



# LEGISLATIVE SUMMARY



## **Bill C-11: An Act to amend the Copyright Act (access to copyrighted works or other subject-matter for persons with perceptual disabilities)**

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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.

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

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*Legislative Summary of Bill C-11*  
(Legislative Summary)

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# LEGISLATIVE SUMMARY OF BILL C-11: AN ACT TO AMEND THE COPYRIGHT ACT (ACCESS TO COPYRIGHTED WORKS OR OTHER SUBJECT-MATTER FOR PERSONS WITH PERCEPTUAL DISABILITIES)

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## 1 BACKGROUND

Bill C-11, An Act to amend the Copyright Act (access to copyrighted works or other subject-matter for persons with perceptual disabilities), was introduced in the House of Commons by the Minister of Innovation, Science and Economic Development, the Honourable Navdeep Bains, on 24 March 2016.<sup>1</sup>

The bill is almost identical to Bill C-65, An Act to amend the Copyright Act (access to copyrighted works or other subject-matter for persons with perceptual disabilities), which was introduced and received first reading in the 2<sup>nd</sup> session of the 41<sup>st</sup> Parliament, on 8 June 2015.<sup>2</sup> That bill died on the *Order Paper* when the general election was called in August 2015. Bill C-65 differed from Bill C-11 in one point only: it contained a short title for the bill as its first clause.

Bill C-11 amends the sections of the *Copyright Act*<sup>3</sup> that set out exceptions to copyright law for persons with perceptual disabilities (sections 32, 32.01 and 32.02 of the Act), as well as the section of the Act addressing the granting of an exception to technological protection measure (TPM or “digital lock”) provisions for persons with perceptual disabilities (section 41.16).

The amendments contained in Bill C-11 are designed to enable Canada to ratify the World Intellectual Property Organization's (WIPO's) *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (Marrakesh Treaty)<sup>4</sup> by ensuring that Canadian copyright law is consistent with the requirements set out in the treaty.

### 1.1 THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S MARRAKESH TREATY

The Marrakesh Treaty adopted in Marrakesh, Morocco, on 27 June 2013, contains an agreed-upon set of mandatory copyright exceptions for the benefit of individuals with perceptual disabilities (persons who are blind, visually impaired, or otherwise print disabled). It is administered by WIPO, a self-funding agency of the United Nations that serves as a global forum for intellectual property policy.<sup>5</sup> To enter into force, the treaty must be ratified or acceded to by 20 eligible parties (it is open to WIPO's 188 Member States<sup>6</sup> and to the European Community). As of the writing of this Legislative Summary, 16 states have ratified or acceded to the treaty.<sup>7</sup>

The treaty contains 22 articles, in addition to its preamble. Article 1 of the treaty specifies that nothing in the treaty affects the obligations that Contracting Parties have under any other treaties.

Article 2 sets out definitions in the treaty,<sup>8</sup> while Article 3 specifies who can be beneficiary persons under the treaty: individuals who are blind, who have visual impairments or perceptual or reading disabilities, or who are otherwise unable to hold or manipulate a book or focus or move their eyes to the extent that would be normally acceptable for reading.

Article 4 sets out the limitations and exceptions that Contracting Parties must include in their copyright laws to facilitate the availability of works in accessible-format copies for persons with perceptual disabilities. Of note, paragraph 4 of Article 4 specifies the following:

A Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter.<sup>9</sup>

Indeed, when Australia ratified the treaty in December 2015, its instrument of ratification contained the following declaration:

Under paragraph 4 of Article 4 of the Treaty, limitations and exceptions applying to authorized entities, as defined in Article 2(c), provided for in Australia's national copyright law in accordance with paragraph 1 of Article 4 shall be confined, for Australia, to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons.<sup>10</sup>

Article 5 of the Marrakesh Treaty sets out parameters for the cross-border exchange of accessible-format copies, while Article 6 specifies when accessible-format copies of works may be imported. Article 9 establishes an information access point through the International Bureau of WIPO to facilitate the cross-border exchange of accessible-format copies.

Article 7 of the treaty specifies that copyright law provisions preventing the circumvention of TPMs should not prevent persons with perceptual disabilities from being able to benefit from the provisions found in the treaty.

Article 8 sets out privacy provisions for beneficiary persons, specifying that Contracting Parties must “endeavor to protect the privacy of beneficiary persons on an equal basis with others” when implementing the limitations and exceptions in the treaty.

Article 10 sets out general principles on implementation of the treaty.

Article 11 of the treaty specifies that Contracting Parties, when adopting measures to apply the treaty, should continue to respect the three-step test included in several international treaties on intellectual property that imposes on signatories to the treaties constraints on the possible limitations and exceptions to exclusive rights under national copyright laws. Limitations on and exceptions to copyright must be limited to “certain special cases” (the first step), should “not conflict with a normal exploitation of the work” (the second step), and should “not unreasonably prejudice

the legitimate interests of the author” (the third step).<sup>11</sup> On the other hand, Article 12 of the treaty specifies that the treaty does not prevent Contracting Parties from providing other copyright limitations and exceptions for the benefit of persons with perceptual disabilities.

Articles 13 to 22 of the treaty address administrative and logistical elements, including eligibility for becoming a party to the treaty, entry into force (three months after 20 eligible parties have deposited their instruments of ratification or accession per Article 18), and languages of the treaty.

## 1.2 COPYRIGHT REFORM AND PERSONS WITH PERCEPTUAL DISABILITIES IN CANADA

In 2012 the federal government passed significant copyright reform legislation, the *Copyright Modernization Act*.<sup>12</sup> As noted in the Act’s summary, the amendments sought to:

- (a) update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards;
- (b) clarify Internet service providers’ liability and make the enabling of online copyright infringement itself an infringement of copyright;
- (c) permit businesses, educators and libraries to make greater use of copyright material in digital form;
- (d) allow educators and students to make greater use of copyright material;
- (e) permit certain uses of copyright material by consumers;
- (f) give photographers the same rights as other creators;
- (g) ensure that [the *Copyright Act*] remains technologically neutral; and
- (h) mandate review [of the *Copyright Act*] by Parliament every five years.

The *Copyright Modernization Act* added exceptions for persons with perceptual disabilities, some of which are now subject to further amendment in order to ratify the Marrakesh Treaty. The Act introduced an exception for non-profit organizations acting for the benefit of persons with a print disability (note how the language is more limited than that found in the Marrakesh Treaty) to make a copy of a work in a format specifically designed for persons with a print disability, and to send a copy of the work to similar organizations abroad as long as the work being adapted is by a Canadian author or a national from the country to which the adapted work is being exported (section 32.01 of the *Copyright Act*). The liability of a non-profit organization that, in good faith, makes a mistake regarding an author’s nationality is limited to an injunction.

As well, the *Copyright Modernization Act* added provisions prohibiting the circumvention of TPMs (section 41 and the sections that follow in the *Copyright Act*), as well as a number of exceptions to those provisions. One of the exceptions to the prohibition on circumvention enables a person with a perceptual disability, or

someone (or a non-profit organization) acting on behalf of that person, to circumvent a TPM “for the sole purpose” of making the work or other subject-matter perceptible to the person with the perceptual disability (section 41.16 of the *Copyright Act*).

During study of Bill C-32, a predecessor, in the 40<sup>th</sup> Parliament, to Bill C-11, the Canadian National Institute for the Blind (CNIB) questioned whether the exceptions added for persons with perceptual disabilities, particularly regarding export and the circumvention of TPMs, would be workable in practice.<sup>13</sup>

## 2 DESCRIPTION AND ANALYSIS

The following section summarizes selected provisions in Bill C-11, which are organized in accordance with the structure of the *Copyright Act*. Bill C-11 contains four clauses, which amend sections 32, 32.01, 32.02, and 41.16 of the *Copyright Act*.

### 2.1 REPRODUCTION OF WORKS FOR PERSONS WITH PERCEPTUAL DISABILITIES (CLAUSE 1; SECTION 32 OF THE *COPYRIGHT ACT*)

Clause 1 contains a number of amendments to section 32 of the *Copyright Act*, which governs the reproduction of works and other subject-matter in alternative formats for persons with perceptual disabilities. It appears that this clause is designed to implement Article 4 of the Marrakesh Treaty, which sets out the limitations and exceptions that Contracting Parties must include in their copyright laws to facilitate the availability of works in accessible-format copies for persons with perceptual disabilities.

Clause 1(1) modifies the French version of the introductory paragraph of section 32(1) to make it better match the English version of the section (changing “de se livrer à l’une des activités suivantes” to “d’accomplir l’un des actes suivants”).

Clause 1(2) replaces section 32(1)(a) of the *Copyright Act* with new sections 32(1)(a), 32(1)(a.1) and 32(1)(a.2) to allow for the reproduction and fixation, in a format specially designed for persons with perceptual disabilities, of literary, musical, artistic or dramatic works (other than cinematographic works), performances of such works and sound recordings. Under the current version of the Act, section 32(1)(a) only allows the making of a copy or sound recording of such works – it does not include reproduction and fixation, and does not refer to a performer’s performances.

Clause 1(3) adds new section 32(1)(b.1) to the Act, to clarify that it is not an infringement of copyright to provide a person with a perceptual disability with, or with access to, a work or other subject-matter referred to in sections 32(1)(a) and 32(1)(b), in a format specially designed for persons with a perceptual disability. The new section also states that doing any other act that would be necessary to provide such material would not be an infringement of copyright.

Clause 1(4) modifies the French version of section 32(1)(c) to make it better match the English version (changing “ou l’exécution en public d’une telle oeuvre fixée” to “soit en direct soit” to match the English, which reads, “perform in public a literary or dramatic work, other than a cinematographic work, in sign language, *either live or in*



a format specially designed for persons with a perceptual disability” [author’s emphasis]).

Clause 1(5) replaces existing section 32(2) (which does not authorize the making of large print books) and section 32(3) (which limits the exception on reproduction in alternative formats to situations where the work or other subject-matter is not already commercially available in the format needed) with new section 32(2), which is a slightly modified version of existing section 32(3). By maintaining, in new section 32(2), the limitation regarding what is already commercially available, the government seems to be following the provision in paragraph 4 of Article 4 of the Marrakesh Treaty, which provides that where a Contracting Party confines limitations or exceptions under Article 4 to works that cannot be obtained commercially, the Contracting Party must then declare so in “a notification deposited with the Director General of WIPO at the time of ratification of, acceptance of or accession to this Treaty or at any time thereafter.”

## 2.2 EXPORT REGIME FOR WORKS MADE FOR PERSONS WITH PERCEPTUAL DISABILITIES (CLAUSE 2; SECTION 32.01 OF THE *COPYRIGHT ACT*)

Clause 2 of Bill C-11 amends section 32.01 of the *Copyright Act*, which sets out the export regime regarding reproductions of works and other subject-matter made for persons with perceptual disabilities. It appears that this clause is designed to implement Article 5 of the Marrakesh Treaty, which states the parameters for the cross-border exchange of accessible-format copies of copyrighted works and other subject-matter.

Clause 2(1) replaces sections 32.01(1) to 32.01(4) of the *Copyright Act*. New section 32.01(1) indicates that it is not an infringement of copyright for a non-profit organization acting for the benefit of persons with a print disability to engage in the reproduction and fixation of literary, musical, artistic or dramatic works (other than cinematographic works), performances of such works, and sound recordings in a format specially designed for persons with perceptual disabilities. Such non-profit organizations may also provide foreign non-profit organizations (acting for the benefit of persons with a print disability) or foreign individuals with a print disability with access to or copies of the above-noted works or other subject-matter.

However, new section 32.01(2) specifies that non-profit organizations cannot provide such works or other subject-matter to organizations or individuals in countries where the work or other subject-matter is already available in an appropriate format for persons with perceptual disabilities, within a reasonable time and for a reasonable price, and where such material can be located with reasonable effort.

New section 32.01(3) specifies that an injunction is the only remedy that the owner of copyright in the work or other subject-matter being reproduced has against a non-profit organization relying on the exception set out in section 32.01 if the foreign country to which the reproduction is being sent is a Marrakesh Treaty country, and if the only infringement is that the work or other subject-matter is already available and may be located in a perceptible format in that country.

New section 32.01(3.1) specifies that, where the foreign country to which the reproduction is being sent is a non-Marrakesh Treaty country, an injunction is the only remedy that the owner of copyright in the work or other subject-matter being reproduced has against a non-profit organization relying on the exception set out in section 32.01 if the conditions set out in new section 32.01(3) are met *and* the non-profit organization can demonstrate that it had reasonable grounds to believe that the work or other subject-matter was not available and could not be located in that country.

New section 32.01(4) specifies that a non-profit organization relying on the exception set out in section 32.01(1) shall pay to the copyright owner any royalties established under regulations.

Clause 2(2) modifies section 32.01(6) of the *Copyright Act* regarding the obligations of a non-profit organization to submit reports to an authority about its activities under this section, changing “organization” to “non-profit organization” to reflect the exception set out in section 32.01(1).

Section 32.01(7) sets out the regulations that the Governor in Council may make regarding sending copies of works or other subject-matter in accessible formats for persons with perceptual disabilities outside Canada. Clause 2(3) replaces section 32.01(7)(a) with language that reflects the changes made elsewhere in the section, though the essence of section 32.01(7)(a) remains the same: it provides the ability to make regulations to require Canadian non-profit organizations sending copies of works or other subject-matter in accessible formats for persons with perceptual disabilities outside Canada to enter into contracts with recipient non-profit organizations.

Clause 2(4) modifies section 32.01(7)(d) to indicate that the Governor in Council may make regulations respecting payment of a royalty to a collective society where the copyright owner of a work or other subject-matter cannot be located. Currently, section 32.01(7)(d) only mentions works or classes of works, and does not include “other subject-matter” (which might include performer’s performances and sound recordings).

Clause 2(5) adds a definition of “Marrakesh Treaty country” to section 32.01(8) of the *Copyright Act*, and it adds “artistic” to the definition of “print disability”: “a disability that prevents or inhibits a person from reading a literary, musical, artistic or dramatic work in its original format.”

### 2.3 NON-PROFIT ORGANIZATION (CLAUSE 3; SECTION 32.02 OF THE *COPYRIGHT ACT*)

Clause 3 of Bill C-11 adds new section 32.02 to the *Copyright Act*, specifying that for the purposes of sections 32 and 32.01 of the Act, a non-profit organization “includes a department, agency or other portion of any order of government, including a municipal or local government, when it is acting on a non-profit basis.”

## 2.4 CIRCUMVENTING TECHNOLOGICAL PROTECTION MEASURES (CLAUSE 4; SECTION 41.16 OF THE *COPYRIGHT ACT*)

Sections 41 to 41.22 of the *Copyright Act* (added in 2012) contains provisions prohibiting the contravention of TPMs, which are technologies, devices or components that control access to a work or the ability to copy a work.

Sections 41.11 through 41.18 of the Act contain several exceptions to the prohibition on circumventing TPMs. In particular, section 41.16 contains an exception to enable contravention of a TPM “for 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.”

Clause 4 of Bill C-11 adds the following purposes to this single purpose whereby a TPM can be contravened for the benefit of persons with perceptual disabilities, as described in section 41.16(1) of the *Copyright Act*.

- to permit a person or a non-profit organization to benefit from the exception found in section 32 of the Act (which governs the reproduction of works and other subject-matter in alternative formats for persons with perceptual disabilities); and
- to permit a non-profit organization to benefit from the exception found in section 32.01 of the Act (which sets out the export regime regarding reproductions of works and other subject-matter made for persons with perceptual disabilities).

Clause 4 also modifies section 41.16(2), which specifies that the prohibitions on the distribution and marketing of devices, such as software, that can be used to circumvent TPMs, do not apply to the provision of services to persons or non-profit organizations referred to in section 41.16(1), or to those who manufacture, import or provide a technology for the sole purpose of enabling persons or non-profit organizations referred to in section 41.16(1) to circumvent a TPM.

## 3 COMMENTARY

On 24 March 2016, the day that Bill C-11 was introduced and received first reading in the House of Commons, the CNIB issued a news release indicating its support of the effort to ratify the Marrakesh Treaty. John Rafferty, President and CEO of the CNIB, said, “The introduction of Bill C-11 announced today is a significant step forward for the people we serve.”<sup>14</sup> The CNIB is the primary producer of accessible-format literature in Canada.

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## NOTES

1. [Bill C-11, An Act to amend the Copyright Act \(access to copyrighted works or other subject-matter for persons with perceptual disabilities\)](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament.
2. [Bill C-65, An Act to amend the Copyright Act \(access to copyrighted works or other subject-matter for persons with perceptual disabilities\)](#), 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament.
3. [Copyright Act](#), R.S.C. 1985, c. C-42.

4. World Intellectual Property Organization [WIPO], [Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled](#) [Marrakesh Treaty], 27 June 2013.
5. WIPO, [“What is WIPO?”](#), *Inside WIPO*.
6. WIPO, [Member States](#).
7. WIPO, [“Contracting Parties: Marrakesh VIP Treaty \(Treaty not yet in force\)”](#), *WIPO-Administered Treaties*, accessed 2 May 2016.
8. As described in WIPO, Marrakesh Treaty, art. 2, the treaty applies to “works”:
 

literary and artistic works within the meaning of Article 2(1) of the Berne Convention in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media.

The Berne Convention sets minimum standards of protection for authors of literary, dramatic, musical and artistic works. It also defines the scope and duration of protection: see WIPO, [Berne Convention for the Protection of Literary and Artistic Works](#), 1886, as amended [Berne Convention]. Canada acceded to the Berne Convention on 10 April 1928, and to the 1971 revision on 28 September 1998.
9. WIPO, Marrakesh Treaty, art. 4, para. 4.
10. WIPO, [“Ratification by Australia,”](#) *Marrakesh Notification No. 12: Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, 10 December 2015.
11. The three-step test was first added as article 9(2) of the Berne Convention in 1967. Variants of the three-step test are found in World Trade Organization, [Agreement on Trade-Related Aspects of Intellectual Property Rights](#), art. 13; [WIPO Copyright Treaty](#), art. 10; and [WIPO Performances and Phonograms Treaty](#), art. 16.
12. [Copyright Modernization Act](#), S.C. 2012, c. 20.
13. House of Commons, Legislative Committee on Bill C-32, [Evidence](#), 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament, 24 March 2011, 1215 (Ms. Cathy Moore, National Director, Consumer and Government Relations, Canadian National Institute for the Blind [CNIB]). See also CNIB, [“A Brief on Bill C-32: Copyright Reform and the CNIB Library to the Legislative Committee on Bill C-32,”](#) 18 March 2011.
14. CNIB, [“CNIB applauds Government of Canada’s push to ratify Marrakesh Treaty,”](#) News release, 24 March 2016.