

**BILL C-59: AN ACT TO AMEND THE CRIMINAL CODE
(UNAUTHORIZED RECORDING OF A MOVIE)**

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LEGISLATIVE HISTORY OF BILL C-59

HOUSE OF COMMONS

Bill Stage	Date
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First Reading:	1 June 2007
Second Reading:	13 June 2007
Committee Report:	13 June 2007
Report Stage:	13 June 2007
Third Reading:	13 June 2007

SENATE

Bill Stage	Date
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First Reading:	14 June 2007
Second Reading:	18 June 2007
Committee Report:	21 June 2007
Report Stage:	
Third Reading:	22 June 2007

Royal Assent: 22 June 2007

Statutes of Canada 2007, Ch. 28

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative history by Michel Bédard

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BILL C-59: AN ACT TO AMEND THE CRIMINAL CODE
(UNAUTHORIZED RECORDING OF A MOVIE)*

BACKGROUND

A. Purpose of the Bill

Bill C-59, An Act to Amend the Criminal Code (unauthorized recording of a movie) was introduced in the House of Commons by the Minister of Justice on 1 June 2007. It received Royal Assent and came into force on 22 June 2007.⁽¹⁾

The bill addresses the illegal recording of movies in theatres. To this end, it creates two offences in the *Criminal Code*⁽²⁾ (the Code):

- recording for personal use of a movie shown in a theatre – liable to imprisonment for not more than two years; and
- recording for commercial purposes of a movie shown in a theatre – liable to imprisonment for not more than five years.

B. Foundations of the Bill

1. The Issue of Illegal Recording of Movies in Theatres

The bill addresses the illegal recording of movies in theatres, especially at initial releases. One of the intentions of the legislation is to fight the distribution of pirated copies, over the Internet for instance, since movies are often premiered in North America a few months before they are released elsewhere in the world.

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) See Bill C-59, Royal Assent version,
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3066125&Language=e&Mode=1>.

(2) R.S. 1985, ch. C-46.

Statistics on the illegal recording of movies in theatres in Canada come from different sources and are often contradictory. The film industry figures quoted by the government before the Senate Standing Committee on Transport and Communications indicate that 90% of the illegal copies in circulation were recorded in movie theatres.⁽³⁾ The same sources report that 20% to 25% of movies illegally recorded are from Canada,⁽⁴⁾ and that about 70% of these are from Montréal.

2. Gaps in the Existing Legislation

The illegal recording of movies in theatres is currently addressed in the *Copyright Act*.⁽⁵⁾ Under this Act, only recording for commercial purposes can lead to criminal charges.⁽⁶⁾ Film industry members argue that “it is almost impossible to prove that the person camcording intends to make a copy for commercial distribution (sale or hire).”⁽⁷⁾

Since the criminal liability established in the *Copyright Act* cannot effectively combat pirating, the Government of Canada has decided to create the new offence in the Code of recording movies for personal use. As a result, a person may be found guilty without any proof that the recording was made for commercial purposes.

In addition, since the bill creates an offence in the Code, any police force in Canada has jurisdiction to enforce it, rather than only the Royal Canadian Mounted Police.

Under the bill, recording for commercial purposes is still an offence, but now it is added to the Code and constitutes a type of aggravating circumstance. A person making a recording for personal use is liable to imprisonment for not more than two years, while a person making a recording for commercial purposes is liable to imprisonment for not more than five years.

(3) Senate, Standing Committee on Transport and Communications, *Evidence*, 1st Session, 39th Parliament, 20 June 2007 (Patricia Neri).

(4) *Ibid.*

(5) R.S., 1985, ch. C-42.

(6) *Copyright Act*, section 42.

(7) Government of Canada, “Canada’s New Government Amends Criminal Code to Stop Film Piracy,” News release, Ottawa, 1 June 2007, <http://news.gc.ca/web/view/en/index.jsp?articleid=310999&categoryid=1&category=News+Releases&>.

DESCRIPTION AND ANALYSIS

The bill has just one clause. This clause creates the two offences of illegal recording in section 432, in Part XI of the Code, which is entitled *Wilful and Forbidden Acts in Respect of Certain Property*. This Part includes such offences as mischief⁽⁸⁾ and mischief in relation to data.⁽⁹⁾

The bill subdivides section 432 of the Code into four subsections. The offences of recording for personal and commercial purposes (and the maximum penalties) are stipulated in subsections 432(1) and 432(2) respectively. Subsections 432(3) and 432(4) pertain to the forfeiture of anything used in the commission of the offence.

A. Elements of the two Illegal Recording Offences (Subsections 432(1) and 432(2) of the Code)

The bill creates two offences in the Code, namely, illegal recording of a movie shown in a theatre for personal use (subsection 432(1) of the Code) and illegal recording of a movie shown in a theatre for commercial purposes (subsection 432(2) of the Code).

In the case of recording for personal use, a person may be found guilty merely of illegally recording a film shown in a theatre. The recording does not have to have been intended for commercial purposes. That is a case of *mere recording*.

As to recording for commercial purposes, a person may be found guilty if the purpose of the illegal recording was sale, rental or other commercial distribution.⁽¹⁰⁾

Apart from the intention to sell, rent or otherwise commercially distribute an illegally recorded work, the elements of the offences that must be proved are the same. Essentially, the recording must be:

- made without the consent of the theatre manager;
- of a cinematographic work within the meaning of the *Copyright Act*;
- that is shown in a movie theatre; or
- of its soundtrack.

(8) Subsection 430(1) of the Code.

(9) Subsection 430(1.1) of the Code.

(10) We can assume that the phrase used in the bill, “or other commercial distribution,” includes some of the acts stipulated in section 42 of the *Copyright Act*, including “by way of trade exhibiting in public an infringed copy.”

The bill refers to the *consent of the theatre manager* and not that of the copyright holder, as is the case in the United States under the *Family Entertainment and Copyright Act of 2005*.⁽¹¹⁾ It is usually the holder of copyright on a film (and not the theatre manager) who has the right to authorize any reproduction.

On the second point, a cinematographic work must, under the *Copyright Act*, be original and “expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack.”⁽¹²⁾ However, unlike the American federal statute,⁽¹³⁾ the bill does not stipulate whether the illegal recording must include the entire cinematographic work or whether recording part of it constitutes an indictable offence.

B. Penalties for the two Illegal Recording Offences (Subsections 432(1) and 432(2) of the Code)

The two illegal recording offences are hybrid offences. As a result, they may, at the prosecutor’s discretion, be treated as indictable offences or as offences punishable by way of summary conviction (summary offences).

Mere recording is liable to not more than two years in prison (indictable offence) or a fine not exceeding \$2,000 and not more than six months in prison, or either of these (summary conviction)⁽¹⁴⁾ (subsection 432(1) of the Code).

By comparison, the American federal statute provides for a maximum of three years in prison for the first offence and six years for a repeat offence.⁽¹⁵⁾ Before the Senate Standing Committee on Transport and Communications, the government cited the examples of California and Japan.⁽¹⁶⁾ The California law provides for a maximum fine of \$2,500 and a maximum of one year in prison or either of these. The new Japanese law provides for a maximum fine of 10 million yen (about \$85,000) and a maximum of 10 years in prison.

Under the bill, illegal recording for commercial purposes may result in more severe punishment than would be the case with mere recording. For an indictable offence, the maximum penalty is five years in prison (paragraph 432(2)a) of the Code). It should be noted,

(11) 18 USCS § 2319B(a).

(12) Definition of a “cinematographic work” in section 2 of the *Copyright Act*.

(13) 18 USCS § 2319B(a).

(14) See subsection 787(1) of the Code.

(15) 18 USCS § 2319B(a)(1)(2).

(16) Senate, Standing Committee on Transport and Communications, *Evidence*, 1st Session, 39th Parliament, 20 June 2007 (Michael Zigayer).

however, that if the illegal recording for commercial purposes is prosecuted as a summary offence, the bill provides for the same maximum penalty as for mere recording, that is, a fine of \$2,000 and six months in prison, or either of these (paragraph 432(2)*b*) of the Code).⁽¹⁷⁾

At present, a person who illegally records a movie in a theatre for commercial purposes is liable, under section 42 of the *Copyright Act*, to a fine not exceeding one million dollars and imprisonment not exceeding five years, or either of these.

C. Forfeiture (Subsections 432(3) and 432(4) of the Code)

Being found guilty of one of the two illegal recording offences may lead to forfeiture of anything used in the commission of the offence, such as a camcorder, tripod or blank medium (subsection 432(3) of the Code). If that thing is the property of a person who is not a party to the offence⁽¹⁸⁾ (for example, if the offender used his or her parents' camcorder), the court cannot order that it be forfeited (subsection 432(4) du Code).

COMMENTS

Although some observers regard Bill C-59 as a major step forward,⁽¹⁹⁾ others point to the lack of an independent study on illegal recording in movie theatres in Canada.⁽²⁰⁾ Still others call into question the effectiveness of the proposed measures.⁽²¹⁾

In the House of Commons and the Senate, the bill was supported by all political parties. It moved quickly through the legislative process: introduced at first reading in the House of Commons on 1 June 2007, it received Royal Assent and came into force on 22 June 2007.

(17) See subsection 787(1) of the Code.

(18) Section 21 of the Code defines being party to an offence.

(19) Élisabeth Fleury, "Pirater un film deviendra criminel; Le gouvernement Harper dépose un projet de loi pour contrer l'enregistrement d'œuvres au cinéma," *Le Soleil*, 2 June 2007, p. 8.

(20) See for instance Janice Tibbetts, "Ottawa Tackles Movie Pirates," *The StarPhoenix* (Saskatoon), 2 June 2007, p. A11; Allan Woods, "House Supports Film Piracy Law; Bill Would Make Recording Movies In Theatres A Criminal Offence, Crack Down On Distributors," *The Toronto Star*, 2 June 2007, p. A04; Michael Geist, "Taking A Peek Behind The Scenes of Canada's Movie Piracy Bill," *The Ottawa Citizen*, 12 June 2007, p. D1.

(21) Geist (2007).