March 9, 2012

Christine Holke David
Clerk of the Legislative Committee on Bill C-11
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Filed via E-Mail:
CC11@parl.gc.ca

Dear Ms Holke David:

Re: Technical Amendments to Bill C-11, An Act to Modernize the Copyright Act

1. The Canadian Media Production Association (CMPA) appreciates this opportunity to provide our recommendations respecting what we regard as necessary technical amendments to Bill C-11, An Act to Modernize the Copyright Act.

2. The CMPA represents the interests of screen-based media companies engaged in the production and distribution of English-language television programs, feature films, and new media content in all regions of Canada. The CMPA's 400 member companies are significant employers of Canadian creative talent and assume the financial and creative risk of developing original content for Canadian and international audiences.

3. The CMPA appeared before the Parliamentary Committee studying Bill C-11's predecessor, Bill C-32, on February 1, 2011. At that time, we indicated our support for the provisions in the bill addressing the treatment of technical protection measures and adding parody and satire as fair dealing. We also raised certain concerns we had about the bill.

4. In commenting now on Bill C-11, we still hold to the positions we advanced in the context of the review of Bill C-32. This includes our belief in the need to supplement the bill's notice and notice provisions for Internet service providers (ISPs) with a notice and take-down requirement, since notice and take-down is the most appropriate way to address the responsibility of ISPs and companies hosting web sites which infringe

copyright. It also includes our position that the bill should recognize producers as first owners and authors of copyright in cinematographic works.

5. Nevertheless, on the understanding the government now wishes to restrict further input on the bill to proposals respecting necessary technical amendments, we have chosen in this document to focus on recommending a short list of such amendments which we believe are necessary to ensure the government's stated objectives for the bill are met and that unintended consequences are avoided, where possible.

6. Accordingly, below we propose technical amendments to the provisions dealing with the following subjects:

    - those who enable infringement;
    - education as fair dealing;
    - user-generated content;
    - time- and format-shifting;
    - moral rights for performers; and
    - statutory damages.

Enabling Infringement

7. The CMPA strongly supports the government's plan to amend the *Copyright Act* to target those who enable and profit from the infringements of others, and to give copyright owners the tools to pursue those who willfully and knowingly enable copyright infringement online, such as operators of websites that facilitate illegal file-sharing.

8. However, as the CMPA and many others have pointed out, the current provisions of Bill C-11, which target services that are "designed primarily to enable acts of infringement", may be drafted too narrowly to ensure they achieve these objectives. Many websites that facilitate illegal file-sharing and other forms of infringement may not be "designed" to do so, in a technical or legal sense, but nevertheless are certainly operated or used to facilitate infringement, or induce acts of infringement, and therefore should be clearly targeted.

9. Accordingly, the CMPA recommends that proposed s. 27(2.3) be amended so as to read (change highlighted):

> **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, operated or used primarily to enable acts of copyright infringement, or induces 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.

10. Moreover, as the bill is currently worded, the safe harbours available in respect of a person providing hosting or caching functions would apparently still be available notwithstanding the person designed, operated or used those functions to enable or induce copyright infringement. This could defeat the purpose of the enabler provisions in such cases. Those who enable infringement should not be able to obtain immunity from the enabler provisions simply by pointing to their hosting or caching functions, which the bill as currently worded may allow them to do.

11. Accordingly, the CMPA recommends that proposed s. 31.1 be amended by placing the text of the current subsection 31.1(2) at the end of the section, making it refer to the preceding network service, caching and hosting subsections, and renumbering the subsections accordingly. The amended section would then read as follows:

> **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.
> (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, by virtue of that act alone, infringe copyright in the work or other subject-matter.
>
> (3) Subsection (2) does not apply unless the person, in respect of the work or other subject matter,
>
> (a) does not modify it, other than for technical reasons;
> (b) ensures that that any directions related to its caching or the doing of any similar act, as the case may be, that are 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
> (c) does not interfere with the lawful use of technology to obtain data on its use.

(4) Subject to subsection (5), a person who, for the purpose of allowing the telecommunication of a work or other subject-matter 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.

(5) Subsection (4) does not apply in respect of a work or other subject-matter if the person providing the digital memory knows of 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.

(6) <u>This section does not apply if the person infringes copyright under subsection 27(2.3)</u>.

12. The CMPA also recommends <u>the deletion of proposed s. 38(1)(6)(d)</u> which would preclude rights holders from electing to recover an award of statutory damages against those who enable infringement contrary to s. 27(2.3). Making statutory damages available in the case of infringement actions against enablers is entirely consistent with the government's objective of allowing rights holders to pursue enablers since it will often be difficult to assess actual damages in such cases.

Education as Fair Dealing

13. The CMPA and many others have expressed concern regarding the unintended consequences and protracted litigation that could result with the proposed addition of "education" as fair dealing unless there is clarity as to what constitutes "education". To address this concern, the CMPA recommends that the bill treat education in this context in a manner consistent with the other provisions in the Act and the other proposed amendments in Bill C-11 dealing with education, namely by linking it to an "educational institution", which is a term already defined in the Act[1] and well-understood. Accordingly, we recommend that proposed new s. 29 be amended so as to read (recommended change highlighted):

[1] "Educational institution" is defined in s. 2 of the Act to mean "(a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education; (b) a non-profit institution that is directed or controlled by a board of education regulated by or under an Act of the legislature of a province and that provides continuing, professional or vocational training; (c) a department or agency of any order of government or any non-profit body, that controls or supervises education or training referred to in paragraph (a) or (b); or (d) any other non-profit institution prescribed by regulation.

29. (1) Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.

(2) Subsection (1) applies to education only if it is for the purpose of educational instruction by an educational institution or a person acting under its authority.

User Generated Content

14. While the CMPA understands the objective of the proposed Non-commercial User-generated Content (UGC) provisions (proposed s. 29.21), we and others are seriously concerned that, as currently worded, the provisions would allow for almost unlimited uses of copyright works and thus go far beyond the "YouTube video" concept contemplated.

15. For example, because such UGC would not transform the original works by adding new expression or meaning, or add value to the original by creating new information, new aesthetics, new insights or understandings, it would not constitute the kind of "mash-up" which the provisions are intended to permit.

16. Moreover, by permitting an individual to use such permitted UGC in any manner and to authorize an intermediary "to disseminate" such permitted UGC, the current wording of the proposed section would go far beyond using the Internet to communicate the UGC, which the new section is intended to cover. We recommend therefore that the section instead reference the right to communicate to the public by telecommunication, which would be a more appropriate manner of addressing "use" and "dissemination" over the Internet or other digital network, as intended.

17. Accordingly, we recommend that proposed new s. 29.21(1) be amended as follows:

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a transformative new work or other subject matter in which copyright subsists and for the individual - or with the individual's authorization, a member of their household - to communicate the new work or other subject matter to the public by telecommunication or to authorize an intermediary to communicate it to the public by telecommunication through the Internet or another digital network, if

(a) the new work or subject-matter is communicated to the public by telecommunication solely for non-commercial purposes;
...

(d) the communication to the public by telecommunication of the new work or subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation...etc.

18. This approach would also allow for deletion of the definition of "use" in proposed s. 29.21(2).

Time- and Format-Shifting

19. For greater clarity as well as to provide consistency of language with sections 29.24, 30.6 and 30.9 of the bill and s. 80(1) of the current Act, which already addresses private copying, the CMPA recommends the following changes to Bill C-11:

a. Amend s. 29.22)(1)(b) and (e) so as to read:

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…

(b) the individual owns – or has a licence to use – a copy of the work or other subject-matter from which the reproduction is made, and owns or is authorized to use the medium or device on which it is reproduced;
…

(e) the reproduction is for the private use of the individual who makes the copy.

b. Amend s. 29.23(1)(f) to read:

29.23 (1) It is not an infringement of copyright for an individual to fix a communications 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…

(f) the recording is for the private use of the individual who makes the recording or of a member of their household.

Moral Rights for Performers

20. Subsection 17(1) of the current Act provides that, where a performer authorizes the embodiment of her performance in a cinematographic work, she may no longer

exercise her performance right, as established in subsection 15(1) of the current Act, in respect of that performance in that cinematographic work.

21. Proposed subsection 17(1.1) in Bill C-11 creates a new moral right for performers. The CMPA submits that, to be consistent with the objective of s. 17(1) respecting performers' performances when embodied in cinematographic works, s. 17(1) should be amended so as to also reference s. 17(1.1).

22. In addition, in light of the addition of new provisions to s. 15 as proposed in Bill C-11, which expand the breadth of performers' rights for Canadians and extends those rights to performers' performances taking place in WPPT countries, the CMPA recommends that current s. 17(1) also be amended so as to reference all the performers rights now covered in s. 15.

23. Accordingly, s. 17(1) should be amended to read:

> **17.** (1) Where the performer authorizes the embodiment of the performer's performance in a cinematographic work, the performer may no longer exercise, in relation to the performance where embodied in that cinematographic work, the copyright referred to in section 15 or the moral rights referred to in subsections 17.1, 17.2 and 28.2(1).

Statutory Damages

24. Bill C-11 is intended to target those who destroy wealth through copyright infringement whether for their own commercial purposes or for their own "kicks".[2] The CMPA strongly supports this objective. However, in order to achieve this objective, it is necessary to ensure both that statutory damages are available in the case of enablers (as addressed above) and that the limits on statutory damages proposed in s. 38.1 do not unintentionally serve to establish an inexpensive licence to infringe by those who do so on a grand scale just for their own "kicks" (which may not necessarily be for commercial purposes).

25. It is widely known that certain persons will engage in massive online copyright infringement activities not for commercial purposes but solely in order to stroke their own ego and/or boost their reputation within the online piracy community. Indeed, certain participants during the government's copyright consultation process readily boasted of their non-commercial activities and motivation in this respect.

[2] (Then) Minister of Industry Tony Clement, *The Globe and Mail*, September 22, 2010 and November 17, 2010.

26. In order to give rights holders the tools necessary to go after these persons who destroy wealth through copyright simply for their own, non-commercial "kicks", while preserving the government's objective of ensuring substantial statutory damages may only be awarded in the appropriate circumstances, the CMPA recommends that proposed s. 38.1(1) be amended so as to limit statutory damages in cases where the infringements are for the private use of the individual infringing, rather than where the infringements are for "non-commercial purposes".

27. To this end, we recommend that an amended s. 38.1(1) read as follows:

> **38.1** (1) Subject to this section, a copyright owner may elect...to recover...an award of statutory damages...
>
> > (a) subject to paragraph (b), in a sum of not less than $500 and not more than $20,000 that the court considers just, with respect to all infringements involved in the proceedings for each work of other subject matter; or
> >
> > (b) in a sum of not less than $100 and not more than $5,000 that the court consider just, with respect to all infringements involved in the proceedings for all works or other subject-matter, if the infringements are for the private use of the individual infringing.

28. In this way, paragraph (a) would become the default rule so that substantial statutory damages would be available to address and deter wealth destroyers regardless of whether they undertake their infringing actions for commercial purposes or for non-commercial "kicks". That default rule, however, would be subject to paragraph (b) which employs language consistent with other provisions of the bill to create an exception for persons whom the government specifically seeks to shield from substantial statutory damages awards, namely those whom undertake infringing activity solely for their limited, truly personal use.

All of which is respectfully submitted.

Sincerely,

[*original signed by*]

Norm Bolen
President & CEO

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