Submission to

the Legislative Committee on Bill C-11

Submitted to:
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Clerk of the Committee/ Greffière du Comité

Legislative Committee on C-11/Comité législatif chargé du projet de loi C-11

House of Commons / Chambre des communes

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February 24, 2012

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Canadian Independent Music Association

SUMMARY OF RECOMMENDATIONS

The Canadian Independent Music Association strongly encourages the Government of Canada to:

1. **Not remove Subsection 30.9(6) of the Copyright Act**
2. **Amend Bill C-11 to delete Sub-Section 68.1(1)(a)(i) of the Copyright Act, thereby removing the royalty exemption on radio broadcasters' first $1.25 million of annual advertising revenues.**
3. ***Amend Bill C-11 Section 34 (amending Subsection 30.9(4) of the Act) as per the following:*** The broadcasting undertaking must destroy ***all*** reproductions 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 ***first*** reproduction, unless the copyright owner authorizes the reproductions to be retained, and may not subsequently reproduce the same sound recording, or the performer's performance or work as embodied in the same sound recording, unless the copyright owner authorizes further reproductions to be made.
4. **Extend the private copying tariff to include digital audio recording devices that are designed to copy music**
5. **Amend *Bill C-11* by removing the phrase '*designed primarily*' from Section 18 (amending Section 27(2.3) of the Act), and to provide greater clarity on the definition of 'infringement, provision of services' under Section 18.**
6. **Amend *Bill C-11* Section 41 (which replaces Sections 41.25-41.27 of the Act) to reflect a 'Made-in-Canada' solution that provides both the proper exception and liability protections for ISPs, while at the same time provides a much stronger and actionable enforcement mechanism through the requirement of a take-down order.**
7. **Increase the limit of statutory damages, and at a minimum providing for a provision for fees, while amending the language in *Bill C-11* Section 46 (amending Sections 38.1(1) to (3) of the**

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Act) to allow all victims of copyright infringement to seek compensation through the courts.

8. **To clearly provide a distinction between individuals and registered companies (and all other commercial entities) in *Bill C-11* Section 46 (amending Sections 38.1(1) to (3) of the Act), for the purpose of providing statutory damage limits only to individuals.**

9. **Amend Bill C-11 Section 52 (amending Subsection 67.1.(4) of the Act) by deleting subsection *(b) the infringement of the rights referred to in paragraph 15(1.1)(d) or 18(1.1)(a); or*; and Section 54 (amending Subsection 68.2(2) of the Act) by deleting *subsection (b) the infringement of the rights referred to in paragraph 15(1.1)(d) or 18(1.1)(a); or*; thereby returning the language of these Sections back to the original language of the current Copyright Act.**

10. **Delete the phrase 'parody or satire' from *Bill C-11* Section 21 (amending Section 29 of the Act).**

11. **Delete the Non-Commercial User Generated Content language from the Bill (Section 22, amending Section 29.21 of the Act).**

12. **Amend Section 23 of the Copyright Act to extend the term of copyright for musical works to 70 years.**

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INTRODUCTION

Thank you very much for the opportunity to provide comments on *Bill C-11, the Copyright Modernization Act*. Certainly, we agree with your government's position that this Bill is extremely important and long overdue, and that the rights of creators and copyright holders in the music field in particular must and should be defined and protected in this digital age.

We applaud the government's stated intention of bringing Canada in compliance with our international obligations under the WIPO treaty with a modernized *Copyright Act*. The added requirement of a mandatory review of the legislation every five years is a welcome and sound approach, as it will ensure that Canada will be on the leading edge of changes to the economic and digital environment in the years to come.

By way of background, CIMA represents more than 180 Canadian companies and professionals engaged in the worldwide production and commercialization of Canadian independent music, who in turn represent thousands of Canadian artists and bands.

CIMA's membership consists of Canadian-owned companies and representatives of Canadian-owned companies involved in every aspect of the English-language music and music-related industries. They are exclusively small and medium sized businesses which include: record producers, record labels, publishers, recording studios, managers, agents, licensors, music video producers and directors, creative content owners, artists and others professionally involved in the sound recording and music video industries.

Some of the great Canadian independent artists and bands represented by our members include Rush, Bruce Cockburn, Sarah McLachlan, Broken Social Scene, Feist, The Trews, Tokyo Police Club, K'Naan, Luke Doucet, Blue Rodeo, City and Colour, Chromeo, K-OS, Metric, Diamond Rings, Lights, Our Lady Peace, Said The Whale, Jenn Grant, Dan Mangan, Chilly Gonzales, Delhi to Dublin, Canadian Brass and Saidah Baba Talibah, to name but a few.

To put our industry's size in perspective, the Canadian independent music sector – taken as a bloc – is one of the largest in terms of sales in this country, second only to Universal Music Canada. According to Nielsen SoundScan sales figures, the independent sector accounts for approximately 24% of all music sales in Canada – larger than EMI (12%) and Warner Music (10%) sales combined, and greater than Sony Music (16%).

For 36 years, CIMA has dedicated its efforts to developing business opportunities through an international network of business contacts in the music and entertainment industries and in the

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associated media such as film, TV, new media and other users of music products. CIMA's mandate is to ensure the long-term development of the Canadian-owned music sector and to raise the profile of Canadian independent music both in Canada and around the world.

In short, our members are the owners and operators of small businesses who invest in the creation of intellectual property that spurs economic benefits in terms of jobs, increased GDP, contributions to our nation's trade balance, and are an integral component of Canada's culture as expressed through music. As Canada's economic sectors continue to evolve, CIMA believes that the creation and protection of intellectual property is one of the few potential growth areas for our economy, particularly through exports.

CIMA sees *Bill C-11, the Copyright Modernization Act*, as having the potential to truly strengthen, protect and help expand Canada's independent music industry. We agree with the government's stated goals that a modernized copyright regime in Canada should indeed serve to create jobs, promote innovation and most importantly, ***give creators and copyright owners the tools to protect and be compensated for their work***.

By and large, *Bill C-11* does attempt to move Canada's copyright regime closer to where it needs to be in this modern digital age. In CIMA's view, it is critically important that the government 'get it right' in terms of ensuring that copyright owners not only have the tools to flourish and be compensated for their efforts, but that effective measures are put in place to protect their intellectual property from being misappropriated or misused.

The government's respect for the rule of law, and for victims' rights, must be the foundation of *Bill C-11*, and any and all other legislation that serves to protect and nourish critical sectors of Canada's economy.

While *Bill C-11* does make in-roads to modernize the *Copyright Act* in regard to the WIPO treaties, CIMA believes that some provisions of this Bill will lead to significant problems for copyright owners in their efforts to protect their rights, determine the use of their works and to enjoy reasonable compensation for the intellectual property.

As such, CIMA respectfully submits its views and recommendations on how *Bill C-11* can and should be strengthened in order for Canada to truly enjoy "the best intellectual property regime in the world," as recently stated by Minister Moore.

PRINCIPLES

It cannot be stressed enough that while copyright owners and creators must have clearly defined rights to protect their property, it is just as essential to have proper remedies that are cost effective and efficient that can be used by copyright owners to protect these same rights.

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While *Bill C-11* attempts to address these important principles, CIMA is of the opinion that some of its language may lead to unintended consequences in that rights holders will in fact be negatively impacted – either through lost revenues or a 'legalized' misuse of their property. Indeed, under *Bill C-11*, the onus of rights protection and litigation will seem to fall squarely on the shoulders of CIMA members - small business owners and operators, who cannot bear the cost or the burden of lengthy court proceedings against those who may infringe on their rights.

It bears noting that the independent music industry has suffered severe blows over the past decade. A confluence of the emergence of digital technology; piracy; changing consumer habits (from buying music to 'free' downloading; from album sales to individual songs); shifting business models and a global recession – all have served to diminish the ability of the independent music industry to be successful.

Consider that since 2006, Canadian music industry sales have decreased an average of 9.3 percent each year – 13.1 per cent in 2010 alone, according to the International Federation of Phonographic Industries (IFPI). And while Canada is the sixth largest market for music sales in the world (despite being the 35th largest country based on population); we are not immune to the negative forces affecting the global market.

The necessity of strong intellectual property laws that will protect our reputation not just as a nation of innovators but innovators with rights of property that can be enforced to allow proper returns to record companies and recording artists, is imperative.

There is much at stake. Copyright is the vehicle by which the owners of intellectual property can legally monetize their product, and protect that same property if it is stolen or illegally used by third parties. Therefore, the ability of the Canadian music industry to not only compete, but thrive and grow domestically and around the world depends on strong copyright protection and the broad monetization of their product.

While CIMA has been very active in developing trade and revenue opportunities in markets around the world for its members, the need to properly collect all monies due for the use of their music significantly increases year by year. In particular, CIMA is concerned that if the rights for remuneration to performers and record companies for the public performance of audio-visual works are denied in any way in Canada, then it will be extremely difficult for our members to pursue legitimate revenues in international markets due to a lack of reciprocity. Canada's failure to grant similar rights to sound recordings used in audio-visual works as in many other jurisdictions jeopardizes Canada's competitiveness in the international market. As a result, Canada risks moving from a being major exporter of music and culture, to being an importer of music only.

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It is imperative that legitimate control and ownership of intellectual property – music and sound recordings – must and should be strengthened and protected. Therefore, the rights-holders within the music industry's 'supply chain' must and should be fairly compensated for the use of their property in all commercial ventures, regardless of the medium used. With the severe decline in sales and the dramatic increase in illegal downloads of music, copyright owners and creators, now more than ever, are relying on enforceable rules, laws and regulations to help them levy and collect fair tariffs for the sale or use of their products. Our industry is struggling to nurture and develop Canadian talent, and is in need of any and all support that will help them stabilize and ultimately grow the independent music sector.

Indeed, a new copyright regime by all rights should serve to remove barriers and encourage the economic growth and viability of the independent music sector – yet CIMA is concerned that *Bill C-11* as written may inadvertently create the opposite effect in many critical areas.

COMPENSATION

As noted above, the Canadian independent music industry has been grappling with the numerous challenges it has faced over the past decade. In order to regain its balance, the industry needs predictability in the marketplace as well as a solid foundation in law that will serve to not only provide the best environment in which to conduct business, but also to protect the ownership of the products and services that it creates – as well as the right to fair compensation. Unfortunately, the industry does not have that predictability, as language in *Bill C-11* may exacerbate that uncertain future.

With an annual decline in overall music sales of over 9 percent, a continual decline in revenues from the private copying tariff on blank CDs, 'piracy' from illegal online downloads of music and other factors, the small business people that make up CIMA membership have been battling an almost perfect storm of negative forces. But by and large, CIMA members have managed to keep their 'ship on course' as they've struggled to be successful over the years, despite the continual annual loss of millions of dollars in revenues. Now, CIMA members and the industry at large are potentially facing the annual loss of an additional $21.2 million a year if *Bill C-11* Section 34 (amending Section 30.9 of the Act) is approved as currently drafted.

Currently, Section 30.9 of the *Copyright Act* creates a limited exception that permits broadcasters to make temporary recordings of works and other subject matter in order to facilitate their broadcast. *Bill C-11* proposes a number of significant changes to that section:

- Amending the "transfer of format" exception in Subsection 30.9(1) of the Act, which permits the reproduction of a sound recording, a performers' performance or a musical work "for the purpose of transferring it to a format appropriate for broadcasting," with a full-scale broadcast exception that would permit broadcasters to make an unlimited number of reproductions as long as they were made "for the purpose of their broadcasting".

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- Repealing existing Subsection 30.9(6) of the Act, which provides that the exception for ephemeral recordings does not apply where a licence is available from a collective society.

The potential loss of the ephemeral rights in *Bill C-11* Section 34(3) repealing Subsection 30.9(6) of the Copyright Act – commonly referred to as the 'broadcast mechanical' tariff – is a critical blow to the independent music industry. This amendment to the Copyright Act likely reduces or erases approximately $21.2 million of annual revenues paid not through tax dollars but private broadcasters for the right to make copies of and broadcast sound recordings – which is a significant loss of dollars for the independent music industry.

Just as importantly, the language in *Bill C-11* Section 34 undermines the basic principle that intellectual property has inherent value, and that the owners of such property must and should always be fairly compensated for its use. Exceptions to this basic tenet devalue intellectual property, and in CIMA's view, are not in keeping with the spirit of intent of *Bill C-11*.

1. **CIMA recommends the government <u>not remove</u> Subsection 30.9(6) of the Copyright Act.**

The Copyright Act currently gives commercial radio stations an exemption on the royalties paid to performers and record companies on their first $1.25 million in advertising revenue.

This exemption was created in the mid-1990s in a down-market when radio was experiencing transition. Today, commercial radio is posting record profits in every region and in every language but still enjoys this subsidy, meaning that performers and makers continue to be denied millions of dollars in rightful compensation.

The justification for this exemption no longer exists and music creators should no longer have to subsidize the commercial radio industry in this manner. CIMA is seeking an amendment that would repeal Subsection 68.1(1)(a)(i) of the Copyright Act, one that will fix a market distortion and inject approximately $8 million a year into the Canadian economy at no cost to taxpayers or consumers.

The commercial radio industry was granted the $1.25 million exemption when the Copyright Act was amended to grant eligible performers and makers of sound recordings the right to receive fair compensation for the public performance (or broadcast) of their works (commonly referred to as 'neighbouring rights'). At the time, only composers and music publishers received such royalties for airplay and the public performance of their music in Canada. It is the only legislative exemption of its kind in the Copyright Act, and does not exist in any other jurisdiction.

When the Act was amended, the government of the day granted radio stations the exemption as it applies to ***performers and makers of music only***. While the financial situation for commercial radio was

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less certain than it is today, the government at the time rationalized that the exemption helped radio stations transition to the introduction of royalties for performers and makers.

The reality is, however, that this exemption for radio stations denies the payment of fair compensation to one group of rights holders (those that create the music such as record companies, artists and background musicians), and does not impact the other group of rights holders, namely songwriters and publishers.

CIMA supports the government's goal of a sustainable, home grown music industry that creates jobs for artists and the businesses behind them to realize economic progress for themselves. Canadian music creators support market solutions to the very real challenges they continue to face in this uncertain and changing market – but a balanced solution that protects copyright by ensuring fair compensation is paid when the music it creates is used by broadcasters for commercial purposes. Unfortunately, the current Copyright Act prevents Canadian music creators from collecting fair market compensation for the entire use of their work in commercial radio. This prevents the growth of our industry and slows reinvestment into the creation of Canadian music.

The government has made it clear that it won't introduce new royalties that will increase costs for consumers. Removing this $1.25 million subsidy is a common-sense, cost-neutral solution that would provide an additional $7 million to $8 million in annual compensation to the Canadian music industry - without any cost to Canadian consumers or taxpayers.

2. **CIMA recommends the government amend Bill C-11 to delete Sub-Section 68.1(1)(a)(i) of the Copyright Act, thereby removing the royalty exemption on radio broadcasters' first $1.25 million of annual advertising revenues.**

The proposed changes in *Bill C-11* Section 34 would create a much broader exception that would apply regardless of the availability of a licence from a collective society. Rather than simply converting a recording into a format appropriate for broadcasting, broadcasters would be entitled to make as many copies of the reproduction on their hard drives or servers as are useful for their broadcasting purposes. The Copyright Board has found that broadcasters typically make multiple copies for these purposes, and that those copies "allow stations to increase their efficiency and profitability" and therefore have real economic value.

Broadcasters can comply with the 30-day destruction requirement by making copies of copies, at little or no additional cost, while continuing to enjoy the use of a copy of the work indefinitely. In fact, the entire process of "copying copies" can easily be automated such as to be integrated seamlessly into a broadcaster's day-to-day operations.

The combination of technological change and the proposed amendments would convert an exception intended only for ephemeral recordings into a complete exception for the many valuable recordings made by broadcasters in the course of their operations.

As a result, the issue raised by the proposed amendment is not whether broadcasters should benefit from an exception for ephemeral reproductions. Instead, the question is whether they should be completely exempt from the requirement to pay to reproduce musical works.

In order to give effect to the government's stated intention and limit the exception to 30 days, CIMA agrees with the *Canadian Music Publishers Association* (CMPA) that technical amendments are required in order to prevent broadcasters from making reproductions that, while technically retained for only 30 days, in fact constitute a permanent library of music.

CIMA and the CMPA believe that all reproductions of a given sound recording should be destroyed within 30 days after the making of the first such reproduction. This eliminates the possibility of multiple reproductions being made within that 30-day period, thus extending the window by another 30 days and possibly longer – and that no further reproductions of the same recording can be made later without authorization from the copyright owner.

3. ***CIMA recommends the government amend Bill C-11 Section 34 (amending Subsection 30.9 (4) of the Act) as per the following:*** *The broadcasting undertaking must destroy* ***all*** *reproductions 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* ***first*** *reproduction, unless the copyright owner authorizes the reproductions to be retained, and may not subsequently reproduce the same sound recording, or the performer's performance or work as embodied in the same sound recording, unless the copyright owner authorizes further reproductions to be made.*

Private Copying

As mentioned, the industry is experiencing a continual decline in the private copying levy applied to blank CDs, as consumers' use of this medium declines each year – from about $27.6 million four years ago to $8.8 million this year. Unfortunately, *Bill C-11* does not extend the tariff to include new media such as digital audio recorders, an oversight that CIMA is encouraging the government to reconsider.

The private copying legislation was enacted in 1998 to address the widespread and un-stoppable illegal copying of musical works. This solution, proposed by Canada's songwriters, performers, record labels

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and music publishers, allows Canadians to make copies of music for their personal use and in exchange, it provides music creators with some compensation for that use.

The private copying levy is a royalty earned by rights holders for use of their work. It is not a grant, government subsidy or a tax. Indeed, the levy would only apply to devices that are designed, manufactured and advertised for the purpose of copying music. This money is an important source of revenue for the independent music industry, and is often used to aid tour start-up costs, finance new albums or to simply pay the bills while they create the music Canadians value.

4. **CIMA recommends the government extend the private copying tariff to include digital audio recording devices that are designed to copy music.**

EXCEPTIONS & LIABILITY

There are several sections of *Bill C-11* where the *intent* of the language is laudable and indeed supported by CIMA and its membership. Provisions that enable copyright holders to pursue legal remedies against infringement; provide exceptions for common and non-commercial use of copyrighted materials like music; exceptions and responsibilities for the online community; and a specific limit on statutory damages should infringement occur are all noble in their attempt to put some definition and structure around ownership and use of copyrighted material in today's digital age.

These are complex and cumbersome issues for government and the legal community to grapple with, which is why, in CIMA's opinion, that clarity of language and intent is critically important for this Bill to be truly effective and enforceable by government. Failure to provide specificity, as well as the language that will truly serve to support and nurture an innovative culture and intellectual property, will result in confusion, a loss of investment, and a never-ending cycle of fruitless, expensive and numerous litigation proceedings against those that misappropriate or misuse copyrighted music.

Enablement Right

CIMA supports the provision that gives copyright holders the ability to pursue through legal means, those that enable or profit from infringing on copyright, such as illegal peer-to-peer file sharing sites. *Bill C-11* attempts to define infringement and helps to guide the court on how to interpret the nature of infringement. However, CIMA believes the Bill would be strengthened if language in *Bill C-11* Section 18 amending Section 27(2.3) of the Copyright Act was amended to provide a more succinct definition of digital services that are utilized for copyright infringement.

Currently, *Bill C-11*'s amended language for Section 27(2.3) states, "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."

The intent of this amendment, while indeed supportable, does require a change in language in order for this section of the Bill to be truly effective. The phrase, '*designed primarily to enable acts of copyright infringement'* does leave the definition open to broad interpretation, and as such CIMA fears it will be used by those who purposely and wilfully engage in copyright infringement as a means to avoid legal prosecution. In addition, a website that is "designed primarily" for selling smart phones, for example, could be enabling the download of music but would not be considered in violation of the new Act, under *Bill C-11*. We encourage the government to amend this section of the Bill to in order to remove any and all vagaries in the language, in part by removing the phrasing '*designed primarily'*.

5. **CIMA recommends the government amend *Bill C-11* by removing the phrase 'designed primarily' from Section 18 (amending Section 27(2.3) of the Act) and to provide greater clarity on the definition of 'infringement, provision of services' under Section 18.**

ISP Exceptions and Responsibilities/Statutory Damages

There are two areas in particular of *Bill C-11* that outline the liability of Internet Service Providers (ISPs), the process by which owners of copyright must follow in order to pursue legal action, and a limit on statutory damages that may be awarded by the courts on those cases of infringement that are non-commercial in nature.

Again, CIMA believes the Act as written may lead to significantly less protection and compensation for its small business members, and as described earlier, will force copyright owners to repeatedly pursue expensive litigation against those that may misuse or misappropriate their intellectual property – with very little hope of recovering the true value of their loss.

Specifically, *Bill C-11* Section 47 (replacing Section 41 of the Act, specifically Sections 41.25-41.27) does not adequately address the issue of ISP liability in our view. The 'notice-and-notice' provision puts an unreasonable burden on copyright owners and creators to self-police infringements -- while essentially allowing ISPs once notified of an infringement, to have no further involvement and thereby creating the untenable situation whereby infringements will continue.

In other words, *Bill C-11* means that ISPs would only have to give notice of an alleged infringement, and not be required to take down the illegal posting of copyrighted material -- as is the law in the United States. While critics of the US provision say that taking down an alleged infringing post upon notice does so without 'due process', *Bill C-11* overcompensates by putting the onus on copyright owners to go to court to enforce an alleged copyright infringement. CIMA believes that without a 'take-down' provision, the Bill becomes ineffective as an enforcement mechanism, and again serves to devalue intellectual

property. CIMA would therefore encourage the government to develop a 'made-in-Canada' solution that provides both the proper exception and liability protections for ISPs, while at the same time provides a much stronger and actionable enforcement mechanism through the requirement of a take-down order.

6. **CIMA recommends the government amend *Bill C-11* Section 41 (which replaces Sections 41.25-41.27 of the Act) to reflect a 'made-in-Canada' solution that provides both the proper exception and liability protections for ISPs, while at the same time provides a much stronger and actionable enforcement mechanism through the requirement of a take-down order.**

On the issue of statutory damages, CIMA understands the government's intent to provide a mechanism to limit the amount of statutory penalties that may be levied against individuals when infringement occurs for 'non-commercial' purposes. The government seemingly wants to avoid situations that have occurred in other jurisdictions where an individual has been fined significant, and in the eyes of some, a disproportionate amount of money when found guilty of illegally downloading and sharing music. *Bill C-11* Section 46 (amending Sections 38.1(1) to (3) of the Act) separates statutory damage limits for 'commercial' and "non-commercial' purposes, and amends the Act to provide a range for the latter at 'not less than $100 and not more than $5,000."

While CIMA sympathizes with the intent of *Bill C-11* in this regard, the fact is setting pre-established damages for copyright infringement makes litigation for infringement meaningless, as the cost of court proceedings would far outweigh the amount copyright owners would be awarded by the court. Indeed, if any copyright owner seeks statutory damages from a particular defendant, then every *other* copyright owner is prevented from electing statutory damages against the same defendant for any infringements that occurred prior to the proceedings in which statutory damages are already being claimed. *Bill C-11* essentially enables a race to the front of the line, and unfairly prevents any and all other victims of copyright infringement from receiving compensation for the misuse or misappropriation of their materials.

In addition, a statutory limit –particularly one as low as $5,000 -- may empower infringers who will be safe in the knowledge that litigation from small businesses such as CIMA members is not affordable or realistic. Also, by failing to make a distinction between individuals and companies in terms of infringement, the Bill inadvertently provides companies with a 'business case' for infringement. In other words, a limited statutory fine may well become the "cost of doing business" for those companies intent on misusing or misappropriating copyrighted material such as music.

This section of *Bill C-11*, instead of protecting copyright, appears to give incentives to infringers, puts the burden on creators and copyright owners to prove damages, and increases uncompensated copying. Having taken the cost of litigation into account, the new statutory limitations remove realistic remedies

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for infringement, thereby making the Act a vehicle for the licensing of infringement. This is not effective enforcement and derogates from the rights that copyright owners enjoy in the current Act.

7. **CIMA recommends the government increase the limit of statutory damages, and at a minimum providing for a provision for fees, while amending the language in *Bill C-11* Section 46 (amending Sections 38.1(1) to (3) of the Act) to allow all victims of copyright infringement to seek compensation through the courts.**
8. **CIMA recommends the government clearly provide a distinction between individuals and registered companies (and all other commercial entities) in *Bill C-11* Section 46 (amending Sections 38.1(1) to (3) of the Act), for the purpose of defining statutory damage limits only to individuals.**

Making Available Right

Proposed changes to the Copyright Act relating to the 'making available right' is a solution looking for a problem. The Copyright Act as currently written recognizes the 'making available right' of rights holders; Bill C-11 is needlessly implementing a roadblock that will impede this international right.

The 'making available' right is an exclusive right for authors, performers and 'phonogram producers' to authorize or prohibit the dissemination of their works and other protected material through interactive networks such as the internet. This exclusive right is one of the most important achievements of the WIPO Treaties and constitutes a basic requirement for the development of electronic commerce.

The international community (which includes Canada) in the 1996 Diplomatic Conference that adopted the treaties, unanimously acknowledged that record producers in particular needed this exclusive right to cover the use of their works in the digital environment.

The reason was not only to fight piracy. The international community also recognised that the dissemination of music in digital networks such as the internet constitutes a primary form of exploitation of music, and therefore should be subject to the control of the rights owner. The making available right covers both the actual offering of the music or other protected material and its subsequent transmission to members of the public. The exclusive right provides control over the act of 'making available' by all means of delivery—by wire or wireless means—and whenever members of the public may access the music from a place and at a time individually chosen by them.

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This right is fundamental for the dissemination of music over digital networks and therefore for promoting the development of electronic and digital business models by the recording industry. This right is also of the greatest importance, alongside the reproduction right, for music producers to stop the unauthorized exploitation of their intellectual property over the internet, for instance by those who illegally upload and open to the public databases containing thousands of music tracks without the authorization of the producer.

Language in Bill C-11 would require rights holders to seek a tariff or the written consent of the Minister of Industry in order to enforce their making available right – a needless bureaucratic requirement that serves no purpose and in fact disrupts the intention and wording of the Act and Canada's obligations under the WIPO treaty.

9. **CIMA recommends the government amend Bill C-11 Section 52 (amending Subsection 67.1.(4) of the Act) by deleting subsection *(b) the infringement of the rights referred to in paragraph 15(1.1)(d) or 18(1.1)(a); or*; and Section 54 (amending Subsection 68.2(2) of the Act) by deleting subsection *(b) the infringement of the rights referred to in paragraph 15(1.1)(d) or 18(1.1)(a); or*; thereby returning the language of these Sections back to the original language of the current Copyright Act.**

FAIR DEALING/NON-COMMERCIAL USER GENERATED CONTENT

CIMA has serious concerns with provisions in *Bill C-11* that permit the uses of copyrighted material without the express consent from, or fair compensation to, the copyright holders.

It is a basic principle that rules governing the use, distribution and compensation of copyrighted material must and should always respect those who own that intellectual property. Once exceptions are given -- particularly those exceptions with broad or vague definitions – then the inherent value of intellectual property is not only dramatically diminished, but may also be irrevocably damaged beyond repair.

A case in point is the 'Fair Dealing' exception as briefly described in *Bill C-11* Section 21 (referring to Section 29 of the Act) – "*Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright*."

It is unclear how 'parody or satire' made for commercial purposes will be treated under this exception, nor is it clear who would retain ownership for this material.

Similarly, the Non-Commercial User Generated Content language beginning with *Bill C-11* Section 22 (amending to Section 29.2 of the Act) could result in serious unintended consequences that may serve to damage the intent of *Bill C-11*, which is to strengthen the intellectual property rights regime in Canada.

First off, this amendment to the Copyright Act is unique to Canada, and does not exist anywhere else in the world. The result will be the almost total loss of control by authors and performers as anyone would be permitted to use derivatives of any copyrighted material, including translations, adaptation, synchronizations, and the like. Ownership of this new material would be in question, as is the definition of 'non-commercial uses'. For instance, a family video posted on You Tube that incorporates a 'sound track' using copyrighted music is in fact using a commercial vehicle – You Tube – to disseminate that video to the public-at-large. While the family in this instance may not be engaged in a commercial activity, You Tube is certainly being compensated as its business model is based on user-generated content.

The owners of the copyrighted materials have no way of controlling how their work is being used, nor have the ability to prevent its use from purposefully or inadvertently damaging the brand that this intellectual property represents. While the government has stated this user-generated exception is intended for 'creations that do not affect the market for the original material', this statement is highly subjective and cannot be properly defined. A seemingly innocent and so-called 'private use' of copyrighted material could conceivably and unpredictably affect the market after the fact. In these cases, *Bill C-11* prevents the owners of the copyright from seeking compensation for the use of the material, and damages that may result from this infringement.

Although *Bill C-11* Section 22 states (amending Section 29.21(1d) of the Act) that no individual may cause 'substantial adverse' damage to the market for an existing work, it does not define what this term means, leaving it open to broad interpretation. In addition, this section of the Bill seemingly does not limit these exceptions to online use, thereby potentially creating an interpretation that they will apply to physical goods as well. As well, this section would permit the 'mash-up' of video clips and music for so-called 'private use', but this fails to recognize the fact that such uses negatively affect moral rights to the integrity of musical works and sound recordings.

Simply put, the Fair Dealing and the Non-Commercial User Generated Content provisions remove a copyright owner's right to control and license those his/her intellectual property, thereby undermining the intent of *Bill C-11*.

10. **CIMA recommends the government delete the phrase 'parody or satire' from *Bill C-11* Section 21 (amending Section 29 of the Act).**

11. **CIMA recommends the government delete the Non-Commercial User Generated Content language from the Bill (Section 22, amending Section 29.21 of the Act).**

EXTENSION OF COPYRIGHT PROTECTION

In keeping with Canada's international economic competitors such as the United States and the European Union, CIMA recommends that the Term of Copyright for sound recordings and performer's performances under Section 23 of the Act be extended to a minimum of 70 years.

While a minimum of 70 years has been in existence in the United States for a number of years, the European Union recently extended the term of copyright protection offered to performers and producers of musical works to 70 years from 50 years. CIMA is of the opinion that since the government is currently modernizing the Copyright Act, it makes sense to ensure that the new Act is in keeping with international standards.

12. **CIMA recommends the government amend Section 23 of the Copyright Act to extend the term of copyright for musical works to 70 years.**

Thank you very much for the opportunity to express CIMA's views on how to strengthen and improve *Bill C-11*, a critically important piece of legislation that Canada's independent music industry truly needs in order to grow, create jobs and be competitive on the world market. Ministers, we would be pleased to meet with you and your staff in order to discuss these important issues, and to answer any questions or concerns that you may have regarding our submission. You may direct your staff to contact Stuart Johnston, President, at (416) 485-3152 ext. 232, or stuart@cimamusic.ca to arrange a meeting.

Yours sincerely,

Stuart Johnston
President

Cc: CIMA members

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