[LETTERHEAD]

14 October 2010

The Hon. Tony Clement
Minister of Industry
Government of Canada
C.D. Howe Building
235 Queen Street,
Ottawa, ON K1A 0H5

The Hon. James Moore
Minister of Canadian Heritage and Official Languages
Ottawa, ON K1A 0A6

Dear Ministers,

Re: Bill C-32 – An Act to amend the *Copyright Act*

The Barreau du Québec has examined Bill C-32, which you tabled for First Reading in the House of Commons on 2 June of this year. The Barreau wishes to inform you of its strong concerns and reservations concerning the Bill.

The Bill amends the *Copyright Act*[1] in order 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 it remains technologically neutral; and
(*h*) mandate its review by Parliament every five years.

The need to enact legislation has arisen in order to take action with respect to international undertakings made by Canada when it signed the World Intellectual Property Organisation (WIPO) Treaty, which was adopted in Geneva in 1996, as well as the World Trade Organisation's Agreement on Trade-Related Aspects of Intellectual Property Rights. In the past unsuccessful attempts were made in 2005 and 2008 to amend the Act. Moreover, the constant changes in reproduction and communication

[1] S.C. 1985, c. C-42.

technologies have forced the government to draft legislation that is technologically neutral and the principles in which can still apply even as technological developments are introduced at an accelerated pace to the consuming public. We are living in the era of the knowledge economy and copyright legislation, which is an essential tool in the organization of markets for intellectual products, forms part of this dynamic of innovation and connectedness.

Some of the desired objectives set out in the summary are not achieved satisfactorily by the Bill. This is true, for example, of the goal of complying with international standards. In particular, the introduction of new exceptions to the rights of reproduction and communication in those cases where the rights-holders have already put in place mechanisms that provide them with payment for these reproductions and communications seems to be totally contrary to the so-called "three-stage" test to be found in the Bern Convention and in both the WIPO Treaties of 1996.

The *Copyright Act* is framework legislation that must promote creativity, innovation and the public interest through clear, foreseeable, effective and fair rules. The Barreau wonders about the scope and effectiveness of several provisions of the Bill. Clause 4 of the Bill, among others, raises a problem of consistency in the use of the principle of international exhaustion, the meanings of which can differ depending on whether copyright or industrial property rights are at issue. Clause 10 of the Bill, which concerns moral rights, raises the issue of consistency and cohabitation with the law governing personality set out in the *Civil Code of Quebec*. It is also likely to cause problems in other Canadian provinces. Moreover, the goal of clarifying the liability of Internet service providers is not achieved by the provisions of the Bill. The Barreau also questions the actual scope and effectiveness of the new subsection 27(2.3) set out in clause 18 of the Bill, which refers to violations involving service providers. What onus of proof will be required for the provider to be found liable? Does the new section 41.25, set out in clause 47 of the Bill, serve any practical purpose? Generally speaking, clarifications need to be provided to define the different kinds of suppliers offering services in a digital universe.

In several respects the Bill introduces legal uncertainty in a way that will lead to greater use of the courts to determine the relations between authors, suppliers and users/consumers. The new conditions governing the existence of copyright are many and complex (see in particular subclauses 9(1), (2) and (3), 11(1), (2), (3) and (4) and clause 15). These are "made-to-measure" provisions offering protection given to foreigners. It is clear that the government has attempted to provide only the bare minimum of what Canada is required to provide by its many treaties. Despite major statements of principle, Canada has in fact always been quite protectionist in the area of copyright and has been very reluctant to extend the protection of the law to foreigners. Here it is clear that all the provisions governing the extension of protection are exceedingly complex. It is possible that they will one day give rise to legal disputes.

However, the new exceptions to copyright often depend on unrealistic or unverifiable conditions (see clauses 18 and 22 of the Bill and, more particularly, the provisions that add the new sections 29.21, 29.22 and 29.23 to the Act). These exceptions are negated by the mere presence of technological protection measures (TPM). Further, the definition of these measures in the Bill goes beyond the international requirements by restricting access to works by the public.

The addition to section 29 of the word "education" as one of the permitted fair uses of a work gives this provision a very broad and imprecise scope, especially in light of the many new exceptions specifically for the benefit of educational institutions. Indeed, given all the exceptions proposed for the field of education, it is difficult to see what could still be included in the concept of "fair use". The 2004

decision of the Supreme Court in *CCH*[2] has already laid down the tests for fair use and the addition of the word "education" to section 29 would probably give the expression unlimited scope. Many disputes would arise if the wording of the Bill were retained.

In 2000 UNESCO produced a *Guide to the Collective Administration of Authors' Rights*.[3] It recognized the importance of the collective administration of copyright in modern society:

> *The collective administration of authors' rights is generally intended to facilitate the effective execution of these rights by the authors themselves and to favour the lawful exploitation of works and cultural productions. It is seen in modern society as one of the most appropriate means of assuring respect for exploited works and a fair remuneration for creative effort of cultural wealth, while permitting rapid access by the public to a constantly enriched living culture.*
>
> *The industrialized countries have used it widely, particularly in the field of music, and the developing countries, and those in transition to a market economy, are attaching more and more importance to its establishment and promotion.*[4]

Bill C-32 prefers instead an approach of individual court actions, a remedy that is unrealistic and often not practical in a context of mass distribution.

Collective administration means administration for the benefit of a community of authors. It is not a tax but the author's salary. Collective administration is the only possibility that guarantees respect for the author's legitimate interests when the author is dealing with a host of users. Collective administration is also the most effective means of promoting public dissemination of works by permitting users to access them. The Barreau is very much in favour of this contractual approach that does not rely on use of the courts for remunerating authors since it promotes access by the public to culture and creative works. This modern and socially responsible approach stands is very much in line with the values of accessible justice and balanced resolution of disputes between authors and users. This approach works and is the predominant model on the international stage.

Developments in the area of mass communication of creative products has led to the gradual abandonment of the individual control of copyright in return for guarantees of remuneration for rights-holders through the collective administration of copyrights. For many people, the mass dissemination of cultural products requires the guaranteed revenue sources offered by the collective administration of copyrights. Without a guarantee of revenues, there will be no long-term investment in talent and this will delay or even prevent the professionalization of content creators.

In many cases where the existing Act provides for exceptions to copyright, these exceptions do not apply where dissemination is provided for under a licence for the collective administration of copyright granted to a copyright collective society. A balance is thus achieved between the rights of authors and the rights of users. The Bill jeopardizes that balance. The *Copyright Act* must be a mechanism that

---

[2] *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339.

[3] *Guide to the Collective Administration of Authors' Rights – The Administration Society at the Service of Authors and Users*, Paula SCHEPENS, 2000.

[4] *Ibid.*, at p. 9.

structures dissemination and creation while respecting the balance of rights and obligations of users and authors.

Bill C-32 provides for an approach that does not allow Canada to show leadership in this area of law. These are piecemeal amendments lacking in vision and overall consistency and rehashing parts of foreign models that are already known to be out of date. The general reflection process begun in the 1980s must be continued. The original Canadian model of collective administration of copyrights and the Copyright Board of Canada, which reports to the Department of Industry, have proved themselves and are now beacons for several foreign jurisdictions. We need to build on these achievements, which have been involved in the creation of a Canadian identity. The Bill should instead advocate the governance of collective administration of copyrights to confirm that Canada is a leader in this area.

Bill C-32 accordingly displays several major shortcomings: it is a source of legal insecurity; it is ineffective in achieving the goal of protecting copyright; it encourages the use of the courts and devalues the process of collective administration of copyright; it is dubious in terms of respect for Canada's international commitments, including the Bern Convention, and it constitutes a set of piecemeal amendments lacking in overall vision. For these reasons, the Barreau is opposed to the enactment of the Bill and offers its assistance in the establishment of a committee of experts tasked with reviewing the legislation in order to allow Canada to assert its leadership in this crucial area of the knowledge economy in the 21st century.

In the hope that you will find our comments and observations useful, we remain

Yours truly,

(signed)
Gilles Ouimet
Bâtonnier of Quebec