SUBMISSION OF THE WRITERS' UNION OF CANADA TO THE PARLIAMENTARY COMMITTEE REVIEWING BILL C-32

The Writers' Union of Canada, founded in 1973 by writers for writers and certified in 1998 under *The Status of the Artist Act*, is the national voice of Canada's professional book writers who work in the English language. Our members, approximately 2,000 professional writers, live in every region of Canada and earn their living by writing books. The *Copyright Act* provides us with essential protection for our writing, which is at the heart of a flourishing but fragile publishing industry that reflects the culture of our country.

Only about 10% of the cover price of a book usually goes to its writer. The remaining 90% is dispersed to others who work in the book publishing sector, including publishers, editors, book designers, printers, marketers, publicists, distributors and booksellers. Despite our crucial role at the core of the publishing industry, most professional writers in Canada earn less than $20,000 annually from their writing.

Writers want their works to be widely distributed and easily accessible to the public. That is, after all, why we write.

Introduction

We are in favour of revisions to update the *Copyright Act* to deal with the digital environment, but those revisions must benefit creators as well as the public who use and enjoy the works that we produce. If passed unamended, Bill C-32, the *Copyright Modernization Act*, will curtail authors' rights and will likely shrink writers' markets in the book publishing industry and other cultural industries, making it harder for us as individual professional writers to find outlets for our work and earn a living.

As acknowledged in the preamble to Bill C-32, the purpose of the exclusive rights in the *Copyright Act* is to "provide rights holders with recognition, remuneration and the ability to assert their rights". Yet this bill proposes new, extremely broad limitations on those rights in order to "further enhance users' access to copyright works" without payment and without sufficient consideration of their impact on authors and the marketplace within which we work. Put more simply, this will decrease authors' incomes because it reduces copyright costs for educators and other users.

We will support modernized copyright legislation that recognizes that:

- Creators must be fairly paid for their work;
- The integrity of creators' work must be respected; and
- Copyright licensing, which provides the public with "easy, one-stop shopping" and writers with fair remuneration when creators' work is copied, makes exceptions unnecessary.

In the Writers' Union of Canada's submission in response to *Improving Canada's Digital Advantage*, the Government's Consultation Paper on a Digital Economy Strategy for Canada earlier this year, we said:

> ….Canadian writers need fair remuneration for their work and they need an environment in which their works can be distributed safely online. This will enable Canada's writers to continue to compete with the world's best.
>
> We want stronger copyright laws that will protect our works from circulating on the Internet without our authorization and without appropriate payment or attribution. The challenge to copyright in the digital age is better met by legislative measures that support collective administration of copyright than by exceptions. Collective societies provide easy access to consumers while ensuring rightsholders of fair payment.…

In the *Speech from the Throne* in March 2010, the Government said that "….To encourage new ideas and protect the rights of Canadians whose research, development and artistic creativity contribute to Canada's prosperity, our Government will also strengthen laws governing intellectual property and copyright."

Bill C-32 does not strengthen laws governing copyright in a way that will encourage or protect Canada's writers. It will have just the opposite effect. A number of its new, over-broad, vague exceptions will badly hurt writers – not only radically expanding what can be copied without payment but also introducing greater uncertainty into what copyright protects and inevitably leading to prolonged litigation. We believe that these encroachments on authors' existing rights breach Canada's international obligations and will be the cause of complaints from our trading partners under *NAFTA* and the *TRIPs* agreement.

We also note Article 15 of the *International Covenant of Economic, Social and Cultural Rights* ("ICESCR"), in which contracting states recognize everyone's right to "To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." This echoes Article 27(2) of The Universal Declaration of Human Rights. In a report to the United Nations in 2004 on the implementation of the ICESCR, Canada reported that:

> As a member of the World Intellectual Property Organization (WIPO), in December 1997, Canada signed the two treaties that were adopted at the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, December 2 to 20, 1996: the *WIPO Copyright Treaty* and the *WIPO Performances And Phonograms Treaty*. And, in 1998 Canada undertook research and consultations on legislative amendments that would be required to ratify these treaties.

WIPO "Internet Treaties" were concluded almost 15 years ago and Canada's subsequent ICESCR reports to the United Nations do not mention copyright. Bill C-32 is intended to implement new rights contained in these WIPO treaties, but it concerns us that the Government's *Backgrounder* and website Q&A on Bill C-32 are evasive on whether this Government intends to ratify them.

Exceptions without Remuneration

The four exceptions introduced by Bill C-32 that most threaten writers are:

(1) fair dealing for education;
(2) user-generated content;
(3) digital delivery by libraries; and
(4) reproduction for private purposes.

Most professional writers don't oppose any uses that increase accessibility to their work. However, we do oppose carte blanche exceptions for uses for which we and other creators will receive no remuneration.

Collective administration by collective societies provides the same ease of access to consumers as exceptions from copyright infringement, but provides creators with fair remuneration that is either negotiated with organizations representing users or fixed by the Copyright Board. Collective licences or tariffs replace multiple, low-value transactions between individual rightsholders and users, and give teachers, students and others immediate access to works from Canada and around the world at low cost.

Statutory exceptions should be considered only where individual licences are not practicable and collective administration is not normally available. Because we are living in a time of rapid technological change, exceptions should not be created prematurely – that is, before rightsholders have a reasonable opportunity to develop new business models in a safer online environment than what exists today.

Fair Dealing for Education

In a government fact sheet on Bill C-32, entitled *What the New* Copyright Modernization Act *Means for Teachers*, the Government emphasizes that fair dealing for the purpose of education will be an "important" change to the *Copyright Act* and that "Extending this provision to education will reduce the administrative and financial costs for users of copyrighted materials that enrich the educational environment." There is no mention that these costs to be saved by educators, both by expanded fair dealing and by the other "greatly expanded exceptions for education" referred to in a Q&A on the government website, will come straight out of the pockets of writers and other rightsholders.

We are in favour of "enriching" the educational environment. However, the new permitted uses trumpeted in this fact sheet as having "important economic societal and cultural benefits" for individuals and businesses, as well as education, do not have to be free uses at our expense. These are mostly not new uses and, without the proposed exceptions, they would continue under collective licensing with payment to rightsholders. Teachers, principals, university presidents, secretaries and janitors who work in the education sector are paid. Writers should also be fairly paid for their work.

The debate on copyright is clouded because much of the pressure for more exceptions is coming from academics and the educational institutions that employ them. Academic writers receive

their income mainly from salaries, are not dependent on royalties from their books, and often have little interest in earning royalties. It is enough that publication helps advance scholarly reputations and leads to increased salaries. Professional writers, on the other hand, cannot afford to give their work away free or have it pirated because they depend on writing for their living.

The opening lines of the preamble to Bill C-32 refer to the *Copyright Act* as "an important marketplace framework law and cultural policy instrument" that supports creativity and affects many sectors of the knowledge economy "through clear, predictable and fair rules". Yet the undefined scope of the proposed extension to fair dealing for education will create uncertainty that can only be resolved by costly litigation and on a case-by-case basis.

If Bill C-32 becomes law with this expansion of fair dealing intact, it is our view that Parliament will have shirked its responsibility to enact legislation that is clear and intelligible to those who need to understand it. From the perspective of rightsholders, users and taxpayers, it would be irresponsible to leave in limbo – to be decided by litigation – what educators will be able to copy without paying rightsholders. **(We include further explanation of the problem created by this extension of fair dealing in the appendix to this submission.)**

We ask you to recommend to the House of Commons that "education" be deleted from the purposes of fair dealing as expanded by Bill C-32. All exceptions for education must be clearly delineated.

User-Generated Content or "Mash-Ups"

The proposed "mash-up" exception, sometimes referred to as the YouTube exception, is unfair to the authors of existing works. We are unaware of a precedent for this in the law of any other country. Bill C-32 would allow an existing work to be used in the creation of a new work by a different author for his or her "non-commercial purposes". Nevertheless the author of the new work could send it to anyone with little restriction – and without payment to the author of the original work on which the new work is based – and could even authorize a commercial "intermediary", such as YouTube, to disseminate or distribute it. Before any such exception from copyright infringement is enacted, creators of all genres should be consulted and attention paid to their various concerns, including their moral rights, potential damage to the market of their existing works, and appropriate remuneration.

One well-intentioned but largely ineffective safeguard in this section of Bill C-32 is the condition that the new work should not have "a substantial adverse effect" on the existing work, but the original author would not be entitled to make a legal complaint until after this has actually happened – by which time the market for the original work may have been severely damaged or destroyed. There may be a diminished market for the original author's next book in his popular series, especially if a sequel by someone else goes viral on the Internet. This exception would also allow the making of a film based on an author's book without her permission. The wording even allows, however unlikely this may be to happen, its distribution in movie theatres as well as on the Internet, which would reduce the author's own chances of optioning film rights to that book.

Another well-intentioned safeguard to this proposed amendment for user-generated content is the requirement to mention the original author's name, although only "if it is reasonable in the

circumstances to do so". This is intended to provide some protection for an author's moral rights, which involve the integrity of the author's work or use of the author's name or work in contexts which damage his or her reputation. Zombie themes, to take an example, are currently very popular, some of them clever and entertaining, and there are zombie adaptations of novels, particularly classics that are in the public domain. But most authors do not want their story to be adapted for readers of zombie fiction. Under current copyright legislation, an author has the exclusive right to authorize adaptations of his or her work and can refuse to license adaptations that he or she finds distasteful. If this particular amendment allowing user-generated content becomes law, the author would not be able to prevent any adaptation of his or her short story, as long as the new work created is for a non-commercial purpose. That new work might be, for example, a zombie-themed short story posted on YouTube or play performed live by students in a school.

Clearer and stronger restrictions are needed to make any user-generated content exception fair to the original author whose work is used without his or her authorization, whose work could be distorted, and whose opportunities could be scooped by another author. There is no clear prohibition, at least in the English-language version of this exception, against commercial distribution by a disseminator of a new work that uses an existing work. These issues do not disappear just because the creator of the new work has no commercial purpose or because the original author can litigate after there has been "a substantial adverse effect". A new work that uses an existing work by another author should remain private unless there is permission or payment.

Be it fan fiction or a teacher's collection of poems for her class, a for-profit disseminator such as YouTube should be responsible for remunerating the rightsholders whose existing works are used in the ways permitted by this proposed exception. As the *Globe & Mail* reported on October 15, 2010, Google's chief financial officer said that "the Internet industry is waging a 'war for talent'" and that Google-owned YouTube is "monetizing" more than 2 billion views each week, up 50% from the previous year. YouTube and other disseminators should be required to pay at least a small fraction of their money from advertising or access fees to collective societies to compensate those rightsholders whose works would be adapted or otherwise used under this exception for user-generated content.

We ask you to recommend in your report to the House of Commons that the exception for user-generated content be deleted from Bill C-32.

Digital Delivery by Libraries

This exception in Bill C-32 will allow libraries to email a single copy of a newspaper or magazine article that is more than a year old, an article from a scholarly, scientific or technical periodical, or any non-fiction material covered by fair dealing for research or private study to the patron of another library – an extension of an existing exception commonly referred to as interlibrary "loan". This new exception would allow a single library to supply the same copyright material directly to the computer of every student or other person across Canada who might choose to order it from his or her school or university library or local public library.

Although we are in favour of direct digital delivery from libraries to library patrons, collective societies should be given a reasonable opportunity, following the update of other provisions of

the *Copyright Act*, to offer licences for digital delivery. Allowing digital dissemination of multiple copies of the same copyright material without a licence and remuneration and without a restriction on the number of copies a library can email to library users is unfair to rightsholders and will lead to increased "sharing" and decreased purchases of magazine and other subscriptions by libraries.

We ask you to recommend in your report to the House of Commons that the exception permitting the electronic delivery of copyright material to library patrons be deleted.

Reproduction for Private Purposes

This proposed, extraordinarily broad exception will allow everyone to reproduce any work without compensation to the author "for private purposes". This reproduction is subject to some restrictions, including that the work copied must be non-infringing and legally obtained but not borrowed or rented. Nor can technological protection measures be circumvented in order to make the copy. However, since there is no definition of "private purposes", no one knows what this exception may permit or how different "private purposes" may be from "private use", a term already used elsewhere in the *Copyright Act*. It is at least intended to allow format shifting by a user from one medium or device to another medium or device he or she owns.

Without the "clear, predictable and fair rules" promised in the preamble to Bill C-32, it will be left to individual litigants to find out what the courts may allow as a "private purpose". "Digital locks" are not an acceptable substitute for clear copyright laws. However, without certainty about what is covered by this new exception, rightsholders will be encouraged to use technological protection measures in order to prevent unremunerated dissemination of their works by users to relatives, friends and casual acquaintances. Any such dissemination to others that could fall within this exception for "private purposes" should be prohibited, or else it should be licensed and the rightsholder remunerated.

We ask you to recommend in your report to the House of Commons that the exception permitting reproduction for private purposes be deleted and allowed only if and when appropriate compensation is provided for writers and other rightsholders.

Curtailment of Collective Licensing

All four of the exceptions on which we have focused are intended to exempt users from licensing and payment for uses that currently are or could be administered effectively and efficiently by collective societies – rightsholder-run organizations which already have developed models that provide users with easy access and creators with fair remuneration, subject to the oversight of the Copyright Board. Royalties and other terms of use are negotiated by users and rightsholders or are fixed by the Copyright Board.

There are other amendments in Bill C-32 that cut back on or preempt collective administration of copyright to the detriment of writers. These include removal of an exception from two existing educational exceptions that negates these exceptions if works are commercially available under a licence from a collective society – reproducing or telecommunicating works as required for tests

and examinations and making copies for overhead projection on the premises of a school or other educational institution. Other exceptions, which will preempt collective administration, are for the use of material publicly available on the Internet by students and teachers (so-called "P.A.M.") and alternate format material sent to other countries for persons with print disabilities. Bill C-32 appears to be a deliberate cutback to the administration of copyright by collective societies.

We ask you to recommend in your report to the House of Commons that proposed exceptions that eliminate or preempt collective licensing be removed from Bill C-32 or amended, so that rightsholders will continue to be able to pursue the normal commercial exploitation of their work through collective administration of their copyright.

Canada's International Obligations

Bill C-32 has created some new startlingly broad exceptions that harm writers, the most egregious of which we have commented on. All of these exceptions cut back on the existing rights of authors and interfere with their current as well as potential future revenue streams from collective societies. They are, therefore, viewed by our international colleagues as a breach of the "3-step test" in the *Berne Convention*, which is echoed in *NAFTA* and the *TRIPs* agreement, annexed to the World Trade Organization agreement, but with "rightsholder" substituted for "author". The 3-step test is also included without that change in the *WIPO Copyright Treaty*, which Bill C-32 is intended to implement. Section 9 of the *Berne Convention* reads:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [literary and artistic] works [protected by the Convention] in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

We believe that all four of the exceptions on which we have commented depart from the "internationally recognized norms" referred to in the preamble of Bill C-32 and breach Canada's international commitments and that, if not removed from Bill C-32, they will expose Canada to complaints from other countries.

We submit that the 3-step test articulated in the Berne Convention and the WIPO Copyright Treaty should be included in the text of the Copyright Act to assist courts in future interpretation of exceptions.

Statutory Damages

Bill C-32 introduces a distinction between commercial and non-commercial infringements and makes infringers for non-commercial purposes liable for drastically reduced statutory damages. Additionally and inexplicably, persons who provide services via the Internet that are designed primarily to enable others to infringe copyright are exempted altogether from statutory damages.

Statutory damages, now ranging from $500 to $20,000, in the judge's discretion for each work infringed, are an important tool for creators with limited financial resources. If creators prove

infringement they can ask the court to award these damages without the difficulty and expense of proving actual damage suffered. Bill C-32 restricts the statutory damages that can be claimed by a copyright owner in a lawsuit for non-commercial infringements to between $100 and $5000 regardless of how many infringements and how many works have been infringed. Once a copyright owner who has commenced a legal proceeding opts for statutory damages, all other copyright owners whose works have also been infringed by the same defendant are barred from recovering statutory damages for any non-commercial infringements that preceded the commencement of that legal proceeding. This is unfair to these other copyright owners whose works have also been infringed.

We note too that both commercial entities and large non-profit institutions may infringe copyright for non-commercial purposes. If they do so, these infringers are provided with a safety net – statutory damages of no more than $5000, regardless of the number of infringements and the number of copyright owners whose works have been infringed – which could be regarded as a cost of doing business.

We ask you to recommend in your report to the House of Commons that these amendments restricting statutory damage awards for non-commercial infringements should only benefit individuals and not benefit corporate or institutional infringers. We also ask that statutory damages be available against a person who provided an Internet service that was operated primarily to enable others to infringe copyright by means of the Internet.

Conclusion

A number of the copyright amendments in Bill C-32 can be viewed as a deliberate attack on authors' rights – expropriation without compensation. Curtailment of authors' rights – that is, less copyright protection for authors – means more free copying and fewer book sales. If Bill C-32 is passed without the amendments we have asked for, inevitably some book publishers will decide to reduce their operations and publish fewer books. Some may disappear altogether. Writers' markets will shrink. All writers will make less money from the reproduction and communication of their works and many will find it even more difficult to survive on their income from writing alone. Canadians – and Canadian educational institutions – will have fewer made-in-Canada books.

As mentioned above in our comments on fair dealing, the preamble to Bill C-32 recognizes the *Copyright Act* as "an important marketplace framework law and cultural policy instrument". Over the past four decades there has been a great flowering of literature and other forms of culture in this country. Canadians can take pride in the accomplishments of Canadian writers and other creators whose works play a large role in forming Canada's cultural identity and in providing the foundation for its successful cultural industries. Without strong copyright legislation and appropriate remuneration, professional writers will produce fewer books, and literature in this country will be in danger of losing the sharp cutting edge that defines works of excellence and enables Canadians to point with pride to Canada's literary accomplishments.

Copyright provides the legal foundation for writers' business models and makes it possible for us to obtain remuneration for our work. It is also the economic basis for the whole publishing industry. Bill C-32 takes rights from us and our international colleagues. More collective

licensing, not the new exceptions in Bill C-32, is the key to efficient and equitable access to copyright works in the digital environment as well as to fair payment to writers. Any "modernization" of the *Copyright Act* – "bringing it in line with advances in technology and international standards", to borrow language from the Government's *Backgrounder* on Bill C-32 – must surely provide reasonable remuneration for writers and appropriate protection for their works.

We call on Parliamentarians to make changes to our *Copyright Act* that will ensure that authors' rights continue to be respected and make it easier, not harder, for authors to make their cultural and economic contribution to Canada and to be remunerated for their work. We ask that you fix Bill C-32.

RESPECTFULLY SUBMITTED BY THE WRITERS' UNION OF CANADA
on March 24, 2011

APPENDIX

Note on the extension of fair dealing for the purpose of "education"

The Government's *Backgrounder* on Bill C-32 states that the expansion of fair dealing will enable use of copyright material for the purpose of education "in a structured context", but neither the *Copyright Act* nor Bill C-32 defines "education" and no connection is made between the undefined term "education" and the term "educational institution", which is defined in the current *Copyright Act*. Nothing in Bill C-32 points to or explains the "structured context" referred to by the Government. Nor is there any guidance in this proposed legislation to consumers and rightsholders on how the new fair dealing exception for education is intended to relate to the educational exceptions currently in the *Copyright Act* or to the new ones proposed in Bill C-32.

Most exceptions for educational institutions have been crafted to suit particular fact situations (for example, reproduction of a work to display it for the purpose of education or training on the premises of an educational institution). However, the Supreme Court indicated in a 2004 judgment (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339) that there is no need to consider the relevance of any other exception in the *Copyright Act* if a user of a copyright work is entitled to rely on fair dealing, seemingly even if a specific exception would apply to the particular fact situation. This means that carefully calibrated exceptions for education are in danger of being displaced or swallowed up by fair dealing, for which there are no clear parameters except those that would eventually be established by the courts on a case-by-case basis in prolonged and costly litigation.

The factors applied to fair dealing by the Supreme Court of Canada (S.C.C.) in the 2004 *Law Society* case involving the delivery of legal materials by a law library cannot simply be applied to reproduction for the purpose of "education", but there is a real danger that this could happen and badly hurt rightsholders and the system of collective licensing that they have developed over two decades. If "education" as an allowable purpose for fair dealing is not removed from Bill C-32, legislators ought to determine and state in the *Copyright Act* what factors should be considered when determining what constitutes fair dealing in the context of education and not leave this to the courts. Factors that should be given particular weight are whether the work may be copied under a collective society licence or tariff (rejected as a consideration by the S.C.C. as an appropriate alternative to the dealing) and what effect the copying of the work could have on the rightsholder's market for the work (not considered to be of primary importance by the S.C.C.).

In the case referred to above, the Supreme Court of Canada stated that "The fair dealing exception, like other exceptions in the Copyright Act, is a user's right….it must not be interpreted restrictively." Even with amendments to Bill C-32 that would keep specific exceptions from being subsumed by fair dealing and that would spell out factors to be considered in a determination of fair dealing for education, the revenues that rightsholders will receive from their collective societies are likely to be much less than they are now.