Summary of Michael Geist's Article "From Rhetoric to Reality: The Key Issues in Bill C-32," from *The Hill Times*, Sept 27, 2010.[1]

- **Bill C-32 merits broad support if a compromise on digital locks can be found**

- **Digital lock** rules effectively override all other copyright rights (e.g. fair dealing and new consumer exceptions) and go much farther than what is required to comply with WIPO internet treaties. Fair dealing and consumer rights must be preserved alongside legal protection for digital locks.

- Although some groups claim **fair dealing** reforms will result in hundreds of millions of dollars of losses, "the reality is far less worrisome." C-32 reforms do not mean that all education uses are now fair dealing; they simply allow education uses to undergo a fair dealing analysis. New consumer exceptions (e.g. time shifting, format shifting, etc.) reflect reasonable consumer expectations and help encourage new creativity.

- The inclusion of a safe harbor that protects **Internet** intermediaries from liability is "critically important to foster a robust and vibrant online world."

- C-32 provisions that distinguish between commercial and noncommercial infringement for the purposes of **statutory damages** are welcome. Until now, the massive liability (up to $20,000 per infringement) that was designed for commercial infringement has been used to target noncommercial infringement by peer-to-peer file sharers. The cap of $5000 equitable on noncommercial infringers is more equitable.

- Many groups are demanding that the **private copying levy** be extended, but previous proposals have raised concerns over the risks of extension, its impact on consumer pricing, and its interaction with digital locks. Unfortunately, groups that support the private copying levy extension are reluctant to demand legalization of non-commercial, personal downloading. The two must go together.

[1] http://www.michaelgeist.ca/content/view/5337/159/; http://www.hilltimes.com/page/view/geist-09-27-2010

Michael Geist's article in this week's hill times on copyright:
OTTAWA—With the House of Commons back in session, there are indications that Bill C-32, the copyright reform bill, will emerge as a government priority. Given the rhetoric since its introduction, it seems likely that some will seek to paint critics of the bill as anticopyright, pirates, or radical extremists. While the rhetoric may seek to delegitimize consumers and many Canadians vocal on the copyright issue, the reality is that many consumer and education groups have been far more supportive of the bill than proponents such as the music industry.When C-32 was first introduced, many Canadians acknowledged that the government did a good job compromising on some very contentious issues (ISP liability, fair dealing, consumer provisions, statutory damages) but expressed concern that the bill's digital lock approach represented a huge flaw that undermined many of the positive steps forward. That reflects my view as well, since I believe that if a compromise on digital locks can be found, the bill merits broad support.

The most contentious issues in C-32 include:
1. Digital Lock Provisions (anti-circumvention rules)
The digital lock rules, which are an import from the U.S., are by far the biggest problem with the bill since they effectively trump virtually all other copyright rights (particularly fair dealing and the new consumer exceptions) and extend far beyond what is required to comply with the WIPO internet treaties.
In the months since the bill was introduced, it has become apparent that the Canadian proposal is even more restrictive than that found in the U.S., where its law now features exceptions for DVD circumvention in some non-commercial cases and for jail-breaking cellphones.
A compromise that provides legal protection for digital locks, but preserves fair dealing and consumer rights is needed.

2. Fair Dealing Reform
The fair dealing reforms, which add education, parody, and satire to the list of fair dealing categories, represent a reasonable compromise between those seeking a U.S.-style fair use provision and those opposed to new exception categories. While some claim they will result in hundreds of millions of dollars of losses, the reality is far less worrisome.
This is because the inclusion of education as a category of fair dealing does not mean that any use for educational purposes qualifies as a fair dealing. Rather, all uses must still meet the sixpart fair dealing test. The C-32 change only means that education uses can undergo a fair dealing analysis, not that all education uses are now fair dealing.

Closely related to fair dealing are the new consumer exceptions, including time shifting, format shifting, backup copies, and the so-called "YouTube exception." These exceptions reflect reasonable consumer expectations and help encourage new creativity, though suffer from being subject to digital locks.

3. ISP Liability

Bill C-32 adopts the successful notice-and-notice approach that has been used in Canada on an informal basis for many years. The creation of a legal safe harbour that protects Internet intermediaries from liability for the actions of their users is critically important to foster a robust and vibrant online world. Without such protections, intermediaries (which include internet service providers, search engines, video sites, blog hosts, and individual bloggers) frequently remove legitimate content in the face of legal threats. Bill C-32 rightly includes an explicit safe harbour that insulates intermediaries from liability where they follow a prescribed model that balances the interests of users and content owners.

4. Statutory Damages Reform

Bill C-32 contains important provisions that distinguish between commercial and noncommercial infringement for the purposes of statutory damages. Canada is one of the only countries in the world to have a statutory damages provision. It currently creates the prospect of massive liability—up to $20,000 per infringement—without any evidence of actual loss. This system may have been designed for commercial-scale infringement, but its primary use today is found in the U.S. where statutory damages led to the massive liability for several peer-to-peer file sharing defendants and leaves many with little option but onerous settlement. Bill C-32 recognizes this problem and creates a still significan$5,000 cap on liability in non-commercial cases.

5. Extending the Private Copying Levy

The fifth major issue involves a change not contained in C-32—the extension of the private copying levy to cover iPods and other devices. Unfortunately, previous proposals have raised concerns about the potential for very broad coverage including cellphones and personal computers, the competitive impact on consumer pricing, and the interaction between private copying and digital locks. Moreover, many proponents of extending the levy are reluctant to acknowledge that doing so should fully legalize non-commercial, personal downloading. Rather, they engage in a policy bait-and-switch where file sharing is used as the basis to obtain the levy extension but then does not legalize the copying for which Canadians will be asked to pay new fees.

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