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To: Standing Committee on Industry,
Science and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Subject: **Statutory Review of the Copyright Act**

Dear Members of the Committee,

1. We are pleased to provide our recommendations on the ways in which the Government can maximize benefits to Canadians and the Canadian economy through its statutory review of the *Copyright Act* (the *Act*).

2. Bell is Canada's largest communications company, providing a comprehensive and ground-breaking suite of broadband communications and content services to consumer, residential, business, not-for-profit and government customers. Bell Media is Canada's pre-eminent content creation company with both local television and radio stations, a variety of popular English and French discretionary television services as well as digital media assets.

3. As a content creator and major economic partner with Canada's creative community, and also a broadcaster and Internet intermediary, we have a unique perspective that balances the need for modern copyright protections in creative and knowledge economies with the need to avoid unduly impeding legitimate innovation.

4. We are members of the Canadian Association of Broadcasters (CAB) and have actively participated in and support their submission of this Committee. We are also members of the Business Coalition for Balanced Copyright and have actively participated in the development of their submission.

5. This submission focuses primarily on how the *Copyright Act* can be updated to provide for modern and more effective measures to combat online content theft. In particular, we recommend:

- Ensuring existing offences for commercial-scale copyright theft are technologically neutral;
- Establishing a public body to enforce intellectual property (IP) protection; and
- Establishing a provision that specifically empowers courts to issue injunctions requiring intermediaries to contribute to combating content theft.

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6. Our submission also identifies areas where we believe existing rules are working well, or where updates to address unanticipated issues are required to ensure an appropriate balance is maintained in the *Act*. In particular, we recommend:

- Maintaining consumer-friendly educational and pro-competitive practices under the notice and notice regime; and
- Maintaining existing exemptions from liability related to broadcasting and the provision of networks and services in the digital economy.

7. We expand on these recommendations below.

1. **COMBATTING PIRACY**

8. Piracy is an increasingly critical issue for Canadian creators and legitimate Canadian industries relying on the integrity of copyrighted works. Piracy infringes the rights of Canadians that create, invest in, produce, and disseminate creative works, and makes it more difficult to build the successful business models that will meet the evolving demands of Canadians, support Canadian content production, and contribute to the Canadian economy.

9. Indeed, the urgency of the threat now posed by growing content theft brought together an unprecedented coalition of more than 30 organizations comprising Canadian artists, content creators, unions, guilds, producers, performers, broadcasters, distributors, and exhibitors to form FairPlay Canada. The fact that such a diverse range of stakeholders, representing tens of thousands of members and employees and millions of Canadian customers, came together to emphasize the urgent need to address this issue should emphasize for the Committee the importance of addressing it in this review.

10. The FairPlay Canada coalition filed an application with the Canadian Radio-television and Telecommunications Commission (CRTC) in January 2018 asking the CRTC to enforce a rule under the existing *Telecommunications Act* that would disable access to some of the most egregious piracy sites on the Internet.

11. FairPlay Canada's application to the CRTC summarized the overwhelming evidence regarding the impact of content theft on Canada's economy and creative sector:

- Piracy sites now regularly reach **up to 15.3%** of Canadian households (or **more than 2 million** households) through illegal set-top-boxes loaded with KODI piracy add-ons or providing access to piracy subscription services. This is up from effectively zero five years ago.¹
- In addition, there were **2.5 billion** visits to piracy sites to access stolen TV content using web browsers in Canada in 2017. This form of piracy is also growing rapidly, up approximately 9% between just the first six months and the last six months of the year.²
- In addition, as the Committee has already heard in testimony, **one in every three** Canadians obtained music illegally in 2016, up approximately 30% from about one in every four Canadians in 2015.³
- According to recent research conducted for Innovation, Science, and Economic Development Canada, in partnership with Canadian Heritage, **26% of**

¹ Sandvine, "Video Piracy in Canada", *Global Internet Phenomena Spotlight*, pages 5 and 6.

² MUSO, *Annual Piracy Report: TV – Canada (2017)*.

³ See the submission made by Michael Geist to the CRTC at paragraph 43. This is addressed in the intervention of Barry Sookman submitted to the CRTC at page 3.

Canadians self-report as accessing pirated content online.⁴ This likely understates the size of the problem: given that sites and services engaged in content theft often promote themselves openly as legal, some people may not know they are accessing infringing content; others may be unwilling to admit to infringement in a survey response.

- Not surprisingly, this content theft is having a significant economic impact on Canadian cultural industries that employ **630,000 people or ~4% of Canadians** and contribute **\$55B or ~3% of Canada's gross domestic product**:⁵
- A number of different estimates of the economic impact of TV piracy in Canada all have midpoints in the range of **\$500M to \$650M** annually.⁶
- Studies show that piracy will cost legal streaming services such as Netflix and Amazon **more than \$50 billion** between 2016 and 2022.⁷

12. The Committee has received some testimony attempting to dismiss this overwhelming evidence.⁸ Whether deliberately or inadvertently, that testimony misrepresents and misunderstands the data and is simply inaccurate. FairPlay Canada replied comprehensively to these claims in its Reply submission filed with the CRTC and to ensure the Committee has an accurate record on which to base its report, we have attached that Reply to this submission. Tellingly, nobody disputing FairPlay's evidence before the Committee has acknowledged let alone engaged with the FairPlay Reply submission.

13. The CRTC found that "the record of [its] proceeding demonstrates that there is evidence that copyright piracy results in harm to the Canadian broadcasting system and to the economy in general" but also that it did not have jurisdiction to adopt the FairPlay proposal because it was more appropriately a matter of copyright.⁹ The CRTC specifically pointed to "other avenues to further examine the means of minimizing or addressing the impact of copyright piracy, including the parliamentary review of the *Copyright Act*".¹⁰

14. Consistent with the CRTC's conclusion, the Committee has heard directly from many of the members and supporters of FairPlay Canada – including labour unions, creative organizations, exhibitors, broadcasters, Internet service providers (ISPs), and even the Business Coalition for Balanced Copyright – about the need for new statutory measures to address piracy. In this regard, three specific recommendations have found wide support.

a. Make Existing Offences Technologically Neutral

15. Section 42(1) of the *Act* provides that certain acts of copyright infringement undertaken for commercial purposes or at commercial scale are criminal offences. Specifically, it refers to activities such as *copying* and distributing *copies* of works without authorization. In the new digital economy, illegally *streaming* (or otherwise making available or communicating to the public by telecommunication) copyrighted works has replaced *copying* as the most common

⁴ ISED, *Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada*, dated 30 March 2018.

⁵ Canadian Heritage, *Creative Canada: Policy Framework* (2017), page 7. See Application at paragraph 34.

⁶ Armstrong Consulting, *The Economic Impact of TV Program Piracy*, dated 11 May 2018; FairPlay Canada Application to the CRTC, dated 30 January 2018, paragraphs 38 and 41.

⁷ Stewart Clarke, "Piracy Set to Cost Streaming Players More Than \$50 Billion, Study Says" *Variety*, dated 30 October 2017.

⁸ See for example the oral testimony and written brief submitted by the Public Interest Advocacy Centre.

⁹ Telecom Decision CRTC 2018-384, *Asian Television Network International Limited, on behalf of the FairPlay Coalition – Application to disable online access to piracy websites*, (Decision 2018-384) paragraph 72.

¹⁰ *Ibid.*

method of commercial-scale piracy operators.¹¹ The criminal provisions have not expanded to reflect that technological shift.

16. Revising section 42(1) of the *Act* to apply to all forms of commercial scale copyright theft would be consistent with the underlying principle of the *Act* that its provisions and remedies be technologically neutral and would help Canada avoid becoming a safe-haven for what is effectively organized, profit-motivated criminal activity. Unfortunately, our country has become known as something of a safe harbour for operators engaged in massive global piracy (for example, the individuals that operated the illegal Popcorn Time service operated out of Montreal, as did the operator of TVAddons, until recently one of the top piracy sites in the world).

17. We recommend that the criminal provisions be updated to address streaming by including making available and communicating to the public by telecommunication pirated material at commercial scale or for a commercial purpose as a criminal offence. To be clear, just as is the case with the existing offence, this offence would not apply to individual users but rather only to significant piracy operators. Making the existing offence technologically neutral would simply reflect the reality that modern piracy typically occurs through online streaming.

b. Establish a Public Body to Enforce IP Protection

18. Stronger and more orderly enforcement of copyright in the digital world is key to Canada's innovation and creative economies. At present, there is no Canadian agency or office dedicated to intellectual property rights enforcement and the Royal Canadian Mounted Police (RCMP) and Canada Border Services Agency (CBSA) have been constrained in the area in recent years by resource constraints, other enforcement priorities, or both.

19. The *Act* should empower government to take a more active role in IP protection by establishing an enforcement office that would bring together government agencies and law enforcement to tackle piracy under a more cohesive national strategy. Participants could include the RCMP and provincial police forces, as well as the CBSA and Ministries of Justice and Canadian Heritage.

20. We note that similar offices exist in other jurisdictions including the U.S. and the UK. For example, the U.S. maintains an Office of the Intellectual Property Enforcement Coordinator and a National Intellectual Property Coordination Centre that together coordinate dedicated administrative and law enforcement resources to protect IP rights. For its part, the UK maintains an Intellectual Property Office whose mandate includes supporting IP enforcement and reducing IP crime and infringement. Creating similar structures and priorities would allow Canada to better coordinate investigation and enforcement both domestically and with its international partners.

c. Provide for Injunctions Applying to Intermediaries

21. We support the existing exemptions from infringement and financial liability for intermediaries that are contained in the *Act*. However, intermediaries that do business with or whose business is directly or indirectly relied on by large, egregious infringing sites should be required to contribute to combatting copyright theft where they are well placed to do so.

22. In cases around the world, intermediaries such as ISPs, web hosts, domain name registrars, search engines, payments processors, and advertising networks have been required

¹¹ See section 27(2.3) of the *Act*.

to play a role in addressing content theft by ceasing to incorporate in their business specific egregious illegal piracy sites after those sites have been identified through a legal process and a court order has been issued.

23. This is sometimes called a "follow-the-money" approach, and a report to Heritage Canada in 2016 "concluded that Follow-the-money approaches (or the disruption of visibility, payment services and advertising revenue) can be effective... [and] have a role to play in a wider global strategy" to combat content theft.

24. To put this approach into effect, we recommend that the *Act* be amended to include a new provision that specifically empowers courts to order, in appropriate cases, intermediaries to stop doing business with, displaying search results from, providing access to, or otherwise supporting commercial scale piracy websites. To craft the provision, we recommend looking to Article 8(3) of the European Union's *Directive on the harmonisation of certain aspects of copyright and related rights in the information society* and article L336-2 of the French intellectual property code.¹²

25. Injunctions of this kind are already available under Canadian law in other areas. For example, for decades, Mareva injunctions have been available in Canada to enlist banks and other financial intermediaries as third parties in the enforcement of one party's rights in a dispute, and the Supreme Court has recently confirmed that Google, as an intermediary, can be required to deindex a site involved in the infringement of IP rights.¹³

26. For such remedies to provide a practical means to address the issue of piracy, however, the *Act* must be amended to provide for them explicitly and directly. This is required for two reasons. First, it will provide certainty to all parties and avoid prolonged litigation over whether such a remedy is indeed available at common law in each particular case. Second, it will make it possible for rights holders to apply for this type of remedy directly rather than only after a protracted legal process.

¹² EU Article 8(3) provides: that "Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."

French Article L336-2 provides: "En présence d'une atteinte à un droit d'auteur ou à un droit voisin occasionnée par le contenu d'un service de communication au public en ligne, le tribunal de grande instance, statuant le cas échéant en la forme des référés, peut ordonner à la demande des titulaires de droits sur les œuvres et objets protégés, de leurs ayants droit, des organismes de gestion collective régis par le titre II du livre III ou des organismes de défense professionnelle visés à l'article L. 331-1, toutes mesures propres à prévenir ou à faire cesser une telle atteinte à un droit d'auteur ou un droit voisin, à l'encontre de toute personne susceptible de contribuer à y remédier."

Building on these precedents and on the structure and approach already adopted in Canada's Copyright Act, the Act could be amended to add new sections under Part IV (dealing with remedies) that read as follows:

34(2) Without prejudice to any other remedies that are or may be conferred by law, the court may order any measure directed at preventing or ending an infringement of copyright against any intermediary likely to contribute to preventing or ending the infringement.

34(3) If it grants an order as set out in subsection 34(2), the court shall, among any other relevant factors, consider the following in establishing the terms of the order:

- (a) the harm likely to be suffered by the copyright owner if steps are not taken to prevent or restrain the infringement; and
- (b) the burden imposed on the person against whom the order is made.

¹³ *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34. While this case has raised some controversy around the ability of Canadian courts to make orders applying to Google outside of Canada, no significant doubt has been raised about the ability or appropriateness of Canadian courts ordering online intermediaries to take steps to address IP infringement in Canada.

27. Amending the *Act* to provide for a flexible range of orders against all types of intermediaries would allow copyright enforcement to be tailored in the manner that is most efficient and effective in any given circumstance, and will minimize the burden placed on any individual party in connection with remedying widespread content theft.

2. MAINTAINING BALANCE

28. In many areas the *Act* is working well, and no or only small changes are required. We highlight two of these areas below.

a. Allow Notice-and-Notice to Remain Effective

29. The Minister has taken steps to address the sending of settlement demands through the notice and notice system, and we do not believe any further action is required with respect to the content of notices. In particular, the Committee should not accede to calls to restrict rights holders from educating consumers as to the legal source for content.

30. For example, if someone has illegally downloaded *Letterkenny* it is a best practice and exactly in keeping with the theory of the notice and notice system for us to include in the notice to that subscriber information indicating that they can access the show at an affordable rate on the over-the-top service Crave TV. The Committee should not recommend any measures or limitations that would prevent this consumer-friendly and pro-competitive practice.

b. Maintain Existing Exemptions

31. The existing exemptions from financial liability that apply to certain acts undertaken by broadcasters and the provision of networks and services in the digital economy should be maintained. These exemptions have achieved their purpose of protecting innovation in products and services without diluting the value of copyright.

CONCLUSION

32. We appreciate the opportunity to provide our views on how to reform the *Act* in order to ensure that it continues to accommodate the realities of the digital age while maintaining a balance between the protection of copyright, consumers' rights to access and use copyright material, and support for business, innovation, and investment. We would be pleased to provide any additional information.

Yours truly,

[*Original signed by R. Malcolmson*]

Robert Malcolmson

Senior Vice-President – Regulatory Affairs

Attachment

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