Intellectual Property Institute of Canada
Institut de la propriété intellectuelle du Canada

Intellectual Property Institute of Canada (IPIC) submission on Bill C-10: An Act to Amend the Broadcasting Act and to Make Related and Consequential Amendments to Other Acts

Submission to the
Standing Committee on Canadian Heritage

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INTRODUCTION

The Intellectual Property Institute of Canada (IPIC) is the professional association of patent agents, trademark agents and lawyers practicing in all areas of intellectual property law. Our membership totals over 1,850 individuals, consisting of practitioners in law firms and agencies of all sizes, sole practitioners, in-house corporate intellectual property professionals, government personnel, and academics. Our members' clients include virtually all Canadian businesses, universities and other institutions that have an interest in intellectual property (e.g. patents, trademarks, copyright and industrial designs) in Canada or elsewhere, as well as foreign companies who hold intellectual property rights in Canada.

IPIC has reviewed Bill C-10 and the proposed consequential amendments to the *Copyright Act* in respect of Ephemeral Recordings (sections 30.8 and 30.9 of the *Copyright Act*) and the Retransmission Regime (section 31 of the *Copyright Act)*.

PROPOSED CHANGES TO THE EPHEMERAL RECORDING EXCEPTIONS

IPIC has been informed by officials that these amendments to the *Copyright Act* are intended by Government solely to maintain the status quo. But the proposed amendments do the opposite: they *broaden* the scope of the ephemeral recordings exception in section 30.8 of the *Copyright Act* and, possibly, section 30.9, by making it available to "online undertakings."

The practical consequences of these amendments appear to run contrary to the Government's policy objectives. In introducing Bill C-10 in the House of Commons,[1] Minister Guilbeault stated that the Bill "aims to … ensure the sustainability and vitality of our Canadian series, films and music, as well as of the people who make them and broadcast them." Yet these amendments, if passed, could significantly *reduce* remuneration paid to Canadian creators. They could also violate Canada's international treaty obligations as further detailed below.

i. The Ephemeral Recordings Exception (subsection 30.8(1) of the *Act*)

Subsection 30.8(1) of the *Copyright Act* allows programming undertakings, in certain limited circumstances, to make ephemeral recordings of works, performers' performances, and sound recordings to facilitate the broadcast of live performances. The scope of this exemption and the

[1] Hansard 31 - November 18, 2020; available at https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-31/hansard#11014677.

conditions imposed on its applicability were tailored to the needs and technological realities of traditional means of communication by telecommunication.

Bill C-10 as drafted would amend the definition of a "programming undertaking"[2] in subsection 30.8(11) of the *Copyright Act* to include "an online undertaking as defined in subsection 2(1) of the *Broadcasting Act*, that is carried on lawfully under that Act, in respect of the programs that it originates." This change in definition would significantly expand the availability of this limited exception more broadly to "online undertakings."

Bill C-10 defines "online undertaking" to mean "an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus." This definition encompasses as many business models as the interface of digital technology and the Internet will allow. These business models and the technology they utilise are very different from the traditional models addressed by current subsection 30.8(1). It is not clear that the implications of any mismatch have been fully taken into consideration. The implications of this expansion cannot be predicted with certainty. At minimum, it seems likely that the exception would apply to any number of online services, and to any number of "programs" (as that term is defined in the *Broadcasting Act*), that are currently required to pay royalties for the use of copyright material.

ii. The Ephemeral Recordings – Broadcasting Undertakings Exception (subsection 30.9(1) of the *Act*)

IPIC has a similar concern that the proposed amendment has the apparently unintended potential to disrupt the exception in subsection 30.9(1) of the *Copyright Act*, which provides that it is not an infringement of copyright for broadcasting undertakings to make ephemeral recordings for broadcasting purposes in limited circumstances. As in the case of Subsection 30.8(1), Subsection 30.9(1) is an exemption tailored to the realities of conventional broadcasting.

Subsection 30.9(7) of the *Copyright Act* defines a "broadcasting undertaking" for the purposes of this exception as "a broadcasting undertaking as defined in subsection 2(1) of the *Broadcasting Act* that holds a broadcasting licence issued by the Canadian Radio-television and Telecommunications Commission under that Act." Bill C-10 would amend the definition of

[2] The current definition of programming undertaking provides that it means (a) a programming undertaking as defined in subsection 2(1) of the *Broadcasting Act*, (b) a programming undertaking described in paragraph (a) that originates programs within a network, as defined in subsection 2(1) of the *Broadcasting Act*, or (c) a distribution undertaking as defined in subsection 2(1) of the *Broadcasting Act* in respect of the programs that it originates. The undertaking must hold a broadcasting licence issued by the CRTC under the *Broadcasting Act* or be exempted from this requirement by the CRTC.

"broadcasting undertaking" in the *Broadcasting Act* to include an "online undertaking" as newly defined. As a result, it may be that online undertakings will try to claim the benefit of the exception in subsection 30.9(1) of the *Copyright Act*.

While it seems contrary to Parliament's apparent intention to limit the definition of "broadcasting undertaking" to conventional broadcasters (i.e., only those that hold a broadcasting licence issued by the CRTC), the ambiguity will almost undoubtedly lead to litigation.

iii. The Extraordinary Power of the CRTC over the Scope of the Copyright Amendments

The Committee also understands that the Government intends to defer the meaning of when an online undertaking will be "carried on lawfully under [the] *Broadcasting Act*" to regulations that are still to be established by the CRTC. That decision has significant ramifications for the *Copyright Act*. The Committee is concerned that the CRTC's determination could disrupt the delicate balance between the interests of various copyright stakeholders, which has been calibrated carefully by Parliament over many years.

Since the proposed amendments to section 30.8 turn in part on what it means for an "online undertaking" to be carried on lawfully under the *Broadcasting Act,* the full scope of the exception in subsection 30.8(1) will ultimately fall to be determined by the CRTC, not by Parliament. The Committee submits that it is undesirable to give the CRTC the equivalent of legislative authority over the *Copyright Act*, for at least two reasons:

- First, as the Supreme Court of Canada has recognized, copyright exceptions by their nature are suffused with policy considerations.[3] As representatives of ISED and Canadian Heritage have acknowledged in discussions with the Committee, the CRTC's mandate prohibits it from considering the copyright implications of its decision-making; indeed both the Supreme Court of Canada and the CRTC itself have previously expressed the view that the CRTC has no authority over the copyright regime.[4] In effect, this leaves the scope of *Copyright Act* exceptions to be determined by an agency that is prohibited from doing so.

[3] See *Bishop v. Stevens*, [1990] 2 SCR 467.

[4] See *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, in which the SCC overturned the CRTC's decision to create a value-for-signal regime because it conflicted with the retransmission regime under the *Copyright Act*, available online at https://www.canlii.org/en/ca/scc/doc/2012/2012scc68/2012scc68.html. See also Telecom Decision CRTC 2018-384 (the "**FairPlay Decision**") available online at https://crtc.gc.ca/eng/archive/2018/2018-384.pdf.

- Second, the exception in subsection 30.8(1) is a limitation on an exclusive right that is expressly required by the Berne Convention.[5] To the extent that an exception is permitted, Article 11*bis*(3) of the Berne Convention provides that it must be established by *legislation*.[6] In any event, the authority to determine the scope of the exception should not be delegated to an administrative tribunal with no expertise in, or jurisdiction over, copyright law.

iv. Other Unintended Consequences of the Proposed Amendments

The Committee is concerned that Parliament's effort to amend the *Broadcasting Act* to advance certain cultural objectives could also undermine other cultural objectives in the copyright regime and put Canada offside its international treaty obligations.

The expansion of these exceptions could widen the field considerably, permitting any number of online commercial enterprises—the scope of which is currently undefined and could remain that way for years—to seek the benefit of these exceptions in relation to copies made to facilitate their online broadcasts. Expanding them beyond their existing scope would create uncertainty for rightsholders and users alike about the compensability of uses that create value for users and generate revenue for rightsholders.

In practice, the amendments could have the unintentional effect of reducing the royalties payable by online service providers for the reproduction of copyright material, notwithstanding the economic benefit they derive from those copies. Simply by way of example, the Copyright Board of Canada has already found that the section 30.9 exception could lead to royalty discounts of up to 27.8% for valuable copies made by commercial radio broadcasters.[7] The Copyright Board concluded

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[5] Article 11*bis*(1) provides that "Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

[6] Article 11*bis*(3) provides that, "In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation."

[7] See *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, available online at https://decisions.cb-cda.gc.ca/cb-cda/decisions/en/366778/1/document.do.

recently, in an arbitration between CBC and SODRAC, that the aggregate economic value of the copies potentially eligible for section 30.9 discounts was 52.63% of all copies made by CBC.[8]

The amendments may be contrary to Canada's treaty obligations. The ephemeral recording exceptions were introduced in Canada for very specific policy reasons, with a careful eye to Canada's international treaty obligations, and for the limited purpose of conventional broadcasting. Article 11*bis*(3) of the Berne Convention provides that permission granted by authors in relation to the broadcasting of their works does not imply permission to record the work that is broadcast, but rather that signatories may introduce regulations relating to ephemeral recordings made by a *broadcasting undertaking* for use *in its own broadcasts*. The proposed amendments in Bill C-10 seem to expand the ephemeral recording exceptions beyond what is contemplated or permitted by the Berne Convention, particularly because neither online streaming nor "online undertakings" as defined in the bill existed when Article 11*bis*(3) was introduced.

v. Recommendations

In summary, the Committee is concerned that the cultural objectives that prompted the amendments to the *Broadcasting Act*, including the importance of securing fair compensation for creators from the use of their work online, would be undercut by the proposed amendments to the *Copyright Act* and the seemingly *ad hoc* rebalancing of its delicate policy objectives. In some sectors, the revenue lost to the expansion of the ephemeral recording exceptions could well exceed any new revenue produced by the amendments to the *Broadcasting Act*.

If Parliament intends to maintain the status quo, there is no need to amend subsection 30.8(11) to include online undertakings or to replace the requirement of a licence issued by the CRTC with the requirement that the undertaking be "carried on lawfully under" the *Broadcasting Act*. In other words, subsection 30.8(11) should simply remain as is.

Similarly, if Parliament intends to maintain the status quo and does not intend to expand the availability of the exception in section 30.9 of the *Copyright Act*, that intention should be made more explicit. Specifically, subsection 30.9(7) of the *Copyright Act* should be amended to read as follows:

In this section, *broadcasting undertaking* means a broadcasting undertaking as defined in the *Broadcasting Act* that holds a broadcasting licence issued by the Canadian Radio-television and Telecommunications Commission under that Act, but does not include an online undertaking as defined in that Act.

[8] See *SODRAC v. CBC, 2012-2018 [Determination]*, Decision of the Board, January 27, 2021, available online at https://decisions.cb-cda.gc.ca/cb-cda/l/en/491857/1/document.do.

Looking forward, the Committee suggests that proposed amendments to the *Copyright Act* targeted at online undertakings take into account all relevant considerations to that particular sector, to ensure the appropriate balance is maintained in the *Copyright Act*.

PROPOSED CHANGES TO THE RETRANSMISSION REGIME

i. Amendments to s. 31

Section 34 of the Bill introduces a number of amendments impacting the "retransmission regime" contained within s. 31 of the *Copyright Act*. The retransmission regime involves a compulsory licence regime, in which the Copyright Board values the capturing of free, over-the-air broadcast signals for use on cable TV, satellite TV, IPTV, or similar systems known as "BDUs". This regime was the result of a historic bargain between Canada and the United States in the 1988 Canada-U.S. Free Trade Agreement (Art. 2006).[9] According to the Copyright Board, the retransmission regime is the second-largest tariff regime, with estimated annual royalties of $130-million paid to rights holders in 2018.[10]

While program owners ordinarily have the exclusive right to authorize communication to the public of their works by telecommunication, s. 31 of the *Copyright Act*:

- Provides a **full exception** to retransmission of programs contained in "local" signals.
- Creates a **compulsory licence** for retransmission of programs contained in "distant" signals, to be valued by the Copyright Board in tariff proceedings. While program owners cannot block retransmissions, they get a fair and equitable royalty for the use of their works in distant signals.

It appears to the Committee that the intent of Bill C-10 is to maintain the status quo of the retransmission regime and not to open up the retransmission regime to "new media

[9] A brief history of the bargain is contained in this legislative summary to Bill C-48, tabled in December 2001. See also the Canada-United States-Mexico Agreement (CUSMA), Chapter 20 - Intellectual Property Rights, Footnote 60, to subsection 20.61, which reads: *a Party may provide for the retransmission of non-interactive, free over-the-air broadcasts, provided that these retransmissions are lawfully permitted by that Party's government communications authority; any entity engaging in these retransmissions complies with the relevant rules, orders, or regulations of that authority; and these retransmissions do not include those delivered and accessed over the Internet.*

[10] Copyright Board Annual Report 2019-2020, p. 9.

retransmitters" by regulation through the *Broadcasting Act.* There are complex policy decisions behind this choice, which are beyond the scope of the technical comments made in this submission.

ii. Recommendation : Define the Key Term "Retransmitter" in the Main Body of the Act

If the intent is to maintain the status quo of the retransmission regime, IPIC recommends that the key term "retransmitter" should be defined in the main body of the *Copyright Act*.

At present, the term "retransmitter" is defined in s. 31(1) as "mean[ing] a person who performs a function comparable to that of a cable retransmission system, but does not include a new media retransmitter."

This definition has maintained stability over time and has been held over many tariffs to include BDUs' dissemination of distant signals via new technologies such as satellite-based systems and Internet Protocol Television (IPTV). The courts have construed the term in such a way as to maintain Parliament's decision in 2002 to exclude new media transmitters from the compulsory licence.[11]

Bill C-10 proposes to remove this definition from the *Copyright Act*, and leave the definition of "retransmitter" to the regulations.

IPIC understands that there may be a desire on the part of the government to maintain flexibility in defining the term "retransmitter" as technologies change over time. However, the meaning of the term "retransmitter" is at the very heart of the retransmission regime. It defines which users are eligible for the protections of the local signals exemption compulsory licence and which users are liable to the rights holders for payment of royalties under the distant signals regime. Large investments of time and energy are made by rights holders and users alike in reliance on this definition. If government proposes to amend this definition, such a proposal should be addressed in Bill C-10 before Parliament given the great potential impacts on the second-largest tariff regime before the Copyright Board.

[11] *2251723 Ontario Inc. v Bell Canada*, 2016 ONSC 7273 at ¶24.