming undertaking to make, without payment of royalties, for the purpose of deferred broadcasting, an ephemeral recording of a live performance which incorporates copyrighted works. It also allows a broadcasting undertaking to make, without payment of royalties, a reproduction of an ephemeral recording made by a programming undertaking, provided that both undertakings belong to the same "prescribed network";

(b) section 30.9 of the Copyright Act, as enacted by section 18(1) of Bill C-32, allows a broadcasting undertaking to reproduce a sound recording of a copyrighted work in a format which facilitates the delivery of programming.

Subsections 30.8(2) and 30.9(2) of the Copyright Act provide that programming and broadcasting undertakings which make ephemeral recordings in accordance with these exceptions must keep current a record of information pertaining to each ephemeral recording which they make. The required information includes the date of making and destruction of the recording as well as "any other prescribed information".

These regulations define "network" for the purposes of s.30.8(9) and specify the additional information which

is required pursuant to ss 30.8(2) and 30.9(2).

The definition of "network" will benefit certain programming and broadcasting undertakings. In particular, broadcastings undertakings within a prescribed network will be able to make and use a temporary reproduction of an ephemeral recording originally made by a programming undertaking belong to the same network.

The regulations will also require more detailed record keeping than the Act itself in respect of musical works. This will better assist right holders in keeping track of the uses of their musical works and thus, the royalties payable to them, whenever ephemeral recordings are kept for longer than the 30 days allowed by the exceptions.

Benefits and Costs

The additional administrative cost of these regulations to the affected industries is not anticipated to be significant. There will be no additional costs to the Government due to the implementation of these regulations. Both copyright holders and users were consulted before and during the regulation drafting process. The Department of Canadian Heritage and Industry Canada asked the parties consulted to comment on the drafting instructions explaining the policy adopted with regard to the regulations, as well as the latest version of the regulations.

Consultations

The following associations were consulted: the Association canadienne de la radio et de la télévision de langue française (ACRTF), the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ), the Canadian Association of Broadcasters (CAB), the Canadian Broadcasting Corporation (CBC), the Canadian Cable Television Association (CCTA), the Canadian Musical Reproduction Rights Agency (CMRRA), the Canadian Recording Industry Association (CRIA), and the Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC).

During the consultations, the departments received many comments and proposals which were considered in the development of a final version.

Alternatives

Advance notice concerning the definition of "network" was entered in the Report on Plans and Priorities for the Fiscal Year 1998-99.

This is not a major regulatory initiative. Accordingly, the Business Impact Test will not be applied. A

definition of "network" by regulation is required before s. 30.8 of the Copyright Act may be brought into force.

In addition to the dates of making and destruction, any broadcaster who makes an ephemeral recording pursuant to the above exceptions must keep a record of "any other prescribed information". A regulation is therefore necessary to specify such other information.

The status quo was not retained given that the stakeholders consulted agreed that more specific information would be required by regulation.

Duplications

There is no duplication. The federal government has exclusive jurisdiction in this matter.

Compliance and Enforcement

Compliance and enforcement mechanisms are not required.

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The regulations were prepublished in the Canada Gazette, Part I on January 30, 1999. Comments received from stakeholders have resulted in a reexamination of certain aspects of the regulations, which is currently underway.

Exceptions for Educational Institutions, Libraries, Archives and Museums Regulations

Description

Bill C-32, an Act to amend the Copyright Act, received Royal Assent on April 25, 1997. Among the measures introduced in this bill were exceptions to allow the copying of material by non-profit educational institutions, libraries, archives, and museums.

Under the Act a person may engage in "fair dealing" (normally copying) for purposes of research, private study, criticism or review of copyrighted material without infringing copyright. The Copyright Act allows non-profit libraries, archives, and museums, or persons acting under their authority to do these same things on behalf of a person engaged such activities. In addition, non-profit libraries, archives and museums, or persons acting under their authority, may make a single copy of certain articles appearing in a newspaper or periodical, if they are satisfied that the copy is to be used by the person for purposes of research or private study. The Act provides that the above exceptions also apply to interlibrary loans. However, where the requested copy is transmitted electronically between two institutions, the Act specifies that the copy given to the patron must not be in digital form.

The Regulations prescribe the information to be recorded by such institutions concerning copies of copyrighted material they have made for patrons under the exceptions. The Regulations further provide that the information must be retained by the institutions for three years, and set conditions for access to the records. However, where copying is done by an institution at its premises for patrons engaged in "fair dealing," records need to be kept only for copies made prior to January 1, 2004. This "sunset" clause will provide libraries, archives, museums and copyright owners the opportunity to assess, over a set period of time, the costs and benefits of this particular record keeping requirement. Prior to the "sunset" date, the Departments of Industry and Canadian Heritage will review the operation of this provision with affected stakeholders.

The regulations give effect to provisions in the Act which allow a non-profit archive to make a copy of an unpublished work deposited in the archive after these provisions come into effect, provided that the copyright owner has not prohibited copying and the archive is satisfied that the copy will be used for purposes of research or private study. In the event that a copyright owner cannot be located, and the work was deposited in the archive prior to the coming into force of the exception, the Regulations set out what records must be kept by the archive. These records are open to inspection by the author of the work, the copyright owner of the work, or the representative of the author or copyright owner.

Under the Act, non-profit educational institutions, libraries, archives and museums are not liable with respect to independent uses of photocopiers on their premises if they have an agreement with a copyright collective or if a copyright collective has filed a tariff with the Copyright Board or the Copyright Board has approved such a tariff, provided that a sign containing information set out in the Regulations has been posted in the immediate vicinity of the machine. The notice is to warn against copyright infringement. (Copyright collectives are organizations which collect royalties on behalf of copyright owners).

Benefits and Costs

These Regulations may help copyright owners detect infringement, ie. copying which exceeds or is outside of the statutory exception, and will protect the institutions against liability for unauthorized copying done on photocopying machines on their premises.

The Regulations will impose an administrative burden on the institutions. However, the cost to institutions will depend upon how many copies are made under the exceptions, the number of requests from copyright owners for access to the records, and the nature of the institutions' record keeping processes.

There will be no additional costs to the government due to these Regulations.

Consultations

As a result of consultations undertaken by the Departments of Industry and Canadian Heritage, the following were provided with informal drafts of these Regulations: The Writers' Union of Canada (TWUC), Periodical Writers Association of Canada (PWAC), Playwrights Union of Canada, League of Canadian Poets, CANCOPY, COPIBEQ, Association nationale des éditeurs de livres (ANEL), Canadian Publishers' Council, Association of Canadian Publishers, Canadian Association of University Teachers (CAUT), National Library of Canada (NLC), Canadian Library Association (CLA), Canadian Association of Research Libraries (CARL), Association of Universities and Colleges of Canada (AUCC), Association pour l'avancement des sciences et des techniques de la documentation (ASTED), Archival Community Copyright Committee (ACCC), National Archives of Canada (NAC), Canadian Museums Association (CMA), Canadian Newspaper Association.

Groups representing creators and copyright owners supported record keeping for all types of copying done on behalf of patrons of libraries, archives and museums. Representatives of libraries felt that records should be kept only with respect to interlibrary loans. In particular, representatives of libraries were opposed to keeping records with respect to copies made for fair dealing purposes on behalf of patrons on the same premises.

While views remained divergent on certain issues, attempts were made to address in the Regulations many of the concerns raised in comments received by the two departments.

The Regulations and accompanying Regulatory Impact Analysis Statement were prepublished in the January

30, 1999 issue of the Canada Gazette, Part I. Interested parties were invited to make any representations concerning the regulations within 45 days of the date of republication.

Comments were received from the Canadian Library Association, Canadian Association of University Teachers, Canadian Association of Research Libraries, Association pour l'avancement des sciences et des techniques de la documentation, Association of Universities and Colleges of Canada, Association of Canadian Community Colleges, The Writers' Union of Canada, Periodical Writers Association of Canada, Playwrights Union of Canada, League of Canadian Poets, Canadian Copyright Licensing Agency, The Law Society of British Columbia, Law Society of Upper Canada, Canadian Association of Law Libraries, The Law Society of Saskatchewan, British Columbia Courthouse Library Society, Association of Canadian Publishers, Canadian Publishers' Council, Ontario Library Association, Forum of Public Libraries of Ottawa-Carleton, Ottawa Public Library, McGill Medical and Health Libraries Association, Royal Columbian Hospital Library Simon Fraser Health Region.

Minor changes were made to the regulations in order to clarify the intention of the Government or to ensure consistency in language.

Records kept under Section 30.2 of the Act: in response to concerns, subsection 4(5) was redrafted to clarify the Government's intention to prevent the making of multiple requests to the same institution in the course of a calendar year, in respect to a particular work. This means that a right holder may not make more than one request with respect to the copying of a work in a single calendar year.

In this same subsection, paragraphs (b) and (c) were reworded to ensure consistency with the language contained in paragraph (a).

These modifications do not in any way change the policy formulated by Industry Canada and Canadian Heritage.

Notice: Comments were also received regarding Section 8, seeking clarification that staff members would not be required to give an interpretation of the law as to what constitutes authorized copying. No modifications were made to the Regulations as it is not expected that this section of the regulations would result in staff members having to provide interpretations of the law.

Other comments were received from stakeholders, but after careful consideration, they did not result in changes to the Regulations, for the following reasons:

- they exceeded the regulatory power provided for in the Copyright Act
- they were contrary to the policy developed by Industry Canada and Canadian Heritage, in consultation with stakeholders
- they were issues of terminology not required for a better understanding of the Regulations.

Alternatives

Three alternatives were considered with respect to the scope of record keeping: record keeping regulations only where required under the Act, recording keeping for all types of uses allowed for under the exceptions, and record keeping for selected uses permitted under the exceptions. The third option was chosen. It was felt that only in the case of certain uses would record keeping assist copyright owners in detecting possible infringements.

Record keeping was not required under the section of the Act dealing with the "Management and maintenance of collections" because it was felt that these activities were of a routine nature and the possibility of infringement was minimal. Record keeping was required elsewhere because it was felt that this could deter or provide evidence of possibly infringing activities. The Regulation prescribes the nature of the notice to be displayed near photocopy machines because this would provide certainty and avoid disputes over the nature or adequacy of the notice.

There is no overlap or duplication. The federal government has exclusive jurisdiction in this matter.

Compliance and Enforcement

Compliance and enforcement mechanisms are not required. Failure to keep the records required by the Regulations would constitute copyright infringement.

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This regulation was prepublished in the Canada Gazette on January 30, 1999 and will come into force in the second half of 1999.

Regulations Prescribing Cinematographic Works for the Purposes of Section 17 of the Copyright Act

Description

A recent amendment to the Copyright Act provides for new rights for performers. Among these is a right to remuneration in respect of cinematographic works embodying their performances. More specifically, subsection 17(2) provides that where there is an agreement between the performer and the producer of the cinematographic work, governing the embodiment of the performance in the work and which includes a right to remuneration for the reproduction or other uses of the work, the performer may collect the residuals or remuneration from the other party (producer), a subsequent assignee or any other person who subsequently owns a copyright in the work, and who exploits the work either through its reproduction, its performance in public or its broadcast to the public. Subsection 17(3) limits the application of this right by providing that it may only be exercised when the performer's performance is embodied in a prescribed cinematographic work.

These Regulations prescribe the types of cinematographic works in which this right to remuneration is available. Further, these Regulations provide that the right to remuneration is available only if the contract governing the embodiment of the performer's performance has been concluded on or after the date on which these Regulations come into force.

Alternatives

No alternatives were considered.

Benefits and Costs

These Regulations will clearly define the circumstances under which performers may exercise their right to remuneration against original contracting parties, assignees and subsequent owners of copyright in cinematographic works embodying their performances. In so doing, these Regulations will benefit performers.

The cost of these Regulations to the affected industries is not anticipated to be significant. There will be no additional costs to the Government due to the implementation of these Regulations.

Consultation

As a result of a consultative initiative undertaken by the Departments of Industry Canada and Canadian Heritage, the following associations were provided with informal drafts of these Regulations: ACTRA Performers Guild, Association des producteurs de films et de télévision du Québec (APFTQ), American Federation of Musicians of the United States and Canada (AFM), Canadian Association of Film Distributors and Exporters (CAFDE), Canadian Film and Television Production Association (CFTPA), Canadian Motion Pictures Distributors Association (CMPDA), and Union des Artistes (UDA).

Draft regulations have been pre-published in the Canada Gazette (Part I) on May 2, 1998. Comments were received. After careful consideration, the departments involved decided to proceed to final publication without amendments.

Compliance and Enforcement

Compliance and enforcement mechanisms are not required.

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The Regulations came into force on April 22, 1999.