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The Impact of Bill C-11 on Educational Content Providers:
*How the proposed Copyright Modernization Act will harm Independent Suppliers
of Audio and Visual Education Materials*

Brief to the Legislative Committee on Bill C-11

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Jean-François (J.F.) Cormier

General Manager

Audio Ciné Films Inc.

1955 Côte-de-Liesse Road, Suite 210

Montréal, Québec H4N 3A8

Suzanne Hitchon

VP, General Manager

Criterion Pictures

30 MacIntosh Blvd, Unit 7

Vaughan, Ontario L4K 4P1

Dear Committee members:

We are speaking to you today on behalf of hundreds of private businesses located across Canada that employ more than 8,000 Canadians. Our many firms and their employees are involved in the production and/or distribution of audio/visual content, at fair-market prices, for the education sector in Canada.

We represent a private industry that does not rely upon government subsidies or grants in order to operate. In fact our market is one of the rare sectors of Canadian film and television which has operated without public subsidy, and whose livelihoods are most directly affected by Bill C-11.

The license fees paid to our industry by schools, colleges and universities provide funding for production of Canadian content that would not otherwise exist in Canada's regionally diverse market—one that has two principal languages and 13 education ministries with different curricula and standards in each province and territory.

Clauses in Bill C-11 (particularly section 29.5 relating to new exceptions granted to educational institutions) will have consequences that will cause serious financial damage to our small and medium-sized firms, to the point where we will be driven out of business and thousands of Canadians will lose their jobs, through no fault of their own.

It is our view that Members of Parliament and the Government are largely unaware of the existence of our industry. And as such, in an effort to address concerns relating to access to content for educational institutions, exemptions currently drafted in section 29.5 have produced unintended consequences that will greatly harm our industry.

We are appealing to you as Committee members to recognize the harm that will be caused to our industry and the jobs that will be lost if Bill C-11 is passed in its current form.

Thank you for your consideration and for allowing us present our case to this committee.

Sincerely,



Jean-François (J.F.) Cormier
General Manager
Audio Ciné Films Inc.



Suzanne Hitchon
VP, General Manager
Criterion Pictures

BACKGROUNDER

Criterion Pictures a division of Visual Education Centre Inc. and Audio Ciné Film are speaking on behalf of more than **500 firms** throughout Canada involved in the production and/or distribution of audio/visual content, at fair prices, for the education sector. Our industry employs an estimated 8,000 Canadians.

Both Audio Ciné Film and Criterion Pictures are privately owned companies and have never received any government assistance or subsidies – we sell our services and products at competitive market rates. Our market is one of the rare sectors in the cinematographic industry that operates without the support of public funds, yet remains highly vulnerable to the proposed changes (particularly 29.5) proposed in Bill C-11.

We are an established industry in Canada with more than 40 years of experience and we have made considerable investments in our infrastructure over that period of time. **Our industry generates an estimated \$30 - \$50 million in annual revenue and employs 8,000 Canadians.** Sales to educational institutions (K-12 through post-secondary) represent 70% of our overall revenue.

Our products are made available to our clients via hard copy, online streaming, blanket licensing, duplication rights, and more recently digital delivery. Our prices are fair and reasonable and reflect market rates. The average cost for a license is about \$0.50 per student. The overall licensing cost to schools, school boards and post-secondary institutions typically represents less than 0.001% of their overall budgets.

The negative effect of Bill C-11 on our industry:

Clauses in Bill C-11 (particularly section 29.5 relating to new exceptions granted to educational institutions) will have consequences that will cause serious financial damage to our small and medium-sized firms, to the point where we will be driven out of business and thousands of Canadians will lose their jobs, through no fault of their own.

With the new exceptions contained in section 29.5 (Performances), private-sector Canadian companies that currently provide a vast pool of content at a fair market price to educational institutions will be unfairly harmed. Companies like ours have built our businesses over decades in all parts of Canada and constitute one of the only sectors of the Canadian content industry that has done so without government subsidies.

The license fees paid to these companies by schools, colleges and universities provide funding for the production of Canadian content that would otherwise not exist in Canada's regionally

diverse market—one that has two principal languages and 13 education ministries with different curricula and standards in each province.

This legislation proposes to reduce recordkeeping and monitoring requirements, reverses the onus of proof of copyright violations onto the copyright holder and greatly reduces compensation and fines if and when such violations are proven, particularly in the case of cinematographic works.

While these measures are the result of extensive consultation of the educational sector, no parallel consultation took place with private-sector companies and individual Canadians whose livelihood would be most directly affected by these measures.

While the immediate result of passing Bill C-11 with these technical clauses in place may open up free access to a vast spectrum of audio-visual content and cinematographic works, the longer-term consequences will not be in the public interest:

- There will be a loss of Canadian jobs across the country, as well as lost revenues for content providers—both Canadian production companies and all rightsholders whose content is sold by Canadian distribution companies.
- There will be no financial incentive for the private sector to produce and distribute the uniquely Canadian materials which educational institutions demand, creating pressure on government institutions such as the CBC and the National Film Board to replace this content at taxpayer expense.
- Students will no longer benefit from the value-added that Canadian companies provide in the form of thoughtful, age-appropriate content designed to meet school curricula and produced in collaboration with teachers and school boards.

In addition, the blanket exemption for the educational sector contained in Section 29.5 will unduly harm our market, as educational institutions will no longer need to purchase licenses from our companies in order to show audiovisual material in classrooms. Since an established and widely recognized collective licensing system already exists, such an exception would not respect the last point in the six fair dealing tests of *CCH Canadian Ltd. vs. Law Society of Upper Canada*, which to a certain extent says that the fair dealing being should not harm the work, or in this case, the market for that work.

About Criterion Pictures / Visual Education Centre Ltd:

Criterion, a division of Visual Education Centre Inc., is a non-subsidized, private company that has supplied audio-visual content to educational institutions and school boards for more than 40 years.

We charge fair-market and consistent prices, and currently sell our content to virtually every Canadian school district and post-secondary institution.

We have invested hundreds of thousands of dollars upgrading our content supply system from hard copy to digital in order to meet the needs and demands of the educational community.

We have offices and staff in Montreal, Vancouver, Calgary and Toronto, and operate in both official languages.

Sixty-seven percent of our company's revenues are derived from the educational sector of the market, equaling approximately \$4,087,000. This revenue will be immediately lost due to the unintended consequences of Bill C-11 should it pass in its current form.

Our organization employs 28 full-time staff members. We anticipate that we would have to lay off 15-18 of them immediately upon adoption of the current proposed legislation, and possibly close our doors completely as the economic consequences of this loss would likely be too great for us to sustain the other divisions.

About Audio Ciné Films:

Audio Ciné Films Inc. is a Montreal-based Canadian rights representative for thousands of cinematographic works. We license the public presentation of these cinematographic works in all types of organisations, including educational institutions. We are a non-subsidized, private company that has been in operation since 1966. We currently employ 10 people. Entirely Canadian owned, Audio Ciné Films Inc. has been a positive contributor to the Canadian economy for several decades.

Close to 70% of our business is with the educational sector, in particular K-12 schools, school boards and post-secondary institutions, which license the use of cinematographic works for use in the classroom. We charge fair-market and consistent prices, and currently sell our content to virtually every Canadian school, school board and post-secondary institution.

As part of our business operations, we regularly produce reference catalogues and maintain a fulltime website with complete cinematographic listings, sorted by subject and theme, and teaching guides specifically adapted for hundreds of cinematographic works for use in educational institutions.

Furthermore, ACF has invested hundreds of thousands of dollars in upgrading and maintaining its movie information web site, and the information we send to educational institutions. Additional substantial investments are scheduled towards the digitization of the movie distribution industry. These investments cannot be funded if this legislation is passed.

Our proposed technical amendment to Bill C-11:

We have received legal advice from Stéphane Caron, a partner at Gowlings who practices in the intellectual property law department with an emphasis on copyright, trade-marks and intellectual property litigation, and put forward a technical amendment for your consideration.

Bill C-11 currently proposes amending Section 29.5 of the *Copyright Act* to add a fourth paragraph as identified in black lined text below:

29.5 It is not an infringement of copyright for an educational institution or a person acting under its authority to do the following acts if they are done on the premises of an educational institution for educational or training purposes and not for profit, before an audience consisting primarily of students of the educational institution, instructors acting under the authority of the educational institution or any person who is directly responsible for setting a curriculum for the educational institution:

[...]

d) the performance in public of a cinematographic work, as long as the work is not an infringing copy or the person responsible for the performance has no reasonable grounds to believe that it is an infringing copy.

In particular, the proposed addition of paragraph 29.5 d) creates a blanket exception for all performances of cinematographic works in the classroom, irrespective of whether such rights are already available to educational institutions through licences from collective societies. The exception as drafted does not take into consideration the effect on copyright owners and we understand that it will have unintended consequences on the market for audio-visual works in the educational sector.

Our concerns can be addressed by supplementing the language of paragraph 29.5 d) as proposed below

d) the performance in public of a cinematographic work, as long as the work is not an infringing copy or the person responsible for the performance has no reasonable grounds to believe that it is an infringing copy, and provided a licence to perform the cinematographic work in public for educational or training purposes is not available from a collective society.

The proposed amendment would allow Educational Institutes to continue to have access to licences available from collective societies to perform works in public for educational or training purposes. The exemption proposed in Bill C-11 would otherwise apply where such licence is not available

Educational Support

There are unintended negative impacts on our industry as a result of the wording of the current legislation. Bill C-11, in its current form, does not represent the intended balance between educators and rights holders. Nor does it provide the desired clarity.

The following testimony presented before the Legislative Committee on the previous Bill C-32, on Thursday, March 24th, 2011 on behalf of the Council of Ministers of Education of Canada (CMEC), demonstrate the objectives, and the willingness of the education sector to pay for content:

"This bill, as amended, will continue to respect the artist and creators. It will provide balance whereby the public education system will have fair and balanced access to materials. There is nowhere that the amendments would impact upon creative people and businesses receiving their information."

"We're not asking for anything for free. The education system, the sector, pays for licences and copyright and will continue to do so. What we're asking for with these amendments is to have things clarified."

Hon. Romana Jennex (Chair, CMEC and Minister of Education for Nova Scotia)

*"The **minister's** message, the very important message that I think needs to be brought out here today, is that clarity in the Copyright Act is critically important for both the people who use the Act and the people who benefit economically from it."*

Ms. Wanda Noel (Legal Counsel, Copyright Consortium, CMEC)

"Our assessment is that each year across Canada there's likely more than a billion dollars spent by the education sector to pay creators for their books, movies, art, etc., that are purchased and used by schools and universities. There are processes in place via the Copyright Board for things like Access Copyright and rates to be struck for the photocopying of materials."

"We don't believe in any way that this bill would change that. All of those processes will be in place. We would not anticipate that this bill would in any way reduce the amounts of money the education sector would be putting into these efforts. We think it's cost-neutral in that respect. Those processes remain in place. They will still be there. As they are there now, they will be there should this bill become law. "

Ms. Rosalind Penfound

(Deputy Minister, Copyright Consortium, CMEC)