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Recommendations on Bill C-32, Regarding the Visual Arts and the Digital Environment

Presented by

Regroupement des artistes en arts visuels du Québec – RAAV

and

Canadian Artists' Representation / Le Front des artistes canadiens - CARFAC

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SUMMARY

According to CARFAC and RAAV, two associations representing the visual artists of Canada and Quebec, a number of modifications proposed to the Copyright Act in Bill C-32, and several serious omissions, will likely have major repercussions for visual artists.

Through a thorough analysis of Bill C-32, CARFAC and RAAV conclude that it could have damaging consequences for professional artistic creators, copyright collectives and Canadian society as a whole.

Therefore we ask the government to take all the time and perspective necessary to study this bill and modify it in depth, in both wording and spirit. We present the following recommendations.

CARFAC and RAAV ask our elected members at the House of Commons :

- 1- to follow the lead of their colleagues in 59 other countries, including the United Kingdom, Australia and California, by including the Artists' Resale Right in the Copyright Act as part of Bill C-32;**
- 2- to withdraw Section 4 of Bill C-32, as it applies to sales of artworks ;**
- 3- to stop the discrimination against aging artists by removing the following words in paragraph g of Section 3(1) of the Copyright Act: "created after June 7, 1988."**
- 4- to remove Section 38 from Bill C-32 in order to allow photographers, portrait artists and drafts people to share in the wealth created by their work ;**
- 5- that language be added to clarify that the new exception for education in Bill C-32 must not be used in a manner that would drain revenue from creators;**

- 6- to more clearly define the new exceptions involving parody and satire, introduced in Section 21 of the bill to avoid shifts harmful to the rights of original creators;
- 7- that all uses of artworks in the education sector be subject to use licences negotiated with the copyright collective societies;
- 8- that Section 28 and 29 of Bill C-32 be modified to specify that the digitization of documents and their communication by telecommunications must be the object of collective licences negotiated with the Copyright collective societies;
- 9- that the private copying regime be extended to all apparatuses used to navigate on the Internet, to hear or view works, copy them, digitize them, and store them, so that creators can share in the profits being made from their work; we also ask that Canadian legislators design and implement a system through which part of the operating revenues for digital networks, such as the Internet, will be redistributed to various creators of artistic content through collective licences negotiated and administered by their copyright collective societies;
- 10- to remove from Bill C-32 those parts of Section 27 and 35 that relate to *Infringement – Provision of Services*; we also ask that Section 47 of the bill, *Provisions Respecting Providers of Network Services or Information Location Tools*, be modified in order to establish an effective complaint-based mechanism to give creators affordable access to justice.

Bill C-32, the Visual Arts, and the Digital Environment

Introduction

A number of modifications proposed to the Copyright Act in Bill C-32, and several serious omissions, will likely have major repercussions for visual artists if the bill is adopted as is.

Among the omissions: the Artist Resale Right on the resale of artworks, which is included in the legislation of at least 59 countries throughout the world, an omission that deprives Canadian and Quebec visual artists of an important source of income; and the maintenance of an unacceptable discrimination against older artists under the Exhibition Right, which will continue to be in effect if the bill is not amended.

Among the major repercussions: the free appropriation of artists' works by anyone with access to the Internet; the disappearance of revenue from uses in the education sector; and the maintenance of the system of expropriation of intellectual property rights in the digital environment, especially on the Internet.

Bill C-32, complex and difficult to interpret, contains only one positive item for visual artists: photographers, printmakers, and portrait artists will finally see an end to the discrimination against them in the current act. But this gain is almost completely cancelled out by an exception that favours the private users of their works.

Below, the Regroupement des artistes en arts visuels du Québec (RAAV) and Canadian Artists' Representation / le Front des artistes canadiens (CARFAC) present their comments and recommendations concerning the visual arts field. Together, CARFAC and RAAV represent over 18,000 Canadian and Quebec artists in this sector.

1- Missed opportunity regarding the Artists Resale Right

Canadian and Quebec visual artists suffer from an injustice since they cannot share in the profits of the resale of their works – neither in Canada nor in the 59 countries that have adopted the Artist Resale Right. The entire EU and Australia are among those whom have already adopted it. Unfortunately, in this respect Canada is lagging behind. As it updates the Copyright Act, the Canadian legislature should not miss this opportunity to raise it to the level of the most advanced copyright statutes in the world by adopting the Artist Resale Right.

In the negotiations that are currently underway between Canada and Europe for a free-trade agreement, the European partners have requested that Canada adopt the Artists Resale Right so their artists would be able to receive royalties when their works are resold in Canada and vice versa. This will not be possible as long as the Resale Right is not included in Canadian legislation.

There are a number of factors supporting the establishment of the Artist Resale Right in Canada:

- The full value of an artwork often isn't realized on the initial sale. It is common for visual art to appreciate in value over time, as the reputation of the artist grows. This growth in value is a direct result of their pursuit of their art practice and their efforts to expand their reputation.
 - For example, Governor General award winner 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. Similarly, his mixed media piece, *Instrument of Torture*, originally sold in 1959 for \$150 fetched \$4500 in the same auction. Without an ARR, the artist did not benefit from the increased value of his work..
- Purchasers or collectors, and the enterprises that make the resale, are the only ones to profit from this increased value.
 - In 2006, Joyner Waddington's Canadian Fine Art Auction house sold Ron Bloore's *Byzantium Sign #5* for \$55,200, smashing the artist's previous auction record of \$4,700 and its expected sale price of \$2000-2500. The artist received nothing from this sale, and despite exhibitions of his contemporary work being shown around that time, he was not selling work in the primary market
- Even if their works are resold in any of the 59 countries that have adopted the Artist Resale Right, Canadian artists cannot profit from this right since their country is not within the group of countries with the most advanced copyright statutes.
- Once the Artist Resale Right is adopted, the growth in income of Canadian artists, especially established senior artists, would mean greater financial independence for them.
 - Renowned Canadian artist Mary Pratt sold a painting in 1966 for a mere \$40, which is now valued at \$20,000. As an established senior artist with growing health concerns, she now struggles to find the energy to produce enough work to maintain a decent living, and without an ARR, she is unable to benefit from the drastically increased value of her early work.
- Finally, the federal, provincial, and territorial governments would also benefit from the Artist Resale Right, since its application means the obligatory declaration of sales, which will mean better recovery of taxes and better monitoring of transactions of works acquired illegally in Canada or abroad.

In the UK, DACS sends out requests for information to art market professionals on a quarterly basis, asking them to declare the artworks they have resold in that quarter. By law, all art market professionals must respond within 90 days. Once the form is submitted to DACS, they invoice them for the appropriate amount owed to the artist, and royalties are paid to artists within 30 days of collection.

CARFAC and RAAV ask the members of the Canadian government to follow the lead of their colleagues in 59 other countries, including the United Kingdom, Australia and California, by including the Artists' Resale right in the Copyright Act as part of Bill C-32.

2- A new right for artists to sell their own works?

Section 4 of Bill C-32 intends to add to the list of exclusive rights of creators of artworks a right that, it seems to us, they already have under Article 3 of the Copyright Act. Even without copyright, artists have always had the right to sell their works. Unless the government's intention has been misinterpreted (and in this case it should be clarified), this section seems pointless.

This added exclusive right reads as follows:

(j) in the case of a work that is in the form of a tangible object, to sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner.

One literal (and nonsensical) interpretation would be that a work in the form of a tangible object that is returned or resold to its creator, for any reason whatsoever, could not be resold or given away by the creator. The creator would therefore have to keep the work in his or her possession, since the ownership of this object has already been transferred in the past with his or her authorization. The artist would thus have, starting now and for the duration of the copyright, the exclusive right ... to keep it.

Another interpretation of this section would mean the extinction of all copyright on the resale of works once the creator and rights holder have transferred ownership a first time in Canada or abroad.

Upon reading, section 4 of the bill is difficult to interpret, may lead to confusion, and would end all hope of seeing the Artist Resale Right adopted in Canada.

Therefore, RAAV and CARFAC ask that Section 4 of Bill C-32 be clarified or withdrawn.

3- Discrimination in application of the Exhibition Right

Since the recognition of Exhibition Right in the Copyright Act, in 1988, many visual artists have seen their income grow substantially. The payment of a royalty for exhibition of their works, in contexts other than those of sale or rental, has gradually been established as a standard. The sums paid are rising annually, even though they are still insufficient.

Unfortunately, the mention of a cut-off date in the act, 8 June 1988, means that all works produced before this date are not covered by the Exhibition Right, which is an aberration.

The direct effect of this cut-off date is to establish age-based discrimination against older artists, since they are the ones who produced works before 8 June 1988.

This negative discrimination based on the date of creation has never been justifiable and, in the view of CARFAC and RAAV, is very simply unfair. Furthermore, we feel that it contravenes Section 15 of the Canadian Charter of Rights and Freedoms and comparable legislation in different Canadian provinces.

Therefore, CARFAC and RAAV ask for the addition, in Bill C-32, of a section the objective of which would be to remove the following words in paragraph g of section 3(1): “created after June 7, 1988.”

4- Copyright for photographers, printmakers, and portrait artists

The only true gain for the visual arts field in Bill C-32 is found in Sections 6 and 7. CARFAC and RAAV salute the government’s intention to stop the unfair treatment of photographers, drafts people, and portrait artists that currently exists in the Copyright Act. The removal of section 10 and paragraph 13(2) of the Act would end the discrimination to which they have been subjected with regard to their copyright.

But this legal gain is possibly without any economic advantage since Section 38 of Bill C-32 tempers it with the addition of a paragraph in section 32.2 of the Act. The new paragraph (f) will permit unlimited reproduction of a photograph commissioned from a photographer for all purposes except commercial ones – thus for example, the lucrative market of copies of wedding photographs for relatives disappears. Of course, the bill mentions that agreements to contrary effect may be concluded, but users will likely claim this exception from the law to keep from having to pay reproduction royalties.

CARFAC and RAAV therefore ask that Section 38 be withdrawn from Bill C-32.

5 – Exception regarding education

The Copyright Act as written currently already gives access to all artistic, literary, and musical works in a school or university context – sometimes without remuneration for the authors because their works are used for criticism or review and sometimes by establishing collective licences with collective societies representing creative artists. Therefore, organizations and institutions in the education sector already have simple, low-cost access to works. The extension of these licences to the digital environment is the logical solution to the problems posed by the use of new telecommunications tools and network services such as the Internet. And if the government fears that collective societies might commit abuses, the Copyright Board is already set up to prevent such abuses.

Although this may seem like a great idea on the surface, the addition of this new exception will actually drain income from visual artists whose average net professional income lingers around \$8000 per year. Because the educational exception is rather unclear as a notion, but has an excessively broad reach, we can already see that it could be used by all types of individuals and organizations to exempt themselves from application of the Copyright Act. This new exception will be, we are certain, a permanent source of lawsuits between artists and collective societies on the one hand, and all organizations and individuals who claim to be providing educational services, on the other hand.

For visual artists, all of the income from classroom presentation of their works will be threatened; just as reproductions in textbooks would no longer be subject to remuneration, income from the public presentation of their works may also disappear. Indeed, what would keep a museum or exhibition centre from claiming that its exhibitions are in reality only educational activities for the public? We can already imagine the many lawsuits that this exception will lead to.

The current system of collective licences is simple and has been working for a long time. Its application to the digital world is even more relevant because the digital tools themselves make it easy to apply. There is therefore no need to change the existing structure by including an educational exception that will sow discord for a long time among creators, their collective societies, and users of their works.

Therefore, RAAV and CARFAC ask that language be added to clarify that the educational exemption must not be used in a manner that would drain revenue from creators.

6- Exceptions regarding parody and satire

Independent of any “criticism” aspect, Bill C-32 sets out among the forms of fair dealing, alongside the existing private study and research exceptions, the inclusion of parody and satire. These exceptions will likely lead to numerous lawsuits, while the pretext for the parody or satire may be used without any relationship to any form of criticism.

Because they can be seen as a form of critique of a work, copyright theoretically allowed that a parody or satire could be covered by the criticism or review exception already included in the Copyright Act. But the courts saw it as null and void, so to speak, because most of the time the

parody or satire was simply a pretext for profiting from the success of a work. The most grotesque example was that of the producer of a pornographic film who claimed that its unauthorized use of fictional characters well known to the public, *La petite vie*, was a parody, a form of criticism. Yet, the court clearly noted that the “criticism” invoked was a pretext for attempting to legitimize the use of well-known fictional characters with the sole purpose of maximizing sales of the pornographic film.

In reality, those benefiting from these additions to the Act could largely be those who draw an income from the legal problems it creates. In effect, the courts will have to decide, and gradually jurisprudence will be built related to the interpretation of these new exceptions. Who else will truly define the concepts of satire and parody? Who will be the arbitrator between those who originally created the works and those who appropriate these works to copy, deform, and falsify them?

Artists who create original works will likely be the first penalized, since these new exceptions could open the door to undesired and unauthorized uses of their works. Most often, for lack of financial means, artists will be forced to give up on having their rights respected. A right that is impossible to enforce is as useless as no right at all.

Up to now, the current formulation of the Copyright Act has allowed Canadian creators who wanted to use parody or satire to do so without it being expressly mentioned in the law. Why is it necessary to introduce these new exceptions? Who are they trying to protect? Creators of original works of satire or parody? They are protected already.

By inserting these new exceptions into the Act, the Canadian legislature would leave open to doubt its intention to protect the moral rights of original creators. In addition, these additions would encourage a culture of copying, imitation – and, therefore, plagiarism.

CARFAC and RAAV ask that the two exceptions involving parody and satire be more clearly defined to avoid shifts harmful to the rights of original creators.

7- Copyright and pedagogical uses in the digital era

The purpose of Sections 23 to 27 of Bill C-32 is to provide a different way of framing the use of protected works in teaching establishments. In reality, the major difference in this bill would ultimately be the establishment of a regime of absolute free use of artistic, literary, musical, and dramatic works for pedagogical purposes, not only on the premises of a teaching institution but also in the virtual space of the Internet. This hypothesis is strengthened by the educational exception discussed above.

In fact, as reprography agreements come to an end, due to these five sections and the educational exception introduced in Section 21, the rights of creators of works to receive royalties for use of their works in the educational sector may be definitively extinguished.

In addition, this will apply to all “commercially available” works – works that are “available in Canada, within a reasonable time and for a reasonable price, and may be located with reasonable effort.” It would therefore be possible to present in the classroom, without payment to the creators concerned, reproductions of artworks, films, recorded concerts, and television programs that have been purchased or rented, as long as they are not counterfeit copies and are being used for “pedagogical or educational” purposes.

It is clear that, over the short or medium term, the effect will be the death of copyright collective societies. Brandishing the educational exception and a right to visual presentation in the classroom for pedagogical purposes, universities, colleges, and other teaching establishments will claim absolute exemption from royalty payments. Since the collective societies are mandated by creators to promote their copyright and receive the associated royalties, and their own survival depends on this, they will have no choice but to go to court. And since the intention of the legislature, as expressed in this bill, is clearly to establish free-of-charge use in the educational sector, one might already anticipate the response of the courts. Furthermore, Canadian students will receive a clear message: intellectual property is free of charge and freely accessible.

CARFAC and RAAV cannot support a bill whose effect would be to extinguish the copyright of creators, including visual artists, in the education sector, and to destroy the tools of collective management that they created for themselves. To the contrary, these rights should be reasserted, and pedagogical uses in the education sector should be compensated by proper copyright royalties paid through collective licences managed by their collective societies. Adaptation of the Copyright Act in the digital era must not mean the extinction of copyright in the education sector.

Therefore, RAAV and CARFAC ask that all uses of artworks in the education sector be subject to use licences negotiated with the copyright collective.

8- Reprography, digitization, and telecommunications in libraries and archives

Sections 28 and 29 of Bill C-32 grant libraries and archives rights of communication by telecommunications of copyright-protected works. Yet, the Copyright Act recognizes that the creator has an exclusive right to communication by telecommunications. As long as this right has not been ceded, this right remains the artist's. By making possible, even under specific conditions, the sending of documents between libraries and users without infringement on copyright, Bill C-32 limits the exclusivity of the creators' right to authorize these electronic transfers of their works.

Moreover, the protection measures promoted by Bill C-32 are, unfortunately, inadequate. The only protection offered to creators is drastic and detrimental to everyone: to forbid the digitization of their works. This practice asks creators to refuse public access to their works in order to protect them better, which is contrary to the interests of all: our fellow citizens, artists, and their collective societies.

Digital reproduction of documents and their communication by telecommunications must be treated as reprography has been for many years. They should be the object of collective licences granted, in return for fair royalties, by collective societies representing the creators. This way of proceeding ensures complete access by students at all levels and by the public in general to protected documents, while helping to provide financial support of creators in their professional activities of literary or artistic creation.

CARFAC and RAAV consider it unjust to reduce the scope of copyright, notably for reproducing works by digitizing them and for communicating them by telecommunications. As a consequence, CARFAC and RAAV ask that Sections 28 and 29 of Bill C-32 be modified to specify that the digitization of documents and their communication by telecommunications must be the object of collective licences negotiated with the Copyright collective societies.

9- Internet service providers and their responsibilities as corporate citizens

A large part of Bill C-32 is devoted to establishing in the Copyright Act a system of exploitation controlled by service providers for networks such as the Internet. These businesses harvest large amounts of money both from taxpayers, in return for connecting them to the Internet, and from suppliers of artistic, promotional, educational and advertising content, in return for communicating this content with members of the public who use the Internet.

The value of a network such as the Internet is its focal point.

The value of the content that circulates on the Internet is distinct from the costs related to the “vehicle” used to transport it. The current situation on the Internet is that one side of the equation weighs heavily in favour of the “transporters” of content, while the other side, the value of the content itself, is considered negligible. In fact, it seems that the content on the Internet, whatever it is, is considered “self-generated” by the tools that transport it; it is as if the pipeline produced the natural gas or oil that it transports, and the price of gasoline at the pump were simply paying for the pipeline.

The businesses that operate digital networks supply transport services permitting the communication by telecommunications of content that has value. The reason for being of these networks is the content that they transport. Without content, there is no need for a network. This content is formed, in part, by simple exchanges among individuals; if that is all it was, it would simply be a sophisticated version of the telephone. But the content that circulates on the Internet is, as we know, much more elaborate. There are magazines and newspapers; promotional materials for various products and services; digital reproductions of artworks; and literary works, poetry, and plays – in short, everything that makes up contemporary culture.

Internet service providers are dependent, in large part, on the works produced by creators and producers – who are, in a way, partners in the communication of this content by telecommunications. How is it, then, that almost all the profits resulting from operation of the Internet go into the pockets of only one of these partners, the Internet service provider? This system is paradoxical and unfair.

In the view of RAAV and CARFAC, a new economic model must be implemented to remunerate creators and producers of artistic content on the Internet. This new model is inherent to contemporary telecommunications technology and involves the sharing of revenues from the operation of digital networks.

Artists agree that it is important to facilitate as full an access as possible to their works by the public for which they have been created. The Internet is an essential dissemination tool for them, as it serves to inform the public about their art, to promote their creative work, and, eventually, to make sales. For users, the Internet is a tool for entertainment, education, news, and interpersonal communications that they no longer want to do without.

However, while professional Canadian creators feel that the public must know about their works, they also feel that they must be able to draw an income from the communication to the public of their works. Remuneration of professional creators is the only means of enabling development of the arts and the enrichment of Canadian culture. The capacity to take advantage of the uses made possible by the Internet and digital apparatuses must be accompanied by a form of compensation by users, as well as by the enterprises that make access to the works possible.

CARFAC and RAAV ask that the private copying regime be extended to all apparatuses used to navigate on the Internet, to hear or view works, copy them, digitize them, and store them, so that creators can share in the profits being made from their work.

In addition, CARFAC and RAAV ask that Canadian legislators design and implement a system through which part of the operating revenues for digital networks, such as the Internet, will be redistributed to various creators of artistic content through collective licences negotiated and administered by their copyright collective societies.

10- ISP responsibility in complaint resolution

Internet service providers must be part of the solution rather than part of the problem. Since they are situated at the nodal point of the supply of and demand for services, this solution must involve greater responsibility, not less. It must involve their effective and diligent participation in eliminating digital criminality. It must involve a graduated answer to Copyright infringement that provides affordable access for creators to justice.

Therefore, with regard to copyright infringements, a simple “notice and notice” system is clearly insufficient. What is needed is a system based on the precautionary principle, a system of “notice and withdrawal” administered by Internet service providers similar to what other countries have adopted. This is the only logical and consequential way of extending the state of law to the Internet.

Therefore, CARFAC and RAAV ask for the removal from Bill C-32 those parts of Sections 27 and 35 that relate to *Infringement – Provision of Services*.

CARFAC and RAAV also ask that Section 47 of the bill, *Provisions Respecting Providers of Network Services or Information Location Tools*, be modified to establish an effective complaint-based mechanism to give creators effective recourse.

Conclusion

Our position is that the effects of Bill C-32, as proposed, will have serious repercussions for Canadians and for all creators, including visual artists. The bill's consequences for arts and culture in Canada are potentially devastating and irreparable.

According to Georges Azzaria, law professor at Université Laval, “The Canadian legislature’s bill falls within a current that removes creators from the main legislative measure designed to give economic value to their work.”¹ This is precisely where its fundamental fault lies: under the pretext of adaptation to the possibilities of the digital age and the Internet, the primary function of the *Copyright Act* – that of ensuring the survival of professional artistic creation in Canada – is being diverted. The bill as a whole proposes a serious weakening of the rights of authors and artists in favour of consumers and users of works, both for individuals and organizations. Worse, no measures are set out to compensate artists for loss of income due to all of the benefits conceded to users. For instance, the private copying levy would not be extended to digital devices, and Internet service providers will still appropriate the majority of revenues from the Internet.

Artistic creation must be protected and sustained by a legal regime adapted to the realities and possibilities of the digital age, and not threatened by them. Network service providers, and users of their services, must understand that the vitality of Canadian culture depends on their effective participation in the protection of artworks and on the funding of professional artistic creativity.

Most countries throughout the world wish to protect the distinctiveness of their culture and are seeking means to use the Internet to help their creators. Their primary objective is to preserve the diversity of cultural expression against a generalized levelling of human culture by huge media conglomerates. For example, the French minister of culture, Frédéric Mitterand, has said that it is important “to protect rights against those who would like to make the Internet the terrain for their libertarian utopias.”

The current government claims to be “modernizing copyright” by bringing it into line with various international treaties dealing with protection of intellectual property. In C-32, instead, we are seeing the legalization of infringement of copyright and the trivialization of the appropriation of the rights of authors.

¹ Georges Azzaria, “Loi sur le droit d’auteur - Les auteurs mis sur la touche,” *Le Devoir*, 15 June 2010 (our translation).

Through a thorough of Bill C-32, CARFAC and RAAV conclude that it could have damaging consequences for professional artistic creators, copyright collectives and Canadian society as a whole.

Therefore we ask the government to take all the time necessary to study this bill and modify it in depth, in both wording and spirit.