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**Written Submission of**

**Rogers Communications**

**to the**

**Legislative Committee on Bill C-11**

**March 8, 2012**



1. Rogers Communications (Rogers) is pleased to submit our comments to the Legislative Committee on Bill C-11 (“the Committee”) for consideration in respect of the proposed amendments to the *Copyright Act*.
2. Rogers is a diversified Canadian communications and media company engaged in a variety of businesses, including, wireless, high speed Internet access, cable television, radio and television broadcasting and program production. Rogers is also a publisher of magazines and an innovator in digital media. We welcome a national digital strategy that optimizes growth of digital services and investment in innovation. Updating the *Copyright Act* to balance the needs of creators with those of consumers to fully benefit from technical innovations in products and services should be a principle objective of a national digital strategy.
3. Rogers is a member of the Business Coalition for Balanced Copyright (BCBC) and fully supports and adopts the technical changes proposed by the BCBC. The references to section numbers refer to section numbers of the *Copyright Act* as amended by Bill C-11.
4. Substantial investments are necessary to implement the technologies required to support what customers want to watch, when they want to watch it, and on the platform or device of their choice. In order to facilitate the transition to new digital services, regulatory policies and legislation, such as Bill C-11, must provide certainty as well as being flexible and minimally intrusive.
5. Rogers believes that a balanced approach to copyright reform will continue to reward innovation and creativity. In this respect, Bill C-11 goes a long way towards striking this balance, and we support its passage in a timely manner. However, we think that the Bill would benefit from minor technical clarifications that would provide greater certainty for both users and rights holders, particularly with respect to the provisions intended to make new on-line remote storage services legal.

6. In our submission, we will focus on the new safe harbours for Network Services and Information Location Tools in Section 31.1(5) - (Clause 35). We are concerned that the new provisions that are intended to facilitate “hosting” remote storage of format-shifted or time-shifted copies may not be sufficiently clear to allow for the development and introduction Network Personal Video Recorders (NPVR), cloud computing and other online remote storage services.
7. We think it is timely that Bill C-11 will allow Canadians to legally time-shift and format-shift television, radio and internet programming to enjoy at a later time with no restrictions on the device or medium they wish to use, such as a personal video recorder (PVR).
8. The Government has left no doubt about its intention to see Canadian consumers use innovative services and technologies such as NPVRs and online cloud storage solutions without delay and without incurring extra fees. When announcing Bill C-11, Minister Paradis said clearly:

“Canadians will be able to download material from their online personal storage spaces without triggering a double payment.”

9. The NPVR service, for example, represents the evolution of time-shifting devices which began with the VHS recorder and progressed to the PVR. The NPVR will operate in the same way as a PVR but will allow our customers to store time-shifted programs remotely in servers located in our headends rather than in the set top box in the customer’s home. Given that an NPVR service can store programs available from any television set in a customer’s house, it removes the need for them to rent or own a separate PVR for each of their television sets. It also allows us to make seamless upgrades to our customers’ NPVR service without them having to rent or purchase new equipment. Reducing the equipment our customers need and improving the time-shifting experience makes the NPVR service a greener and more technically efficient way for our customers to enjoy all the television programming available to them.



10. Although NPVR is not yet legal and available in Canada, it is far more than just a concept elsewhere. In fact, it is commercially available in the United States, Australia and Singapore. The first NPVR service was launched by Cablevision in the United States at the end of 2010 following lengthy and expensive litigation in which a US Appeals Court ultimately ruled that the concept was lawful under US copyright law. This means that Cablevision's customers are now able to time-shift programs on any one of their home television sets without the need to purchase or rent a PVR.
11. Rogers is eager to provide our customers with the same benefits of a NPVR service that are being experienced by Cablevision's customers. We therefore fully support the technology neutral approach to the time-shifting and hosting exceptions in the Bill and the government's intent to enable NPVR services and remote storage cloud solutions. However, problematic language in Bill C-11 could result in a series of unintended negative consequences for innovators, investors, consumers and the Canadian economy as a whole.
12. Should the hosting provision of Bill C-11 remain as it is now drafted, it could result in a number of serious consequences for Canadian consumers and policy makers.
13. As drafted, Bill C-11 allows network service providers to host remote storage of personal time-shifted and format-shifted copies, but it is vague about the retrieval of those personal copies. We are concerned that we will face years of battling frivolous litigation to keep consumers from facing double payments for copyrighted works stored in the cloud because section.31.1(5) is ambiguous and unclear.
14. The consequence of this ambiguity in the section 31.1(5) will be to throttle innovation. We will likely see the delayed rollout and diminished adoption of next generation technologies like NPVRs. In fact, left unchanged, the law could have the effect of locking Canadians to set top PVRs and physical storage devices long after new solutions could have replaced them.

15. Legal uncertainty could also lead to higher overhead costs for cloud storage providers and fewer options for consumers. Vague and ambiguous language in Bill C-11 could well conspire to leave Canadian investors and consumers looking enviously to other jurisdictions enjoying the benefits of new cloud storage solutions.
16. Finally, failure to ensure that the legislation lives up to the government's stated policy intent could result in significant forgone investment in Canada's digital economy. A Harvard Business School study found that legal certainty provided by the landmark US court ruling in the Cablevision case dealing with the scope of copyrights as they pertain to remote storage resulted in additional incremental venture capital investment in these services of \$728 million to \$1.3 billion in the US alone.<sup>1</sup>
17. We can avoid these negative consequences of ambiguity in Bill C-11 with simple technical amendments which will reflect the government's intended policy for copyright amendments.
18. We have proposed a narrow, technical amendment to Bill C-11's hosting provision that would provide certainty for consumers and entrepreneurs and would ensure the success of Canada's burgeoning NPVR, remote storage, and cloud solutions services. These important, purely technical, changes would prevent the unintended legal risks that might lead to years of litigation and barriers to the development of cloud computing and other remote storage services similar to NPVR.
19. NPVR and cloud computing require a safe harbour from liability for ISP's that host and store copyright content on a remote server for individual subscribers. As currently drafted, the safe harbour in the Bill leaves too much uncertainty to ensure

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<sup>1</sup> Lerner, Josh. The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies. Rep. Harvard Business School, 11 Nov. 2011. Web. 12 Jan. 2012. <http://www.cciagnet.org/CCIA/files/ccLibraryFiles/Filename/000000000559/Cablevision%20white%20paper%20%2811.01.11%29.pdf>



remote storage services will be protected from liability for copyright infringement each time stored content is retrieved by a subscriber. The use of the phrase “by virtue of that act alone” in amending paragraphs 31.1 (3) and (5) is too easily interpreted to mean that only the content stored by the remote storage provider is exempt from liability. This ambiguity about transmitting the customer’s same content back to them when they request to retrieve it can easily be remedied with a technical drafting amendment. We support the BCBC proposed drafting change below which would cure this oversight in the Bill and ensure the legislation lives up to the government’s stated policy objective.

### Hosting

31.1(5) Subject to subsection (6), a person who provides digital memory in which another person stores a work or other subject matter for the purpose of allowing the telecommunication of the work or other subject matter does not, solely by reason of providing digital memory and transmitting the work or other subject matter through the Internet or another digital network, ~~provides digital memory in which another person stores the work or other subject matter does not, by virtue of that act alone~~, infringe copyright in the work or other subject-matter or contravene any other provision of the Act.

20. Rogers appreciates the opportunity to submit our views to the Committee and to offer our recommended amendments to the Bill which we strongly believe would bring the Bill into conformity with the Government’s copyright amendment policy objectives.