

## **Canadian Music Publishers Association C-11 submission**

**FINAL – November 29, 2011**

### **Introduction:**

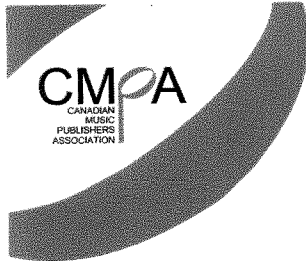
The Canadian Music Publishers Association (CMPA) is the oldest music industry association in Canada, founded in 1949, federally incorporated as a non-profit corporation in 2005. CMPA represents 75 members from across the country; our bylaws mandate that both our membership and our board of directors are comprised by a majority of Canadian owned and operated companies. However, our member publishers represent the interests of hundreds of both Canadian and international songwriter partners, from the highest profile to the up and coming. CMPA advocates for music publishers and their songwriter/composer partners for progressive copyright legislation, fair compensation, and recognition by the public sector and other stakeholders of the value of our work, both culturally and as an economic force. Furthermore, we represent the viewpoint of Canadian music publishers through our involvement in numerous other music industry associations both domestically and internationally.

Music publishers manage and administer music copyrights, that is, the intellectual property that is created by the writing of a song. Equally, if not more important, music publishers are key to the “research and development” of the music industry. It is not uncommon for a songwriter to sign a publishing deal before signing a record deal, and this situation is becoming more prevalent. Music publishers provide critical support to emerging artists and songwriters, who we recognize are the lifeblood of the music industry.

CMPA believes that the management of intellectual property rights will only grow in importance as the manufacture of hard product continues to decline. As part of their ongoing efforts to both shape and adapt to such fundamental changes in the marketplace, music publishers have a responsibility to contribute to this legislative committee’s review of Bill C-11, An Act to Amend the Copyright Act.

Intellectual property is a critical part of the Canadian economy; the skill, talent, and experience required to write a hit song is best nurtured by protecting the ability to earn a living doing it. The association has signed to the Cultural Industries’ Statement on C-32 and we continue to endorse all of the positions put forth in that document.

The government has stated that the key objectives of C-11 are to 1) modernise the Copyright Act, bringing it in line with advances in technology and current international standards 2) address the interests of Canadians, from those who create the content to the consumers who will benefit from it 3) ensure that copyright law is forward thinking and flexible, will help protect and create jobs, stimulate our economy and attract new investment to Canada and 4) introduce



technological neutrality, so that the law is more adaptable to a constantly evolving technology environment while ensuring appropriate protections.

These are worthy objectives. However, in our opinion C-11 falls short of these goals on a number of fronts.

Having stated that position, however, we understand that the government believes that C-11 does meet policy objectives, and as a result, wishes to approve this legislation as soon as possible.

Since C-11 was introduced, CMPA has met with government members who have indicated they will consider technical amendments that are consistent with its policy objectives. With that in mind, we propose amendments, which would further strengthen the proposed legislation.

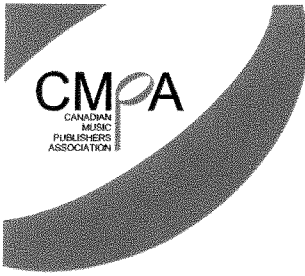
#### **1. Ephemeral Recordings**

***The elimination of 30.9 (6) of the Copyright Act will cost creators and rights holders millions by the de facto elimination of the broadcast mechanical tariff and related licensing regimes. The government is proposing a 30-day exemption. We recommend ensuring that the government's intended 30 day exemption is clear, and cannot be worked around.***

When a song arrives at a radio station to be added to a playlist, a copy is made from the originating file to the radio station's programming hard drive. Let us emphasize, a copy is made, thereby making use of the right of reproduction. The creation of permanent hard drive copies of song files greatly streamlines the efficiency of radio stations. The Copyright Board of Canada has consistently opined that these copies do in fact have value, and the Board has assigned rates tariffs to reflect that value.

The song's creators and rights holders are currently compensated for this use of their rights, as long as the rights can be easily licensed through a collective. This right is currently worth about \$21 million annually to creators and rights holders, paid by radio stations. Compensation for this reproduction is paid in many territories, and although American broadcasters do not pay for this use, the law would require them to do so at such time as the rights holders demand.

The Copyright Act currently includes an exemption that allows broadcasters to make temporary or "ephemeral" copies of recorded music for the purpose of their broadcasts without any obligation to obtain licences or pay royalties. After 30 days, however, either the copies must be destroyed or a licence must be obtained from the applicable copyright owners. When introduced in 1997, however, this exemption was made subject to the caveat that, if a licence is available

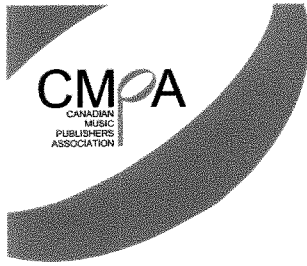


from a collective society for the making of ephemeral copies, the exemption does not apply. The logic behind this caveat was very straightforward: although it might be unduly onerous to require radio stations to seek out a large number of copyright owners and negotiate separately with each of them for the necessary licences, collective licensing would provide broadcasters with a simple way to license and pay for the use of these copies, such that no exemption was necessary.

This regime has been highly effective. It has encouraged rightsholders to license their works collectively, thus streamlining the licensing process for the benefit of broadcasters. In turn, tariffs certified by the Copyright Board of Canada have ensured fair compensation for the use of those rightsholders' works. However, Bill C-11 would repeal subsection 30.9(6) of the Act –the collective licensing carve-out – and would instead make the entitlement of songwriters and music publishers to be paid at all for the making of these ephemeral copies subject to the general 30-day exemption. In other words, once this exemption is repealed, broadcasters will be able to keep copies of songs on servers for 30 days without payment, as long as the songs are deleted at the end of that period.

CMPA's strong preference would be that the committee choose not to eliminate section 30.9 (6) of the Copyright Act. Recognizing, however, that the policy of the Government appears to be that a general 30-day exemption is appropriate regardless of the availability of licences from collective societies, we wish to focus instead on ensuring the integrity of that 30-day limitation. As section 30.9 is currently written, broadcasters will be able to game the system by deleting a song file every 30 days, then immediately restoring it. Technology makes this sleight of hand simple. As explained by Professor Michael Murphy in a study commissioned by CMRRA-SODRAC Inc. and submitted to the committee that studied Bill C-32:

... Canadian broadcasters could indeed comply with the technical requirement of Bill C-32 subsection 30.9 (4) that they destroy all reproductions within the 30 day period prescribed in the Bill. ... Radio and television stations make use of many reproductions that are either erased before 30 days, or they can easily modify processes to ensure that they are erased within this time limit. For digital copies that are presently retained for greater than 30 days, technical and procedural options are available that could allow broadcasters to "recreate" or refresh their libraries of musical works every 30 days and thus comply with the 30 day provision for these types of copies as well. As a result, each type of copy of a musical work that is made for broadcasting purposes would remain a so-called ephemeral copy. However, by making copies of copies, the broadcaster would have the use of the work for as long as it was beneficial to the broadcaster. The changes necessary to meet the 30 day requirement involve little to no additional cost to implement and would be applicable for both radio and television operations. The changes required will only become more viable in the future as bandwidth speeds increase and



digital technology continues to increase in capacity and decrease in cost. (Emphasis added.)

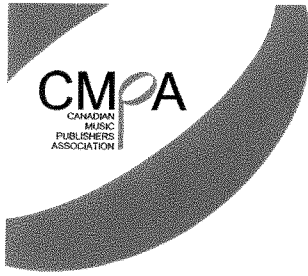
In other words, broadcasters can easily comply with the 30-day destruction requirement by making copies of copies, at little or no additional cost, while continuing to enjoy the use of a copy the work indefinitely. In fact, the entire process of “copying copies” can easily be automated such as to be 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. 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, technical amendments are required in order to prevent broadcasters from taking advantage of new technology to make reproductions that, while technically retained for only 30 days, in fact constitute a permanent library of music. By ensuring that all reproductions of a given sound recording are destroyed within 30 days after the making of the first such reproduction – foreclosing the possibility of making multiple reproductions 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, the following specific amendments to subsection 30.9(4) would achieve that goal:

**30.9 (4)** 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.

These technical amendments alone, however, are not sufficient to preserve these critical revenue streams for content owners. Several other provisions of the Bill that, if passed, would equally undermine the Government’s intention to limit the ephemeral recordings exception to a 30-day window and otherwise to preserve the broadcast mechanical right.



The specific provisions at issue, with recommended solutions and technical amendments, are as follows:

- **Section 30.71: Temporary Reproductions for Technological Processes.** This proposed new section provides that it is not an infringement of copyright to reproduce a work or other subject-matter if the reproduction “forms an essential part of a technological process” and “exists only for the duration of the technological process.” The government has indicated that the purpose of this new exception is to target activities such as reformatting Web pages for display on smart phones or purely technical processes such as cache memory transmission on the Internet. However, the drafting of the section is broad enough to cover a wide range of other activities – including the vast majority of reproductions made by radio and television broadcasters, the purpose of which is to facilitate the technological process of broadcasting. As a result, if passed as drafted, section 30.71 could significantly expand the scope of the existing exception for broadcasters, depriving rightsholders of the corresponding revenues.

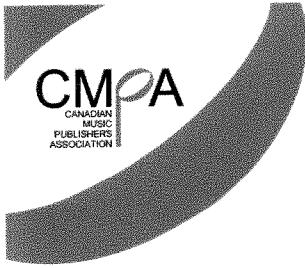
***Solution: Amend proposed section 30.71 by limiting it only to reproductions that have no significant economic value and excluding from its scope any reproduction that falls within the scope of the existing exceptions in sections 30.8 and 30.9.***

### **Temporary reproductions**

**30.71** It is not an infringement of copyright to make a reproduction of a work or other subject-matter if:

- (a) the reproduction forms an essential part of a technological process;
- (b) the reproduction’s only purpose is to facilitate a use that is not an infringement of copyright, and the reproduction itself has no significant economic value;
- (c) the reproduction exists only for ~~the duration of the technological process~~ a transitory period.

For greater certainty, this section does not apply to reproductions made by or under the authority of a “programming undertaking.”



as that term is defined in subsection 30.8(11), or a “broadcasting undertaking,” as that term is defined in subsection 30.9(7).

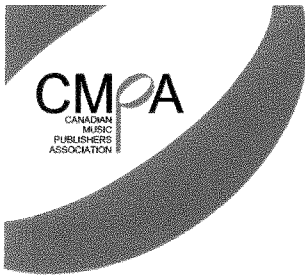
- **Section 29.23: Time Shifting.** It is entirely understandable that the Government would wish to modernize the Act in order to permit the recording of broadcast programs for later listening or viewing, and to extent this exception to programs transmitted only via the Internet. However, this change could have a significant unintended consequence: combined with the use of the broad term, “program,” which is not defined, the effect seems to be that the reproduction of certain audio webcasts, which is in many cases licensed by CSI, is now exempted. Similarly, it would appear that the exception would apply to programs transmitted by satellite radio services, even though the making of copies of those programs for time-shifting purposes is already licensed by CSI through the *CSI Satellite Radio Tariff*. The likely outcome is that people will feel free to create and store extensive digital libraries of an increased variety of audio and audiovisual programming, which will necessarily lead to a reduced demand for paid copies of the same works.

***Solution: Amend proposed section 29.23 to ensure that time-shifting copies are used only for the personal enjoyment of those who make them, not shared with others, to exclude programs transmitted by subscription services and not just on-demand services, and to ensure that “program” cannot be interpreted to apply to single works, which would create a serious risk of eroding the market for digital downloads.***

**29.23 (1)** It is not an infringement of copyright for an individual to fix a communication signal, to reproduce a work or sound recording that is being broadcast or to fix or reproduce a performer’s performance that is being broadcast, in order to record a program for the purpose of listening to or viewing it later, if

(a) the individual receives the program legally;

(b) the individual, in order to record the program, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented;



(c) the individual makes no more than one recording of the program;

(d) the individual keeps the recording no longer than is reasonably necessary in order to listen to or view the program at a more convenient time;

(e) the individual does not sell, distribute, rent out or give the recording away; and

(f) the recording is used only for ~~private purposes~~ the individual's own private use.

### **Limitation**

(2) Subsection (1) does not apply if the individual receives the work, performer's performance or sound recording under an on-demand service or a subscription service.

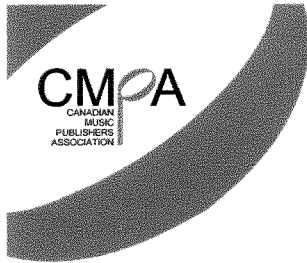
### **Definitions**

(3) The following definitions apply in this section.

“broadcast” means any transmission of a ~~work or other subject-matter~~ program by telecommunication for reception by the public, but does not include a transmission that is made solely for performance in public.

“on-demand service” means a service that allows a person to receive works, ~~performer's~~ performers' performances and sound recordings, or programs containing works, performers' performances and sound recordings, at times of their choosing.

“program” means sounds or visual images, or a combination of sounds and visual images, containing more than one work or other subject-matter.



“subscription service” means a service that allows a person to receive programs for a fee or for other valuable consideration, including on a free trial or other promotional basis.

- **Section 29.24: Backup Copies.** There is clearly merit to permitting individuals, and perhaps institutions as well, to make backup copies of various types of work for safekeeping. However, proposed section 29.24 goes considerably farther than that. As in the case of section 30.71, many of the reproductions made by broadcasters to facilitate broadcasting could well be characterized as “backup copies” that would be permitted under the new exception and therefore no longer subject to existing licensing schemes or tariffs, including both the CSI Commercial Radio Tariff and the CSI Satellite Radio Tariff. The result would be to devastate the economic value of these tariffs and licensing schemes.

***Solution: Amend proposed section 29.24 to limit the exception to the making of one backup copy only, by persons other than broadcasters, and in circumstances where the copy is not already subject to an existing licence, contract or tariff or to another exception in the Act.***

### **Backup copies**

**29.24 (1)** It is not an infringement of copyright in a work or other subject-matter for a person who owns – or has a licence to use – a copy of the work or subject-matter (in this section referred to as the “source copy”) to reproduce make a single reproduction of the source copy if

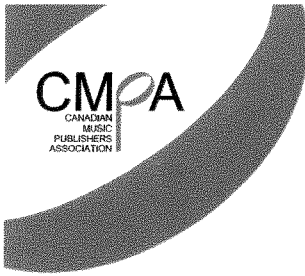
(a) the person does so solely for backup purposes in case the source copy is lost, damaged or otherwise rendered unusable, other than by the deliberate act of the person who made the reproduction;

(b) the source copy is not an infringing copy;

(c) where the person has a licence to use the source copy, the licence does not prohibit the making of backup copies and the person complies with all other material conditions of the licence;

(ed) the person, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection





measure, as defined in that section, or cause one to be circumvented; and

(de) the person does not give any of the reproductions away sell, distribute, rent out or give the reproduction away.

### **Backup copy becomes source copy**

(2) If the source copy is lost, damaged or otherwise rendered unusable, other than by the deliberate act of the person who made the reproduction under subsection (1), one of the reproductions the reproduction made under subsection (1) becomes the source copy.

### **Destruction**

(3) The person shall immediately destroy all reproductions made under subsection (1) after the person ceases to own, or to have a licence to use, the source copy.

### **Application**

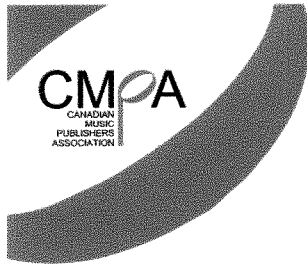
(4) This section does not apply to reproductions that are subject to section 30.71 or to Part VIII, or that are made by or under the authority of an “intermediary,” as that term is defined in subsection 29.21, a “programming undertaking,” as that term is defined in subsection 30.8(11), or a “broadcasting undertaking,” as that term is defined in subsection 30.9(7).

### **Reproductions subject to licence, contract or tariff**

(5) If the person is bound by a licence or other contract that governs the extent to which the individual may reproduce the source copy for the purposes set out in subsection (1), or if the reproduction of the source copy is subject to the terms of an approved tariff, the licence, contract or tariff prevails over subsection (1) to the extent of any inconsistency between them.

## **2. The Role of ISPs in Reducing Online Piracy**

***The provisions for ISP liability can be improved to ensure that they are in keeping with the government’s goals.***

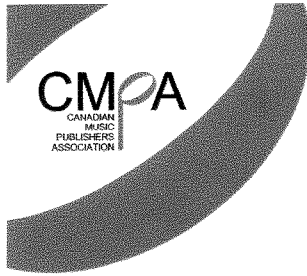


Internet service providers (ISPs) are the gatekeepers between the content creator and the consumer; therefore, they are the logical partner for rightsholders in their efforts to secure fair and reasonable compensation for the use of their works online.

In *SOCAN v. Canadian Association of Internet Providers*, the Supreme Court of Canada confirmed that ISPs and other internet intermediaries which do no more than provide the means necessary for the communication of works to the public by telecommunication are entitled to the “safe harbour” protection of subsection 2.4(1)(b) of the *Copyright Act*. However, that protection might not be available to a service provider who has knowledge of the existence of infringing content posted on its servers. The Court found that “copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system and fails to take remedial action,” and that, in appropriate circumstances, an ISP could be found to have authorized copyright infringement.

Today, both the technological capacity and the actual operations of ISPs make it quite clear that ISPs do not engage in the sort of neutral hosting and facilitation that was before the Supreme Court in 2004. Today, ISPs take an active role in shaping the internet traffic that flows through their systems. The ongoing debate over so-called “net neutrality,” puts the lie to any suggestion that modern-day ISPs are no more than passive conduits. Rather, using techniques like “deep-packet inspection,” they are able to – and do – know with relative certainty when and where infringing content is being hosted and transmitted. ISPs are aware – indeed, they regularly monitor – how much of the traffic they carry takes the form of “torrents” and other transmissions that are overwhelmingly used for the unauthorized transmission of content files. The amounts are not trivial. One of the more popular torrent services, Isohunt, is known to facilitate unauthorized and uncompensated access to more than 10 petabytes of shared content – the equivalent of 10 billion megabytes – with over 40 million unique searches per month. This unauthorized traffic dwarfs all paid commerce in digital content.

Many of these sites are outside of Canadian jurisdiction and therefore cannot be shut down at source. However, it is possible for Canadian ISPs to block access to these sites. In Article 8(3) of European Parliament and Council Directive 2001/29/EC (commonly known as the “Information Society Directive”), the European Community directed member states to “ensure that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.” In the United Kingdom, the UK *Copyright, Designs and Patents Act 1988* was amended in 2003 to implement that directive through the addition of section 97A, which gives the High Court a relatively broad power to grant an injunction against any service provider who “has actual knowledge of another



person using their service to infringe copyright.” Very recently, the High Court relied on that provision to grant an injunction requiring a leading British ISP to use reasonable technological measures to block access to Newzbin, a sophisticated file-sharing service that, while available to British Internet users, was located offshore and therefore out of the direct reach of the British courts: see *Twentieth Century Fox Film Corp. et al. v. British Telecommunications PLC*, [2011] EWHC 1981 (Ch.). Without requiring the cooperation of ISPs, there would have been no effective way to shut down Newzbin’s presence in the UK.

It is important to recognize that an injunction of this type does not involve a finding of copyright infringement against the service provider, nor does it expose the provider to monetary damages. Instead, it merely creates a positive obligation for the service provider to prevent the use of its services to infringe copyright. Similar measures, if taken in Canada, would go a long way toward restoring a robust online market for lawfully-acquired content.

The proposed language is as follows:

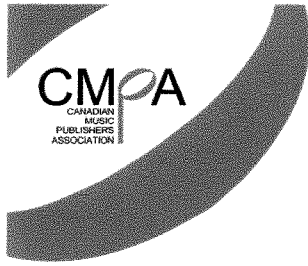
#### **Proposed Amendment**

41.28(1) Notwithstanding anything in this Act, a court may grant an injunction against a person described in paragraph 41.25(1)(a), (b) or (c), requiring that person to make reasonable efforts to prevent the services, digital memory or information location tool that it provides from being used to infringe copyright.

#### **Annotation**

The language of this proposed amendment mirrors Article 8(3) of the Information Society Directive. Importantly, an injunction granted under this subsection would *not* constitute a finding of copyright infringement. Instead, it would simply require the online service provider to make reasonable efforts to prevent the use of its services to access online enablers. The service provider would still be entitled to claim the benefit of the limited liability in section 31.1.

Alternatively, a more limited version of the above language would permit injunctions only for the purpose of requiring service providers to block access to services that are “primarily intended or ordinarily used to enable acts of copyright infringement” – that is, the same “online enablers” that are targeted by subsection 27(2.3). Although this language would arguably be less effective at preventing copyright infringement generally, it would nonetheless have a significant impact on online enablers by providing an effective way for Canadian courts to restrict access to services that would otherwise be outside their jurisdictional reach.



## Proposed Amendment

41.28(1) Notwithstanding anything in this Act, a court may grant an injunction against a person described in paragraph 41.25(1)(a), (b) or (c), requiring that person to make reasonable efforts to prevent the services, digital memory or information location tool that it provides from being used to gain access to a service or computer program the provision of which constitutes an infringement of copyright under subsection 27(2.3).

### 3. Secondary Liability for Copyright Infringement: Online Enablers

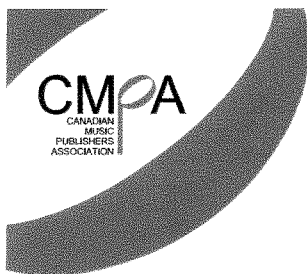
It has been suggested that the elimination of liability for most Internet intermediaries is balanced in the Bill by proposed subsections 27(2.3) and (2.4), which target so-called “online enablers” – third parties who provide online services that “enable acts of copyright infringement” by providing access to infringing content at the expense of creators, publishers and distributors who invest in and support creativity.

While these provisions are a welcome first step, they are drafted too narrowly and ambiguously for this new cause of action to achieve any meaningful result against the intended sites and services. Among other things:

- Limiting the prohibition to services that are “designed primarily” to enable acts of infringement creates a significant loophole for services that may have been designed for innocuous purposes but which, in practice, are primarily *intended* or *ordinarily used* to enable infringement.
- Limiting the prohibition to services that enable acts of infringement creates an unintended loophole that would exclude from liability services that provide streaming access to significant libraries of unauthorized content, often competing with licensed services like Spotify, Pandora and Hulu. Since users who stream illegal content rather than downloading it are not likely committing acts of copyright infringement, providing access to that content for the purpose of streaming may not be considered “enabling acts of infringement.”

## Annotation

Recognizing the policy of Bill C-11 to limit the liability of Internet service providers, this language is a more limited version of section 97A of the U.K. Copyright, Designs and Patents Act 1988, with injunctions available only to block access to online enablers as defined in subsection 27(2.3).



- It is unclear whether distributing computer software that, when installed on a user's computer, enables acts of copyright infringement would be equivalent to providing a "service" that enables infringement.
- The factors proposed in subsection 27(2.4) to distinguish between legitimate and illegitimate service providers, while useful in some respects, are in many cases ambiguous and, unless clarified, will need to be litigated extensively before their scope is clearly understood.
- Subsection 38.1(6) precludes any award of statutory damages against online enablers. As a result, rightsholders who wish to pursue relief under subsection 27(2.4) will be forced to prove actual damages under subsection 34(1). This exclusion of statutory damages is at odds with the stated intention that the online enablers provision be used to crack down on online file sharing and piracy. When actual damages are difficult to prove, as is often the case, statutory damages are a critical tool for enforcement.

To address these specific matters, the following amendments are proposed, with explanatory annotations provided opposite each suggested revision:

### **Proposed Amendments**

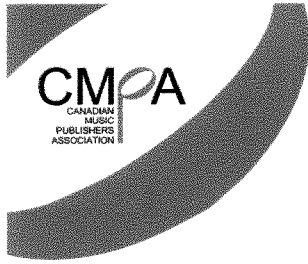
**27 (2.3)** It is an infringement of copyright for a person to ~~provide~~, by means of the Internet or another digital network, to provide a service, or to distribute or make available a computer program, that

(a) the person knows or should have known is designed primarily intended or ordinarily used to enable acts of copyright infringement or to provide access to a copy of a work or other subject-matter that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it, or

(b) induces acts of copyright infringement,

### **Annotation**

The focus in subsection 27(2.3) on the *design* of a service seriously compromises its effectiveness at fighting online piracy. Very often, sites and services that are not "designed primarily" to enable acts of copyright infringement are nonetheless used extensively for that purpose. The initial design of a service may be completely innocuous, but that does not prevent the service from being operated to induce, aid or abet infringing activities, or from being used for infringing purposes. By shifting focus from the design of a service to its principal intention, and its actual and ordinary use, the section would effectively capture services that, even if not necessarily designed primarily for copyright infringement, nonetheless allow



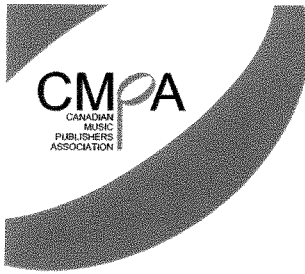
if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service or computer program.

works and other subject matter to be exchanged freely between consumers.

Similarly, by focusing strictly on the provision of a “service”, the provision risks overlooking those who distribute computer software applications, like LimeWire and FrostWire, that facilitate peer-to-peer file sharing and other types of online infringement. This omission is addressed by adding express reference to those who “distribute or make available a computer program” that is either designed or used for infringing purposes and by adding further references to computer programs where appropriate throughout the remainder of subsections (2.3) and (2.4).

By expanding the provision to include not only services and programs that enable acts of copyright infringement but also those that provide access to infringing copies, the prohibition will extend to unauthorized streaming services that would otherwise compete unfairly with licensed services that compensate rightsholders for the use of their content. The suggested language mirrors that in existing subsection 27(2) of the Act, which deals with secondary infringement generally.

Finally, in order to ensure that the provision achieves its intended purpose, reference is made to services and/or computer programs that “induce acts of copyright infringement” – that is, take active steps to encourage direct infringement by others – rather than just



**(2.4)** In determining whether a person has infringed copyright under subsection (2.3), the court may consider

(a) whether the person expressly or implicitly marketed or promoted the service or computer program as one that could be used to enable acts of copyright infringement;

~~— (b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;~~

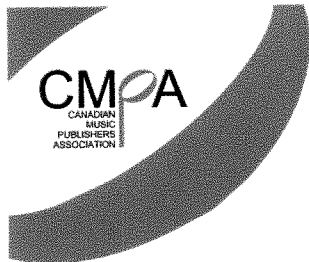
~~(c) (b) whether the service or computer program has significant uses is ordinarily used other than to enable acts of copyright infringement;~~

“enable” such acts. Inducing copyright infringement was the basis of the successful claim by content owners in *MGM v. Grokster*, decided by the Supreme Court of the United States in 2005.

If amended as proposed above, subsection 27(2.3) would already require knowledge that the service was “ordinarily used” to enable acts of copyright infringement, with the factors in subsection 27(2.4) designed to examine the intention and/or knowledge of the relevant person. This would make paragraph (b) redundant.

In any event, the requirement that a “significant number” of infringing acts have taken place introduces ambiguity into this subsection that is unnecessary and will complicate enforcement.

The use of the phrase “significant uses” in paragraph (b) (currently subparagraph (c)) is similarly ambiguous and unnecessary. The focus should be on how the service is *in fact* ordinarily used, not on hypothetical other ways it *might* be used.



~~(d)~~ (c) the person's ability, as part of providing the service, to limit acts of copyright infringement that occur through the use of the service or computer program, and any action taken by the person to do so; and

~~(e)~~ (d) any benefits the person received as a result of enabling or inducing the acts of copyright infringement; and

~~(f)~~ the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

Service providers may be in a position to limit acts of copyright infringement other than directly as part of providing the service itself. Their failure to take any action possible to do so should be seen as evidence of their intention to enable infringement.

As drafted, paragraph (f) has the unintended consequence of unnecessarily limiting the scope of subsection 27(2.4) to commercial services only. In fact, many services that enable acts of copyright infringement are not intended for the commercial gain of their operators. Paragraph (f) also appears redundant, since paragraph (b) (formerly subparagraph (c)) already examines whether the service has uses (or, if amended as proposed, whether the service "is ordinarily used") other than to enable acts of copyright infringement. Presumably, this would capture any economically viable uses as well as non-commercial ones.

\* \* \* \* \*

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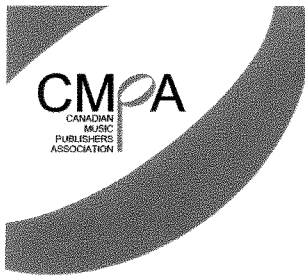
**38.1(6)** No statutory damages may be awarded against

...

~~(d)~~ a person who infringes copyright under subsection 27(2.3);

This is a technical amendment that would make statutory damages available against online enablers, as they currently are





against other direct and indirect infringers. Since subsection 27(2.3) expressly provides that acting as an enabler is just as much an infringement of copyright as any other infringement in the Act, there is no basis for any distinction, which would serve only to place a nearly impossible burden on copyright owners to quantify damages.

In addition, limited technical amendments to the proposed ISP liability provisions are required to ensure that the online enabler prohibitions function as intended. Specifically:

- There is no principled reason for section 31.1 to distinguish between network service providers, who are not entitled to the benefit of the statutory safe harbour if found to be online enablers within the meaning of subsection 27(2.3), and digital memory providers, to whom the safe harbour appears to apply either way. There should be no circumstances under which online enablers can avoid liability for copyright infringement; subsection 27(2.3) should therefore trump both subsection 31.1(1) and subsection 31.1(6).
- Online service providers who provide more than merely the means necessary for the telecommunication or reproduction of works and other subject-matter, and providers of information location tools who reproduce or communicate works for purposes other than those strictly necessary for the provision of the tools, should not be entitled to the benefit of a statutory safe harbour.
- As discussed in more detail below, the effective enforcement of a prohibition against online enablers requires that courts retain the jurisdiction to require networks services providers and information location tools to block access to services that infringe copyright under subsection 27(2.3) but are located outside Canada and may therefore be beyond the jurisdictional reach of Canadian courts.

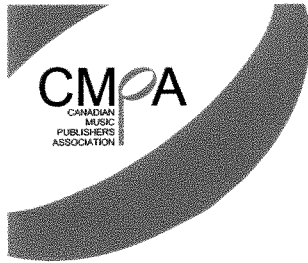
The language proposed is as follows:

#### **Proposed Amendments**

**31.1 (1)** A person who, in providing services related to the operation of the Internet or another digital network,

#### **Annotation**

Limiting liability for the provision of “*any means*” for the telecommunication or reproduction of work permits ISPs and



provides ~~any~~ only the means necessary 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.

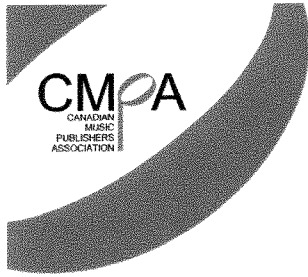
**(2)** Subsection (1) does not apply in respect of a service provided by the person if the provision of that service constitutes an infringement of copyright under subsection 27(2.3).

**(3)** Subject to subsection (4), a person referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, solely to make the telecommunication more efficient, does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

...

others much greater latitude than necessary to provide services that enable infringement. Instead, subsection 31.1(1) should be restricted to those who provide “*only the means necessary*” to facilitate the operation of the Internet. That is, the safe harbour afforded to ISPs and other Internet intermediaries should be limited to the provision of services that are *necessary* for the operation of the Internet, mirroring the existing safe harbour in subsection 2.4(1)(b) of the Act. This should also minimize unnecessary duplication and confusion with subsection 2.4(1)(b) of the Act, which has already been recognized by the Supreme Court of Canada as immunizing ISPs from liability for infringement of the communication right in works, provided that their services are limited to “providing the means of telecommunication necessary” to communicate those works to the public.

Consistent with the decision of the Supreme Court of Canada in *SOCAN v. Canadian Association of Internet Providers*, caching and other acts performed in relation to infringing content should be exempted from liability only if the *sole* purpose of those acts is to make the telecommunication more efficient.



**(5)** Subject to subsection (6), a person who, for the purpose of allowing the telecommunication of a 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.

**(6)** Subsection (5) does not apply in respect of a work or other subject-matter if

(a) the provision of that digital memory constitutes an infringement of copyright under subsection 27(2.3); or

(b) the person providing the digital memory knows, or should have known, of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter.

\* \* \* \* \*

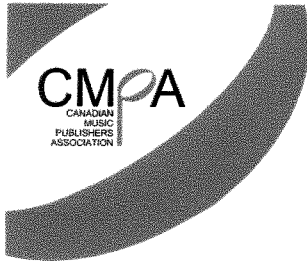
**41.26 (3)** A claimant's only remedies against a person who fails to perform his or her obligations under subsection (1) ~~is~~ are:

(a) statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000; and

As drafted, subsection 31.1(6) would limit the liability of so-called “digital locker” and other cloud-based services that are primarily intended or ordinarily used to enable acts of copyright infringement by providing large-scale infringers with remote facilities to store their unlawfully-obtained content. This results in a curious imbalance between the liability of the network services providers contemplated by subsection 31.1(1) and that of the digital memory providers contemplated by subsection 31.1(6). Neither category of service providers should be entitled to the benefit of an exception if they are in fact “online enablers” who infringe copyright under subsection 27(2.3).

\* \* \* \* \*

Although there may be legitimate reasons to confer limited liability on network service providers, particularly where they respond constructively to notices of claimed infringement, their failure to do so should attract more significant remedies than a fine that large providers in



(b) in the discretion of a court of competent jurisdiction, an injunction requiring the person to comply with his or her obligations under subsection (1).

**(4)** The Governor in Council may, by regulation, increase or decrease the minimum or maximum amount of statutory damages set out in subsection (3).

**41.27 (1)** In any proceedings for infringement of copyright, the owner of the copyright in a work or other subject-matter is not entitled to any remedy other than an injunction against a provider of an information location tool that is found to have infringed copyright by making a reproduction of the work or other subject matter or by communicating that reproduction to the public by telecommunication.

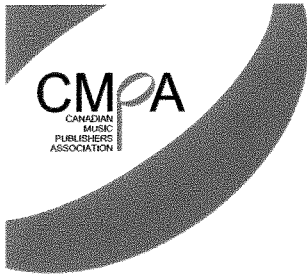
**(2)** Subsection (1) applies only if the provider, in respect of the work or other subject-matter,

(a) makes and caches, or does any act similar to caching, the reproduction in an automated manner and only for the purpose of providing the information location tool;

(b) communicates that reproduction to the public by telecommunication only for the

particular are likely to view as a negligible cost of doing business. As drafted, the available remedies create little incentive for service providers to comply with their notice obligations. Instead, the full range of statutory damages should be available for each work or other subject-matter to which the claimed infringement relates, with the precise amount of a given order within the discretion of the court. The court should also be entitled, in appropriate cases, to issue an injunction requiring a provider to perform its obligations.

This is a technical amendment that mirrors the proposed changes to subsection 31.1(3), discussed above. Caching and other acts performed in relation to infringing content, including its communication to the public, should be exempted from liability only if the *sole* purpose of those acts is to provide the information location tool and the



purpose of providing the information that has been located by the information location tool;

information that it locates, not other value-added features that may result in commercial benefit to the service provider.

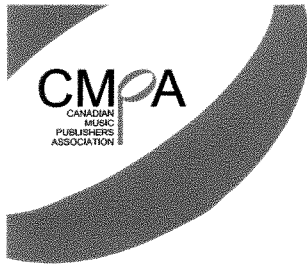
(c) does not modify the reproduction, other than for technical reasons;

(d) complies with any conditions relating to the making or caching, or doing of any act similar to caching, of reproductions of the work or other subject-matter, or to the communication of the reproductions to the public by telecommunication, that were established by whoever made the work or other subject-matter available through the Internet or another digital network and that lend themselves to automated reading and execution; and

(e) does not interfere with the lawful use of technology to obtain data on the use of the work or other subject-matter.

#### **4. The proposed treatment of statutory damages would impede enforcement and rob the Copyright Act of much of its deterrent effect**

In the backgrounder released with Bill C-32, the government signalled its intention to “[protect] Canadians from unreasonable penalties by distinguishing between commercial and non-commercial infringement” and to “[introduce] the concept of proportionality in statutory damages.” Certainly, Canada would do well to avoid the sort of astronomical damages that have been awarded in some of the copyright infringement suits brought in the U.S. by the Recording Industry Association of America (RIAA). However, CMPA submits that, in its attempt to achieve “proportionality” in statutory damages, the government has in fact created significant obstacles to copyright enforcement that will ultimately have the effect of robbing the Copyright Act of nearly all of its deterrent effect on potential infringers.

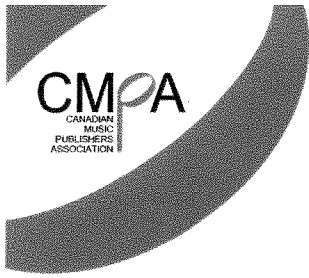


In its proposed amendment to subsection 38.1(1) of the Act, the government has created two different ranges for awards of statutory damages. Where the infringements at issue are for “commercial purposes,” statutory damages would continue to range from \$500 to \$20,000 for all infringements of each work involved in the proceeding. The simple reality is that the proposed changes would deprive copyright owners of any effective response to “non-commercial” infringement. The costs of collecting damages in these cases would so exceed the maximum recovery that no rightsholder would be able to afford to enforce rights. Given the difficulty of proving actual damages in copyright cases – the very reason statutory damages were introduced in the first place – the practical effect would be virtually to immunize infringers from suit where their infringements are ostensibly for “non-commercial” purposes.

The meaning of “non-commercial” is unclear. As amended by Bill C-11, the legislation would use at least three different phrases to describe acts that are seen as worthy of either reduced penalties or an absolute exemption from liability: the private copying regime would continue to apply only to copies made for the “private use” of the person who makes them, while reproductions made pursuant to the exceptions in proposed sections 29.22 and 29.23 may be used only for “private purposes” and user-generated content created and disseminated pursuant to the exception in proposed section 29.21 must be for “non-commercial purposes.” A plain reading of these three different standards would suggest that, while “own private use” is clearly personal to the individual who makes the copy while “private purposes” may extend to the use of the copy by others within the individual’s private circle. “Non-commercial use” is broader still; presumably, it could include the widespread distribution of unauthorized copies, as long as the person who makes and/or distributes them is not doing so for the purposes of commerce.

Applying this analysis to the statutory damages regime, the difficulty with the proposed limitation for non-commercial infringement becomes very clear. For example, a charitable organization could make 5,000 copies of a CD containing 12 songs, each protected by copyright, and distribute those CDs for free, on a cost-recovery basis or possibly even as a fundraising activity, and nonetheless be liable for a maximum of \$5,000 in statutory damages – even though rightsholders may have been deprived of many times more than that in lost revenue. Similarly, an individual who fills his or her iPod or computer hard drive with 20,000 songs, each one obtained from an illegal P2P service – now a commonplace occurrence – would be liable for no more than \$5,000 in statutory damages, even though the cost of those songs, if bought on iTunes at an average price of 99¢, would approach \$20,000.

Whether taken together or considered separately, these limitations appear to run entirely contrary to the government’s stated intentions to crack down on piracy and protect incentives to create. Statutory damages are a necessary tool for the enforcement of copyright, in which actual



damages can be very difficult to prove. If passed, the proposed limitations will inevitably have the effect of curbing enforcement, rather than curbing piracy.

Further, CMPA submits that the government should revisit the terms “private use,” “private purposes” and “non-commercial purposes” to describe various acts contemplated by the Bill. Without clear definitions in each case, the use of these terms, which are similar and overlap in significant ways, is sure to lead to confusion and, consequently, to costly and unnecessary litigation.

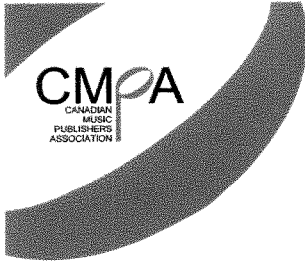
**As stated from the outset, CMPA has limited its suggested “technical” amendments to those areas which would strengthen C-11 and allow the government to achieve its stated objectives in a more effective manner. That being said, there are a number of policy-related areas in which CMPA’s viewpoint differs from the government, which we have outlined in the section below.**

***C-11’s provisions for non-commercial user generated content (UGC) are broader than anywhere else in the world, violate the 3 step test, and will cost creators and rights holders money.***

C-11 would allow consumers to use legitimately acquired material in the creation of content for non-commercial purposes that do not affect the market for the original material. In so doing, the government is proposing language that not only affects the commercial market but also creates unintended, negative consequences. For example, there is no consideration given to third parties who may be generating revenue by providing access to UGC, just as there is no consideration given to the consequences of the use of the UGC provisions in combination with the hosting exception, which would allow websites to disseminate compilations without restriction, and for their own profit. Exemptions of these kinds of commercial enterprises from liability are in contravention of international treaties. Users armed with the UGC exception may believe they are permitted to make any use of copyright protected works. Also, it is not clear from the drafting that use made under the UGC exception would still be subject to the moral rights provisions contained in the Act.

- The use of the term “non-commercial” in the absence of a clear definition is indicative of a problem that runs throughout C-11. Leaving such terms undefined, and failing to match these terms with existing terms in the Copyright Act, leads to ambiguity and does not provide the clarity that the Government sought when introducing this bill.

Furthermore, there is no precedent for this type of exception anywhere else in the world and this exception as drafted violates the Berne Three Step Test by its lax conditions on



the UGC creator, asking only that they create a “new Work”, one that does not have to be transformative, thereby possibly prejudicing the interests of the original rights holder.

- In order to create clarity in the bill, ensure the Government’s objectives are met, protect legitimate markets, and stay on-side of our international treaty obligations the provisions contained in subsections (a) though (d) need to be reviewed to ensure the permitted acts are always fair and that damaging activities are not inadvertently being permitted.

We are in agreement with the amendment proposed in the CSI submission.

***The proposed revisions to create new education exceptions and expand fair dealing are not fair to creators and rights holders.***

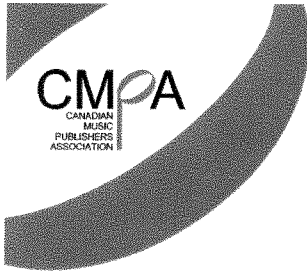
Currently, educational institutions are expected to pay fair market value for teachers and staff, for gyms and volleyballs, for lights and cables. They must also compensate creators and rights holders for reproducing textbooks, magazine articles, and other materials, and they pay to run film and video.

C-11 would exempt much of the payment for the use of the works of content creators, forcing them to in effect subsidize education without their permission. This subsidy could cost creators and rights holders as much as \$60 million a year...a small percentage of educational spending, but a dramatic amount of income to those who produce these learning resources. In addition, many of these new and expanded exemptions would conflict with the ability of creators to exploit their copyright in ways upon which they currently rely.

C-11 is unclear about many of the specifics regarding these exemptions. The bill is also unclear regarding the definition of what constitutes “education” for these purposes. Government officials responsible for the bill have stated publicly that the unclear aspects can be decided in court. This is a frustrating response that would condemn rights holders to huge expenditures and years spent in litigation before a resolution. Legislation by litigation is not acceptable. This is an important issue for music publishers, and the Association therefore wholeheartedly support the more detailed positions presented by Access Copyright and others on this issue.

***The private copying regime was designed to be technologically neutral. However, proposed s.29.22 of C-11 would threaten this by exempting copies made to DAR’s.***





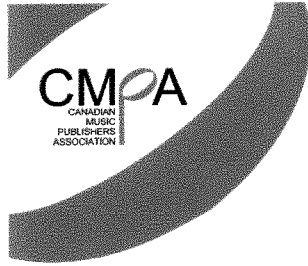
If C-11 was technology neutral, it would extend the principle of the private copying regime to digital audio recorders, in recognition of the shift in how consumers copy and listen to music. The disregard of this important change represents the loss of millions of dollars in compensation to creators and rights holders.

The private copying levy has been an important part of the Canadian copyright regime since 1999. To date, the Canadian Private Copying Collective, which administers the royalties from the private copying, has distributed more than \$180 million to rights holders.

The private copying legislation was enacted to address the widespread and unstoppable illegal copying of musical works. This solution, proposed by Canada's songwriters, performers, record labels 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 the use of their work. It is not a grant or a government subsidy or a tax. The money is an important source of revenue for artists, particularly new and developing artists, 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.

It is important to remember that, as originally drafted, the private copying regime is a model of technological neutrality; the definition of "audio recording medium" was clearly designed to accommodate changing technology. Had the courts not intervened, MP3 players would already be subject to a fair and reasonable levy. C-11 provides an excellent opportunity to bring the Copyright Act up-to-date - and, by doing so, to restore the original intent of Parliament in this regard - by making a small change to the wording that would restore the intention of the private copying levy. A simple amendment to section 79, Part VIII of the Copyright Act would allow the levy to be extended to MP3 players. The levy would only apply to devices that are advertised, designed and manufactured for the purpose of copying music. An amendment of this nature would ensure that creators receive fair compensation for their work by applying the levy on a device that is commonly used for copying purposes. The Canadian Private Copying Collective has proposed specific language for an amendment to C-11 which would address this problem; CMPA endorses CPCC's proposed amendment without reservation.



## **Conclusion**

The government's state intentions with C-11 are reasonable. The government's overarching stated principle has been one of balance; the amendments we are proposing will improve the chances of delivering on that balance for both creators and consumers.

The motivation to tackle copyright has come in no small part from the desire to bring Canada's copyright laws in line with international standards. This is also important and worthy goal and the government needs to ensure that C-11 will not keep Canadian creators, rights holders and copyright users will be tied up in expensive litigation for decades. Furthermore, creators and rights holders need a fair hand in order to protect our rights from unauthorised use.

CMPA encourages the Committee to consider the above concerns carefully; the Association believes in the stated goals that the government is attempting to achieve with this bill, and that all Canadians deserve a bill that meets this goals.