ole Position Paper on
Canadian Copyright Policy
and
Proposed Changes to the *Copyright Act* as set out in Bill C-32

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Introduction

ole (oh-lay) is Canada's largest full-service music publisher, with offices in Toronto, Nashville and Los Angeles. We are 100% Canadian owned. Our music publishing copyright business uniquely straddles two digital media silos: music and TV/Film. With over forty thousand songs and thirty thousand hours of TV music across all genres, we are also one of the fastest-growing and largest independent music publishers in the world. Our diverse catalogue contains important Canadian heritage copyrights such as the 70's group Lighthouse, the now iconic Vancouver Olympic anthem "I Believe", pioneer Canadian Hip Hop duo Dream Warriors, Canadian Country superstar band Doc Walker, "Black Velvet" (Alannah Myles), current teen recording star Shiloh, film and TV compositions by Canadian composing legend Jack Lenz, and all of the music from the vast library of Canada's legendary children's television producer Nelvana (Babar The Elephant, etc.).

Our songs and songwriters have received numerous SOCAN and Juno awards, and this year at the Canadian Country Music Awards ole was named "Music Publisher of the Year" for the fourth time in a row. Internationally, our music has topped many charts, and last year we earned our first Grammy award for "White Horse", one of our many Taylor Swift compositions.

As a successful Canadian music publishing company active in both domestic and world markets, ole has a stake in, and definite views on, Canadian intellectual property policy and the impact of Bill C-32 on the Canadian digital economy.

We recognize that, given the wide range of issues covered by copyright law, Bill C-32 deals with many subjects affecting a long list of stakeholders. This submission, however, focuses on music copyright and on how creators and rights holders (songwriters and music publishers), should be compensated in the digital age.

While the proposed legislation now before the committee seeks to balance the interests of many parties, the very real value that creators and rights holders provide to consumers – who derive enjoyment from the work produced – and to content distributors – who derive financial benefit by making the works available – is not recognized in any meaningful way. No party in the music enjoyment value chain is identified as responsible for paying for the creative content they are profiting from.

Therefore, it should not be a surprise that the proposed legislation fails to ensure anything close to fair compensation to creators and rights holders, which should be a principal goal of the

Government's policy. Correcting such a basic flaw in the policy framework itself may be beyond the scope of the committee mandated to examine the bill, but surely it should be acknowledged, and discussion held as to how this flaw should be addressed.

This submission begins with suggestions for reassessment of a policy that leaves songwriters and artists out of the value chain in a digital marketplace. While the reassessment is urgent, it will take time, given that it must engage all interested parties and carefully evaluate the impact on stakeholders of policy changes being considered. Because it will take time, it will not help creators and rights holders today.

That is why this submission also identifies specific changes that must be made to the proposed legislation which, if left as is, will destroy two highly successful compensation mechanisms for songwriters and music publishers in the current Act. The Broadcast Mechanical Tariff and the Private Copying Levy, must not be compromised, and there is no need to – they are the most "future-proof" and digitally savvy provisions of the Act

2. Getting the Fundamentals Right

What copyright reform should accomplish

With respect to any new digital age copyright policy, the role of the Canadian government should be to create an environment that will foster a viable marketplace for copyrighted media such as music and video. Innovation, consumer interests, and robust high-speed internet access have all been successfully addressed.

What remains unaddressed is to provide an appropriate framework for the monetization of content in the digital economy. This requires immediate action on the part of the government if a balance of interests is to be re-established among the stakeholders.

Of the key stakeholder groups in digital music – creators, intermediaries and the public – only one group, the creators and rights holders of music, have not received their fair share from the digital distribution of and access to their music. While government policy pays lip-service to the need for fair compensation to creators, the means for achieving this have been ineffective. The proposed legislation can only have the effect of exacerbating the situation.

Current policy is biased against content creators

Canada should not be developing its delivery systems in the digital domain at the expense of the content creators. Current policy favors the distribution industries over the creators and other suppliers of content. As a result, it allows delivery systems to be built at the expense of the content creators.

The true potential of the digital economy will never be realized until this inequity is rectified. Intellectual property is one of the largest and fastest-growing contributors to Canadian and global GDP. It is also a driver behind the growth of the delivery system providers. It is time to ensure that there is a framework in place that enables fair compensation for music creators and rights owners whose work contributes much of the value to what service providers offer.

The government states on its Digital Economy Consultation Website that:

"…the digital media sector is shifting away from linear production chains with distinct players and discrete products into three main areas of activity: 1) The creation of content; 2) enabling content creation and distribution; and 3) the aggregation of content. A significant part of the innovation taking place today and the prospects for future prosperity are related to these activities."

The companies involved in the activity of enabling content creation, distribution and the aggregation of content are largely shielded from liability, and thus have no incentive to pay the parties that create the content. This is the fundamental flaw in the current policy and the proposed legislation will actually make it worse.

All we need is a marketplace

A marketplace exists when a willing seller and a willing buyer are free to negotiate the sale of goods or services. When the buyer can take the product without paying, there is no negotiation – it is a failed marketplace. For the creators of music, the Internet is largely a failed marketplace.

In an interview with the Wall Street Journal, Eric Garland, the CEO of Big Champagne LLC, which monitors file-sharing activity for clients around the world said, *"The music marketplace and the digital entertainment marketplace is overwhelmingly a pirate market."*

Mr. Garland offered what he called a "conservative" estimate that about 12 billion songs a year are downloaded illegally. That compares with 1.2 billion songs downloaded in all of 2009 from paid services in the U.S. — by far the world's largest market for digital downloads. Even adding in other nations' downloading, peer-to-peer sharing dwarfs paid music downloads by about seven to one.

The future of creators and rights holders can only lie if they are accorded their rightful place in the online distribution value chain. For this to happen, control of the monetization of creative works in the digital realm cannot rest solely with delivery system providers who, after all, have a track record of facilitating the piracy of the work to their own advantage.

Bill C-32 reflects the government's deeply flawed copyright policy in that it provides no viable tools to allow creators and rights holders to be fairly compensated. It creates the illusion of modernizing protections for creators and rights holders in the digital domain, while ensuring that a market cannot be established for creative works that will be enforceable or collectable.

"Notice and notice" for example, is heralded as targeting Internet Service Providers (ISPs) for the piracy activity on their networks. In fact, all it does is require them to assist in redirecting blame to the consumer, thus further and formally absolving ISPs of any real responsibility. In effect, this amounts to more government protection for the ISP business model of monetizing piracy to their benefit.

We don't need useless band-aids for copyright enforcement - we need a marketplace. Because the primary enablers and facilitators of piracy are shielded from liability, creators' can be taken, sold or consumed without the creators being paid for it.

That said, the process of obtaining pirated music does have a cost to consumers – the consumer pays the intermediary such as the ISPs or hardware manufacturer. The intermediary is shielded from the obligation to pay creators and rights holders by the current law and nothing in Bill C-32 will change this. At least for music, technical protection measures to lock up music, and suing consumers has failed to reduce piracy or create a marketplace. Between ineffective strategies such as "Notice and Notice", and strengthening support for the futile use of technical protection measures, Bill C-32 misguidedly places nearly all of its anti-piracy hopes on these losing strategies.

The U.S. should not be copied on copyright

The U.S. has one of the least effective music copyright environments in the developed world, a fact that is masked by the sheer size of the market. It lacks many rights and revenue streams enjoyed by songwriters and artists in most of the rest of the world, including broadcast mechanicals, payments to artists from radio play, and viable private copying payments.

Compounding these weaknesses, the U.S. prematurely introduced digital copyright legislation with unforeseen serious shortcomings.

The U.S. *Digital Millennium Copyright Act* (DMCA) has a fatal flaw that Bill C-32 replicates. The drafters of the DMCA accepted the "dumb pipe" arguments of the ISPs, and chose to make websites and consumers, rather than the ISPs, liable for infringement. Conventional wisdom at the time said that a website was necessary for the average person to distribute or access content on the Internet, thus the law focused on consumer behavior and a mechanism to remove unauthorized copyrights from websites. Apparently no one foresaw the emergence of P2P (peer-to-peer file sharing) and "Bit Torrent" technology, which enables consumers to circumvent websites and distribute media person-to-person via the Internet, rendering the U.S. DMCA largely ineffective and obsolete for music.

The U.S. has taken the most punitive action in the world against consumers of pirated music. Even though it has the highest number of legitimate music services, tens of thousands of consumers were sued by the record industry trade association (The Recording Industry Association of America, the U.S. equivalent of the Canadian Recording Industry Association). Neither lawsuits nor "Notice and Takedown" activities have restored the music industry to health in the U.S. Nor have they driven meaningful numbers of consumers of pirated content "above ground" and into using the legitimate services as a substitute for accessing pirated music. The DMCA has neither reduced piracy in a meaningful way, nor fostered a robust digital economy for music.

The American experience has shown the futility of targeting consumers for Internet music piracy, and the attempts to mimic them by creating "graduated response" regimes around the world have proven to be ineffective. "Notice and Notice" is not a useful tool for music copyright owners, and will do nothing material to create a viable digital economy for us.

Music is the canary in the coalmine

Some copyright owners, such as video game producers, may appreciate aspects of Bill C-32 such as the strengthening of the laws around Technical Protection Methods (TPM), as they currently enjoy some benefit from TPMs, as does the film and TV business to a certain extent. In the U.S., the application of the "notice and takedown" provision in the DMCA has been a modestly effective tool to control piracy for these media, although very cumbersome to manage.

However, this is a temporary situation due to the fact that the bandwidth required to distribute video is still relatively large and impractical to download, rendering video akin to music before the MP3 made it easy to download music by shrinking the size of files. As a result, a website, the only legal target of the DMCA notice and takedown regime, is still the primary method for consumers to access video content.

Inevitably, technological progress will make the downloading of the large files fast and easy and will put video content on the same plane as music – easy to pirate. Soon, even the limited benefit of TPMs for large bandwidth media will disappear.

Rights are what matter

In order to monetize intellectual property, whether that property is embodied as physical or digital products, we need enforceable rights. Our rights are what provide the legal basis from which we can negotiate payment for the use of our music. History and current events show that without meaningful consequences for infringing behavior, no business will voluntarily pay for their role in the distribution of intellectual property.

Having rights without the means to enforce them amounts to having no rights. Bill C-32's introduction/clarification of the "Right of Making Available", while a welcome development, is at best, a half-measure. In practical terms, the right cannot be enforced against consumers, so unless it is enforceable against the intermediaries in the digital piracy chain, it is essentially useless.

A simple solution to enable a viable marketplace

Any policy addressing these issues needs to be technology-neutral, targeting enabling behaviour, rather than fast-changing technology. Otherwise, the policy – and the legislation which gives effect to it – risks being out of date by the time the ink is dry. It is the enabling role

of ISPs and other intermediaries that creates the scale of the infringement problem, not their use of any particular technology per se.

Vast wealth has been diverted into the pockets of industries that enable and profit unjustly from infringement. ISPs act as short circuits that enable their customers to circumvent markets. As long as they are free to do so, there will be no truly viable market for recorded music and similar media.

While severely undermining the value of recorded music, the ISPs have built a very lucrative business charging for unauthorized content, by billing customers for the amount of bandwidth they use for unauthorized access to media. Legislation can be used to make this underground business a legitimate one, creating a win for all stakeholders: consumers, creators, the ISPs and, especially, government through increased tax collection on what is now an underground market.

Liability for content on ISPs' networks would create a corresponding ability for them to openly, rather than covertly, profit from it. Following introduction of legislation establishing liability for copyright infringement on their networks, ISPs would have a very simple decision to make:

- take the infringing material off of their networks; or,
- negotiate payment with the owners and suppliers of this content.

This is a perfect example of a well-functioning marketplace.

History can show the way forward

There is ample precedent in Canadian law and our experience with Music Tariffs to point the way forward. We faced a similar problem at the dawn of the cable TV industry, when cable systems were distributing programming containing music to Canadian consumers, without paying performance royalties to SOCAN (Society of Composers, Authors and Music Publishers of Canada). As is the case with ISPs, they claimed that paying for music copyright was not their responsibility. The drafters of the *Copyright Act* had not foreseen the development of cable technology, leaving a liability gap, and depriving television music composers of fair compensation for their work.

After the *Act* was amended, the Copyright Board determined that the cable systems, and the channels they carried, were jointly and severally liable for Performance Right payments. They

also concluded that the only practical place in the value chain for SOCAN to obtain payment was where the consumer paid their monthly access fee – the cable company.

The fairness, simplicity and business logic of this solution is obvious in hindsight. Unfortunately it took ten years or more to resolve all the legislative, tariff and legal appeal issues. During that time, composers were deprived of their rightful share of the revenue that others derived from their work. It is important to point out that is has been about ten years since the introduction of Napster, which launched the Internet piracy era. The time to act to bring just compensation from the Internet to creators is now.

The "well-wired" Canadian family often buys their "infotainment" service from a single cable and Internet supplier. Typically they pay $100 per month or more for one service - "cable TV", and $50 per month for the other - "Internet". Ironically, these two services arrive via a single physical wire, from the same provider. Both services provide an increasingly similar combination of information and entertainment. Consumers, especially young ones, are frequently accessing the $100 "cable TV" material through the $50 Internet connection. The fact that the same company will, on the one hand, take the lion's share of the $100 monthly access fee and redistribute it to the creators and suppliers of the content, and on the other, not distribute any of the $50 monthly access fee to the creators and suppliers of much of the same content on the other connection, is obviously unjust.

The reason, of course, is that on the one service the law requires the ISP/cable company to pay for content and on the other it doesn't. It also demonstrates how the business model for ISPs could mimic that of cable TV. Any one of a number of proven revenue-sharing schemes would enable the access provider to allocate an appropriate share to the creator or supplier of that content.

This need not take more money from the consumer's wallet than the cable/ISP industry currently does. There is plenty of inefficiency in the cable business model to enable it to re-allocate fees already being collected, from one group of content suppliers on cable, to another on the Internet. No doubt, consumers would rather pay for media they actually consume, rather than subsidize channels they never watch but are forced to pay for through bundled packages.

Another example of a successful provision in the current *Copyright Act* is the Broadcast Mechanical Tariff (BMT). It has been a spectacularly successful compromise on the part of rights owners to simplify licensing for use of our reproduction right by broadcasters.

Faced with allegations that our reproduction right was too complicated and cumbersome for broadcasters to bother paying for, rights owners gave up the ability to enter into individual free market negotiations, and in exchange the *Act* requires Broadcast Mechanical licenses to be issued through a collective, creating a convenient one-stop licensing "store" for broadcasters, and a win-win situation for all.

It is telling that C-32 proposes to amend the provision of the Act dealing with the BMT in such a way as to virtually eliminate its value. We will return to this subject later in this submission.

Net neutrality

No discussion of monetizing content on the Internet can avoid the discussion on "net neutrality".

Broadly defined, "net neutrality" refers to a principle that ISPs should not discriminate between various websites and services, so that anyone offering any site or service has an equal opportunity to reach consumers. Such a principle may sound noble, but in reality it is an unsustainable fantasy.

To thrive, business depends on the arbitrage of information, scarcity, friction, variance in talent, vision and risk and, particularly in media, gate keeping. Businesses compete by providing different levels of service, price, quality, value and convenience to consumers who then choose which combination appeals to them. We may enjoy Freedom of Speech in our society, but it is never been free to communicate it to the public via the media of the day, be it newspapers, radio, or television. Consumer choice created by unequally efficient, innovative use of resources by entrepreneurs, artists and businesses is what made our society rich both materially and culturally.

We believe the natural, evolutionary direction of the ISP business is the offering of tiered services, differentiating not only between levels of bandwidth, but also levels of brand named services or bundles of content. Much like cable TV, ISPs would provide basic bandwidth for a base price, and then access to various services would be available in value-added bundles, such as the "social network bundle" – Facebook, MySpace and YouTube. This will provide a much

healthier environment for the monetization of the content, with clear fees being charged for access to media on the bundled services.

Many of the most popular Internet services today are actually not currently sustainable stand alone businesses, and are subsidized by various parties for various reasons. YouTube, which is subsidized by Google, is a great example - one of the most popular services subsidized by one of the most successful businesses, both making money parasitically from music and other copyrighted material.

Net Neutrality rules actually prevent consumers from enjoying innovative products and services. One of the biggest obstacles to great new sustainable innovative music products reaching the consumer is their inability to properly monetize their business. Charging consumers directly for music has been a daunting challenge, and advertising supported music services have shown little ability to generate enough revenue to sustain their business and pay the artists fairly. Spotify, a music service that has generated much excitement in tests overseas, has had a great deal of difficulty entering the North American market as their business model fails to provide sufficient revenue to pay the artists fairly. It needs an additional revenue stream, such as could be provided by ISPs paying for exclusivity for the service. Net Neutrality rules would apparently prevent such a traditional business arrangement.

Protecting the privacy of the consumer

Identifying and paying for current unauthorized content from the networks of ISPs need not compromise the privacy of individual consumers. In a monetization scheme, copyright owners can easily be compensated for use of their music without attribution to specific customers. For instance, music publishers and songwriters have a great deal of experience with compensation systems that use proxies to estimate actual use of their music.

A reassessment of policy must be initiated immediately

It is clear from the discussion above that we believe there needs to be fundamental change to the philosophic orientation and policy that drives Canada's copyright legislation. While we recognize that this may not be possible to complete such a reassessment in only a few months, we do believe that it is urgent and that it must begin as soon as possible.

Accordingly, we would ask that the committee include a provision in C-32 that would require the government to immediately undertake such a reassessment of policy regarding our industry and how best to foster a marketplace in the digital age that provides fair compensation to creators and rights holders, as well as intermediaries, while delivering good value to consumers.

Further, we would ask that there be a report back to Parliament in as short a time as possible – e.g. twelve months – with a view to passing legislation to enable such a marketplace.

In the meantime, certain amendments are required now to Bill C-32 if our industry is to have any hope of continuing while we await the results of such a review. The next section of this submission identifies the specific amendments necessary.

3. Required Amendments to Bill C-32

Extend the Private Copying Levy

The Private Copying Levy is a revenue source that was created in 1997 as a result of innovative changes to the *Copyright Act*. It compensates copyright owners, as well as performers and record companies, for the unauthorized copying of music onto blank media for personal use. In effect, it is compensation for uncontrolled mass consumer piracy.

The law directs the primary business beneficiary of this activity, manufacturers of a blank recording medium, to share their profits with rights holders. In actual fact these companies were directed to place a levy on the purchase of each blank CDR. The annual revenue generated for creators and rights holders from this source appears to have peaked at about $37 million four years ago. Since then, it has been rapidly declining because of a shift in how consumers copy music for their use. MP3 players are now the copying medium of choice, as opposed to blank CDs. This change in behaviour would not affect the compensation to creators, except for the fact that the Federal Court has determined that MP3 players are outside the definition of "recording media" as stated in the *Act*.

This is an excellent example of why legislation must be technology neutral, targeting enabling behaviour so as to continue being relevant despite the inevitable to the technology itself.

Bill C-32 would have been a great opportunity to correct this situation in respect of private copying by extending the levy to devices that are now commonly used for private copying, such as MP3 players.

Unfortunately, the proposed legislation does no such thing and the sharp decline in revenue for artists and creators will only continue unless this is corrected. In fact, Bill C-32 explicitly limits this compensation to blank CDs and MiniDiscs. As the use of blank CDs to store copied music diminishes in favor of copying or downloading music to MP3 devices, the right to compensation becomes meaningless in the digital age.

Government officials have been quoted as describing this right as not being technology neutral, but the *Act* clearly was drafted with the intention of being technology neutral. The Copyright

Board agreed, setting tariffs on most modern digital music devices, only to see the application to these devices over ruled by the court.

Ironically, the provision that gave meaning to the concept of compensating creators for copies made by consumers for personal use, regardless of the technology used to do so, is being neutered by the very legislation that seeks to adapt to the digital age.

The solution is simple: clarify the *Act* to reflect its initial intention and extend the levy to MP3 players, at least until such time as a reassessment of policy can address the broader question of fair compensation and value to all stakeholders in the digital music copying chain.

Do not destroy the Broadcast Mechanical provision

The BMT was a revenue source created in 1997, also as a result of changes to the *Copyright Act*. An application of the Right of Reproduction, it enables the owners of song copyrights to be compensated by radio stations for the reproduction of their music. Radio stations are thus enabled to take advantage of technological advances to store, organize and broadcast recordings more efficiently, while ensuring that songwriters are compensated for use of their rights. Bill C-32 would eliminate creators' and rights holders' rights to compensation for this activity, which is currently about $13 million a year.

This move to block licensing of the Reproduction Right can only be justified if one believes that the use of the reproduction right by broadcasters is trivial or worthless. In so doing, the government has unilaterally decided the value of the rights, or that some uses are so trivial that they have no value. It should be the marketplace, not government – and in the absence of agreement in the marketplace, the Copyright Board – that decides the value of any given right in any given context.

As stated earlier in this submission, the Broadcast Mechanical provision has been successful and is a great example of a progressive law, enabling a well-functioning marketplace in a fast-changing technological environment.

This retrograde measure can easily be remedied, simply by not eliminating section 30.9(6) of the current *Copyright Act,* as called for in Bill C-32.

Both the Private Copying Levy and Broadcast Mechanical Tariff are excellent examples of progressive ways of empowering copyright users to take advantage of innovative technology while retaining the creators rights to be paid. Is that not what this bill should stand for? These provisions should be left as is, but instead, proposed changes to them will sabotage the market for songwriters, artists, and rights holders.

4. Conclusion

Bill C-32 is destructive to music creators and rights holders

While Bill C-32 may be a well-intentioned attempt to modernize Canada's *Copyright Act* for the digital age, most of the purported benefits are illusory, are actually destructive to music creators and rights owners, cancelling the most progressive aspects of the current legislation that provides a means of dealing with the digital era, and will not result in a viable digital marketplace for music.

Generally, the consequences of Bill C-32 include:

- Reducing the income of songwriters and artists by $37 million, through the elimination of current rights and revenue (broadcast mechanicals), while blocking the logical extension of another right and revenue stream (private copying);
- Providing increased legal protection to the companies that facilitate and profit from piracy;
- In so doing, it supports the "steal the content to build a distribution business" philosophy;
- Enshrining the ability of companies to build businesses on the backs of creators without either enabling a free marketplace, or requiring them to pay for the use of content;
- Implementing anti piracy-measures that have proven to be ineffective in other countries; and,
- Introducing rights that are unenforceable.

The bill is unbalanced and weighted heavily in favor of distributors, hardware manufacturers, and consumers at the expense of creators and rights owners. It proposes no new ideas or mechanisms to reduce piracy and no new, effective tools to ensure that creators are paid.

ole strongly believes that if our industry is to survive, a reassessment of policy must be initiated immediately. That said, we recognize that such an assessment is a significant undertaking and that will not benefit creators and rights holders today. That is why we are asking for the Private Copying Levy to be extended, logically, to MP3 players until the conditions that foster a marketplace for private copying in the digital age exist. Also, based on marketplace principles and the fact that the BMT in the current legislation is a successful outcome of such principles, we respectfully request that this provision be maintained.

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