Submission on Bill C-11, *The Copyright Modernization Act*

Canadian Association of Broadcasters

CAB | ACR

Executive Summary

The Canadian Association of Broadcasters (CAB) welcomes this opportunity to formally state its perspective on Bill C-11, *The Copyright Modernization Act*. A key challenge for the broadcasting industry is copyright reform. The Canadian private radio broadcasters welcome the establishment of a fair and balanced copyright licensing regime that reflects the important contributions of all those who support and provide a significant window for Canadian talent and generally generate success and wealth in the Canadian cultural industry. The private radio broadcasters embrace the provision to include a broadcaster reproduction right exception that recognizes the realities of broadcaster operations in the digital environment. Bill C-11 achieves an important objective for our industry and goes a long way to reducing unnecessary and unfair duplication in royalties. We support passage of Bill C-11 with the inclusion of a meaningful broadcaster exception.

This submission is intended to complement the CAB's written submission to and appearance before the Special Legislative Committee on Bill C-32, and sets out the specific requests of the CAB with respect to Bill C-11 as well as the corresponding rationale.

- Section 30.9 – the reproduction right exception for radio broadcasters – is an essential part of Bill C-11. A full reproduction right for radio broadcasters must be part of Bill C-11. In order to achieve this objective Bill C-11 requires slight modification to correct minor drafting errors, ensure technological neutrality, ensure consistency with the remainder of the provision, and ensure the provision provides a meaningful exception that is consistent with the objective of the amendment and in line with the operational reality of radio broadcasters.

- The 30-day destruction requirement in subsection 30.9(4) must be removed if broadcasters are realistically going to be able to realize any benefit from the reproduction exception contained in Bill C-11. All broadcasters that use music keep it for more than 30 days. Radio broadcasters (large and small) do not have the technical capability or resources to delete and reconstitute music every 30 days. Bill C-11 requires such deletion. CAB requests that the 30 day limit be removed from Bill C-11.

- The CAB also requests that the Minister of Industry publish a statement in the *Canada Gazette* at the time Bill C-11 is enacted to state that no payments will flow to the countries that do not provide a right of similar scope and duration to their own nationals. The publication of this statement is contemplated in section 20.21 of Bill C-11 as a means to ensure fairness in national treatment.

- Section 68.1 must remain in the *Copyright Act*. It is not currently addressed in Bill C-11. One witness, Re:Sound, and some other parties have made submissions before the Special Legislative Committee on Bill C-32 and/or Bill C-11 that this section should be changed as a possible additional source of income for rightsholders. The original provision was incorporated into the *Copyright Act* as a permanent provision specifically to protect low revenue radio broadcasters.

Introduction

1. The Canadian Association of Broadcasters (CAB) welcomes this opportunity to formally state its perspective on Bill C-11, the *Copyright Modernization Act*. This submission is a complement to the submissions filed with the Special Legislative Committee on Bill C-32 from the CAB, from regional broadcasting associations, and from small, medium and larger broadcasters. We support the positions outlined in those submissions. We also support the submission of Hayes eLaw LLP in respect of proposed technical amendments to section 30.9 to ensure that the provision, as worded, will meet the Government's stated intention that radio broadcasters will no longer be required to compensate copyright owners for making reproductions in the context of their operations.

2. The CAB's copyright concerns are consistent with the Government's stated objectives in this copyright reform process, and particularly with the need for balance, modernizing copyright to keep up with a fast-moving digital environment, and promoting innovation and development in Canada.

Copyright – A Significant Cost for Canadian Broadcasters

3. On July 9, 2010, the Copyright Board of Canada released its Reasons and an accompanying Fact Sheet in respect of the combined Tariffs for Commercial Radio for the collectives SOCAN (2008-2010); Re:Sound (2008-2011); CMRRA-SODRAC Inc. (2008-2012); AVLA-SOPROQ (2008-2011); and ArtistI (2009-2011). The marginal rate for all 5 tariffs was set at 8.95%. This remains the current rate and the Copyright Board has indicated that it does not intend to modify the rate absent a material change in circumstances.

4. Of this rate, 2.45% is attributable to the three reproduction right royalties. The remaining 6.5% is attributable to the performance and communication rights royalties. As broadcasters have stated consistently, the performance and communication rights payments are not in any way impacted by any amendments to section 30.9.

5. Contrary to unsubstantiated assertions from recipients of reproduction rights payments and their allies, Canadian broadcasters pay more in copyright fees than their counterparts in comparable international jurisdictions.

6. In addition to paying multiple copyright fees for their use of music in over-the-air broadcasts, Canadian broadcasters also pay a myriad of increasingly complex tariffs for their online uses of music. These tariffs have increased in both number and value over time.

Creating Value for the Music Industry

7. Broadcasters are not just passive conduits for the creative content they distribute to consumers. They add real value to the content through the manner in which it is programmed and packaged and marketed for distribution. By virtue of the business model – delivering creative content to audiences in innovative and interesting ways – the music and audio-visual content conveyed through broadcasting receives substantial and meaningful promotion.

8. Radio airplay remains the primary method by which Canadians learn about new music. This promotional and marketing value represents a meaningful contribution to the success of artists. It is also incremental to the direct payments made for the use of copyright works.

9. On top of royalty payments, broadcasters also contributed millions to the development of Canadian talent and to the creation and broadcast of Canadian content and talent. In 2009, radio broadcasters contributed $51 million to Canadian Content Development initiatives. Broadcaster value-add consists of both direct payment through development investment and royalties for use, and indirect benefits that generate sales of the works or tickets to events. This significant value that Canada's broadcasters create in musical works is not recognized by the current copyright tariff regime.

10. Broadcasters find and fund artists through development projects and then create value in works by generating awareness, markets and audiences for their works that would not otherwise exist. This value creation takes many forms, the most important of which is free airplay which promotes the works, the artists and related money-making events for the artists such as concerts.

Local Broadcasters – Serving Communities Across Canada

11. As noted in the testimony of individual broadcasters that have appeared before the C-11 Committee, broadcasters make direct contributions within their own communities to local events and initiatives supporting the music industry, nurturing community interest in musical artists. Here are just some of the many music industry initiatives that CAB radio members supported in 2009-10:

    - Winnipeg Jazz Festival
    - Kitchener-Waterloo Octoberfest concert series
    - City of Pembroke Music Festival
    - Waterloo Region District School Board for purchase of new instruments and sheet music
    - Mariposa Folk Festival
    - RNC Media-Antenne 6 bursary program to support students from the journalism program of Collège de Jonquière,
    - The Western Canada Music Awards
    - Les Rencontres de l'ADISQ
    - North by Northeast
    - Music Education Program of the Canadian Academy of Recording Arts and Sciences
    - FANFEST at Canadian Music Week

12. Broadcasters support their entire communities, not just the musicians within them. Tens of millions of dollars are raised for local charities by broadcasters every year. An example is Astral's National Day of Caring for Kids Radiothon, through which, for two years in a row, Astral listeners raised a record $7.1 million for Children's Miracle Network and several Astral-supported children's charities across Canada. Similarly, in 2010, Corus Radio stations contributed over $15 million to Canadian charities.

13. Radio broadcasters' payment of over $115 million for artists in a single year on top of tens of millions in community and charitable contributions is a significant contribution. We believe that we are doing our part to support Canadian artists.

A Reproduction Right Exception for Broadcasters Makes Sense

14. Broadcasters' current reproduction right liability effectively taxes radio stations for being innovative and efficient in using technology to get music to listeners. The following are the key arguments in favour of granting a broadcaster exception:

- **Broadcasters already pay for the right to play music** and are not disputing the need to compensate rights holders for playing music. However, the reproduction right tariffs for commercial radio alone now represent three additional payments (and counting) to use music in a broadcast. The multiplicity of payments represents an unfair burden by any standard.

- Making these reproductions only facilitates the broadcasting of the music broadcasters have already paid to use. **No new use is made of the music, radio makes no additional revenues** when they make the reproductions and, in fact, radio makes significant capital investment in the technology and in dedicated staff.

- The types of reproduction engaged in by broadcasters **do no harm to the rights holder**: they do not encroach on the rights holders' content exploitation markets in any way. To the contrary, the use of digital music transfer systems serves to cut costs for the music labels. Costs are cut through savings made by not having to provide stations with CDs and not sending artist reps to the stations to advocate the playing of particular sound tracks. Broadcasters are no different from consumers or digital network operators when they use technology to make digital music files broadcast-ready: the use is ancillary to an efficient technical process.

- Copyright tariff payments are calculated as a percentage of revenues. This means a more **successful broadcasting sector translates into higher tariff payments**, which will lead to an increase in copyright payments despite the introduction of an exception for broadcasters.

- As noted by the Canadian Federation of Musicians in their appearance before the C-11 Committee, broadcast mechanical royalties are for publishing companies and record labels, not for artists. Eliminating this payment will mean that money that would otherwise flow outside the country to foreign multibillion dollar companies **will stay in Canada with 100% Canadian companies that invest substantially in Canadian artists and culture**.

15. The proposed exception will not undermine the value of the integrity of the work and will provide the broadcasting industry with competitive conditions. The proposed exempted activity – engaging in digital processing to support a lawful broadcast – is simply an intermediary practical step in the course of a legitimate industrial use activity, for which creators are already being compensated.

16. We support the inclusion of an exception for broadcasters, and Bill C-11 attempts to address this problem by including a provision that removes the requirement to pay for reproductions as long as they are destroyed 30 days after they are made. Although the intent is good, this is an unreasonable and unworkable solution that fails to recognize the operational reality of a radio station. Compliance with the exception as currently worded demands time-intensive processes to be implemented at every radio station and results in the creation of even more reproductions.

17. The CAB is proposing technical amendment to the broadcaster exception to ensure technical neutrality, consistency with the rest of the *Copyright Act*, and a true reflection of operational reality so that the exception can be meaningful for broadcasters.

Required Amendments to Make the Exception Work

18. These following proposed technical amendments are necessary to ensure the broadcaster provision provides broadcasters with a meaningful exception from reproduction right liability. If incorporated, these technical amendments would provide broadcasters with the full exception intended and result in no additional costs or loss of revenue to the rights holders. As well, broadcasters will continue to pay all the same rights holders pursuant to the far more valuable communication right, in addition to supporting countless Canadian content initiatives with significant levels of funding.

19. As currently worded, section 30.9(1)(a) requires a broadcaster to "own" a copy of a musical track in order to avail themselves of the exception. This concept pre-dates digital technologies. At this point, virtually all broadcasters use digital files of sound recordings, which can only be "possessed" not owned. This is a drafting error that can be easily remedied to ensure the legislation is technologically neutral.

20. The removal of the reference to performer's performance or work will help eliminate redundant language – if a broadcaster possess a sound recording, it must also possess the performer's performance and work which are embodied in the sound recording. The addition of the reference to "owner of copyright in the sound recording" is consistent with operational realities for both the broadcaster and the copyright owner – the broadcaster receives its digital music from the sound recording maker.

21. Finally, Bill C-11 builds on earlier analog-era references to a 30 day time frame for retaining copies. By removing the words "at the latest" the Government can ensure that the retention provision does not force broadcasters to unnecessarily delete and reconstitute files at significant expense even when the original authorized copies of the file are retained.

22. The artificial 30 day "destroy regime" is potentially expensive and administratively restrictive for smaller broadcasters, yields no benefit to rights holders and is, in any event, unworkable. This proposed modification does not change the intent of the provision; it merely removes a reference that would otherwise interfere with an authorized activity pursuant to the broader exception in s. 30.9.

23. The following are the CAB's proposed technical amendments to s. 30.9 of the *Copyright Act* as set out in s. 34(1) and (2) of Bill C-11 in **RED:**

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

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

[…] (4) The broadcasting undertaking must destroy the reproduction when it no longer possesses the sound recording, or performer's performance or work embodied in the sound recording, or its licence to use the sound recording, performer's performance or work expires, or ~~at the latest~~ within 30 days after making the reproduction, unless the copyright owner authorizes the reproduction to be retained.

National Treatment for Neighbouring Rights

24. Bill C-11 introduces expanded rights for performers, including clearer reproduction rights. This is so Canada can ratify the WIPO Performances and Phonograms Treaty (WPPT). The outcome of this change to the *Copyright Act*, and Canada's subsequent ratification of the WPPT, would mean that Canada will have to pay nationals of other WPPT countries for performances of their works.

25. The US is such a country, but it has taken a reservation to the treaty such that performers/makers are not compensated by US broadcasters. Under the proposed wording of Bill C-11, Canadian broadcasters will have to compensate US performers/makers even though they are not compensated in the US. Canadian performers/makers are also not compensated by US broadcasters. Canadian broadcasters already willingly compensate Canadian performers/makers for the use of their content.

26. This proposed change will directly affect the bottom line of Canadian broadcasters. Re:Sound is the collective that represents performers and sound recording makers. Currently, the Re:Sound payments from radio are $13M per year. The amount includes a stated deduction of 50% because Re:Sound does not represent US performers/makers, as noted above. <u>If Bill C-11 passes, Re:Sound would represent the US performers/makers, so the payment from broadcasters will double to $26M per year</u>.

27. Bill C-11, as drafted, also provides a mechanism for Canada to forego national treatment for US performers/makers to the extent of the US reservation under WPPT. Section 20(2.1) provides:

…if the Minister is of the opinion that a WPPT country does not grant a right to remuneration similar in scope and duration to that provided by subsection 19(1.2), for the performance in public or the communication to the public of a sound recording whose maker, at the date of its first fixation, was a Canadian…the Minister may, by a statement published in the Canada Gazette, limit the scope and

duration of the protection for sound recordings whose first fixation is done by a citizen or permanent resident of that country….

28. Accordingly, if the Minister publishes a statement expressly limiting Canada's national treatment obligations for the United States on the basis that it has taken a reservation under Article 15(3) of the WPPT, and this statement is published concurrent with the enactment of Bill C-11 so as to ensure seamless protection, the national treatment obligations will not apply and no payments will be required for US performers/makers.

29. The CAB requests that the Minister of Industry publish a statement in the *Canada Gazette* at the time Bill C-11 is enacted to state that no payments will flow to the US on the basis that they do not provide a right of similar scope and duration to their own nationals. The publication of this statement is contemplated in section 20.21 of Bill C-11 as a means to ensure fairness in national treatment.

Only Logical Solution for section 68.1: Maintain Flat Rate Threshold

30. Neighbouring rights were introduced into the *Copyright Act* in 1997. A significant consequence of this change was the creation of the copyright collective Re:Sound (formerly called the Neighbouring Rights Collective of Canada or NRCC). Re:Sound was charged with collecting royalties for sound recording makers and for performers. Their first target was private radio broadcasters.

31. The Government knew that would be the case, and knew that the introduction of a new tariff for radio broadcasters would represent a substantial burden for the industry, which was in the turmoil of a deep recession at that time. Accordingly, the neighbouring rights regime was integrated into the *Copyright Act* along with some special provisions for radio broadcasters. Specifically, the inclusion of section 68.1 which provided that all stations were to pay a flat fee of $100 on the first $1.25M in revenues, and that any stations making more than $1.25M in revenues were to pay the rates established by the Copyright Board. The Copyright Board certified the first neighbouring rights tariff in August of 1999, at a rate of 1.44% of advertising revenues.

32. Evidence from the Parliamentary Committee hearings at that time shows Susan Katz, the Director General of the Cultural Industries Branch at the Department of Canadian Heritage, stating:

> Finally, special and transitional measures have been provided for radio broadcasters. For all private radio stations, the royalty in perpetuity on the first $1.25 million of annual advertising revenues will be $100 per year. The royalty payable on advertising revenues over $1.25M will be phased in gradually.[1]

[1] *House of Commons Debates*, 16 (18 June 1996) at 1120 (Ms. Susan Katz), http://www.parl.gc.ca/content/hoc/archives/committee/352/heri/evidence/16_96-06-18/heri16_blk-e.html.

33. Further evidence from her briefing to the Committee indicates that "the structure of the regime as set out in the bill acknowledges the financial situation of small stations. In fact, 65% of private radio stations would pay only the $100 tariff."[2]

34. Re:Sound and its affiliated interest groups glibly argue that this provision is a "subsidy" for the radio industry, that it was intended to be temporary, and that it is largely benefiting the large radio corporations. This is false. The Government's intention is clear from the testimony of Ms. Katz. The *Copyright Act* was to include special and transitional measures for radio. The special measure was the $100 threshold on the first $1.25M in revenue. The transitional measure was the gradual phasing in of the Re:Sound tariff. These measures were incorporated into the *Copyright Act* specifically to acknowledge the financial situation of small stations. Small stations, then and now, face real financial challenges. This has not changed. It is still the small stations that are benefitting the most from this threshold.

35. Based on recent calculations based on information supplied from Statistics Canada and the Canadian Radio-Telecommunications Commission, low-revenue commercial radio stations still clearly require reduced tariff payments. Based on 2007 figures, an average music station with revenues below $1.25 million realized an 8.9% loss.

36. Section 68.1 must remain in the *Copyright Act*. Notably, it is not currently referenced in Bill C-11, so there is no legislative basis for the Standing Committee to consider revoking it.

Conclusion

37. Including the reproduction right exception with amendments to remove the requirement to delete music every 30 days will mean money that would otherwise flow out of the country to multibillion dollar foreign companies stays in Canada with Canadian businesses. We urge passage of Bill C-11 with the inclusion of a clarified broadcaster reproduction exception.

[2] *Ibid*, at 1220.