UNEQ

UNION DES ÉCRIVAINES
ET DES ÉCRIVAINS QUÉBÉCOIS

Brief to the Legislative Committee on Bill C-32

By

Union des écrivaines et des écrivains québécois

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Preamble

The Union des écrivaines et des écrivains québécois is a trade union founded March 21, 1977, by some fifty writers rallied by Jacques Godbout.

It now numbers close to 1,400 poets, novelists, playwrights, essayists, writers of children's literature, authors of educational and scientific work and other writers. UNEQ works to promote and disseminate Quebec literature, in Quebec, throughout Canada and abroad, and defends writers' socioeconomic rights.

In 1990, UNEQ was recognized under the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* (R.S.Q., c. S-32.01) as the association most representative of artists working in the field of literature, and consequently speaks on behalf all Quebec writers.

In 1996, UNEQ was also certified by the Canadian Artists and Producers Professional Relations Tribunal, gaining exclusive authority to negotiate framework agreements with producers under federal jurisdiction on behalf of self-employed artists working in the field of literature.

For over 30 years, UNEQ has been contributing to the vitality of Quebec literature, most notably by running a variety of programs enabling writers to meet their readers in schools, libraries and other public places. It also helps to raise the international profile of Quebec writers through overseas partnerships, including residencies and large public events.

By taking part in various roundtables and other bodies, UNEQ plays a leading role in developing the cultural and literary milieu.

UNEQ is chaired by Danièle Simpson.

Summary of UNEQ's position

We are told that the goal of Bill C-32 is to try to balance the rights of authors and the interests of consumers. In fact, its main effect is to unfairly deprive creators of income. Writers are particularly affected, because they supply the raw material to the educational system—raw material that the government is seeking to make available at no charge. If the bill were passed as is, it would not be an infringement of copyright to use a work for the purpose of "education, parody or satire"; that is, works could be used without the authors' consent and without payment, as long as the use was "fair," as defined by the Supreme Court's 2004 ruling in *CCH*. But that definition contains a wide range of exceptions that favour users. What is more, as the bill does not define the term "education," it is not limited to educational institutions. Similarly, the recurring phrases "considered reasonable" and "can reasonably be expected" underscore the approximate nature of many provisions and render them meaningless when it comes to the remedies available to rights holders in cases of illegal use. Writers who feel they have been harmed must, at their own expense, ask the courts to rule. This could lead to years of legal wrangling and feelings of insecurity for both creators and users. The bill would thus wind up doing exactly the opposite of what it is supposed to. Fines in noncommercial cases are minimal, and Internet service providers (ISPs) cannot be held liable for content circulating on their sites, even if it is in breach of the law.

The many exceptions in the bill, which make a number of uses currently managed by collective societies free of charge, are even more serious. These societies have proved themselves over many years, providing users with unimpeded access to content, while at the same time guaranteeing income to creators. It is clear to us that collective administration maintains the balance the government says the bill is intended to achieve, while the bill's many new exceptions eliminate that balance altogether.

That is why the government should not take lightly the threat that these exceptions pose to collective administration. Access to literary works for educational purposes, interlibrary loans, Internet access to works—in all these cases, collective administration permits both access to works and payment to creators. The current bill may make collective societies obsolete, thus depriving thousands of creators of income to which they are entitled, just as any worker who does a job is entitled to be paid.

In other words, Bill C-32, rather than defending authors against illegal uses of their works (that is, unpaid or violating their integrity) legalizes such uses and obliges rights holders to resort to technological protection measures to prevent their artistic works from being pirated. This reversal is not only indefensible, but dangerous, for the ensuing legal proceedings will put the Canadian cultural industry in jeopardy for years to come.

Legitimate exceptions

We would like to begin by recalling the original definition of exceptions to copyright, as set forth in article 9 of the **Berne Convention**, to which Canada is a signatory:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works 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**.

The exceptions that Bill C-32 adds to those already in existence are, by their number and scope, prejudicial attacks on the interests of authors—totally legitimate interests in light of the fact that the works are the fruits of their labour. The proposed exceptions are nothing like "special cases," because their aim is to allow a wider use of works, without providing for compensation to creators. It is therefore quite clear that Bill C-32 fails to respect Canada's international commitments.

Exceptions should exist only for works that are unavailable. Furthermore, such exceptions should only be allowed if the three-step test is met, and the bill should spell that out. Section 2 of the Act as it stands already contains a definition of commercially available:

> "commercially available" means, in relation to a work or other subject-matter,
> (a) available on the Canadian market within a reasonable time and for a reasonable price and may be located with reasonable effort, or
> (b) for which a licence to reproduce, perform in public or communicate to the public by telecommunication is available from a collective society within a reasonable time and for a reasonable price and may be located with reasonable effort.

Also, as the *bâtonnier* of the Barreau du Québec [head of the Quebec bar association] said in his letter of October 14 to the ministers of industry and heritage,

> Collective administration is the only way to guarantee an author's legitimate interests when faced with a huge number of users. Collective administration is, moreover, the most efficient way to facilitate public dissemination of works by making them available to users.

If the government, in its copyright legislation, acknowledged the contribution of collective administration in terms of both user access and payment to creators, Bill C-32 would not need to include an endless list of exceptions.

Unfortunately, the bill has been drafted as if the question of availability of works, especially in education, has never been addressed or resolved. The *bâtonnier* pointed out that collective administration is "a modern, socially responsible approach […] right in line with the values of accessible justice and balanced resolution of disputes between authors and users." Bill C-32 upsets the balance and will cause an increase in litigation, because the vague language of the bill will lead to an increase in legal proceedings.

Let us examine the exceptions that will do the most obvious harm.

Section 29, Fair dealing for the purpose of education, satire and parody

Bill C-32 amends section 29 to expand fair use to include use for the purpose of "education, parody or satire." The lack of definition of the term "education" will enable any organization that offers any kind of training to claim to be educational and to exercise the right to fair use. As the scope of the concept itself is not very clear, users and artists will have to ask the courts for clarification. Consequently, we will end up with a kind of patchwork law developed by dint of litigation and court rulings.

The educational milieu is where literary works are most likely to circulate, making it a major source of authors' income. It is therefore essential that the true value of the contribution creators make to the education of Canadians, to the development of their imagination and to the acquisition of their knowledge be recognized, just as the work of teachers and other staff of educational institutions is recognized. Depriving creators of the compensation they deserve when their works are the raw material of education is unacceptable, and should not even be contemplated.

Besides, we do not believe that creators will be the only ones paying for this provision. On the contrary, the easy answer of extending fair use to education will not serve teachers, either, as it will be many long years before they can be certain whether they are making "fair use" of a work or not. Teachers will be paralysed by insecurity, and taxpayers will pay and suffer for it. The world of education would be better served by strictly defined exceptions that pass the three-step test, and only once it has been demonstrated that the works are unavailble to teachers for activities deemed necessary for the quality of their teaching.

Last, we should point out that the educational exception is covered by several provisions in the bill, and that the conditions governing them are most often vague, with guidelines that are almost impossible to enforce. We should also add that the paltry damages C-32 provides for will hardly encourage rights holders to institute proceedings when their rights are violated.

We would like to bring this comment by Line Beauchamp, Quebec Minister of Education, Recreation and Sports, to the attention of the legislative committee:

> In Quebec, the government is committed to ensuring that creators receive their fair share for third-party use of their works, especially in educational institutions. Quebec's position, that the right to education and the rights of creators go hand in hand, is in keeping with the department of culture and communications' 1980 policy statement, *La juste part des créateurs* [creators' fair share].

UNEQ is also concerned by the very broad scope of the concepts of satire and parody. Satire and parody certainly have their place in a democratic society with freedom of expression as one of its cornerstones, but UNEQ believes that the bill inadequately protects the moral rights in works being satirized or parodied. In our opinion, the section on fair use for the purpose of satire or parody should have language limiting how much of the work can be used for such a purpose. It should require that satire or parody be sufficiently distinguishable from the original work that it is not simply an adaptation or reproduction with only a few words changed.

Recommendation: Delete "education" from section 29. Define fair use for the purpose of parody or satire so as to restrict the scope and ensure that moral rights are respected.

Section 29.21, Exception for user-generated content

The purpose of section 29.21 is to legalize the use of protected content by users who wish to use it, even modify it, in order to create a new work disseminated digitally at no profit. The government, in its desire to recognize a practice that has become increasingly common, especially on sites like YouTube, is completely ignoring the concept of moral rights. In fact, a great deal of user-generated content betrays the spirit of the works used, and even mentioning the source cannot remedy that. This exception cancels out authors' rights to preserve the integrity of their works, which forms the basis of moral rights.

Two examples will suffice to demonstrate the extent to which this exception takes a wrong approach. The first concerns American writer Seth Grahame-Smith's *Pride and Prejudice and Zombies*, a book published in 2009 that takes Jane Austen's novel and incorporates a storyline full of zombies. The effect is certainly interesting in its way, but Jane Austen's stature as a classic author and our knowledge of her work to some extent protect its integrity.

The second example concerns the widespread phenomenon of fan fiction, whereby readers who love a novel, for instance, write and distribute sequels or variations set in the author's universe. Some see it as a tribute to the author, but actually it is first and foremost a takeover of the intellectual work of an author who constructed an imaginary world using his or her own words. Fan fiction hijacks this imaginary world and its expression, taking it in directions the author never intended. Loving a work does not entitle a reader to usurp the author's role. Imagine the creation and distribution of a work in which Mordecai Richler's hero Duddy Kravitz becomes a Nazi. It is not impossible, because Bill C-32 provides no guidelines as to how a user may transform an original work and make it a "new" work.

We ask the government not to cater to a fad and blur the distinction between an original work and a counterfeit.

Recommendation: Repeal section 29.21.

Section 29.22, Reproduction for private study and research

Section 29.22 makes it legal to reproduce a substantial part of a work, in whole or in part, for private purposes. The conditions that must be met to benefit from this exception offer no guarantee against the harm that such a permissive provision will undoubtedly cause, and UNEQ believes that it is disproportionate to any real needs that might justify it. Furthermore, the wording of the conditions is so vague as to make them unenforceable.

Recommendation: Repeal section 29.21.

Section 29.24, Backup copies

This exception gives the owner of a work the right to make backup copies and use them if the original becomes unusable. It allows the reproduction of as many copies of the work as the owner deems necessary, in any medium, with no compensation for the author. For its intended

purpose, such a provision should limit reproduction to a single copy. Since all other cases of reproduction are merely a new way of making copies for private purposes, they would be unnecessary if they were part of a private copy licensing scheme with compensation for the reproduction of all categories of works.

Recommendation: Repeal section 29.24.

Section 30.01, Communication of a work by telecommunication

Under this provision, an educational institution may, for the purposes of distance education, communicate a protected work to a student as part of a lesson. The institution must take measures that can "reasonably be expected" to prevent students from further disseminating the work, but no penalty is provided should it fail to do so. It should also be noted that the term "lesson" is not satisfactorily defined in the bill, making it difficult to interpret this provision. This exception tramples on the work accomplished by collective societies and denies their expertise, which they could bring to bear to find a solution to the question of this type of use.

Educational institutions' lack of obligation to pay authors for the use of their works is definitely an unprecedented harm, which no one else involved in education would accept. More serious still, such a provision sends students the message that the works they benefit from have no economic value, and the consequence of that message may well be seen when the time comes for them to choose a career. We might wonder then, what will happen to the development of truly Canadian culture and knowledge in the decades to come. We might also wonder how such a provision is likely to make Canada competitive in the knowledge economy.

Recommendation: Repeal section 30.01.

Section 30.02, Extension of licence to photocopy

The addition of this section means that digital reproductions are considered to be the same as print reproductions, and thus allows their cost to be assessed on the same basis, without regard to the possible dissemination of the work. Furthermore, this extension is granted to educational institutions without the consent of the copyright holder. This exemplifies the poor fit between the bill and the impact of the possibilities of digital reproduction in terms of distribution. Under this section, digital reproduction would be totally uncontrolled. Subsection 30.02(6) also demonstrates the reasoning behind the bill, namely that it is up to rights holders to oversee the protection of their works. Furthermore, there is nothing dissuasive about the damages provided for in section 30.02(7), especially with regard to the financial and human costs that any remedy sought by rights holders is bound to entail.

Recommendation: Redraft this section to distinguish between digital reproduction and print reproduction, and adjust compensation accordingly.

Section 30.04, Work available through Internet

Educational institutions will be able, for educational purposes, to reproduce, communicate by telecommunication and perform in public a work available on the Internet. Currently, a work is protected by the *Copyright Act* as soon as it exists in any material form, without any other formality. This exception eliminates this protection in an educational setting, benefiting users of works and obliging artists and writers to employ technological protection measures. Authors are unduly burdened with the responsibility to protect their works: a lone individual cannot police the Internet, and it is contradictory to table a *Copyright Act* that requires creators to oversee the protection of their works themselves.

We must point out once again that the purpose of collective administration is to make works available and compensate authors. There is no reason to believe that such a practice could not apply to the Internet, once the necessary adjustments have been made.

As a result, this measure is unnecessary. Why give free access to all unlocked material when there are already millions of works readily available at no charge through free educational licences such as those obtainable through the Creative Commons? There are even search engines that can easily find the material needed. And works that are not readily available can easily be licensed through a collective society.

Recommendation: Repeal section 30.04.

Sections 31.1, 38.1, 41.25, 41.26 and 41.27, Making ISPs responsible and statutory damages

UNEQ does not consider that the notice-and-notice principle in Bill C-32 is an appropriate means of protecting rights holders against counterfeiting on the Internet. Indeed, the proposed provisions relieve ISPs from most of the responsibility that should be theirs, since the content they host is the very basis of their activity and their astronomical income. This approach is thus too lax with regard to the risk of illegal distribution of copyrighted content on the Web. Bill C-32 obliges creators to police the Web, a burden disproportionate to their means and abilities, given the Web's size and complex legal character, not to mention the ludicrously low statutory damages, ranging from $100 to $5,000 for noncommercial uses *for an entire site*, for example. On the other hand, the current Act provides for statutory damages ranging from $500 to $20,000 *per counterfeited work* on the incriminated site.

Recommendation: Amend sections 41.25, 41.26 and 41.27 according to principle of notice and take down and maintain the fines in the current Act.

Sections 79, 80, 81 and 82, Levies for private copying

The lack of extension of levies for private copying on new media, including digital memory (digital players, hard drives and USB keys, for example), contradicts one of the objectives of Bill C-32, which is to modernize the Act and update it to meet the challenges of digital media. The private copy licensing scheme in France covers digital media and provides for a sliding

scale of levies, depending on the size of the medium, and empowers an independent commission to determine which media should have levies upon them.

A thoroughly modern *Copyright Act* should not only extend levies for private copying to new digital media, but should also provide payment to artists working in all areas, not just in sound recording, as is currently the case. Developments in books and digital publishing have now made it possible to transfer content to more than one device. This is a significant change for creators in the field of literature, and up-to-date legislation must take it into account.

Recommendations: Amend section 79 of the current Act to include the authors of works of all categories and define digital memory along with blank audio recording medium.
Amend section 80 of the current Act to include all categories of works and digital memory.
Amend section 81 of the current Act to include authors of all categories of works, works of all categories and digital memory.
Amend section 82 of the current Act to include digital memory.

Conclusion

Bill C-32, in the guise of a certainly necessary modernization, opens the door to the worst sorts of excess. It increases the number of exceptions, without providing for payment to artists and writers; denies their right to approve or not the use of their works; remains vague as to the meaning of the terms used, leaving it up to the courts to interpret them (thereby neglecting the real situation of creators, who often cannot afford to bring court action); sets laughable fines, compared with the costs that would be incurred; relieves ISPs, which make enormous profits thanks to the circulation of works, of liability; ignores Canadian copyright collective societies' successful negotiations over the years; and endangers the book industry and development of new publishing markets.

What is more, the bill violates international agreements signed by Canada, namely the Berne Convention and the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), article 13 of which says:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

The proliferation of exceptions allowed by the bill clearly violates the principle of exceptions, at the expense of creators.

UNEQ therefore wishes to express its serious reservations with regard to the consequences of adopting the bill as it stands, and does not see how, in such a framework, the goal of copyright, that is, to stimulate creativity by assuring creators that their works will be adequately protected, can be achieved. We would like to draw attention to the severe criticism that the bill has received from international observers such as STM (International Association of Scientific, Technical and Medical Publishers), the International Federation of Reproduction Rights Organizations and the International Publishers Association. The Quebec National Assembly passed a motion calling on the Government of Canada to amend Bill C-32 to ensure that creators' rights are recognized, and the motion was also supported by Montreal's municipal council. We fail to see how weakening copyright will help develop the Canadian economy, nor do we believe that such a copyright system will help make Canada a leader in the digital economy.

We therefore demand that Bill C-32 be reviewed and overhauled so as to provide adequate compensation for the use of works that copyright is supposed to protect and that exceptions, when they are absolutely necessary to ensure the availability of works, remain specific, as the Berne Convention provides.

A nation cannot exist without culture. Artistic and literary creations make an essential contribution to the development of culture, while at the same time playing a major economic role. It is crucial that the true value of this contribution be recognized by a copyright system that gives creation and creators their rightful due.