Written Presentation to the Legislative Committee on Bill C-32

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Presenter: Alexander Crawley, Executive Director, Professional Writers Association of Canada (PWAC)

The Professional Writers Association of Canada is a not-for-profit membership organization founded in 1976. We represent the social, cultural and economic interests of freelance writers in all regions of Canada for their non-fiction works including books, magazines, newspapers, government and corporate communications and the various uses that require the services of a professional writer.

We appreciate the initiative to reform the law in light of the rapidly changing world of digital production, distribution and consumption. While bill C32 contains certain gains for individual creators such as the right of distribution, the making available right, the recognition of photographers as first owners, and some other provisions the overall structure of the bill and the list of new exceptions tend to undermine these gains even as they are provided. From our perspective C32 sacrifices principle for perceived short-term gain and seems to conceive of the desired balance to be struck solely between two classes of users: consumers and corporations. This is deeply disturbing as it leaves individual creators out of the equation in practical terms. While it might be characterized as a noble attempt to resolve the issues in a digital context, this bill as a whole is misconceived and requires major amendments if it is to meet its stated objectives.

It has become a truism that “content is king” amongst those who purport to speak for cultural production. A colleague recently described the digital marketplace that is the key to Canada’s economic future this way: “If content is king, distributors are King Kong and Internet Service Providers are Godzilla.” The problem with C-32 is that it places content creators at the base of the totem pole and then cuts away the roots that sustain creativity. The bill fails to account for the ways that digital distribution can enable market development. C32 seems to conceive of digital cultural production as a replica of the traditional model based on the physical object. There is no apparent recognition that a major segment of developing digital markets for copyright materials is in secondary uses, the most obvious one being licensing the use of digital works in whole or in part. In the old model works could be valued based on the number of physical copies produced and sold. Royalties were payable to content creators based on these measurable statistics. In order to adapt this principle to digital production and distribution individual creators need the law to be strengthened to support collective rights

administration. The bill as drafted seems to suggest that the monetary value of the creativity in a work is exhausted at first sale and all future exploitation of the work is a free-for all between corporations and anyone who obtains a single copy. This was true and acceptable before access to mechanical copying was commonplace. The broad penetration of digital technology means that a single copy, whether obtained legally or not, is infinitely replicable. Therefore, the law must provide a framework for appropriate valuation of these copies. As written the bill encourages confusion between the copy itself and the creative content it contains.

It's not as if we didn't see this coming. Decades ago Canadian writers formed collectives, eventually including publishers, for the purpose of recognizing the value of our works as copied for various uses including uses by government, the corporate sector, ancillary publishing and within educational institutions. The two most prominent collectives are Copibec and Access Copyright. These structures are easily adaptable to digital technologies. Yet the list of exceptions in C32 including that for "education" under Fair Dealing puts this most practical approach to compensation for use at peril.

On point:

<ins>On Fair Dealing</ins> We reject the open-ended test for fairness contained in the Supreme Court judgment in *CCH* the application of which will promote further litigation. We prefer the Berne 3 step test as a codification that has withstood the test of time and succeeding generations of technology. Also without invoking Berne we understand that we are in danger of violating our international obligations.

<ins>On the User-Generated exception:</ins> This gives web services explicit permission to avoid compensating rights-holders and sees Canada leading the devaluation of intellectual property instead of providing a legal framework for its appropriate valuation.

<ins>On royalties for private copying:</ins> The persistent misrepresentation of the projected cost of extending the current regime to current and future technologies contradicts the claim that this bill is technologically neutral.

<ins>On DRMs and TPMs</ins>: The position that these measures are a "one-size-fits-all" solution to piracy is misguided and addresses only the interests of the larger corporations who dominate the entertainment industry. Individual creators are not against legal protection for these methods. We recognize that they align with our international obligations. However, they fail to address our needs as small

businesses and the suggestion that they present a workable solution for individual creators is false.

On statutory damages: Our experience as a party to the class action suit brought in the name of Heather Robertson on behalf of freelance against major Canadian publishers strongly suggests that the proposed limits to statutory damages for infringement amount to a slap on the wrist for corporate infringers. The amounts awarded by the courts in those cases total nearly $15 Million. They have taken over 12 years to settle.

(This fact also indicates that the ambiguities in the bill around the new exceptions will, as many have pointed out, lead to an extended period of costly litigation. We suggest that the legislative process is the appropriate place to put maximal certainty into the law, rather than leaving it to the courts.)

On ISP Liability: C32 fails to propose appropriate responsibility for Internet Service Providers or such enterprises as may replace them in future. C32 needs appropriate provisions to ensure compensation to the rights holders whose works are made available through these delivery systems. We support the graduated response that has proven effective in other jurisdictions as a minimum step towards adequate security for a digital economy that provides equitable benefits for those who create copyright works , not only for delivery.

Finally we understand that the Committee is interested in precise language required to amend C32. We have worked with our colleagues to develop the aforementioned Joint Statement on C32. With them we share a desire to see certain provisions of the bill entirely removed. But we are not unaware of the political currents affecting the process. While we have been involved in the crafting of specific amendments you will understand that this is an iterative process responding to the progress of your deliberations. You may rest assured that we will make specific recommendations on language to be included in C32 in due course.