CMRRA
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AGENCE CANADIENNE DES DROITS DE REPRODUCTION MUSICAUX LTÉE

CANADIAN MUSIC PUBLISHERS ASSOCIATION
ASSOCIATION CANADIENNE DES ÉDITEURS DE MUSIQUE

Submission to the Standing Committee on Industry, Science and Technology

This submission is made on behalf of the Canadian Musical Reproduction Rights Agency ("**CMRRA**") and the Canadian Music Publishers Association ("**CMPA**") in respect of the section 92 review of the *Copyright Act* (the "**Act**").

A more detailed account of CMRRA and CMPA's recommendations and justifications for reform of the *Act* are available in their joint position paper available online[1].

CMRRA and CMPA urge the government to undertake a fulsome review of the *Act* with a view to ensuring that it promotes the public interest in the encouragement and dissemination of works of the arts and intellect, on one hand, and obtains just rewards for rightsholders, on the other[2]. In the following pages, we set out and elaborate on three key recommendations:

1. Amend the exceptions introduced in 2012 for backup copies (section 29.24), technological processes (section 30.71), ephemeral copies (section 30.9(6)), and hosting services (subsection 31.1(4)) to restore balance and address unintended consequences.
2. Amend the Copyright Act to authorize a court, on application by a rightsholder, to grant a site-blocking or de-indexing injunction against an Internet intermediary, on a "no-fault" basis to the intermediary.
3. Through legislative and regulatory changes, improve the efficiency of the Copyright Board's processes and the timeliness and predictability of its decisions.

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[1] http://www.musicpublisher.ca/wp-content/uploads/2018/08/18-07-17-CMPA-CMRRA-Copyright-Reform-consolidated-submission-FINAL-1.pdf

[2] *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, 2 SCR 336, at para. 30.

1. **Amend the exceptions for backup copies (section 29.24), technological processes (section 30.71), and hosting services (subsection 31.1(4)) to address unintended consequences.**

a. **Backup Copies (section 29.24)**

The exception for 'backup copies', introduced in 2012, applies whether the copies are made for private or commercial purposes, including large-scale, profit-driven organizations. Where broadcasters and other profit-driven organizations make such copies, backup copying can have significant additional value – under the exception, that additional value is derived from the works of rightsholders, but none of that additional benefit is transferred to them.
In the context of commercial radio, it was concluded by the Copyright Board that the economic value of backup copies constituted over 23% of the value of all reproductions made by radio stations[3]. In light of the newly created exception, the royalties payable to rightsholders were, in fact, reduced by 23.31%.

CMPA and CMRRA propose clarifying the exception to apply only to non-commercial uses, ensuring consistency with the other exceptions introduced in 2012[4].

b. **Temporary Reproductions for Technological Processes (section 30.71)**

The exception provides that it is not an infringement of copyright to make a reproduction of a work or other subject-matter if the reproduction forms an essential part of a "technological process" and is deleted immediately after the duration of the process. However, the term "technological process" is not defined, nor does the provision specify what it means for a reproduction to exist only for "the duration". This current form has encouraged argument from commercial users that the entirety of their use constitutes a "technological process", so as to escape the liability to pay rightsholders[5].

CMPA and CMRRA propose that section 30.71 be amended to clarify the meaning of a "technological process" and the requirement that a reproduction made under that exception exists only for "the duration" of the technological process. In particular, CMPA and CMRRA propose that the section be amended to stipulate that

- a technological process must have no human input between the initiation and the

[3] *Commercial Radio Tariff: SOCAN (2011-2013); Re:Sound (2012-2014); CSI (2012-2013); Connect/SOPROQ (2012-2017); Artisti (2012-2014)*, Decision of the Board, April 21, 2016, online at <http://www.cb-cda.gc.ca/decisions/2016/DEC-2016-04-21.pdf>, (the "2016 Commercial Radio Decision"), Appendix A, table 3..

[4] Nothing in this submission should be taken as agreement by CMPA or CMRRA that an uncompensated exception for private copying (i.e., section 29.22) is appropriate or reflects a reasonable balance between the interests of rightsholders and other stakeholders.

[5] 2016 Commercial Radio Decision, *supra* note 3 at para. 177, citing the Written Submissions of the CAB (Exhibit CAB-11) dated February 14, 2014 at para. 37 (emphasis added).

termination of the process; and

- the temporary reproduction must be made, used, and deleted *automatically*, as part of the technological process itself and without human intervention.

c. Ephemeral Recordings Made by Broadcast Undertakings, s. 30.9

Radio stations frequently make copies of musical works for various purposes. Copies that are intended to exist for no more than 30 days are sometimes known as 'ephemeral copies'. With the advent of digital technologies, radio stations rely increasingly on these types of reproductions to generate valuable efficiencies in their operations. The resultant savings have led directly to increased profits.

Prior to 2012, an exception to copyright for those ephemeral copies addressed the concerns of both rightsholders, who wanted to be compensated for the copies, and broadcasters, who wanted to minimize the onerous task of seeking licences from countless individual rightsholders. The exception did not apply where a licence to make these copies was available from a collective society.

However, following lobbying from broadcasters, s. 30.9 was amended in 2012, and s. 30.9(6), the collective licensing restriction, was repealed[6]. As a result, the Copyright Board reduced the royalties payable for those copies by up to an additional 27.8%[7], but declined to provide any guidance for broadcasters as to how they could prove their compliance with the terms of the exception, creating a regime that has so far proven unworkable for users and rightsholders to administer.

By expanding the ephemeral recordings exception in 2012, Canada eliminated a recognized and monetized exclusive right under copyright. Doing so has deprived rightsholders of compensation that they had come to rely on. Radio stations continue to derive the same (or greater) economic value from ephemeral copies as before; they just pay much less for the right to make them.

There is no reason why commercial broadcasters should not compensate rightsholders when they themselves benefit so greatly from the use of ephemeral copies. CMRRA and CMPA recommend that s. 30.9(6) be reintroduced, in keeping with the original intention – to provide relief to broadcasters from the burden of obtaining licences from countless individual rightsholders, while recognizing that the right is compensable where collective licences are available to eliminate that burden.

d. The Exception for Hosting Services (Section 31.1(4))

[6] *Copyright Modernization Act*, S.C. 2012, c. 20, s.34(3)
[7] 2016 Commercial Radio Decision, para. 370

In 2012, the *Copyright Modernization Act* introduced a regime to limit the liability of Internet intermediaries, introducing broad exceptions for internet service providers[8], hosting providers[9], and search engines[10] and establishing the so-called "notice and notice" regime[11]. The hosting service exception provides that a person who, for the purpose of allowing the telecommunication of a work or other subject matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject matter does not, "by virtue of that act alone," infringe copyright in the work[12].

The unintended consequence of this exception has been the expansion of what is known as the "value gap": a massive reallocation of economic value from copyright owners to ad-supported online platforms that purport to qualify for the hosting exception while effectively functioning as online music streaming services.

CMPA and CMRRA propose that the hosting exception in subsection 31.1(4) be amended to make clear that it does not apply to a hosting service that acts as a *content provider*, and not as a mere conduit for the storage of data for the purpose of allowing a telecommunication. Specifically, the exception should not apply to a service that plays any active role in the communication to the public of the works or other subject matter that other persons store within its digital memory.

As amended, the exception would not apply to a service that promotes or optimizes the presentation of works that it makes available to the public, whether by categorizing works by genre, style, or the like, creating recommended playlists, providing an "auto-complete" search function, or the like. However, hosting services that are truly passive intermediaries would continue to receive the full protection of the existing exception as well as the protections afforded under the notice and notice regime.

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[8] Exceptions are available for persons who provide any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet, and any such person who caches a work or other subject matter, or does any similar act in relation to the work, to make the telecommunication more efficient. See: *Copyright Act*, ss. 31.1(1) and 31.1(2).

[9] *Copyright Act*, s. 31.1(4).

[10] *Copyright Act*, s. 41.27.

[11] *Copyright Act*, s. 41.27.

[12] *Copyright Act*, s. 31.1(4).

2. **<u>Amend the Copyright Act to authorize a court, on application by a rightsholder, to grant a site-blocking or de-indexing injunction against an Internet intermediary, on a "no- fault" basis to the intermediary.</u>**

Canadian rightsholders are harmed by services that facilitate and profit from the large-scale commercial infringement of copyright on the Internet. Those services include torrent portals, such as the infamous Pirate Bay website, and cyberlockers that host copyright-protected material that may be shared with other users. Such services are designed to capitalize on the infringement of copyright: they typically permit anonymous users to upload content at no charge, host the content free of charge, reward users that post popular content (even if pirated), and derive more advertising revenue the more users visit the site. To make matters worse, many infringing services are located outside Canada, immune from the jurisdiction of Canadian courts.

In Canada, the Supreme Court has recognized the authority of courts to issue broad de-indexing injunctions[13]. Other jursidictions, such as the EU, UK, and Australia have implemented legislative amendments to enable site-blocking injunctions. These appear to have been extremely successful in deterring usage of sites featuring infringing content.

However, the *Copyright Act* does not specifically authorize Canadian courts to grant injunctive orders to require an ISP or hosting service to block access to an infringing website, or require a search engine to prevent an infringing site from showing up in its search results, without risk of liability. Moreover, the notice-and-notice regime established in 2012 gives intermediaries little incentive to help combat online piracy. As a result, rightsholders typically have no recourse but to commence costly and ineffective individual legal proceedings against every commercial infringer.

CMPA and CMRRA recommend amending the *Copyright Act* to clarify that Canadian courts are empowered to require ISPs, hosting services, and search engines to block access to infringing content that is hosted outside Canada by issuing site-blocking and de-indexing injunctions, and to amend section 27(2.3) of the *Act* to reduce the burden of proof on rightsholders to demonstrating that an ISP has general knowledge of infringing activity before secondary liability is established.

[13] *Google Inc. v Equustek Solutions Inc.* 2017 SCC 34

3. **Through a combination of legislative and regulatory changes, improve the efficiency of the Copyright Board's processes and the timeliness and predictability of its decisions.**

The Copyright Board is mandated, through the *Copyright Act*, to establish the royalties payable for the use of copyright-protected works that are administered by a copyright collective society, and may also supervise agreements between licensing bodies and users. The Board estimates that the tariffs it certifies generate $434 million a year in royalties.[14]

Recent expansion of the Board's workload, combined with the emergence of new uses of copyright-protected work in the digital era, have exposed serious challenges, which have, in turn, led to a dangerous uncertainty in the markets that it regulates, affecting rightsholders, users, and the public.[15]

These include:

- Delays in certification of a tariff. The *CSI*[16] *Online Music Services Tariff (2011-2013)*, the tariff was filed in March 2010, with the decision finally released on August 25, 2017. Such delays have a number of deleterious effects, including:
    - The delays caused by pending tariffs can deprive rightsholders of revenue for years following the period during which use occurs; and
    - market uncertainty preventing new entrants into the market as they are unable to determine the operational costs of being appropriately licensed.
- New tariff proceedings often raise legal issues of first impression. As the Board is tasked with dealing with these, its workload becomes substantially larger.

CMRRA and CMPA propose the following reforms:

1. Mandatory decision-making timelines, such as the Board being required to release decisions and certify a tariff within no more than one year after the end of a timely hearing, or before the effective date of the proposed tariff;
2. Modification of the board's procedures to expedite the period of time from the filing of a proposed tariff to the certification of the tariff, including optional case management;
3. Establish clear criteria or a specific economic standard for the Board to consider in making its decisions, and the adoption of rules of procedure;
4. Set a requirement that a certain number of Board members have a minimum level of

[14] http://www.cb-cda.gc.ca/about-apropos/speeches-discours/PRE-2016-11-03-EN.pdf para. 10; Fox on Canadian Law of Copyright and Industrial Designs 26:1; http://publications.gc.ca/collections/collection_2015/pc-ch/CH44-155-2015-eng.pdf

[15] Senate Standing Committee on Banking, Trade and Commerce, *Copyright Board: A Rationale for Urgent Review* (Ottawa, 2016) [Senate Report].

[16] A joint venture between CMRRA and La société du droit de reproduction des auteurs, compositeurs et editeurs au Canada (SODRAC) to jointly license certain types of music users.

subject-matter expertise in either copyright law or economics;

5. Permit all collecting societies to enter into private licensing agreements with users in the absence of a tariff;
6. Establish consistent enforcement remedies for all collecting societies; and
7. Permit withdrawal of tariffs under a voluntary regime, provided their withdrawal is made prior to the effective date of the tariff.