Bill C-32 Weakens Canada's Global Competitiveness

New Exceptions to Copyright Would Undermine Canada's Digital Economy

February 2011

NINE WARNINGS ON C-32...

See inside

This statement is endorsed by the following groups:

Access Copyright, The Canadian Copyright Licensing Agency
Alberta Craft Council
Alliance of Canadian Cinema, Television and Radio Artists (ACTRA)
Arts and Cultural industries Association of Manitoba
Association acadienne des artistes professionnel.le.s du Nouveau-Brunswick (AAAPNB)
Association des journalistes indépendants du Québec (AJIQ)
Association des professionnels de l'édition musicale (APEM)
Association des professionnels des arts de la scène du Québec (APASQ)
Association des réalisateurs et réalisatrices du Québec (ARRQ)
Association nationale des éditeurs de livres (ANEL)
Association of Book Publishers of British Columbia
Association of Canadian Publishers (ACP)
Association of Canadian University Presses (ACUP)
Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ)
Association québécoise des auteurs dramatiques (AQAD)
Atlantic Publishers Marketing Association (APMA)
Book Publishers Association of Alberta (BPAA)
Canadian Actors' Equity Association (CAEA)
Canadian Artists Representation Copyright Collective Inc. (CARCC)
Canadian Artists' Representation (CARFAC)
Canadian Arts Presenters Association (CAPACOA)
Canadian Authors Association (CAA)
Canadian Conference of the Arts (CCA)
Canadian Copyright Institute (CCI)
Canadian Crafts Federation
Canadian Educational Resources Council (CERC)
Canadian Federation of Musicians (CFM)
Canadian Freelance Union, CEP 2040 (CFU)
Canadian Independent Music Association
Canadian League of Composers (CLC)
Canadian Media Guild (CMG)
Canadian Music Centre (CMC)
Canadian Music Publishers Association (CMPA)
Canadian Musical Reproduction Rights Agency Ltd (CMRRA)
Canadian Publishers' Council (CPC)
Canadian Society of Children's Authors, Illustrators and Performers (CANSCAIP)
Centre de musique canadienne – région du Québec
Civil Society of Multimedia Authors (SCAM)
CMRRA-SODRAC Inc. (CSI)
Communications, Energy and Paperworkers Union of Canada (CEP/SCEP)
Conseil québécois de la musique
Conseil québécois du théâtre
Craft Council of British Columbia
Creators Copyright Coalition (CCC)
Culture Montréal
DAMI© - Droit d'auteur / Multimédia-Internet / Copyright
Directors Guild of Canada (DGC)
Edmonton Musicians' Association
Educational Rights Collective of Canada (ERCC)
Exchange for the Performing Arts (CINARS)
Fédération culturelle canadienne-française
Front des réalisateurs indépendants du Canada (FRIC)
Guilde des musiciens et musiciennes du Québec (GMMQ)
Independent Media Arts Alliance
League of Canadian Poets
Literary Press Group of Canada (LPG)
Literary Translators' Association of Canada
Ontario Craft Council
Organization of Book Publishers of Ontario (OBPO)
Playwrights Guild of Canada
Professional Writers Association of Canada (PWAC)
Regroupement des artistes en arts visuels du Québec
Regroupement des arts interdisciplinaires du Québec
Regroupement des centres d'artistes autogérés du Québec (RCAAQ)
Regroupement québécois de la danse
Royal Canadian Academy of Arts
Saskatchewan Arts Alliance
Saskatchewan Publishers Group
Saskatchewan Writers Guild (SWG)
Screen Composers Guild of Canada (SCGC)
Société de développement des périodiques culturels québécois (SODEP)
Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec (SOPROQ)
Société de gestion de l'Union des Artistes (ARTISTI)
Société des auteurs de radio, télévision et cinéma (SARTEC)
Société des auteurs et compositeurs dramatiques (SACD)
Société professionelle des auteurs et des compositeurs du Québec (SPACQ)
Société québécoise de gestion collective des droits de reproduction (Copibec)
Société québécoise des auteurs dramatiques (SOQAD)
Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC)
Society of Composers, Authors and Music Publishers of Canada (SOCAN)
Songwriters Association of Canada (SAC)
The Writers' Union of Canada (TWUC)
Union des artistes (UDA)
Union des écrivaines et écrivains québécois (UNEQ)
Vancouver Alliance for Arts and Culture
Writers' Federation of Nova Scotia
Writers Guild of Alberta
Writers Guild of Canada

The present platform reflects the common positions of the signatories. Each association, however, remains free to make clarifications, add supplementary information, and complement the analysis of the issues in its respective field of activity.

Find out more at: www.c32jointstatement.ca

Bill C-32 Weakens Canada's Global Competitiveness

New Exceptions to Copyright Undermine Canada's Digital Economy

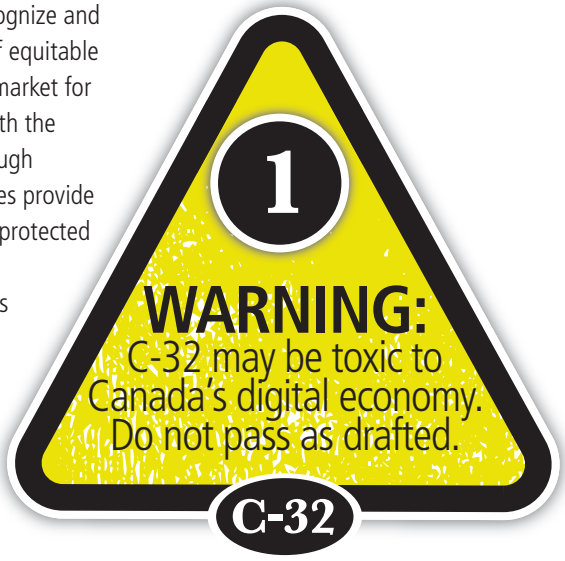
Canada's Arts and Culture Industries, represented by the signatories of this statement, are very concerned by provisions of the Copyright Modernization Act (C-32) because they overturn core principles of copyright law that historically have ensured a healthy environment for creators, producers, distributors and consumers of Canadian cultural content.

C-32 introduces a long list of new exceptions, including the expansion of the "fair dealing" purposes to cover education, which would, if enacted, cause serious damage to markets for Canada's cultural sector and significantly reduce current and future revenues on which creators depend for their incomes and survival. With regards to the interests of the artists and creators represented by the signatories of this document, these proposed changes reflect an unfortunate lack of understanding of the structure of creative industries in today's rapidly evolving digital economy. Failure to amend the legislation and salvage C-32's more positive provisions could severely compromise Canada's cultural and economic performance and undermine creative expression of its culture for decades to come.

Canada's $46-billion Arts and Culture Industries employ more than 600,000 Canadians and, as Canadian Heritage Minister James Moore has acknowledged, 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. Weakening core principles of copyright weakens Canada's competitiveness in the global digital economy and undermines the economic future of creators of Canadian content who are at the heart of it all.

Canada's Arts and Culture Industries support the Government of Canada's digital economy policy objectives. We agree with the position, as stated in the government's digital strategy consultation paper, that, "with the right framework, digital media entrepreneurs have the ability to create Canada's digital content advantage with vision and boldness (...) and drive more innovation in the years ahead."

We also acknowledge the Government of Canada's commitment to ensure that "Copyright reform, in addition to legislative change, must include engaging with creators." However, Parliamentarians need to understand that, for Canadian creators and creative industries to remain vibrant contributors to a successful digital economy, legislative change to copyright must adequately recognize and respect both exclusive rights and rights of equitable remuneration – rights that underpin the market for creative products and provide creators with the ability to obtain remuneration, often through collective management. 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. More collective management, not broad new exceptions, is the practical approach to equitable access to copyright works for consumers.



While the Copyright Modernization Act (C-32) does include some protections for creators of Canadian content, its "one size fits all" approach to rights management - namely relying exclusively on digital locks and litigation - leaves many with no protection at all. Unintended consequences of new exceptions to copyright law will result in significant revenue flows being unfairly expropriated and new, fledgling markets disappearing before they can develop. From the perspective of a number of rights owners, the net effect is therefore a step back, rather than a step forward.

Failure to provide a clear, predictable framework of rights will undermine investments in creative products and significantly reduce fair compensation

for Canadian content owners, which will lead to a decline in innovation and in the production and dissemination of home-grown content. This will have many negative consequences, including the decline of Canadian cultural and business voices, along with the associated loss of jobs – income earned and taxes paid! By relying on individual legal recourse and litigation instead of a collective management approach, C-32 puts at risk Canada's collective licensing system which remains, particularly in a digital environment, the most effective means for facilitating the dissemination and access to copyright protected works. Canada's hopes for a vibrant digital economy are at risk when protection for intellectual property - the raw material of the knowledge economy - is effectively undercut.

Canada's $46-billion Arts and Culture Industries, and the 600,000 jobs they support, can only thrive in an environment where intellectual property, the heart of the digital economy, is protected.

Background

Copyright exists to protect creators and copyright owners from unauthorized and uncompensated copying, use and re-use of their works by others. It is a core principle of copyright law, "on the books" since the 18th century, that holders of copyright, be they writers of literary and dramatic works, songwriters, composers, artists, performers, publishers or producers, can define the business terms on which their works will be used and re-used by others, and maintain their right to authorize their uses and to receive compensation for such uses.

Re-use - in other words, the secondary market for copyright-protected works - is a rapidly evolving revenue stream for rights holders. Multiple secondary uses of content generate income through licenses offered by collective copyright societies or copyright owners. For example, written works generate income through re-use when a university buys a collective license so that teachers and students may use reproductions of the works of Canadian writers in course study materials, or when a school board buys a textbook developed by Canadian writers, illustrators and publishers and, instead of purchasing new originals, opts to copy excerpts including entire chapters. Musical works generate income through re-use when radio and television stations are licensed to reproduce and broadcast recorded performances of musical works to the public, or when restaurants, hotels and similar venues are licensed to play music in public spaces.

Markets for copyright-protected works are seriously compromised by C-32 as currently drafted by virtue of a long list of broadly worded exceptions for use without compensation, and weak remedies for infringement.

Failure to amend C-32 to ensure fair compensation for Canadian content owners can only lead to a decline in the production of Canadian content and its dissemination domestically and abroad.

The User-Generated Content Exception

The so-called YouTube exception for user-generated content is intended to let individuals post family videos using pop songs as a backdrop. This may seem totally reasonable at first blush! But anybody would also be permitted to post almost any new work that is a derivative of an original work including translations, adaptations, synchronizations, and new works in a series. The result would be almost a total loss of control by authors and performers of their works and would deprive them of the ability to be remunerated for this widespread exploitation of their copyrights by others such as YouTube.

Today, by law, user-generated content sites like YouTube must negotiate agreements with individual copyright owners or collectives representing songwriters, composers, performers, writers, artists and other copyright owners so that consumers can do this. Under C-32, Canada would become the first country in the world where businesses like YouTube can leverage copyright-protected works to gain revenue without any obligation to obtain consent or to compensate the creators of this content.

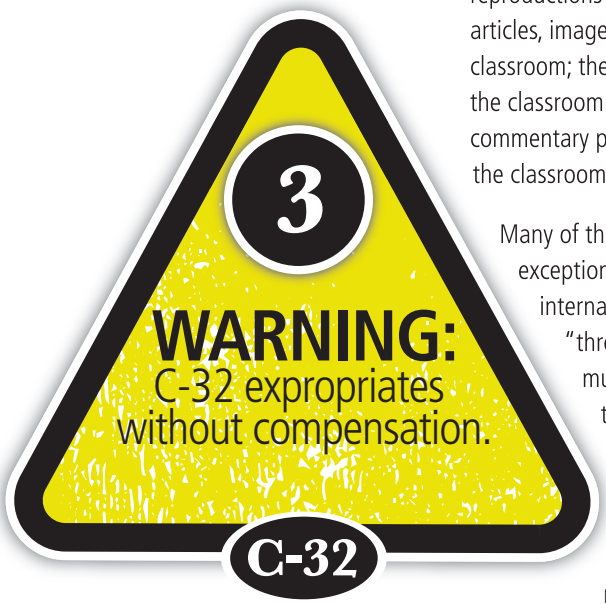
There is no requirement that user-generated content be fair to the creator whose work is used in the creation of a new work. Although the exception requires that no individual use may cause substantial damage to the market for an existing work, it ignores the cumulative effect of many new user-generated works on the existing work. A multiplicity of user-generated content uses of a work could destroy the market for that existing work. Distributors who then profit from facilitating this activity will be relieved of any obligation to compensate creators for the use of their works. This is not fair.

To make matters worse, the exception as drafted is not even limited to the online dissemination of digital content. It might just as easily be interpreted to permit the creation and distribution of course packs, compilation CDs and other physical products for non-commercial purposes, disrupting existing markets for those materials.

Instead of allowing copyright owners to develop innovative business models for the use of content by consumers, C-32 as it now stands would simply expropriate the right of copyright owners to control these uses or earn compensation from them.

Bill C-32 does not place enough safegaurds on the ability of individuals to post "user-generated content" that includes copyright material and would allow websites to distribute such material with impunity when it can be easily and effectively licensed collectively.

The Education Exceptions



Similarly, the education exceptions and the expansion of fair dealing to include education are effectively an unfair expropriation of revenues payable to creators for primary and secondary uses of their works. Educational institutions are expected to pay fair market value for material inputs needed to deliver education, such as furniture and equipment. They currently must also negotiate licenses, including collective licenses, to compensate rights holders for the following: reproductions of parts of original books, magazine articles, images and other materials used in the classroom; the reproduction and performance in the classroom of news programs and news commentary programs; and the performance in the classroom of cinematographic works.

Many of the new and expanded education exceptions will likely violate Canada's international obligations known as the "three-step-test" (where all three steps must be met) and may ultimately form the basis of a trade challenge under the World Trade Organization regime (WTO). The so-called "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. The expansion of fair dealing to include "education" may violate the first step since it is not limited to specific institutions or any structured education context. This does not make the exception "a certain special case," as required by this first step. Fair dealing for the purpose of education, as well as other education exceptions that eliminate payments currently received by creators and publishers under collective licences, may also conflict with the normal exploitation of creators' copyrights and unreasonably prejudice their legitimate interests thereby violating the remaining two steps.

In exempting some of these uses, C-32 arbitrarily wipes out the associated revenue, seriously compromising primary and secondary markets for educational materials. These exceptions, which unfairly discriminate against the content creators who are at the heart of Canada's cultural industries, will drastically reduce unit sales of Canadian educational books and audio-visual works and, in addition, may divert as much as $60 million annually from creators, publishers and distributors of content used in education.

The distributive effects throughout the economy will be even greater. While this amount represents less than one per cent of total educational spending (and therefore cannot seriously be justified as a cost-saving measure), it is a very significant portion of the revenue stream available to those who produce the learning resources used in Canadian schools.

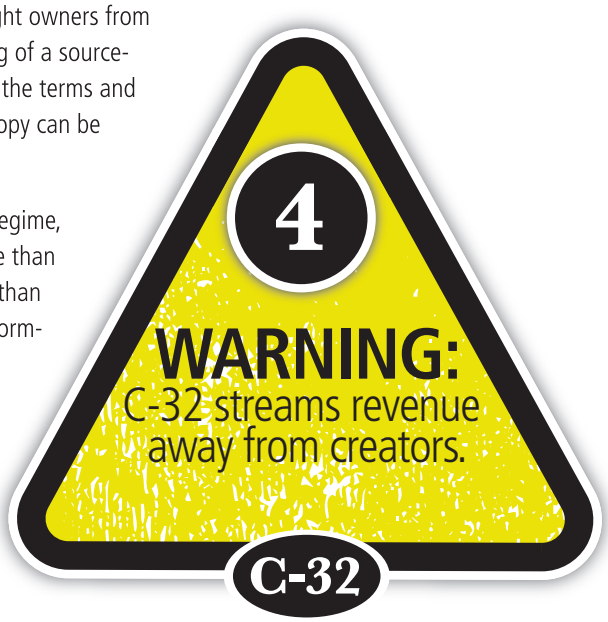
The long list of new and expanded exceptions will create uncertainty in the marketplace. This will lead to years of litigation as copyright owners and users grapple with the market impact of the new, often broad, exceptions.

Private Purposes

Bill C-32 streams revenues away from creators by legalizing undefined uses that it describes generally as "private purposes", which would include format shifting, and legalizing the making of back-up copies. It does not provide compensatory regimes – like that provided for under the private copying regime. These exceptions are so broadly drafted that they could permit unauthorized side loading and sharing of content files over networks. These new exceptions may significantly reduce the size of the market. The market for e-books and digital copies of television shows and movies could be jeopardized notwithstanding the unprecedented growth in e-readers and tablets. They will also undermine existing revenue streams from private copying and the broadcast mechanical tariffs, and compromise the development of new licensing regimes and business models that provide fair compensation for these additional uses.

The current draft of Bill C-32 significantly expands the concept of private copying without building on existing royalty systems that ensure that compensation for use flows to creators and producers and without regard for the plight of the cultural industries affected by the convergence of technologies. The exceptions should be limited to enabling individuals to make private copies exclusively for their own private use. If Bill C-32 were to extend the private copying regime to cover copies of any kind of content made by individuals for their own private use irrespective of the technology used, such an extension should not prevent copyright owners from authorizing or prohibiting the making of a source-copy, and therefore from prescribing the terms and conditions under which the source-copy can be made and used.

The existing private copying royalty regime, which applies to music, has put more than $200 million in the pockets of more than 97,000 songwriters, composers, performers and other rights holders since its inception. But revenue from that regime is drying up at an alarming rate due to a shift in how Canadians make their private copies. In 2008, the amount available for distribution was $27.6 million. In 2010 the amount will be about $10.8 million - a 60 percent drop in revenue over a three-year period. Despite claiming to be "technology neutral," C-32 does not recognize that many consumers have switched the media and devices they use to copy music. With fewer and fewer people buying blank CD-Rs, if the regime isn't extended to MP3 players and other digital devices it will soon become obsolete.

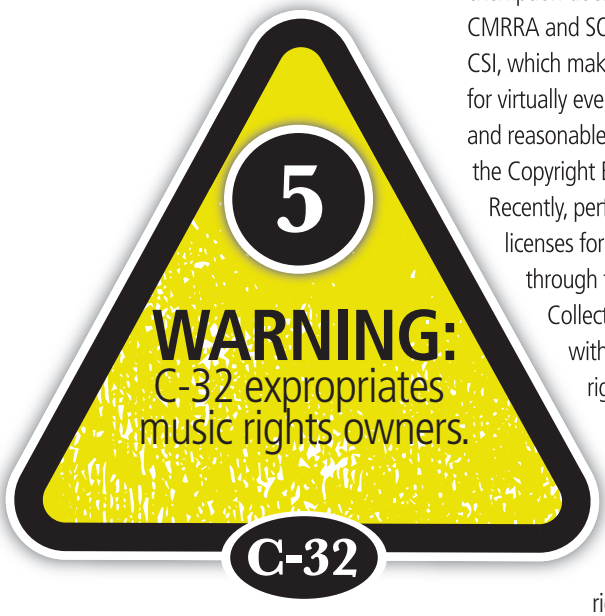


Myriad new exceptions — for education, broadcasting, private purposes, and user-generated content (the so-called YouTube exception, found nowhere else in the world) — as well as failure to extend the private copying regime, will reduce the revenues on which creators depend by legalizing uncompensated re-use of copyright-protected work.

Exemptions for Broadcasters

Today, pretty much all broadcasting operations are automated: stations are programmed and music is played using copies stored on file servers. Broadcasters continually use the reproduction right in songs and recordings, and clearly value the copies they make, since these copies are the foundation of automated broadcasting. Under the current Copyright Act, creators and rights owners have the exclusive right to make, or authorize the making of such copies.

In 1997, Parliament granted a 30-day exemption to broadcasters, but made it conditional: where the rights to copy songs and recordings are made available through a collective society, the 30-day exemption does not apply. Two collective societies, CMRRA and SODRAC created a single entity, namely CSI, which makes licenses available to radio stations for virtually every song they play, in advance, at a fair and reasonable royalty rate which is determined by the Copyright Board of Canada in a public hearing. Recently, performers and record labels have made licenses for recordings available on a similar basis through their collective licensing bodies. Collective licensing provides broadcasters with all the rights – in advance. These rights, which apply to commercial radio and television, the CBC, pay audio services and satellite radio, generate nearly $30 million per year for the songwriters and performers who create the music, as well as other rights holders.



Contrary to the broadcasters' fears during the debate around the creation of mechanical reproduction rights, their industry has only become more profitable in the ensuing decade. Radio broadcasting is one of the most profitable businesses in Canada today. Even in the context of a substantial financial recession, in 2009 commercial radio earned a pre-tax profit margin of 21.2%. Out of the $1.5 billion they earned in 2009, commercial radio stations paid only $21 million for reproduction rights, which is less than1.4% of their revenue. Value is paid for value received.

Bill C-32 would remove the "collective licensing" provision, simply granting broadcasters a 30-day exemption for making copies of music and recordings. Bill C-32 would simply give the broadcasters a free ride for the use of these rights, depriving music creators and rights owners of the fair compensation they now enjoy in return for the use of their exclusive rights by broadcasters.

These royalties form a vitally important part of the overall revenue for songwriters, performers and music rights owners. Bill C-32 would simply expropriate these rights for the sole benefit of the broadcasting industry. Leave the law as it stands today, without change.

A long standing source of revenue for copyright owners derived from a tangible benefit to broadcasters will be removed with the passage of Bill C-32.

Statutory Damages

Because it is often difficult for copyright owners to calculate and demonstrate damage caused by infringement, pre-established damages known as statutory damages ensure that copyright owners are compensated for proven infringements. Such measures work to deter would-be infringers. Statutory damages are part of a well-functioning copyright regime.

Copyright owners do not wish to seek disproportionate damage awards from individuals. The courts already have the discretion to reduce statutory damages awards when individuals infringe for non-commercial purposes. They should continue to have that discretion. The new limitations on statutory damages for infringement proposed in Bill C-32 – including their restriction to commercial infringements - essentially knock the teeth out of the existing Copyright Act. Taking the cost of litigation into account, the limitations remove any hope of meaningful remedies for infringement. Imposing arbitrary caps on the statutory damages that can be awarded risks turning this remedy into little more than a license fee for infringement. This is not the stuff of effective enforcement.

Instead of curbing copyright infringement, C-32 gives incentives to infringers to continue to infringe by capping statutory damages for any and all infringements, putting the onus on creators to prove damages while increasing uncompensated copying and by removing meaningful remedies.

Turning Copyright on its Head

Today it is necessary to request authorization for use of copyright-protected works. Exceptions have been, well, exceptions – not the rule. No more, if Bill C-32 passes without substantial changes.

What's worse is that litigation will no longer be an effective remedy, given the limitations on statutory damages. This may create a de facto license to infringe copyright. Here's why. The YouTube exception and broad fair dealing purposes turn current copyright law on its head by signaling to users that they can infringe copyright as much as they want until someone sues them for damages, which may be relatively limited. But to succeed in doing so, the creator, publisher or producer must demonstrate that the market for their works has been significantly damaged, a notoriously difficult burden of proof. During the time it takes to gather the evidence and prepare for litigation, the unauthorized activity will have continued to take place. By the time the court puts an end to the infringement – if ever – the market for the works may have been irreparably damaged.

C-32 tells users that they can infringe copyright as much as they want until someone sues them for relatively modest damages.

ISP liability

Under C-32, the "notice and notice" provision puts an intolerable onus on creators to police infringement while giving a free ride to infringers and allowing Internet Service Providers (ISPs), once they have notified an infringer, to have no further responsibility. Infringements can therefore continue. There is no notice and takedown right. ISPs are also insulated from liability even when they have actual knowledge that they are contributing to infringements and do nothing to stop it. Hosting providers have immunity from liability even when they knowingly are hosting infringing files.

Search engines have no liability to stop distributing or linking to infringing files. The new enablement provisions are inadequate to address online infringements and, in any event, are not the appropriate limitation on the scope of the new ISP exceptions. Additionally, the exemption from statutory damages for persons who enable copyright infringement deprive rights holders of meaningful remedies.

Other jurisdictions have found solutions that ensure that ISPs are partners in the fight against piracy. Failure to do so will ensure that Canada continues to be a safe haven for pirates.

C-32's "notice and notice" provisions do not go far enough to assist copyright owners in their efforts to reduce piracy and other infringement.

The Artist's Resale Right

Bill C-32 misses an important opportunity to establish the Artist's Resale Right which would allow visual artists to share in the profits being made from their work on later sales and align Canada with our trade partners. The Artist's Resale Right would give artists 5% from the resale of their work.This is important because the full value of an artwork often is not realized on the initial sale. It is common for visual art to appreciate in value over time, as the reputation of the artist grows. For example, acclaimed Canadian artist Tony Urquhart sold a painting, "The Earth Returns to Life", in 1958 for $250. It was later resold by Heffel Fine Art auction house in 2009 for approximately $10,000.

Canada's Aboriginal artists in particular are losing out on the tremendous profits being made on their work in the secondary market. Many artists living in isolated northern communities live in impoverished conditions, while their work dramatically increases in value.

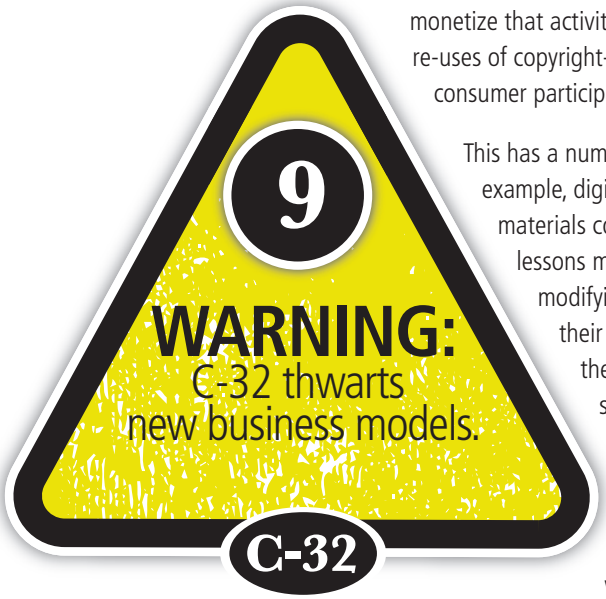
Once established in Canada, artists would be able to benefit from reciprocal arrangements with other countries where the Artist's Resale Right exists. Fifty-nine countries world-wide have legislated the Artist's Resale Right, including the United Kingdom, Ireland and Australia, and in the United States, the state of California. Canada's European partners specifically requested that Canada adopt the Artist's Resale Right during negotiations for the Comprehensive Economic and Trade Agreement.

The Artist's Resale Right would ensure that visual artists share in the profits made from their work and align Canada with our trade partners.

Conclusion:

Finally, we underline the significance of the damage to Canada's place in the new digital economy from the destruction of incentives to develop new business models to meet consumer needs in the digital era. Canada's $46-billion Arts and Culture Industries, and the 600,000 jobs they support, depend on Canada's continuing ability to provide an environment in which the rights of creators are protected by law.

In Canada, as around the world, consumer habits are evolving from passive to active consumption, through forms of participation in creative activity facilitated by digital technologies. Increasingly, the future vitality of Canada's Creative Industries will depend on our ability to create new and innovative business models to monetize that activity and leverage revenue from re-uses of copyright-protected works through consumer participation.



This has a number of different dimensions. For example, digital availability of educational materials could allow teachers to make lessons more vivid and relevant by modifying lesson content so as to insert their own examples, or selecting only the best passages or chapters for the students to study. This is surely a good thing. However, under C-32, teachers would be able to post these modified copies of copyright-protected work on websites, for others to use without penalty and without compensation for the original creators. By legislating an exception that allows such use, C-32 effectively destroys the incentive for educational publishers to create new business models better suited to new teaching methodologies.

The exception for user-generated content also effectively destroys any incentive for creators and content producers to develop new business models based on the offer of products or services leveraging participation of the consumer in the creative experience. User mash-ups of copyright-protected works are permitted under an exception, yet they are themselves protected by copyright and the maker of the mash-up could sue the author of the original work if that author subsequently were to produce a work with some similarities to the mash-up. This is surely a perversion of the intent of copyright law. As we have stated, this exception exists nowhere else in the world.

The long list of expanded and new, often broad, exceptions would create uncertainty in the marketplace. This would lead to years of litigation as copyright owners and users grapple with the meaning and market impact of the new, ill-defined exceptions. Existing business models around the sale of DVDs of movies and television programs will soon cease to be relevant as distributors and consumers increasingly turn to digital downloads and online streaming of audio-visual material. These digital copies can be easily copied, shared and loaned. These uncompensated uses will significantly increase under the proposed exceptions. New business models for distribution of audio-visual content are evolving and the Copyright Act must at least remain neutral to changes in the marketplace rather than actively preventing creators from earning revenues from these business models. The scope and breadth of the exceptions have no international precedent and likely also would violate Canada's international treaty and trade obligations.

Bill C-32 misconstrues the spirit of the Copyright Act and ignores its fundamental principles - much to the detriment of professional creators and artists (as well as other copyright owners), who will be the main losers in this reform. For artists, content creators, editors and producers, C-32 does not modernize copyright; in fact, it dismantles it. The Copyright Act is the legal instrument that ensures that creators, artists and copyright owners receive fair remuneration and it must remain so. It must, first and foremost, protect them. Private, institutional or commercial users of their works must accept this choice in return for fair access to creative works. The vitality of Canadian culture depends on it.

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Copyright is in everyone's interest. Let's get copyright right.