SOCAN

Society of Composers, Authors and Music Publishers of Canada

Société canadienne des auteurs, compositeurs et éditeurs de musique

PRELIMINARY SUBMISSION

TO

THE HOUSE OF COMMONS SPECIAL COMMITTEE TO CONSIDER

BILL C-32

An Act to amend the *Copyright Act*

November 19, 2010

BILL C-32 PRELIMINARY SUBMISSION

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* INTRODUCTION

1. On behalf of the members of **The Society of Composers, Authors and Music Publishers of Canada/Société canadienne des auteurs, compositeurs et éditeurs de musique** ("SOCAN") this Submission provides our preliminary views regarding Bill C-32, the *Copyright Modernization Act*, which was tabled on June 2, 2010 ("Bill C-32").

2. SOCAN submits that copyright law amendments must respect the following fundamental principles.

3. First, in order to foster innovation and creativity in Canada, Bill C-32 must ensure there is a viable and sustainable digital marketplace for Canadian creative content. In short, Parliament must ensure that those who innovate, create, produce and publish creative content are fully and fairly compensated when their works are used.

4. At present, Bill C-32 puts the cart before the horse because it focuses disproportionately on the technologies that deliver content, rather than the content itself. Bill C-32 must be improved so that it does more to encourage the creation and protection of content.

5. Second, Canada's copyright laws must be modernized in a manner that balances the rights of SOCAN's members and other creators with the needs of users of copyright works.

6. As it is currently drafted, Bill C-32 does not strike an equitable balance. Rather, it focuses too much on the needs of users and erodes creators' rights. Amendments are required to ensure that the rights of creators are respected and promoted rather than diminished.

7. Third, to stand the test of time, copyright law amendments must be technologically neutral, and must not merely address issues raised in the last half of the 20th century, or implement treaties negotiated over a decade ago.

8. Changes are required to ensure that Bill C-32 addresses the issues that are confronting creators and copyright industries in the 21st century.

9. Fourth, Bill C-32 must respect both of Canada's legal traditions, i.e., copyright and *droit d'auteur*.

10. Since the proposed amendments do not express the respect for creators' rights that is a cornerstone of *droit d'auteur*, Bill C-32 must be recalibrated.

11. In accordance with the foregoing key principles, SOCAN's submissions are presented under the following headings:

    I. Who We Are

    II. SOCAN supports Bill C-32's clarification of the Making Available Right for Musical Works, and its provisions regarding Rights Management Information ("RMI")

III. SOCAN's Clearing House Function

IV. SOCAN opposes Bill C-32's wholesale Exceptions because they diminish the right that creators have to be paid for the exploitation of their works

V. Bill C-32's sweeping Exceptions are contrary to internationally recognized norms

VI. Part VIII of the *Copyright Act* must be amended to ensure Bill C-32 respects the principle of Technological Neutrality

VII. Bill C-32's Measures against enablers of copyright infringement may require clarification

VIII. Provisions respecting Providers of Network Services or Information Location Tools should be strengthened

VIIII. Conclusion

I. WHO WE ARE

12. SOCAN is a Canadian owned and operated not-for-profit organization that is directly affected by Canada's copyright laws.

13. For over 80 years SOCAN and its predecessors have represented composers, lyricists, songwriters, and publishers of musical works from across Canada and around the world.

14. On behalf of our more than 35,000 active Canadian members, and members of affiliated similar societies from around the world, SOCAN collectively administers a specific part of copyright.

15. The copyright that we administer is the ***performing right*** in music and lyrics, which are commonly referred to as ***musical works***.

16. The performing right is that part of copyright that gives owners of musical works the sole right to perform in public, to broadcast or communicate their works and to authorize others to do so, in return for royalty payments.

17. These performing rights royalties are important to SOCAN's members because the majority of SOCAN's members are risk-takers who do not get paid "up front" for creating or publishing music. They are only entitled to receive copyright royalties if their musical works are actually performed, communicated or exploited by others.

18. The amount of copyright royalties our members receive is determined by the Copyright Board of Canada that sets applicable tariffs payable by those who choose to perform musical works. This quasi-judicial tribunal balances the interests of creators and users, and allows interested parties an opportunity to be heard in transparent public hearings, thereby promoting the public interest.

II. SOCAN SUPPORTS BILL C-32'S CLARIFICATION OF THE MAKING AVAILABLE RIGHT FOR MUSICAL WORKS, AND ITS PROVISIONS REGARDING RIGHTS MANAGEMENT INFORMATION ("RMI")

19. As noted above, the copyright that SOCAN administers is the performing right, which gives owners of musical works the sole right to perform in public, to broadcast or communicate their works and to authorize others to do so, in return for royalty payments.

20. The performing right is included in Part I of the *Copyright Act*, where Paragraph 3(1)(f) provides that the copyright of SOCAN's members and other creators includes the sole right "to communicate the work to the public by telecommunication", and to authorize such communication.

21. The term *communication to the public by telecommunication* is defined in Section 2.4 of the *Copyright Act.*

22. SOCAN supports Section 3 of Bill C-32 which clarifies Section 2.4 of the *Copyright Act* by stating that the *communication of a work 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.*

23. SOCAN also supports the provisions regarding Rights Management Information ("RMI") contained in Bill C-32's Section 47 because they will help creators to monitor the use of their works, will ensure that those entitled to royalties will be paid when their works are exploited and will assist in the enforcement of their rights.

24. With respect to Bill C-32's provisions regarding Technological Protection Measures ("TPMs"), SOCAN generally does not rely on these measures because our mandate is to license the world's music repertoire and collect royalties in accordance with tariffs set by the Copyright Board when musical works are performed. However, we respect the right of other copyright owners to use TPMs to the extent and in the manner that they may choose in order to protect and market their works if they so desire.

III. SOCAN's CLEARING HOUSE FUNCTION

25. The collection and distribution of performing rights royalties create significant challenges. These challenges are constantly changing as the means of distributing public performances of musical works expands due to evolving technologies, including wireless mobile devices and broadband Internet.

26. Even if these technologies were not evolving, it would be impossible for every individual Canadian composer or lyricist to keep track of the millions of music users and public performances and broadcasts of their works across Canada and abroad.

27. Likewise, music users would find it impossible or very costly to obtain the permission of each of the hundreds of thousands of copyright owners from Canada and around the world each time they wished to perform or authorize the performance of music.

28. SOCAN meets these technological and logistical challenges by serving as a cost-effective clearing house that licenses music users and seeks fair and equitable compensation for music creators.

IV. SOCAN OPPOSES BILL C-32'S WHOLESALE EXCEPTIONS

29. As noted above, the *Copyright Act* creates certain exclusive rights for rights holders, including the right to communicate to the public by telecommunication, and the right to authorize others to do so in return for remuneration in the form of royalty payments.

30. However, the *Copyright Act* sometimes deviates from these exclusive rights because some uses of works are permitted without the rights holder's authorization, and without the payment of any remuneration. These deviations are called "exceptions".

31. When dealing with copyright amendments, it is therefore important to distinguish between:

    (1) the creators' ***exclusive right*** *to authorize the use* of their works;

    (2) the creators' ***right to remuneration***; and

    (3) ***exceptions***, where creators have neither the right to authorize the use of their works, nor the right to remuneration.

32. Exceptions are included under Part III of the *Copyright Act* in Sections 29 et seq. Part III is entitled *Infringement of Copyright and Moral Rights and Exceptions to Infringement*.

33. Bill C-32 contains 20 pages of amendments to Part III, that include almost 40 new exceptions and which graphically illustrate the bill's failure to balance the interests of users with the rights of creators.

34. Only two of these 20 pages contain *infringement* provisions which are designed to protect creators' rights.

35. However, the other 18 pages (Sections 21-34 of Bill C-32) develop additional *exceptions and limitations,* which effectively deprive creators of their right to get paid when their works are used.

36. For example, Bill C-32's Section 21 proposes to significantly expand the scope of the *Copyright Act's* fair dealing exception by adding three broad new categories – i.e., education, parody and satire.

37. The current ***education*** exceptions under Section 29.4 and Section 29.5 of the *Copyright Act* are subject to Section 29.3, which prohibits actions "carried out with motive of gain". SOCAN submits that exceptions should not be permitted if carried out with motive of gain, and, therefore, section 29.3 of the *Copyright Act* should be amended to apply to Bill C-32's exceptions.

38. Since the scope of the new education fair dealing exception is undefined and unknown, costly litigation is expected. Unlike the existing educational exceptions under the *Copyright Act* which are limited in scope, Bill C-32's new general education exception is general and very broad in scope, and it may be invoked by any party, whether an educational institution or not. SOCAN submits that this exception does not meet the "certain specific cases" requirement of the internationally accepted "three-step test", which is further discussed below.

39. SOCAN agrees with the positions of Access Copyright and other representatives of creators and publishers of educational materials including all of the creators and publishers whose existing income streams and businesses will be negatively impacted by the amendments provided in Bill C-32.

40. With respect to ***parody and satire***, while it may be in the interest of society to add parody and satire to the fair dealing exception (and for the parodist or satirist to benefit from the use of their parody or satire), it is unfair to allow them to benefit financially from the exploitation of another creator's work if that work is used in whole or in part without compensating the original creator from whose work the parody or satire derives.

41. If parody and satire exceptions are introduced, then the law should specify that the usual tests for fair dealing must be applied, and it should only apply if the original work is the subject of the parody or satire and if the parody or satire is made for non-commercial purposes.

42. In addition, if new fair dealing "allowable purposes" for parody and satire are introduced, Bill C-32 must be amended to ensure that these new exceptions do not facilitate the infringement of authors' moral rights under Subsections 14.1 or 28.1 and 28.2 of the *Copyright Act*.

43. SOCAN opposes Bill C-32's new exceptions that offend international treaty law (see Part IV below), because they radically expand the *Copyright Act's* exceptions, and seriously diminish creator's *droit d'auteur* and their ability to earn a livelihood. If these exceptions are enacted, SOCAN believes that additional legal uncertainty will be created with consequential litigation.

44. To best foster innovation and creativity in Canada, Parliament must ensure that those who innovate and create are fully compensated when their works are used. Therefore, copyright amendments must not set up unwarranted exceptions, or otherwise limit, the copyright royalties paid when the musical works of SOCAN's members are performed or communicated.

45. If Parliament decides to dilute the rights provided in the *Copyright Act* and deprive SOCAN's members of copyright royalties, it is basically asking over 35,000 Canadian creators to take risks and work for nothing. That's not realistic, and it's not fair. Others are not expected to work for free or give away the fruits of their labour. Creators should not be expected to either.

V. BILL C-32's SWEEPING EXCEPTIONS ARE CONTRARY TO INTERNATIONALLY RECOGNIZED NORMS

46. Although Bill C-32's Preamble states that "in the current digital era copyright protection is enhanced when countries adopt coordinated approaches, based on internationally recognized norms", Bill C-32's expanded exceptions are contrary to longstanding international norms and treaties to which Canada is a Party.

47. For example, Article 9(2) of the ***Berne Convention For The Protection of Literary and Artistic Works (Paris Text 1971)*** (the "Berne Convention") creates the following "**three-step test**" for exceptions:

> *It shall be a matter of legislation in the countries of the Union to permit the reproduction of such works 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**.*
>
> (emphasis added)

48. Moreover, Article 11*bis* (2) of the Berne Convention states:

> *It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They **shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration** which, in the absence of agreement, shall be fixed by competent authority.*
>
> (emphasis added)

49. Likewise, Article 13 of the World Trade Agreement (the "WTO") ***Agreement on Trade-Related Aspects of Intellectual Property Rights*** ("TRIPS") includes the aforementioned Berne Convention's three-step test, which must be respected by any limitations or exceptions to the exclusive rights of SOCAN's members and other rights holders:

> *Members shall confine limitations or exceptions to exclusive rights to:*
>
> * *certain special cases*
> * *which do not conflict with a normal exploitation of the work and*
> * *do not unreasonably prejudice the legitimate interests of the right holder.*

50. On July 27, 2000, the WTO Dispute Settlement Body adopted the Panel Report entitled ***United States – Section 110(5) of the US Copyright Act***[1]. The WTO Panel considered the aforementioned Article 13 of the TRIPS and concluded that an exception

[1] WT/DS160/R

in the *US Copyright Act* was inconsistent with provisions of the Berne Convention, which had been incorporated into the TRIPS Agreement.

51. The WTO Panel therefore recommended that the Dispute Settlement Body ask the United States to bring its copyright exception into conformity with its obligations under the TRIPS Agreement. The Panel further noted that:

> *…in cases where there would be a serious loss of profit for the copyright owner, the law should provide him with some compensation (a system of compulsory licensing with equitable compensation).*[2]

52. It should also be noted that, under the heading "Limitations and Exceptions", Article 10 of ***the World Intellectual Property Organization ("WIPO") Copyright Treaty*** states:

> *(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.*
>
> *(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.*

53. SOCAN submits that the 18 pages of wholesale exceptions in Bill C-32 are overly broad and are not confined to special cases. In addition, by totally depriving creators of any remuneration, Bill C-32's exceptions conflict with a normal exploitation of the work and unreasonably prejudice the legitimate interests of the right holder.

54. To eliminate these wholesale exceptions, some parts of Bill C-32 should be amended to provide creators with an equitable right of remuneration as discussed in paragraph 60. For example, the remuneration regime that applies to SOCAN is preferable to outright exceptions because it strikes a reasonable balance between the rights of creators and the needs of users, and it is in keeping with Canada's international obligations.

55. This regime allows composers, lyricists, songwriters, and their publishers, through their collective SOCAN, to decide, on their own volition, to donate the use of their works to a particular user, for a specific purpose. In the event SOCAN is not prepared to forego remuneration, and SOCAN and a user are unable to agree on a royalty, the Copyright Board of Canada provides a fair mechanism to set the royalty and balance the needs of users with the rights of creators.

56. The *Copyright Act* currently recognizes that exceptions are not appropriate where licenses are available from a collective society. Subsection 30.9(6) of the *Copyright Act* limits the ephemeral rights exception for sound recordings "if a license is available from a collective society to reproduce the sound recording, performer's performance or work".

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[2] Ibid. Paragraph 6.229 and Note 205

57. Subsection 30.9(6) of the *Copyright Act* is a good example of how Canada's collective licensing copyright system and the Copyright Board's royalty setting process work efficiently to balance the needs of users with the rights of creators.

58. However, in a radical departure from past practice, Subsection 34(3) of Bill C-32 repeals Subsection 30.9(6) of the *Copyright Act*, thereby depriving creators of their existing equitable remuneration rights.

59. The *Copyright Act's* balanced remuneration regime has stood the test of time, and it strikes a more equitable balance than Bill C-32's sweeping exceptions, which strip creators of their rights to be paid when their works are used.

60. Bill C-32 must therefore be amended by deleting those sections that create exceptions to existing rights that are already effectively administered by collective societies. Likewise – and in general – no exceptions in C-32 should apply if a licence is or can be made available from a collective society. Therefore, a provision similar to Subsection 30.9(6) of the *Copyright Act* must be added to Bill C-32's exceptions.

61. SOCAN supports the submissions of the Canadian Music Publishers Association and SODRAC (Société du droit de reproduction des auteurs compositeurs et éditeurs au Canada) with respect to "Ephemeral Recordings".

62. Section 22 of Bill C-32 adds Section 29.21 that provides an exception from infringement for the creation and posting of "non-commercial user generated content" or UGC. It appears that the laudable intent of this section is to allow – subject to a number of conditions – individual persons to share UGC by posting that content (i.e. reproduce and/or communicate UGC) as "new works" even though that UGC may contain copyright protected works of others. However, upon careful reflection, this section will have significant unintended consequences.

63. First, under the existing "fair dealing" provision, the courts should already be able to assess whether an infringement occurs through the posting of UGC. This section, therefore, should not interfere with that principle, except in so far as individuals are concerned, and subject to the application of other provisions (e.g. moral rights).

64. Secondly, the current wording of Section 29.21, – may also cover entities (services or intermediaries) that use copyright protected content, other than individual persons whom the section is purportedly designed to protect from infringement claims. These entities could assert that they too should be protected by this section when they reproduce or communicate user generated content produced by individuals. The difference, however, is that entities such as services or intermediaries – unlike individuals – can and do financially benefit directly or indirectly from the posting of user generated content by individuals that may contain copyright protected works of third parties.

65. For example, sites like YouTube could claim that the UGC they host on their site and that contains copyright protected works does not require a licence. Such sites would make this claim that they do not infringe in accordance with Subsection 29.21 despite the fact that sites like YouTube (owned by Google) is a multi-billion dollar corporation that commercially benefits from all of the online traffic that is attracted to the site for the

myriad of content, including the copyright protected works of others that are posted by individuals as UGC.

66. Proposed subsection 29.21(1)(a) provides that the exception only applies if the dissemination…"is done solely for non-commercial purposes." Without additional conditions, uncertainty and litigation will arise if it is not made clear that it is only the individual that may be saved harmless if they post UGC. Bill C-32 must specify that if commercial entities like Google and YouTube enable the individual to post UGC that contains copyright protected works, then they will be held responsible for infringement if they directly or indirectly benefit from that dissemination.

67. As a Party to Berne and the WTO TRIPS treaties (and a potential Party to the ***WIPO Copyright Treaty*** and the ***WIPO Performances and Phonograms Treaty***), we submit that Canada must fully respect the foregoing 3-step test regarding any existing or proposed copyright limitations and exceptions.

68. In accordance with Canada's copyright treaty obligations, SOCAN hereby opposes Bill C-32's proposals to promote exceptions at the expense of creators' rights, including their rights to remuneration for the use of musical works.

69. Before enacting more unwarranted exceptions, Parliament must answer a fundamental question – Why are creators being singled out and required to work for free?

VI. PART VIII OF THE *COPYRIGHT ACT* MUST BE AMENDED TO ENSURE BILL C-32 RESPECTS THE PRINCIPLE OF TECHNOLOGICAL NEUTRALITY

70. Bill C-32's Summary states that it is amending the *Copyright Act* to "ensure that it remains technologically neutral."

71. To enable Canada's copyright laws to withstand the test of time, they should not be confined to the technology that exists the day they are enacted.

72. For example, when the *Copyright Act* was amended in 1997, it created a private copying levy to compensate right holders when Canadians make copies of their work for personal use. However, the courts have interpreted the wording to only apply the levy to blank media like audio cassettes, Mini-Discs and CD-Rs.

73. A decade later, these amendments are obsolete because this particular blank media technology is no longer popular. Instead, digital audio recorders (DARs – i.e. devices rather than "media") like the iPod have become the overwhelming method chosen by individuals for copying and storing music.

74. In 2010, it has become clear that the 1997 copyright amendments have not stood the test of time, and the *Copyright Act* must be updated to deal with private copying technologies in the digital age today, and tomorrow.

75. Section 22 of Bill C-32 states that its provisions regarding *Reproduction for Private Purposes* do not apply "if the reproduction is made onto an audio recording medium as

defined in section 79" of the *Copyright Act*.

76. However, Bill C-32 does not update Section 79 or any of the other Private Copying provisions of Part VIII of the *Copyright Act*. This omission flies in the face of the First Report of the ***House of Commons Standing Committee on Canadian Heritage***, which was tabled on March 17, 2010, and stated:

> *That the Committee recommends that the government amend Part VIII of the Copyright Act so that the definition of "audio recording medium" extends to devices with internal memory, so that the levy on copying music will apply to digital music recorders as well, thereby entitling music creators to some compensation for the copies made of their work.*

77. The Heritage Committee's Report was concurred in by the House of Commons on April 14, 2010. As currently drafted, Bill C-32 does not reflect the will of Parliament because it does not include the necessary amendments to Section 79 of the *Copyright Act*.

78. We support the amendments proposed by the Canadian Private Copying Collective (the "CPCC") in this regard because they reflect the will of Parliament and because they respect the principle of technological neutrality.

79. As a member of the CPCC, we also oppose Bill C-32 as currently drafted because it will decrease the compensation flowing to creators for an important use of their works, it will reduce the role of the CPCC, impede the development of Canada's collective licensing system, and it will diminish the role of the Copyright Board in setting copyright royalties that are in the public interest.

VII. BILL C-32'S MEASURES AGAINST ENABLERS OF COPYRIGHT INFRINGEMENT MAY REQUIRE CLARIFICATION

80. Bill C-32's Section 18 proposes to add the following infringement provision to Section 27 of the *Copyright Act* :

> *(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 primarily to enable acts of copyright infringement.*
>
> (emphasis added)

81. Although SOCAN welcomes infringement measures that target those who enable online piracy, we are concerned that the words "designed primarily" may give rise to uncertainty and costly litigation. As currently drafted, Bill C-32 may allow some enablers to argue that they do not infringe because their particular service was neither "designed" nor designed "primarily" to enable copyright infringement. Furthermore, SOCAN submits that the sanctions provided in Bill C-32 against enablers should be the same as those sanctions provided against other infringers.

82. SOCAN supports the efforts of producers of audio and audio-visual content [CRIA (Canadian Recording Industry Association), CIMA (Canadian Independent Music Production Association), CMPDA (Canadian Motion Picture Distributors Association)

CMPA (Canadian Media Production Association) and ADISQ (Association québécoise de l'industrie du disque, du spectacle et de la vidéo)] to ensure that creators' rights are fully protected and promoted.

VIII. PROVISIONS RESPECTING PROVIDERS OF NETWORK SERVICES OR INFORMATION LOCATION TOOLS SHOULD BE IMPROVED

83. SOCAN's submissions regarding Bill C-32's approach to Internet Service Providers ("ISPs") and other providers of network services or information location tools are presented under the following sub-headings:

(i) Amendments are required to limit Bill C-32's expansive Safe Haven provisions

(ii) Bill C-32's Notice and Notice regime does not recognize the major role that ISPs play in facilitating copyright infringement

(iii) Parliament cannot allow its copyright law to continue to be openly flouted by enacting provisions that invite circumvention and quickly become outdated.

(i) Amendments are required to limit Bill C-32's expansive Safe Haven provisions

84. Bill C-32's Section 35, proposes to treat ISPs as mere "conduits" and provide a "Safe Haven" to exempt them from liability for copyright infringement by adding to the *Copyright Act* :

> ***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.*
>
> (emphasis added)

85. This broad Safe Haven provision would not apply if the ISP is found to enable acts of copyright infringement, as defined by Section 18 of Bill C-32 [the so-called enabler provision Subsection 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 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.*
>
> (emphasis added)

86. As noted above, SOCAN is concerned that Section 18's requirement that an ISP service be "designed primarily" to enable acts of copyright infringement may give rise to

uncertainty and costly litigation.

87. As discussed below, Bill C-32's "enabler" provisions will not stop ISPs from aiding and abetting copyright infringement, or authorizing such infringement.

88. As a result, the "enabler" provisions of Section 18 of Bill C-32 do not effectively limit the broad scope of Section 35's Safe Haven. Amendments are required to ensure that Canada does not create a Safe Haven that turns a blind eye to the major role that ISPs play in facilitating copyright infringement.

89. Second, to escape infringement liability, Bill C-32's Section 35 requires an ISP to satisfy certain conditions when the ISP ***caches*** [Subsection 31.1(4)] or ***hosts*** content [Subsection 31.1(6)].

90. In addition to these conditions, Section 35's eligibility requirements should be amended to require ISPs and other network service providers to fully comply with the "Notice and Notice" provisions included in Bill C-32's Section 47 (e.g., Sections 41.25 and 41.26).

91. As further discussed below, to qualify for Safe Haven treatment, ISPs must also engage in more affirmative cooperation with copyright holders to stop copyright infringement from occurring on their networks.

92. Third, Bill C-32's new "Safe Haven" provisions cannot be considered in isolation from similar provisions that have already been enacted. Subsection 2.4(1)(b) of the *Copyright Act* states:

> *For the purposes of communication to the public by telecommunication,* ***a person whose only act*** *in respect of the communication of a work or other subject matter to the public* ***consists of providing the means of telecommunication*** *necessary for another person to so communicate the work or other subject-matter* ***does not communicate*** *that work or other subject-matter to the public;*
>
> (emphasis added)

93. If Parliament enacts an additional Safe Haven provision regarding the provision of the means of telecommunication, it will create duplication and confusion.

94. SOCAN therefore submits that, in addition to making the aforementioned amendments, Parliament should delete Subsection 2.4(1)(b) of the *Copyright Act* because it is redundant, potentially confusing and could result in litigation.

(ii) Bill C-32's Notice and Notice regime does not recognize the major role that ISPs play in facilitating copyright infringement

95. Bill C-32's Notice and Notice provisions are a step in the right direction, but more is required to balance the rights of creators with the needs of ISPs and other intermediaries.

96. As currently drafted, Bill C-32 only requires an ISP to do two things to counteract the copyright infringement that occurs on their networks:

- Electronically forward a copyright infringement Notice; and
- Retain certain records for 6-12 months.

97. Passing on a Notice and retaining certain records for a few months does not recognize the major role that ISPs play in facilitating copyright infringement.

98. SOCAN submits that the following facts demonstrate that it is wrong to assume that ISPs are simply providing a passive connection between those who illegally upload and download copyright content.

99. First, there is no evidence that ISPs are unaware that their services are used to enable a significant number of acts of copyright infringement, including the illegal downloading of the musical works of SOCAN's members.

100. In fact, ISPs openly market and promote their services based on bandwidth and their customers' ability to "download high quality music files, stream video, or play games".[3]

101. Second, ISPs commercially benefit by charging higher prices for the bandwidth they promote and market in this manner.

102. Commercial benefits that arise as a result of condoning copyright infringement constitute unjust enrichment – an unintended result universally recognized to be avoided.

103. Third, although ISPs have the ability to limit acts of copyright infringement, Bill C-32 merely requires an ISP to play a passive role.

104. However, Canadian Courts have held that ISPs are not by definition passive conduits, and that failure to play a more active role may constitute authorization of copyright infringement. For example, in the Supreme Court of Canada, Binnie J. observed:

> *I agree that notice of infringing content, and a failure to respond by "taking it down" may in some circumstances lead to a finding of authorization.*[4]

105. SOCAN submits that Parliament should amend Bill C-32's Safe Haven provisions to specify that these provisions do not apply unless an ISP can prove it had no knowledge that copyright infringement was occurring on its network service.

106. Furthermore, Bill C-32 should therefore contain provisions that specify that the failure to establish lack of knowledge of copyright infringement, to comply with a Notice of copyright infringement or a request to take down the copyright infringing material, may constitute authorization of such infringement, and result in the ISP bearing joint and several liability with the copyright infringer and/or enabler.

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[3] See http://www.bell.ca/shopping/PrsShpInt_NewAccess.page?userType=NEW

[4] See *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, Para. 127

(iii) Parliament cannot allow its copyright law to continue to be openly flouted by enacting provisions that invite circumvention and quickly become outdated

107. The foregoing amendments are required because Bill C-32's current Notice and Notice regime is fatally flawed since it has no effective or efficient legal means to require the removal of infringing material that continues to infringe.

108. Unless there are amendments, infringers will be able to receive an unlimited number of Notices with no statutory consequences, and the infringing material can continue to be available on the Internet for other infringers.

109. Bill C-32's Notice and Notice regime also lacks effective sanctions. Instead of creating offences and fines, Bill C-32's Section 47 includes Subsections 41.26(3) and 41.26(4), which force a copyright holder to commence legal proceedings against an ISP.

110. As currently drafted, Bill C-32 also limits an ISP's liability for failure to respect its Notice and Notice obligations to statutory damages of only $5,000-$10,000. These minimal damages may be amended by government regulation.

111. Bill C-32 must be amended to ensure that ISPs cannot turn a blind eye to the ongoing copyright infringement that occurs on their networks, and to ensure that repeat offenders cannot continue to illegally download with impunity.

112. To ensure it remains relevant, Parliament cannot enact legislation that will be as openly flouted as Canada's current copyright law.

113. Parliament must therefore also consider amendments that provide for more effective and enforceable cooperation between rights holders and ISPs, and that create a more effective mechanism for detecting and actually deleting infringing material from sites and reducing and preventing access to infringing **sites and services,** but not depriving individuals of access to the internet.

114. Section 47 of the Bill that provides for amendment subsection 41.26(1)(b) should also be amended to require ISPs to retain any records related to a claimed infringement for a period of at least 5 years from the date of the notice of claimed infringement is received.

115. In addition, Parliament should consider measures that limit an infringer's internet connection speed or capacity or that block access to **particular material or sites**. Such measures could include escalating consequences after due process if an infringer or an enabler **continues** to engage in or to enable copyright infringement notwithstanding the application of the statutory processes to reduce infringement

116. Finally, it must be recognized that the internet continues to evolve rapidly. As a result, the establishment of a parliamentary committee to review the *Copyright Act* every five years will not ensure that Canada's response to internet copyright infringement remains current and effective.

117. SOCAN therefore submits that Section 58 of Bill C-32 should specify that every three years Parliament must conduct a comprehensive review of the *Copyright Act's* provisions regarding ISPs and other providers of network services or information location tools.

VIIII. CONCLUSION

118. SOCAN welcomes this opportunity to provide our preliminary views regarding Bill C-32 and to propose the aforementioned amendments – including amending Bill C-32's Section 41, by adding the following provisions as Section 33.3 of the *Copyright Act*:

Interpretation ***In interpreting any limitations or exceptions to copyright under Part III of the Act, the court shall ensure that such limitations or exceptions are confined to certain special cases, do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the author, including the author's right to equitable remuneration.***

119. We look forward to continuing to work closely with Ministers, their officials, and Members of Parliament to enact the amendments required to ensure Bill C-32 strikes the right balance between the needs of users and the rights of creators.