Coalition des ayants droit musicaux sur Internet [coalition of Internet music rights holders, or CAMI]

The Coalition des ayants droit musicaux sur Internet (CAMI) comprises five professional associations of writers, composers, performers, producers, publishers and musicians, as well as four authors' rights collectives for writers active in the music sector. CAMI thus represents the entire music industry in Quebec; it speaks for some 100,000 thousand rights holders.

Professional associations represented

Association québécoise de l'industrie du disque, du spectacle et de la vidéo
[Quebec recording, live performance and video industry association, or ADISQ]

Founded in 1978 to defend its members' interests and promote the development of the music industry in Quebec, the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) is a non-profit professional association.

Its original mandate was essentially to organize two major collective promotion activities for the Quebec music industry: first, to set up a booth at the International Record, Music Publishing & Video Music Market (MIDEM), the huge international trade fair held every year in Cannes, and coordinate its members' participation there; and second, from 1979 on, to produce an annual gala honouring performers, craftspeople and professionals in Quebec's music industry.

Today, ADISQ's mandate goes beyond collective promotion on domestic and international markets. It deals on behalf of its members with government agencies and authorities on such issues as general policies for the recording, performing and video industry, funding for the industry, defence of producers' rights, and broadcasting regulations. It also negotiates and manages collective agreements with recognized performers' associations, and undertakes collective promotion of recordings, performances and videos.

Association des professionnels de l'édition musicale
[music publishing professionals' association, or APEM]

The Association des professionnels de l'édition musicale (APEM) brings together music-publishing professionals in order to study, develop and defend their interests as well as to promote national and international recognition of their profession. It now has over 50 members, and works actively on a number of issues including revision and implementation of Canadian copyright legislation, collective management of rights and certification of tariffs, implementation of government assistance programs for music

publishing, basic training and ongoing professional development for publishers, and improvement of working conditions for its members. Via its involvement in the International Confederation of Music Publishers (ICMP-CIEM), APEM also works to maintain levels of international protection for published works.

Guilde des musiciens et musiciennes du Québec
[Quebec musicians' guild, or GMMQ]

For over a century, the Guilde des musiciens et musiciennes du Québec (GMMQ), which is affiliated with the American Federation of Musicians of the United States and Canada, has represented all of Quebec's musicians. These are people working in every sector of the music industry: live music, recordings, television, film, radio, advertising, Internet and new media, and in every style (jazz, classical, background music, rock, etc.).

The GMMQ is a professional association accredited by the [former] Commission de reconnaissance des associations d'artistes et des associations de producteurs. It is also a union, whose mission is to defend and promote its members' economic, social, moral and professional rights and interests.

The GMMQ has offices in Montreal and Quebec City. It has a membership of more than 3,300 professional musicians and is itself a member of the Paris-based Federation of International Musicians (FIM), which represents more than 250,000 musicians throughout the world.

Société professionnelle des auteurs et des compositeurs du Québec
[professional corporation of Quebec authors and composers, or SPACQ]

The Société professionnelle des auteurs et des compositeurs du Québec (SPACQ) is a non-profit organization whose mission is to protect the economic, moral and professional rights and interests of all Quebec composers and Canadian French-language authors, whether of songs or of soundtracks. The SPACQ represents 600 authors and composers.

Union des artistes
[performers' union, or UDA]

The Union des artistes (UDA) is a professional union representing almost 12,000 performing artists working in French, and languages other than English, all across Canada.

The UDA's mission entails the identification, study, defence and development of performers' economic, social and moral rights and interests. Today it manages over 100 collective agreements covering the advertising, film, recording, dubbing, stage and television sectors.

Copyright collectives represented

Artisti

Artisti is the collective management society created by the UDA. It administers and distributes to performing artists who have taken part in a published audio recording, in whatever language, the royalties generated by the copyrights they hold. Artisti has nearly 2,300 members and has distributed to them so far more than $13 million in royalties.

Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC)

SODRAC is a collective for managing the reproduction rights of its 6,000 member authors, composers and publishers of music, as well as all rights of its 600 visual arts and art crafts members. In addition, SODRAC is the exclusive representative in Canada of the musical repertoire of some 100 countries and territories and of the artistic works of 35 countries. Its mission is to ensure fair compensation for its members' work. SODRAC is thus a single window for rights clearances, which promotes easy access to this rich repertoire of musical and artistic works so that they can be used on all analogue and digital platforms. SODRAC is a member of the Canadian Private Copying Collective (CPCC), the International Bureau of the Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), the International Confederation of Societies of Authors and Composers (CISAC) and the Conseil International des auteurs des arts graphiques et plastiques (CIAGP).

Society of Composers, Authors and Music Publishers of Canada (SOCAN)

SOCAN is the Canadian copyright collective that administers the performing rights of more than 100,000 authors, composers and music publishers, by licensing the use of their music in Canada. It collects licence fees on their behalf and distributes royalties to them. Through reciprocal agreements with foreign counterparts, SOCAN also represents the quasi-totality of the world repertoire in Canada.

Société de gestion collective des droits des producteurs de phonogrammes et vidéogrammes du Québec
[Quebec collective rights management society for producers of audio and video recordings, or SOPROQ)

SOPROQ is a non-profit collective created in 1991 to collect and distribute royalties owed to independent producers of audio recordings and video clips under the *Copyright Act*, and in particular royalties arising from the equitable remuneration and private copying regimes. On behalf of its members, SOPROQ licenses the right of reproduction for audio recordings and the use of video clips. It administers uses both in Canada and abroad via agreements it negotiates in the interests of its members. SOPROQ represents hundreds of rights holders, both Canadian and foreign, for whom it manages thousands of audio recordings and video clips.

CAMI's mission

CAMI was established to bring together all representatives of music industry rights holders with a view to jointly studying, documenting, analyzing and targeting one or more solutions for ensuring remuneration adapted to the new technological environment and new consumer practices, including Internet file swapping.

The current platform reflects positions jointly held by the various associations and collectives CAMI represents.

INTRODUCTION

On June 2, 2010, the federal government tabled a bill ostensibly designed to update the *Copyright Act*.[1] But although many stakeholder groups in Canadian arts sectors had submitted warnings and recommendations in the preceding months, the government in its Bill C-32[2] appears to have shrugged off the issues the stakeholders raised, despite their crucial importance to the industry.

The government claims it has introduced legislation that will "rebalance" the interests of content creators and content consumers. But copyright laws exist first and foremost to protect creators' rights. Too much consideration for the interests of consumers, on the pretext of "balancing" the legislation, undermines the primary role that such legislation should play: defence of the work of content creators. While the Bill has been presented as the fruit of "balance" between the interests of both sides, it is on the contrary unbalanced because of its stress on consumers' interests.

The Coalition des ayants droit musicaux sur Internet is gravely concerned about the disastrous consequences that passage of Bill C-32[3] in its present form could have.

Creators of content have the right to control their work and to be paid for it. This is the first premise that should guide the drafting of copyright legislation. We are not Luddites, opposed to the use of new technologies by consumers, and we favour easy access to creative work, but not by literally dispossessing content creators of their right to remuneration. The Bill is riddled with major exceptions[4] and the proposed wording eviscerates the very concept of copyright.

RESPONSABILITY OF INTERNET SERVICE PROVIDERS

CAMI is gravely concerned about the failure to assign any responsibilities to Internet service providers (ISPs). As the Bill now stands, it leaves ISPs out of the debate, even though they are the chief beneficiaries of illegal music file swapping.

In our view, not only have network owners been since the start of the 21st century making money off the transit of cultural content via their high-speed subscriptions, but also they are the only players involved that are in a position to introduce an effective solution to the problem afflicting our industry.

The Bill reduces the responsibility of ISPs to simply notifying their clients, and leaves up to the rights holders the responsibility of bringing and pressing charges. ISPs have significant means at their disposal for countering piracy, educating consumers and compensating the

[1] Translator's note: there is no content attached to this footnote number in the French original.
[2] Translator's note: there is no content attached to this footnote number in the French original.
[3] Translator's note: there is no content attached to this footnote number in the French original.
[4] Translator's note: there is no content attached to this footnote number in the French original.

music industry for losses incurred. But nothing in the text of the Bill calls upon ISPs to do anything of the kind, or to reimburse in any way rights holders shortchanged by a technology over which they have no control.

From now on, digital distribution of musical content and the revenue generated by this activity will to a great extent be out of the hands of content creators, publishers and producers. And yet nothing in the Bill attempts to correct, mitigate, or compensate for, this loss of the music industry's control over its own future.

The "balance" between creators' rights and consumers' rights that the government claims it was seeking via these amendments to the *Copyright Act* has not been achieved. Far from it. Instead, the gulf between music lovers and content creators is widening and deepening. **Legal copying is being given official status without any compensation at all for rights holders and without the owners of the digital distribution channels – the ISPs – being held legally and financially responsible for the business they are running**. Music, which has speedily become the ultimate drawing card for selling high-speed Internet and cell-phone services, is now valueless in the eyes of the very people who consume it, as well as of those who exploit it for commercial purposes. For the past 10 years the music industry has been paying a heavy price for this loss of dollar value.

No new revenue can be expected, even though a new availability right and distribution right are proposed in the Bill

Contrary to the government's assertions, consumers will not be paying any new money for their digital subscriptions, and unauthorized listening and downloading will be not subject to any kind of legal proceedings at all. It must be clearly understood that rights holders have virtually no way of tracing people who steal from them, especially as policing consumption has never been how content creators, publishers, performers and producers see their role.

Why not make the entities that control and place a dollar value on bandwidth responsible for introducing practices to protect the rights of those who produce the content they carry on that bandwith? How can it be acceptable for ISPs to undermine the commercial value of the content they carry just to promote subscriptions to their own services? How can Bill C-32 grant so little protection to creative work, offering users a panoply of exceptions to copyright and thereby diminishing still further the already small incomes that creative artists still receive?

All questions that have yet to be answered, and are apparently of no concern to the government...

It seems that the spread of technology and the ISPs' market penetration have gone far beyond the protection of rights achieved during a century of struggle.

Educating consumers, eradicating piracy and making the ISPs assume their fair legal and financial responsibilities are in our view goals that the law should be pursuing in conjunction with the Canadian music industry. The ISPs are part of the solution and must

not be left out of the socio-political debate over the issue of piracy and the serious economic impact caused by the destructive phenomenon of illegal downloading and swapping of protected content. **We call upon Parliament to review the Act from the perspective of content creation and production and to focus on protection of Canadian works, rather than on support for the financing of digital distribution networks.**

RECOMMENDATION:

> **CAMI recommends against absolving internet service providers of responsibility; they are a necessary part of the solution and have benefitted greatly thus far from the content provided by content creators without giving them any remuneration in return.**

PRIVATE COPYING REGIME

The current *Copyright Act* provides for the public to reproduce music for their own private use and for rights holders to receive remuneration for this use of their work. In the last reform of the *Copyright Act*, in 1997, Canada enacted a measure that already existed in a number of countries enabling rights holders in the music sector to receive remuneration in exchange for the permission for the public to make private copies of their music. This was the private copying regime, established in Part VIII of the Act. Moreover, since 1999, the private copy levy has been fully consistent with the spirit of the Act by providing fair compensation for this specific use of the music. Until recently, this levy generated approximately $30 million annually for rights holders in the music sector.

The private copy levy was at one time collected from importers and manufacturers of blank audio cassettes and CDs. Now it applies to blank CDs only. **Yet the way copies are made has changed dramatically in recent years. People hardly ever make copies onto blank CDs any more, copying instead to digital audio recorders such as MP3 players and iPods.**

Of the more than 1.3 billion songs copied in Canada every year, 70% are copied onto digital audio recorders, a figure that is steadily increasing. Since these devices have become the preferred method for copying music and private copying levies do not apply, rights holders do not receive remuneration for music copied onto these devices. Revenues from the current levies are now drying up at an alarming rate. **From 2008 until the end of 2010, the levy amounts available for distribution fell by over 60%.**

It is high time that these levies be applied to the new media to reflect the way music is copied today, an objective that Bill C-32 does not achieve.

The federal government is seeking to "update" the Act by legalizing copies made for personal use. The Bill does not go far enough, however, since it does not ensure that rights holders will receive the remuneration to which they are entitled when their music is copied in that way.

It would be catastrophic for music creators if Bill C-32 were passed in its current form since the levies currently applicable to music copied to blank CDs would not apply to music copied onto digital audio recorders. Why does the government provide for rights holders to receive remuneration if their songs are copied onto blank CDs but not for music copied to iPods?

A copy is a copy. Every copy has a value regardless of the technology used. Rights holders are entitled to remuneration for this use of their music. For many of them, the income they receive from private copying levies enables them to continue recording new music.

We, the members of CAMI, maintain that Bill C-32 must be changed to correct this tremendous injustice. We demand that the federal government extend the levies to private copies made on digital audio recorders.

Private copying levies are fair, for consumers and rights holders alike. Consumers have the right to know that the private copies they make are legal and content creators deserve remuneration for their work.

RECOMMENDATION

CAMI recommends that the *Copyright Act* be amended to make all current and future digital audio platforms subject to the private copying regime.

REPRODUCTION RIGHT

1. Temporary reproduction for technological processes

Modernization of the *Copyright Act* **must not jeopardize the reproduction right which must continue to exist in the digital environment as in the analogue environment.** The reproduction right is an essential feature of the Act and constitutes an exclusive right of rights holders who must continue to exercise it in respect of their works. [5]

Digital copies of works and recordings made digitally, whether over the Internet, through a server or onto a digital device, all have a specific and distinct purpose. These copies must be authorized by the rights holder and a range of economic values applied based on the usefulness and efficiency they afford those making the copies.

Transition to the digital era does not revolutionize the reproduction right.

[5] Moreover, subsection 1(4) of the WIPO Copyright Treaty, which Canada signed in December 1997, provides that:
"It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."

Establishing the economic value of the reproduction right has not posed a problem to date in Canada since the value of various reproductions has been determined over time through free negotiation between music users and management collectives representing the rights holders of musical works and recordings.

Economic value is also determined by the Copyright Board of Canada, an independent tribunal and economic regulatory body, through a quasi-judicial process during which users and rights holders assert their arguments. This includes the use of various technological processes in determining the amount of levies to be paid for the reproduction of protected works.

Pursuant to free negotiation and various Copyright Board decisions, economic values are currently established according to the type of reproduction of works, from buffering with a low value to a permanent copy with a higher value.

The legislator should not intervene when there are already guidelines defining what a temporary or transitional copy is and to evaluate and distinguish it from copies with greater economic value.

Section 30.71 in Bill C-32 is therefore unnecessary.

RECOMMENDATION

CAMI maintains that the new section 30.71 should be removed and that this right must continue to be evaluated by free negotiation among the parties or through an equitable process before the Copyright Board.

2. Temporary recording

Modernization of the *Copyright Act* **should not suddenly eliminate the right and the revenues that have been paid to rights holders for a number of years.** Remuneration must be paid for copies made in the digital environment "to prevent someone other than the creator from appropriating whatever benefits may be generated."[6]

It has been established that radio stations use music more efficiently than in 1987. If broadcasters choose to reproduce a work, they do so because it is advantageous to them. **There are many advantages deriving from the storage of musical works on a central server, including efficiency, control, quality, flexibility and costs.**[7] Reproduction also allows stations to create their own musical catalogues on hard drives. In so doing they optimize the operation of programming management software and facilitate the use of the

[6] *Théberge* v. *Galerie d'Art du Petit Champlain inc*. (2002) 2 S.C.R. 336, 2002 CSC 34, par. 30.

[7] "*The use of new broadcasting techniques, which involve copying onto a hard drive, has reduced programming and production costs. […] The collectives were able to show that there are advantages in using these techniques, among them the ability to remain competitive."* [emphasis added] Copyright Board decision, Reproduction of Musical Works by Commercial Radio Stations in 2001-2004, p. 11, (March 28, 2003).

music. Management collectives have demonstrated before the Copyright Board that **there are advantages to using reproduction techniques, including remaining competitive.**[8]

Radio stations have paid the levies set by the Board for nine years and this has not led to collapse of the market. To put things in perspective, radio stations' total revenues were close to $1.5 billion in 2009. The annual reproduction royalties they have to pay to authors, composers, publishers and sound recording producers are estimated at $21 million. This means that **radio stations effectively pay less than 1.4% of their revenues for the right to reproduce musical works and recordings**. In that same year (2009), the commercial radio industry had a before-tax profit margin of 21.2%, an increase from 2005.[9]

For broadcasters, exercising the reproduction right therefore yields savings in human resources and space while enhancing productivity, programming quality and their competitive position.

With regard to copyright holders whose musical works and recordings are used by these same broadcasters, Bill C**-32 eliminates the right to authorize the creation of a separate copy for distribution for exclusively commercial purposes.**

CAMI is opposed to the repeal of section 30.9(6), which would simply give broadcasters full latitude to use these rights free of charge, thereby depriving creators and copyright holders of the fair compensation they currently receive in exchange for the exercise of their exclusive rights by broadcasters.

RECOMMENDATION

Modernization of the *Copyright Act* must not jeopardize the reproduction right.

CAMI maintains that the new section 30.71 must be removed and that this right must continue to be evaluated through free negotiation among the parties or through an equitable process before the Copyright Board.

CAMI is also opposed to the repeal of section 30.9(6).

EXCEPTION FOR USER-GENERATED CONTENT

The so-called "YouTube exception" allows an individual to disseminate, for instance, videos of family activities with popular songs in the background. Individuals may also post any new work derived from an existing work, that is, a translation, adaptation, synchronization or new works in a series, resulting in a near total loss of control over the work by its author

[8] *"If the appellant recorded Bishop's work, it did so because it was in its interests to do so. It thereby ensured that its broadcasts would be of a better quality and could later be rebroadcast more cheaply. It is quite understandable that the appellant should have to pay for these benefits."* [emphasis added] *Bishop* v. *Stevens*, (1987) 18 C.P.R. (3rd) 257, 260 (F.C.A.).

[9] *Commercial Radio Statistics and Financial Summaries 2005 – 2009 – Radio AM / FM, CRTC.*

or creator. There are no requirements regarding fair use or transformation. This is not fair. Any person can have a considerably negative impact on the market for a work. The market for works and new works could be completely destroyed. This is not fair.

Commercial distributors who benefit from this measure would accordingly be exempt from any requirement to remunerate users for the works used. That is not fair either. Under the current Act, sites with user-generated content such as YouTube are required to negotiate the terms with copyright holders either individually or with collectives representing authors, composers, artists and other copyright holders. Under Bill C-32, however, Canada would become the first country in the world allowing companies such as YouTube to use copyright protected works to collect revenues without being remunerating the content creators.

RECOMMENDATION

The legislator must remove the exception for user-generated content that ignores the moral right of rights holders.

EQUITABLE USE FOR EDUCATIONAL PURPOSES

Presented by the government as a balanced approach to copyright, the Bill contains a number of exceptions for educational institutions, libraries and consumers, without providing any remuneration to rights holders.

In some cases, exceptions to copyright are granted on the basis of overwhelming interests. Subject to the international treaties to which Canada is a party, these must be "special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder" (TRIPS, Article 13 and Berne Convention, Article 9). Since these exceptions are a type of expropriation of the creators' property rights, fair compensation is usually provided. This is true everywhere except in Canada.

The exceptions provided in Bill C-32 are very broad and are not limited to special cases. Moreover, by depriving content creators of any remuneration, the exceptions in the Bill impinge on the normal exploitation of the work and cause unfair prejudice to the legitimate interests of rights holders.

To eliminate these exceptions, certain sections of the Bill should be amended to ensure that content creators continue to be entitled to fair remuneration when management collectives are involved. There are currently agreements between management collectives such as Copibec, SOCAN, SODRAC and SOPROQ and educational institutions, providing guidelines for the use of literary, artistic, dramatic and musical works. These agreements were negotiated in good faith by the parties and, in the event of

disagreement, the Copyright Board offers a fair mechanism for establishing levies and balancing content creators' interests with users' needs.

Why tamper with a system that works?

Bill C-32 would expand the concept of equitable use for educational purposes. Since the new exception for equitable use for educational purposes is not clearly defined in the Bill, the courts will have to define their true scope, which will involve costly and lengthy legal battles. The Supreme Court already ruled in 2004 in CCH that exceptions were users' rights and that they must be interpreted broadly. Since the term "education" is not defined in the Act, this new exception could apply to all kinds of educational activities, not only those at schools. Moreover, since this exception is not in the section on educational institutions, various types of users, including corporations, could claim that education includes any kind of training. This exception could have a major impact on certain management collectives, a majority of whose revenues are based on agreements with the education sector.

The new exceptions violate international treaties by radically expanding the exceptions in the *Copyright Act* and reducing content creators' rights and their ability to earn a living from their art.

RECOMMENDATION

CAMI is opposed to including in the *Copyright Act* any exception that would expand the scope of equitable use for educational purposes.

CONCLUSION

In conclusion, CAMI recommends:

With regard to the duty of internet access providers, do not absolve of responsibility those internet service providers that are a necessary part of the solution and that have benefitted greatly thus far from the content provided by content creators without giving them any remuneration in return.

With regard to the private copying regime, amend the *Copyright Act* to ensure that all current and future digital audio platforms are subject to the private copying regime.

With regard to the exception for user-generated content, remove this exception as it ignores the moral rights of rights holders.

With regard to the reproduction right:

- **Modernization of the *Copyright Act* must not jeopardize the exercise of the reproduction right.**
- **The new section 30.71 must be removed and this right must continue to be evaluated through free negotiation among the parties or an equitable process before the Copyright Board.**
- **The bill must NOT eliminate section 30.9(6) of the current Act.**

With regard to equitable use, CAMI is opposed to including in the *Copyright Act* any exception that would expand the scope of equitable use for educational purposes.