



**ole Position Paper on
Canadian Copyright Policy
and
Proposed Changes to the *Copyright Act* as set out in Bill C-11**

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1. Introduction

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ole (oh-lay) is Canada's largest domestic music publisher, and among the largest independents in the world. We are 100% Canadian owned and have over \$115 million invested in copyrights. ole invests heavily in Canadian songwriters, composers, and artists, and helps them attain international success. We have deals with many of the top Canadian TV production companies to administer or co-own the theme and background music in their productions, and have become an important source of secondary financing for this vital Canadian media industry. We import significant royalty revenue from around the world resulting from the global success of our copyrights, and contribute to Canada's GDP, employment and tax base.

Our music publishing copyright business uniquely straddles two digital media silos:

1. Songs - comprising over forty-five thousand songs across all genres, ole's diverse catalog contains important Canadian heritage copyrights such as the 70's group Lighthouse, the iconic Vancouver Olympic anthem "I Believe", pioneer Canadian Hip Hop duo Dream Warriors, Canadian Country superstar Johnny Reid, the band Doc Walker, "Black Velvet" (Alannah Myles), and teen recording star Shiloh.

Our songs and songwriters have received numerous SOCAN and Juno awards, and last year at the Canadian Country Music Awards ole was named "Music Publisher of the Year" for the fifth time in a row. Internationally, our music has topped many charts, and last year we earned our first Grammy award for "White Horse", one of the many Taylor Swift compositions owned by ole.

2. TV/Film - comprising the music copyrights in over forty thousand hours of programming, highlights of which include the film and TV compositions by such well known Canadian composers as Jack Lenz, and all of the music from the vast library of Canada's legendary children's television producer Nelvana (Babar The Elephant, etc.), and the music of Cookie Jar, Cineflix, and DHX TV productions.

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Recently we entered the Production Music Library (or "Stock Music") business, which provides 100% pre-cleared music for use as background score in TV, movies, trailers, advertising, video games, and web sites. ole owns or represents up to 150,000 production music tracks within its MusicBox and clear libraries, and we are one of the largest providers of Production Music Library music in Canada.

2. The Problem: Turning Digital Art Into Dollars

Here's the reality. It has been eighteen years since the Internet was switched on, and thirteen years since the launch of Napster. This powerful mix spawned a decade long money drenched "frat party" enjoyed by entrepreneurs, tech start ups, venture capitalists, telecoms, search engines, and hardware manufacturers. Creators and copyright owners were not invited to the party, but paid much of the bill. Their financial hangover knows no end, and Bill C-11 will not cure it.

Copyright is a good thing. Copyright transactions transform art into dollars. They create vibrant markets and economic systems that enable creators to monetize their work, leverage its value to fuel their career, maximize their revenue and exposure, and protect their artistic integrity. This is the very currency of the value chain that enables the songwriter or composer's work to reach the public, be enjoyed, and for the creator to be economically rewarded for it.

To transform digital art into dollars, copyright laws must apply to those companies whose products and services facilitate access to the digital art. To paraphrase Jerry Lee Lewis, "...there's a whole lot of turning digital art into dollars goin' on..." but like much of Mr. Lewis' activity, it happens largely outside the law. This copyright monetization generates billions of dollars a year, but most of it happens outside of the current law, to the benefit of all concerned, except for the creators and copyright owners. Bill C-11 will not change this.

Bill C-11 is heavily biased in favour of the corporate users of copyrighted music, the "free riders", the anti-copyright crowd, and those business and consumers who are happy to benefit from music but who think it is someone else's responsibility to pay for it. It favours the distribution industries over the creators and other suppliers of content. As a result, it allows delivery





systems to be built at the expense of the content creators. Canada should not be supporting the development of its delivery systems in the digital domain at the expense of the content creators.

Under the banner of “protecting innovation”, the Bill seeks to protect the innovation of the technology sector at the expense of those who create music. In fact, songwriters and musicians provide culturally innovative work that is just as valuable to Canadians. Favouring the innovation of one group of industries over another is hardly serving the public.

In the digital age, where ideas are arguably more valuable than tangible goods, a country that fails to protect intellectual property and creativity fails to protect its economic future. Protecting intellectual property means *protecting the creators and rights holder’s ability to profit from their creations.*

The corporate user group favoured by this bill includes traditional businesses that use copyrights, such as broadcasters, as well as the newer digital technology industries that profit from our intellectual property without paying for it – Internet Service Providers (ISPs), search engines, advertisers, web sites, and device manufacturers. These companies “monetize” music, without paying any of the proceeds to those who created it.

The government states on its Digital Economy Consultation Website that:

“...the digital media sector is shifting away from linear production chains with distinct players and discrete products into three main areas of activity: 1) The creation of content; 2) enabling content creation and distribution; and 3) the aggregation of content. ”

The companies involved in enabling distribution and the aggregation of content are largely shielded from liability, and thus have no incentive to pay the parties that create the content. This is the fundamental flaw in the current Bill. If links number two and three in the media sector value chain are not required to pay link number one, the entire system breaks down.





Bill C-11 provides legal protection for the ISPs, search engines, advertisers, websites, and device manufacturers who profit parasitically from digital music piracy, ensuring that they will never have to pay. It allows these industries to monetize their innovations on the back of ours, without the creators being fairly rewarded. Consumers pay for Internet bandwidth, MP3 players, ad-supported searches, etc. and expect that their money goes to support the entire economic ecosystem that brings them music. Unfortunately, these companies do not pay the creators, because the law does not require them to. Under Bill C-11 they will continue to enjoy their free ride.

Bill C-11 provides no new viable tools to allow creators and rights holders to be fairly compensated. It creates the illusion of modernizing protections for creators and rights holders in the digital domain, while ensuring that a market cannot be established for creative works that will be enforceable or collectable.

“Notice and notice” for example, is heralded as targeting ISPs for the piracy activity on their networks. In fact, all it does is require them to assist in redirecting blame to the consumer, thus further and formally absolving ISPs of any real responsibility. In effect, this amounts to more government protection for the ISP business model of monetizing piracy to their benefit.

At least for music, technical protection measures to lock up music, and suing consumers has failed to reduce piracy or create a marketplace. Between ineffective strategies such as “Notice and Notice”, and strengthening support for the futile use of technical protection measures, Bill C-11 misguidedly places nearly all of its anti-piracy hopes on these losing strategies.

We don't need band-aids for copyright enforcement - we need a marketplace. As long as the primary enablers and facilitators of piracy are shielded from liability, creators' works can be taken, sold or consumed without the creators or rights holders being paid for it. This is a failed marketplace.

Not only does the “Copyright Modernization Act” not provide any new tools for our belt to monetize digital music, it will actually take two of them away - the Broadcast Mechanical and the private copying provision. This step backwards produces a net loss in our ability to turn digital art into dollars.





The Broadcast Mechanical is one important way songwriters get paid from radio stations that use their music. It licenses the digital reproduction (or “mechanical copying”) process used by most modern radio stations to get music on the air. The Broadcast Mechanical is a clear example of a law creating a right that in turn, enables a marketplace. This important revenue stream is currently \$21 million per year, and will effectively disappear under Bill C-11.

In the late '90s, as a response to the widespread, unstoppable illegal copying of music enabled by new home recording technology, Canada created one of the world's most effective private copying solutions that put money in the hands of creators whose work was being copied without compensation. It was an elegant, progressive solution to a nearly identical problem to today, and was an effective alternative to trying to change consumer behavior. As the use of blank CDs to store music is quickly being replaced by newer digital media and devices, this crucial revenue source, worth \$180 million to date, has declined by 70% since 2008, and is rapidly headed towards insignificance.

Canada needs to catch up. There are over 40 countries around the world whose music creators are paid by a modern private copying system that covers digital media and devices. Instead, Bill C-11 seeks to permanently block efforts to extend this right to new forms of digital media. Given that today we face nearly the identical situation that existed when our private copying regime was implemented – widespread, unstoppable copying of music – such a move is clearly regressive and illogical, and will only harm creators without motivating a corresponding change in consumer behavior, or an effective marketplace solution.

3. There is a Solution

Our position starts with a simple premise – that creators and rights holders must be compensated for the use of their works throughout the entire digital value chain. Perhaps an obvious statement, but one that needs to be made in the face of the anti-copyright forces so prevalent in our society today.

We believe that the shortcomings of Bill C-11 may be overcome with relatively simple changes to the legislation, outlined below, and urge the committee to return the Bill to parliament incorporating these changes.





Required Amendments to Bill C-11

a) Rein in the Free Riders by Broadening the "Enabling Provision"

This section of Bill C-11 [27(2.3), (2.4)] contains the seed of a solution, but does not go far enough. The Enabling Provision was intended to "make the enabling of online copyright infringement itself an infringement of copyright", but it is so narrowly written that it will only affect the most egregious pirates. It should be broadened to include all of the industries that profit by enabling the public to access music, not just the obvious pirates.

ISPs, search engines, advertisers, web sites, and device manufacturers all benefit enormously from "monetizing" music through their networks, services, and devices without paying any of the proceeds to those who created it. This extensive network of industries enables the digital music piracy that makes up the majority of digital music consumption. Legitimate services such as iTunes, which are mere side shows to the real game, would rightly be allowed to continue uninterrupted under Bill C-11.

If the Enabling Provision were effectively written, it would create a marketplace solution with no need for a levy. As a result, companies that enable infringement would be liable for their actions. An effectively written Bill would create the environment required for market place negotiations for the use of music. As written the creators and rights holders are currently uncompensated by those who profit from the public's unauthorized use of music.

Vast wealth has been diverted into the pockets of industries that enable and profit unjustly from infringement. ISPs act as short circuits that enable their customers to circumvent markets. As long as they are free to do so, there will be no truly viable market for recorded music and similar media.

While severely undermining the value of recorded music, the ISPs have built a very lucrative business charging for unauthorized content, by billing customers for the amount of bandwidth they use for unauthorized access to media. Contrary to their assertions, they are not "dumb pipes"; they are smart networks that act dumb when it suits their interests. Legislation can be used to make this underground business a legitimate one, creating a win for all stakeholders: consumers, creators, the ISPs and, especially,





government through increased tax collection on what is now an underground market.

Liability for content on ISPs' networks would create a corresponding ability for them to openly, rather than covertly, profit from it. Following introduction of legislation establishing liability for copyright infringement on their networks, ISPs would have a simple decision to make:

- take the infringing material off of their networks; or,
- negotiate payment with the owners and suppliers of this content.

This is a perfect example of a well-functioning marketplace.

While the U.S. copyright system has its failings, its Contributory Infringement Law isn't one of them. Companies who contribute to copyright infringement can be as liable as those who actual commit the infringing act. It was this law that led to the creation of the iTunes store. Apple needed a way to avoid contributory infringement claims against the iPod, so it negotiated with the music industry for a means to legitimize the device in conjunction with purchased music files, resulting in one of the most innovative digital services ever devised, and more importantly, an additional revenue stream for creators and rights holders.

U.S. legislators are also taking actions that might foretell future copyright law revisions there. A Senate committee recently held hearings investigating Google, as it has occurred to members that Google earns huge amounts of money selling ads on websites that feature pirated media. It has been suggested that legislators are considering Google's activities as enabling piracy.

As a solution, ole supports the suggested changes to Bill C-11, as drafted by the Canadian Music Publishers Association (CMPA), reproduced with permission in the appendix of this brief.

b) Reverse the Expropriation of Current Rights

Legislation intended to accommodate the digital era should not start out by destroying current digital revenue sources. If Bill C-11 goes ahead without revisions, millions of dollars of annual private copying and Broadcast Mechanical revenue will disappear. Bill C-11 removes these pioneering digital monetization tools and their associated royalty streams.





1. The Broadcast Mechanical

ole supports the submission of the CMPA on this subject, which is an aggregate of various related clauses and sections under the banner of “Ephemeral Recordings”.

Although, like the CMPA, ole would rather the government not eliminate section 30.9 (6) of the Copyright Act, we understand that the government would like to confer a 30-day exemption from paying this right. As the related section of the Act is currently written, broadcasters can play the system by simply deleting a song every 30 days, and then immediately restoring the same file. This, it would seem, is an unintended consequence of how this section of Bill C-32 has been written.

There are additional amendments required to the specific sections listed below, in respect of temporary reproductions for technical purposes, time shifting and back-up copies that would be required to preserve the \$21 million revenue stream mentioned previously.

- Imposition of limits on the proposed section 30.71 - “Temporary Reproductions for Technological Processes”
- Amendments to section 29.23 (1) - “Time Shifting”
- Amendments to section 29.24 - “Backup Copies”

2. Extend the Private Copying Right to the Digital Realm

While it is ole’s position that sufficiently broadening the enabling provision would create a marketplace where levies would be unnecessary, in the absence of such a circumstance, ole supports the specific recommendations made by the CMPA and supported by the Canadian Private Copying Collective (CPCC) as set out below.

“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.”





4. Conclusion

Bill C-11 is destructive to music creators and rights holders

ole strongly believes that if our industry is to survive and thrive, important revisions to Bill C-11 are required. While Bill C-11 may be a well-intentioned attempt to modernize Canada's *Copyright Act* for the digital age, most of the purported benefits are illusory. The Bill is actually destructive to music creators and rights owners as it cancels the most progressive aspects of the current legislation that provide a means of dealing with the digital era, and will not result in a viable digital marketplace for music.

If Bill C-11 is passed in its current form the result will be to:

- Reduce the collective income of songwriters and artists by millions of dollars annually, through the elimination of current rights and revenue (broadcast mechanical), while blocking the logical extension of another right and revenue stream (private copying);
- Provide increased legal protection to the companies that facilitate and profit from piracy;
- Support the "steal the content to build a distribution business" philosophy;
- Enshrine the ability of companies to build businesses on the backs of creators without either enabling a free marketplace, or requiring them to pay for the use of content;

The Bill as written is unbalanced and weighted heavily in favour of distributors, hardware manufacturers, and consumers at the expense of creators and rights owners. It proposes no new ideas or mechanisms to reduce piracy and no new, effective tools to ensure that creators are compensated for their works.

The future of creators and rights holders can only be secure if they are accorded their rightful place in the online distribution value chain. For this to happen, control of the monetization of creative works in the digital realm cannot rest solely with delivery system providers who, after all, have a track record of facilitating the piracy of the work to their own advantage.





It is important to emphasize that the creators and rights holders don't want to limit access to their music, they just want to be paid for it.

With the majority of digital music consumption resulting from corporate enabled piracy, the very creativity, indeed livelihood, of the artist is at risk. A fair marketplace exists when a willing seller and a willing buyer are free to negotiate the sale of goods or services. When the buyer can take the product without paying, there is no negotiation. For the creators of music, the digital space is largely a failed marketplace, leaving them unable to effectively turn their digital art into dollars.

How long do our artists have to wait for the law to catch up so they can be properly compensated by the businesses that deliver their digital art to the public?

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Annex – Specific Amendments

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Ephemeral Recordings

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.

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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' performers 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;

(~~e~~) 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

(~~e~~) 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.

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Secondary Liability for Copyright Infringement: Online Enablers

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,

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.

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 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 “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.

(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;~~

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

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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.

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

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

~~(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.



* * * * *

38.1(6) No statutory damages may be awarded against

...

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

infringement. Presumably, this would capture any economically viable uses as well as non-commercial ones.

* * * * *

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, 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

Annotation

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



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.

...

(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

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.

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





(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

(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

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 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



the public by telecommunication only for the purpose of providing the information that has been located by the information location tool;

(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.

sole purpose of those acts is to provide the information location tool and the information that it locates, not other value-added features that may result in commercial benefit to the service provider.