

January 31, 2011

Mr. Gord Brown, M.P.
House of Commons
Ottawa, ON
K1A0A6

Via email: CC32@parl.gc.ca

Dear Mr. Brown:

1. Hayes eLaw LLP appreciates the opportunity to submit comments to the Legislative Committee on Bill C-32. We represent Canada's private broadcasters and, accordingly, this submission is intended to be complementary to and supportive of the submissions filed by the Canadian Association of Broadcasters (CAB), as well as those filed by various regional broadcasting associations and individual broadcasting companies. The intention of this submission is to provide a strictly legal perspective on the proposed reproduction right exception for broadcasters, as outlined in the amendments to section 30.9 of the *Copyright Act*.
2. When Bill C-32 was tabled, the Government stated its intention regarding the proposed amendments to section 30.9, namely that radio broadcasters would no longer be required to compensate copyright owners for making reproductions in the context of their operations. Having conducted a close legal analysis of the provision in Bill C-32, it is our opinion that the provision, as currently drafted, may not fully achieve the Government's stated intention vis-à-vis radio broadcasters, as well as the stated objective of achieving technological neutrality. In this submission, we propose slight corrective modifications to the text.
3. Our suggested amendments are highly technical in nature and are designed to promote technological neutrality, minimize confusion, and ensure consistency with the rest of the provision, as well as the *Copyright Act* as a whole. The amendments are consistent with the spirit of the proposed amendment to section 30.9 as drafted in Bill C-32.

Proposed Amendments and Explanatory Rationale

30.9 (1) It is not an infringement of copyright for a broadcasting undertaking to reproduce in accordance with this section a sound recording, or a performer's performance or work that is embodied in a sound recording, solely for the purpose of their broadcasting, if the undertaking

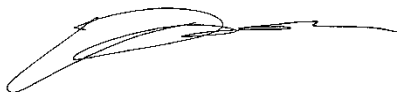
(a) ~~owns the~~ possesses a copy of the sound recording, ~~performer's performance or work~~ and that copy is authorized by the owner of the copyright in the sound recording, or has a licence to use the copy;

4. The first suggested revision is to replace the word *owns* with the word *possesses* in (1)(a). Proposed subsection (4) uses the word *possesses* in reference to one of the thresholds for destruction of the reproduction (e.g. The broadcaster must destroy the reproduction when it no longer possesses the sound recording.) Introducing *possesses* into paragraph (1)(a) ensures consistency in the language in the provision and thereby minimizes confusion.
5. This revision also promotes technological neutrality. Basic rules in intellectual property law make it impossible to *own* a digital track in the same way a broadcaster could have owned a physical CD; because there is no tangible property (material form) in a digital track, there can be no true ownership. This is recognized with the introduction by the drafters of the phrase "or has a licence to use the copy" which appears intended to ensure technological neutrality in Bill C-32. Removing the reference to *owning* a copy is necessary to ensure complete technological neutrality throughout this provision.
6. The second suggested revision is to remove the reference to performer's performance or work and, in its place, expressly reference the "owner of the copyright *in the sound recording*". This is done to simplify the provision. In reality, if a broadcaster possesses a copy of the sound recording it must also possess a copy of the performance and work embodied in the sound recording. It is redundant for the legislation to explicitly acknowledge the performance and work, as a broadcaster could never possess a performance or work without possessing the sound recording, and vice versa.
7. This proposed revision acknowledges the operational reality of how music gets on air – it is provided by the sound recording maker (SRM), as has always been the case. To ensure the music it acquires for broadcast purposes is non-infringing music, the broadcaster must be able to rely on the SRM and assume that any track it receives from the SRM has been authorized for broadcast purposes. Recording contracts include permission for the SRM to make and distribute

copies of an album/song for promotional purposes. This includes delivery to a broadcaster. Separate express permission is not required from the performer and the composer.

8. The inclusion of these two small, highly technical amendments will ensure that section 30.9 is structured to provide private broadcasters with the relief intended by the Government. We are happy to provide any additional information, as requested. Thank you for the opportunity to submit comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gabriel van Loon', with a long horizontal flourish extending to the right.

Gabriel van Loon
Lawyer
Hayes eLaw LLP

SUMMARY OF PRIVATE BROADCASTERS' PROPOSED TECHNICAL AMENDMENTS TO SECTION 30.9

30.9 (1) It is not an infringement of copyright for a broadcasting undertaking to reproduce in accordance with this section a sound recording, or a performer's performance or work that is embodied in a sound recording, solely for the purpose of their broadcasting, if the undertaking

(a) ~~owns the~~ possesses a copy of the sound recording, ~~performer's performance or work~~ and that copy is authorized by the owner of the copyright in the sound recording, or has a licence to use the copy;

1. Change *owns* to *possesses*

- Promotes technological neutrality – cannot own a digital track
- Consistent with rest of provision – used in (4)

2. Remove reference to performer's performance or work

- Removes redundant language – if broadcaster possess sound recording, it must also possess the performer's performance and work embodied in the sound recording

3. Add reference to owner of copyright in sound recording

- Consistent with operational reality for both broadcaster and copyright owner – broadcaster receives music from sound recording maker. SRM must be able to deliver music to be used for broadcasting. Recording contracts permit promotional copies.