

# sodrac

**TECHNICAL MODIFICATIONS  
TO THE  
COPYRIGHT MODERNIZATION  
ACT (BILL C-11)**

**PROPOSED BY THE**

**SOCIETY FOR REPRODUCTION RIGHTS OF  
AUTHORS, COMPOSERS AND PUBLISHERS IN  
CANADA (SODRAC)**

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## Executive summary

SODRAC acts on behalf of 6,000 Canadian members authors, composer and music publishers and represents on an exclusive basis in Canada the repertoires of collective management societies active in nearly 100 foreign territories. In the music field, SODRAC's repertoire includes more than 10 million works in the songwriting and audiovisual (television, film and video) sectors; in the visual arts and crafts field, we represent in Canada the rights of approximately 40,000 artists and copyright holders from around the world.

It is imperative to modernize the Copyright Act and to adopt measures to stimulate Canada's digital economy. However, Bill C-11, in its current form, goes beyond the government's intentions and could have the effect of excluding creators from the digital economy. In order to better achieve the goals of the *Copyright Modernization Act*, we are proposing various technical modifications pertaining to the following:

### I – PROVISIONS CONCERNING THE REPRODUCTION RIGHT

#### a) Section 30.71: Temporary reproductions for technological processes

To clearly reflect the government's vision while avoiding legal uncertainties, the notion of the *duration* of the technological process should be defined by specifying that the reproduction must have a *less than transitory duration*. It is also necessary to specify that those reproductions are *temporary and accessory*, and that they *have no real value*. In addition, section 30.71 should not apply to reproductions made by a "programming service or broadcasting distributor" as they already benefit from the exceptions in sections 30.8 and 30.9

#### b) Section 30.9 : Ephemeral recordings by radio broadcasters

The government limits this exception to temporary recordings kept for a maximum of 30 days. However, it is possible to create automated systems for recopying and destroying recordings—which would make it possible to do indirectly what the Bill prohibits from being done directly. It is thus necessary to make minor modifications to the Bill in order to eliminate the possibility that this provision might be bypassed (contrary to the government's intent) by creating a series of "ephemeral" recordings that could be recopied and destroyed every 30 days.

#### c) Section 29.24 : Backup copies

The exception should never apply when the production of backup copies is subject to a contract, licence or tariff or to an existing system provided for under the law, in particular part VIII. Similarly, the exception should not apply to programming companies or radio broadcasting companies, which are subject to sections 30.8 and 30.9 respectively. Accordingly to paragraph 30.6(b), only one copy should be authorized for backup purposes. The requirement that backup copies may not be given away should be expanded to include sale, rental or any other form of distribution.

### II – PROVISIONS CONCERNING THE CONSUMER

#### a) Section 29.21: Non-commercial user-generated content

The restrictions set out in the Bill to prevent a negative impact of that kind are insufficient for the government to achieve its objective. The proposed exception must be modified to prevent the creation of physical copies of compilations or of collective works created by individuals, to avoid mass distribution of reproductions, particularly via commercial sites that generate advertising or other revenues.

**b) Section 29.22: Reproduction of works for private purposes**

Bill C-11 does not extend the application of the private copying regime to include digital audio recorders and it follows that the financial compensation that copyright holders have been receiving for use of their works will disappear. As the music industry does not use digital locks, we believe that the government should not allow users to make copies of works for private purposes without compensation. We thus recommend not introducing sections 29.22, 29.23 and 29.24 of Bill C-11.

**c) Section 38.1: Statutory damages**

According to the Bill, repeat offenders could simply receive notice after notice with no other consequences other than being potentially sued by a copyright holder, in which case the maximum damages would be limited to \$5,000. We thus recommends retaining the current provision on statutory damages. However, if the government insists on reducing the damage amounts for individuals who commit violations for non-commercial purposes, we recommend including a provision to the effect that violations by repeat offenders will be subject to statutory damages for violations of a commercial nature.

**III – PROVISIONS CONCERNING ISPs**

**a) Sections 27(2.3) et 27(2.4): Enablers of online piracy**

These sections have four areas of weakness that make them virtually unenforceable. It would be important to target all those who make illegal peer-to-peer file sharing possible, without excluding any other person or network infringing copyright in a “non-primary” way. In addition, the six evaluation factors, listed in paragraphs a) to f) of section 27(2.4), will require numerous legal challenges before the courts will be able to determine the actual scope. In addition, the Bill in its current form does not hold responsible an enabler who would directly infringes a copyright holder’s rights. Finally, section 38.1(6) d) of the Bill prohibits copyright holders from seeking statutory damages from enablers of copyright infringement, which is inconsistent with the message that the government want to send.

**b) Section 41.25: “Notice and notice” regime**

The notice and notice regime creates the illusion that a right exists, even though it will be virtually impossible to exercise. In our view, it would be preferable to introduce a “notice and withdrawal” procedure, in line with the Supreme Court’s wishes. In the absence of such a procedure, SODRAC recommends improving the effectiveness of the “notice and notice” regime by making it mandatory for ISPs to respond to information requests, in order to ensure the effectiveness of the system in place, which could be reviewed if other solutions proved necessary in order to stem online piracy, while facilitating the growth of legal access to works.

**c) Section 31.1: Non-liability of Internet Service Providers**

We are favourable to the ratification and implementation of the WIPO treaties (WIPO Copyright Treaty/WCT) and the WIPO Performances and Phonograms Treaty/WPPT). However, since those agreements date back 15 years, we believe that the mechanisms designed to protect the rights should be reviewed and strengthened since they are now insufficient to ensure an adequate level of protection for works on the Internet ISPs play a significant role in (i) educating Internet users (ii) introducing dissuasive measures (filtering or graduated response) and (iii) paying compensation, for an interim period or permanently. Even more important, ISPs should be able to block their national clients’ access to foreign sites that violate the principles set out in Canada’s *Copyright Act*.

#### IV – PROVISIONS CONCERNING EDUCATION

**a) Section 29: Including education, parody and satire for fair dealing purposes**

The government has stated that “fair dealing is not a blank cheque”, but is proposing new exceptions that will permit the use of works without payment of royalties to the copyright holders. SODRAC, who maintains close ties with the education sector, already fosters flexible and easy access to its repertoire, at a reasonable cost. In order to ensure that exception are restricted to special cases, and “does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”, we recommend that the legislation expressly state that the “three-step test” described in section 9 (2) of the Berne Convention, which Canada signed in 1928, is incorporated as a general interpretation guideline, in complement of those set out in the Supreme Court’s decision CCH.

**b) Section 30.04: Use of publicly available material on the Internet**

The government wants to permit the use of publicly available material on the Internet by teachers and students without compensating the rights holders, even if collective management societies such as SODRAC are perfectly able to effectively provide, on its members’ behalf, the required authorizations to educational institutions for use of its members’ works. We thus recommends not permitting the use of material accessible on the Internet by teachers and students without compensating the rights holders since that would be an unjustified modification of the balance that currently exists between access to works for teaching and education purposes and the legitimate interests of the rights holders.

#### V – PROVISIONS CONCERNING ARTISTIC WORKS

**Section 3(1) j): Droit de mise en circulation des œuvres sous forme d’objets tangibles**

The government wants to allow creators to control the first sale of every copy of their works in the form of tangible objects. However, the proposed text will lead to a range of interpretations due to its lack of clarity. In order to eliminate any ambiguity, SODRAC thus recommends incorporating the proposed modifications (please see appendix) specifying that authors will have the right to carry out or authorize the first transfer of ownership of their own work, in particular through a sale. In the case of an artistic work other than a map, chart or plan, authors will have the right to collect a royalty on the subsequent resales of that work. In addition, in order to reflect government’s concern for aligning the rights of various creators, we recommend to extend the scope of the exhibition right on artistic to all protected artistic works described in section 3(1) g), instead of only applying the right to works created after June 7, 1988.

#### VI – PROVISIONS CONCERNING CANADA’S INTERNATIONAL OBLIGATIONS

We recommend incorporating the proposed modifications (please see appendix) and incorporating within the Copyright Act what is customarily referred to as the “Berne three-step test” so that Canada, as a signatory country, will ensure that the exceptions are limited to “certain special cases that [do] not conflict with the normal exploitation of the work and [do] not unreasonably prejudice the legitimate interests of the author”.

## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	2
TABLE OF CONTENTS .....	5
INTRODUCTION : A Clear Framework for Stimulating the Digital Economy.....	6
<b>I – PROVISIONS CONCERNING THE REPRODUCTION RIGHT</b>	
a) Allowing temporary reproductions for technological processes .....	10
b) Withdrawing radio broadcasters’ requirement to pay for making ephemeral recordings .....	11
c) Allowing the making and accessing of backup copies .....	12
<b>II – PROVISIONS CONCERNING THE CONSUMER</b>	
a) Allowing the creation of non-commercial user-generated content .....	13
b) Allowing reproductions of works for private purposes without compensation	13
c) Reducing amounts of statutory damages .....	14
<b>III – PROVISIONS CONCERNING ISPs</b>	
a) Effectively targeting enablers of online piracy .....	15
b) Creating a “notice and notice” regime .....	16
c) Non-liability of Internet Service Providers .....	17
<b>IV – PROVISIONS CONCERNING EDUCATION</b>	
a) Including education, parody and satire for fair dealing purposes .....	17
b) Allowing the use of publicly available material on the Internet.....	19
<b>V – PROVISIONS CONCERNING ARTISTIC WORKS</b>	
Introducing resale rights for authors of artistic works .....	19
<b>VI – PROVISIONS CONCERNING CANADA’S INTERNATIONAL OBLIGATIONS</b>	
Introducing a general interpretation guideline .....	20
SODRAC: Who are we? .....	22
SODRAC: SUMMARY OF RECOMMENDATIONS.....	23
APPENDIX I: PROPOSED AMENDEMENTS .....	Appendix I, pages 1 to 20
APPENDIX II : <i>Fact Sheet - Commercial Radio Tariff, 2008 to 2012</i>	
APPENDIX III : <i>Commercial radio tariffs, 1998 to 2011 – Prepared by ADISQ/SOPROQ</i>	
APPENDIX IV : <i>Commercial radio - Statistical and Financial Summaries, 2004 to 2009</i>	

## **Introduction: A Clear Framework for Stimulating the Digital Economy**

For more than 25 years, SODRAC has played a leading economic role by collectively managing copyrights on behalf of the rights holders, authors, composers and publishers it represents.

SODRAC manages the reproduction rights for an extensive repertoire of musical works in two distinct sectors: music (songwriting) and audiovisual (television, film and video). SODRAC also manages copyrights for its members' artistic works in the areas of visual arts and crafts. It should be noted that all creators and businesses represented by SODRAC help drive Canada's culture and economy.

The *Copyright Act* is the essential foundation granting creators ownership rights with respect to the use of works they create. The reproduction right is itself a fundamental right, separate from the performance right, that is recognized in the *Copyright Act* and the *Berne Convention*, of which Canada is signatory. The Joint declarations concerning the *WIPO Copyright Treaty (WCT)*, of which Canada is now preparing to incorporate in its legislation the rights and protections, mentions, among others, "that the storage of a protected work in digital form on an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention." This principle must continue to be upheld and be respected.

We do agree that 15 years after the last major reform, the *Copyright Act* must be modernized. The question is: at what price? If it is imperative that measures be adopted to stimulate Canada's digital economy and implement the rights and protections of the WIPO treaties, we believe that Bill C-11, in its current form, goes beyond the government's intentions.

Bill C-11 withdraws existing rights and introduces new exceptions while offering consumers and users a broader access to musical and artistic works without compensation. Certain proposed amendments affect collective copyright management as well as music reproduction rights thus considerably reducing creators' revenues.

However, to achieve the balance being sought by the government, we must ensure that the actual scope of these new provisions does not end up depriving rights holders of legitimate sources of royalties that are an essential form of remuneration and the fruit of their creation. The *Copyright Act* should continue to enable creators to be compensated for the use of their works; if they are not, they will be excluded from the digital economy.

As SODRAC represents different categories of rights holders, we will see what impact Bill C-11 will be in each of these sectors. Indeed, although rights are the same for the songwriting and the audiovisual sectors (where the music is, among other, commissioned works for television, film and video games), the consumption of music is very different from one sector to another. To reflect this disparity, it may be necessary to adopt an approach tailored to each sector, particularly regarding legal protections for digital locks.

## Songwriting sector

**Among the royalties that SODRAC currently collects for rightsholders in the music industry, the following are threatened in many ways:**

The decline in sales of sound recordings directly affects the level of royalties. The recording industry (CD) was the first and hardest hit by the transition to digital in Canada. The value of sales of sound recordings fell from \$1.217 billion in 2000 to \$567 million in 2010, according to the International Federation of the Phonographic Industry (IFPI). The Canadian recording industry shrank by more than 53% over 10 years, representing cumulative annual losses of nearly \$4 billion. This industry is still losing about 500 million per year. In Quebec, the decrease as a percentage, is similar, although the decline in sales is primed with a few years lag.

Sales in digital formats have utterly failed to offset these losses. Indeed, the recording industry has evolved into the music industry in a new technological environment in which it is more complex to monetize works. According to IFPI, sales of digital music in 2006 accounted for only 3% of revenues from sales of sound recordings in Canada, whereas CDs accounted for 87% and DVDs 10%. In 2010, as overall sales of sound recordings continued to decrease, sales of digital formats still only accounted for 33% of the music sold, according to Music Canada.

The changes proposed to the reproduction right with the exception for ephemeral recordings for radio broadcasters and for the technological processes affect the royalties that we collect from radio stations. Under pretext to help smaller stations benefit of this exception, the Copyright Board of Canada has considered the income of these small stations and reduced the royalty rate of reproduction rights for the stations whose incomes are lowest, establishing new rates broken down into three income groups: less than \$625 000, between \$625 000 and \$1,250,000 and over \$1,250,000 (see Table 1 “Comparison of the rates certified today with the previous rates” on page 2 of the *Fact Sheet - Commercial Radio Tariff*, 2008 to 2012, Copyright Board of Canada, July 9, 2010).

Not extending the royalty for private audio copying levy to MP3 players and enabling consumers to reproduce works without compensation will also reduce the revenues of rightsholders.

The introduction of the fair dealing exception for educational purposes directly threatens the revenues deriving from our agreement with the Ministère de l'éducation du Québec.

We estimate that the impact of these exceptions will total approximately 40% of SODRAC's royalty collections, regardless of whether the Bill will curb the illegal peer to peer file sharing and that no form of remuneration or compensation is provided for the losses due to piracy.

### **Audiovisual sector (television, film, video)**

In the audiovisual sector, the situation of creators is different. We are in favour of the legal protection measures for digital locks, which should make it possible to protect producers' investments in this sector, although that under the Canadian business model, in most cases, the creators renounce to their reproduction rights when works that will be integrated with TV productions, films or video games are commissioned. As a result, these creators are not participating in the economic life of their works because they obtain almost no revenue from subsequent uses that are made. Thus, these legal protection measures favors producers almost exclusively.

### **Visual arts and crafts**

Sales at auctions of artistic works totalled \$65 million in Canada in 2010, according to the Heffel Auction House. That figure does not include the market for works resold by commercial galleries and other specialists. However, creators earn nothing on these transactions, even though large profits are often generated when their works are resold. The introduction of "resale rights" in the Copyright Act would restore balance in this regard. This right, which is set out in the Berne Convention, to which Canada is a signatory, is in effect in more than 50 countries. In the US, a bill concerning resale rights was introduced in Congress in December 2011.

### **A clear framework for the balance espoused by the government**

Consumers asked the government for flexibility and that is what they got. This flexibility will enable them to listen to works at different times, to change works' formats and to make back-up copies. Commercial radio stations will no longer be required to pay for temporary copies of works and Bill C-11 does not extend the private copying regime to include audio digital recorders. With the advent of virtual music libraries, business models will evolve. In the immediate future, however, the music industry, which currently does not use digital locks, will not benefit from the new provisions that will make it illegal to bypass these technological protection measures.

As mentioned, we support the introduction of legal protections for digital locks that can be very effective in regulating certain uses of works. However, rather than creating exceptions without remuneration, we believe it would be preferable, in order to allow access to works, to favor the licensing system by collecting societies, which is as effective for rightsholders as for users.

In our view, in this context, establishing this essential balance so that creators participate fully in the digital economy will require even more restrictive measures targeting those who facilitate copyright violations. Provisions will also be required whose scope is in line with lawmakers' intentions. In order to better achieve the goals of the *Copyright Modernization Act*, we are proposing various technical modifications pertaining to the following:

- Reproduction rights: temporary reproductions, ephemeral recordings, back-up copies
- Consumers: user-generated non-commercial content, private copying, pre-determined monetary damages



- Internet service providers: online piracy enablers, “notice and notice” regime and ISP non-accountability
- Education: adding education, parody and satire for fair use purposes, documentation that is publicly accessible on the Internet for teaching and education purposes
- Artistic works: distribution rights (resale rights and exhibition rights)
- International obligations

## I – PROVISIONS CONCERNING THE REPRODUCTION RIGHT

- a) 

<b>Allowing temporary reproductions for technological processes (section 32 of Bill C-11 providing for the addition of section 30.71 to the current <i>Copyright Act</i>)</b>
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1. The government is seeking to foster company-level innovation and to allow certain temporary reproductions. The objective is to ensure that certain temporary reproductions do not constitute copyright infringement, provided that they are an essential element of a technological process, that they are only aimed at facilitating a use that does not constitute copyright infringement and that they only exist for the duration of the technological process.
  2. According to the government, this provision will have no copyright implications because it covers “temporary, technical and incidental digital reproductions made as part of a technical process, such as cached transmissions over the Internet”. However, the very broad terms used in the proposed exception will give rise to a wide range of interpretations with respect to its scope and will jeopardize numerous digital reproductions **whose value is already established**. That would have an adverse impact on the normal use of the works and on the financial compensation that copyright holders currently receive.
  3. In addition, many users will claim in virtually all cases that the reproduction forms an “essential part of a technological process [whose] only purpose is to facilitate a use that is not an infringement of copyright and [which] exists only for the duration of the technological process”.
  4. To clearly reflect the government’s vision while avoiding legal uncertainties, the notion of the *duration* of the technological process should be defined: the section heading mentions *temporary reproduction*, although this term does not appear again in the section itself. Instead, reference is made to the *duration of the technological process* without qualifying this further. However, the term “temporary” means “momentarily” and “limited in time”.
  5. We propose that this notion be reflected in the wording of the legislation by specifying that the reproduction must have a **less than transitory duration**. This notion is based on a decision of the US Court of Appeals in the *Cablevision* case in 2008: “A work must be embodied in a medium, i.e. placed in a medium such that it can be perceived, reproduced, etc. [...] from that medium [...]. It must remain thus embodied **for a period of more than transitory duration**.”
  6. In order for the government to achieve its objective, it is also necessary to specify that the temporary reproductions in question **have no real value**<sup>1</sup>. In line with the government’s wishes, that would make it possible to better identify the field of application for this exception in the context of the examples provided in the fact sheets,

while leaving untouched the types of reproduction that are already protected and that have a definite economic value stemming from the real benefits that accrue to users.

7. Finally, as drafted, this exception may also seem to apply to reproductions made by a “programming service or broadcasting distributor” within the meaning of the Act. This could lead to confusion with respect to the applicability of section 30.71, in addition to the separate exceptions already granted to these companies in sections 30.8 and 30.9.
8. **SODRAC thus recommends incorporating the proposed modifications to the new section 30.71 (please see appendix) in order to specify that the reproductions in question have no actual value, that they only exist for a transitory period and that the reproductions made by or under the authority of a “programming undertaking” are not covered by this exception. This would ensure the implementation of the fair and balanced approach espoused by the government.**

b)

<p><b>Withdrawing radio broadcasters’ requirement to pay for making ephemeral recordings (section 34 of Bill C-11 amending section 30.9 of the current <i>Copyright Act</i>)</b></p>
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9. The government is seeking to modernize the radio broadcasting rules and to ensure that “radio broadcasters will no longer be required to compensate copyright owners for making temporary reproductions of sound recordings required for digital operations”.
10. We believe that, as the use of all reproduction rights by commercial radio stations accounts for barely 1.4% of their annual revenues<sup>2</sup>, section 30.9(6) should not be abrogated. However, based on our reading of the Bill and the related fact sheets, it is our understanding that the government still wants copyright holders to be duly compensated and to receive their fair share of the efficiencies stemming from the use of reproduction rights for copies of works made by radio stations and kept for more than 30 days, e.g. for storing musical works on their central server.
11. However, despite the government’s clear wishes to limit this exception to temporary recordings kept for a maximum of 30 days, with today’s technologies it is possible to create automated systems for recopying and destroying recordings—which would make it possible to do indirectly what the Bill prohibits from being done directly.
12. **SODRAC thus recommends incorporating the proposed minor modifications to section 34(2) of the Bill (please see appendix) in order to eliminate the possibility that this provision might be bypassed (contrary to the government’s intent) by creating a series of “ephemeral” recordings that could be recopied and destroyed every 30 days.**

c) **Allowing the making and accessing of backup copies  
(section 22 of Bill C-11 amending section 29.24 of the current *Copyright Act*)**

13. According to the proposed section 29.24, it is not an infringement of copyright for a person who owns a copy of a work or who holds a licence to use a work to reproduce the source copy solely for backup purposes if the source copy is not counterfeited, if the person who makes the copy does not circumvent a technological protection measure and if the backup copies are not given away. If the person ceases to be the owner of the source copy or ceases to hold a licence to use the work, all existing backup copies must be destroyed immediately.
14. By permitting individuals to make backup copies of music, this exception would create overlap and would be at odds with part VIII of the Copyright Act, which already authorizes the production of backup copies, although it also stipulates that rights holders must be paid remuneration for them. The proposed new exception would permit individuals to make copies without paying any remuneration. Consequently, the production of multiple backup copies by individuals will simply become another form of non-remunerated use in the very near future.
15. The proposed exception would also undermine other existing systems for granting licences, such as the agreements negotiated by SODRAC with non-commercial radio stations and TV broadcasters, as well as the CMRRA-SODRAC Inc. tariff for commercial radio and the CMRRA-SODRAC Inc. tariff for satellite radio services. If the production of backup copies is governed by a contract, e.g. in the case of downloads of musical works purchased from online music distribution services, the exception would override contractual licence-granting provisions authorizing the production of backup copies under the terms of a sales contract.
16. So this exception should never apply when the production of backup copies is subject to a contract, licence or tariff or to an existing system provided for under the law, in particular part VIII. Similarly, the exception should not apply to programming companies or radio broadcasting companies, which are subject to sections 30.8 and 30.9 respectively.
17. Contrary to paragraph 30.6(b) of the current Copyright Act, which permits a single backup copy of a computer program, the proposed exception sets no limit. Accordingly to paragraph 30.6(b), only one copy should be authorized for backup purposes.
18. At the very least, the requirement that backup copies may not be given away should be expanded to include sale, rental or any other form of distribution.
19. **SODRAC thus recommends incorporating the proposed modifications (please see appendix) in order to limit the proposed exception to a single back-up copy and to ensure that the exception only applies if the production of these copies is covered by a contract, a licence, a tariff or an existing legally binding system, in keeping with the spirit of the legislation. This would ensure the implementation of the fair and balanced approach espoused by the government.**

## II – PROVISIONS CONCERNING THE CONSUMER

a) **Allowing the creation of non-commercial user-generated content  
(section 22 of Bill C-11 providing for the addition of section 29.21 to the current  
*Copyright Act*)**

20. The government is seeking to allow consumers to use legitimately obtained works in order to create new content for non-commercial purposes. This provision is designed to exclusively cover the creation of content that does not affect the market for the original works. However, the restrictions set out in the Bill to prevent a negative impact of that kind are insufficient for the government to achieve its objective.
21. For example, this provision would allow an individual to create compilations or collective works (musical, literary, cinematographic, artistic, etc.) from existing works and to upload them onto a social network or a host site where thousands of Internet users could subsequently download them.
22. Mass distribution of that kind, particularly via commercial sites that generate advertising or other revenues, will diminish the attraction of these original works and will automatically have a negative impact on their market. In addition, under the Bill's current wording, such commercial intermediaries are exonerated from any responsibility.
23. In addition, the current wording of the government's proposed exception does not prevent the creation of **physical** copies of compilations or collective works created by individuals, nor does it restrict the **number of copies** allowed under this exception.
24. **SODRAC thus recommends incorporating the proposed modifications to section 22 (please see appendix) designed to improve the wording of the Bill's provisions and to ensure that the permitted activities are effectively restricted to those carried out for personal and non-commercial purposes and that they do not undermine the market for the original works.**

b) **Allowing reproductions of works for private purposes without compensation  
(section 22 of Bill C-11 amending section 29.21 of the current *Copyright Act*)**

25. With Bill C-11, the government is seeking to give "consumers the flexibility to enjoy and manage legitimately acquired content, while respecting the choice of copyright owners to use digital locks to prevent unauthorized use of their works."
26. However, the current Bill provides for the payment of compensation to authors and copyright holders for reproductions of their works made by consumers for private purposes. Seeing how it is impossible to control copies made "in the home", the private

copying regime is completely appropriate and is an effective means for compensating copyright holders for use of their works.

27. However, despite technological changes, Bill C-11 does not extend the application of the private copying regime to include digital audio recorders, such as iPods, which are widely used by consumers to reproduce musical works, or to include audiovisual works or any other categories of works that are also copied in large numbers.
28. Although Bill C-11 proposes an alternative to the legal protections allowing copyright holders to use digital locks to prevent unauthorized use of their works, it is a well-known fact that the music industry does not use digital locks. It follows that the financial compensation that copyright holders have been receiving for use of their works will disappear if the private copying regime is not extended to include digital audio recorders; this will have an adverse effect on the normal use of works, with no real alternative to prevent them from being copied.
29. That is why we believe that the government should consider modernizing the private copying regime in order to preserve a fair compensation model for creators' work. However, if the government elects not to extend the scope of the current regime to include digital audio recorders, in our opinion it should not allow users to make copies of works for private purposes without compensation.
30. **SODRAC thus recommends, together with the Canadian Private Copying Collective (CPCC), not introducing sections 29.22, 29.23 and 29.24 of Bill C-11 in order to ensure that private copying of musical works is not permitted without paying royalties.**

c)

<b>Reducing amounts of statutory damages</b> <b>(section 46 of Bill C-11 amending section 38.1 of the current <i>Copyright Act</i>)</b>
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31. "The Bill ensures that Canadians are not subject to unreasonable penalties by significantly reducing statutory damages for infringement for non-commercial purposes by individuals."
32. Bill C-11's provisions reduce the damages, which currently range from \$500 to \$20,000 for **all infringements related to one work** to maximum amounts ranging from \$100 to up to \$5,000 for **all infringements related to all works** used for non-commercial purposes by individuals. These reduced statutory damages send a message to Canadian citizens that copyright violations are minor events.
33. We are particularly concerned about repeat offenders, who, according to the Bill, could simply receive notice after notice. The Bill provides for no other consequences other than being potentially sued by a copyright holder, in which case the maximum damages would be limited to \$5,000.

34. SODRAC thus recommends retaining the current provision on statutory damages. However, if the government insists on reducing the damage amounts for individuals who commit violations for non-commercial purposes, we recommend including a provision to the effect that violations by repeat offenders will be subject to statutory damages for violations of a commercial nature.

### III – PROVISIONS CONCERNING ISPs

- a) 

<b>Effectively targeting enablers of online piracy (section 18 of Bill C-11 providing for the addition of sections 27(2.3) and 27(2.4) to the current <i>Copyright Act</i>)</b>
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35. The government believes that online piracy is a serious infraction and is seeking to implement new measures targeting those who enable copyright infringement on the Internet. To counter this plague, which has had a negative impact on the development of legal online business models, a new provision refers to “services [...] used to enable acts of copyright infringement” and targets “enablers of online infringement”, such as illegal peer-to-peer file sharing sites. The government hopes that this new provision will provide copyright holders with the tools they need to take legal action against those who facilitate online piracy. However, as drafted, these sections have four areas of weakness that make them virtually unenforceable.
36. First, the only services targeted are those “designed primarily to enable acts of copyright infringement” (*Our emphasis*). Any other person or network infringing copyright in a “non-primary” way would thus not fall within the scope of this section. In our view, the government should be sending a clear message aimed at targeting all those who make illegal peer-to-peer file sharing possible.
37. In addition, the application of this provision is subject to six evaluation factors, listed in paragraphs a) to f) of section 27(2.4), that will require numerous legal challenges before the courts will be able to determine the actual scope.
38. In addition, this provision only apply “if an actual infringement of copyright occurs by means of the Internet (...) as a result of the use of that service” (*Our emphasis*). Thus, an enabler who would directly infringes a copyright holder’s rights, would not be held responsible of such infringement as the Bill in its current form does not hold these services responsible for copyright infringements committed on their networks (section 31.1). Therefore, it should be précised that no exception applicable to ISP should apply to these enablers.
39. Finally, in section 38.1(6) d), the Bill prohibits copyright holders from seeking statutory damages from enablers of copyright infringement, which is inconsistent with the message that the government should be sending, namely that copyright infringements are unacceptable. We are proposing amendments (see appendix) aimed at improving

the wording of the Bill in order to ensure that the government's objectives are reached more effectively.

40. SODRAC thus recommends incorporating the proposed modifications (please see appendix) in order to improve the wording of section 27(2.3) and to target all those who facilitate illegal peer-to-peer file sharing. In addition, in order to better achieve the government's objectives, we recommend not adopting section 38.1(6)d) in order to enable rights holders to sue piracy enablers for statutory damages.

b) 

<p style="text-align: center;"><b>Creating a "notice and notice" regime</b> (section 47 of Bill C-11 providing for the addition of section 41.25 to the current <i>Copyright Act</i>)</p>
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41. "The Bill formalizes the voluntary 'notice and notice' regime currently used by Canadian ISPs. [...] This uniquely Canadian approach has been effective at discouraging infringement and is consistent with Canadian values." Under this regime, the only obligation imposed on ISPs is to provide notification if a copyright holder reports that a subscriber might be infringing copyright.
42. The notice and notice regime creates the illusion that a right exists, even though it will be virtually impossible to exercise. Indeed, taking legal action would become an onerous financial burden for authors seeking to defend their rights. The notice and notice regime provides an even more illusory form of protection in the case of "repeat offender" Internet users, who will have very little incentive to stop their illegal activities since they will merely be subject to minimal statutory damages and will not be subject to any penalties from their ISPs, while those same ISPs will continue to store the works and enable them to be used without authorization.
43. In SODRAC's view, it would be preferable to introduce a "notice and withdrawal" procedure, in line with the Supreme Court's wishes.<sup>3</sup> In the absence of such a procedure, SODRAC recommends improving the effectiveness of the "notice and notice" regime by making it mandatory for ISPs to respond to information requests. This would ensure the effectiveness of the system in place, which could be reviewed if other solutions proved necessary in order to stem online piracy, while facilitating the growth of legal access to works. For example, ISPs should be able to provide the number of notices sent to a given address, as well as the total number of notices sent per year. In addition, records making it possible to identify violators should be kept for at least three years (i.e. the length of the legal prohibition) and not just six months, as currently stipulated in the current version of the legislation.



c)

**Non-liability of Internet Service Providers (ISPs)**  
**(section 35 of Bill C-11 amending section 31.1 of the current *Copyright Act*)**

44. The government is seeking to ensure that “ISPs and search engines will not be held liable for the copyright infringements of their subscribers, to the extent that they are acting as neutral intermediaries”. At the same time, the government recognizes that “ISPs are in a unique position to facilitate the enforcement of copyright on the Internet”.
45. By modernizing the *Copyright Act*, the government is seeking to enable the ratification and implementation of the WIPO treaties (WIPO Copyright Treaty/WCT) and the WIPO Performances and Phonograms Treaty/WPPT). However, since those agreements date back 15 years, we believe that the mechanisms designed to protect the rights of authors, artists, performers and producers of sound recordings should be reviewed and strengthened since they are now insufficient to ensure an adequate level of protection for works on the Internet
46. The government recognizes that illegal file sharing has a significantly adverse effect on online business models, although the adoption of the proposed measures will not serve to reduce illegal peer-to-peer file sharing on the Internet. Since one of the government’s primary goals is to enable Canadians to play a role in the digital economy, we believe that to reach that objective, the Bill should make ISPs more accountable when it comes to significantly reducing illegal file sharing on the Internet if it cannot be stopped.
47. **SODRAC thus recommends that ISPs play a significant role in (i) educating Internet users (ii) introducing dissuasive measures (filtering or graduated response) and (iii) paying compensation, for an interim period or permanently. Even more important, ISPs should be able to block their national clients’ access to foreign sites that violate the principles set out in Canada’s *Copyright Act*, thereby steering Internet users towards legal solutions.**

#### IV – PROVISIONS CONCERNING EDUCATION

a)

**Including education, parody and satire for fair dealing purposes**  
**(section 21 of Bill C-11 amending section 29 of the current *Copyright Act*)**

48. The government is proposing to expand the field of exceptions for fair dealing, in particular with a new exception for educational purposes designed to give teachers and students free-of-charge access to copyright-protected works in a context of teaching and studying.

49. Although the government has stated that “fair dealing is not a blank cheque” (for use to be fair, it must not have an adverse impact on the original work’s market value), it is creating new exceptions that will permit the use of works without payment of royalties to the copyright holders. The government believes that “extending this provision to education will reduce administrative and financial costs for users of copyrighted materials that enrich the educational environment “.
50. Needless to say, SODRAC favours broad, easy and reasonable access to its repertoire, provided that authors, composers and music publishers it represents are financially compensated in the process. However, when this access becomes free-of-charge, an imbalance is created; in our view, the expropriation of copyright holders is unjustified.
51. It should be noted that SODRAC maintains close ties with the education sector and already fosters flexible and easy access to its repertoire, at a reasonable cost. Our agreement with the Quebec Department of Education, Recreation and Sports (MELS) is a good example of the “normal” use of works in our repertoire. There is no question that permitting free-of-charge access to these works in the future will unreasonably prejudice the legitimate interests of the copyright holders we represent.
52. The government has stated, however, that “fair use is not a blank cheque”. But will that really be the case? In its landmark *CCH Canadian Ltd. vs. Law Society of Upper Canada* decision in 2004, the Supreme Court attempted to establish a six-part test aimed at determining what constitutes fair use. Seven years later, in December 2011, the matter of defining fair use was again brought before the Supreme Court. However, during the hearings in that case, one of the users/plaintiffs concluded that the application of the test established by the CCH decision supported his case, while a co-plaintiff (also a user) stated exactly the opposite. An additional interpretative tool is thus required to reduce this legal uncertainty.
53. **SODRAC thus recommends that the legislation expressly state that the “three-step test” described in section 9 (2) of the Berne Convention, which Canada signed in 1928, is incorporated as a general interpretation guideline. These principles can be read in conjunction with those set out in the Supreme Court’s CCH decision. Indeed, the Berne test’s first principle stipulates that exceptions should be limited to those specifically defined in the legislation (“certain special cases”), which is already the case in Canada. The six steps set out in the CCH decision can then be interpreted by verifying that a given use “does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”, as stated in the Berne Convention.**

b) **Allowing teachers and students to use publicly available material on the Internet for teaching and education purposes**  
(section 27 of Bill C-11 providing for the addition of section 30.04 to the current *Copyright Act*)

54. Bill C-11 “allows teachers and students to use publicly available material that has been legitimately posted for free use on the Internet by copyright owners for the purposes of teaching and education.”
55. The education sector has stated in principle that it is not opposed to paying for the use of musical works available on the Internet if there is the expectation that the copyright holders should be compensated for use of their works. A collective management society such as SODRAC is perfectly able to effectively provide, on its members’ behalf, the required authorizations to educational institutions for use of its members’ works. Our agreement with the Quebec Department of Education, Recreation and Sports (MELS) is a testament to the advantages of a system that provides teachers and students with access to material and also ensures that our members receive compensation.
56. **SODRAC thus recommends not permitting the use of material accessible on the Internet by teachers and students without compensating the rights holders since that would be an unjustified modification of the balance that currently exists between access to works for teaching and education purposes and the legitimate interests of the rights holders.**

## V – PROVISIONS CONCERNING ARTISTIC WORKS

a) **Enable creators to control the first sale of every copy of their works by granting them distribution rights**  
(section 4 of Bill C-11, which provides for the addition of sub-section j) to section 3(1) of the current *Copyright Act*)

57. According to the Bill C-11 fact sheets, the government wants to allow creators to control the first sale of every copy of their works in the form of tangible objects. This provision “could be used, for example, to prevent the distribution of their work in advance of an official release date”. This new *distribution right* reflects the government’s broader perspective with respect to creators, i.e. the goals of *protecting their interests* and *promoting creativity*, as set out in the fact sheets. The government is also demonstrating its concern for fairness between creators by aligning the rights of photographers with those of other creators.
58. Adding subsection 3(1)j) to the *Copyright Act* will lead to a range of interpretations due to its lack of clarity. To cite the Barreau du Québec: “Among other things, section 4 poses a problem of coherence due to its use of the international principle of exhaustion

of rights, which differs depending on whether copyright or industrial property is concerned.”

59. **In order to eliminate any ambiguity, SODRAC thus recommends incorporating the proposed modifications (please see appendix) specifying that authors will have the right to carry out or authorize the first transfer of ownership of their own work, in particular through a sale. In the case of an artistic work other than a map, chart or plan, authors will have the right to collect a royalty on the subsequent resales of that work.**
60. By introducing resale rights for artistic works, the government will be promoting creativity and implementing a right set out in the Berne Convention (to which Canada is a signatory), which stipulates that the signatory countries may grant the author of an original artistic work and, after his/her death, the copyright holders, the “inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work”.
61. Implementing resale rights would thus enable authors of artistic works and their copyright holders to receive a portion of the proceeds if works are resold during the copyright protection period, not only in Canada, but also in the approximately 50 countries where this right already exists. Nearly one half of these countries are member states of the European Union, where this right already exists, i.e. if works are sold outside Canada.
62. **In addition, SODRAC recommends incorporating the proposed modification (please see appendix) to section 3(1) g) in order to reflect government’s concern for aligning the rights of various creators by making the scope of the exhibition right of artistic works, which only covers works created after June 7, 1988, similar to the public performance rights enjoyed by authors of other categories of works. In other words, exhibition rights would henceforth apply to all protected artistic works described in section 3(1) g). That would put an end to a form of discrimination that often ends up depriving experienced artists of the right to request exhibition royalties, whereas their younger peers can request these royalties.**

## **VI – PROVISIONS CONCERNING CANADA’S INTERNATIONAL OBLIGATIONS**

63. Under Canadian law, it is established that any legislation introduced by Parliament must be consistent with the country’s international obligations. However, in accordance with the Berne Convention and the WIPO Internet treaties, in addition to the information on the World Trade Organization Trade-Related Aspects of Intellectual Property Rights (TRIPS), legal exceptions must only be introduced *in certain special cases, provided that they do not adversely affect the normal exploitation of the work or cause any unjustified prejudice to the copyright holders’ legitimate interests.*

64. All of Bill C-11's exceptions should be interpreted in light of the principles set out in the agreements to which Canada is a signatory.
  65. It is not a question here of importing the content of foreign decisions into Canadian legislation, but rather one of offering our courts an internationally recognized interpretation guide taken from a convention to which Canada has subscribed.
  66. **SODRAC thus recommends incorporating the proposed modifications (please see appendix) and incorporating within the *Copyright Act* what is customarily referred to as the "Berne three-step test" so that Canada, as a signatory country, will ensure that the exceptions are limited to "certain special cases that [do] not conflict with the normal exploitation of the work and [do] not unreasonably prejudice the legitimate interests of the author".**
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1. As specified also in article 5 par. 1 of the European Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29 EC): "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2." (*Our emphasis*)

2. Copyright Board of Canada news release. *The Copyright Board of Canada sets royalties to be paid by commercial radio stations for the use of music for the years 2008 to 2012* (July 9, 2010 : <http://www.cb-cda.gc.ca/decisions/2010/20100709-CP.pdf>)

3. « A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory "notice and take down" procedure as has been done in the European Community and the United States ». *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45, paragraph 127

## **SODRAC: Who are we?**

SODRAC, the Society for reproduction rights of authors, composer and publishers in Canada, is a collective management society. In the music field, it manages the reproduction rights of authors, composers and publishers of musical works, songs and commissioned works (audiovisual); in the visual arts and crafts field, it manages all copyrights of the creators it represents. SODRAC regularly authorizes the use of works in its repertoire on all types of analog and digital platforms.

Our organization acts on behalf of 6,000 Canadian members and represents on an exclusive basis in Canada the repertoires of collective management societies active in nearly 100 foreign territories. In the music field, SODRAC's repertoire includes more than 10 million works; in the visual arts and crafts field, we represent in Canada the rights of approximately 40,000 artists and copyright holders from around the world.

Since it was founded in 1985, SODRAC has been a voting member of the International Confederation of Authors and Composers Societies (Confédération internationale des sociétés d'auteurs et compositeurs/CISAC) and the Bureau International de l'Édition Mécanique (BIEM), the international organization representing mechanical rights societies. SODRAC is also the only Canadian reproduction rights society representing authors, composers and music publishers to have voting member status within CISAC. In addition, in the visual arts and crafts field, SODRAC is the only Canadian collective management society with voting member status within CISAC's International Council of Creators of Graphic, Plastic and Photographic Arts (CIAGP).

Thanks to its extensive network of affiliated organizations around the world, SODRAC ensures that its Canadian members benefit from monies collected for use of their works outside Canada. Within Canada, SODRAC's wide-ranging repertoire enables it to enter into agreements with companies operating in various sectors and to contribute significantly to its members' revenues by providing them with various sources of royalties.

**SUMMARY OF RECOMMENDATIONS**

**TECHNICAL MODIFICATIONS  
TO THE  
COPYRIGHT MODERNIZATION ACT  
(BILL C-11)**

**PROPOSED BY SODRAC**

**MARCH 5, 2012**

## SODRAC: SUMMARY OF RECOMMENDATIONS

1. To incorporate the proposed modifications to the new section 30.71 (**temporary reproductions** – please see appendix) in order to specify that the reproductions in question have no actual value, that they only exist for a transitory period and that the reproductions made by or under the authority of a “programming undertaking” are not covered by this exception. This would ensure the implementation of the fair and balanced approach espoused by the government.
2. To incorporate the proposed minor modifications to section 34(2) of the Bill (**duration of ephemeral recordings** – please see appendix) in order to eliminate the possibility that this provision might be bypassed (contrary to the government’s intent) by creating a series of “ephemeral” recordings that could be recopied and destroyed every 30 days.
3. To incorporate the proposed modifications (**back-up copies** – please see appendix) in order to limit the proposed exception to a single back-up copy and to ensure that the exception only applies if the production of these copies is covered by a contract, a licence, a tariff or an existing legally binding system, in keeping with the spirit of the legislation. This would ensure the implementation of the fair and balanced approach espoused by the government.
4. To incorporate the proposed modifications to section 22 (**non-commercial user-generated content** – please see appendix) designed to improve the wording of the Bill’s provisions and to ensure that the permitted activities are effectively restricted to those carried out for personal and non-commercial purposes and that they do not undermine the market for the original works.
5. SODRAC recommends, together with the Canadian Private Copying Collective (CPCC), not introducing sections 29.22, 29.23 and 29.24 of Bill C-11 in order to ensure that **private copying of musical works** is not permitted without paying royalties.
6. SODRAC recommends retaining the current provision on **statutory damages**. However, if the government insists on reducing the damage amounts for individuals who commit violations for non-commercial purposes, we recommend including a provision to the effect that violations by repeat offenders will be subject to statutory damages for violations of a commercial nature.
7. To incorporate the proposed modifications (**enablers of online piracy** – please see appendix) in order to improve the wording of section 27(2.3) and to target all those who facilitate illegal peer-to-peer file sharing. In addition, in order to better achieve the government’s objectives, we recommend not adopting section 38.1(6)d) in order to enable rights holders to sue piracy enablers for statutory damages.
8. To introduce a “notice and withdrawal” procedure, in line with the Supreme Court’s wishes. In the absence of such a procedure, SODRAC recommends improving the



effectiveness of the “**notice and notice**” regime by making it mandatory for ISPs to respond to information requests. This would ensure the effectiveness of the system in place, which could be reviewed if other solutions proved necessary in order to stem online piracy, while facilitating the growth of legal access to works. For example, ISPs should be able to provide the number of notices sent to a given address, as well as the total number of notices sent per year. In addition, records making it possible to identify violators should be kept for at least three years (i.e. the length of the legal prohibition) and not just six months, as currently stipulated in the current version of the legislation.

9. To extend the liability of **ISPs** and invite ISPs to play a significant role in (i) educating Internet users (ii) introducing dissuasive measures (filtering or graduated response) and (iii) paying compensation, for an interim period or permanently. Even more important, ISPs should be able to block their national clients’ access to foreign sites that violate the principles set out in Canada’s *Copyright Act*, thereby steering Internet users towards legal solutions.
10. To provide (“**three-step test**” **interpretation guideline** – please see appendix) that the legislation expressly state that the “three-step test” described in section 9 (2) of the Berne Convention, which Canada signed in 1928, be incorporated in the *Copyright Act* as a general interpretation guideline in order to provide that exceptions be limited to those specifically defined in the legislation (“certain special cases”) and that a given use “does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”.
11. To forbid the use of **material accessible on the Internet** by teachers and students without compensating the rights holders since that would be an unjustified modification of the balance that currently exists between access to works for teaching and education purposes and the legitimate interests of the rights holders.
12. To incorporate the proposed modifications (**resale rights** – please see appendix) specifying that authors will have the right to carry out or authorize the first transfer of ownership of their own work, in particular through a sale. In the case of an artistic work other than other than a map, chart or plan, authors will have the right to collect a royalty on the subsequent resales of that work.
13. To incorporate the proposed modification to section 3(1) g) (**exhibition right** – please see appendix) in order to reflect government’s concern for aligning the rights of various creators by making the scope of the exhibition right of artistic works, which only covers works created after June 7, 1988, similar to the public performance rights enjoyed by authors of other categories of works. In other words, exhibition rights would henceforth apply to all protected artistic works described in section 3(1) g).

# **APPENDIX I**

**Amendments to Bill C-11  
proposed by SODRAC**

**MARCH 5, 2012**

RECOMMENDATION / RECOMMENDATION # 1

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments
<p>REPRODUCTIONS TEMPORAIRES POUR PROCESSUS TECHNOLOGIQUES</p> <p>TEMPORARY REPRODUCTION FOR TECHNOLOGICAL PROCESSES</p>	<p>32</p>	<p>30.71</p>	<p>30.71 It is not an infringement of copyright to make a <u>temporary</u> reproduction of a work or other <u>subject-matter</u> if:</p> <p>(...)</p> <p>(b) the reproduction's only purpose is to facilitate a use that is not an infringement of copyright, and <u>the resulting copy has no significant value</u>; and</p> <p>(c) the reproduction exists only for the <u>duration</u> of the <u>technological process</u>; a <u>transitory duration</u>;</p> <p><u>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).</u></p>
			<p>30.71 Ne constitue pas une violation du droit d'auteur le fait de reproduire temporairement une œuvre ou tout objet du droit d'auteur si les conditions suivantes sont réunies:</p> <p>(...)</p> <p>(b) elle a pour seul but de faciliter une utilisation qui ne constitue pas une violation du droit d'auteur et <u>la copie en résultant n'a pas de valeur réelle</u>;</p> <p>(c) elle n'existe que pour la <u>durée</u> du <u>processus technologique</u> une <u>durée transitoire</u>;</p> <p><u>Pour plus de certitude, l'exception prévue à cet article ne s'applique pas aux reproductions effectuées par ou sous l'autorité d'une « entreprise de programmation », tel que défini à l'article 30.8 (11) ou d'une « entreprise de radiodiffusion », tel que défini à l'article 30.9 (7).</u></p>

RECOMMENDATION / RECOMMENDATION # 2

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifiés / Sec. Amended Act	Amendements proposés / Proposed Amendments
<p>ENREGISTREMENTS ÉPHÉMÈRES EPHEMERAL RECORDINGS</p>	<p>34(2)</p>	<p>30.9(4)</p>	<p>30.9 (4) Elle est tenue – sauf autorisation à l'effet contraire du titulaire du droit d'auteur – de détruire la toute reproduction dans les trente jours suivant sa première réalisation ou, si elle est antérieure, soit à la date où l'enregistrement sonore ou la prestation ou œuvre fixée au moyen d'un enregistrement sonore n'est plus en sa possession, soit à la date d'expiration de la licence permettant l'utilisation de l'enregistrement, de la prestation ou de l'œuvre et ne peut reproduire subséquemment ces mêmes enregistrements sonores, prestations ou œuvres fixées au moyen du même enregistrement sonore sauf si le titulaire de droit l'autorise à faire une telle reproduction subséquente.</p> <p>30.9 (4) The broadcasting undertaking must destroy <u>all</u> 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 <u>first</u> 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.</p>

RECOMMENDATION / RECOMMENDATION # 3

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifiée / Sec. Amended Act	Amendements proposés / Proposed Amendments
<p>COPIES DE SAUVEGARDE</p> <p>BACKUP COPIES</p>	<p>22</p>	<p>29.24 (1) Ne constitue pas une violation du droit d'auteur le fait, pour la personne qui est propriétaire de la copie (au présent article appelée « copie originale ») d'une œuvre ou de tout autre objet du droit d'auteur, ou qui est titulaire d'une licence en autorisant l'utilisation, de faire une seule reproduction de cette copie originale la reproduire si les conditions ci-après sont réunies :</p> <p>a) la reproduction est effectuée exclusivement à des fins de sauvegarde au cas où il serait impossible d'utiliser la copie originale, notamment en raison de perte ou de dommage qui n'a pas été causé de façon délibérée par la personne;</p> <p>(...)</p> <p>c) dans l'éventualité où la personne est titulaire d'une licence qui autorise l'utilisation de la copie originale, et que cette licence n'interdit pas la création de copies de sauvegarde et que la personne respecte les autres conditions applicables de cette licence;</p> <p>ed) la personne ne contourne pas ni ne fait contourner une mesure technique de protection, au sens de ces termes à l'article 41, pour faire la reproduction;</p>	<p>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 <u>make a single reproduction</u> of the source copy if</p> <p>(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 <u>deliberate act of the person who made the reproduction;</u></p> <p>(...)</p> <p>(c) where the person has a licence to use the source copy, the licence does not prohibit the <u>making of backup copies and the person complies with all other material conditions of the licence;</u></p> <p>(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</p>

<p>(de) elle ne vend, distribue, loue ou donne aucune la reproduction à personne</p> <p>Assimilation</p>	<p>(de) the person does not give any of the reproductions away sell, distribute, rent out or give the reproduction away.</p> <p>Backup copy becomes source copy</p>		
<p>(2) Une des La reproduction faites au titre du paragraphe (1) est assimilée à la copie originale en cas d'impossibilité d'utiliser celle-ci, notamment en raison de perte ou de dommage qui n'a pas été causé de façon délibérée par la personne</p> <p>(...)</p> <p>Application</p>	<p>(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.</p> <p>(...)</p> <p>Application</p>		
<p>(4) Le présent article ne s'applique pas aux reproductions prévues aux articles 30.71 ou celles de la Partie VIII ou qui sont faites par ou sous l'autorité d'un intermédiaire, au sens de la définition de ce terme à l'article 29.21 d'une entreprise de programmation au sens de la définition de ce terme à l'article 30.8(11) ou une entreprise de radiodiffusion au sens de la définition de ce terme à l'article 30.9(7)</p> <p>Reproduction assujettie à une licence, contrat ou tarif</p>	<p>(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).</p> <p>Reproductions subject to licence, contract or tariff</p>	<p>22</p> <p>29.24</p>	<p>COPIES DE SAUVEGARDE</p> <p>BACKUP COPIES</p> <p>(suite / continued)</p>
<p>(5) Les termes et conditions énumérés dans une licence, contrat ou tarif portant sur l'étendue du droit de faire une copie originale ont prééance sur les conditions décrites à l'alinéa 29.24 (1) en cas de conflit entre ces conditions</p>	<p>(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.</p>		

RECOMMENDATION / RECOMMENDATION # 4

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifiée / Sec. Amended Act	Amendements proposés / Proposed Amendments
<p>CONTENU NON COMMERCIAL GÉNÉRÉ PAR L'UTILISATEUR</p>	<p>22</p>		<p>29.21 (1) Ne constitue pas une violation du droit d'auteur le fait, pour une personne physique, d'utiliser une œuvre ou tout autre objet du droit d'auteur ou une copie de ceux-ci — déjà publiés ou mis à la disposition du public avec l'accord du titulaire de droit — pour créer une autre œuvre ou un autre objet du droit d'auteur protégés et, pour cette personne de même que, si elle les y autorise, celles qui résident habituellement avec elle, d'utiliser la nouvelle œuvre ou le nouvel objet ou d'autoriser un intermédiaire à le diffuser dans un format numérique sur Internet ou tout autre réseau numérique, si les conditions suivantes sont réunies :</p>
<p>NON-COMMERCIAL USER-GENERATED CONTENT</p>	<p>29.21</p>		<p>29.21(1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public with the consent of the copyright owner, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual's authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it in digital format, by means of the Internet or other digital network, if</p> <p>(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for the non-commercial, personal purposes of the individual;</p> <p>(b) the source — and, if given in the source, the name of the each author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;</p>

<p>CONTENU NON COMMERCIAL GÉNÉRÉ PAR L'UTILISATEUR</p>	<p>22</p>	<p>c) la personne croit, pour des motifs raisonnables, que l'œuvre ou l'objet ou la copie de ceux-ci, ayant servi à la création de la nouvelle œuvre ou du nouvel objet n'était pas contrefait;</p> <p>d) <u>la personne a obtenu la copie de l'œuvre ou un autre objet du droit d'auteur protégés déjà publiés ou mis à la disposition du public légalement, autrement que par emprunt ou location; et afin d'utiliser l'œuvre ou l'objet ou une copie de ceux-ci, n'a pas contourné ou fait contourner une mesure technique de protection, tel que ces termes sont définis à l'article 41; et</u></p> <p>e) l'utilisation de la nouvelle œuvre ou du nouvel objet, ou l'autorisation de les diffuser, ou la diffusion de la nouvelle œuvre ou du nouvel considérée isolément ou avec des utilisations similaires.</p>	<p>(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and</p> <p>(d) <u>the individual legally obtained the copy of the existing work or other subject-matter, other than by borrowing or renting it, and, in order to use the existing work or other subject-matter or a copy of it, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented; and</u></p> <p>(e) the use of, or the authorization to disseminate, or the dissemination of, the new work or other subject-matter <u>by itself or together with similar dealings</u></p>
<p>NON-COMMERCIAL USER-GENERATED CONTENT</p> <p>(suite / continued)</p>	<p>29.21</p>	<p>(f) <u>n'a aucun effet négatif important, pécuniaire ou autre, sur l'exploitation — actuelle ou éventuelle — de l'œuvre ou autre objet ou de la copie de ceux-ci ayant servi à la création ou sur tout marché actuel ou éventuel à son égard, notamment parce que l'œuvre ou l'objet nouvellement créé ne contient pas un substitut à ceux-ci et ne peut s'y substituer.</u></p>	<p>does (f) <u>would not have a substantial an</u> adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not, <u>and does not contain, a substitute for the existing one;</u></p>



<p>CONTENU NON COMMERCIAL GÉNÉRÉ PAR L'UTILISATEUR</p> <p>NON-COMMERCIAL USER-GENERATED CONTENT</p> <p>(suite / continued)</p>	<p>22</p> <p>29,1</p>	<p>(ii) <u>n'a aucune effet négatif, financier ou autre, sur l'intérêt du détenteur de droit, producteur, auteur ou artiste-interprète de l'œuvre ou autre objet ayant servi à la création, incluant le droit moral de quiconque</u></p> <p>(iii) <u>n'est pas faite dans quelque intention de faire un gain sans le consentement du titulaire de droit, et</u></p> <p>(iv) <u>est autrement une utilisation qui est équitable par ou pour cette personne</u></p> <p>Définitions</p> <p>(2) Les définitions qui suivent s'appliquent au paragraphe (1)</p> <p><b>«diffuser disseminate»</b>  <u>« diffuser » Permettre la mise à la disposition, la communication au public par télécommunication sur Internet ou tout autre réseau numérique de la nouvelle œuvre ou nouvel objet du droit d'auteur créée en vertu du paragraphe (1).</u></p>	<p>(ii) <u>would not have an adverse effect, financial or otherwise, on the interests of the copyright owner, maker, author, or performer of the existing work or other subject-matter, including the moral rights of any person.</u></p> <p>(iii) <u>is not done for any motive of gain without the consent of the copyright owner, and</u></p> <p>(iv) <u>is otherwise a dealing, by or for the individual, that is fair.</u></p> <p>Définitions</p> <p>(2) The following definitions apply in subsection (1):</p> <p><b>“disseminate” « diffuser »</b>  <u>“disseminate” means, in relation to a new work or other subject-matter created pursuant to subsection (1), to make it available, communicate it to the public by telecommunication, or otherwise distribute it by means of the Internet or other digital network.</u></p>
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<p>CONTENU NON COMMERCIAL GÉNÉRÉ PAR L'UTILISATEUR</p> <p>NON-COMMERCIAL USER- GENERATED CONTENT</p> <p>(suite / continued)</p>	<p>22</p>	<p>29,1</p>	<p>« intermédiaire » «intermediary» intermédiaire » Personne ou entité qui fournit régulièrement un espace une mémoire numérique ou des moyens similaires pour permettre au public de voir ou d'écouter sur Internet ou tout autre réseau numérique des œuvres ou d'autres objets du droit d'auteur</p> <p>« utiliser » «use» « utiliser » S'entend du fait d'accomplir tous actes qu'en vertu de la présente loi seul le titulaire du droit d'auteur a la faculté d'accomplir, sauf celui d'en autoriser l'accomplissement, <u>incluant la diffusion des œuvres en vertu du paragraphe (1).</u></p>	<p>“intermediary” « intermédiaire » “intermediary” means a person or entity who regularly provides <u>space digital memory or other similar</u> means for works or other subject-matter to be enjoyed <u>viewed or heard</u> by the public <u>by means of the Internet or other digital network.</u></p> <p>“use” « utiliser » “use” means to do anything that by this Act the owner of the copyright has the sole right to do, other than the right to authorize anything, <u>and includes the dissemination of a work pursuant to subsection (1).</u></p>
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RECOMMENDATION / RECOMMENDATION # 7

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments.
<p>VIOLATION RELATIVE AU FSI INFRINGEMENT PROVISION OF SERVICES</p>	<p>18</p>	<p>27(2.3)</p>	

RECOMMENDATION / RECOMMANDATION # 8

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments	
<p>DISPOSITIONS CONCERNANT LES FOURNISSEURS DE SERVICES RÉSEAU ET D'OUTILS DE REPÉRAGE</p> <p>PROVISIONS RESPECTING PROVIDERS OF NETWORK SERVICES AND INFORMATION LOCATION TOOLS</p>	<p>47</p>	<p>41.26</p>	<p>41.26 (1)</p> <p>La personne visée aux alinéas 41.25(1)a) ou b) qui reçoit un avis conforme au paragraphe 41.25(2) a l'obligation d'accomplir les actes ci-après, moyennant paiement des droits qu'elle peut exiger :</p>	<p>41.26 (1)</p> <p>A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so</p>
	<p>41.26</p>		<p>(b) conserver, pour une période de six-mois <u>trois ans</u> à compter de la date de réception de l'avis de prétendue violation, un registre permettant d'identifier la personne à qui appartient l'emplacement électronique et, dans le cas où, avant la fin de cette période, une procédure est engagée par le titulaire du droit d'auteur à l'égard de la prétendue violation et qu'elle en a reçu avis, conserver le registre pour une période de <del>un</del> <u>six</u> ans suivant la date de la réception de l'avis de prétendue violation.</p>	<p>(b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so <del>six months</del> <u>three years</u>, beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those <del>six months</del> <u>three years</u>, for <del>one</del> <u>six</u> years after the day on which the person receives the notice of claimed infringement.</p>

<p style="text-align: center;">DISPOSITIONS CONCERNANT LES FOURNISSEURS DE SERVICES RESEAU ET D'OUTILS DE REPÉRAGE</p> <p style="text-align: center;">PROVISIONS RESPECTING PROVIDERS OF NETWORK SERVICES AND INFORMATION LOCATION TOOLS</p> <p style="text-align: center;">(suite / continued)</p>	<p><b>47</b></p> <p><b>41.26</b></p>	<p style="text-align: center;"><del>41.26(2)</del></p> <p><del>Le ministre peut, par règlement, fixer le montant maximal des droits qui peuvent être exigés pour les actes prévus au paragraphe (1). À défaut de règlement à cet effet, le montant de ces droits est nul.</del></p> <p style="text-align: center;"><del>41.27 (3)</del></p> <p><del>Dans le cas où le fournisseur reçoit un avis de prétendue violation conforme au paragraphe 41.25(2) à l'égard d'une œuvre ou d'un autre objet du droit d'auteur après le retrait de celui-ci de l'emplacement électronique mentionné dans l'avis, le paragraphe (1) ne s'applique, à l'égard des reproductions faites à partir de cet emplacement, qu'aux violations commises avant l'expiration de <del>trente</del> dix jours — ou toute autre période prévue par règlement — suivant la réception de l'avis.</del></p>	<p style="text-align: center;">41.26 (2)</p> <p><del>The Minister may, by regulation, fix the maximum fee that a person may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection</del></p> <p style="text-align: center;">41.27 (3)</p> <p><del>If the provider receives a notice of claimed infringement, relating to a work or other subject-matter, that complies with subsection 41.25(2) after the work or other subject-matter has been removed from the electronic location set out in the notice, then subsection (1) applies, with respect to reproductions made from that electronic location, only to infringements that occurred before the day that is 30 10 days — or the period that may be prescribed by regulation — after the day on which the provider receives the notice</del></p>
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RECOMMENDATION / RECOMMENDATION # 10

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments
<p>INTERPRÉTATION</p> <p>INTERPRETATION</p>		<p>32.3</p>	<p><u>32.3(1) En interprétant les limitations ou exceptions au droit d'auteur en vertu de la Partie III de la Loi, le tribunal doit s'assurer qu'elles ne concernent que certains cas spéciaux où il n'est pas porté atteinte à l'exploitation normale de l'œuvre ni causé de préjudice injustifié aux intérêts légitimes de l'auteur, artiste-interprète ou producteur.</u></p> <p><u>32.3(1) In interpreting limitations or exceptions to copyright in Part III of the Act, a court shall restrict them to certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author, performer or maker</u></p>

RECOMMENDATION / RECOMMENDATION # 12

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifiée / Sec. Amended Act	Amendements proposés / Proposed Amendments
DROIT DE SUITE	4	3(1)j	<p><u>3(1) j) in the case of a work that is in the form of a tangible object, to do or authorize to do the first transfer of ownership, notably through a sale; and, in the case of an artistic work other than a map, a plan or a graphic, to collect a royalty on the subsequent resales of that work, sell or otherwise transfer ownership of the tangible object, as long as that ownership has never previously been transferred in or outside Canada with the authorization of the copyright owner;</u></p> <p><b>Interpretation</b>  <u>4(1) In sections 4, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8 and 4.9 "Art market professional" means:</u>  <u>(a) an auctioneer; or</u>  <u>(b) the owner or operator of an art gallery;</u>  <u>or</u>  <u>(c) the owner or operator of a museum; or</u>  <u>(d) an art dealer; or</u>  <u>(e) an antique dealer; or</u>  <u>(f) a person otherwise involved in the business of dealing in artworks.</u>  <u>"resale right" means the right described in subsection 4.2(1);</u>  <u>"resale royalty" means the royalty described in subsection 4.2(3);</u></p>
RESALE RIGHT	4	3(1)j	<p><u>3(1) j) s'il s'agit d'une œuvre sous forme d'un objet tangible, d'en effectuer ou d'en autoriser le premier transfert de propriété, notamment par vente; et, s'il s'agit d'une œuvre artistique autre qu'une carte géographique ou marine, un plan ou un graphique, de percevoir un droit de suite lors des transferts de propriété subséquents, notamment par la revente, de la manière prévue au paragraphe (4) et suivant de l'objet, dans la mesure où la propriété de celui-ci n'a jamais été transférée au Canada ou à l'étranger avec l'autorisation du titulaire du droit d'auteur;</u></p> <p><b>Interprétation</b>  <u>4(1) Dans les articles 4, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8 et 4.9</u>  <u>« Professionnel du marché de l'art » signifie</u>  <u>(a) un encanteur; ou</u>  <u>(b) le propriétaire ou l'administrateur d'une galerie d'art; ou</u>  <u>(c) le propriétaire ou l'administrateur d'une musée; ou</u>  <u>(d) un marchand d'œuvres artistiques, ou</u>  <u>(e) un antiquaire; ou</u>  <u>(f) toute personne opérant une entreprise de vente d'œuvres artistiques.</u>  <u>« droit de suite sur la revente d'œuvres artistiques » est le droit décrit à l'alinéa 4.2(1);</u></p>

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments
DROIT DE SUITE			<p>« redevances pour droit de suite sur la revente d'œuvres artistiques » signifie la redevance décrite à l'alinéa 4.2(3). « prix de vente » signifie le montant obtenu de l'acquéreur pour la vente de l'œuvre, excluant toute commission pour l'acquéreur ou toute taxe applicable.</p> <p><b>Œuvres concernées</b> 4.1(1) Pour l'application des articles 4, 4.1, 4.2, 4.3, 4.5, 4.6, 4.7, 4.9 et 4.10, « œuvre » signifie une œuvre artistique autre qu'une carte géographique ou marine, un plan, un graphique ou une œuvre architecturale, et inclut tout collage, gravure, lithographie et œuvre d'artisanat textile, céramiques et œuvre en verre.</p> <p>(2) À moins d'une édition limitée, réalisée par l'auteur ou avec son autorisation, les copies ne sont pas prises en compte.</p> <p><b>Droit de suite sur la revente d'œuvres artistiques</b> 4.2(1) L'auteur d'une œuvre protégée par le droit d'auteur a le droit de percevoir une redevance sur toute vente subséquente au premier transfert de propriété effectué par l'auteur. (2) Le droit de suite s'applique pour toute la durée du droit d'auteur sur l'œuvre. (3) Le droit de suite est une redevance égale à cinq pour cent du prix de vente. (4) Le droit de suite ne s'applique pas sur</p>
RESALE RIGHT (suite / continued)	4	3(1)j	<p>"sale price" means the price obtained for the sale of the work by the buyer, but does not include any buyers premium or other tax payable on the sale.</p> <p><b>Works covered</b> 4.1(1) For the purpose of sections 4, 4.1, 4.2, 4.3, 4.5, 4.6, 4.7, 4.9 and 4.10, "work" means an artistic work, other than a map, chart, plan or architectural work, and includes any collage, print, lithograph, tapestry, ceramic or glassware. (2) A copy of a work is not to be considered a work unless such copy is one of a limited number which has been made by the author or with the authorization of the author.</p> <p><b>Artist's resale right</b> 4.2(1) The author of a work in which copyright subsists shall have a right to a resale royalty on any sale of the work which is a resale subsequent to the first transfer of ownership by the author. (2) The resale right in a work shall continue to subsist so long as copyright subsists in the work. (3) The resale royalty shall be an amount equal to five percent of the sale price. (4) There is no resale royalty right in respect of a sale price of less than \$1,000 or, if the sale price is paid in a foreign currency, the amount worked out using the exchange rate applicable at the time of the sale described in subsection (1)</p>



Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments
<p><b>DROIT DE SUITE</b></p> <p><b>RESALE RIGHT</b> (suite / continued)</p>	<p>4</p> <p>3(1)j</p>	<p>les ventes dont le montant est moindre que 1 000 \$ ou, si le prix de vente est payé en monnaie étrangère, le montant établi en utilisant le taux de change en vigueur au moment de la vente décrite au paragraphe (1).</p> <p>(5) Pour l'application du paragraphe (1), premier transfert de propriété inclut:</p> <p>a) un don ou un cadeau de l'auteur;</p> <p>b) un legs testamentaire par l'auteur ou découlant d'une succession ab intestat;</p> <p>c) la disposition d'une œuvre par un syndic de faillite dans le cadre du règlement d'une succession.</p> <p><b>Co-autorat</b></p> <p>4.3(1) Dans le cas d'une œuvre réalisée par plus d'un auteur, le droit de suite appartient conjointement aux auteurs.</p> <p>(2) Le droit de suite appartient aux auteurs à parts égales à moins d'entente contraire signée par les auteurs.</p> <p><b>Incessible, inaliénable</b></p> <p>4.4(1) Le droit de suite sur la revente des œuvres artistiques ne peut être cédé, il est inaliénable et nul ne peut y renoncer.</p> <p><b>Responsabilité face au droit de suite</b></p> <p>4.5(1) La responsabilité face au droit de suite survient au moment de la vente décrite au paragraphe 4.2(1).</p>	<p>(5) For the purpose of subsection (1), first transfer of ownership includes:</p> <p>a) donation or gift by the author;</p> <p>b) testamentary disposition by the author or by intestate succession;</p> <p>c) the disposal of the work by a trustee in bankruptcy for the purposes of realization of the author's estate.</p> <p><b>Joint authorship</b></p> <p>4.3(1) In the case of a work of joint authorship, the resale right shall belong to the authors as owners in common.</p> <p>(2) The resale right shall be held by the joint authors in equal shares unless otherwise agreed in writing.</p> <p><b>No assignment, inalienable</b></p> <p>4.4(1) The resale right is unassignable and inalienable, and may not be waived.</p> <p><b>Liability to pay resale royalty</b></p> <p>4.5(1) Liability to pay the resale royalty arises at the time of the sale described in subsection 4.2(1).</p>

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments
<p><b>DROIT DE SUITE</b></p> <p><b>RESALE RIGHT</b> (suite / continued)</p>	<p>4</p>	<p>3(1)j</p>	<p>(2) <u>Les personnes suivantes sont solidairement responsables du paiement de la redevance pour droit de suite sur la revente des œuvres artistiques : (a) le vendeur de l'œuvre ou, s'il y a plus d'un vendeur, tous les vendeurs ; et (b) toute personne agissant à titre de professionnel du marché de l'art à titre d'agent du vendeur.</u></p> <p><b>Admissibilité</b> <u>4.6(1) Le droit de suite conféré au paragraphe 4.2(1) ne s'applique que si l'auteur était</u> <u>(a) à la date de la vente décrite au paragraphe 4.2(1), un citoyen canadien ou un résident permanent en vertu de la définition du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés,</u> <u>ou</u> <u>(b) un citoyen, sujet ou résident permanent d'un pays qui accorde aux citoyens canadiens ou à ses résidents permanents en vertu de la définition du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés un droit similaire à celui prescrit par la Loi.</u></p> <p><b>Eligibility</b> <u>4.6(1) The resale right conferred by subsection 4.2(1) applies only if the author was (a) at the date of the sale described in subsection 4.2(1), a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, or (b) a citizen, subject or permanent resident of a country that grants Canadian citizens or permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act a substantially similar resale right as prescribed by the Act.</u></p>

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifie / Sec. Amended Act	Amendements proposés / Proposed Amendments
DROIT DE SUITE	4	3(1)j	<p><b>Gestion collective</b>  <u>4.7(1) Le droit de suite sur la revente des œuvres artistiques ne peut s'exercer que par l'intermédiaire d'une société de gestion du droit d'auteur.</u>  <u>(2) Lorsque le titulaire du droit de suite n'a pas cédé la gestion de ses droits d'auteur à une société de gestion, la société de gestion qui gère des droits d'auteur d'œuvres artistiques est considérée comme ayant reçu le mandat de gérer son droit de suite.</u>  <u>(3) S'il y a plus d'une société de gestion, le titulaire du droit peut choisir celle qu'il mandate pour gérer son droit de suite.</u>  <u>(4) Le titulaire du droit auquel s'applique le paragraphe (2) a les mêmes droits et obligations, eu égard à la gestion de son droit, que les titulaires ayant cédé la gestion de leur droit à la société de gestion concernée.</u></p>
RESALE RIGHT (suite / continued)			<p><b>Collective management</b>  <u>4.7(1) The resale right may be exercised only through a collective society.</u>  <u>(2) Where the holder of the resale right has not transferred the management of the right to a collective society, the collective society which manages copyright on behalf of authors of works shall be deemed to be mandated to manage the right.</u>  <u>(3) Where there is more than one such collective society, the holder may choose which of them is so mandated.</u>  <u>(4) A holder to whom subsection (2) applies has the same rights and obligations, in respect of the management of the right, as have holders who have transferred the management of their right to the collective society concerned.</u></p> <p><b>Right to pertinent information</b>  <u>4.8(1) The holder of the resale right has the right to obtain, on a confidential basis, all information regarding the sale described in subsection 4.2(1) in order to establish solely the amount of the resale royalty due and, if applicable, the name and address of the person responsible for making the payment.</u>  <u>(2) A request under subsection 4.8(1) may be made to any person listed in subsection 4.5(2).</u></p>

RECOMMENDATION / RECOMMENDATION # 12

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments
<p><b>DROIT DE SUITE</b></p>			<p>(3) <u>The person to whom the request under subsection 4.8(1) is addressed shall do everything within the power of that person to transmit the information within 90 days following receipt.</u></p> <p>(4) <u>If the person responsible for transmitting the information required by subsection 4.8(1) does not do so within the prescribed time, the holder of the resale right may by way of an application to be heard and determined without delay and in a summary way, apply for an order requiring the person to whom the request is made to supply the information.</u></p>
<p><b>RESALE RIGHT</b> (suite / continued)</p>	<p>4</p>	<p>3(1)j</p>	<p><b>Succession</b></p> <p><u>4.9(1) The resale right in respect of a work passes, on the death of the author, to</u></p> <p><u>(a) the person to whom the right is specifically bequeathed;</u></p> <p><u>(b) where there is no specific bequest of the resale right and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed; or</u></p> <p><u>(c) where there is no person described in paragraph (a) or (b), the person entitled to any other property in respect of which the author dies intestate.</u></p> <p><u>(2) Subsection (1) applies, with such modifications as the circumstances require, on the death of any person who holds the resale right.</u></p>

RECOMMENDATION / RECOMMENDATION # 12

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments
DROIT DE SUITE			<p><u>Transitional provisions</u>            4.10(1) (a) Liability to pay the resale royalty does not apply to sales described in subsection 4.2(1) that preceded the coming into force of this section; but (b) applies notwithstanding that the work sold was made before that coming into force.</p>
RESALE RIGHT (suite / continued)	4	3(1)j	<p><u>Mesures transitoires</u>            4.10(1) (a) La responsabilité de payer la redevance de droit de suite ne s'applique pas aux ventes décrites au paragraphe 4.2(1) qui ont précédé l'entrée en vigueur de la présente partie ; mais (b) elles s'appliquent néanmoins à toute œuvre produite avant cette entrée en vigueur.</p> <p><u>Recours</u>            34(3) Dans tout recours pour une infraction au droit de suite d'un auteur, le tribunal peut accorder à l'auteur, au titulaire ou à la personne qui gère ce droit, toute pénalité ou dommage prévu par la Loi pour les infractions aux droits d'auteur.</p> <p><u>Resale Right Remedy</u>            34(3) In any proceeding for an infringement of the resale right of an author, the court may grant to the author or to the person who holds or manages the resale right, as the case may be, all remedies by way of damages and otherwise that are or may be conferred by law for the infringement of a right.</p>

RECOMMENDATION / RECOMMENDATION # 13

Sujet / Issue	Art. de C-11 / Sec. of Bill C-11	Art. Loi modifié / Sec. Amended Act	Amendements proposés / Proposed Amendments
DROIT D'EXPOSITION / EXHIBITION RIGHT		3 (1)g)	<p>3(1)g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une œuvre artistique - autre qu'une carte géographique ou marine - créée après le 7 juin 1988 ;</p> <p>3(1)g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan;</p>

## **APPENDIX II**

**Fact Sheet - Commercial Radio Tariff  
2008 to 2012**

**Copyright Board of Canada  
July 9, 2010**

**MARCH 5, 2012**



## FACT SHEET

### Commercial Radio Tariff,

2008 to 2012

July 9, 2010

#### *What is the Copyright Board of Canada?*

The Copyright Board of Canada is an economic regulatory body empowered to establish, either mandatorily or at the request of an interested party, the royalties to be paid for the use of works protected by copyright, when the administration of these rights is entrusted to a collective society. The Board also supervises agreements signed between users and collective societies and can issue licences when the copyright owners cannot be located.

#### *What is the commercial radio tariff?*

The commercial radio tariff sets the fees that Canadian commercial radio stations must pay for the use of copyrighted musical works and sound recordings. They pay these fees to six collective societies: SOCAN, Re:Sound, CSI, AVLA, SOPROQ and ArtistI. For a description of each society, see the answer to the last question.

#### *What are the rates set by the decision and how do they compare with what applied before?*

Table 1 shows the rates certified today. The rates apply to a commercial radio station's gross income. SOCAN and Re:Sound rates remain the same. The rates for CSI have been increased as indicated in the table. The AVLA, SOPROQ and ArtistI rates are new.



**Table 1**

**Comparison of the rates certified today  
with the previous rates**

	SOCAN (previous and new)	Re:Sound (previous and new)	CSI		AVLA/ SOPROQ (new only)	ArtistI (new only)
			(previous)	(new)		
<b><u>Low Use Stations</u></b>						
<b>For income:</b>						
Not exceeding \$625,000	1.5	0.75	0.12	0.135	0.113	0.003
Above \$625,000 but not exceeding \$1.25M	1.5	0.75	0.23	0.259	0.234	0.005
Above \$1.25M	1.5	0.75	0.35	0.434	0.405	0.008
<b><u>Other Stations</u></b>						
<b>For income:</b>						
Not exceeding \$625,000	3.2	1.44	0.27	0.304	0.278	0.006
Above \$625,000 but not exceeding \$1.25M	3.2	1.44	0.53	0.597	0.564	0.011
Above \$1.25M	4.4	2.1	0.80	1.238	1.192	0.023

Note: The Re:Sound rates are subject to subparagraph 68.1(1)(a)(i) of the *Act* which sets the amount broadcasters pay on annual advertising revenues not exceeding \$1.25 million at \$100 per year.

***What is the rate base to which the rates certified today apply?***

The rate base for all collective societies is a radio station's gross income. This includes, in particular, the gross amounts received by a station pursuant to turn-key contracts with advertisers. Previously, the rate base was advertising revenues for SOCAN and Re:Sound, while the rate base was gross income for CSI.

***How much will the new rates generate in royalty payments, compared to the old rates?***

The Board estimates that commercial radio stations will pay a total of \$85 million in royalties. This is based on total station revenues of slightly over \$1.5 billion in 2009. Using the previously certified rates, radio stations would have paid about \$72 million. The new rates thus increase the amount of royalties by \$13 million. Of this amount, \$10.2 million represent royalties resulting from the introduction of two new rates, for AVLA/SOPROQ and ArtistI.

*How much will each collective society receive?*

Of the total amount of royalties of \$85 million paid by radio stations, the Board estimates that \$51 million will go to SOCAN, \$13 million to Re:Sound, \$11 million to CSI, \$10 million to AVLA/SOPROQ and \$200,000 to ArtistI.

*How many commercial radio stations are there in Canada? What are their revenues, costs and profits?*

In 2009 there were 644 commercial radio stations. Their total revenues were about \$1.5 billion, while total expenses were about \$1.2 billion. Profits before interest and tax were \$272 million, or 18.0 per cent of total revenues. Table 2 provides financial statistics for 2005 to 2009.

**Table 2**  
**Commercial Radio Stations Financial Statistics, 2005-2009**  
(millions of dollars)

	2005	2006	2007	2008	2009
Number of Stations	565	593	614	630	644
Total Revenues	\$1,342	\$1,419	\$1,503	\$1,591	\$1,508
Total Expenses	\$1,108	\$1,086	\$1,160	\$1,212	\$1,191
Profits Before Interest and Tax (P.B.I.T.)	\$284	\$285	\$299	\$335	\$272
P.B.I.T. as a Proportion of Total Revenues	21.1%	20.1%	19.9%	21.1%	18.0%

Source: CRTC, Commercial Radio 2005-2009 Financial Summaries

*What is a low music use station?*

A low music use station is any station that broadcasts works in the repertoire of SOCAN, or published sound recordings of musical works, for less than 20 per cent of its total broadcast time.

*How much are individual stations expected to pay in royalties as a result of the new tariff?*

As indicated in Table 3, a typical large radio station with gross income of \$2.5 million in a year would be paying a total of about \$62,000 if it were a low music use station and \$163,000 if it were not. The table also indicates royalties to be paid by typical smaller stations.

**Table 3**

**Amount of royalties to be paid by commercial radio stations as a result of the new rates, by size of station**

	Typical small radio station		Typical medium-sized radio station		Typical large radio station	
Average gross income	\$120,000		\$1,100,000		\$2,500,000	
	Standard station	Low-use station	Standard station	Low-use station	Standard station	Low-use station
<b>Total royalties</b>	\$4,646	\$2,201	\$44,542	\$20,534	\$163,013	\$62,181
<b>Royalties to:</b>						
SOCAN	\$3,840	\$1,800	\$35,200	\$16,500	\$95,000	\$37,500
Re:Sound	\$100	\$100	\$100	\$100	\$26,350	\$9,475
CSI	\$365	\$162	\$4,736	\$2,074	\$21,106	\$7,888
AVLA/SOPROQ	\$334	\$136	\$4,417	\$1,818	\$20,163	\$7,169
ArtistF	\$7	\$4	\$90	\$43	\$394	\$150

*The Copyright Act mandates that stations pay Re:Sound \$100 on the first \$1.25 million of advertising revenues, yet the tariff is set as a percentage of gross income. How will this work?*

To illustrate how the Re:Sound tariff will be applied, we will use three examples.

*Example 1: A radio station with gross income of \$500,000, including advertising revenues of \$450,000.*

The station pays \$100 on its advertising revenues, and 1.44 per cent on the remaining \$50,000 in gross income. The total payment is \$820 (\$100 + \$720).

*Example 2: A radio station with gross income of \$1.3 million, including advertising revenues of \$1.1 million.*

The station pays \$100 on its advertising revenues, 1.44 per cent on the next \$150,000 of gross income, and 2.1 per cent on the remaining \$50,000. The total payment is \$3,310 (\$100 + \$2,160 + \$1,050).

If it is a low music use station, it pays a single rate of 0.75 per cent on the \$200,000 balance. In that case, it would pay \$1,600 (\$100 + \$1,500).

*Example 3: A radio station with gross income of \$4 million, including advertising revenues of \$3.8 million.*

The station pays \$100 on the first \$1.25 million of advertising revenues. The balance of gross income is \$2.75 million, for which the station pays a rate of 2.1 per cent. In total, the station pays \$57,850 (\$100 + \$57,750).

If it is a low music use station, it pays 0.75 per cent on the \$2.75 million balance. In that case, it would pay in total \$20,725 (\$100 + \$20,625).

*Who are the six collective societies entitled to receive royalties as a result of this tariff?*

1. The Society of Composers, Authors and Music Publishers of Canada (SOCAN) is a society that administers performing rights in musical works on behalf of Canadian composers, authors and publishers, as well as affiliated societies representing foreign composers, authors and publishers.
2. Re:Sound [formerly the Neighbouring Rights Collective of Canada] is a not-for-profit company dedicated to obtaining fair and equitable compensation for artists and record companies for their performance rights.
3. CSI acts for the Canadian Musical Reproduction Rights Agency (CMRRA) and the Society for Reproduction Rights of Authors Composers and Publishers in Canada (SODRAC).

CMRRA is a Canadian centralized licensing and collecting agency for the reproduction rights of musical works in Canada. It represents more than 6,000 Canadian and U.S. publishers who own and administer approximately 75 per cent of the music recorded and performed in Canada.

SODRAC administers royalties stemming from the reproduction of musical works. It represents some 6,000 Canadian songwriters and music publishers as well as the musical repertoire of more than 89 countries.

4. The Audio-Video Licensing Agency (AVLA) is a collective that administers the copyright in master audio and music video recordings. AVLA licenses the exhibition and reproduction of music videos and the reproduction of audio recordings for commercial use.
5. The *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ), a copyright collective for producers of sound recordings and videos, administers the royalties owed to independent makers of audio and video recordings. It distributes to its members the royalties which come from the equitable remuneration (“neighbouring rights”) and private copying regimes as well as the royalties

which come from licensing agreements it has entered into with regards to the broadcast of videoclips and reproduction of sound recordings.

6. ArtistI is the collective society of the *Union des artistes* (UDA). It administers the remuneration rights and copyrights of performers.

Note: The reasons along with a News Release and the certified Tariff can be found on the Board's Web site under "What's New – Recent decisions" at the following address: <http://www.cb-cda.gc.ca/home-accueil-e.html>

## **APPENDIX III**

**Commercial radio stations - Applicable tariffs  
1998 to 2011**

**Prepared by ADISQ/SOPROQ  
2012**

**MARCH 5, 2012**

PREPARED BY ADISQ / SOPROQ (2012)  
Commercial radio stations - Applicable tariffs

COLLECTIVE	RIGHTS HOLDERS REPRESENTED	1998	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	
SOCAN	COMMUNICATION AUTHORS - COMPOSERS	3,200%	3,200%		2,200%					4,400%				4,400%				
RESOUND	COMMUNICATION MAKERS - PERFORMERS		1,440%							2,100%				2,100%				
CSI	REPRODUCTION AUTHORS - COMPOSERS						0,800%			0,800%				1,238%				
AVL/SOPROQ	REPRODUCTION MAKERS														1,192%			
ARTISTI	REPRODUCTION PERFORMERS																	0,023%

\* These rates do not take into account the exemptions and reductions given to radio stations with revenues lower than 1.25 million dollars  
 \*\* When considering all the exemptions and reductions given to the radio stations, the aggregate effective rate equals 5,7 % of the 1,5 billion dollars commercial radio station revenues in 2009

## **APPENDIX IV**

### **Commercial radio Statistical and Financial Summaries 2004 to 2009**

**Prepared by SODRAC**

**MARCH 5, 2012**



**RADIO COMMERCIAL/COMMERCIAL BAYON**  
Radio Amfin

	2004	2005	2006	2007	2008	2009	2010
unités rapportées/reporting units	546	565	566	575	631	648	654
Revenu total/global revenue	\$1 227 035 025	\$1 342 263 930	\$1 419 324 832	\$1 503 730 114	\$1 683 973 745	\$1 607 732 722	\$1 591 708 189
Dépenses totales/global expenses	\$957 512 749	\$1 018 146 648	\$1 087 293 769	\$1 160 329 373	\$1 211 820 987	\$1 191 018 620	\$1 208 482 741
B.A.I./P.B.I.T.	\$230 468 648	\$422 137	\$293 050 424	\$478 664	\$337 795 823	\$271 593 863	\$298 394 358
Bénéfices(part) avant impôts/ Pre-tax Profit	\$210 315 184	\$385 153	\$298 105 148	\$306 400 820	\$191 623 821	\$193 282 413	\$3 311 144
Marge avant impôts/Pre-tax Margin	16,9%	28,6%	20,9%	20,2%	11,4%	12,0%	0,2%
Marge avant impôts/Pre-tax Margin	17,1%	28,4%	21,0%	20,3%	11,3%	11,9%	0,3%

**MARCHÉ MATHUR/MATHUR MARKETS**  
(Montreal/montréal)

	2004	2005	2006	2007	2008	2009	2010
unités rapportées/reporting units	59	62	64	66	70	70	68
Revenu total/global revenue	\$448 825 440	\$490 471 070	\$526 862 478	\$539 468 698	\$587 831 469	\$512 619 836	\$525 088 680
Dépenses totales/global expenses	\$336 666 045	\$349 864 166	\$378 850 835	\$4 898 857	\$398 873 374	\$386 832 850	\$378 818 871
B.A.I./P.B.I.T.	\$102 820 798	\$131 601 901	\$141 313 173	\$139 667 263	\$147 097 344	\$128 208 891	\$128 703
Bénéfices(part) avant impôts/ Pre-tax Profit	\$99 228 168	\$121 315 579	\$101 205 490	\$147 824 871	\$171 623 069	\$139 779 233	\$44 117 807
Marge avant impôts/Pre-tax Margin	22,6%	24,7%	19,2%	27,3%	29,3%	27,3%	8,6%
Marge avant impôts/Pre-tax Margin	21,3%	24,3%	19,0%	27,0%	30,7%	27,3%	8,4%

**GRANDS MARCHÉS/LARGE MARKETS (POPULATION PLUS/OVER 500 000)**  
(Calgary/Edmonton/Heimtown, Winnipeg, Ville de Québec)

	2004	2005	2006	2007	2008	2009	2010
unités rapportées/reporting units	70	74	71	75	76	77	81
Revenu total/global revenue	\$272 297 154	\$3 089 989	\$298 848 025	\$4 274 483	\$364 028 115	\$332 809 285	\$430 988 825
Dépenses totales/global expenses	\$282 896 271	\$2 828 846	\$2 824 864 473	\$3 135 401	\$3 290 837	\$2 688 395	\$2 898 197
B.A.I./P.B.I.T.	\$59 233 336	\$847 648	\$12 758 884	\$14 874 468	\$98 851 790	\$73 445 161	\$79 168 686
Bénéfices(part) avant impôts/ Pre-tax Profit	\$58 853 475	\$812 193	\$12 636 629	\$14 867 718	\$106 998 565	\$66 184 174	\$83 523 513
Marge avant impôts/Pre-tax Margin	21,6%	26,3%	4,2%	34,8%	29,1%	20,0%	19,0%
Marge avant impôts/Pre-tax Margin	20,8%	24,1%	27,8%	34,3%	29,2%	22,8%	20,3%

**MARCHÉ NOUVEAUMÉNUS/MARKETS**  
(Halifax/Kitchener/Winnipeg, London/Ottawa/Niagara, Autres marchés (moyenne-cumulée))

	2004	2005	2006	2007	2008	2009	2010
unités rapportées/reporting units	43	42	45	46	48	46	46
Revenu total/global revenue	\$191 823 812	\$2 387 896	\$109 915 064	\$2 617 026	\$2 711 802	\$1 247 649 844	\$2 888 812
Dépenses totales/global expenses	\$79 757 445	\$1 054 824	\$44 170 400	\$2 004 957	\$2 118 145	\$2 176 370	\$2 043 040
B.A.I./P.B.I.T.	\$16 095 186	\$432 702	\$25 138 888	\$627 057	\$27 340 843	\$21 878 021	\$27 783
Bénéfices(part) avant impôts/ Pre-tax Profit	\$17 181 278	\$395 999	\$21 928 920	\$391 068	\$24 969 781	\$19 185 640	\$28 079
Marge avant impôts/Pre-tax Margin	8,9%	16,5%	20,0%	14,6%	9,0%	1,5%	0,9%
Marge avant impôts/Pre-tax Margin	8,8%	16,3%	19,9%	14,5%	8,9%	1,5%	0,9%

**PETITS MARCHÉS /SMALL MARKETS (POPULATION MOINS/UNDER 250 000)**

	2004	2005	2006	2007	2008	2009	2010
unités rapportées/reporting units	374	383	404	415	438	447	452
Revenu total/global revenue	\$408 598 519	\$1 685 351	\$458 810 118	\$1 140 486	\$535 806 782	\$529 238 845	\$581 873 231
Dépenses totales/global expenses	\$339 833 028	\$906 603	\$382 878 720	\$847 664	\$443 382 877	\$468 860 318	\$480 982 505
B.A.I./P.B.I.T.	\$68 563 578	\$130 197	\$38 919 354	\$131 403	\$73 862 773	\$50 899 137	\$70 113 331
Bénéfices(part) avant impôts/ Pre-tax Profit	\$41 872 243	\$108 610	\$46 995 916	\$139 015	\$77 887 901	\$17 983	\$9 457 987
Marge avant impôts/Pre-tax Margin	10,2%	6,4%	10,2%	11,8%	14,5%	3,4%	1,5%
Marge avant impôts/Pre-tax Margin	10,2%	6,3%	10,2%	11,8%	14,5%	3,4%	1,5%

Pour des raisons de confidentialité, la somme des catégories peut être différente du total. /For privacy reasons, the sum of the categories may differ from the total.

Les données financières des années antérieures ont été mises à jour afin de tenir compte des révisions de données subséquentes aux dates respectives de publication. /Prior year's financial information has been updated to reflect revisions to data received.

