Bill C-32: The Copyright Modernizing Act

Presentation to the Legislative Committee on C-32

by the Canadian Conference of the Arts

February 1, 2011

Mr. President, Members of the committee,

My name is Alain Pineau and I am the National Director of the Canadian Conference of the Arts. The CCA is the oldest and largest coalition of the arts, culture and heritage sector in Canada. We cover all disciplines and all regions of the country. Through our organizational and individual members, we represent the overall interests of self employed artists and creators, unionized personnel, employers, private and public cultural institutions and volunteers, in all well over 400 thousand persons who are an important component of the Canadian creative economy.

When it comes to copyright, we have members who are rights holders and members who are rights users, so we are quite sensitive to the position you may find yourselves as law makers when it comes to this prickly pear.

It is from this broad and unique perspective that I come here to comment on Bill C-32. I will concentrate on the big picture and let our member organizations propose specific amendments to ensure the Copyright Act really works for the benefit of the Canadian creative economy, of Canadian consumers and, obviously, of our artists and creators who should be at the centre of our preoccupations.

Copyright is a key piece of any national digital strategy and should be one of the cornerstones on which Canada defines its place in the global knowledge economy. Failure to amend the legislation and salvage C-32's more positive provisions could severely compromise Canada's cultural and economic performance.

Canada's $46-billion Arts and Culture Industries employ more than 600,000 Canadians and, as Canadian Heritage Minister James Moore has acknowledged on several occasions, contribute twice as much to GDP as the forestry industry. These knowledge economy jobs can thrive only in an environment where intellectual property is respected and safeguarded.

Let me start with the positive. First, we all agree that it is high time that Canada update its Copyright Act and we thank the government for attempting once again to bring forward this important piece of legislation up to date and in line with our international obligations. We share the urgency …but not at any cost!

Second, it is clear that C-32 satisfies a number of people, particularly in the corporate world and in the entertainment software, recording and cinematographic industries. Our members rejoice that those components of the cultural sector are satisfied with the Bill. So I am not here to dispute the lists of happy campers which Mr. Del Mastro has quoted often both in the House and here, but I will point to the still longer list of people for whom C-32, as it now stands, is hurtful.

Third, C-32 contains elements which are viewed as positive by artists, creators and cultural workers in general. I refer here to the distribution right, the reproduction and moral rights for performers, the length of protection of sound recordings and the rights to photographers.

Let me now move to the negative aspects of C-32. The Bill's main flaw is that it fails to recognize the existence of at least <u>two</u> very different kinds of markets. The Bill proposes a "one-size fits all" approach which clearly satisfies the big players and international company interests but which is far less important to the majority of Canadian musicians, writers, actors, visual artists and other cultural creators. Moreover, the slew of often ill-defined new exceptions will

result in significant revenue flows being unfairly expropriated and new, fledgling markets disappearing before they can develop. From the perspective of those rights owners, the net effect is therefore a step back, rather than a step forward.

The proponents of the Bill argue that it gives artists and creators the tools necessary to protect and monetize their work and develop new markets: they simply have to put digital locks on their works and resort to the justice system to have their rights respected. Locks trump exceptions, which has Professor Geist up in arms and does not satisfy the education community either. But since locks are not an option for most artists and individual content creators, the Bill is rightly perceived by them as a *de facto* expropriation of their property rights without compensation

The lock/litigation approach is disconnected from the realities of life of most Canadian artists and creators. First, our artists do not want to lock their work away, they want them to be as accessible to Canadians and to the world as possible, but they want to be compensated for their labour and the uses made of their intellectual property. Second, in the case of music, locks have proved to be inefficient and have been abandoned by most large recording companies.

More to the point, the world of most Canadian artists is not that of Ubisoft or of CRIA. 42% of Canadian artists are self-employed. They do not have the resources to monitor internet and wireless users to see if they are infringing their property rights. Because they are busy creating their art and developing new business models that seize upon the opportunities of direct access to their audiences, they don't have the time or financial resources to launch complicated court cases against those who illegally copy their work, whether for commercial or non-commercial use.

The unprecedented YouTube exception and the broad fair dealing purposes included in C-32 turn current copyright law on its head by signalling to users that they can infringe copyright as much as they want until someone sues them for damages. Even these are limited by the bill in such a way as to favour intentional infringement. To have their rights respected, the creator, publisher or producer must demonstrate that the market for their works has been significantly damaged, a notoriously difficult burden of proof.

The challenges they may face are perfectly illustrated by the case of Claude Robinson, who has been in litigation for the past fifteen years to defend rights which this Bill will jeopardize further if not amended. (*For those of you not familiar with Claude Robinson's case, I have added a summary at the end of this presentation*).

The precarious situation of self-employed artists was recognized by a previous Conservative government when it adopted the *Status of the Artist Act* in 1992. This Act created the possibility for individual artists and self-employed creators to be represented by collectives.

In order to facilitate access to their works and ensure proper compensation, over the past twenty years artists have established a number of organizations responsible for collecting and distributing royalties to artists as well as for defending their interests in front of regulatory bodies and tribunals. Collective societies provide consumers with easy access to copyright-protected content and rights holders with efficient management for many uses of their works – replacing numerous uneconomic, low-value transactions between creators and consumers for their mutual benefit.

One of the core problems with C-32 is that it sets the stage for the destruction of this collective system of rights management and offers an unworkable replacement. Worse still, the Bill takes away recognized rights and revenue – over $ 126 million a year and counting - in exchange for vague promises of a better future. We submit to you that more collective management, not broad new exceptions, is the practical approach to equitable access to copyright works for consumers.

This bill fails to provide a clear, predictable framework for the rights of creators and for the users of these rights. As the Quebec Bar Association has aptly pointed out, the long list of new, expanded and often ill-defined exceptions will create uncertainty in the marketplace. Assuming a few successful artists might have the means to take legal action without the help of their weakened collectives, the best case scenario will be years of litigation as copyright owners and users grapple with the meaning of this or that article of the law.

There are many other problems with this Bill, and in the short time I have, I will simply refer you to the attached list of required broad amendments. I thank you for your attention and will be happy to answer your questions.

List of the main areas to amend in Bill C-32

- Ensure that C-32 adequately recognizes and respects both exclusive rights of artists and creators and their right to equitable remuneration.

- Allow for more collective management for content creators to provide equitable access to copyright works for consumers and businesses.

- Remove all clauses which undermine recognized rights and take away current sources of revenue, including those that:

    - legalize, without compensation, certain types of reproductions, e.g. broadcast reproductions, private copying onto digital audio recorders;
    - provide for educational uses of copyright protected materials without compensation to creators and copyright owners; and
    - allow the exploitation of works in other ways without permission or compensation to the creator, e.g. user-generated content (i.e. the YouTube or "mash up" exception).

- Remove education from the fair dealings and provide educational establishments with targeted exceptions adequately crafted to ensure that both users and rights holders won't be obliged to go through years of costly judicial proceedings

- Make all remaining exceptions subject to the three-step process established in the Berne Convention (the "three-step test" states that to qualify as an exception, the reproduction of works must be **limited to certain special cases, not conflict with a normal exploitation of the work and not unreasonably prejudice the legitimate interests of the author).**

- Restrict the "private purpose" exception to enabling individuals to make private copies exclusively for their own private use, subject to equitable remuneration for rights holders of all categories of works.

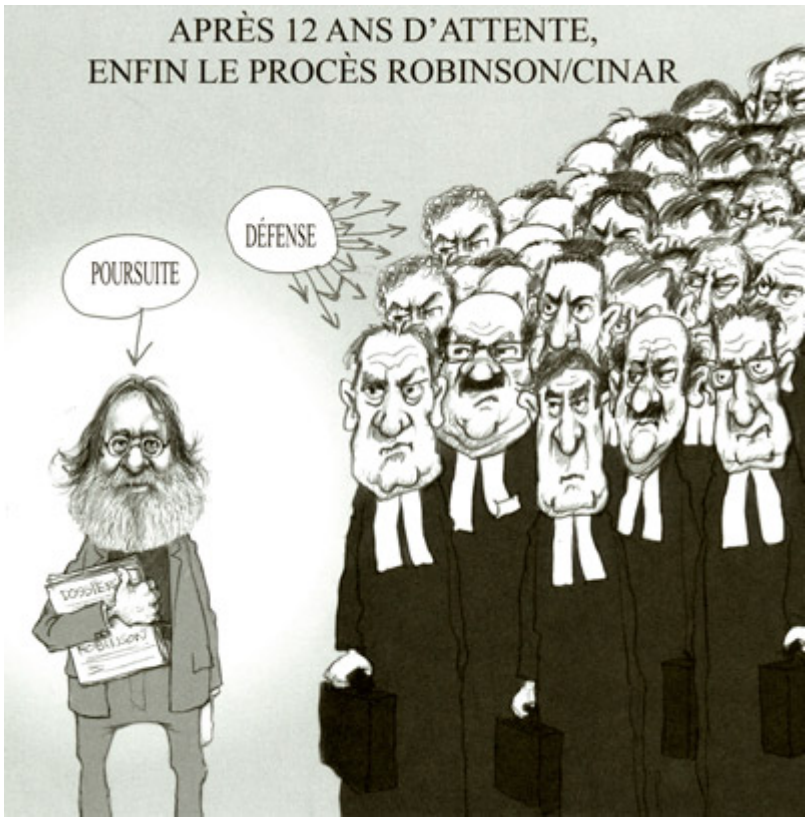
- Ensure that the Act is technologically neutral by putting in place a regime of fair compensation for right holders, whatever the support used to make copies of their work.

- Provide ISPs with the impetus to be partners in the fight against piracy, instead of enablers or, worse, perpetrators. Failure to do so will ensure that Canada remains a safe haven for intellectual property pirates, to the detriment of its knowledge economy.

- Insert in the Bill an Artist's Resale Right to ensure that visual artists share in the profits made in the resale of their works and to align Canada with our trade partners.

Claude Robinson: A case study in the difficulty of defending intellectual property

(This information is adapted from the following website: http://en.clauderobinson.org/)



Claude Robinson has been fighting alone since 1995…
Caricature: Serge Chapleau, *La Presse*, September 2, 2008

History

On September 8, 1995, Claude Robison recognizes Robinson Curiosité, the character he created (renamed Robinson Sucroë by the plagiarists), airing on Canal Famille. In fact, he recognizes himself since he had crafted the character after himself. His whole world turns upside down.

During his testimony at the Superior Court, he declared “I was K.O.; I could not speak to people anymore. At the restaurant, I started crying uncontrollably. These people knew me personally. They knew I had invested myself in this project. There was a deep reflection and a personal engagement on my side. The depth of my adversaries’ cruelty is what scares me.”

The Facts:

1982

Claude Robinson creates Robinson Curiosité, the main character for a children's cartoon series, based on his own face. He develops the concept, creates other characters, and writes summaries, scenarios and a bible where each character is pictured.

1983 to 1985

Claude Robinson presents *Les Aventures de Robinson Curiosité* to various producers and broadcasters in Quebec, as well as Téléfilm Canada. In 1985, he associates with Pathonic in order to produce the animated series.

1986

Claude Robinson and Pathonic hire Cinar in a consulting role to promote and sell the series to the United-States market. In the contract signed by Ronald A. Weinberg, Cinar agrees to take cognizance of the whole project (characters, synopsis, scenarios and other components). Claude Robinson goes to New York and Los Angeles with Cinar and Pathonic representatives to meet various producers and broadcasters. Despite the interest manifested by American broadcasters, these meetings do not yield any results.

1987

Claude Robinson teams up with a new partner, SDA, and now also aims for the European market. In April, he presents his project at the MIP-TV, in Cannes, among others, to Christophe Izard, who was with Calypa at the time, and to Peter Hille, president of Ravensburger. There, he meets with Micheline Charest and Ronald A. Weinberg. Thérésa Plummer-Andrews from the BBC requests a demo tape of Robinson Curiosité.

1988 to 1994

In 1988, Claude Robinson founded a new business in order to independently produce his project.

1995

Some steps taken with Philips to produce interactive CD-is yield results. However, on September 4, Claude Robinson sees the first episode of *Robinson Sucroé* airing on Canal Famille. He is shocked. In early October, he sends Cinar a demand, who claims it does not have any traces from any Claude Robinson or his work in its archives. In early November, he files a formal complaint (RCMP) for copyright counterfeiting and sends a second demand, in vain.

1996

In July 1996, Claude Robinson files a civil action against the producers of *Robinson Sucroé*. Through countless time-consuming procedures and numerous attorney changes, Cinar and its accomplices managed to delay the trial for over 12 years.

The Procedures:

Autumn 1996

After four precision requests regarding his declaration, the respondents deny Claude Robinson the right to sue foreign firms in Quebec and file an interlocutory proceeding in order for his legal action against the BBC and Ravensburger to be declared illegal, and to have all fees and damages imputed to him.

February 1997

The trial judge grants Claude Robinson the right to sue foreign firms in Quebec and adds that for the objection to the jurisdiction: “Without going into all the details of proof they’ve offered, the claimants have established that the defendants have plagiarized and infringed the claimant’s copyright regarding his work entitled *Robinson Curiosité*”. This ruling will be appealed.

Spring 1997

The criminal complaint for counterfeiting continues, and searches are performed at Téléfilm Canada and Cinar. The RCMP completes its investigation and requests for court action are filed with the Crown, who decides not to lay charges.

October 1997

In the civil courts, the Court of Appeal unanimously confirms the first instance verdict, thus granting Claude Robinson the right to sue foreign companies and their directors here in Quebec. This ruling is jurisprudential, as it shows the accurate application of a clause of the new civil code.

October 1998

The defendants initiate a new procedure to force Claude to choose between damages or profits, under the pretext that he is not entitled to both. Claude Robinson states he’s entitled to both and that he should own the counterfeit work. The Court rules in his favour. This judgement is not appealed and is jurisprudential in similar cases.

Autumn 1999 and Winter 2000

The scandal regarding the nominees breaks out due to Claude Robinson’s investigative work. At the federal and provincial levels, public funds management policies are reviewed. The RCMP is mandated to investigate some fiscal irregularities, and Robinson’s complaint for counterfeiting is reactivated.

January 2000

At Claude Robinson's request, the Chief Justice of the Superior Court assigns a judge to the case—Judge Pierre Tessier.

September 2000

With the Court's permission, Claude Robinson registers the McRaw society, property of Micheline Charest and Ronald A. Weinberg, as well as Hélène Charest, as respondents to the claim.

February 2001

Through another request, Micheline Charest and Ronald A. Weinberg's attorneys file a formal demand for all documents and information obtained during interrogations to be confidential in order to prevent Claude Robinson to use them for investigation purposes. The court of first instance rules in their favour.

Mai 2001

Claude Robinson appeals this decision, invoking he would then be prevented from investigating and would hamper his right to a fair trial. The Court of Appeal partially reverses this judgment at first instance by ruling that Claude Robinson is allowed to investigate and get knowledge regarding his case, while confirming the confidentiality of the documents and information thus obtained.

January 2002

On January 22, the Crown announces it does not intend to file a criminal charge against Cinar for tax evasion, but the criminal investigation regarding the counterfeiting complaint continues.

February 2002

Cinar and the other respondents initiate new procedures to change attorneys.

March 2002

The Commission des valeurs mobilières du Québec fines the Charest/Weinberg couple $1,000,000 each, and forbids them from directing or managing any publically-traded business in Canada for 5 years.

December 2003

As the RCMP is about to interrogate the key witnesses suspected of plagiarism, Justice Canada calls the investigation off under the pretext that it is not of "public interest" (despite the fact that it had been requested by a minister). In 2001, in a preliminary report, RCMP investigators wrote: "It seems increasingly obvious that *Robinson Curiosité* was plagiarized." The investigation will never be completed, raising some questions regarding a possible cover-up.

2005

The dilatory procedures and attorney changes on the defendant side continue to delay the process.

September 2, 2008

Following a long judicial battle, the Robinson-Cinar trial begins at the Superior Court of Québec.

December 1, 2008

After three months of hearings in Montreal, the trial moves to Paris to hear about fifteen European witnesses.

August 26, 2009

Judge Claude Auclair, from the Superior Court of Québec, concludes that Claude Robinson's work was plagiarized, and condemns the defendants to pay him 5.2 million dollars.

September 22, 2009

France Animation, Christophe Izard—the plagiarist and executive producer of Robinson Sucroë—and Ravensburger Film appeal the case based on erroneous legal grounds. They consider that Judge Auclair "decided wrongly by founding his decision on Dr. Claude Perraton's expert report."

September 25, 2009

Cinar, Ronald Weinberg and Christian Davin, CEO of France Animation, appeal the case for the same reasons. They also dispute the amount of $400,000 awarded for moral damages to Claude