We feel that, in addition to ensuring a better balance between the rights of users and the rights of authors, it would be wiser to establish a general royalty regime applicable to private copies; should a right, such as the right of reproduction for private purposes without compensation for the authors, be established, we think that Canada would run the risk of legal action before the World Trade Organization.

c) Risk of legal action against Canada

We feel that the right to reproduce for private purposes without compensation to the authors would go against the obligations set out in the international treaties and would expose Canada to recourse before certain international organizations, such as the World Trade Organization.

In fact, article 10 of the WIPO Copyright Treaty sets out the rules that restrict the introduction of new limitations or exceptions for rights granted to authors:

> (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.
>
> (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.[48]

Any new limitation or exception must be analyzed in light of the three-step test, already present in the Berne Convention[49] and carried over in the *Accord on Trade-Related Aspects of Intellectual Property Rights* (TRIPS)[50]: (1) the limitation or exception must be a special case, (2) does not conflict with a normal exploitation of the work and (3) does not unreasonably prejudice the legitimate interests of the author.

This three-step test was used and analyzed by a WTO panel in a case between the United States and the European Union.[51] In that case, the *Copyright Act* allowed certain exceptions for stores, which were authorized to distribute music without having to compensate the authors for the use that the stores made of their work. We must therefore keep in mind, beyond the panel's interpretation of the three-

[48] WIPO Copyright Treaty (WCT), article 10 [online] http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P83_10885 (page originally consulted on January 13, 2011; page consulted for translation purposes on January 31, 2011)

[49] Berne Convention for the Protection of Literary and Artistic Works, [online] http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html (page originally consulted on January 17, 2011; page consulted for translation purposes on January 31, 2011)

[50] Accord on Trade-Related Aspects of Intellectual Property Rights (TRIPS), [online] http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs (page originally consulted on January 17, 2011; page consulted for translation purposes on January 31, 2011)

[51] Report of the World Trade Organization panel, United States – section 110(5) of the *United States Copyright Act*, 15 June 2000, WT/DS160/R. This decision has received a lot of commentary, so we will not comment on it.

step test, that there is also a risk that Canada might be brought before such a panel and that this risk should be taken into account when analyzing the relevance of amending Bill C-32 to try to limit the prejudice that the new measures are likely to bring about for the authors. To resolve the problem and to avoid all recourse, it would therefore be preferable and desirable that the royalty system for private copies be expanded.

Proposed amendment

We propose that the current paragraph (*c*) of section 29.22 be removed and that it be replaced with something that might read:

> **c) for the reproduction of works for private purposes, the authors, performers and makers are entitled to remuneration from the manufacturer or importer of the medium or device, under the terms of section 82 and subsequent sections of the *Copyright Act*.**

In addition, the current conditions related to actions occurring after the authorized reproduction should ideally appear as bans on the use of that reproduction. We add to these reservations our criticism of the technological protection measures, already mentioned, which lead us to request that the paragraph relating to circumventing the technological protection measures be removed. Section 29.22 could therefore read as follows:

> **29.22 (1) It is not an infringement of copyright for an individual to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if**
> **a) the copy of the work or other subject-matter from which the reproduction is made is not an infringing copy;**
> **b) the individual legally obtained the copy of the work or other subject-matter from which the reproduction is made, other than by borrowing it or renting it, and owns or is authorized to use the medium or device on which it is reproduced;**
> **c) the reproduction is made and used only for private purposes.**
>
> **(2) In consideration of the reproduction of works for private purposes, authors, performers and makers are entitled to remuneration from the manufacturer or importer of the medium or device, under the terms of section 82 and subsequent sections of the *Copyright Act*.**
>
> **(3) For the purposes of paragraph (1)(*b*) and (*c*) a "medium or device" includes digital memory in which a work or subject-matter may be stored for the purpose of allowing the telecommunication of the work or other subject-matter through the Internet or other digital network.**
>
> **(4) Infringement of copyright includes:**
> **a) giving the reproduction to a third party;**
> **b) keeping the reproduction when the person has given away the reproduced copy.**

d) Fixing signals and recording programs for later listening or viewing

As we mentioned earlier, we recommend removing section 29.23 and creating, in its place, an expanded right to reproduce for private purposes.

e) Backup copies

Clause 22 of Bill C-32 proposes the introduction of a section 29.24 to the *Copyright Act*. The section would cover a new exception to the benefit of users, namely, the right to make backup copies.

Traditionally, the right to make backup copies has been reserved for software (the Act uses the term "computer program"). Paragraph 30.6(*b*) of the *Copyright Act* states that:

> 30.6 It is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorized by the owner of the copyright to
>
> (*b*) make a single reproduction for backup purposes of the copy or of a reproduced copy referred to in paragraph (*a*) if the person proves that the reproduction for backup purposes is destroyed immediately when the person ceases to be the owner of the copy of the computer program.[52]

Therefore, Bill C-32 proposes that users be able to make backup copies of all copies of the works they own. However, section 29.23 of the *Copyright Act*, as proposed by the bill, already permits the reproduction of works. We feel that introducing such an exception to the rights of authors would needlessly complicate the *Copyright Act*: users will legitimately be able to wonder which works they are allowed to back up and how making a backup copy differs from making a reproduction for private purposes.

We have already mentioned that the bill should try to make the rights of users as clear as possible so that they can be certain that their use of creative works are covered by the exceptions in the *Copyright Act* and that they are aware of the limitations of those rights conferred upon them.

However, introducing the right to make backup copies creates confusion and uncertainty by establishing two different systems for backup copies, depending on whether the work is a computer program or another work that is not a computer program.

[52] Section 30.6 of the *Copyright Act*.

We can also reiterate our criticism of the conditions surrounding this exception and focusing on the technological protection measures: being unable to exercise this right to make a backup copy when a technological protection measure has been inserted in the work unduly limits the rights of users. Clause 31 of Bill C-32, which sets out a replacement of section 30.6 of the *Copyright Act*, does not prohibit circumventing a technological protection measure in making backup copies of computer programs.

Clauses 22 and 31 of Bill C-32 merit particular comment.

Clause 22 of Bill C-32 proposes a new section 29.24 of the *Copyright Act*, which would read:

> It is not an infringement of copyright in a work or other subject-matter for a person who owns — or has a licence to use — a copy of the work or subject-matter (in this section referred to as the "source copy") to reproduce the source copy if...

That paragraph, as written, is such that it perpetuates some confusion in the understanding of the copyright system. The same can be said for clause 31 of Bill C-32, which would amend section 30.6 of the *Copyright Act* as follows:

> It is not an infringement of copyright in a computer program for a person who owns a copy of the computer program that is authorized by the owner of the copyright, or has a licence to use a copy of the computer program, to reproduce the copy for the sole purpose of obtaining information that would allow the person to make the program and any other computer program interoperable.

The owner of the copy of a work owns only the medium, unless the author gave up all of his or her rights to the work. The licence is conferred by the author or the owner of the right on the user and is really about (or should really be about) royalties. The user's ownership of a medium may not limit the author from exercising his or her copyright. Nor can the licence limit the user's rights.

On that matter, Séverine Dusollier explains:

> [Translation]
> If there really is a sale, it is of a copy of a computer program or a database and not the sale of the work itself. Otherwise, there would be a total transfer of the copyrights on the work, which in no way reflects the reality of such a commercial distribution. The licence applies to the work, separate from the material copy it is on....
>
> It does not prevent this contractual figure, which is certainly complex, from being split into two separate agreements: the sales agreement related to the medium, or service delivery if it

> was downloaded or being used remotely, and the licence agreement related to the copyright on the work incorporated into the medium or sent by computer platform.[53]

The licences granted systematically prohibit backup copies. This is particularly the case for videogames. Prior to playing one, the user must accept the end-user licence agreements.[54]

This practice, which involves selling the medium of the work with the licence agreements, is beginning to spill over into video with Blu-Ray discs, and even into publishing with electronic books, and is also appearing in the music industry, with platforms such as iTunes.

In addition, given the inability of consumers to negotiate these licence agreements and assert their user rights, we recommend that Bill C-32 clearly state that the rights conferred on users by the Act, often through exceptions to the exclusive rights of the owners, be declared publicly and that the Act recognize that users cannot waive them.

Proposed amendment

Clause 21 of Bill C-32 should be amended and should propose the addition of a section 29 to the *Copyright Act*, which would read as follows:

> **No person may, by convention, require a user to waive a right that confers on him or her either of the exceptions to copyright set out in this Act.**

3) Responsibility of Internet service providers

With regard to the responsibility of Internet service providers, Bill C-32 legalizes the current practices of Internet service providers. In fact, the "notice and notice" system is covered by the addition of section 41.26 of the *Copyright Act*.

This notice and notice system is already in place and is used as a prevention means for users who engage in certain acts that contravene copyright. This system functions fairly simply: copyright owners who find one or more of their works being used on the Internet in a way that they feel contravenes their rights send a message outlining this contravention of their rights to the Internet service provider of the offending user. The supplier would then communicate that notice to the user.

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[53] DUSOLLIER, Séverine, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, Larcier, Brussels, 2007, p. 413.

[54] For example, the licence agreement for the company Rockstar states: "You agree not to: make a copy of the Software or any part thereof." [online] http://www.rockstargames.com/eula (page originally consulted on January 20, 2011; page consulted for translation purposes on January 31, 2011). Electronic Arts also prohibits users from making a copy of the FIFA Soccer 10 videogame under section 1d of the licence agreement [online] http://www.ea.com/portal/pdf/legal/EULA_en_SecuROM_Disk_and_Digi_No_Ad_PC_20090824.pdf (page originally consulted on January 20, 2011; page consulted for translation purposes on January 31, 2011)

Some copyright owners are requesting that section 41.26 be amended and that it be replaced by a "notice and takedown" system, like the one in the United States' *Digital Millennium Copyright Act*.[55] Unlike the "notice and notice" system, copyright owners would not just send an allegation that his or her rights had been violated to the Internet service provider or content host; the copyright owner could demand, through application of the notice and takedown system, and by simply notifying the access provider, the content that he or she finds problematic is removed from the network. The user would be informed that he or she could send the service provider a counter-notice requesting that the content remain online, where applicable, by establishing that he or she was not guilty of the alleged violation. However, this notice and takedown system is far from perfect and has been strongly criticized in the United States.

Some have criticized the excessive powers that the system gives copyright owners, who have sometimes used it to try to limit freedom of expression. To that end, the Electronic Frontier Foundation (EFF) posts on its website a "Takedown Hall of Shame," which details the takedown requests of copyright owners who have made abusive use of this system. For example, Universal Music Group has asked on a number of occasions that a program criticizing one of its artists be removed;[56] and Warner Music Group has requested a number of times that amateur videos on YouTube featuring a song for which Warner owned the rights be removed.[57] These are just two examples from the long list of uses of this notice and takedown system that EFF finds shameful.

Other copyright owners are asking that the Act require Internet service providers to provide compensation for works circulating on the Internet in contravention of their rights.[58] In fact, copyright owners are asking Internet service providers to pay for all actions that they feel are illegal and that are apparently being committed by users on the networks. If Internet service providers are required to pay for such "rights," it could surely be expected that they would in turn increase Internet subscription rates. In other words, all the users, whether or not they contravene the rights of copyright owners, would have to pay for such compensation. If such a royalty system had to be considered, it would be good that a more logical and fair system be proposed. It is strange to consider a system that proposes maintaining, if not multiplying, the contraventions to the *Copyright Act* (the users who would pay without breaching the Act would be encouraged to do so) and that anticipates payment by non-contraveners of "royalties" that should as much as possible be imposed only on those who intend to engage in acts that are likely to

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[55] 17 U.S.C. §§ 512

[56] Music Publisher Tries to Muzzle Podcast Criticizing Akon, [online] https://www.eff.org/takedowns/music-publisher-tries-muzzle-podcast-criticizing-a (page originally consulted on January 22, 2011; page consulted for translation purposes on February 1, 2011)

[57] YouTube's January Fair Use Massacre, [online] https://www.eff.org/deeplinks/2009/01/youtubes-january-fair-use-massacre (page originally consulted on January 22, 2011; page consulted for translation purposes on February 1, 2011)

[58] Radio Canada, *Les artistes montent aux barricades* [Artists climb the barricades], [online] http://www.radiocanada.ca/nouvelles/arts_et_spectacles/2010/11/30/001-droit-auteur-manif.shtml (page originally consulted on January 22, 2011; page consulted for translation purposes on February 1, 2011) "[Translation] In particular, the artists are demanding royalties from Internet service providers to compensate for their losses incurred as a result of the illegal download of music on the Internet."

concern works covered by copyright. We will present below an approach that we think would be more acceptable.

4) Responsibility of service providers

Clause 18 of Bill C-32 proposes introducing new paragraphs (2.3 and 2.4) to section 27 of the *Copyright Act*:

> (2.3) It is an infringement of copyright for a person to provide, by means of the Internet or another digital network, a service that the person knows or should have known is designed primarily to enable acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.
>
> (2.4) In determining whether a person has infringed copyright under subsection (2.3), the court may consider
>
> *a)* whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;
> *b)* whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
>
> *c)* whether the service has significant uses other than to enable acts of copyright infringement;
>
> *d)* the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;
>
> *e)* any benefits the person received as a result of enabling the acts of copyright infringement; and
>
> *f)* the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

These paragraphs were submitted to take on online services that allow downloading and that make copyrighted works available on the Internet. In other words, it would involve putting an end to services like Isohunt or the Pirate Bay.[59]

[59] Testimony of Barry Sookman before the Legislative Committee on Bill C-32 on December 1, 2010: "Of course, in a Canadian situation we have problems similar to The Pirate Bay. We have isoHunt, which is the second-largest BitTorrent site in the world. It is the largest in Canada. We have seven other BitTorrent sites operating in Canada, and many leech sites and other sites. The Pirate Bay is a good litmus case to think about. We have those problems in Canada that need to be addressed, and the enablement provision would very much help to do that." (Emphasis added) [online] http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4839067&Mode=1&Parl&Language=E (page originally consulted on January 22, 2011; page consulted for translation purposes on February 1, 2011)

But this clause cannot be read independently of the provisions of clause 35 of Bill C-32, which proposes adding a section 31.1 to the *Copyright Act* that would specifically target Internet service providers:

> 31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.
> (2) Subsection (1) does not apply in respect of a service provided by the person if the provision of that service constitutes an infringement of copyright under subsection 27(2.3).

Sections 27(2.3), (2.4) and 31.1 of the *Copyright Act*, taken together, mean that Internet service providers who do not themselves want to be held liable or to be vulnerable to lawsuits for copyright violations would be required to block Internet services that could potentially lead to copyright violations (or even to allegations of such violations from the copyright holders). A requirement of that kind inevitably leads to questions being asked about the affront that blocking network services would cause to the freedom of expression that is guaranteed under the *Canadian Charter of Rights and Freedoms*[60] and, more generally, to the neutrality of the Internet that it seems to us essential to preserve. It is certainly not for access providers to decide which sites Internet users should or should not have access to.

If that kind of approach might theoretically seem tempting to some, law-makers could do well to consider foreign experiences along those lines, all of which have been shown to be useless and none of which, in any event, have provided a way for authors to be compensated. Such was the case in Sweden with the IPRED Act, which was supposed to put an end to "piracy"[61] and in France with the HADOPI Act, where users found a way around the applications that HADOPI monitored and continued their previous practices by other means.[62] All such desperate attempts to put an end to "piracy" are a waste of time and money for authors and other players in the digital economy alike.

It is regrettable to see this option, of demonstrably ineffective repression, still seemingly championed by some, despite the failure of approaches like it. Surely, it is finally time to get down to the task of finding

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[60] Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, http://www.canlii.org/en/ca/const/const1982.html (page originally consulted on January 26, 2011; page consulted for translation purposes on February 1, 2011)

[61] CHAMPEAU, Guillaume, *La loi suédoise IPRED est un succès : le piratage augmente, les ventes aussi* [Swedish IPRED Act is a success: pirating increases, and sales do too] [online] http://www.numerama.com/magazine/15417-la-loi-suedoise-ipred-est-un-succes-le-piratageaugmente-les-ventes-aussi.html (page originally consulted on January 22, 2011; page consulted for translation purposes on February 1, 2011)

[62] Zdnet article, *Hadopi : 75% des adeptes du téléchargement n'ont pas modifié leurs habitudes* [Hadopi: 75% of download enthusiasts have not changed their ways] [online] http://www.zdnet.fr/actualites/hadopi-75-des-adeptes-du-telechargement-n-ont-pasmodifie-leurs-habitudes-39757470.htm (page originally consulted on January 22, 2011; page consulted for translation purposes on February 1, 2011)

new ways to compensate authors. A licence allowing their work to be made available on the Internet, with a fee paid by users to their service providers, seems to us to be more effective. This kind of approach, whereby authors would be paid by users for copyright work from money collected by Internet service providers, seems to us to have the greatest likelihood of satisfying all the parties involved. Such an approach would certainly be preferable to an attempt to make Internet service providers accountable; they would have no other choice but to establish online blocks or filters. Not only would this be ineffective, it would also probably involve significant financial resources, resources that, with no shadow of a doubt, would come from the pockets of consumers. This kind of approach would clearly limit the distribution of creative work, would endanger both the neutrality of the Internet and freedom of expression, and would involve costs to consumers that authors will never see, although they, of course, want their works distributed more widely. We continue to believe that it is high time to re-evaluate priorities and to work towards developing a framework that will benefit everyone involved.

Let us not forget that some countries have established a lead that we can follow. In Spain, case law has consistently refused to convict sites that allow downloading and that make works available on the Internet. As a court clearly stated: "Conviction would imply criminalising socially admitted and widely practised behaviour where the aim is not to gain wealth illegally but to obtain private copies."[63]

Allow us to draw a parallel with a passage from Montesquieu's The Spirit of Laws, a passage that we can but hope will also inspire Canadian law-makers:

> We have said that the laws were the particular and precise institutions of a legislator, and manners and customs the institutions of a nation in general. Hence it follows that when these manners and customs are to be changed, it ought not to be done by laws....[64]

So, as experiences in other countries have demonstrated, current custom will not be changed through legislation; legislation will simply cause Internet users to turn to applications or websites where they can make copies of creative works.

It is important to remember that the basic goal of copyright legislation is, on the one hand, to promote the spread of creativity and, on the other, to make sure that authors are fairly compensated. If current technology and practice have as their result the unprecedented spread of creative works, it would be

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[63] CHAMPEAU, Guillaume, *Le partage par P2P est légal en Espagne selon la Justice!* [Justice says P2P sharing is legal in Spain!] [online] http://www.numerama.com/magazine/3519-Le-partage-par-P2P-est-legal-en-Espagne-selon-la-Justice.html (page originally consulted on January 26, 2011; page consulted for translation purposes on February 1, 2011)

[64] Montesquieu, *The Spirit of Laws*, Book XIX, Chapter XIV [online] http://etext.virginia.edu/etcbin/toccer-new2?id=MonLaws.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=301&division=div2 (page originally consulted on January 22, 2011; page consulted for translation purposes on February 1, 2011)

absurd to try to curb the opportunity for unprecedented access through the very legislation that seeks to promote it. How much wiser would it be to keep sight of the other goal of fair compensation for authors, a goal that current practices alone do not achieve.

This is why we suggest establishing a method of compensating authors that is based on the collective management of the availability of creative works. If put into practice, users wanting access to creative works online could obtain a licence that would actually be available through the user's Internet account. An additional fee, the rate to be set by the Copyright Commissioner, would be charged by the Internet service provider and paid by the user. The fee would then be forwarded to the agency that would manage the licences and the redistribution of the monies collected.

It is wrong to say that "free culture" currently dominates digital networks and that consumers will refuse to pay for what they presently get at no direct cost. Consumers recognize the value of creativity; experience has shown that, when authors give users the freedom to set their own prices for music, including the choice to pay nothing at all, the vast majority of users are prepared to pay to support the authors. There are many examples of this kind of offer, including Misteur Valaire, Radiohead and Nine Inch Nails, and those examples speak volumes.

So, as law-makers move forward with their reforms, we invite them to ensure that the present balance in the *Copyright Act* be maintained. This balance allows authors to be compensated when their work is used and gives users access to that work and to their culture in full enjoyment of their rights.