INF 2181, University of Toronto

Brief Report Number One

CANADIAN PARLIAMENT Vs. THE RADICAL EXTREMISTS:

Making Sense of the Bill C-32 Debate

by

Grant Patten

October 25, 2010

Canadian Parliament Vs. The Radical Extremists

On June 2nd, 2010, two ministers in the Conservative Party of Canada – Industry Minister Tony Clement and Heritage Minister James Moore – introduced Bill C-32, *An Act to amend the Copyright Act*, at the Electronic Arts video game studio in Montreal. (Nowak, 2010a) This was a very strategically chosen location, as the Conservatives knew that their bill would be warmly received by the video game industry. If they had instead chosen a university as their location to announce the bill, however, the reception would have no doubt been very different. This paper will examine the major stakeholders in the Bill C-32 debate and attempt to make sense of their competing perspectives. We will consider Lasswell's age old political question of "who gets what, when, and how?" (Schneider & Ingram, 1993, p. 334) with a special emphasis on the *how*. Certain groups have no doubt become more powerful than others in the Canadian political regime, but we will examine some of the less-than-obvious ways in which they have become so through the use of established policy analysis tools, including Schneider & Ingram's social construction of target populations and Braman's multiple definitions of information.

The primary point of controversy in Bill C-32 is the issue of digital locks. A digital lock refers to the software embedded in media that is used to prevent consumers from easily copying the content. (Geist, 2010) People in the video game industry are generally pleased with the bill (Nowak, 2010a) because they feel that it strengthens their ability to fight piracy. Operating under the US Digital Millennium Copyright Act, powerful companies in the music industry already tried enforcing this approach but found that consumers simply refused to buy CDs protected by digital locks. (Clement, 2010) Music companies then reluctantly began to

think about the songs themselves as complementary commodities and focused their attention more on the promotion of live performances and sales of merchandise. But, as the executive director of the Entertainment Software Association of Canada (ESAC) explains, “we don’t go on tour, we don’t sell T-shirts. It’s the sale of the actual intellectual property of the video game. So, being able to adequately protect our content is really important.” (Elias, 2010) But people represented by another stakeholder, the Canadian Association of University Teachers (CAUT), are not so pleased. (Nowak, 2010a) Teachers feel that digital locks contradict the principle of fair use by infringing on their right to circumvent copy protection for educational purposes. A fundamental disagreement over the nature of the debate can be seen here – is this more of an economic issue, or more of a social issue? Is this more about selling, or more about learning? Braman writes about information policy that “lack of agreement on [the operational definition of the policy subject] is among the most serious of the factors that impede the ability to reach agreements on contested issues.” (2006, p. 9) ESAC regards information as a commodity – to them, it only needs to be thought about as something that we buy and sell (p. 13) because that is how the content creators make a profit and that is how the industry stays alive. To CAUT, however, information should be thought about as more of a constitutive force in society (p. 19) because it is not merely about economics but also about shaping minds and helping people to understand their world. To CAUT, then, information has “an enormous power in constructing our social reality.” (p. 20) As the university system is a massive part of the Canadian economy, the government should not want to alienate its representatives, so it is interesting to consider why ESAC has been largely favoured over CAUT on the digital locks debate. To propose an

answer, we will look at the concept of frames, defined here as "policy positions resting on underlying structures of belief, perception, and appreciation." (Schon & Rein, 1994, p. 23)

Braman writes that "definitions of information that treat it as a commodity work to the advantage of those who win when the game is played on economic grounds," (2006, p. 21) and there is little doubt that the Harper administration has historically been more sensitive to economic than social issues. (Geddes, 2010) This seems to provide an immediate explanation for why ESAC was favoured over CAUT, but there may be a deeper reason. Schon & Rein write, "many practitioners believe, on grounds of hard-headed practicality and in view of the pressures and distractions of real-world experience, that higher-level reflection is the prerogative of university scholars and out of place in the world of practice." (1994, p. xv) This belief that the opinions of those in academia are trivial seems quite predominant in the Harper administration. One of the Prime Minister's most well-known quotes illustrates his hostility toward academia: "grand blueprints that have been done on the blackboard, endorsed by experts with no practical experience in the economy or society, are disastrous." (Geddes, 2010) Harper's choice of words, namely "blackboard", creates an allusion to academia in his statement that cannot be denied. Harper's open disdain of experts from academia has been framing Conservative decision-making and encouraging others in the administration to adopt similar discourse. At a conference on June 22nd, 2010, James Moore said about those questioning Bill C-32, "…these people out there who pretend to be experts who the media cite all the time, they don't believe in any copyright reform whatsoever. …The only people who are opposed to this legislation are really two groups of radical extremists." (mmastrac, 2010) In a

number of other Bill C-32 conferences, Moore has openly chided University of Ottawa law professor Michael Geist. (FAIRCOPYRIGHT, 2009) If a government wanted to socially construct a target population in a negative light, then publicly calling them “radical extremists” may help in achieving that objective. A government may use this kind of “symbolic language” (Schneider & Ingram, 1993, p. 334) to characterize a group negatively, thereby making it more socially acceptable to enact policy with which the group disagrees. Following Schneider & Ingram’s model, academics may now be seen publicly as “deviants” who sympathize with criminal activity, looked upon negatively and stripped of any power. It may be reasonable to suggest, then, that despite the formidable power of the two groups, ESAC was favoured by the Conservative government over CAUT because of CAUT’s unfortunate association with academics, a group that has historically been socially constructed in a very negative light by the Harper administration. “Symbolic power shapes human behavior by manipulating the material, social, and symbolic worlds via ideas, words, and images,” writes Braman. (2006, p. 26) The Conservative government has been particularly effective, then, at using language to characterize social groups in a particular manner. This, in turn, leads to a successful manipulation of not only those outside the stigmatized group but also those within it. Schneider & Ingram write, “groups portrayed as dependents or deviants frequently fail to mobilize or to object to the distribution of benefits and burdens because they have been stigmatized and labeled by the policy process itself.” (1993, p. 344) Thus, while Canadian academics have clearly mobilized on some level with CAUT and other interest groups, perhaps they would have mobilized more had it not been for the repressive effects of symbolic power.

Canadian Parliament Vs. The Radical Extremists

CAUT is certainly not the only group to oppose Bill C-32, but the concern that consumer rights are being violated by the digital locks provision seems to be shared by all of the objectors. Under Bill C-32, circumventing a digital lock will be illegal under any circumstance. (Nowak, 2010a) The Option consommateurs, the Consumers Council of Canada, and the Public Interest Advocacy Centre are among the groups arguing that consumers should be allowed to circumvent a digital lock if it is done for private, non-commercial use. The Canadian Film and Television Production Association (CFTPA) is happy with the bill because they say it will "help protect jobs" *(ibid.)* but, somewhat ironically, the Documentary Organization of Canada (DOC) is unhappy for the opposite reason – they say Bill C-32 will make it harder for filmmakers to do their job because now they "will not be able to use as source material any content behind a digital lock." (Wilson, 2010) But the Information Technology Association of Canada (ITAC) fully supports Bill C-32, (Courtois, 2010) citing the gaming industry example as why digital locks are necessary. Danielle Parr of ESAC says that banning digital locks would be akin to "promoting piracy under the guise of user rights." (Nowak, 2010a) The Conservative government seems quite content to appear as if they are more concerned with protecting industry than with protecting consumer rights. They will no doubt keep powerful industry groups like ITAC and ESAC on their side by adopting that position. But as Schon & Rein remind us, "when public disputes revolve around conflicts of basic values, it may not be possible, by mediated negotiation or other means, to reach agreement." (1994, p. 18) Two previous attempts at this legislation were made – Bill C-60 and Bill C-61 – which both died when Parliament was dissolved. ("Bill C-61", 2010) Both bills were met with considerable

public opposition for the very same reason – restricted consumer rights – and this no doubt contributed to their failure. *(ibid.)* As the rights issue has not disappeared with Bill C-32, one wonders why the Conservative government thinks this bill will be any more successful. We might ask, then, rather than going through this legislative merry-go-round *ad infinitum*, how might this situation be improved? The mediated negotiation discussed by Schon & Rein may provide an answer: "such exercises are usually intended not to change the participants' views of their interests but to aid them in inventing win-win options…" (1994, p. 19) Industry representatives seem to hold a rather unrefined view of copy protection, which is likely a major reason why Bill C-32 mandates a blanket provision against circumventing digital locks. By helping industry representatives see why reframing their beliefs about circumvention may actually aid them, they may "see both the issue and their interests in a new light," (p. 20) thus resulting in a less toxic legislative environment. No doubt, by putting a digital lock on a video game, DVD, CD, or any other media, these companies will be missing out on business from the significant part of the population that refuses to buy anything with a digital lock on it. (McOrmond, 2010) Some people are refusing for perfectly benign reasons, e.g. they want to be able to play an HD DVD disc on their PlayStation 3 because their HD DVD player is broken. Others, admittedly, are refusing for more nefarious reasons, e.g. they want to copy the content on that disc and share it on a peer-to-peer network. But companies may actually stand to benefit from adopting a more nuanced frame that does not view everyone who circumvents a digital lock as a criminal. By finding ways to direct the punishment more accurately toward those who are circumventing for illegal purposes, companies will gain back consumers they

alienated with the blanket digital locks provision.

We should now examine some of the key words that have been used by competing stakeholders in the Bill C-32 debate, because that is an effective way of identifying the main points of contention. Schneider & Sidney write that "policy designs need to contain arenas for discourse that engage multiple ways of knowing the issue." (2009, p. 111) No doubt, "ownership" has been a prominent part of the discourse thus far on Bill C-32. (Nowak, 2010b) Consumers generally feel that after they have bought a DVD, for instance, they own it and should therefore not be burdened with a lock on that product. But distributors of DVDs generally feel that ownership was not transferred to the consumer in the sale; rather, they feel that consumers have paid "for the right to watch it, not to copy it." *(ibid.)* This is similar to the concept of rental, "where someone other than the owner makes use of the property while the owner retains ownership rights," (McOrmond, 2010) but it is also quite dissimilar in that the DVD is not expected to be returned after it has been purchased. McOrmond feels that it is unreasonable for DVD distributors to expect the general public "to understand this brand new type of relationship that is neither ownership nor rental." *(ibid.)* The Conservative government has not been particularly active in engaging "multiple ways of knowing the issue" (Schneider & Sidney, 2009, p. 111) of ownership. The government has largely favoured the definition agreed upon by industry groups such as DVD distributors. In a CBC interview, Tony Clement said that Bill C-32 is trying "to make sure that the creator has an incentive to create." (2010) But what, exactly, does "creator" mean here? The common sense answer is that Clement is referring to artists and he means that they are being given an incentive to create more art. But a deeper

consideration of the discourse reveals another interpretation: perhaps Clement is referring to the companies that create e-book readers, tablets, phones, and DVD players when he says "creators." Policy expert David Eaves writes, "those 'creators' get more say in the destiny of Canadian artists' copyrights than the artists themselves." (2010) This situation is exemplified by Apple, which consistently usurps copyright power from artists when their work is distributed on Apple devices. (McOrmond, 2010) Under Bill-C32, Apple – as the copyright holder – can decide to place a digital lock on any of its devices and demand legal punishment on anyone who circumvents that lock for any purpose. The original creator of the work being distributed on Apple's device has no say in the matter, (Eaves, 2010) even if they would like to give consumers the option to copy their content for certain purposes. Schneider & Sidney ask us to consider how policy might change the dynamics of the future and produce what they call "feed-forward effects." (2009, p. 108) It is possible to imagine that – if the industry-biased mentality behind Bill-C32 is allowed to perpetuate – artists may lose so much autonomy (McOrmond, 2010) when it comes to the distribution of their content that they may actually feel a disincentive to keep creating. This would hurt not only artistic output, but also industry, resulting in quite the opposite of what the Conservatives intended with this bill.

Another reason that consumer interest groups have been mostly unsuccessful in revising Bill-C32 might be that "benefits are concentrated on a few, but costs are widely distributed." (Schneider & Sidney, 2009, p. 109) Industry groups benefit – at least ostensibly – from Bill-C32 in that they are given power to legally defend against digital lock violations. Once a digital lock has been added to a product, it has been added across-the-board for all

consumers, thereby distributing the burden of owning a product with a digital lock on it. Any price fluctuations that may result on products while covered under Bill C-32 will also be distributed across the consumer base as a whole. This distribution allows individual consumers to feel as if they are not being singled out and, therefore, should not complain about the legislation. This has created an environment of "clientist politics" in which "elected leaders distribute expensive favors to their clients while [consumers] are apathetic." *(ibid.)*

Buchwald writes, "when a problem is in the process of being coupled with a proposal, the choice of proposal may depend heavily on the accepted definition of the problem." (2000, p. 136) It is not surprising to see that a policy window *(ibid.)* has opened here again, as the two failed attempts at copyright reform – C-60 and C-61 – left industry groups unsatisfied and determined to keep fighting. For people in industry, the problem of piracy has yet to be dealt with adequately in Canada (Nowak, 2010a) and those two failed attempts allowed them to gain valuable experience in pushing their definition of the problem. Industry groups have clearly defined the problem as "anyone who circumvents a digital lock for any purpose." Third time may very well be the charm for industry, as this time around, their problem definition seems to coincide especially nicely with the government's open disdain of anyone publicly criticizing Bill-C32, characterized now by the Conservatives as a "radical extremist." Although the government has mandated that, if passed, Bill C-32 will be "reviewed" every five years, ("Bill C-32", 2010) that does not mean another policy window will open at that point. Michael Geist says about Bill C-32, "our history is such that once we get a bill passed, if it is this bill, we won't revisit this issue in a serious way for reform for at least another ten to fifteen years."

(gordonmcdowell, 2010) Bill C-32 no doubt “looks very good from the perspective of information as a commodity,” (Braman, 2006, p. 23) but it is possible to imagine that, fifteen years after the bill has passed and thousands of people have been fined for creating copies of products for private use, “unfortunate dysfunctionalities” *(ibid.)* in the bill may have revealed themselves, and consumers will perhaps be not so apathetic anymore.

REFERENCES

Bill C-32, An Act to amend the Copyright Act. (2010). S. 92, Third Session, Fortieth Parliament. Retrieved October 22, 2010, from http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=4580265&file=4

Bill C-61 (39th Canadian Parliament, 2nd Session). (n.d.) In Wikipedia. Retrieved on October 22, 2010, from http://en.wikipedia.org/wiki/Bill_C-61_(39th_Canadian_Parliament,_2nd_Session)

Braman, S. (2006). Change of State: Information, policy and power. Cambridge, Mass: MIT Press. 1-38.

Buchwald, C. (2000). The Study of Canada's Coalition for Public Information in the Information Highway Policy-Making Process. Library and Information Science Research. 22(2), 123-144.

Clement, T. (2010). New copyright bill. Power & Politics with Evan Solomon. Video retrieved on October 22, 2010, posted to http://www.cbc.ca/arts/media/story/2010/06/02/copyright-bill-clement-montreal.html

Courtois, B. (2010). Modern copyright legislation: a balancing act. Retrieved October 22, 2010, from: http://itacblog.wordpress.com/2010/06/07/modern-copyright-legislation-a-balancing-act/

Eaves, D. (2010). A Dark Beginning to Canada's Copyright Debate. Retrieved October 22, 2010, from: http://www.themarknews.com/articles/1823-a-dark-beginning-to-canada-s-copyright-debate

Elias, E. (2010). Canadian copyright bill opens up debate on digital locks. Retrieved on October 22, 2010, from: http://www.straight.com/article-333548/vancouver/canadian-copyright-bill-opens-debate-digital-locks

FAIRCOPYRIGHT. (2009). Canadian Heritage Minister James Moore's Obamaesque Speech On Copyright. Video retrieved on October 22, 2010, posted to http://www.youtube.com/watch?v=C_OHx2PpsoQ

Geddes, J. (2010). Why Stephen Harper thinks he's smarter than the experts. Retrieved October 22, 2010, from: http://www2.macleans.ca/2010/08/09/cracking- eggheads/

Geist, Michael. (2010). Seven Copyright Questions for Canadian Heritage Minister James Moore. Retrieved October 22, 2010, from: http://www.michaelgeist.ca

gordonmcdowell. (2010). Michael Geist dissects Bill C-32 Canada's new copyright bill. Video retrieved on October 22, 2010, posted to http://www.youtube.com/watch?v=sGkhDgt_8z0

McOrmond, R. (2010). When consumer choice is not enough: Dishonest Relationship Misinformation (DRM). Retrieved October 22, 2010, from: http://www.itworldcanada.com/blogs/ahead/2010/05/03/when-consumer-choice- is-not-enough-dishonest-relationship-misinformation-drm/53093/

mmastrac. (2010). James Moore attacks 'copyright extremists' (@mpjamesmoore). Video retrieved on October 22, 2010, posted to http://www.youtube.com/watch?v=cP6v7DHkAcQ

Nowak, P. (2010a). Copyright bill would ban breaking digital locks. Retrieved on October 22, 2010, from: http://www.cbc.ca/arts/media/story/2010/06/02/copyright-bill-clement-montreal.html

Nowak, P. (2010b). Copyright bill may spark battle over who owns what. Retrieved on October 22, 2010, from: http://www.cbc.ca/technology/story/2010/05/20/copyright-legislation-drm-debate.html

Schneider, A. & Ingram, H. (1993). Social construction of target populations: implications for politics and policy. American Political Science Review, 87(2), 334-347.

Schneider, A. & Sidney, M. (2009). What is next for policy design and social construction theory? The Policy Studies Journal. 37(1), 103-119.

Schon, D. & Rein, M. (1994). Frame Reflection: Toward the resolution of intractable policy controversies. Basic Books: New York. x-36.

Wilson, D. (2010). Canadian Documentarians Infuriated Over Copyright Legislation. Retrieved October 22, 2010, from: http://www.zeropaid.com/news/89292/canadian-documentarians-infuriated-over- copyright-legislation/