14 October 2010 *(This translation was prepared by the Canadian Conference of the Arts)*

The Honourable Tony Clement
Minister of Industry
Government of Canada
C. D. Howe Building
235 Queen Street
Ottawa, Ontario K1A 0H5

The Honourable James Moore
Minister of Canadian Heritage and Official Languages
Ottawa, Ontario K1A 0A6

RE: Bill C-32, "An Act to amend the *Copyright Act*"

Dear Sirs:

The Barreau du Québec has studied Bill C-32, which you presented for first reading in the House of Commons on 2 June 2010. The Barreau wishes to share with you its strong concerns and misgivings regarding this bill.

According to the Legislative Summary of the bill, the *Copyright Act*[1] is amended to:

> (a) update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards;
> (b) clarify Internet service providers' liability and make the enabling of online copyright infringement itself an infringement of copyright;
> (c) permit businesses, educators and libraries to make greater use of copyright material in digital form;
> (d) allow educators and students to make greater use of copyright material;
> (e) permit certain uses of copyright material by consumers;
> (f) give photographers the same rights as other creators;
> (g) ensure that it remains technologically neutral; and
> (h) mandate its review by Parliament every five years.

Adoption of a bill has become necessary in order to meet the international commitments that Canada made when it signed the World Intellectual Property Organization (WIPO) treaties, adopted in Geneva in 1996, and the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights. There were unsuccessful attempts to amend the act in 2005 and 2008. Moreover, the constant evolution in reproduction and communications techniques obliges the legislature to formulate a technologically neutral statute whose principles may continue to be applied even though technical advances are being made available to the

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[1] L.R., 1985, ch. C-42.

consuming public at an accelerated rate. We are in the era of the knowledge economy, and legislation on copyright, which constitutes an essential tool in the organization of markets for intellectual products, is part of the dynamics of innovation and connectedness.

Some of the stated objectives in the summary are not satisfactorily achieved in the bill. This is the case, for example, for the objective of compliance with international standards. In particular, the introduction of new exceptions to the rights of reproduction and communication to the public, in cases in which rights holders have already instituted mechanisms ensuring them remuneration for such reproductions and communications, seems to be completely contrary to the “three-step” test in the Berne Convention and in the two 1996 WIPO treaties.

The *Copyright Act* is a framework law intended to encourage creativity and innovation and to serve the public interest through clear, predictable, effective, and fair rules. The Barreau questions the scope and effectiveness of a number of provisions in the bill. Among others, section 4 poses a problem of coherence in the use of the international principle of exhaustion of rights, which differs depending on whether it is copyright or industrial property that is concerned. Section 10 of the bill, dealing with moral rights, poses the question of coherence and cohabitation with regard to the right of publicity set out in the *Québec Civil Code;* the nature of this section may also cause difficulties in other Canadian provinces. Furthermore, the bill does not achieve the objective of clarifying the responsibility of Internet service providers. The Barreau also questions the concrete scope and effectiveness of the proposed new paragraph 27(2.3) in section 18 of the bill, which covers infringement by service providers. What is the burden of proof necessary to establish service providers’ responsibility? Does the new clause 41.25 proposed in section 47 of the bill have practical application? In general, clarifications must be made regarding the various types of suppliers of services in the digital universe.

In a number of ways, the bill introduces legal uncertainty that is likely to encourage litigiousness between creators, suppliers, and users/consumers. The new conditions for the existence of copyright are numerous and complex (see, in particular, paragraphs 9(1) (2) (3), 11(1) (2) (3) (4), and section 15). These provisions are those that “tailor” protection for foreigners. It is clear that the legislature has attempted to meet only the minimum requirements of Canada’s many treaty commitments. Despite grand statements of principle, Canada has always been quite protectionist with regard to copyright and has extended the protection of its statute to foreigners only parsimoniously. Here, it is clear that all of the provisions regarding extension of this protection are very complex and might lead to lawsuits.

Furthermore, the new exceptions to copyright are based on conditions many of which are unrealistic or unverifiable (see sections 18 and 22 and, in particular, the provisions that add the new articles 29.21, 29.22, and 29.23 to the act). These same exceptions are wiped out simply by the presence of technical protection measures. In addition, the definition of technical protection measures in the bill goes beyond international requirements for restraining access to work by the public.

The addition to section 29 of the word “education” as one of the permitted purposes for fair dealing of a work gives an extremely broad and imprecise scope to this provision, especially with regard to the numerous new exceptions specific to educational institutions. In fact, given all of the exceptions proposed for education, it is difficult to see what would remain covered by the

field of "fair dealing." The Supreme Court decision in the CCH case in 2004[2] had already established guidelines for fair dealing, and the addition of the word "education" in section 29 would probably give this term unlimited scope. It should be anticipated that the wording of the bill will give rise to numerous lawsuits.

In 2000, UNESCO published a guide to collective copyright management.[3] This guide recognized the importance of collective copyright management in modern societies:

> The collective administration of authors' rights is generally intended to facilitate the effective execution of these rights by the authors themselves and to favour the lawful exploitation of works and cultural productions. It is seen in modern society as one of the most appropriate means of assuring respect for exploited works and a fair remuneration for creative effort of cultural wealth, while permitting rapid access by the public to a constantly enriched living culture.
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> The industrialized countries have used it widely, particularly in the field of music, and the developing countries, and those in transition to a market economy, are attaching more and more importance to its establishment and promotion.[4]

Bill C-32 advocates, instead, an approach of individual litigation – an approach that is often impractical and unrealistic in the context of mass communications.

Collective management means management that benefits a group of creators. It is not a tax, but a salary for creators. Collective management is the only way to guarantee respect for the legitimate interests of creators faced with a multitude of users. It is also the most effective means for facilitating public dissemination of works for access by users. The Barreau is very much in favour of this non-litigious contractual approach to remunerating creators, an approach that encourages public access to culture and creative works. This modern, socially responsible approach is directly in line with the values of access, fairness, and balanced resolution of disputes between creators and users. A functional approach, it is the dominant model on the international level.

Developments in the sector of mass consumption of creative products have led to the gradual abandonment of individual control of copyright, in favour of guarantees of remuneration for rights holders through collective copyright management. For many, the mass communication of creative products is conditional on guarantees of income sources provided by collective copyright management. Without income guarantees, there is no long-term investment in talent, and this impedes, or even prevents, the professionalization of content creators.

In many of the cases in which the current statute sets out exceptions to copyright, these exceptions do not apply if distribution is planned under licence for collective copyright management granted to a collective society. In the bill, this equilibrium is compromised. The *Copyright Act* should be a tool for structuring the communication of creative products while maintaining respect for the balance between the rights and interests of users and creators.

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[2] CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339.
[3], Paula Schepens, *Guide to the Collective Administration of Authors' Rights,* United Nations Educational, Scientific and Cultural Organization, 2000.
[4] Ibid., p. 9.

Bill C-32 advocates an approach that does not allow Canada to play a leadership role in this sphere of the law. It consists of piecemeal amendments, without vision or overall coherence, that make poor use of parts of foreign models that are known to be obsolete. The global reflection started in the 1980s must be continued. The original Canadian model of collective copyright management and the Copyright Board of Canada, which falls under Industry Canada, has proven its worth and is a guiding light for a number of foreign jurisdictions. We must build on these assets, which contribute to the construction of the Canadian identity. The bill should propose governance of collective copyright management to confirm Canada as a leader in this sphere.

Bill C-32 thus contains a number of important lacunae: it is a source of legal insecurity and is ineffective with regard to the objective of copyright protection; it encourages litigiousness and the devaluing of the process of collective copyright management; it is questionable on the level of respect for Canada's international commitments, notably the Berne Convention; and it constitutes a group of piecemeal amendments with no overall vision. For these reasons, the Barreau is opposed to adoption of the bill and offers its assistance with the creation of an expert committee with the mandate of reviewing the legislation in order to enable Canada to affirm its leadership in this crucial sphere of the knowledge economy of the twenty-first century.

We hope that our comments and observations will be useful.

Sincerely,

Gilles Ouimet
President of the Barreau du Québec

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