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Legislative Committee on Bill C-32
House of Commons!
Chambre des Communes
Ottawa, Canada
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Cher President et membres du Comité!
Dear Mr. Chair and Committee members,

This brief is presented to the Legislative Committee on Bill C-32 (the "Committee") pursuant to a News Release issued by the Committee on December 6, 2010 soliciting comments from all Canadian constituencies. I am submitting the present comments as an independent scholar, with a particular focus on the perspective of individual consumers lawfully accessing copies of copyrighted works. The following remarks are informed by my current research work which seeks to define and substantiate consumers' rights with respect to copies of copyrighted works that they lawfully access (e.g. the subject of my Ph.D. thesis at Osgoode Hall Law School in Toronto) and my teaching experience in the field of intellectual property law. They are also influenced by my past legal and business experience (including as Vice-President and Executive Director of Bell Canada and BCE Inc.) which involved the promotion and protection of intellectual property rights. I am mindful of preserving a vigorous copyright system that takes into account the interests of authors, copyright holders, users, consumers and the public. In that vein, I commend the Government's attempts to reach that goal, as recently illustrated with the introduction of Bill C-32 as a proposal to amend the Canadian *Copyright Act* (the "CCA").

1. The policy objective of the CCA to promote innovation and creativity in Canada (as enunciated in the preamble of Bill C-32) encompasses users, consumers and the public, and not just authors and copyright holders.

2. The need to clarify the rights of individual consumers and users in the copyright holder centric framework of the CCA is critical in the digital environment, to promote innovation and creativity while balancing competing freedoms.

3. The need to maintain the coherence of, and to minimize distortions to, the grant of exclusive rights to copyright holders under the *CCA* (with their limitations) is essential to preserve the balance that is sought with the introduction of Bill C-32.
4. There is a need to maintain the currency and credibility of the *CCA*, and to promote its compliance.
5. The need to seek out clarity and simplicity is of particular importance in the areas of reform that are most likely to directly affect individual consumers.

Bill C-32: substantiating the rights in the copy of copyrighted works by individual consumers

In the landmark judgment by the Supreme Court, *Theberge v. Galerie d'Art du Petit Champlain inc/ Binnie* 1. for the majority, characterized the entitlements of copy ownership of a copyrighted work as follows: "once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it." 2 The proposal in Bill C-32 of a trio of provisions (the "Trio Provisions,")3 that specifically apply to individual consumers, is an attempt to articulate the ramifications of copy ownership (and other forms of lawful possessions) of a copyrighted work, and to describe how it competes with and limits the exclusive rights conferred by Parliament to copyright holders. Many consumers may be surprised to learn that they are not already entitled to perform the acts specifically introduced in Bill C-32, as such acts are now part of their everyday life. For historical reasons, it is not so, and the proposals of Bill C-32 are an important attempt to cure in part the severe disjuncture that presently subsists between what consumers believe they are entitled to do with copies of copyrighted works and what is legal under the *CCA*.4 By specifically addressing the case of individual consumers in the Trio Provisions, Bill C-32 is consistent with its announced

1 [2002] 2 S.C.R. 336

2 *Ibid.*, at paragraph 31.

3 E.g. clause 22, with the addition of the new sections 29.21 "Non commercial User-generated Content", 29.22 "Reproduction for Private Purposes" and 29.23 "Fixing Signals and Recording Programs for Later Listening or Viewing"

4 Since its first enactment, the *CCA* has been predominantly centered on defining the exclusive rights of copyright holders. It has thereafter gradually expanded those rights in scope as well as in types of works and other subject matter of copyright. This copyright holder centric framework has led some to believe that the exclusive rights conferred by the *CCA* can and should allow copyright holders to set an exceptional amount of limitations (compared to other chattels not subjected to copyright) on how individual consumers (and other users) enjoy copies of the works that copyright holders lawfully make accessible to the public through various markets or otherwise: But as the scope of possibilities of consumer enjoyment of copyrighted works is expanding by the explosion of network and access to technological advances, the model of the *a priori* supremacy of the exclusive rights of copyright holders over the ownership rights of copy owners is being challenged in an unprecedented way. It is fraught with major incongruity with the concept of ownership and the fundamental values that it beholds. It is also inconsistent with the objectives of copyright itself to promote creativity, innovation and the dissemination of work-, and fails to properly address competing interests.

objective of balancing competing interests, especially with respect to a category of users that is more prone than other groups of users to imbalances in bargaining power and information asymmetry in their lawful dealings with copyrighted works.

The following remarks contain a brief analysis of the Trio Provisions in Bill C-32, with a particular focus on the right to reproduce for private purposes as a starting point. They also include suggestions of modifications for consideration by the Committee. The remarks are informed by the Guiding Principles enunciated in the introductory comments of this brief.

The introduction of s. 29.22 "Reproduction for Private Purposes", would allow individual consumers to reproduce (an unlimited number) of a non-infringing copy of any work lawfully obtained (e.g. either purchased or licensed) as long as such reproduction is made for private purposes and that it is made on a device owned by the individual consumer (or which she is authorized to use) .. It is consistent with the "self-seekingness" that private ownership of chattels by individuals generally entails, and the fundamental values of autonomy and freedom that ownership seeks to promote. Viewed from the perspective of a competing ownership right to the exclusive rights of copyright holders, there is a strong justice reason to support the argument that the curtailed limited reproduction right introduced by the new section 29.22 is a fair limitation on the exclusive reproduction rights of copyright holders, if any limitation there is. Arguably, this limited reproduction right for private purposes, granted to individual consumers having lawfully acquired a copy of the copyrighted work, is not even within the domain of the exclusive economic reproduction rights of the copyright holder. A contrary view is defensible, through a strict application of copyright holders' exclusive reproduction rights and a mechanical focus on the amount of copies made. However, it fails to consider the actual economic effects of making such additional limited copies⁵ and to oppose equally legitimate individual user considerations to the copyright holder's exclusive rights. In a technologically savvy economy, consumers have come to expect that this is one enjoyment of owning a digital copy a copyrighted work. Just as copyright has evolved and expanded over the years and will continue to do so if Bill C-32 becomes law, so does the concept of ownership with

respect to digital copies. This said, the ownership rights of individual consumers are still limited in significant ways in section 29.22, allegedly as an attempt to balance the competing interests of copyright holders. Individual consumers lawfully owning copies of a work, such as a musical recording or a film on a DVD, would not be allowed to communicate the work or the copy by telecommunication or to lend the copy in any manner to a friend or family member in the same household.⁶ Central to this provision is the fact that it applies only to non-infringing copies - which suggests an objective test where absence of knowledge would be irrelevant - that are lawfully accessed. These two components can be an important vehicle to address copyright holders' concerns of

⁵ Which, in the case of private purposes is minimal, and is made mainly for convenience and enhanced usage of the copyrighted work.

⁶ Although with respect to family members, there may be an argument that they would be impliedly allowed to do so.

copyright infringement, while potentially incenting consumers to lawfully access non-infringing copies, by giving them the minimum "breathing space" that they have come to expect as copy owners (or through other form of lawful possession) .

The following suggestions may enhance this provision's success at balancing competing interests as sought by Bill C-32. They may also induce individual consumers towards greater compliance of copyright holders' exclusive rights. First, the language of s. 29.22 should allow other individuals of the same household to perform the same act. Second, and consistent with basic ownership rights in chattels, it should allow consumers to lend such copies to a friend or extended family member. In each case, the friend, household *or* extended family member would in turn not benefit from the same rights as the lawful owner of the copy of the copyrighted work, by the application of s. 29.22(b). This would address valid concerns that copyright holders may have on the scope of the reproduction right. Third and perhaps the most fundamental comment on s. 29.22, Parliament should clarify whether this new provision confirms an enforceable reproduction right of individual consumers, or whether it is a mere privilege that is left to the will of copyright holders. By the application of s.29.22 (c), the individual consumer purchasing a copy to which a technological protection measure is attached would need to obtain the permission of the copyright holder to be able to exercise the reproduction freedom contemplated in s. 29.22. Setting aside the huge impracticality and burden that this represents for individual consumers, it is not even clear that the copyright holder would be under any obligation to allow the individual consumer (following her request) to reproduce the copy of the work for private purposes under the current language of s. 29.22. A suggestion of clarification that would confirm the instances under which the exceptions to copyright infringement are rights and not mere privileges is discussed further below under the heading "Preserving the legislative intent to balance competing interests within the CCA".

The individual consumer who is the lawful purchaser of a non -infringing copy (under the proposed s. 29.22 examined above) of a copyrighted work would also be entitled to perform all acts that are within the exclusive domain of copyright holders as per the proposed section 29.21 that addresses "non-commercial user-generated content". This would include the right to create new works (often - called "derivative works") and communicate them to the public for non -commercial purposes, in accordance with the proposed language of section 29.21.⁷ There is an even broader range of individuals than lawful purchasers of copies who are contemplated by s. 29.21 than it is the case of s. 29.22 for the reproduction of works for private purposes. The only requirements dictating how the copy of the existing work is accessed in s. 29.21, is that the existing works be published or made available to the public, and that the individual consumer had reasonable grounds to believe that the existing work was not infringing copyright. Downloaded material from the internet for free could fall under that category. Further, there is no explicit prohibition against the "circumvention" of the work; similar to the one found in s. 29.22. The less stringent requirements regarding how the copy is acquired, than in s. 29.22, may be justified on the basis of a different balancing act in the case of

user generated content than in the case of reproduction for private purposes. In the former case, it may be that copyright reform should favor more leniency towards the transformative use of works for the creation of new works, which are at the heart of copyright law objectives. By contrast, in the case of non creative reproductive uses (as contemplated in s. 29.22) such acts are at the heart of the traditional exclusive domain of copyright holders and the impetus is to contain them. The attempt in Bill C-32 to secure important freedoms for the benefit of individuals and consumers alike is laudable. It promotes their creativity, innovation and freedom of expression. At the same time, the current structure of the provision, more precisely, the open-ended manner by which the existing work to be transformed can be accessed in the first place, renders the characterization and justification for these newly recognized rights of users more difficult within the existing framework of copyright law. It may give rise to valid concerns of authors and copyright holders and lead to unintended consequences.

The following suggestions may enhance this provision's success at balancing competing interests as sought by Bill C-32. They may also provide greater clarity and incentives to individual consumers towards greater compliance with the CCA. First, individual consumers should be made aware of potential violations of moral rights pertaining to the existing work. Right now, the acts authorized in s. 29.21 can still be caught by the moral rights provisions of the CCA. A provision clarifying instances where the creative acts in s. 29.21 will be deemed not to be infringing the moral rights of the author should be added to provide greater certainty and clarity to individual consumers targeted by s. 29.21. Second, Parliament may want to consider narrowing how the copies of copyrighted works need to be accessed to be eligible copies for the creation of new works to individual user-creators. Requirements such as the ones found in section 29.22, e.g. that the copy be non-infringing or the existing copy be lawfully acquired, may be avenues to explore further. The clarification and securing of greater rights for individual consumers with respect to copy ownership (or other lawful access) may incent individual consumers to seek lawful access to copyrighted works as opposed to uncertain ones.

Section 29.23 "Fixing Signals and Recording Programs for Later Listening or Viewing"

The introduction of the new provision s. 29.23, which confirms the limited right of individual consumers to fix communication signals (and reproduce broadcasted works, musical recordings or performers' performances) for later viewing or listening for private purposes only, may be the one provision of the Trio Provisions of Bill C-32 that would surprise individual consumers most. The current state of Canadian Copyright law does not allow such acts with respect to broadcasts. It suggests another significant disconnect between the law and what consumers have come to conceive as mundane day to day acts, remote from any likelihood of copyright infringement issues. The clarification that this new section brings is important as it would rectify this dissonance with the result of maintaining the credibility and currency of the CCA. The various limitations that this section imposes on the individual consumer with respect to the recording are debatable -

e.g. the recorded copy is allowed for a limited time period only; it must be destroyed after use, and the recording cannot be given away. However, these limitations may be more acceptable here, given that the individual consumer does not enter into any transaction to acquire ownership rights (or other lawful right of access) in the copy of the communication signal or of the work that is being broadcast (unlike the scenario contemplated by the new section 29.22 on which I commented above). Finally, Parliament needs to clarify whether this section would confirm rights of individual consumers or mere privileges. The prohibition against the circumvention of technological protection measures to make the recording creates uncertainty in that regard.⁸ A proposal to address this important question is discussed further below under the heading "Preserving the legislative intent to balance competing interests within the CCA".

(i) Exceptions to copyright infringement cannot be overridden by contract or otherwise

With the introduction of the Trio Provisions, Bill C-32 attempts to address the complex balancing act between the competing interests of copyright holders and, among others, of the individual consumers accessing their works. Leaving matters as they stand, leads in a digital environment, to results that are inconsistent with the alleged policy objective of the CCA to promote innovation and creativity. It would also maintain a great dissonance between, how most individual consumers expect to experience digital copyrighted works and what they would be in effect allowed to do with such works. As commendable as the proposed Trio Provisions may be, their effect is likely to be seriously compromised unless their legal effect is more clearly ascertained. Given that a large amount of copyrighted works are made available to individual consumers through non-negotiated contracts, the grant of rights and limitations created by Parliament through the CCA can be easily trumped at the will of copyright holders, unless there is a more robust mechanism that will confirm the obligation of copyright holders with respect to the freedoms of conduct built in the Trio Provisions for the benefit of individual consumers. Having to interpret the scope of the fair dealing provisions in the CCA, the Supreme Court declared in *CCH Canadian Ltd. v. Law Society of Upper Canada (HCC)*,⁹ that the exceptions to copyright infringement are "users' rights" and not just mere loopholes in the CCA.¹⁰ To give effect to this characterization by the Supreme Court of "users' rights" under the CCA, and to avoid any uncertainty between the Supreme Court judgment and Parliament's intent, further clarification would be required. This uncertainty could be remedied by adding a provision confirming that the exceptions to

⁸ As found in clause 22, s. 29.23 (1)(b) of Bill C-32. See the remarks of the potential effects of a similar provision in the analysis of section 29.22 of Bill C-32 earlier in this brief.

copyright infringement enumerated in the *CCA* cannot be overridden by contract or otherwise (except perhaps by fully negotiated contracts). By enacting this overriding clause to preserve the coherence of the rights and limitations it confers to copyright holders' rights, Parliament would place the burden on copyright holders to ensure that their copyrighted works are made available to users and consumers in a way that respects and promotes this delicate balance. This would incidentally incent copyright holders to inform consumers and other users about their rights with respect to copyrighted works and to adapt their licencing practices and technological protection measures accordingly. In the case of specific limitations to copyright holders' exclusive rights, it would force copyright holders to give effect to Parliament's intent, which is no less than what most consumers would expect from the proposed amendments in Bill C-32. In the case of less clearly defined "exceptions", such as fair dealing, it would incent copyright holders to develop best practices for the application of fair dealing and how their works need to be made available to users to accommodate their right. By contrast, without the suggested overriding provision, the burden is placed on individual consumers for each work the access or use of which is limited (either through contract terms or through the effect of technological protection measures) to locate copyright holders individually, and to demand that their rights under the *CCA* be complied with. Even after this lengthy procedure, there would be no certainty that copyright holders would be required to make their work available with the freedoms of action incorporated in the Trio Provision and other "exceptions" to copyright infringement, given the remaining uncertainty as to whether Parliament intends to create "rights" for the benefit of individual consumers or not. This leads to highly inefficient and unconscionable results for individual consumers. It undermines at the outset any attempt to secure individual consumer freedoms (e.g. rights) and to maintain the currency and credibility of the *CCA* by (among others) the introduction of the Trio Provisions. There would be at least one other important policy benefit to make copyright holders liable for ensuring that the basic individual consumer freedoms clarified in the Trio Provisions are respected. In that scenario, individual consumers are likely to be better informed of their rights and limitations to owning (or possessing) copies of copyrighted works under the *CCA* than they presently are. The clarification that the *CCA* confers rights to users (that can only be derogated through negotiated contract) combined with suggestions previously made in this brief to refine the methods of access under which the Trio Provisions would be available to individual consumers, may also incent greater compliance with the *CCA*, for the benefit of authors and copyright holders.

(ii) The newly introduced exhaustion (or first sale) provisions need to be adapted to the dissemination of digital works

The introduction by Bill C-32 of exhaustion or first sale provisions¹¹ is welcome for individual consumers and other copyright users, as it confirms the scope of their rights in the copy of a copyrighted work, vis-a-vis the ones of the copyright holder. The increasing dissemination of works online eliminates the "hand to hand" exchange of the copy of a copyrighted work (such as a book, a music CD or a film DVD). Nevertheless, such copies are no less tangible and physical. Otherwise, they would not fulfill the requirement that a

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work needs to be "fixed" in order to benefit from copyright protection. It is not clear that the current language of the first sale provisions in Bill C-32 would cover such copies. This clarification is critical to fulfill the announced objective of Bill C-32 to balance competing interests with respect to copyrighted works in a digital environment.

The Trio Provisions introduced by Bill C-32 are an innovative legislative attempt to address competing interests of individual consumers with respect to how copyrighted works are accessed and used in a digital environment. Cautiously and incrementally, they are an attempt to articulate individual consumer's rights in and to copies of copyrighted works to counterbalance the traditionally copyright holder centric legal framework of the *CCA*. Parliament should resist the pressure to overly expand copyright holders' rights on the basis of the increased threat that the digital environment poses to copyright infringement. While the threat is real, there is no normative justification that its solution can ignore important competing rights of lawful individual consumers and other users. To do so would make the *CCA* largely inconsistent with its core and encompassing objectives to promote a creative and innovative society. It would fail to address the effect of important technological evolution that is strengthening individual consumers' (and other users') creative and innovative participation through how they experience copyrighted works, and hence, their legitimate and reasonable expectations thereto.

Several other issues on how Bill C-32 purports to achieve the balance of competing interests in the digital environment are not addressed in this brief. For instance, Parliament may consider the opportunity to address imbalances between individual authors and copyright holders by singling out individual authors, just the specific concerns of individual consumers are addressed separately from other users of copyrighted works in, among others, the Trio Provisions. The fair treatment of individual authors should be a central concern of any copyright reform. The root causes of possible imbalances are similar to the ones raised in this brief with respect individual consumers: e.g. asymmetry in information and bargaining power. The extent to which Bill C-32 addresses this inherent imbalance to nurture a vibrant innovative and creative society should be examined more carefully.

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