ASSOCIATION DES PRODUCTEURS DE FILMS ET DE TÉLÉVISION DU QUÉBEC

APFTQ Memorandum

On Bill C-32

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On November 5, 2010, the federal government referred Bill C-32—an Act to Amend the *Copyright Act* (CA) to a legislative committee for review. Today the Association des producteurs de films et de télévision du Québec (APFTQ) is submitting a memorandum relating its positions on various aspects of the bill that closely affect the film and television industry.

As spokesman for more than 140 independent film and television companies, the APFTQ represents the vast majority of Quebec companies producing for all screens in either French or English. In 2009-2010, film and television production in Canada brought in close to $5 billion all told and, directly and indirectly, produced more than 117,000 full-time equivalent jobs.

Here is a brief summary of the submissions set out in detail in our memorandum:

1) *New performers' rights*

   Bill C-32 provides for new rights for performers. Under the WIPO (the WPPT), these rights do not apply when the performances are embodied in audiovisual works. The AFPTQ feels that the legislative committee should amend section 10 of the bill to bring it into line with subsection 17 (1) of the existing CA to ensure that the new rights conform to the WPPT.

2) *Piracy*

   Bill C-32 must be tightened up to make illegal all services facilitating piracy, to make such services subject to payment of heavy penalties and to ensure that these services are not allowed to escape liability under any circumstances. As it stands, the bill legalizes mass piracy on the part of consumers. This must be remedied by amending the exception allowing reproduction for private purposes.

   The technological protection measures, which Bill C- 32 would make it illegal to circumvent, are only measures that control access to works. The bill contains no provisions preventing consumers from circumventing measures to control reproduction. We feel that the bill must continue to make it illegal to circumvent measures protecting access to works.

3) *The new exemptions*

   The text on the new exemptions must be revised to ensure that they apply only to the acts and individuals that the government really has in mind. As they stand, the exemptions are too broad and fail to compensate the copyright owners.

4) *Remuneration of copyright owners*

   We suggest creating a new system of digital cultural content use in order to finance the production and digital use of new cultural content.

5) *Authors of cinematographic works*

   While this topic is not directly discussed in Bill C-32, we feel that it underlies all of the audiovisual aspects of the bill. The APFTQ feels that it is essential for the identity of the author of a cinematographic work to be determined in the bill. The maker [*producteur*—Tr] is the

architect of a film and is the one who exploits it once it has been produced. We believe that the maker should be the first owner of the rights to a cinematographic work because, like an employer who benefits from an exemption in the law, he pays upstream all of the authors, including the screen writer and the director, whose works are included in the final cinematographic work.

Our recommendations, highlighted in yellow, are set out at the end of each heading in the memorandum. We have also used boxes for suggested changes in a text in the bill. In the boxed text, the section numbers in bold refer to sections in Bill C-32, and the others, to sections in the *Copyright Act.* Finally, some parts are underlined for greater emphasis.

We wish to thank the legislative committee for giving us an opportunity to comment on Bill C-32. We will be pleased to answer your questions when we appear before the committee.

1) NEW PERFORMERS' RIGHTS

Bill C-32 sets out new rights for performing artists in order to comply with the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT) of 1996. It should be noted that this treaty pertains to sound performances by artists on line or fixed in phonograms and does not include performances fixed or embodied in audiovisual works.

In 1997, when the CA was amended to include certain rights for performers, section 17 was added to ensure that when a performance is embodied in an audiovisual work, the performer may no longer exercise the copyright in relation to the work, in order to comply with the scope of the WPPT.

Subsection 9(1) of Bill C-32 sets out new proprietary rights for performers by the addition of subsection 15(1.1) to the CA. It then adds a moral right in reference to performers by creating sections 17.1 and 17.2, in particular by amending subsection 28.2(1) of the CA. However, the bill fails to adjust section 17 of the CA accordingly. As a result, the new rights would apply to a performance embodied in an audiovisual work, contrary to the notion of vested rights and in violation of the WPPT. We feel that this omission also violates the content of the diplomatic conference on the protection of audiovisual performances held in Geneva from December 7 to 20, 2000. In fact, at the end of this diplomatic conference, the WIPO member states, one of which is Canada, concluded a provisional agreement on a number of items, the preamble of which reads as follows:

> **Recognizing** that the WIPO Performances and Phonograms Treaty done in Geneva, December 20, 1996, does not extend protection to performers in respect of their audiovisual performances,[1]

The APFTQ believes that the legislative committee must make the following adjustments to subsection 17 (1) to bring Bill C-32 into line with the WPPT and its non-application to audiovisual works.

Our recommendations:

> **10. (1)** Subsection 17 (1) of the Act is replaced by the following:
>
> *Cinematographic works*
>
> 17. (1) Where the performer authorizes the embodiment of the performer's performance in a cinematographic work, the performer may no longer exercise, in relation to the performance where embodied in that cinematographic work, the copyright referred to in subsections 15(1) and 15(1.1) or the moral rights set out in subsections 17.1, 17.2 and 28.2(1).

Incidentally, we would like to draw to the attention of the legislative committee the fact that subsection 15(1.1) added to the CA by Bill C-32 contains a number of rights that overlap those already set out in subsection 15(1) of the existing CA. Left as is, it would be difficult to determine which rights apply to a given performance. In our opinion, C-32's subsection 9(1) should state that

[1] http://www.wipo.int/meetings/en/html.jsp?file=/redocs/mdocs/copyright/en/iavp_dc/iavp_dc_3.html

the content of the new subsection 15(1.1) replaces, rather than is added to, that of subsection 15 (1) in the existing CA.

2) *PIRACY*

In a memorandum tabled during the 2009 copyright consultations, the APFTQ recommended four measures for inclusion in the CA to eliminate or at least mitigate mass piracy. They were as follows:

1- Conform to WIPO treaties by providing legal remedies against circumventing technological remedies designed to protect against the suppression or modification of information on the regime of rights incorporated in the work;

2- Ensure that the right of "public availability in order that any person might have access when he or she so requires" [translation] be considered as part of telecommunications law, to prevent it from being a separate law as set out in the WIPO treaties, and in order to make it clearly understood that it is illegal for a consumer to give other consumers access to protected works without prior authorization;

3- Make services facilitating mass piracy illegal and ensure that they are subject to a regime of notification and withdrawal in order to end piracy facilitated by such services;

4- Set out at least one requirement to monitor and report on mass piracy on the part of suppliers of network services, including the Internet.

The measures that we propose were submitted as an entity in an effort to achieve the objective of combating mass piracy in Canada. Tampering with one component of this entity requires an adjustment of the others if the objective is to be achieved. Although the bill addresses some aspects of these measures, a number of them remain unanswered. As drafted, the bill does not help to counteract or at least restrict mass piracy in Canada. Here then is a revision of our recommendations for achieving this, applied to Bill C-32.

A. Services facilitating piracy

We understand that the government's intention is to counteract mass piracy in Canada, which at present is a paradise for such activities. Perhaps it will be impossible to stop this new way of consuming cultural content, but we feel that it is the government's duty to protect the rights of copyright owners. Therefore steps need to be taken to marginalize this type of consumption. To achieve this, the bill must establish three main principles:

i) Make all services facilitating piracy illegal;
ii) Require payment of damages to deter such services; and
iii) Ensure that such services are under no circumstances free from liability.

i) Make all services facilitating piracy illegal

Under "Infringement of Copyright", section 18 of the Bill adds subsection 27 (2.3) to the CA whereby services facilitating the infringement of copyright would be made illegal. We appreciate the intent and regard it as being of the greatest importance, but the text as written can too easily be circumvented and fail in its intent. Here is the text of C-32's section 18:

> **18.** Section 27 of the Act is amended by adding the following after subsection (2):
>
> 27 (2.3) It is an infringement of copyright for a person to provide, by means of the Internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service. [Our emphasis]

Most piracy services are found on websites in which consumers are offered a variety of components, for example data storage or retrieval tools. The criterion whereby a service must be "designed primarily" to enable piracy would not be met in most cases, because the component facilitating piracy is part of a whole. This would provide an escape hatch for most services enabling piracy, as they would maintain that while their web service did contain a component that could facilitate piracy, such was not the main intention of their service. They would also maintain that copyright does not apply to a large portion of the content being exchanged (we do not agree with this), and their service was designed primarily to enable legal acts. Finally, concerning the remainder of the illegally exchanged content, they would maintain that they could not control the content exchanged among their subscribers (we do not agree with this), and that their service was not designed to promote this kind of exchange in any case. We have already had to deal with claims such as these.[2]

Finally, the requirement that a service must be "designed" to enable acts of infringement does not correspond to the need. A tool can be designed for one thing but be used for something else. In our view, what counts is not the design so much as the actual use. The purpose is to counter real, not hypothetical piracy. In the bill as it stands, the bar is set much too high.

Our recommendation:

> **18.** Section 27 of the Act is amended by adding the following after subsection (2):
>
> 27 (2.3) It is an infringement of copyright for a person to provide, by means of the Internet or another digital network, a service that the person knows or should have known is especially designed or used to enable acts of copyright infringement if another person commits such a violation on the Internet or any other digital network while using that service. [Our emphasis]

We should add that a person must commit a violation of copyright while using the service in order for it to be illegal.

ii) Require payment of damages to deter such services

[2] A number of makers accompanied by the ADISQ, the CIRA, the APFTQ and the CIRPA prosecuted the operators of the Quebectorrent.com website in the Superior Court in 2008 (File #500-17-039771-079).

The CA as it now stands states that where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement (section 35 (1)). Since it may be difficult to establish proof, the copyright owner is given the option of choosing statutory damages, as set out in section 38.1(1) of the current CA, which reads as follows:

> 38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages […]

Subsection 46(1) of the Bill retains this option, but adds that services facilitating piracy, such as those set out in the new section 27(2.3) of the CA, are not subject to statutory damages (see new paragraph (d), subsection 38.1(6) of the CA amended by subsection 46(3) of the Bill).

It is very difficult if not impossible for a copyright owner to establish proof of damages in a case of mass piracy. Refraining from subjecting the services facilitating the piracy to statutory damages is not the right answer. Statutory damages must not be excluded from the options made available to the copyright owner, since to do so would be injurious to him or her. The bill must allow these services to be made liable to pay statutory damages, if the copyright owner so chooses.

Moreover, subsection 46(1) of Bill C-32 revisits the section on statutory damages by adding to it a major element of relief for all violations committed "for non-commercial purposes". Here are the sections in the amended CA:

> 38.1(1) (a) in a sum of not less than $500 and not more than $20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work or other subject-matter, if the infringements are for commercial purposes;

> 38.1(1) (b) in a sum of not less than $100 and not more than $5,000 that the court considers just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for non-commercial purposes; [Our emphasis]

The intent in providing this measure of relief is to protect consumers from the risk of incurring large penalties if they are prosecuted. But in providing relief in all "non-commercial" cases, favourable treatment is also given to a host of non-commercial businesses whose services facilitate piracy but who would not meet the criteria of the new CA subsection 27(2.3), since the latter are in most cases non-commercial. This new regime of penalties is so non-punitive that the companies or services in question would not even consider ending their illegal activities. Even at the ceiling for statutory damages they would have to pay no more than $5,000 for all infringements in relation to all works.

Whether a service facilitating piracy is operated by a student or by a business, whether it is commercial or non-commercial, it is still illegal and must stop. We feel that the bill must confine relief of damages to violations made for private purposes. The non-commercial area is too broad and could include many businesses, services and products available now

and in the future that would violate copyright with relative impunity. This cannot be the intention of the government.

Our recommendations:

If relief is to be provided, subsection 46(1) in C-32 must draw a distinction between violations "for a non-private purposes" and violations "for private purposes".

Moreover, the exception set out in section 46(3) of the Bill where paragraph (d) is added to subsection 38.1(6) of the CA, where "a person who infringes copyright under subsection 27(2.3)" cannot be ordered to pay the statutory damages, must be stricken from the bill. In its place, the bill must stipulate that all piracy services are subject to the most severe penalties in the following way:

> **46(1)** Subsections 38.1(1) to (3) of the Act are replaced by the following:
> […]
> 38.1(1) (c) paragraph (a) of this subsection applies in the case of all services referred to in subsection 27(2.3).

With these two recommendations and the inclusion in the bill of our recommended amendments to subsection 27(2.3) of the amended CA, all piracy services, commercial and non-commercial, can be made punishable by the highest statutory damages, i.e. those called "commercial" in Bill C-32. The copyright owner may still choose the option of determining damages and profits in a court.

iii) Ensure that such services are under no circumstances free from liability

Section 35 of C-32 sets out a new regime of exemption from liability for suppliers of network services in cases where the supplier is only providing means of telecommunication or reproduction for telecommunication purposes, except where the service is being used to facilitate piracy under subsection 27(2.3) of the amended CA. While the intention is good, the text is inadequate because the exception does not cover all exemptions from liability added by the bill.

In effect, only suppliers who provide services accessing the Internet (or another network) are subject to this exemption exception. Thus a service facilitating piracy that is provided by a supplier who places protected works in cache storage, for example, might find itself exempt from all liability under the new subsection 31.1(4). Moreover, under subsections (5) and (6) of the same section, a person who provides a storage service for pirates, as is often the case, would be liable only if he knew that a competent tribunal had rendered a copyright violation decision against the person who had stored the work. Copyright owners would therefore have to obtain a decision from a court against consumers in order to make accountable a service facilitating piracy and storing works for these consumers. It should be noted that a consumer must commit a violation of copyright law, be prosecuted and sentenced in order for the service to be illegal.

We do not feel that all the liability exemptions should apply if the supplier of services is providing a service facilitating piracy or if it knows that a competent court has handed down a decision on the one using its services.

Our recommendations:

35. The Act is amended by adding the following after section 31 :

31.1(1) […]

(2) Subsections (1), (3) and (5) do not apply in respect of a service provided by the person if the provision of that service also constitutes an infringement of copyright under subsection 27(2.3).

[…]

(6) Subsections (1), (3) and (5) do not apply in respect of a work or other subject-matter if the supplier knows of a decision of a court of competent jurisdiction to the effect that the person who has used the services of this supplier infringes copyright by using the work or other subject-matter by the way in which he or she uses the work or other subject-matter.

Finally, we repeat that as long as those supplying access to the Internet or to another network are not required to look out for mass piracy, which brings them extra revenue, and to report it to the copyright owners, it will be difficult if not impossible for the latter to assert their rights. Services facilitating piracy are not easily identifiable and even less so are consumers involved in mass piracy. While the intention may not be to prosecute consumers directly, information concerning them is essential to any intervention aimed at putting an end to this kind of activity. Cooperation from suppliers of network access services is essential, which is why the CA must require them to monitor and work on mass piracy.

B. Individual piracy

In looking at the question of consumers who exchange content, we see that two protected actions are involved. The first is making material available to the public by telecommunication in a way that each person may access it from the place and time he or she chooses individually; this action presupposes that the work has first been reproduced either on the memory of a computer or on the digital memory of a storage service (uploading). The second is reproducing when a person downloads the work now made available, which requires the telecommunication of the work in order to do the download. This refers to two actions (by telecommunication, including making a work available and reproducing it), both set out in section 3 of the existing CA, that only the owner of the rights to a work may carry out or authorize. Moreover, subsection 27 (1) of the CA states that it is an infringement of copyright to do these things without the owner's authorization. It is immediately apparent that all actions carried out individually by pirates are illegal.

In its effort to legalize certain actions carried out by consumers, Bill C-32 effectively legalizes the reproduction of works upstream (uploading), allows access to them and legalizes reproduction of them downstream (downloading). This is exactly what mass piracy consists in.

Thus the bill legalizes individual acts on the part of consumers and consequently short-circuits the illegality of services facilitating piracy, since such services are illegal only when a real violation of copyright by consumers takes place. It also short-circuits the non-exemption from liability on the part of the supplier of storage services, because in this case also there must have been a violation of copyright and even a decision against the consumer concerned.

As drafted, the C-32 text on reproduction for private purposes would make mass piracy legal for the following reasons:

- An individual who purchased a musical work could copy it onto the digital memory of a site offering storage services, since the criteria of the amended CA would have been fulfilled:
  - paragraph 29.22(1) (a)–non-infringing work
  - paragraph 29.22(1) (b) – copies legally obtained and reproduced on a medium that the individual is authorized to use
  - paragraph 29.22(1) (c) – the individual is not circumventing any technical measures protecting access to the work
  - definition of 29.22(2) – a medium or device includes digital memory in which a work may be stored
- It may be made available to other individuals from this digital memory, since the definition in 29.22(2) of the amended CA allows telecommunication (which includes being made available to the public, according to subsection 2.4 (1.1) of the amended CA). The only actual infringement would be giving the production away [paragraph 29.22(1) (d)].
- In addition, another person may reproduce this copy on a digital memory by virtue of the same exception, because the source copy was not an infringing copy and was obtained legally; he or she can also make it available to other individuals who can copy it in turn, and so on.
- Not all reproductions are done for private purposes [paragraph 29.22(1) (e)].
- The source work could also be a recording from a television series made under the new exception for later listening or viewing.

In order to correct this unintended outcome, the "reproduction for private purposes" exception must be tightened up as follows:

- Reproduction must be limited to "private use" but not "private purposes", which has a broader connotation;
- The person who does the copying must be the owner of the original copy or have a licence allowing him to reproduce the work for private use;
- The copy must be made on a medium or piece of equipment that belongs to him or to someone who is a member of his household (not the one that he is authorized to use, as in the digital memory provided by an Internet storage service, since this can open the way for uploading and future piracy—see emphasized portions in the following box);

- Not only must the individual doing the copying be prohibited from reproduction; there must be other prohibited actions as well.

Our recommendations:

22. The Act is amended by adding the following after section 29.2:

Reproduction for private use

29.22 (1) It is not an infringement of copyright for an individual to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if

(a) the copy of the work or other subject-matter from which the reproduction is made is not an infringing copy;

b) either the individual is the owner of the copy or has a licence allowing reproduction, and owns or is authorized to use the medium or device on which it is reproduced, or the owner is a member of his or her household;

c) the individual, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented;

d) the individual does not give any reproductions away, and does not perform any other action that only the copyright owner is entitled to perform, such as selling, renting, distributing, telecommunicating or placing at public disposal for the purpose of gaining access to or reproducing it;

e) the reproduction is used for private use only.

(2) In paragraph (1)b), mention of the "medium or device" includes in particular the digital memory in which it is possible to store a work or another object of copyright for the purpose of allowing its telecommunication by Internet or any other digital network. […] {Our emphasis }

C. *Technological protection measures*

Some maintain that C-32 will make it illegal to circumvent all the technological protection measures, and accordingly copyright owners will have only to short-circuit the new exceptions put in place by the bill in order to protect their works. However, this is not quite correct: the only action that the bill would make illegal is the circumventing of protective measures controlling access to the works. We have great difficulty understanding why this measure would be removed from the bill, thereby authorizing illegal access to protected works.

Control of access has nothing to do with control of reproduction. The new exceptions are instances where permission is obtained to reproduce, and there is nothing in the bill to prevent consumers from reproducing a work; on the contrary, it would even be legal to circumvent a measure designed to prevent reproduction. Thus, thanks to the new exception on reproducing for private purposes, a

consumer purchasing musical works would be allowed to reproduce such works for listening on another piece of equipment.

Here are some passages from Bill C-32 that will help to explain:

> **22.** The act is amended by adding the following after section 29.2:
> […]
> 29.22 (1) (c) the individual, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented;
>
> **47.** Section 41 of the Act is replaced by the following:
>
> 41. The following definitions apply in this section and in sections 41.1 to 41.21.
>
> "circumvent" means
>
> a) in respect of a technological protection measure within the meaning of paragraph (a) of the definition "technological protection measure", to descramble a scrambled work or decrypt an encrypted work or to otherwise avoid, bypass, remove, deactivate or impair the technological protection measure, unless it is done with the authority of the copyright owner, and
>
> b) in respect of a technological protection measure within the meaning of paragraph (*b*) of the definition "technological protection measure", to avoid, bypass, remove, deactivate or impair the technological protection measure.
>
> "technological protection measure" means any effective technology, device or component that, in the ordinary course of its operation,
>
> a) controls access to a work, to a performer's performance fixed in a sound recording or to a sound recording and whose use is authorized by the copyright owner; or
>
> b) restricts the doing — with respect to a work, to a performer's performance fixed in a sound recording or to a sound recording — of any act referred to in section 3, 15 or 18 and any act for which remuneration is payable under section 19.
> [Our emphasis]

The bill divides copyright into two categories: 1° access to a work, set out in paragraph (a), and 2° all other rights, including reproducing, in paragraph (b). Briefly, Bill C-32 allows consumers to reproduce works on the condition that they were obtained legally and that the other conditions governing the new exemptions were fulfilled.

As the representative for owners of rights to works the use of which may be duly authorized or prohibited, the APFTQ feels that none of the protection measures should be able to be legally circumvented at any time. The technological protection measures represent the digital right to authorize or prohibit the use of a work. In addition, once an owner authorizes use of his work, he is entitled to receive remuneration for such use. Technological protection measures are the basis of many new models for digital business—video on demand, sale of iTunes, digital rental, etc. With Bill C. 32, copyright owners wishing to protect access to or reproduction of a work in order to use it on the digital media must pay all the costs involved in integrating and managing such a measure, all the while knowing that measures designed to protect reproduction can be

legally circumvented, and the work reproduced free of charge. How can one function in the digital world under these circumstances?

Looking at the bill as it now stands and the significant opposition to the illegality of circumventing the technological protection measures, we feel that at least the circumventing of the measures protecting access to works must be made illegal, as proposed by Bill C-32. We would accept this basic level of protection for copyright holders on the condition of acquiescence with the other recommendations we have made to avoid abuses and to limit mass piracy.

3) *THE NEW EXCEPTIONS*

Our general feeling about the new exceptions is that they should not be added, especially without compensation for the copyright owners. With most of these exceptions, the government's intent appears to be the legalizing of actions carried out by consumers. The danger in including these exceptions is first, they cover areas much broader than intended, and second, they will encourage people to go further. Worse, as already mentioned, these exceptions will facilitate, not do away with, mass piracy and even further erode the remuneration of copyright owners. This cannot be the intent of the government, since it would undoubtedly destroy the whole cultural industry. We shall look specifically at remuneration later on in the document.

In order to make a useful contribution and to limit the adverse effect these new exceptions would have if added, we shall propose adjustments that must be made in the bill before its passage. We must ensure that these exceptions pertain only to the persons and actions that the government really has in mind. The legislative committee will note that we recommend enumerating the actions that will be proscribed in respect to most of the exceptions, in order that the exception is clearly understood. We have already examined the new "reproduction for private purposes" exception in the preceding section. We will now look at the other exceptions pertaining to the audiovisual industry.

i) Research or private study

Section 21 of Bill C-32 contains amendments to CA section 29 on private study or research. This section improves the exception for fair dealing in relation to education, parody or satire. We feel that the legislative committee must define or circumscribe what is meant by fair dealing for the purpose of education, since it can have a very broad scope. Education being a motherhood issue, one can imagine a person downloading several protected works and choosing to regard them as fair dealing for educational purposes, even when accessing or downloading them involves circumventing technological protection measures. One can imagine a large corporation taking advantage of this exception to provide training to its employees. In our view, this would be giving too broad a meaning to the expression, "for educational purposes".

Our recommendation is the same in the case of the need to define or circumscribe what is meant by educational institutions, in order to avoid giving too broad a scope to the exceptions to which these institutions are entitled. One could imagine a driving school or a

golf school attempting to piggyback onto this exception; this would give far too broad a meaning to the expression "educational institutions", which, in our opinion, pertains to places where schooling in the conventional sense takes place: secondary and primary schools, cégeps and universities.

ii) Non-commercial user-generated content (UGC)

We maintain that this exception should not be added to of the CA. It has generally been observed that it does not exist anywhere else in the world and opens the door to abuses. In any case, here are our recommendations for mitigating its impact if this exception must be added to the Act:

- There must be fair dealing (this must be specified even though the exception is under the "Fair Dealing" section in the CA) as determined by the courts;
- Authorization granted to a disseminator of UCG must specify that the dissemination must be digital only and the disseminator must pay the applicable royalties, as indicated in the current CA;
- This use must be for private purposes only, not for non-commercial purposes, since it is too easy to say that there are no revenues involved and that, accordingly, it is not commercial;
- UCG use or dissemination must pass the test of the WIPO treaties, where reproduction in some cases is permitted, provided that it "does not conflict with a normal exploitation of the work or prejudice the legitimate interests of the author".[3] Paragraph 29.21(1) (d) of the amended CA does not pass this test;
- The UCG must be a real transformation of the existing work or must incorporate the latter in the UCG incidentally, to avoid the possibility of someone simply translating a work or modifying an insignificant aspect of it and then exploiting it; and
- The exception must be subject to the legal remedies against circumventing measures controlling access to the existing work, as is the case with the other exceptions.

Our recommendations:

22. The Act is amended by adding the following after section 29.2:

Non-commercial User-generated Content for private use

29.21 (1) It is not an infringement of copyright for an individual to use fairly an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it digitally, if

[3] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html, article 9(2)

a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for private purposes;

b) it is the responsibility of the intermediary to pay whatever fees are attached to the authorization to disseminate;

c) the new work or the new subject created must be a real transformation of the existing work or must incorporate it incidentally;

d) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

e) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

f) the individual, in order to make the use, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented;

g) the use of, or the authorization to disseminate, the new work or other subject-matter does not have an adverse effect on the normal exploitation, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one, and does not do unwarranted damage to the legitimate interests of the author, the performer or the maker. […]

iii) Later listening

The APFTQ feels that this exception is legitimate, but it should be combined with some compensation for copyright owners. Once again, if this exception must be included, it must include at least the following restrictions in order to be acceptable.

Our recommendations:

22. The Act is amended by adding the following after section 29.2

Fixing Signals and Recording Programs for Later Listening or Viewing

29.23 (1) It is not an infringement of copyright for an individual to fix a communication signal, to reproduce a work or sound recording that is being broadcast or to fix or reproduce a performer's performance that is being broadcast, in order to record a program for the purpose of listening to or viewing it later, if

(a) the individual receives the program legally;

(b) the individual, in order to record the program, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented;

> (c) the individual makes no more than one recording of the program;
>
> d) the individual is the owner of the medium or device on which the recording is made
>
> e) the individual keeps the recording no longer than is reasonably necessary in order to listen to or view the program at a more convenient time;
>
> f) the individual does not give the recording away, and does not perform any other actions that only the rights owner may perform, such as reproducing the recording, selling, renting, distributing, telecommunicating and making it available to the public for access or reproduction;
>
> g) the recording is made for private purposes only. […]
>
> {Our emphasis}

iv) Backup copies

This exception must include the same specification as recommended by us for the exception on "Reproduction for Private Purposes", i.e. listing the actions prohibited in relation to the backup copies.

4) *REMUNERATION OF COPYRIGHT OWNERS*

Legalizing certain actions performed by consumers seems to be an important federal government objective. We submit that in order to limit the negative repercussions of this legislation, the exceptions required must be as restrictive as possible; it must also be illegal to circumvent the measures that provide access to works. A corollary to these new exceptions to which copyright holders are subject would be ensuring that the government gives them access to sufficient funding to create content, and that they obtain fair remuneration for the uses made of their works.

At present, in the television sector, outside the government, only cable broadcasting distributors (cable television, satellite, etc.) have to contribute to creating televised content, be it conventional or digital.[4] We have already maintained in the past that Internet access providers and providers of mobility services should also be required to contribute in order to balance a system that is deteriorating because it seeks to finance audiovisual works on all platforms but places the full burden on conventional television alone. We believe that nowadays along with suppliers of Internet access and mobility services, suppliers of content hosting, storage services and retrieval tools must contribute to the creation of cultural content generally, because they greatly benefit from its use and even refer to it in advertising their

[4] See Canada Media Fund (www.cmf-fmc.ca)

services. Thus it is incumbent on the government to write the necessary laws, regulations and guidelines to create a balance and correct a flagrant injustice.

Collective management of rights is usually the primary focus in remuneration of copyright owners for the use of protected works, in particular under the regime of copies for private use (sections 79 and following of the CA); this has already proven its value. However, this regime has been set aside out of hand by the government, even though it fulfilled the objective by legalizing certain actions carried out by individuals while remunerating the copyright owners to compensate them for these exceptions to copyright law. In fact, the private copying regime passes the three-stage WIPO treaty test; in our opinion such is not the case with the new exceptions set out in C-32. In our view, the regime of copying for private use should not only continue to exist, it should become technologically neutral and apply to all kinds of works protected by copyright that are able to be copied.

Since the government does not intend to update this regime, we suggest including in the CA a new regime for digital use of cultural content. This regime should entail contributions on the one hand from suppliers of Internet access services, mobility, content hosting, storage and retrieval tools, and on the other, from government, which has clearly stated its unwillingness to have consumers pay directly for these uses. The fees payable by each contributor could be established by the government or periodically set by the Copyright Board of Canada. The contributions should be managed collectively by a fund set up to finance digitally exploitable cultural content. These new funds would be used to finance project development, content production, marketing and promotion, and to follow up and maintain content. They could also be used to compensate copyright holders for exceptions in the CA, according to a method that would have to be mapped out. Thus copyright holders could continue to create and produce professional quality Canadian cultural content.

This having been said, the government may have another regime of remuneration to compensate copyright owners for these exceptions; if so, we will comment on them in due time.

5) *AUTHORS OF CINEMATOGRAPHIC WORKS*

While this topic is not directly discussed in Bill C-32, in our mind it underlies all aspects of the bill from the audiovisual viewpoint. Since, unlike those of many other industrialized countries, Canada's laws are silent on the matter of the authorship of cinematographic works, determining authorship is a factual and circumstantial question. As things currently stand, an author's identity can only be determined at the very end of a work' is production, and it can only be determined with certainty by a court. As a result, title chains are usually unclear. Worse, the rights set out in the CA, including the right to prosecute for a violation of the law, can be exercised only by an author—and who can tell who the author might be? The more complicated it is to identify the owners of a work's copyright, the more users are encouraged to avail themselves of the works without authorization. All this makes for an urgent situation, especially considering the new digital uses for audiovisual works.

Given that the maker directs and is involved in all aspects of a film from its beginning to end, that he is the exploiter of the film and is the person most likely to initiate prosecution if the

rights to the film are violated, it is both legitimate and essential that the maker's status as first owner of the rights to a cinematographic work be enshrined in the CA. A film is essentially a cinematographic work as described in the CA and is the product of an arrangement of literary, dramatic, musical and/or artistic works orchestrated by the maker. All who are involved in producing a film, including the screen writer, the director, the artists and the technicians are hired by the production company and are paid out of the production budget.

In the case of a work made in the course of employment, as described in section 13(3) of the CA, the employer is the first owner of the rights to the work. The reason for this is quite simple: the employer pays upstream in order to make the work, and he or she is given the rights to it by the CA in order to be able to exploit it. Since the film and television industry is primarily one of freelancers, the maker cannot benefit from the application of section 13(3). The maker of a cinematographic work is a cultural entrepreneur who, like an employer, pays upstream to have the work made and then exploits it. This is why we are requesting an addition to the existing exception for employers to specify that the maker, as defined in the CA, is the first owner of the rights to a cinematographic work.

Our recommendation would in no wise mean that a screen writer could not be seen as the author of a scenario, where applicable, for which the production company must obtain licences in order to produce and exploit a film. It would not prevent a director from being viewed as the author of the production, where applicable, similar to a choreographic work the scenic arrangement or acting form of which is fixed, as set out in the definition of a dramatic work, and for which the production company must obtain licences in order to exploit this work embodied in the film. They are in fact in a situation similar to a composer of music who creates a musical work embodied into a film. All these authors collaborate significantly in creating a film, and their works are an integral part of it. But since a film can and does often exist without music, it can likewise exist without a scenario or being directed. For example, a television game show, talk show or magazine show might involve only anchor-texts with no copyright for a screen-writer or for production and no copyright for the director. The television broadcast nevertheless exists and is protected by copyright, but as things now stand, who can say who the author is?

The obstructions to determining the identity of owners of rights to cinematographic works is detrimental to everyone. Exploitation of a work the rights to which are potentially incomplete is unduly complex and tenuous. The easier it is for a maker to exploit a film or to prosecute should a violation occur, the better it will be for all rights owners. It is time for the government to settle this thorny issue a once and for all, in order to provide a basis for the tools that will be used to gain compliance with copyright in Canada, especially in the digital world, where the need is even more pronounced.

Our recommendation:

The Copyright Act is amended by the addition of the following after subsection 13 (3):

Work executed for the making of a cinematographic work

13(3.1) When the services of the author are retained by a maker in the making of a

cinematographic work, and when the work of this author is performed for the making of the cinematographic work, unless stipulated otherwise, the maker is the first copyright owner of the cinematographic work.