

**Comments by the
Union des artistes,
Artisti
and the Guilde des musiciens et musiciennes du Québec**

**concerning
Bill C-32
(An Act amending the *Copyright Act*)**

INTRODUCTION

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.

The Guilde des musiciens et musiciennes du Québec is a union and an association of recognized artists representing roughly 3,500 professional musicians working in Quebec. Its mission is to defend and promote the economic, social, ethical and professional interests of musicians. Its primary objective is to negotiate collective agreements with producers and provide its members with a standard employment contract.

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 more than \$13.5 million in royalties so far.

Bill C-32

Bill C-32, An Act to amend the *Copyright Act*, grants certain rights to performers, such as moral rights and the full set of exclusive rights under the WIPO Performances and Phonograms Treaty (WPPT), placing them, in theory, on equal footing with the rights granted to authors.

Of course, the Union des artistes, Artisti and the Guilde des musiciens et musiciennes du Québec (hereafter "UDA/Artisti/Guilde") support the creation of such rights, which should have been recognized long ago. However, it is clear that Bill C-32, if passed, will not create economic benefits for the very people it is supposed to protect. For one, Bill C-32 contains various exceptions that render the rights of performers meaningless and fails to give copyright owners a simple and practical way to enforce their rights. In addition, Bill C-32 does not provide for transitional measures comparable to those provided for in the 1997 bill amending the *Copyright Act*, which would ensure that the newly created rights provide a real benefit.

This brief outlines the position of UDA/Artisti/Guilde on some of the changes proposed in Bill C-32, and the lack of change in some cases.

1) The principles that must guide copyright reform were not respected

The opening words of Bill C-32 announce that the bill aims 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;

(...)

(g) ensure that it remains technologically neutral;

(...)

Moreover, the preamble states:

Whereas the Copyright Act is an important marketplace framework law and cultural policy instrument that, through clear, predictable and fair rules, supports creativity and innovation and affects many sectors of the knowledge economy (...)

Whereas the exclusive rights in the Copyright Act provide rights holders with recognition, remuneration and the ability to assert their rights, and some limitations on those rights exist to further enhance users' access to copyright works or other subject-matter

(...) [our emphasis]

Moreover, Bill C-32 is supposed to respond to the requirement that Canada integrate into its national legislation the standards adopted in the 1996 WIPO treaties on copyright and performances and phonograms. These treaties require that signatory countries, including Canada, when providing for copyright limitations or exceptions in their national legislation, meet the following triple test:

- the limitation or exception must be a special case;
- it must not conflict with a normal exploitation of the work, the performance or the phonogram;
- it must not unreasonably prejudice the legitimate interests of the author, the performer or the producer of the phonogram.¹

As discussed more fully below, several elements of Bill C-32 do not meet the stated objectives and/or do not meet the triple test described above and imposed by international treaties that Bill C-32 is supposed to integrate.

Moreover, Bill C-32 generally conflicts with societal choices that were made less than 25 years ago and that should have guided Parliament in its reform of the *Copyright Act*. More specifically, with its amendments to the Act in 1988 (the creation of new provisions favouring the formation and functioning of collective societies under the supervision of a modernized Copyright Board) and 1997 (creation of a right to remuneration for the producers of sound recordings and performers and creation of a private copying regime), Canada has chosen the modern approach of focusing on collective administration. Collective administration has been facilitated to assure rights holders a right to remuneration if exploitations made possible by modern technologies do not fit the absolute control of rights holders on these exploitations through the exercise of their exclusive, traditional rights to authorize or prohibit. Today, by adding exceptions without in exchange providing for a right to remuneration, and by removing responsibility from certain actors in the new economy at the expense of creators, Bill C-32 goes against the modern approach that Canada has taken to copyright.

2) **New exceptions: private copying and later viewing**

a) Private copying

If Bill C-32 passes, anyone will have the right to reproduce for their own private purposes any work, performance or sound recording if the original copy was lawfully obtained and if certain other criteria are

¹ WIPO Copyright Treaty, Article 10; WIPO Performances and Phonograms Treaty, Article 16.

met. This new exception, provided for in clause 22 of Bill C-32, would not apply to a copy of a musical work, a musical work embodied in a sound recording or the performance of a musical work made onto a blank audio recording medium, within the meaning of section 79 of the *Copyright Act* (hereafter, the “Act”).

Section 79 is placed in Part VIII of the Act, entitled “Private Copying,” which was introduced with the 1997 amendments. Before the private copying regime was adopted, the reproduction of recorded music for private use was banned. Thousands upon thousands of people took to making illegal reproductions in the privacy of their own homes, copying music onto the popular medium at the time: blank tapes. Because it was impossible for rights holders to prevent copies made for private use, and because the copiers did not share the value of the copied works with the rights holders, an exception was introduced into the Act to allow for these private copies and, in return, to compensate rights holders for this use of their music.

Since the implementation of the private copying regime, the royalties paid have been a vital source of remuneration for rights holders.

The current private copying regime, which should be technologically neutral, has been outpaced by technology: it provides for royalties on the sales of blank CDs or MiniDiscs only, mediums that are used less and less for copying music. The medium now used to reproduce music, the digital audio recording device (the iPod, for example), is currently excluded from the regime because of an unfortunate ruling by the Federal Appeals Court.

Bill C-32 does not correct this unfair situation. Worse, it exacerbates the problem. If passed, the proposed amendments will strip the private copying regime of all its meaning, for the following reasons:

- By legalizing the reproduction for private use on mediums other than those covered by private copying tariffs certified by the Copyright Board, without providing, in return, compensation for rights holders, Bill C-32 unequivocally expropriates rights holders, including the performers represented by UDA/Artisti/Gilde, of part of their copyright. Numerous reproductions can now be made without giving rights holders recourse or remuneration.
- The new exception of reproduction for private use is not accompanied by an expanded definition of audio recording medium in section 79 of the Act to include digital audio recorders. Rights holders are therefore denied a significant source of revenue, and the actual revenue they receive from royalties from the private copying regime will decline from year to year because of the growing obsolescence of supports currently covered by the regime.
- In fact, it will be absolutely impossible for rights holders to verify that the copy made for private use was lawfully obtained, as the new exception requires. Violators may therefore act with impunity while rights holders remain uncompensated, as in the days before the introduction of the private copying regime.

In addition, the application criteria for this new exception are so complicated that consumers will be completely lost, making this new exception both impractical for consumers, who will end up doing exactly as they please, and performers, who have no means of enforcing their remaining rights.

During public consultations in the summer of 2009, and in the briefs submitted thereafter, several representatives of rights holders, and even users, argued that extending the private copying regime to digital audio recorders was essential to ensure fair remuneration for rights holders in a world where technological advances make the exploitation of content impossible to monitor. Far from implementing

these recommendations, Bill C-32 goes in the opposite direction by expanding uncompensated exceptions.

b) Later viewing

If clause 22 of Bill C-32 is passed, consumers will also have the right to fix and reproduce a communication signal, including a work, a performance or a sound recording that is being broadcast, in order to watch or listen to it later for private purposes, if the signal is lawfully received and if certain other conditions are met.

But, again, the conditions of application of this new exception are numerous and can be verified only by assigning as judge the user who benefits from the exception!

How, indeed, can a rights holder know whether the copy that was made of a television program for later viewing was the only copy made, or that the user kept the copy “no longer than is reasonably necessary in order to view the program at a more convenient time”? What, moreover, is “reasonably necessary”? Could a user keep a copy for years, as long as he hadn’t watched the show?

Clearly, it will be impractical to check that the conditions of the exception have been met. So, for all practical purposes, rights holders cannot exercise any control over the copies made by users and, consumers will do what they want.

The bill provides no form of compensation for rights holders whose works, performances and sound recordings are reproduced in this way. Yet it would be possible, as some European countries such as France have done, to extend the private copying regime (discussed in point 1 above) to include the audiovisual sector.

c) Three private copying regimes, including two that do not provide for compensation

The introduction of new exceptions covering some reproductions made by consumers, without changing the royalty system for private copies, has the perverse effect of creating three regimes of private copying:

1. The current system, providing for the payment of royalties on audio recording mediums;
2. The new “reproduction for private purposes” exception, which allows the reproduction on a medium or device other than those provided under the existing regime, but does not provide for royalties in return; and
3. The new exception allowing reproduction for later viewing, with no compensation for the rights holders.

If Bill C-32 passes, these three regimes of exception to the general rule that a reproduction is a violation of copyright will co-exist, each with its own set of rules. Consumers will be lost and end up doing what they want anyway, because there is no way for rights holders to ensure the legality of reproductions made in the secrecy of people’s homes. The complicated aspect of the exceptions, and the lack of logic of the proposed amendments, goes against at least one of the principles set forth in the preamble of Bill C-32: that the Act should contain “clear, predictable and fair rules.”

There is no logical justification for this distinction between the various copies made by the consumer for his personal use. A copy, made either on a blank CD or a digital audio recorder, is still a copy, and the rights holders should be able to receive royalties for the use of their work, regardless of the medium.

UDA/Artisti/Guilde deplors the fact that Bill C-32 completely ignores the accepted principle that the Act should be “technologically neutral” in relation to the private copying regime and later viewing.

In addition, UDA/Artisti/Guilde believes that the proposed new exemptions would not pass the triple test contained in the international treaties mentioned above. Indeed, the failure to provide a royalty system to compensate for the use of creators’ work creators unreasonably prejudices the legitimate interests of creators and conflicts with the normal exploitation of the work, the performance or the phonogram.

3) Technological protection measures and use

Bill C-32 makes it illegal to circumvent technological protection measures (TPMs), defined as any effective technology, device or component that controls access to a work or restricts the exercise of the exclusive rights granted to copyright owners (clause 47).

The possibility for rights holders to implement TPMs is theoretical in the case of performers, because they are not the ones who make the mediums incorporating their performances available to the public. They are therefore not the ones who can take the necessary technological measures to exercise such control. Even the major labels, who can take these measures, abandoned the development of these costly measures a number of years ago because of their extreme unpopularity.

Bill C-32 is far from creating the necessary incentives to ensure that the use of TPMs is effective in Canada. In fact most rights holders, and that includes the vast majority of performers, cannot afford to sue in hopes of recovering the meagre amounts provided for in Bill C-32. For example, Bill C-32 reduces from \$20,000 to \$10,000 the maximum amount of damages that may be recovered in the case of infringements for non-commercial purposes, and prevents rights holders from recovering statutory damages in cases where an individual circumvents the TPM for his or her own private purposes.

4) Removing responsibility from Internet service providers

Bill C-32 introduces exceptions for “persons providing services related to the operation of the Internet or other digital networks” (section 31.1). One exception provides that the provision of means for the telecommunication or reproduction of a work or other subject matter does not in and of itself constitute copyright infringement. Internet service providers would therefore not be responsible for copyright infringements on their network.

The proposed amendments include a monitoring mechanism in which rights holders could send a notice of claimed infringement to service providers specifying the electronic location to which the claimed infringement relates. The service provider who receives such a notice would be required to forward a copy of the notice electronically to the person who owns the electronic location specified, and retain adequate records to identify that person. Bill C-32 does not, however, require the service provider to remove the material that is alleged to have infringed copyright, as is the case in other countries (the United States, for example). The creation of such a requirement would have the benefit of giving rights holders real ways to stop infringements, and do so quickly. Indeed, in many cases, early intervention, rather than a simple notice system whose effectiveness depends on the willingness of the copyright infringer, could severely limit the economic damage caused to the rights holder whose creation is found illegally on the Internet. For example, the longer an illegal copy of a music file can be found on the Internet, the more it can be copied by other users, who in turn make their illegal copy available; or, conversely, the longer it takes to remove the first illegal copy, the less the system will have the desired effect, that is, preventing economic damage to rights holders.

Internet service providers bear no responsibility for copyright infringement on their networks, while they clearly benefit from the fact that numerous illegal downloads are made every day on the Internet, selling subscribers faster and faster service and bigger and bigger download capacity.

During the public consultations in the summer of 2009, and in the briefs submitted thereafter, it was proposed that Internet service providers could, through royalty payments to compensate rights holders, bear some responsibility in connection with the use of their services for illegal purposes. UDA/Artisti/Gilde regrets that the Government did not see fit to act on these recommendations in Bill C-32.

5) **Exception for reproduction by broadcasters**

Bill C-32 amends the provision regarding ephemeral recordings for broadcasting (section 34). Specifically, it would repeal subsection 30.9(6) of the current Act, which provides that the exception relating to ephemeral recordings does not apply if a licence is available from a collective society to reproduce the recording.

Repealing this provision seems to indicate an intention to eliminate the current requirement on broadcasters to pay royalties for reproductions made for broadcasting purposes. It goes without saying that this would deprive the creators of a significant source of income.

The proposed measure clearly does not meet the requirements of the triple test imposed by international treaties that Bill C-32 is supposed to address. Indeed, the prejudice to copyright owners is clear and unjustified. Moreover, this measure clearly conflicts with the normal exploitation of the performance or sound recording, as the collective management of their reproduction rights is now a reality in Canada. Broadcasters are now required to pay royalties to the relevant collective societies, including Artisti, for the reproduction of these performances and sound recordings.²

By repealing subsection 30.9(6), Bill C-32 once again limits the possibility for performers and other rights holders to collectively manage their copyrights in a profitable manner. This new attack contradicts the principles of fairness and support for creativity that Parliament officially promotes in the preamble of Bill C-32, and is inconsistent with the approach taken by Parliament in 1988 and 1997.

6) **Limited reproduction rights granted to performers**

Bill C-32 introduces, in which would be subsection 15(1.1) of the Act, new rights for performers. While the UDA/Artisti/Gilde approves of these additions, it nevertheless has the following reservations:

- UDA/Artisti/Gilde regrets that the exclusive rights of performers, when their performance is fixed, apply only in cases where the performance is fixed in a sound recording. Indeed, the definition of a “sound recording” does not include soundtracks:

A recording, fixed in any material form, consisting of sounds, whether or not of a performance of work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work.

So the performers whose performance is fixed on a medium that includes visual elements (such as music DVDs or digital files containing video clips) are not entitled to the exclusive right of

² *Statement of Royalties to be Collected by SOCAN, Re: Sound, CSI, AVLA/SOPROQ and Artisti in respect of Commercial Radio Stations, Supplement, Canada Gazette, Part I, July 10, 2010.*

reproduction or to other rights created by Bill C-32. This distinction is unjust and has no rationale.

- Several subsections under 15(1.1) repeat the text of 15(1), which creates some confusion. The new subsections 15(2.1) and 15(2.2) contain a range of conditions that apply to the rights under subsection 15(1.1). UDA/Artisti/Gilde believes it would be simpler to completely reword sections 15(1) and 15(2) so that all the rights and all the conditions of application were in one place.

7) Performers' moral rights

Bill C-32 gives performers moral rights, which UDA/Artisti/Gilde strongly supports. Sections 17.1 and 17.2 will be added after section 17, recognizing the moral rights of performers.

However, UDA/Artisti/Gilde notes that performers' moral rights are recognized only when their performance is live or fixed in a sound recording. For the reasons set out in point 8 below respecting the definition of a sound recording, it follows that the artist whose performance is embodied in an audiovisual or cinematographic work is not entitled to a moral right for that performance. UDA/Artisti/Gilde knows that the economic rights of audiovisual performers are not affected by the provisions of Bill C-32. Yet that should not prevent recognizing the moral rights of all performers, regardless of the economic right in the performance.

Moreover, UDA/Artisti/Gilde notes that the new section 17.1(2) that would be introduced by Bill C-32 provides that performers may waive their moral rights. UDA/Artisti/Gilde believes it should not be possible to waive moral rights with respect to a vocal performance or an artist's image.

The voice and the image are personality rights recognized for every person under the *Civil Code of Quebec*, S.Q., 1991, c. 64 (hereafter, the "Code").

Section 3 of the Code provides that:

Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy

These rights are inalienable.

Section 36 of the Code reads:

The following acts, in particular, may be considered as invasions of the privacy of a person:

...

5. Using his name, image, likeness or voice for a purpose other than the legitimate information of the public;

...

Section 8 of the Code provides that "no person may renounce the exercise of his civil rights, except to the extent consistent with public order."

Providing for the possibility that an artist can waive his claim to the creation of his vocal performance or a performance that uses his image violates the personality rights recognized by the Code. In fact, waiving the right to claim that his voice is his voice or his image is his image is the equivalent of an artist denying he is himself. It is against public order to waive one's association with oneself!

UDA/Artisti/Gilde opposes the possibility of waiving the right to the integrity of a performance in the case of a vocal performance or a performance using the person's image. Under the new wording of 28.2 of the Act, the right to the integrity of a performance is infringed if the performance is "to the prejudice of its performer's honour or reputation."

If the artist waives appealing a performance that is to the prejudice of his honour or reputation, he is waiving his fundamental personality rights, which violates public order.

A waiver to appeal the use of one's voice and one's image in association with a product, cause, service or institution is of course permitted under the Code, and many artists do so regularly, for example in an advertising context. Currently, the artist gives specific permission to a particular person for a specific purpose. However, the ability to waive the exercise of this attribute of moral rights, in the current wording of Bill C-32, is much wider. Indeed, the proposed subsection 17.1(4) stipulates that:

17.1(4) If a waiver of any moral right is made in favour of an owner or a licensee of a copyright, it may be invoked by any person authorized by the owner or licensee to use the performer's performance, unless there is an indication to the contrary in the waiver.

The artist who authorizes the use of his vocal performance (or the use of his image) in favour of a person, albeit in a very specific purpose, would lose control of that performance because he could no longer invoke his moral rights against persons authorized by the owner or licensee of the copyright. Yet the owner or licensee of the copyright would have the power to authorize such use, and would therefore find himself exercising the moral rights of the artist instead of the artist himself! UDA/Artisti/Gilde believes that this solution is unacceptable and that the moral rights of performers should not be thus reduced to a theoretical advantage.

8) Maintaining the exception in section 68.1 of the Act

In the 1997 reform, Parliament introduced the right to equitable remuneration (section 19 of the Act) to be paid to the performer and maker of a sound recording for its performance in public or its communication to the public by telecommunication. This section requires broadcasters to pay royalties for the use of music. Currently, section 68.1 of the Act exempts broadcasters from paying equitable remuneration royalties on the first \$1.25 million of annual advertising revenues.

This situation is completely unfair because it specifically targets royalties for performers and makers of sound recordings, while royalties paid to copyright owners of musical works are not subject to any such exemption.

The exemption in section 68.1 benefits broadcasters. Yet their royalties are not reduced when they receive royalties paid pursuant to the remuneration right assigned to them in section 21 of the Act. This lack of uniformity in the law is not justified. The only act protecting creators of content leads here to unfair treatment.

During the public consultations in the summer of 2009, several witnesses testified that this unfair and outdated exemption should be removed from the Act. UDA/Artisti/Gilde deplores that these requests were ignored.

9) **Absence of transitional measures to prevent the assignment of a new right before the coming into force of new provisions creating it**

Parliament should have ensured that the rights to be granted to performers for the first time are effective and provide a real benefit. Parliament ensured this in 1997, in section 58.1 of the Act amending the *Copyright Act*, S.C. 1997, c. 24:

58.1 No agreement concluded before April 25, 1996 that assigns a right or grants an interest by licence in a right that would be a copyright or a right to remuneration under this Act shall be construed as assigning or granting any rights conferred for the first time by this Act, unless the agreement specifically provides for the assignment or grant.

The usefulness of such a transitional provision is not theoretical. Indeed, it is general industry practice for producers of television shows, cinematographic works, sound recordings, etc., to encourage performers to sell all rights to their performances. To clarify Parliament's intent, which should be that these clauses do not apply to the new rights created under Bill C-32, and which would thus protect performers from costly court battles to enforce their rights, Bill C-32 should have contained such a transitional measure.

CONCLUSION

Unless it undergoes significant changes, Bill C-32 should be abandoned. Indeed, the bill is already outdated, since it does not respect the principle of technological neutrality and does not take the experience of other countries into account. It will therefore not stand up over time. In addition, some of the changes proposed in Bill C-32 not only contradict the direction taken by Parliament in 1988 and 1997 but do not meet the triple test that Canada committed to respecting by signing the WIPO treaties in 1996.

Bill C-32 claims to be modern and author friendly but in fact favours users and businesses that benefit from creators' work. By creating new exceptions to the rights of creators without offering them in return a right to equitable remuneration, Bill C-32 blocks creators from accessing the digital economy by forcing them to invent new business models without giving them the means, neither financial (loss of rights to remuneration) nor structural (recourse unworkable in practice).