House of Commons
CANADA

Legislative Committee on Bill C-32

CC32 • NUMBER 011 • 3rd SESSION • 40th PARLIAMENT

EVIDENCE

Tuesday, February 8, 2011

Chair

Mr. Gordon Brown

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● (1100)

[*English*]

The Chair (Mr. Gordon Brown (Leeds—Grenville, CPC)): Good morning, everyone. We'll call this 11th meeting of the special Legislative Committee on Bill C-32 to order.

We have with us today, from the Alliance of Canadian Cinema, Television and Radio Artists, Ferne Downey and Stephen Waddell. From the International Alliance of Theatrical and Stage Employees, we have John Lewis and Paul Taylor.

For five minutes, we'll hear from the folks from the Alliance of Canadian Cinema, Television and Radio Artists, also known as ACTRA. Ferne Downey, you have the floor.

Ms. Ferne Downey (National President, Alliance of Canadian Cinema, Television and Radio Artists): Thank you so much. Thank you, Mr. Chair and committee members.

My name is, as reported, Ferne Downey. I'm a professional actor and the president of ACTRA. With me today is Stephen Waddell, ACTRA's national executive director. We support the goal of this bill to make it easier for Canadians to use technology to access contents any time, anywhere.

We also applaud the efforts this bill takes to adopt international standards to fight content theft. However, a good bill must do more than fight off those who feel entitled to something for nothing. It must also protect the rights of creators to be compensated for the legitimate use of their work.

Unlike many Canadians, creators don't get a pay cheque from a single employer. We might earn one pay cheque here and another small one over there. It's only when you add them together that we are able to make our mortgage payment and put food on the table. Bill C-32 threatens to wipe out many of these small but crucial revenue streams. It is nothing less than a full-scale attack on collective licensing by introducing a multitude of exceptions that weaken copyright.

As you heard from the Canadian Conference of the Arts last week, the bill puts at risk $126 million in annual revenues that creators and rights holders currently earn under collective licences. And this is on top of what is already lost to content theft. Killing collective licensing, in our view, is neither modern nor balanced. In a digital world, rights-holder-run societies are the only realistic way to provide practical access to users and reasonable compensation to creators. In short, this bill moves us backwards.

We have identified six specific areas where the bill must be amended.

Number one is user-generated content. It is peculiar that the government would in one part of the bill give performers long-needed moral rights, in keeping with international standards, and then on the next page take them all away with a poorly conceived mashup provision that lets users take an artist's content and do whatever they want with it. No other country in the world has a law like this. So why is Canada trying to be a world leader in stripping creators of their rights? This clause must be significantly amended or removed from the bill entirely.

Stephen.

Mr. Stephen Waddell (National Executive Director, Alliance of Canadian Cinema, Television and Radio Artists): Number two is the expansion of fair dealing and new exceptions. This sweeping exception will take millions out of creators' pockets and could devastate our educational publishing industry. Most puzzling is that this destructive provision proposes to fix a problem that doesn't exist. Educators have access to the materials they need for a nominal fee through collective licensing.

Bill C-32 must be amended to meet the internationally accepted method of determining what exceptions in copyright law are fair, the Berne three-step test. It prescribes that exceptions are confined to certain special cases that do not conflict with a normal exploitation of a work and do not unreasonably prejudice the legitimate interests of the author or performer.

Number three is statutory damages. Why does Bill C-32 give illegal file-sharing sites that help people around the world share stolen music and movies a free ride by exempting them from statutory damages? This loophole must be closed. Statutory damages must be proportionate, but there is no need to make a distinction between commercial and non-commercial infringement. Non-commercial infringement damages right holders too.

Number four is ISP liability. If you really want to stop content theft, then you need to give Internet service providers the tools they need to deal with people who continually break the law. We need to discourage repeated acts of infringement with escalating consequences.

Number five is the elimination of the broadcast mechanical licence. This is yet another attack on collective licensing. By removing this provision you take money directly out of the pockets of artists and creators and put it back into the already overflowing wallets of private broadcasters.

Ferne.

● (1105)

Ms. Ferne Downey: Number six is reproduction for private purposes.

Compensation must be attached to format shifting and reproduction for private purposes so that income can continue to flow to artists, regardless of how media develop. The existing private copying levy must be modernized so that it applies to digital devices developed, manufactured, and marketed to copy music. If it is not updated, it will take millions of dollars of royalties from artists' pockets.

Let's be frank. The private copying levy is not new. It is not going to apply to cars. It is not $75. And it is not a tax. The only tax on iPods is the HST. We ask you to put rhetoric aside and do the right thing. Everyone in this room knows that updating the levy instead of letting it die a natural death is the right thing to do.

At some point, whenever it is, you will all be fighting for your jobs. And you are all aware that there are nearly one million creators working together, with great passion, to get this bill fixed. Our reach extends to every single riding in this country. We are particularly counting on the three opposition parties to work together to fix this bill. Together you hold the majority on this committee and in this House. We need you to deliver a bill that recognizes the central role creators and rights holders have in our digital economy and assures them that their intellectual property rights will be respected.

Anything less and Canada will continue to be an international embarrassment, to our collective shame.

Thank you.

The Chair: Thank you very much.

We'll move on to John Lewis.

Mr. John Lewis (Vice-President, Director, Canadian Affairs, International Alliance of Theatrical Stage Employees): Good morning, and thank you for this opportunity to come before the committee to speak on Bill C-32. I'm joined by my colleague, Paul Taylor, who will also be speaking to the committee.

The IATSE was founded in 1893—1898 in Canada—and now has nearly 120,000 members, 16,000 of whom reside in Canada, making it one of the largest trade unions in the entertainment industry. The IATSE represents workers in a number of crafts, with the majority employed in motion picture and television production. Our members are integral to the production, distribution, and exhibition of motion pictures and television.

The number of individuals employed in the production of a given motion picture may be anywhere from 100 to 1,000 employees. They are not in front of the camera, but they supply the absolutely necessary labour to make the movies. Our members include men and women who work on big-budget foreign service productions from the United States, such as *The Twilight Saga: New Moon* in Vancouver and *Mummy: Tomb of the Dragon Emperor* in Montreal, as well as on domestic television and motion picture productions, such as *Republic of Doyle* in St. John's and *Heartland* in Calgary.

How this government deals with digital theft will have a direct impact on our membership. For our members, there is no job security. They depend on a healthy industry to find enough employment to make ends meet. When the industry suffers because of digital theft, that is, when movies do not get made because of digital theft, our members suffer because they find themselves out of work.

The IATSE supports the strongly worded objectives of Bill C-32. Hundreds of our members wrote to their MPs before the introduction of the bill urging them to support strong copyright reform and, following the introduction of the bill, to support the bill's objectives. In particular, we welcomed the government's promise, made at the time of the bill's introduction, that the bill will provide a framework that is forward-looking and flexible, which will help protect and create jobs, stimulate our economy, and attract new investment to Canada.

However, we have serious concerns that the bill, as drafted, will fall short of meeting these objectives. We have prepared written submissions, which I understand have been circulated, but I would briefly summarize our position as follows.

I'll turn to my colleague, Mr. Taylor.

● (1110)

Mr. Paul Taylor (International Representative, International Alliance of Theatrical Stage Employees): On technical protection measures, we support the bill's strong protection for TPMs, both access control and copy control, without which new business models like Netflix would not be possible in Canada. Allowing TPMs to be broken for private purposes or other non-infringing uses would totally undermine these business models.

Enabling infringement. The bill needs to be fixed to clarify that the enabling provisions apply to services that are designed or operated to enable or induce acts of infringement, including specific reference to hosting and caching service providers. These changes are necessary to address the reality that sites that host and stream or permit downloading of illegitimate content are becoming the most significant source of illegal distribution of film and television content online.

The user-generated content exception. This exception should either be scrapped or amended to ensure that it does not prejudice copyright owners. If the exception is maintained, it should be limited to only permit the creation of original, transformative, user-generated content for the individual's personal use if all of the permitted acts can be considered fair dealing under the existing copyright law test and the permitted acts do not have any adverse effect on the market for the original.

With regard to Internet service providers, we believe the bill's ISP safe harbour provisions need to be fixed to ensure that illicit sites such as those that encourage storage of infringement files, host, distribute, or make available illegitimate copies of protected content are not inadvertently immunized from liability. Moreover, to ensure consistency with international standards, ISPs should be required to, one, have an effective policy to curb copyright infringement on their networks, particularly in the case of repeat offenders, and two, take action to remove or disable access to infringing works where they have actual or constructive knowledge of infringing activity, in keeping with the Supreme Court of Canada's comments in the Tariff 22 decision. This would be in order to qualify for their safe harbour.

Finally, the bill should provide copyright holders with injunctive relief against ISPs whose service is being used by a third party to infringe copyright, i.e., to block access to illegal sites.

Our final technical submission is regarding statutory damages. We submit that the bill should be amended to provide for effective statutory damages, which will provide a real deterrent—as opposed to a licence to steal—to illegal file sharing and give copyright owners the ability to stop large-scale enablers of online theft.

If the government wishes to maintain a cap on statutory damages for individuals, it should apply to infringement for private purposes rather than non-commercial purposes. It should be on a per infringement basis, as opposed to encompassing all infringements. Lastly, it should be available to all copyright owners, rather than to only the first rights holder having the ability to sue.

● (1115)

Mr. John Lewis: In summing up, this is about jobs. This bill is about jobs. It's about my members' jobs. It is not a victimless crime. My members are suffering because of this. It's taking money away from the industry and it's reducing the amount of work that is getting done. So I encourage this committee to continue its good work and to bring forward a bill that will ensure that this industry has healthy years to come.

The Chair: Thank you very much to our witnesses.

We'll go to the first round of questioning. For seven minutes, from the Liberal Party, we have Mr. Garneau.

Mr. Marc Garneau (Westmount—Ville-Marie, Lib.): Thank you, Mr. Chair.

Thank you for being here this morning. Thank you for your testimony.

I'd like to start off with the issue of ISP liability. You have both said things about that. Without getting more specific about it, I think you've suggested that the notice and notice approach that is being proposed by the current bill is insufficient. I'd like to hear from both of you, both groups, what you think is necessary. At the same time, I'd like to hear why you don't think notice and notice would be enough.

Mr. Stephen Waddell: Thank you, Mr. Garneau and Mr. Chair.

Notice and notice means just sending notices ad infinitum to infringers. That won't do anything except create a pile of paperwork. No one's going to take notice of all of those notices. It is a system that only works if there's some form of escalating action or reaction as a result of the infringement.

We're looking to this bill to provide some sort of graduated response that would end with the requirement that the infringer take down the offending material. There are various mechanisms that could work, but simply notice and notice is not sufficient. There has to be some form of escalating response that ultimately compels the infringer to take down the offending material.

Mr. Paul Taylor: We're essentially in agreement with that approach. We recognize that notice and notice just isn't a sufficient solution to address the problem we now have in society. People really don't seem to be aware, or they seem to justify what they're doing, and they don't really regard it as theft.

We take the strong position that it is theft. It is hurting our members on a daily basis. It is affecting their ability to get work. We think the ISPs are in the unique position that they're able to do more than just send these notices. They ought to be required to do something more. So we're looking for a graduated response type of system that would require them to have an effective policy.

Mr. Marc Garneau: Let me take it a little bit further. There are those who say that notice and notice will work for the great majority of people. In other words, if somebody does something and they receive a notice, they'll say, “Oh, my God, I'm being watched here” and won't do it again. But there are people who will realize that it's just a notice and doesn't have any consequences.

Do you have any statistics that support your contention that notice and notice is not going to be effective—both groups?

Mr. Paul Taylor: I don't believe we have any statistics.

Mr. Marc Garneau: Is it just your gut feeling, if I can put it that way?

Mr. Paul Taylor: No. I'd say it's based on the actual experience of talking to Canadians, particularly in the younger age group. They have a completely different attitude than we do as industry insiders who have seen the actual effects of the theft that's going on. The people I see outside the industry need to understand that it is theft. We need to see an attitude change through education and having effective laws that make it clear that this is a crime. Notice and notice doesn't send that message.

Mr. Stephen Waddell: What I don't understand about this whole debate on notice and notice is that if I don't pay my gas bill or my hydro bill, I get cut off. How is that infringing on anyone's rights? The fact is, as my colleagues have said, it is true that this is theft and it should be treated as that. Those who are facilitating access, as ISPs do, should be required to shut down people who are stealing.

● (1120)

Mr. Marc Garneau: Thank you.

Let me go on to statutory damages against you. You've both talked about it. I got the feeling you were saying that the current wording is not sufficient; it's not commensurate with the gravity of the offence.

Stephen, you specifically mentioned the situation on file-sharing sites. I'd like to hear a little more about your views on what you think should be the wording in this proposed bill on statutory damages.

Mr. Stephen Waddell: The problem is that the ability to provide substantial statutory damages against major infringers has been removed. That means you have to go to court and prove damages. It's a lengthy and challenging process, when the fact is you want to shut down sites like isoHunt. The only way they understand it is through substantial statutory damages. We're looking for this bill to reinstate them.

Mr. Marc Garneau: What is substantial? Are we talking about orders of magnitude more than $5,000?

Mr. Stephen Waddell: Definitely.

M. Marc Garneau: Okay.

Thank you.

Mr. John Lewis: In our submissions we made three proposals. I know this committee has heard this phrase, but we don't want statutory damages simply to be the cost of doing business and a licence to steal.

We have submitted that the statutory damages would apply to infringement for private purposes specifically, rather than for non-commercial purposes; that they be on a per infringement basis, as opposed to encompassing all infringements; and lastly, that they be available to all copyright owners and not only the first rights holder that sues.

Again, it's a deterrent. This is theft. This is stealing jobs.

Mr. Marc Garneau: Very quickly, yes or no, would you prefer to see mashups or user-generated content removed from this bill, or would you accept some serious changes?

Mr. Paul Taylor: We would have to see what those changes were before commenting on them. But in our submission, you either take it out completely or curtail it in such a way that you ensure that it's not going to be abused.

Our submission on that is to have a number of points to really ensure it is curtailed—that the work is transformative and original, in and of itself, so that somebody doesn't take an entire copyrighted piece and simply add a comment at the end of it. It has to be transformative. Then you have to look at the other aspects we dealt with in our submission.

The Chair: Thank you.

We will move to the Bloc Québécois.

[*Translation*]

You have seven minutes, Madam Lavallée.

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Good day, Mr. Waddell, Ms. Downey. I would like to discuss piracy with you.

The aim of this bill is to counter organized piracy and illegal downloading. If the sole purpose of this public debate was to make consumers and the general public aware of the importance of respecting copyright and the works of creators, then I think it would be a big step forward.

I want to discuss organized piracy and Internet sites designed primarily to encourage peer-to-peer illegal downloading.

In your opinion, how should we deal with pirates? What damages should you be entitled to and should you reasonably expect to receive?

[*English*]

M. Stephen Waddell: Madame Lavallée, thank you—

[*Translation*]

Mrs. Carole Lavallée: I want to clarify something, because I don't think I made myself clear.

Currently there is a ceiling on statutory damages that can be awarded: $20,000 for commercial piracy and $5,000 for non-commercial piracy. Everyone knows that a ceiling of $20,000 is ridiculous. On the other hand, the penalty for breaking digital locks is $1 million and five years in prison. In our opinion, that is a penalty that creators of games software are happier with.

I do not know if you want to go that far. Would you go that far, to be fair?

● (1125)

[*English*]

Mr. Stephen Waddell: We wouldn't mind seeing some of these people in jail, for sure. It's massive theft that they're involved in. So if this committee recommends that some of these folks go to jail, that would be excellent.

There have to be some really substantial deterrents put in place in this bill to stop isoHunt and the other infringers—which unfortunately seem to find a safe harbour in this country—from continuing to operate.

Mr. John Lewis: Mr. Chair, can I just jump in?

[*Translation*]

Mrs. Carole Lavallée: I'm sorry, but my question was for Ms. Downey. We'll get back to you if we have enough time.

Go ahead, Ms. Downey. Do you share Mr. Waddell's opinion?

[*English*]

Ms. Ferne Downey: I concur 100%.

[*Translation*]

Mrs. Carole Lavallée: Correct me if I'm wrong then, but you would like to see higher statutory damages. Are you also in favour of a setting a ceiling, or are you prepared to give us a figure this morning in terms of statutory damages that should be awarded?

[*English*]

Mr. Stephen Waddell: Since we negotiate minimum fees for performers, we would want to see a minimum amount in damages and the ability to escalate those damages to an unspecified amount.

[*Translation*]

Mrs. Carole Lavallée: So then, you think damages could run as high as $1 million?

[*English*]

Mr. Stephen Waddell: We'd like to see it go as high as possible, yes. I don't think $1 million is too much, not considering the type of revenue that is generated by these companies.

[*Translation*]

Mrs. Carole Lavallée: In the bill, the ceiling on statutory damages is set at $20,000 for all serious cases, which, as I see it, means that a work could never be valued at more than $20,000. Is that also how you interpret the bill?

This is a one-time award of $20,000 paid to copyright holders in their lifetime. Basically, it means that an infringer would take $20,000, offer it to the copyright holder and then invite him to file a lawsuit.

[*English*]

Mr. Stephen Waddell: Yes.

[*Translation*]

Mrs. Carole Lavallée: What does it cost to sue an individual or company for piracy?

[*English*]

Mr. Stephen Waddell: It could well cost hundreds of thousands of dollars to pursue a lawsuit.

I actually liked what my colleagues from IATSE said with respect to this matter and would support their position.

[*Translation*]

Mrs. Carole Lavallée: So then, the bill does not deal harshly enough with pirates. Even though we claim to want to counter piracy, we are not including provisions in the bill that would allow us to take a tough stand, which means that the bill is totally ineffective.

[*English*]

Mr. Stephen Waddell: That's correct, it is inefficient. As was stated, $20,000, $5,000.... That level of fine is just like the cost of doing business. These companies make millions of dollars stealing other people's work.

The penalties applied to such infringers should be massive, in the same way that there's massive infringement going on.

[*Translation*]

Mrs. Carole Lavallée: Earlier, you talked about notices. When someone notices that a creative work has been copied, the law states that the onus is on the copyright holder to finger the infringer. The copyright holder must also ask the ISP to issue a warning to the infringer.

Earlier, you said that this approach was ineffective. What approach do you think would be effective?

[*English*]

Mr. Stephen Waddell: As we've said, we would find a system worthwhile that would include the ascending notices, no question about that—one or two, and then start to escalate beyond that if the infringer does not comply with the notice.

We would hope that this committee could find a way to provide such an escalating response.

[*Translation*]

Mrs. Carole Lavallée: Do you have any suggestions as to what could be done to ramp up the pressure?

● (1130)

[*English*]

Mr. Stephen Waddell: In our view, as we've said, there should be some form of graduated response beyond just a simple notice. The ISP should be required to take action against the infringer, and if not, it would be up to this committee to find a means to do that.

But our view is that there should be a continuing response, to the point at which it forces the infringer to take down the material.

The Chair: Thank you very much.

We're going to have to move to Mr. Angus for seven minutes.

Mr. Charlie Angus (Timmins—James Bay, NDP): Thank you very much, and thank you for your presentations this morning.

I guess when we try to address the issues of Bill C-32 we are talking about copyright—the right to make copies. In French it's

[*Translation*]

“*les droits d'auteur*”,

[*English*]

the rights of the author.

We are in a different realm because everybody can make copies. Ten years ago people could make cassettes. Now we can copy books, we can copy television, and it's offered us the greatest distribution platform in human history—and it ain't about to change. The question we have as a committee is how do we address what rights and whose rights?

This is the tricky situation, because it seems from listening to my colleagues in the Conservative Party—and they're getting some things right on this bill; they talk about consumer rights and they talk about corporate rights, the right to lock down content. An individual artist doesn't put a digital lock on; Sony gets to put the lock on. So we have the principle that they're going to protect corporate rights; they're going to protect consumer rights.

But we're looking at the issue of what happens to the artists' individual revenues: the actual right to be paid for the copies, which was always the fundamental principle of copyright.

Do you see this bill as an attack on that right, and an attack on collective licensing?

Ms. Ferne Downey: Yes, we do see this as an absolute, outright attack on all collective licensing. It will reduce existing revenue streams already flowing to artists, let alone lack protection in the future.

Mr. Charlie Angus: So with the many issues you've identified with the bill, if there were a willingness to address this direct loss of revenue, would you be willing to go along with the rest of the bill? Would the rest of the bill be sufficient if we could address the issues of artists' royalties that are being seemingly stripped away and deliberately targeted by this bill?

Ms. Ferne Downey: Well, that's a very intriguing question. I think there are sufficient flaws embedded throughout all of Bill C-32 that you'd have to have a more holistic approach to fix it all. It's not as if the creators' rights and artists' rights are in just some few aspects of the bill; they are embedded in every part of the bill.

I'm going to ask Stephen to comment.

Mr. Stephen Waddell: A lot of oxen are being gored in this bill. A lot of money is being taken out of the pockets of creators—$126 million annually is what we estimate. And that cuts across the folks we represent, the royalty artists of Canada, but also educators, writers, and of course publishers and songwriters. It cuts right across the spectrum in terms of creators, and everybody is going to be hurt by this bill, unfortunately.

Mr. Charlie Angus: Again, on the private copying levy, when it was adjudicated at the Copyright Board they were very specific about what the fees would be and what would be allowed. Given what you've heard from the Conservatives in their media attack on the levy, does that reflect in any way the reality of the levy system that has been in place and what will continue to be?

Mr. Stephen Waddell: I've heard the attack ads and the talk about the $75 iPod tax. As we know, it's not a tax. As we've said, the only tax is the HST on iPods. This is a levy. The idea is that the user who buys the iPod—I have one—should make a contribution to the artists whose work they're going to copy. It's a really simple principle, and it's one that's been in place in Europe, South America, and elsewhere around the world for years.

This is not a tax. It's not taking money from taxpayers; it's taking it from the people who actually buy the product that makes the copies, right? It just makes sense. I don't understand why, coming out of the gate, the Conservatives took the position that this is a tax and it's $75. It's not $75. Currently it's $2 to $25. So I don't get why they're doing this.

● (1135)

Mr. Charlie Angus: I'm interested in the issue of knock-off films. You were talking about the loss of jobs. It seems to me you can break it down.... There are bootleg movies, the knock-offs that are sold in corner stores, and there seems to be no interest by any police to actually deal with those. They're all over the world. You can go to anyplace and they're selling knock-offs. So there's clearly a commercial infringement there that should be dealt with.

There are uploaded clips, mostly television shows, by fans. We've seen in the United States the huge statutory damages against individuals. Certainly, in the New Democratic Party we are very wary about.... Frankly, we think Sony and Universal and gang have poisoned the waters for us on this, because we don't want to see individuals.... But we are concerned about the knock-offs.

Then there's the third element, which is the films that are robbing studios of that precious opening-time release because they're getting bootleg copies out before the legitimate copies. Two years ago we had the camcorder issue. Last week I had someone give me a blockbuster film to watch that was not out on DVD. They said they thought I should see it, because it was excellent quality, and it said very clearly on the watermark to not distribute the film because it was for the promotional awards.

So within the industry itself it seems there is a pretty lackadaisical attitude on knock-offs, if I can watch a film in Ottawa or Toronto that originated in Hollywood and that was meant to be seen strictly as a promotion in set-up for one of the major awards ceremonies.

Within the industry itself, is there talk about educating the industry as much as we're talking about educating consumers? It seems pretty outrageous that the films that are being shown are coming directly out of Hollywood.

Mr. John Lewis: We're an international organization and we're very much involved in the efforts taking place in the United States addressing these issues. I think it's not fair to list one example—maybe for the Oscars or something—where a promotional video gets sent out. The industry has spent literally millions of dollars to educate, to enforce, and to try to bring about real change.

I think we can do things. We can change behaviour. You referred to the Criminal Code amendments that took place. Canada was one of the leading sources of illegal camcording of videos prior to the enactment of the amendments to the Criminal Code. Since that time, we have fallen off the radar—good thing—in terms of being a source for illegally camcorded motion pictures. It shows that if we do something right, if this committee does something right, we can change behaviour.

I hear people say this issue has gotten too big. No matter what you do, it's insurmountable. I disagree. We can change behaviour. It's about education. It's about letting people know there's a strong deterrent.

Madame Lavallée asked a number of questions about statutory damages. We think you should extend those damages to enablers, the hosting sites. That's really where a lot of the problem is happening.

I'll say it, because I think my friends are afraid to: sure, you should send them to jail. I don't think that's going to happen with this committee, but why not? They're stealing.

The Chair: Thank you.

We're going to have to move along to Mr. Del Mastro for seven minutes.

Mr. Dean Del Mastro (Peterborough, CPC): Thank you, Mr. Chairman.

I appreciate the testimony.

I think Canadians are inherently fair. I think that if laws are established, Canadians don't steal. Canadians don't generally break the law—most Canadians abide by the law, especially when they understand it and it's outlined properly and they understand what the rules are in a marketplace.

But I'll also say that Canadians right now are about fed up with being nickel-and-dimed. In fact, they're really fed up with it. We saw a great example last week on the UBB ruling with the CRTC. I'd be surprised if there's a single member of this committee who didn't receive dozens, if not hundreds, or perhaps more e-mails on that decision saying stop nickel-and-diming me. Stop it; I've had it. Canadians are at a level of frustration.

Ms. Downey, you gave a great performance in your presentation.

I'd really like to know...you indicated that the private copying levy, something we've call an iPod tax, won't apply to cars. In fact, you may have listed a few things it won't apply to, despite the fact that my wife's newish vehicle, I believe, has a 30-gigabyte hard drive in it, but it might have a 60-gigabyte hard drive built right into it that's specifically for the storage of music. I'd be very interested in learning from you which devices you do suggest it would apply to.

● (1140)

Ms. Ferne Downey: As the CPCC, the Canadian Private Copying Collective, presented to you last week or the week before, maybe even last month, when they brought their paper forward, the intent is solely digital audio recorders. We're going baby steps, incrementally, as all we have currently are recordable blank CDs, digital audio recorders, created solely for the purpose, nor has the CPCC requested the—

Mr. Dean Del Mastro: But they're already an antiquated technology, right? People are now using devices that are multi-platform. If all you want to go after is an MP3 player, that's 2002. Is that really the bar you want to set, or is this just an entry point so that you can then transition to all these other devices that will store music but also work on multiple platforms?

Ms. Ferne Downey: It should eventually become technology-neutral, but we're still in the mire of having technologies needing to be assigned—

Mr. Dean Del Mastro: So if it's technology-neutral, you are saying it would apply to all devices that store music.

Ms. Ferne Downey: I'm not saying it is currently technology-neutral, but wouldn't that be an ideal place to work toward?

Mr. Dean Del Mastro: That is what you would like to see. You would like to see a technology-neutral approach, where a digital levy would apply to all devices that store music.

Ms. Ferne Downey: We're sticking with MP3 players, and that next baby step will be adequate at this time.

Mr. Dean Del Mastro: But that's not your end goal. That's where you want to start. I understand.

Mr. Waddell, just to be clear, how many times should consumers pay for music? You said creators should be paid when people want to make a copy. If I'm following the rules and I buy a song on iTunes, I buy a licence to make five copies, but you're saying I should also pay a levy on the device I want to copy it onto. How many times should I pay?

Mr. Stephen Waddell: Mr. Del Mastro, actually, when you buy a tune on iTunes, you only get the opportunity to transfer it once. You don't get an opportunity to transfer it multiple times.

Mr. Dean Del Mastro: But I should pay more than once?

Mr. Stephen Waddell: The principle, Mr. Del Mastro, that we're speaking about is that copies have value—

Mr. Dean Del Mastro: Copies have value.

Mr. Stephen Waddell: —especially in the digital environment, in which you can create perfect copies.

Mr. Dean Del Mastro: But if I buy the right to make a copy, Mr. Waddell—

Mr. Stephen Waddell: If you buy the right to make a copy, you should pay for the right to make a copy, and that's all we're saying, Mr. Del Mastro.

Mr. Dean Del Mastro: And how many times should I pay for the right to make a copy, if I've already paid for the right to make a copy?

Mr. Stephen Waddell: You should pay when you buy the unit upon which you put that copy.

Mr. Dean Del Mastro: If I go to iTunes to buy a song, theoretically I'm buying it because I want to make a copy of it. But you're saying I should pay when I buy it on iTunes and I should pay it on top of the device I want to buy.

Mr. Stephen Waddell: That's correct.

Mr. Dean Del Mastro: That's correct. So I should pay at least twice and perhaps more often, because that—

Mr. Stephen Waddell: You should pay a small fee, Mr. Del Mastro, for the right to make the copy on that MP3 player.

Mr. Dean Del Mastro: And you can't understand why Canadians who are fed up with being nickel-and-dimed think that is unreasonable?

Mr. Stephen Waddell: Mr. Del Mastro, you're speaking for your constituency and we are speaking for ours.

Mr. Dean Del Mastro: Well, I would argue that you're not speaking for very many Canadians, who are prepared to pay fair value—

Mr. Stephen Waddell: That's not our information, Mr. Del Mastro.

Mr. Dean Del Mastro: —but are not prepared to see every single device—

Mr. Stephen Waddell: This committee has been presented with evidence, with surveys, and—

Mr. Dean Del Mastro: Mr. Waddell, you had your opportunity to present. This is now mine.

The Chair: Mr. Del Mastro, you have the floor.

Mr. Dean Del Mastro: Thank you very much.

I would argue, Mr. Waddell, that most Canadians are actually in a position in which they understand what's reasonable, and if they buy a song from iTunes and want to put it onto whatever device they want to put it on.... And there are multiple platforms of devices that store music; simply putting it onto MP3 players is certainly not your endgame on this. It is certainly not.

In fact, I would argue it's almost a deceitful approach to say no, we just mean this, but then you're going to transition to something much broader. Otherwise it's completely ineffective. Nobody will be buying MP3 players; it's an antiquated technology, the same as eight-tracks are an antiquated technology. People are moving beyond them, so it will be completely ineffective.

The bill is entirely technologically neutral. In fact, the bill doesn't even touch the digital copying levy. It doesn't touch it at all.

Now I'd also be interested to know this. You said that the expansion of fair dealing wipes out revenues. Can you explain to me which revenues the expansion of fair dealing wipes out, and why?

● (1145)

Mr. Stephen Waddell: May I speak now?

The Chair: Mr. Waddell.

Mr. Stephen Waddell: Thank you.

The fair dealing for the purposes of education wipes out $41.1 million, Mr. Del Mastro.

Mr. Dean Del Mastro: Why?

Mr. Stephen Waddell: It's because it would give the ability to users to create copies again—

Mr. Dean Del Mastro: No, it doesn't.

Mr. Stephen Waddell: —without compensating the writers of that material and the publishers.

Mr. Dean Del Mastro: The Supreme Court ruled that copying was consistent with fair dealing. Is that what they ruled?

Mr. Stephen Waddell: If made for certain purposes; yes, they did.

Mr. Dean Del Mastro: No. In fact they said that copying entire documents is not fair dealing. That's not factual. So what you've presented by saying that $41.1 million would be wiped out is in fact coming from a position of not understanding fair dealing and what the Supreme Court in Canada established—or frankly, what the Berne three-step test established. It's not true. Isn't that right?

The Chair: All right. Thank you, Mr. Del Mastro.

We're going to move to the second round of questioning, for five minutes.

Mr. Rodriguez.

[*Translation*]

M. Pablo Rodriguez (Honoré-Mercier, Lib.): Thank you, Mr. Chair.

[*English*]

Thank you all for being here. I hope you're having a nice day.

We're not inviting you guys to the same Christmas party, that's for sure.

You spoke a little about this being an attack on collective licensing. Can you elaborate on this?

And you spoke about an amount of $126 million that is at risk. Could you give us a bit of detail on what is in that $126 million?

Mr. Stephen Waddell: Thank you, Mr. Rodriguez.

Fair dealing for the purposes of education, in section 29, is $41.4 million; performance of cinematographic works by educational institutions would cost the rights holders $25 million; the non-extension of the private copying regime to digital devices takes $30 million out of the pockets of performers and rights holders; and the ephemeral recordings, section 30.9—the commercial radio tariff—takes $21.2 million out; and the broadcast mechanical, television, and other radio services is $8.6 million, for a total of $126.2 million.

Mr. Pablo Rodriguez: All right. Thank you for that clarification.

[*Translation*]

You expressed some concerns about the field of education, and we share them.

In your opinion, what impact would adding the word “education” have on our writers, publishing houses and creators? How would they be impacted by the inclusion of fair dealing for the purposes of education?

[*English*]

Mr. Stephen Waddell: Define education. Anything can be education. Sitting here certainly is an education.

The problem with the expansion of fair dealing to include education is that it's unfortunately just too broad. We would certainly want to see some fences built around, or more prescriptive wording than the simple, broad—

Mr. Pablo Rodriguez: Let's say we define education.

What is education for you? How should it be—

Mr. Stephen Waddell: I don't know. You can define it in so many ways. We would want to see specific—

Mr. Pablo Rodriguez: But in your case, what should be...? Would it be limited to universities and colleges, for example? Do you have an idea what should be—

Mr. Stephen Waddell: The problem is, as we say, that it's not defined. Watching a film can be educational.

It should be limited to specific research and so on, rather than just allowing unfettered use because of “educational use”.

Mr. Pablo Rodriguez: Okay. So your recommendation would be to take the word “education” out.

Mr. Stephen Waddell: That's right.

Mr. Pablo Rodriguez: If we don't go there, how about doing two things? The first one is to define education, limit it as much as possible, and then put a top test in that would limit the impact of this section.

Mr. Stephen Waddell: That sounds like a reasonable approach, Mr. Rodriguez.

Mr. Pablo Rodriguez: Okay. Thank you.

I think it was you, Mr. Lewis, who said, regarding ISPs, that safe harbours should be fixed. I think you were the one who said it; is that possible?

How can we fix that?

● (1150)

Mr. John Lewis: The bill as drafted provides too broad a safe harbour for what look like seemingly innocent hosting sites, which may have been designed for purposes other than for infringement. The specific language now restricts any type of liability, if they are specifically designed for that purpose. Well, they can be designed for that, but try to prove it.

Secondly, they can be manipulated for a whole host of other, more nefarious uses. That's one of the areas we see in which this bill has to be changed, for hosting sites—and they're proliferating.

With technology changes.... Every time I get a briefing, it's hard to stay on top of the technology changes, and we have to stay ever vigilant. That's one of the areas in which we see that action has to happen. If we don't go after the hosting sites, this will not have been a worthwhile exercise.

The Chair: Thank you very much.

We'll move to Mr. Cardin for five minutes.

[*Translation*]

Mr. Serge Cardin (Sherbrooke, BQ): Thank you, Mr. Chair.

Welcome, ladies and gentlemen.

Before I start, I want to get to one thing. Last week, I did not have time to put all of my questions and comments.

Witnesses alluded to potential losses of $21 million on ephemeral recordings. I want to respond to Conservative Party members who insisted on knowing where that figure came from. I can now tell them that it was pulled from a written statement by the Copyright Board of Canada. That would qualify as a credible agency. That is where the figure came from, Mr. Del Mastro. It appears, however, that the government never calculated the exact impact this could have on creators.

The committee also heard last week from officials from the Canadian Chamber of Commerce. Mr. Webster stated that copyright was a way of rewarding creators. It never even occurred to him that copyright was a form of remuneration for their work, their talent and their creativity. He maintained that it was a reward.

Potential losses of royalties through various ways were recently evaluated at $74 million. Some would even put this figure today at $126 million. If Mr. Webster from the Canadian Chamber of Commerce sees royalties as a reward, then what does he think of a bill that strips creators of $126 million in royalties? What does he think of this government initiative?

What have creators done to the government to deserve, not rewards, but reprimands and loss of income?

[*English*]

Ms. Ferne Downey: We don't know what creators have done to have such a loss of remuneration that currently flows. We always try to paint the picture very carefully that artists in Canada are very modestly remunerated, but your work has value and copies of your work have value. That's the only thing we have: what we create and what we make.

So the existing loss of income is already a particular thorn, let alone contemplating the beautiful world we could inhabit with the expansion of the digital platforms of distribution. I mean, it really should be a much.... There should be recompense for that work and for the distribution of that work.

[*Translation*]

Mr. Serge Cardin: SInce this is the Copyright Act, normally, one should have expected safeguards for creators, not a loss of income. The gains already made should have been guaranteed. The legislation could potentially have favoured development and enough creativity to satisfy other stakeholders involved, such as broadcasters.

Do members of the International Alliance of Theatrical Stage Employees receive payments directly?

● (1155)

[*English*]

Mr. John Lewis: The question I heard is that our members don't receive payments directly, and I'm assuming you're talking about on the levy side. No, the remuneration for most below the line...a crew, which are the members we represent, is paid on a hourly basis for hours worked. We don't have additional payment schemes that flow from the sale or exhibition of a product.

That's why, quite frankly, this isn't our issue. We haven't really commented under those facts, and as we see here again today, the focus of a lot of the debate has been on this one element, which I understand from my friends is a very serious and very important element. It's not to me.

The overall well-being of the industry is. It's my members' jobs that are being impacted. I heard $130 million as a number. That's a serious number. It's also the cost of one motion picture that's being shot in Montreal right now. It's that type of impact on the industry. It's the industry that's suffering and it's jobs that are suffering.

The Chair: Thank you very much.

We'll move to Mr. Lake for five minutes.

Mr. Mike Lake (Edmonton—Mill Woods—Beaumont, CPC): Further to that, actually, Mr. Lewis, could you elaborate? We tend to get bogged down in what people don't like about the bill, because that's typically what people want to talk about when they come here. As we have our deliberations as a committee and are hearing different ideas of what to change or what not to change, I'm interested in what aspects of the bill are most important to protect, from your standpoint.

And why is this bill so important? Or maybe how important is it for us to pass this bill, to make sure we actually pass it in this minority government context here, where we don't know if we're going to get through it? Certainly we won't at the pace we're at right now.

How important is this bill for your members?

Mr. John Lewis: It's crucial. It's interesting to note the change of attitudes. Every three years I get to attend a world conference with trade unions working in the film industry around the world. Four years ago, it wasn't on the radar anywhere. The IA was addressing it as a serious issue.

I just came back in November from a similar conference and it's all anyone's talking about in Europe, in Asia, and in Africa. This is impacting not just Canada but everywhere, and we are falling behind. You guys know this. We need to act and to move forward. It's impacting jobs.

We haven't tried to quote what the number lost is because then it becomes a mug's game of trying to nail down a number of what the loss is to the industry. But they are significant losses. It's not just for foreign service and the big studios, but it's also for the domestic industry, where financing is so precarious and producers are looking for every scrap they can to get a show made. If you take away any element in the revenue stream...it's integral to financing, and you're seeing shows drop off because of that.

Mr. Mike Lake: Thanks.

Mr. Waddell, it's interesting, because I'm a fan of music, movies, and television, and you actually, in your comments, kind of make me feel guilty. I like to think of myself as a customer or a client of the folks you represent, yet you come here and you hammer me over the head because I might want to actually take a song that I purchased and listen to it on my iPod. I just don't get that.

My wife has an iPhone, so she buys a song directly. She hears it on the radio, says she wants that song and she wants to buy it, and she spends her $1.29 to buy the song directly from her iPhone. You're saying, hey, that's not good enough, and you want a piece of the iPhone that she's going to listen to it on. I don't understand that.

By the way, the $75 comes from a Copyright Board proposal, just to clarify the record here. It's not a number that was made up. It was actually a Copyright Board proposal.

But how do you justify that? I don't get it.

Mr. Stephen Waddell: Thank you, Mr. Lake, for the question.

And no, I'm not coming here to hit you over the head. I'm just trying to foster some understanding of what our interests are. Our interests are in ensuring that creators get paid for their intellectual property rights, just as Microsoft gets paid for its intellectual property rights when it sells licences for software. If you use MS software on multiple devices, you have to pay multiple licences. That's the principle, and that's all we're asking for with respect to creators.

We're talking about a modest amount of money, Mr. Lake. Yes, it's $75. I'm a negotiator, I always start high and hope to find a place in the middle, a compromise that makes sense for all parties.

● (1200)

Mr. Mike Lake: Okay.

Now I want to move on from that subject. Again, I see kind of a theme here. We talk about the notice and notice thing, and again you used the word “infringer” several times in regard to notice and notice. I think the whole point of notice and notice is that we don't know if the person is an infringer or not. You're assuming the person is an infringer or you might make an argument that the person is an infringer. But the whole concept of notice and notice is that there's a notice given that someone believes that something is an infringement and then that sets the table—of course there's sort of an order of things that happen there where the ISP has to retain identifying information, for example, as a result of the notice.

You wouldn't cut off someone's gas simply because someone says that maybe they broke a rule or something. You kind of have to prove that they're not paying their bills before you cut off their gas, right?

Mr. Stephen Waddell: I don't think so. I think the gas company just cuts off your gas.

Mr. Mike Lake: They probably would have the proof that you're actually....

Mr. Stephen Waddell: Yes.

Mr. Mike Lake: They'd get in a lot of trouble cutting off people's gas when they haven't proven that there's-—

Mr. Stephen Waddell: Obviously it's got to go a month, or two, or three. Then they send bills, and then they have somebody come over. Eventually they'll cut off your gas.

Mr. Mike Lake: Just because you say someone's infringing, it doesn't mean they are.

The Chair: Thank you to our panel. Thank you to members of the committee.

We're going to take a short recess, and we'll come back with our second panel.

● (1200)

(Pause)

● (1205)

The Chair: We will call this 11th meeting of the special Legislative Committee on Bill C-32 back to order.

For our second panel, we have quite a number of witnesses representing three different groups. From the Art Dealers Association of Canada, we have Patricia Feheley, Johanna Robinson, and Miriam Shiell; from the Canadian Artists' Representation, we have April Britski and Anthony Urquhart; and from the Regroupement des artistes en arts visuels du Québec, we have Christian Bédard and Nadia Myre.

We will hear from the Art Dealers Association of Canada first. You have the floor for five minutes.

Ms. Patricia Feheley (Member of the Board of Directors, Art Dealers Association of Canada): Good morning. My name is Patricia Feheley, and my colleagues and I represent the Art Dealers Association of Canada. We would first like to thank the chair and the honourable members of the committee for inviting us to appear today.

The ADAC is the only national association representing professional commercial art galleries and dealers. We are the major driving force behind the art market. I'm appearing here today with two colleagues from the ADAC: Johanna Robinson is the executive director of the association; Miriam Shiell is the immediate past president and is a senior dealer in both the Canadian and international art markets. I have a commercial gallery specializing in contemporary Inuit art as well as selected first nations artists.

The art market in Canada is increasingly fragile. Consumer spending on art in Canada plunged between 2000 and 2008 by 20.3%. Exports of works of art, central to sustaining a strong Canadian art market for our artists, fell in the same time period by over 25%. The average artist's income is pitifully low.

We did not prepare a formal brief regarding Bill C-32 because we have few objections to the majority of the provisions and because this is better addressed by our colleagues in the other cultural subsectors. Most of the provisions of Bill C-32 support our own view that it is essential that all creators retain not only control over their works but also rights to any secondary revenues.

We're particularly supportive of mandating a review of the Copyright Act every five years. In fact, we agreed to appear here today simply because we have been aware of a concerted effort to include in Bill C-32 a provision for artist resale rights or *droit de suite*, a provision that would allow certain artists to share in revenues from secondary market sales of their works. For the remainder of this statement, I'll refer to this provision as ARR.

Our position is simple: it is premature and it would be irresponsible to add these rights into Bill C-32 at this time. There are many negative aspects that must be considered. It is an extremely complex issue, one that could affect the art market in this country. This impact could be serious enough to warrant considered thought, research, and consultation, which takes time. In our estimation, this time will not be allowed if ARR is added to Bill C-32 at this late date.

Consider the following. We are the business professionals who are most intimately connected with the local and international art market. Neither the ADAC nor the auction houses, which are also major stakeholders, have even been consulted on this issue. Consider the countries that have signed on to the ARR. The United States, with the exception of California, has not implemented it, nor has Asia. The former is the strongest market for Canadian contemporary art; the latter is considered one of our fastest-growing art markets.

A considerable amount of the European art market has been moved to Switzerland, a major European art centre. Switzerland does not recognize it. In Europe there are fundamental problems with the design and implementation of the ARR. Protests have been lodged, both by dealers and by artists. A considerable amount of the European art markets have moved to Switzerland and even to New York.

Based on the European experience, ARR will most often have to be absorbed by art dealers. Typically, commissions for secondary market sales range from 10% to 20%, as we must compete with the auction commissions. An additional 5% is considerable, and it will have to be factored into the resale; that is to say, the resale price will go up. Ultimately, it is the consumer who will pay. Knowing that a 5% tax will be assessed when a work is sold could be a major disincentive to collectors in a fragile art market, particularly, as happens frequently, if the collector is selling at a loss.

It is our opinion that much of the secondary art market will either go underground or leave the country, masking any gains to artists' reputations that the secondary market has.

● (1210)

The expense should also be considered. Both small business and government will have to ensure that it is properly implemented and monitored—for instance, monitoring for compliance when it goes outside the common marketplace, such as to eBay sales. Revenue Canada will have to consider the ARR for both deductions and donations.

Most importantly, secondary market sales that would be counted for ARR account for only a very small portion of the total art market in Canada. Within this small proportion, the benefits will accrue only to a small percentage of artists.

According to a recent study of the ARR in Britain, the top 10% of artists shared 80% of the total amount collected.

In France, 70% of the amount collected goes to seven artists and their families.

The Chair: All right. Thank you very much. We're going to have to wrap it up.

Maybe you can expand a little bit more during the round of questioning.

● (1215)

Ms. Patricia Feheley: Thank you very much.

The Chair: Thank you.

We'll move along now to the Canadian Artists' Representation.

Ms. April Britski (Executive Director, Canadian Artists' Representation): Good afternoon.

I'm April Britski, national director of CARFAC. With me is member Tony Urquhart, a visual artist from Colborne, Ontario.

CARFAC is the national association of professional visual artists, of which there are approximately 17,000 across Canada.

We thank you for the opportunity to speak today about copyright as it applies to visual artists.

We are pleased with some aspects of the bill as presented, including new rights afforded to photographers, portrait artists, and engravers. We also have some concerns about certain amendments, which our colleagues from RAAV will speak about more specifically.

I will focus on a proposed amendment that artists would like to see added to the bill, the artists' resale right, or *le droit de suite*.

The artists' resale right entitles visual artists to receive a percentage royalty payment from all subsequent public sales of their work, through an auction house or a commercial gallery. The resale right would allow artists to share in the ongoing profits made from their work.

The full value of an artwork is rarely realized on the first sale of an artwork. It is common for art to appreciate in value over time, as the reputation of the artist grows. An example of this is the recent sale of one of Mr. Urquhart's pieces, titled *The Earth Returns to Life*, which sold for approximately $250 in 1958 and was resold by Heffel Fine Art in 2009 for $10,000.

The addition of the resale right will mean a new income source for visual artists. This is important, because half of all Canadian visual artists earn less than $8,000 a year, with average earnings of $14,000. Senior artists, who are most likely to have work in the secondary market, have median earnings of $5,000. We've found that even award-winning senior artists find it difficult, if not impossible, to earn a living from their art.

Additionally, many aboriginal artists, particularly those living in northern isolated communities, are losing out on tremendous profits being made on their work in the secondary market, where price markups are dramatically higher.

Canadian artists are missing out not only on royalties from work sold in Canada, but also when their work is sold in other countries. Once established in Canada, artists would benefit from reciprocal arrangements with other countries where the resale right exists, and it would align Canada with our trade partners in those countries. The law was first introduced in France in 1920 and has since been legislated in 59 countries worldwide, including the entire European Union, and more recently in Australia. We base our proposal on the experience of how the right has been applied elsewhere.

The Canadian art market is growing, and auction sales break new records every year. A sale last November of Alex Colville's piece, titled *Man on Verandah*, resulted in a record-breaking hammer price of $1,287,000, purported to be the highest sale achieved for a living Canadian artist.

Twelve other personal-best records were broken that evening. Most artwork sold in that sale fetched much lower prices, but if the artists' resale right had been in place, senior artist Rita Letendre would have received royalties of $790, and a young and newly established artist like Kent Monkman would have received $4,400.

These are hardly figures that will cause a multi-million dollar market to collapse, and yet they are meaningful nonetheless. While the market grows, artists currently receive no profit from those sales. It is important to remember that this is a royalty based entirely on commercial sales of an artist's work and will cost the government nothing.

With copyright, ownership and duration of rights are more complex than they are for most other physical objects, such as houses or cars. Artists retain their copyright when their work is sold, unless they assign them. With respect to visual art, we're talking about intellectual property, related to a physical object. Other artists, such as writers and composers, retain the right to financial benefit from subsequent uses of their work.

The resale right acknowledges that an artist is an important contributor to their work's value, and without the artist, the artwork simply would not exist.

Thank you.

The Chair: Thank you very much.

We'll move along to the Regroupement des artistes en arts visuels du Québec.

[*Translation*]

Mr. Christian Bédard (Executive Director, Regroupement des artistes en arts visuels du Québec): I would like to thank the members of the committee for inviting us to speak today. I am Christian Bédard, Executive Director of the Regroupement des artistes en arts visuels du Quebec (RAAV), which represents over 3,000 visual artists.

I am accompanied by Nadia Myre, a well-known first nations artist from Quebec. Her work has been exhibited throughout Quebec, Canada and the world.

Along with CARFAC, RAAV is asking for the inclusion of the artists resale right in the Copyright Act. To illustrate the importance of that, I want to share with you the story of one Quebec artist. A painting by Marcel Barbeau was practically given away in the 1950s. In 2008, it was resold by the heir of the person to whom it had been given, fetching $86,000. The proposed royalty rate of 5% would have helped the artist, who is ill and can use all the income he can get.

In addition, RAAV would like to underline other aspects of Bill C-32 that we are concerned could pose serious problems for visual artists in Canada and Quebec. These artists are, for the most part, self-employed workers who are trying to make a living from their artwork. The federal government should not undermine their capacity to do so.

Since the recognition of the exhibition right in the Copyright Act, in 1988, many visual artists have seen their income grow substantially. Unfortunately, the mention of a cut-off date in the act, June 8, 1988, means that all works produced before that date are not covered by the exhibition right, which effectively discriminates against senior artists. That is why we respectfully ask the members of this committee to stop the discrimination against aging artists by removing the following words in the Copyright Act: "created after June 7, 1988".

RAAV salutes the government's intention to recognize the copyright of photographers, printmakers and portrait artists. But clause 38 of the bill reduces the capacity of these artists to be fairly remunerated for the uses of their works. That is why we are asking the committee to recommend the complete withdrawal of clause 38 from Bill C-32, in order to allow photographers, portrait artists and printmakers to fairly share in the wealth created by their work.

Finally, no other clause of Bill C-32 may be as damaging to visual artists in Canada and Quebec as the one including education among the fair dealing exceptions. This new exception will likely become a permanent source of lawsuits between artists, on the one hand, and organizations and individuals that claim to be providing educational services, on the other hand. Artists cannot afford to pay astronomical legal bills.

For visual artists, all of the income from classroom presentation of their works could be at risk, just as reproductions in textbooks could no longer be subject to remuneration. Our biggest concern is that public galleries may claim they fall under this exception because their mandates include education. Galleries are the main source of copyright income for visual artists. Because we don't know what a judge will decide is "fair" in our artistic sector, it is quite possible that this main source of income for visual artists will dry up for good. That would mean the end of the exhibition right for which we have fought so many years to obtain.

Consequently, along with more than 90 other cultural organizations that have signed the Canadian Cultural Industries' Joint Statement on Bill C-32, we are asking for the withdrawal of this clause from the bill. These recommendations may seem incidental to you, but they are very significant for visual artists. Canada must not hurt the daily efforts of its visual artists to achieve financial independence.

I will stop my presentation there to leave time for discussion of our recommendations.

● (1220)

[*English*]

The Chair: *Merci*.

We'll move to questioning.

We'll go to Mr. Rodriguez for seven minutes.

Mr. Pablo Rodriguez: Welcome.

[*Translation*]

Good afternoon and welcome.

Let's set aside the technical and legislative considerations related to artists resale right, for the moment. If we look at the issue from a more human and logical perspective, it does not seem all that unusual for individuals who have created something to be compensated when their work is resold, if only a small return on the selling price. I know of a number of paintings that have been sold at extremely high prices without the artists receiving a dime, even when they and their families were very poor. All the while, their works were being sold at auctions, where people were concerned about who the highest bidder would be.

I understand your concerns, but the system appears to be working in 59 countries. I do not believe their markets collapsed. It will be a challenge for you, but I do not think the market will collapse, as a result.

I would like to hear your response to their statement that, in European countries or certain ones, the top 10% of visual artists received 80% of the income. If we include this measure in the bill, are we helping the already rich and famous? Could the measure benefit a lot more people than that?

● (1225)

[*English*]

Ms. Miriam Shiell (Past President, Art Dealers Association of Canada): May I reply?

Mr. Pablo Rodriguez: If you want to reply right now, go ahead.

Ms. Miriam Shiell: The answer is yes, and the experience has been—and the most recent data comes out of Britain, who are newcomers to the ARR—that 80% of the collected funds go to 10% of the artists, most of whom are the superstars of the art market. So there is no real evidence that this is actually helping the average artist in the field. The amounts that are going to artists are trivial after expenses, which are, by the way, quite considerable.

So it's a band-aid solution. It's an excuse for making other real changes to how artists receive....

The best way that artists can make a living is by a healthy art market. Using a few examples of superstar artists at auction is not reflective of the true art market.

Mr. Pablo Rodriguez: But I think you don't perceive things that way. Do you have any comments on that?

Ms. April Britski: My understanding is that when they introduced the law in the U.K., they made the threshold minimum sale price that's eligible for the resale right be roughly a thousand pounds. That actually was a recommendation so that more artists who are not the Damien Hirsts of the art market would receive more royalties.

If I look at a sale that happened in Canada, for example, in November at Heffel Auctions, there was one piece, as I mentioned, that was sold for $1.3 million, but the majority of resale royalties that would have gone to artists involved in that auction would have been considerably lower. There were about 13 artists involved in that sale where the royalties would have been between $350 and $4,400. So the majority of artists involved in that auction were not the big art stars who would be receiving huge royalties.

Ms. Nadia Myre (Visual Artist, Regroupement des artistes en arts visuels du Québec): Can I jump in for a minute?

Mr. Pablo Rodriguez: No, just a second.

[*Translation*]

If I understand correctly, Mr. Bédard, there is also a component of reciprocity. As long as Canada does not extend the resale right to its visual artists, they cannot collect royalties when they work in other places, such as in Europe, where the resale right does exist. Is that correct? We must recognize the resale right here in Canada, before our artists can benefit from that same right elsewhere, under a reciprocal arrangement.

Mr. Christian Bédard: Precisely. As with any copyright agreement, the principle of reciprocity applies.

Clearly, if Canada does not adopt the resale right, Canadian and Quebec artists whose works are sold in European countries such as France or England—where that right does exist—will not be able to benefit, much the same as foreign artists cannot benefit here in Canada. It is a matter of reciprocity.

Mr. Pablo Rodriguez: Very well.

[*English*]

Do you want to respond quickly?

Ms. Miriam Shiell: As an international art dealer, I have to pay ARR every time I buy at auction in Europe, so we are being penalized in the marketplace here.

● (1230)

Mr. Pablo Rodriguez: Are you saying that you have proof that it hurts the market?

Ms. Miriam Shiell: It hurts the market, yes.

Mr. Pablo Rodriguez: Do you have proof of that?

Ms. Miriam Shiell: Yes, because you are charging every time title is passed. The difference, perhaps, between the art market and the other people appearing here today is that we're not talking about intellectual property. We're talking about an object. The artist made an object.

Mr. Pablo Rodriguez: Yes, but you need it. You need their stuff. They have to produce it. They have to paint it for you to sell it and for you to make money, right?

Ms. Miriam Shiell: You're also making assumptions that the secondary market, which is absolutely minute in this country—maybe 10%, 15%, or 20% of the total art market, which, at the very best, may be $1 billion a year—

Mr. Pablo Rodriguez: So the visual artists are wrong. That's for themselves. They're wrong about the whole situation.

Ms. Miriam Shiell: We're saying that it is the wrong approach for solving the issue of artists' income in this country. This is a band-aid solution.

Mr. Pablo Rodriguez: It's a permanent solution, not a band-aid solution.

Ms. Miriam Shiell: It's a permanent solution, believe me, but it's not the answer, and the cost of administration for small business—

Mr. Pablo Rodriguez: Nobody is saying it's the answer to everything. I personally think it's part of the solution, but there are other things we should add.

Ms. Miriam Shiell: It will do harm to the marketplace, and therefore you will harm your artists. There is proof in Britain that dealers are changing their dealing habits; they are not supporting emerging artists because of the increased liability cost. I don't mean liability in the legal sense, but in the sense of the increased cost of administering ARR. So they're choosing to go elsewhere.

[*Translation*]

Mr. Pablo Rodriguez: Do you want to comment?

[*English*]

Do you want to respond to that?

Ms. April Britski: Yes. We've actually had different figures coming from Britain. I understand that in 2007, an independent survey was taken of artists and art market professionals on the subject of the resale right, and they said that over 60% of art market professionals say that the resale right takes them less than five minutes and costs less than £10 per quarter in administration. And 87% of them said that the resale right has not damaged their business.

I would also say that it can be argued that the resale right will, for the most part, affect auction houses rather than commercial galleries, because 97% of the Canadian resale market is within our auction houses rather than in smaller galleries.

The Chair: Thank you very much.

We're going to move to Madame Lavallée, *pour sept minutes*.

[*Translation*]

Mrs. Carole Lavallée: Thank you very much, Mr. Chair. I find this discussion fascinating because it highlights two aspects of the bill. First, we are seeing just how imbalanced the bill is. On one hand, you have the Art Dealers Association of Canada, which represents businesses and is by no means struggling, and on the other, you have the artists, who are clamouring for the resale right, a right that already exists in 59 other countries.

Second, the Conservatives and the opposition parties are divided on a fundamental principle, as are the artists and the art dealers, if I may say so. That principle is this: the creative work belongs to the creator. And that notion does not come from me, but from the great philosopher John Locke. England's Queen Anne enacted the first ever copyright law based on that very philosophy. I find that extremely fascinating. And that principle is clearly front and centre today.

We could, as Ms. Shiell just said, reduce the work to a material object and say if it is sold, it is sold. We could also ask, as Mr. Del Mastro did earlier, how many times are we going to pay for a CD. When you buy a CD, you buy the right to use that CD to listen to the content on it. Assuming that the creative work belongs to the creator, as soon as that artistic content is copied onto another device, the artist should, at the very least, be compensated.

My understanding is that you want visual artists to have the resale right. Mr. Rodriguez said it was a matter of common sense, pure and simple. Of course it is, and why you ask? Because the work belongs to its creator. Therefore, regardless of the fact that the work may simply be a material object in the eyes of many—a material object about which there is much speculation—the fact remains that what art lovers are buying is the pleasure to enjoy their purchase, the pleasure to watch it. Nevertheless, the work itself remains the property of the creator, and in light of that, we should indeed be giving artists the resale right, as is the case in other countries around the world. Most importantly, we should not be depriving artists in Quebec and Canada of what they are due when their works are sold abroad.

I can certainly ask you questions, but I do not see how we can disregard such an important right for visual artists.

My question is for the Regroupement des artistes en arts visuels du Québec. In one of your documents, you say, and I quote: “that the private copying regime be extended to all apparatuses used to navigate on the Internet”. You say it should also apply to visual artists. Could you please elaborate on your proposal.

● (1235)

Mr. Christian Bédard: As you know, the content being downloaded nowadays is more than just music; it is movies and visual artwork. Just yesterday, we heard that Google now has a tool allowing users to visit certain large museums online, in the same way that Google Earth enables users to explore the world. So people will be able to visit a museum, enjoy the museum experience and view works of art up close—remotely. As a result of this tool, works of art will be copied, stored, downloaded and used in a variety of ways. Visual artists should absolutely be able to benefit from the income and economic impact of this tool. The digital economy is based on content, the creators of which must be compensated in one way or another. I think it is important to understand that the private copying regime should apply to every apparatus, and every artistic discipline should benefit accordingly.

Mrs. Carole Lavallée: Which collective copyright management organization currently pays you royalties and for which type of use?

Mr. Christian Bédard: Collective copyright management organizations such as Copibec and Access pay royalties when the artistic content is used in academic settings, including reproduction and classroom presentation of the work. The royalties are minimal. In Quebec, they represent around $300,000 to $350,000 a year. That may not seem like much, but it makes a big difference to a struggling artist when they receive a $400 cheque right before Christmas. What's more, Quebec offers a tax credit on copyright income, which, by the way, the federal government should also do. So there are benefits.

The rest of the income comes from visitor fees at museums, artist-run centres and exhibit galleries. This represents a much larger amount—although still not enough—for the right to exhibit a work of art in a public place, other than for the purpose of selling or leasing it. There are also reproduction rights, in order to reproduce a work of art for marketing purposes, whether commercial or not, for catalogues or for the Internet, among other things. So royalties should be paid for these activities, and some are.

Mrs. Carole Lavallée: You mentioned a tax credit. The Quebec government does indeed provide a tax credit on royalties received by artists in every discipline.

Is there a limit?

Mr. Christian Bédard: Yes, the tax credit can be as high as $15,000, for a maximum income of $30,000. Above that threshold, the tax credit decreases and disappears completely when the income reaches $60,000 or higher.

Mrs. Carole Lavallée: You said there is no such federal tax measure.

Mr. Christian Bédard: Unfortunately not, but there should be.

Mrs. Carole Lavallée: So you pay taxes on copyright income, even on that $400 you get right before Christmas.

Mr. Christian Bédard: Yes.

Mrs. Carole Lavallée: How much of the total paid out by Copibec goes to visual artists?

Mr. Christian Bédard: For each artist, I believe the maximum is $650. Approximately 3% to 4% of the total amount collected by Copibec is paid out to visual artists. It should be more, but we are in talks with Copibec, as we speak. They are pretty small amounts as compared with the big numbers, but they are significant to individual artists, nonetheless.

● (1240)

The Chair: Thank you.

[*English*]

Mr. Angus, for seven minutes.

Mr. Charlie Angus: Thank you very much.

Thank you. This is a fascinating discussion. I would say that we've had two excellent weeks in the world of art. We saved those Riopelles in Montreal. That would have been a disaster for our country, so thank God for the Montreal fire department.

Second, in contradiction to Monsieur Bédard, I think the Google Art Project is one of the most exciting initiatives I've ever heard of, up there with Google Books, which has taken books that were out of print and has given us access. People from around the world are going to be looking at these digital museums and wanting to go there and find out more. So I think the potential is enormous, and we should be encouraging the ability of people in every small community in this country and around the world to see art, because they're going to want to go see it in person.

The question we're talking about here, it seems to me, is very much a technical dispute between dealers and the artists, and we're being asked to sort of come to some understanding of what is fair ground. The issue of fair ground is important.

What are the commissions that are generally put on the sale of an artist's work?

Ms. Patricia Feheley: As I said in my paper, on a secondary market sale, the commissions would range up to and no more than 20%, sometimes less than 10%, simply because those are the auction commissions. So it's not the 50% that has been bandied about.

Mr. Charlie Angus: But on original work—

Ms. Patricia Feheley: That's on secondary market sales, because effectively the art dealers are acting as brokers between a buyer and a seller.

You just finished saying this is between artists and art dealers, and I do take exception to that. What we are saying is, effectively, art dealers and auction houses...this will be passed on, so I think we need to put that on the table.

Our concern is the well-being of the art market in general. It's not an antagonism between the two.

Mr. Charlie Angus: So what would you say would be the commissions that are being asked of your artists? Is it 50%?

Ms. Miriam Shiell: That's in the primary market. We have to make a distinction here between the primary and the secondary market because the ARR is only specific to the secondary market.

There is one fundamental difference, again, with respect to Madame Lavallée's....

When you sell an artwork, title has passed. I find that somewhat different from downloading and all the complications of downloading. The title has passed. That's a legal thing. That artist has sold that work.

There are also some real misunderstandings about whether or not the artists participate in their secondary market. We hear about these auction prices, and it's very interesting that the auctions are not in fact represented at this table. I think that's quite a questionable thing. But every time a shrewd dealer will use and manipulate those prices to revalue those inventories, which in fact will include the artist's work, because the auction prices are effectively the Dow Jones of the marketplace.... So the artists are participating over the lifetime of their career in the increased prices. It's impossible to use these kinds of arguments that a work sold for $250 in 1955, with apologies to Tony—

Mr. Charlie Angus: Sorry. I'm going to have to move on because we only have seven minutes. I'm not trying to be rude here. I'm just trying to get as many questions in as possible.

Mr. Urquhart, you have a long experience in this. You've said 50%. Now, is it common that the artist is often asked to absorb costs such as insurance, shipping, framing, some advertising costs? Is that common?

Mr. Anthony Urquhart (Member, Canadian Artists' Representation): Yes. I usually figure if you make, say, $20,000, if you sell that, then you might end up with $8,500 or so because the commission is 50%. But then you split the costs of advertising and opening, that sort of thing.

● (1245)

Mr. Charlie Angus: Madam Myre, are you a working artist?

Ms. Nadia Myre: Yes, I am.

Mr. Charlie Angus: Do you feel there needs to be better contractual relations between the individual artist and the dealer to protect the artist's rights and that these would then actually be put into clear contracts?

I know in the case of Rebecca Belmore, she's being sued by her dealer. It raises questions. Are we looking at the need to re-establish terms and which artists have some contractual rights?

Ms. Nadia Myre: I totally think that artists and dealers should have mandatory contracts. Right now, often they're by word of mouth or through e-mail, and they're not written at all. The practice isn't there.

As a working artist, I do disagree with Miriam Shiell. I think any amount of money that an artist can receive is worth it, even if it's $250. In my own career I've seen the value of my work go up, through a very important piece I've made, by $5,000. That's through my hard work and diligence. I think I should receive 5% of that. That's not an unfair demand. Even 5% isn't a full 5% if you take into account that you have copyright collectives administrating those fees and managing that money, as we're proposing. So I think that's a very small and reasonable thing to ask for.

Mr. Charlie Angus: Monsieur Bédard, with your organization I understand there are some resale rights being written into certain contracts now, like in Nunavut. Is it the ability of a collective to write in a resale right, or does it have to be legislated by law because it's a sale of property?

Mr. Christian Bédard: It would need to be included in the law.

Certain artists will include it in their contracts. It is up to the seller or the reseller or the owner of the artwork to respect it or not. But definitely it cannot be left unlegislated. It has to be included in an act. I think the Copyright Act is the right place to do it, and now would be the best time for Canada to reach the international standards that are being established now, because 59 countries have it already.

Mr. Charlie Angus: Is there dealer support for standardized contracts so that there's a...?

Ms. Miriam Shiell: We have no problem with that, and we believe it actually exists in practice. Reputable dealers have "understandings contracts" with their artists. By tradition, a handshake is also a contract and is legally binding. But in the clarification of the minutiae of a dealer, there is no issue with contracts. If it was standardized, the Art Dealers Association would be happy to do that for our members. We represent 90 galleries across the country. Our 3,500 artists are the working artists that are effectively selling in the marketplace.

There are a few things that keep getting thrown around here. Of the 59 countries, a vast number are the EU countries that are compelled by other forces to become part of this and cannot act independently, so to speak.

The Chair: Thank you. We're going to have to end there.

Ms. Miriam Shiell: Britain came in because of that.

The Chair: Thank you.

We're going to move to Mr. Braid.

Mr. Peter Braid (Kitchener—Waterloo, CPC): Thank you, Mr. Chair, and my thanks to our witnesses for being here.

Ms. Feheley, in your presentation you described the art market as fragile. Could you explain why that is? Secondly, what could we do to make it stronger?

Ms. Patricia Feheley: We have to be realistic and say that the recession has not helped it, by any means. The Canadian art market is always fragile because we simply do not have the population to support the number of artists we have. So for those of us who work to promote the work of artists, it's very much an uphill battle. It's important to get it out of Canada, to get it out globally, because our art market is not big enough.

It's particularly fragile at this time, but you have to remember that the art market is cyclical, like everything else. It goes up and down. It will be more fragile sometimes than other times. I think we have to be careful about imposing something that remains in place.

● (1250)

Mr. Peter Braid: Absolutely.

So our largest markets are outside of the country. You mentioned the U.S.; you mentioned Asia. I presume that includes aboriginal art?

Ms. Patricia Feheley: Yes.

Mr. Peter Braid: Is that a fair statement?

Ms. Patricia Feheley: Absolutely.

Mr. Peter Braid: Very good.

Ms. Shiell, you were about to provide an answer to a question from Mr. Angus that he didn't want to hear and he stopped you. You were about to explain the flaws in the comparison between what a piece of art received in 1958 versus what it receives now. Could you elaborate on that?

Ms. Miriam Shiell: That argument is totally bogus. I had to ask Tony Urquhart sitting here what his studio rent was in 1959. In 1959, the art market was so tidy that any artist would have been grateful for any sale, and any sale would have made a huge difference in their livelihood. Not that we're saying that it is not so today. Any sale is important to any artist. But to say it was $250—inflation took its toll. In fact, if that artwork is now selling for $10,000 at auction some 60 years later, we're probably losing money on it. And the issue of losing money is one that hasn't been addressed yet. If you're applying the ARR across the board to all secondary market sales, how do we know whether or not that seller is losing money? And if he is losing money, is the government going to allow that deduction as part of a capital loss?

Increasingly, we must also look at who's going to bear the cost of the ARR. Essentially, the wealthy are the major art-buying public. So we're looking at taxing them again. Money will go to where it gets the best return, so it will go where it doesn't have to pay these increased costs. It will in fact go underground. I think that's a real issue, because this is a marginal market in the first place.

Mr. Peter Braid: So one of the things we want to avoid is the black market?

Ms. Miriam Shiell: We want to avoid grey markets. We want to avoid black markets. We want to avoid things like collector-to-collector deals, where the dealer is brokering and no taxes are being paid. These are practices that are going on all the time. New York is the biggest art market in the world, and it's right on our doorstep. It is the elephant in the room, there's no doubt about it, and we should always recognize that.

The British art market is $18.5 billion a year, compared with the Canadian market, which, in the 1990s, was half a billion dollars a year. If we want to be generous, we could say it's now a billion dollars a year. It's probably something considerably less than that. We don't have any recent numbers from Stats Can to be able to give you that definitively. It's tiny.

Mr. Peter Braid: Thank you very much.

I want to move to Ms. Britski, just in the interests of time. To begin, for a point of clarification, Ms. Britski, are you aware that the ARR and the exhibition aspect as well, which our colleagues from Quebec have spoken about...that these two proposals are outside the scope of Bill C-32 and as a result, for all intents and purposes, are outside the scope of discussion at this committee?

Ms. April Britski: I know the resale right currently isn't in the bill, but there is a section that does refer to sales, which Christian knows more about. But I do believe this is the best place to introduce the resale right, because, as you all know, it can take years to push copyright amendments through—

Mr. Peter Braid: We're seeing that, yes.

Ms. April Britski: Yes. I think it's important to note that Canada was the first country in the world to make it so that artists, when they exhibit their work in a public gallery, receive a fee, and that right is in the exhibition right in the Copyright Act. It breaks my heart that we will, at best, be number 60 to get the resale right.

With respect to the other countries that don't have it, I say at best we'll be 60, because I understand that the U.S., Japan, Switzerland, and I believe Venezuela are all actively pursuing it right now.

● (1255)

Mr. Peter Braid: We heard from the Art Dealers Association of Canada that one of their concerns about the ARR proposal is they feel there hasn't been sufficient consultation about this. Could you respond to that? Could you tell us what consultations you have done, what consultations CARFAC has done?

Ms. April Britski: We've conducted a number of information sessions across the country, with artists primarily, and intend to do more. We've consulted widely with other countries about how the resale right works, how it's administered, and what kind of impact it's had on the market. We've talked quite a bit internationally to find out what kind of impact it will have.

We have heard from some dealers and some auction houses about their points of view about how it would work, and some are in support and some obviously are not. But there has definitely been some consultation.

Mr. Peter Braid: Ms. Feheley, you explained that the experience in Europe, to say the least, has been contentious. Could you just elaborate a little?

Ms. Patricia Feheley: I think I have to put something on the table. There have been two...well, in fact, one book and another major report published in the last two to three years that very definitely include a lot of information about the difficulties ARR has caused in other countries.

Nowhere in any of the material I've read here in Canada about this or pertaining to this discussion have these been referenced. We have the text of one, which was texted to us in the last couple of days. We had a week to prepare for today or we would have had a much bigger brief.

I think we have to recognize that a lot of the statements that are being made are simplistic, and they're also based on older data. There is considerable new evidence of the problems with ARR, particularly in Europe.

Unfortunately, I can't quote the 26 pages, but I can certainly provide the references for anyone who wants to pursue it further.

The Chair: Thank you very much. That will have to be the last word. Well....

Ms. Miriam Shiell: May I just give one example?

The Chair: No, we are out of time. I'm sorry, we have to be fair with our rounds and we're pretty well fair on that.

Thank you to the witnesses for being here today and for their informative presentations.

This meeting is adjourned.

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