Submission of the

Business Coalition for Balanced Copyright

To the

Legislative Committee on Bill C-32

January 27, 2011

Introduction

1. The Business Coalition for Balanced Copyright ("BCBC") is pleased to submit these comments to the Legislative Committee on Bill C-32 ("the Committee") for consideration during the Committee's examination of that Bill's potential changes to the *Copyright Act* ("the Act").

2. The BCBC is a coalition of Canada's leading communications, retail, Internet and technology companies and organizations. It was formed in 2007 to provide its members with a vehicle through which to engage in public consultations on copyright reform in Canada.

3. Its members include the Canadian Association of Broadcasters, Canadian Association of Internet Providers, a division of CATAlliance, Canadian Cable Systems Alliance, Canadian Wireless Telecommunications Association, Computer and Communications Industry Association, the Retail Council of Canada, Bell, Bell Aliant, Cogeco Cable, EastLink, eBay, Google, MTS Allstream, Rogers, SaskTel, TELUS, Third Brigade, Tucows, and Yahoo! Canada.

4. BCBC members collectively invest billions of dollars to develop and deliver innovative new products and services to Canadians. These products and services provide the essential links through which consumers can access and legitimately acquire copyright-protected material and include millions of dollars in payments to rights owners.

5. The BCBC understands that in order for Canada to fully develop a sustainable digital economy, we need copyright legislation that (i) rewards creators; (ii) promotes legitimate markets; and (iii) provides consumers with the ability to lawfully access and use content in a way that maximizes the advantages that digital technology provides.

6. While other stakeholders often try to characterize the interests of consumers as being opposed to the interests of creators, the BCBC has always tried to support a middle ground where consumer expectations are met in a way that preserves for creators a legitimate economic market for their creations.

7. The BCBC recognizes and appreciates Parliament's clear commitment to strengthening intellectual property and copyright laws in Canada.

8. The BCBC supports the stated objectives of passing Bill C-32, which include:

    (a) Providing Canadian creators and consumers the tools that they need in order to enhance Canada's international competitiveness;

    (b) Effectively addressing the interests of all Canadians — from the creators of content to the ultimate consumers; and

(c) Providing a flexible framework for copyright legislation which can be readily adapted to fit an ever-evolving technological enviroment and which can create jobs, help stimulate the Canadian economy and attract new investment to Canada.

9. Although the Bill goes a long way to meeting these stated objectives, the BCBC is of the view that the Bill needs a few amendments in order to better achieve the intended results, more effectively balance the interests of all Canadians and to ensure that the *Copyright Act* can continue to adapt to an ever-changing technological environment.

10. Our position, which is explained in detail below, is that the objectives of Bill C-32 can be furthered by referring to these principles:

(a) **Copyright should promote and not stifle technological innovation**. While copyright should protect rights holders' ability to benefit economically from their work, it should not interfere with consumers' legitimate expectations nor include additional payments simply related to the technology used. For example, consumers should be allowed to move content they have purchased between multiple devices, engage in format shifting, and take advantage of remote storage and cloud computing services, without incurring additional copyright liability.

(b) **Copyright should impose reasonable obligations on intermediaries, while protecting them from legal liability and uncertainty**. Intermediaries provide consumers with the tools they need to connect online, such as internet access services, mobile connectivity, content aggregation, search functions, social networking sites, and hosting services. Intermediaries can be expected to promote the legitimate use of their services, but should not be subject to requirements or obligations that are inconsistent with their functions.

11. The BCBC is pleased to provide its recommended amendments which its members feel would better forward the objectives of Bill C-32. Please note that any references to section numbers refer to section numbers of the *Copyright Act* as amended by Bill C-32.

The coalition would also like to take this opportunity to express its support for certain provisions of the Bill which implement those objectives well.

The BCBC's suggested amendments to Bill C-32

A. The "enabler" provisions should be modified to protect innocent actors

12. As drafted, the Bill makes legitimate search engine operators potentially liable for providing links to sites that are designed to enable acts of infringement. It should be modified in order to ensure that innocent actors are not unintentionally made liable.

Proposed Amendment

27(2.3) It is an infringement of copyright for a person to provide, by means of the Internet or

> another digital network, a service that the person ~~knows or should have known is~~ designed or operates primarily to enable acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.

B. Consumers need appropriate personal use exceptions

13. It is very important that common consumer uses of legitimately-acquired media be recognized and protected, and that the rules protecting these common uses are technologically neutral.

14. The BCBC supports the Bill's personal use provisions, which recognize that consumers who have legitimately acquired content are within their rights when they time-shift it, format-shift it, or back it up, regardless of the technology they use.

15. Further, like many stakeholders, the members of the coalition are concerned that the new personal use rights (as well as other legal uses of works) are eliminated when a "digital lock" is used. These new rights benefit Canadians, but the "digital locks" prohibitions render them illusory.

16. To provide greater consistency between the personal use provisions (which as drafted currently prohibit circumvention of both access control and copy control TPMs) and the general anti-circumvention provisions (which only prohibit circumvention of access control TPMs), we propose that the personal use exceptions would continue to be available where a copy control measure has been circumvented, but not where an access control measure has been circumvented.

17. Providing consumers with consistent personal use rights in this manner would prevent confusion and foster innovation.

Proposed Amendments

> 29.22 (1) It is not an infringement of copyright for an individual to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if
>
> (a) the copy of the work or other subject-matter from which the reproduction is made is not an infringing copy;
>
> (b) the individual legally obtained the copy of the work or other subject-matter from which the reproduction is made, other than by borrowing it or renting it, and owns or is authorized to use the medium or device on which it is reproduced;
>
> (c) the individual, in order to make the reproduction, did not circumvent, as defined in ~~section~~ paragraph (a) of the definition of "circumvent" in section 41, a technological protection measure, contrary to paragraph 41.1(1)(a) ~~as defined in section 41~~, or cause one to be circumvented; ~~that section~~;
>
> (d) the individual does not give the reproduction away; and

(e) the reproduction is used only for private purposes.

29.23 (1) It is not an infringement of copyright for an individual to fix a communication signal, to reproduce a work or sound recording that is being broadcast or to fix or reproduce a performer's performance that is being broadcast, in order to record a program for the purpose of listening to or viewing it later, if

(a) the individual receives the program legally;

(b) the individual, in order to record the program, did not circumvent as defined in ~~section~~ paragraph (a) of the definition of "circumvent" in section 41, a technological protection measure, contrary to paragraph 41.1(1)(a) ~~as defined in section 41~~, or cause one to be circumvented

41.1 (1) No person shall

(a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition "technological protection measure" in section 41;

(b) offer services to the public or provide services if

(i) the services are offered or provided primarily for the purposes of circumventing a technological protection measure within the meaning of paragraph (a) of the definition of "technological protection measure" in section 41,

(ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a technological protection measure within the meaning of paragraph (a) of the definition of "technological protection measure" in section 41, or

(iii) the person markets those services as being for the purposes of circumventing a technological protection measure within the meaning of paragraph (a) of the definition of "technological protection measure" in section 41 or acts in concert with another person in order to market those services as being for those purposes; or

(c) manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component if

(i) the technology, device or component is designed or produced primarily for the purposes of circumventing a technological protection measure within the meaning of paragraph (a) of the definition of "technological protection measure" in section 41,

(ii) the uses or purposes of the technology, device or component are not commercially significant other than when it is used for the purposes of circumventing a technological protection measure within the meaning of paragraph (a) of the definition of "technological protection measure" in section 41, or

(iii) the person markets the technology, device or component as being for the purposes of

> circumventing a technological protection measure within the meaning of paragraph (a) of the definition of "technological protection measure" in section 41 or acts in concert with another person in order to market the technology, device or component as being for those purposes.

C. "Ephemeral recordings" by television broadcasters should be treated the same as "transfer of format" reproductions by radio broadcasters

18. The BCBC supports the Bill's provisions making "transfer of format" reproductions by radio broadcasters no longer subject to a licence from a collective society. We submit that for purposes of consistency this principle should be equally extended to television broadcasters who rely on the "ephemeral recording" exception to tape live performances (such as parades and other community events) for later broadcast.

Proposed Amendment

> 30.8 (1) It is not an infringement of copyright for a programming undertaking to fix or reproduce in accordance with this section a performer's performance or work, other than a cinematographic work, that is performed live or a sound recording that is performed at the same time as the performer's performance or work, if the undertaking
>
> [Repealed] ~~Application~~
>
> ~~30.8 (8) This section does not apply where a licence is available from a collective society to make the fixation or reproduction of the performer's performance, work or sound recording.~~

D. The role of intermediaries in fighting piracy needs to be refined

19. Canada's ISPs, most of which are members of, or represented by members of, our coalition, are prepared to assist rights-holders with the enforcement of their rights online. The BCBC supports the Bill's limitation of ISPs' roles to notice delivery and data retention which is to be done under judicial supervision. This approach is in line with the view, accepted around the world, that intermediaries should not unduly interfere with their customers' online activities.

20. Another fundamental policy choice embodied in this Bill, and which the BCBC strongly supports, is the rejection of "notice-and-takedown" and "graduated response" policies, which would turn intermediaries into "copyright police" that would be expected to act on only the mere unproven allegations of rights-holders, outside of the supervision of the courts. Such policies would treat consumers as guilty of violating the law without any due process or judicial determination having been made. They would thus be inconsistent with Canadian values.

21. The BCBC proposes certain amendments to ensure that the obligations to deliver notices and retain data, and the possibility of cost recovery for doing so, come into effect at the same time, and to clarify the requirements. This would ensure that ISPs have adequate time to design and implement the systems required to comply with the notice

requirements, and are also able to recover the costs associated with this function by charging reasonable fees.

22. The BCBC also proposes amendments designed to ensure that courts have sufficient flexibility when they are imposing penalties on intermediaries who may have innocently failed to perform the obligations. Given the very large volume of notices received by ISPs, it would be disproportionate for an ISP to face damages of at least $5,000 per obligation or per notice in the event of a technical failure.

23. Finally, we propose to specify that the injunctive relief available against information location tools should be limited to the removal of the allegedly infringing content from their services.

Proposed Amendments

41.25 (1) An owner of the copyright in a work or other subject-matter or his or her agent may send a notice of claimed infringement to a person who provides […]

(2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall […]

(f) specify the date and time of the commission of the claimed infringement; ~~and~~

(g) contain any other information that may be prescribed by regulation~~.~~; and

(h) be sent in compliance with any other terms and conditions that may be prescribed by regulation.

41.26 (1) A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,

(a) without delay forward the notice electronically to the person ~~to~~ by whom the electronic location identified by the location data specified in the notice ~~belongs~~ was used at the relevant time or times and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and

(b) retain records that will allow the identity of the person ~~to~~ by whom the electronic location ~~belongs~~ was used at the relevant time or times to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.

(2) The Minister may, by regulation, fix the maximum fee or fees that a person may charge for performing his or her obligations under subsection (1). If no ~~maximum~~ maximums ~~is~~ are fixed by regulation, the person may not charge any amount under that subsection.

(3) A claimant's only remedy against a person who fails to perform any of his or her obligations under subsection (1) with respect to a notice sent by the claimant is statutory damages in an amount that the court considers just, but not ~~less than $5,000 and not~~ more than $10,000.

(4) In assessing the amount of statutory damages under subsection (3), the court shall consider

(a) whether the person has implemented measures in good faith to perform the person's obligations under subsection (1);

(b) the nature and scope of the failure;

(c) whether the failure was within the person's reasonable ability to control;

(d) the person's history with respect to any other failures to perform the person's obligations under subsection (1); and

(e) the need to deter other failures to perform the obligations under subsection (1).

~~(4)~~ (5) The Governor in Council may, by regulation, increase or decrease the ~~minimum or~~ maximum amount of statutory damages set out in subsection (3).

47 (2) The regulations referred to in subsections 41.25(2) and 41.26(2) of the *Copyright Act*, as enacted by subsection (1), shall be promulgated on a day that is no later than six months after the date on which this Act is proclaimed in force.

(3) Subsections 41.26(1) and (3) of the *Copyright Act*, as enacted by subsection (1), shall come into force on the day that is three months after the date on which the regulations referred to in subsection (2) are published in the *Canada Gazette*.

41.27(1) In any proceedings under this Act ~~for infringement of copyright~~, the owner of the copyright in a work or other subject-matter is not entitled to any remedy other than an injunction against a provider of an information location tool that is found to have infringed copyright by making a reproduction of the work or other subject-matter or by communicating that reproduction to the public by telecommunication, where such injunctions shall be limited to ordering the provider of an information location tool to remove content from its service in response to notices provided under subsection 45.25(2).

Conditions for Application

41.27(2) Subsection (1) applies only if the provided, in respect of the work or other subject-matter,

(d) complies with ~~any~~ conditions that are industry standard among providers of information location tools relating to the making or caching, or doing of any act similar to caching, of

reproductions of the work or other subject-matter, or to the communication of the reproductions to the public by telecommunication, that were set ~~established~~ by whoever made the work or other subject-matter available through the Internet or another digital network and that lend themselves to automated reading and execution; and

~~41.27 (4) Subsection (1) does not apply to the provision of the information location tool if the provision of that tool constitutes an infringement of copyright under subsection 27(2.3).~~

E. Intermediaries need "safe harbours"

24. The Bill incorporates the international consensus that neutral intermediaries such as ISPs, hosting service providers, and information location tools are not liable for what their users do online. We strongly support this fundamental policy choice.

25. The Government has taken pains to emphasize that this Bill is friendly to cloud computing and to network-based personal video recorder services ("NPVRs"), meaning that it does not create any barriers to these innovations in remote storage. The BCBC submits that there are two technical problems that need to be fixed before the Bill can truly be said to be NPVR and cloud computing-friendly:

    (a) The hosting provisions need to be amended to make it clear that providers of remote storage do not violate copyright law when they transmit stored files (of any kind) back to the individuals who are allowed to access them.

    (b) The general statement that all Internet downloads are "communications to the public by telecommunication" needs to be amended to exclude those transmissions that are not, in fact, to the public at all, but rather only to the person who is eligible to receive them (e.g., the purchaser of a digital music track or video game or the user of an NPVR service). This issue has been the subject of ongoing litigation since 2006, and Parliament should now take the opportunity to resolve this uncertainty in favour of consumers and innovation.

26. The BCBC also submits that each "safe harbour" provision should be modified so that an ISP or operator of an information location tool is not required to prove each time that it is not an "enabler" under subsection 27(2.3).

Proposed Amendments

31.1(1) A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter or contravene any other provision of this Act.

~~Exception~~

~~31.1(2) Subsection (1) does not apply in respect of a service provided by the person if the~~

~~provision of that service constitutes an infringement of copyright under subsection 27(2.3).~~

31.1(2) Subject to subsection (3), a person referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient does not, solely by reason of performing those acts or any similar acts ~~by virtue of that act alone~~, infringe copyright in the work or other subject-matter or contravene any other provision of this Act.

31.1(3) Subsection 2 does not apply unless the person, in respect of the work or other subject matter, …

(b) ensures that any industry standard directions related to its caching or the doing of any similar act, as the case may be, that are set ~~established~~ by whoever made it available for telecommunication through the internet or another digital network, and that lend themselves to automated reading and execution, are read and executed; and

31.1(4) Subject to subsection (5), a person who provides digital memory in which another person stores a work or other subject matter~~,~~ for the purpose of allowing the telecommunication of the work or other subject matter does not, solely by reason of providing digital memory and communicating the work or other subject matter to the public, ~~through the Internet or another digital network, provides digital memory in which another person stores the work or other subject matter does not, by virtue of that act alone~~, infringe copyright in the work or other subject-matter or contravene any other provision of the Act.

31.1(6) Subsection (5) does not apply in respect of a work or other subject-matter if the person providing the digital memory ~~knows~~ is notified by the owner of the work or other subject matter of

(i) a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter, and

(ii) the electronic location of the work or other subject matter.

F. Distinguish between communications that are "to the public" and those that are not

27. As the Bill is currently drafted, it would deem all transmissions over the internet to be "communications to the public by telecommunication" even where a copy of a work has been purchased by an individual online.

28. As a result of the current approach, the rights for multimedia products that contain music (such as sound recordings, movies and games) cannot be cleared through market negotiations. The online sale of these products requires proceedings before the Copyright Board which force services to incur considerable expense and which results in delay and uncertainty in the establishment of prices.

29. The BCBC's proposed approach would distinguish the sale of reproductions online from other forms of communication, such as streaming. The "making available" of reproductions would be covered under the existing reproduction right while other acts of "making available" would be covered under the right to communicate to the public by telecommunication. These revisions would result in Canadian online services being treated the same as online services in the U.S.

Proposed Amendments

2.4(1.1) For the purposes of this Act,

(i) a reproduction of a work or other subject-matter includes making it available to the public by telecommunication in a way that allows a member of the public to access and reproduce it from a place and at a time individually chosen by that member of the public, and any transmissions of the reproduction to a member of the public;

(ii) a communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public, other than in the circumstances described in paragraph (i); and

(iii) a work or other subject matter is not communicated to the public by telecommunication where a reproduction of the work or other subject matter is communicated to a member of the public by telecommunication.

Provisions of Bill C-32 which the BCBC supports

G. The Bill does not, and should not, extend the private copying levy or impose an ISP levy

30. The BCBC is very pleased to see that the Bill would not extend the private copying/blank media levy to devices (the "iPod tax"), and that the Government and the Liberal Party have stated their opposition to this sort of indiscrimate levy on consumers.

31. The idea that devices should be subject to a levy is regressive, anti-innovation, and suffers from a number of well-known problems that make it unworkable.

32. A wide variety of devices now contain digital memory that is capable of storing not only music, but all kinds of other data. Many smartphone and computer owners do not use them to store music at all, yet a levy would require payment as if they did. A levy could

potentially create economic disincentives to the adoption of new mobile technologies – or promote the purchase of those devices across the border.

33. The BCBC is also pleased that the idea of adding a levy to the price of Internet access has also been rejected.

34. While the details of this proposal keep changing, the basic idea is that all Internet users (including those who use the Internet at work, schools and libraries, presumably) should have to pay to subsidize the unauthorized downloading of music by other Internet users.

35. This inequitable and completely unworkable idea suffers from a number of problems that make it a non-starter. For example, it would eliminate legitimate digital music services such as Apple iTunes, worsen the "digital divide" by making broadband access more expensive, and would likely violate Canada's international trade obligations.

H. The BCBC supports the Bill's innovative user-generated content exception

36. The BCBC supports this innovative and consumer-friendly exception, but does recognize that its wording may need to be "tightened up" to ensure that it does not become a loophole that enables piracy.

Conclusion

37. The BCBC would like to express support for Bill C-32. It makes a huge step forward in bringing Canada's copyright laws into the digital age. The Bill only needs a few amendments to ensure that it advances the Government's stated objectives in a consistent, technologically neutral, innovation-friendly manner. Once those amendments have been made, the Bill should be passed.