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SUBMISSION OF THE WRITERS' UNION OF CANADA TO THE LEGISLATIVE COMMITTEE ON BILL C-11

The Writers' Union of Canada (TWUC), founded in 1973 by writers for writers and certified in 1998 under *The Status of the Artist Act*, is the national voice of Canada's professional book writers who work in the English language. Our members, approximately 2,000 professional writers, live in every region of Canada and earn their living by writing books. The *Copyright Act* provides us with essential protection for our writing, which is at the heart of a flourishing but fragile publishing industry that reflects the culture of our country.

Only about 10% of the cover price of a book usually goes to its writer. The remaining 90% is dispersed to others who work in the book publishing sector, including publishers, editors, book designers, printers, marketers, publicists, distributors and booksellers. Despite our crucial role at the core of the publishing industry, most professional writers in Canada earn less than $20,000 annually from their writing.

We want our works to be widely distributed and easily accessible to the public. That is, after all, why we write.

Introduction

We support all of the *Proposed Amendments to Bill C-11, Towards a competitive Canadian digital economy at the service of innovation and knowledge* ("*Towards a Competitive Canadian Digital Economy"),* which is supported by 67 other organizations co-ordinated by the Canadian Conference of the Arts. We are in favour of revisions to update the *Copyright Act* to deal with the digital environment, but those revisions must benefit creators as well as the public who use and enjoy the works that we produce. If passed unamended, Bill C-11, the *Copyright Modernization Act*, will curtail authors' rights and will shrink our markets in the book publishing industry and other cultural industries. This in turn will make it harder for us as individual professional writers to find markets for our work and to earn a living.

As acknowledged in the Preamble to the *Copyright Modernization Act***,** the purpose of the exclusive rights in the *Copyright Act* is to "provide rights holders with recognition, remuneration and the ability to assert their rights." Yet as currently drafted, Bill C-11 proposes broad, new limitations on those rights in order to "further enhance users' access to copyright works", without payment and without sufficient consideration of their impact on authors and on the marketplace within which we work. Put simply, this will decrease authors' incomes because it reduces copyright costs for educators and other users.

Modernized copyright legislation must recognize that:

- Creators must be fairly paid for their work;
- The integrity of creators' work must be respected; and
- Copyright licensing that provides the public with "easy, one-stop shopping" and writers with fair remuneration makes exceptions unnecessary.

In the Writers' Union of Canada's submission in response to *Improving Canada's Digital Advantage*, the Government's Consultation Paper on a Digital Economy Strategy for Canada in June 2010, we said:

> ….Canadian writers need fair remuneration for their work and they need an environment in which their works can be distributed safely online. This will enable Canada's writers to continue to compete with the world's best.
>
> We want stronger copyright laws that will protect our works from circulating on the Internet without our authorization and without appropriate payment or attribution. The challenge to copyright in the digital age is better met by legislative measures that support collective administration of copyright than by exceptions. Collective societies provide easy access to consumers while ensuring rightsholders of fair payment.…

In the *Speech from the Throne* in March 2010, the Government promised that "To encourage new ideas and protect the rights of Canadians whose research, development and artistic creativity contribute to Canada's prosperity, our Government will also strengthen laws governing intellectual property and copyright." The next year's *Speech from the Throne* in June 2011 promised copyright legislation "that balances the needs of creators and users" and "a Digital Economy Strategy that enhances digital infrastructure and encourages Canadian businesses to adopt digital technologies…."

Unfortunately, the *Copyright Modernization Act* does not strengthen laws governing copyright in a way that will encourage or protect Canada's writers. In fact, it will have just the opposite effect. Nor does it balance the needs of creators and users. A number of its new, over-broad and vague exceptions will hurt writers – not only by radically expanding what can be copied under educational exceptions without payment but also by introducing greater uncertainty into what copyright protects. Inevitably, Bill C-11, if unamended, will lead to prolonged litigation. We further believe that these encroachments on authors' existing rights breach Canada's international obligations and will be the cause of complaints under *NAFTA* and the *TRIPs* agreement. Indeed, the International Federation of Reproduction Organisations ("IFRRO"), in a letter to you dated February 24, 2012, expressed its concern that "Canada is offside of its commitments to its trading partners."

Article 15 of the *International Covenant of Economic, Social and Cultural Rights* ("*ICESCR*"), in which the contracting states recognize everyone's right to "To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of

which he is the author" echoes Article 27(2) of *The Universal Declaration of Human Rights*. A report from Canada to the United Nations in 2004 on the implementation of the *ICESCR* reads:

> As a member of the World Intellectual Property Organization (WIPO), in December 1997, Canada signed the two treaties that were adopted at the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, December 2 to 20, 1996: the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*. And, in 1998 Canada undertook research and consultations on legislative amendments that would be required to ratify these treaties.

WIPO "Internet Treaties" were concluded almost 15 years ago. Bill C-11 is intended to implement new rights contained in these WIPO treaties, but in doing so it has taken away other rights by creating new exceptions that conflict with rightsholders' normal exploitation of their works.

Exceptions without Remuneration

The four exceptions introduced by Bill C-11 that most threaten writers are:

(1) fair dealing for education;
(2) user-generated content;
(3) digital delivery by libraries; and
(4) reproduction for private purposes.

Most professional writers do not oppose any uses that increase accessibility to their work. However, we do oppose carte blanche exceptions for uses for which we and other creators will receive no remuneration.

Administration by collective societies provides the same ease of access to consumers as do exceptions from copyright infringement, but also provides creators with fair remuneration that is either negotiated with organizations representing users or fixed by the Copyright Board. "Blanket" licences or tariffs replace multiple, low-value transactions between individual rightsholders and users and give teachers, students and others immediate access to works from Canada and around the world at low cost.

Statutory exceptions should be considered only where individual licensing or collective administration is not practicable. The greater impact of some exceptions in the digital environment should also be considered, and because we are living in a time of rapid technological change, exceptions should not be created prematurely – that is, before rightsholders have a reasonable opportunity to develop new business models in a safer online environment than what exists today. We note that the European Union, in paragraph 44 of the Preamble of its 2001 Directive of the European Union on the harmonization of copyright and related rights in the Information Society cautioned its member states that "exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment.

Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter."

Fair Dealing for Education and other educational amendments

A government fact sheet on Bill C-11, entitled *What the New* Copyright Modernization Act *Means for Teachers and Students*, states that "Extending this provision to education will reduce the administrative and financial costs for users of copyrighted materials that enrich the educational environment." We are certainly in favour of "enriching" the educational environment, but there is no mention that these costs to be saved by educators, both by expanded fair dealing and by other new, specific exceptions for education will come straight out of the pockets of writers and other rightsholders. The permitted uses described in this fact sheet as having "significant social benefits" should not be free uses at the expense of creators. Mostly these are not new uses. Without the proposed exceptions, they would continue to be licensed, with payment to rightsholders.

The teachers, principals, university presidents, secretaries and janitors who work in the education sector are paid for their work. Writers should also be fairly paid for theirs. The debate on copyright has been clouded by pressure for more exceptions that has come from salaried academics and the educational institutions that employ them. Academic writers often have little interest in earning royalties. It is enough for them that publication advances scholarly reputations and leads to salary increases. Professional writers, on the other hand, depend on writing for their living and cannot afford to give their work away free or to have it pirated.

The fact sheet on changes for teachers and students also states: "The Bill enables the use of copyrighted materials for the purpose of education, provided that the use is 'fair' (i.e., it does not harm the market for a work)." It would be more reassuring to be told that this is the Government's intent if the fair dealing section actually said this, and if the Supreme Court of Canada had not already said, "Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair." This omission and statement are not comforting. They are, to say the least, alarming.

The opening lines of the Preamble to Bill C-11 refer to the *Copyright Act* as "an important marketplace framework law and cultural policy instrument" that supports creativity and affects many sectors of the knowledge economy "through clear, predictable and fair rules". Yet the undefined scope of the proposed extension to fair dealing for education will create uncertainty that can only be resolved by costly litigation and on a case-by-case basis. Legislation should be clear and intelligible to those who need to understand both what is covered by "education" and what educators will be able to copy without paying rightsholders. This should not be left to be decided by litigation. We ask for two clarifications to Bill C-11 to answer the last question of what is intended by "fair dealing", as it is explained in the fact sheet. First, that it be made clear that it is the Government's intention that fair dealing "not harm the market for the work" and, secondly, that it be made clear that fair dealing does not apply when the *Copyright Act* contains a more specific, potentially applicable exception.

***We ask you to recommend to the House of Commons the attached amendments to "fair dealing" (section 29), as proposed in* Towards a Competitive Canadian Digital Economy.**

***Because all exceptions for education should be clearly delineated, we ask you also to recommend the attached amendments to section 29.4 on Reproduction for Instruction ("display"), section 30.01 on Lesson, section 30.02 on Digital Reproduction of Works, and section 30.04 on Works posted on the Internet ("P.A.M."), all of which are proposed in* Towards a Competitive Canadian Digital Economy.**

User-Generated Content or "Mash-Ups"

The proposed "mash-up" exception, sometimes referred to as the YouTube exception, is unfair to the authors of existing works. We are unaware of a precedent for this in the law of any other country. Bill C-11 would allow an existing work to be used in the creation of a new work by a different author for his or her "non-commercial purposes". Nevertheless the author of the new work would be free to send it to anyone with little restriction – and without payment to the author of the original work on which the new work is based – and could even authorize a commercial "intermediary", such as YouTube, to disseminate or distribute it.

A well-intentioned but largely ineffective safeguard in this section of Bill C-11 is the condition that the new work should not have "a substantial adverse effect" on the existing work. However, the original author would not be entitled to make a legal complaint until after such adverse effect had actually occurred – by which time the market for the original work could already have been severely damaged or destroyed. There could, for example, be a diminished market for an author's next book in a popular series if a sequel by someone else were to become popular on the Internet. This exception, as worded, would also allow the making of a film based on an author's book without her permission and even distribution in movie theatres as well as on the Internet. We believe that a new work that uses an existing work by another author should remain private unless there is permission or payment.

Under current copyright legislation, an author has the exclusive right to authorize adaptations of his or her work and can refuse to license adaptations that he or she finds distasteful. If this particular amendment in Bill C-11 allowing user-generated content becomes law, the author would not be able to prevent any adaptation of his or her work if the new work is created for a non-commercial purpose.

Clearer restrictions are needed to make any user-generated content exception fair to the original author whose work is used without his or her authorization, whose work could be distorted, and whose opportunities could be scooped by another author. These issues do not disappear just because the creator of the new work has no commercial intention.

Whether it be fan fiction or a teacher's collection of poems for her class created for non-commercial purposes, if distributed by a for-profit disseminator, that disseminator should be responsible for remunerating rightsholders whose existing works are used in new works and distributed in the way permitted by this proposed exception. Google-owned YouTube and other disseminators should be required to pay at least a fraction of their money from advertising or

access fees to collective societies to compensate those rightsholders whose works would be adapted and distributed or otherwise used for commercial gain.

***We ask you to recommend to the House of Commons the attached amendments to the exception for user-generated content (section 29.21), as proposed in* Towards a Competitive Canadian Digital Economy.**

Digital Delivery by Libraries

This exception in Bill C-11 will allow libraries to email a single copy of a newspaper or magazine article that is more than a year old, an article from a scholarly, scientific or technical periodical, or any non-fiction material covered by fair dealing for research or private study to the patron of another library. This is an extension of an existing exception commonly referred to as "interlibrary loan". But this new exception would allow a single library to supply the same copyright material directly to the computer of every student or other person across Canada who might choose to order it from his or her school or university library or local public library.

Although we are in favour of direct digital delivery from libraries to library patrons, we believe that collective societies should be given a reasonable opportunity, following the update of other provisions of the *Copyright Act*, to offer licences for digital delivery. Allowing digital dissemination of multiple copies of the same copyright material without a licence and remuneration and without a restriction on the number of copies a library can email to library users is unfair to rightsholders and will lead to increased "sharing" and decreased purchases of magazine and other subscriptions by libraries. This will inevitably harm the markets of the affected publications.

***We ask you to recommend to the House of Commons the attached amendments to the exception permitting the electronic delivery of copyright material to library patrons (section 30.2), as proposed in* Towards a Competitive Canadian Digital Economy.**

Reproduction for Private Purposes

This proposed, extraordinarily broad exception will allow everyone to reproduce any work without compensation to the author "for private purposes". This reproduction is subject to some restrictions, including that the work copied must be non-infringing and legally obtained and must not be borrowed or rented. Nor can technological protection measures be circumvented in order to make the copy. However, since the exception does not contain a definition of "private purposes", no one knows what this exception may permit other than format shifting and making backup copies or how different "private purposes" may be from "private use", a term already employed elsewhere in the *Copyright Act*.

Without the "clear, predictable and fair rules" promised in the Preamble to Bill C-11, it will be left to individual litigants to find out what the courts may allow as a "private purpose". "Digital locks" are not an acceptable substitute for clear copyright laws. But, without certainty concerning what is covered by this new exception, rightsholders will be forced to use technological protection measures in order to prevent extensive unremunerated dissemination of their works to the relatives, friends and casual acquaintances of individual users, who will

entitled to send those works to their relatives, friends and casual acquaintances, and so on and so forth. Any such widespread dissemination should be prohibited. If not, it should be licensed and the rightsholder remunerated.

But as IFRRO observes, in its letter to you referred to in the Introduction to this submission: "…when adopting Directive 2001/29/EC, the EU – considering the impact of such an exception and its international obligations – obliged Member States that would want to introduce such an exception to also give a right to remuneration to authors and publishers." We note that paragraph 52 of the Preamble of this European Union Information Society directive also states: "When implementing an exception or limitation for private copying...Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it." In other words, give rightsholders and collective societies a chance to develop models for private, personal use before legislating an exception.

We ask you to recommend in your report to the House of Commons that the exception permitting reproduction for private purposes (section 21.22) be deleted, as proposed in* Towards a Competitive Canadian Digital Strategy*, and be considered in future only if and when appropriate remuneration is provided for writers and other rightsholders.

Curtailment of Collective Licensing

All four of the exceptions on which we have focused are intended to exempt users from licensing and from payment for uses that currently are or could be administered effectively and efficiently by rightsholder-run licensing agencies, which already have models in place that provide users with easy access and creators with fair remuneration and that are subject to the oversight of the Copyright Board. Royalties and other terms of use are negotiated by users and rightsholders or are set by the Copyright Board.

There are other amendments in Bill C-11 that cut back on or preempt collective administration of copyright to the detriment of writers. These include removal of an exception from two existing educational "display" exceptions, which negates those exceptions if works are commercially available under a licence from a collective society: reproducing or telecommunicating works as required for tests and examinations under section 29.4(2) and making copies for overhead projection under section 29.4(1)(b) on the premises of a school or other educational institution. Other exceptions, which will preempt collective administration, are for the use of material publicly available on the Internet by students and teachers (the "P.A.M." exception in section 30.04 referred to above), and, jumping the gun on the outcome of current international discussions and disrespecting foreign copyright laws, alternate format material sent to other countries for persons with print disabilities (section 32.01). All of these exceptions encroach on the administration of copyright by collective societies and cut off income for creators.

We ask you to recommend to the House of Commons that proposed exceptions that eliminate or preempt collective licensing be removed from Bill C-11 or amended, so that rightsholders

will continue to be able to pursue the normal commercial exploitation of their work through the collective administration of their copyright works.

Canada's International Obligations

Bill C-11 will create some new startlingly broad exceptions that will harm writers, the most egregious of which we have commented on. All these exceptions cut back on the existing rights of authors and interfere with their current as well as potential future revenue streams. They are, therefore, viewed by our international colleagues as a breach of the "3-step test" in the *Berne Convention*, which is echoed in *NAFTA* and the *TRIPs* agreement, annexed to the World Trade Organization agreement but with "right holder" substituted for "author". The 3-step test is also included, without that change, in the *WIPO Copyright Treaty*, which Bill C-11 is intended to implement. Section 9 of the *Berne Convention* reads:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such [literary and artistic] works [protected by the Convention] in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

We believe that all four of the exceptions on which we have commented depart from the "internationally recognized norms" referred to in the Preamble of Bill C-11 and breach Canada's international commitments and that, if not amended, they will expose Canada to complaints from other countries.

We recognize that it is the nature of statutory provisions, such as fair dealing or an exception for user-generated content, to provide flexibility, and that other exceptions can never be precise, although tailored for particular circumstances. This is all the more so where new or revised exceptions are intended to be technology-neutral. We also recognize that, however much Parliament may endeavour to clarify its intent in providing such exceptions, there will sometimes be litigation to determine whether an exception is applicable in a particular instance. Because in Canada, international treaties do not become part of the law that Canadian courts must follow until their provisions are actually implemented into Canadian legislation, it is important for the 3-step test to be incorporated into the *Copyright Act* to assist judges in interpreting Parliament's intent.

Because treaties are considered to be "self-executing" in many countries, it is not necessary for their legislatures to enact them into their laws, and courts, at least in Austria, Belgium, Finland and the Netherlands, have applied the test as a principle of law. Many other countries, including Australia, Croatia, the Czech Republic, France, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Portugal and Slovakia, have legislated language from the 3-step test into their own laws. There is also a provision in paragraph 5 of Article 5 of the European Union's Information Society directive that provides that exceptions and limitations "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

***We ask you to recommend to the House of Commons that the 3-step test articulated in the Berne Convention and the WIPO Copyright Treaty be inserted into section 32.3 of the Copyright Act to assist courts in future interpretation of exceptions, as proposed in* Towards a Competitive Canadian Digital Economy.**

Statutory Damages

Bill C-11 introduces a distinction between commercial and non-commercial infringements and makes infringers for non-commercial purposes liable for drastically reduced statutory damages. Additionally and inexplicably, persons who provide services via the Internet that are designed primarily to enable others to infringe copyright are exempted altogether from statutory damages.

Statutory damages, now ranging from $500 to $20,000, in the judge's discretion for each work infringed, are an important tool for creators with limited financial resources. If creators prove infringement they can ask the court to award these damages without the difficulty and expense of proving the actual damage suffered. Bill C-11 restricts the statutory damages that can be claimed by a copyright owner in a lawsuit for non-commercial infringements to between $100 and $5000 regardless of how many infringements and how many works have been infringed. Once a copyright owner who has commenced a legal proceeding opts for statutory damages, all other copyright owners whose works have also been infringed by the same defendant are barred from recovering statutory damages for any non-commercial infringements that preceded the commencement of that legal proceeding. This is clearly unfair to these other copyright owners whose copyrights have also been infringed.

We also note that both commercial entities and large non-profit institutions may infringe copyright for non-commercial purposes. If they do so, these infringers are provided with a safety net: statutory damages of no more than $5000, regardless of the number of infringements and the number of copyright owners whose works have been infringed. This could be regarded as simply a cost of doing business.

We support all the amendments to statutory damages (section 38.1) requested in* Towards a Competitive Canadian Digital Economy: *Any limitation on statutory damage awards for non-commercial infringements should only benefit individuals and not benefit corporate or institutional infringers. Statutory damages should be available against a person who provides an Internet service that is operated primarily to enable others to infringe copyright by means of the Internet. Individuals whose works are infringed should not be barred from claiming statutory damages from the infringer because someone else has done so first.

Conclusion

We view a number of the copyright amendments in Bill C-11 as expropriation without compensation. Less copyright protection for authors means more free copying and fewer book sales. If Bill C-11 is passed without the amendments we have asked for, inevitably some book publishers will decide to reduce their operations and publish fewer books. Some publishers may disappear altogether. Writers' markets will shrink. All writers will make less money from the reproduction and communication of their works and many will find it even more difficult to

survive on their income from writing alone. Canadians – and Canadian educational institutions – will have fewer made-in-Canada books.

The Preamble to Bill C-11 recognizes the *Copyright Act* as "an important marketplace framework law and cultural policy instrument". Over the past four decades Canadians have taken pride in the accomplishments of Canadian writers and other creators whose works play a large role in forming Canada's cultural identity and in providing the foundation of its successful cultural industries. Without fair copyright legislation and appropriate remuneration, however, professional writers will produce fewer books, and literature in this country will be in danger of losing the cutting edge that distinguishes works of excellence.

Copyright provides the legal foundation for writers' business models and makes it possible for us to obtain remuneration for our work. It is also the economic basis for the entire publishing industry. Bill C-11 takes intellectual property rights from us and our international colleagues. Collective licensing, not vague new exceptions in Bill C-11, is the key to efficient and equitable access to copyright works in the digital environment as well as to fair payment to writers. Any "modernization" of the *Copyright Act* – "to bring it in line with advances in technology and international standards", to borrow language from the Government's *Backgrounder* on Bill C- – must surely provide reasonable remuneration for writers and appropriate protection for their works. It is not in the public interest to do otherwise.

We call on Members of the Legislative Committee to make recommendations in their report to Parliament on changes to the *Copyright Act* that will ensure that authors' rights continue to be respected in the digital environment and that will make it easier, not more difficult, for authors to be remunerated and to make their cultural and economic contribution to Canada. We ask that you fix Bill C-11.

RESPECTFULLY SUBMITTED BY THE WRITERS' UNION OF CANADA
on March 6, 2012