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By Email

Mr. Michel Marcotte, Clerk of the Committee
Standing Committee on Industry, Science and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Dear Mr. Marcotte:

Re: Business Coalition for Balanced Copyright submission to the Standing Committee on Industry, Science and Technology regarding the statutory Review of the Copyright Act

Please find enclosed the written submission of the Business Coalition for Balanced Copyright (BCBC), which appeared before the Standing Committee on Industry, Science and Technology on November 5, 2018. The BCBC appreciates this opportunity to share its views on the statutory review of the Copyright Act.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Jay Kerr-Wilson

JKW/ss
Enclosure

Business Coalition for Balanced Copyright

Submission to the Standing Committee on Industry, Science and Technology regarding the Statutory Review of the *Copyright Act*

December 10, 2018

Business Coalition for Balanced Copyright

Submission to the Standing Committee on Industry, Science and Technology regarding the Statutory Review of the *Copyright Act*

The members of the Business Coalition for Balanced Copyright (BCBC) include Bell Canada, Rogers, Shaw, TELUS, Cogeco, Videotron, and the Canadian Communications Systems Alliance. Combined, the members of BCBC provide internet, telecommunications, and/or broadcasting services to virtually every Canadian household. The BCBC appreciates the opportunity to present the Coalition's views of the Committee's review of the *Copyright Act*.

BCBC's members understand that Canada's economic and cultural well-being depend on a strong and transparent copyright framework that balances the interests of creators, owners, consumers, and intermediaries. In their unique position linking consumers and creators, BCBC's members support a copyright regime that rewards and protects creators, facilitates access by Canadians to creative content, encourages investment in innovative technology, and supports education and research. These principles are reflected in a *Copyright Act* that has clearly defined rights and clearly defined limitations and exceptions to those rights.

While there is always room for amendments to clarify provisions that are not being applied as intended, or to reflect new developments in technology, we do not believe that the *Copyright Act* currently requires substantial revisions.

The exceptions that were added to the *Copyright Act* in 2012 were necessary to eliminate uncertainty that would restrict or inhibit the development of innovative new products and services. Reducing or eliminating these exceptions will put at risk hundreds of millions of dollars in investments and will cause disruptions in the rollout of legitimate new services that would otherwise be providing copyright owners more opportunity to earn revenue from their intellectual property by giving Canadians more access to more content.

PROPOSALS

Copyright levies should not be imposed on ISPs and other intermediaries

The Coalition does not believe that new copyright levies should be imposed on ISPs and other intermediaries in an attempt to create new sources of revenue for Canadian creators and artists. First, requiring ISPs to make content-specific payments is a clear violation of the principle of network neutrality. Second, and more importantly, the *Copyright Act* is not the appropriate statute for promoting Canadian cultural industries. Canada's obligations under the Berne Convention, TRIPs, and other international treaties require that we provide national treatment in our copyright laws. Any benefit that is granted to Canadian creators must also be provided to non-Canadian creators when their work is used in Canada. As a result, most of the money collected from Canadians would be sent to the United States. Third, copyright owners are already paid for lawful online activities through commercial license agreements and, in case of SOCAN, tariffs approved by the Copyright Board.

Forcing Canadians to pay another fee for receiving these same lawful services is a form of double-dipping—a practice that was rejected by the Supreme Court in *ESA v. SOCAN*. Any ISP levy would disproportionately benefit American rather than Canadian creators and, because the US does not collect a similar payment from its ISPs, nothing would come back across the border to Canadian creators. The Government has far more appropriate policy tools at its disposal to promote Canadian cultural content and Canadian creators. Using those tools enables measures to be specifically targeted to Canadian creators in a way that the *Copyright Act* cannot.

Additional improvement to the notice-and-notice regime

The BCBC strongly supports the amendments to prohibit the inclusion of settlement demands in infringement notices introduced in Bill C-86, the Budget Implementation Act. The BCBC believes, however, that additional amendments are necessary to protect consumers and to give ISPs the tools they need to stop the settlement notices from reaching consumers.

Bill C-86 makes it clear that ISPs will not be required to forward settlement demands to subscribers. However, the amendments contain no useful deterrent to dissuade rights holders or claimants from including settlement demands in their copyright notices. The onus for excluding settlement demands from copyright notices must rest solely with rights owners.

The other change that is needed is to adopt regulations establishing a common standard for notices of claimed infringement. ISPs are currently receiving millions of notices per month and there is no way for these notices to be manually processed. Large ISPs have to adopt automated systems to process and forward the volume of notices they are receiving.

Canadian ISPs and the motion picture industry cooperated on the development of a standard copyright notice format known as the ACNS or Automated Copyright Notice System. This standard is freely available at no charge and reflects Canadian requirements. The Government should use its existing authority to enact regulations requiring that notices be submitted electronically in a form that is based on the ACNS 2.0. Mandating the use of these standards will eliminate the risk of ISPs forwarding non-compliant notices.

The *Copyright Act* should allow for injunctive relief against all intermediaries

The *Copyright Act* should be amended to allow for injunctive relief against the intermediaries that form part of the online infrastructure distributing infringing content. It should be explicit that Courts can issue a blocking order requiring an ISP to disable access to infringing content available on preloaded set-top boxes, or an order prohibiting credit card companies from processing payments for infringing services.

The BCBC recommends that the *Copyright Act* be amended to eliminate a potential conflict between a Court using its authority to order ISPs to block access to infringing internet services, and the CRTC using its authority under section 36 of the *Telecommunications Act* to approve requests by ISPs to control the content of a transmission. The CRTC has stated that an ISP requires the CRTC's approval to block access to an internet service, even in circumstances where a Court has ordered the ISP to block access to that site. Furthermore, the CRTC has stated that it will evaluate any request to block access on the basis of whether the request will further telecommunications policy objectives. These objectives may not take into account whether the content infringes copyright or if there is a Court order requiring access to be blocked.

The BCBC finds it unacceptable that an ISP could be ordered by a Court to block access to an infringing internet service and prohibited by the CRTC from complying with that Court Order. A telecommunications services provider should never have to choose between complying with a lawful Court Order and complying with the *Telecommunications Act*. This conflict must be resolved in favor of the Court Order.

Comments on the proposed reforms to the Copyright Board and collective licensing

The BCBC supports many of the changes that have been introduced in Bill C-86 to improve the efficiency of Copyright Board proceedings. The Coalition is, however, concerned that some of the changes will eliminate important protections for licensees and could result in monopoly copyright licences that are no longer transparent or subject to regulatory oversight.

Currently, anyone who wants to publicly perform musical works in Canada needs a copyright licence from SOCAN. SOCAN enjoys near monopoly power but there is a mandatory system of regulating SOCAN's copyright fees which is administered by the Copyright Board of Canada. Currently, a user cannot be sued if it uses a musical work that is not in SOCAN's repertoire.

If Bill C-86 is passed in its current form, SOCAN will no longer need to get Copyright Board approval for its licences. It will be able to negotiate licences directly with business that want to use music. The Copyright Board will only get involved if the parties cannot agree on terms. Also, if a business uses a song that is not represented by SOCAN it could be sued by the copyright owner and face statutory remedies of between $500 and $20,000 per song. Businesses have no practical way to monitor SOCAN's repertoire, so they cannot mitigate their risks.

The BCBC proposes two amendments that would remedy these problems:

1. an amendment to Bill C-86 that would make it explicit in the *Copyright Act* that users can join together to negotiate with SOCAN or other collective societies, and to participate in proceedings before the Copyright Board if there is no agreement.

2. amendments to modify the collective licensing system so a copyright owner not represented by a collective society can get the royalties to which she is entitled but cannot sue for infringement. This is known as "extended collective licensing" and is already available in other cases in the *Copyright Act*.

The BCBC's proposed amendments are attached as Appendix A.

Claims of a value gap between the music industry and internet services are unfounded

Finally, the BCBC warns the Committee against unfounded claims of a value gap between the music industry and internet services.

The claims made by the music industry and the amendments they are demanding ignore how rights are cleared through commercial transactions. These measures would disrupt well-established commercial relationships and would ultimately result in substantial net outflow of money from Canadians to US record companies.

The music industry appears to suggest that performers and record labels are not paid for the use of recorded performances in the soundtracks of film and television programs. This is simply false. Record companies have to agree to the use of recordings in soundtracks and they are free to negotiate with the movie producer the terms including any payment. Performers have to agree to the use of their performances in soundtracks and are entitled to demand payment through their agreements with the record labels.

Sections 15, 16 and 17 of the *Copyright Act* already provide detailed provisions protecting the right of performers to be paid for the use of their performances including the right to receive money when their performances are broadcast by programming services. The *Copyright* Act has established a system for record labels and performers to be get paid through negotiated commercial agreements, rather than Copyright Board approved tariffs but they are entitled to get paid. Revising the definition of sound recording would result in record labels and performers getting paid twice for the same use. Furthermore, the US, like most of the countries in the world, does not require a second payment to record companies when sound recordings are publicly performed as part of the soundtracks of films and television programs. This means that US record companies would collect millions of dollars from Canadians from this double payment, and not a penny of money would come the other way from the use in the US of Canadian sound recordings on US television.

If the Committee is concerned about improving the financial fortune of performers, it could recommend adjusting the division of royalties between record companies and performers in section 19(3). That simple change would immediately put more money in the pocket of every performer whose performances are played on the radio, streamed online, or played in bars and restaurants.

If there is any value gap in the current system, it is the gap between what record labels are collecting for the use of recordings in soundtracks and what they are passing on to the artists who actually perform the music.

Appendix A

Proposed Amendment 1

75(1) **[no change to current subsection 75(1)]**

75(2) **[no change to current subsection 75(2)]**

75(3) [**replaces current subsection 75(3)]** Where a collective society collects royalties, other than royalties referred to in subsection 29.7(2) or (3) or paragraph 31(2)(d), pursuant to an agreement referred to in subsection 67(3), set out in an approved tariff referred to in subsection 70(1) or fixed under subsection 71(2)
for the public performance or communication to the public by telecommunication of musical works or performer's performances of musical works or of sound recordings embodying such performer's performances, or the reproduction of musical works, an owner of copyright who does not authorize the collective society to collect, for that person's benefit, royalties is, if such royalties are payable during a period when an agreement, approved tariff, or Board decision fixing royalties, that is applicable to that kind of work or other subject matter is effective, is entitled to be paid those royalties by the collective society subject to the same conditions as those to which a person who has so authorized that collective society is subject.

(4) [**replaces current subsection 75(3)]** The entitlement referred to in subsections (1),(2) and (3) is the only remedy of the owner of the copyright for the payment of royalties for the communication, making of the copy or sound recording or performance in public, as the case may be.

(5) [**subsection 75(5) will remain the previous subsection 75(4) with no changes to the text]**

(6) [**additional subsection]** Where more than one collective society collects royalties for the same kind of work or other subject-matter, and with respect to the same uses, referred to in subsection (3), the Board may, on application by a collective society, by a user, or on its own motion, designate a collective society, or societies, for the collection of royalties on behalf of all owners referred to in subsection (3) with respect to those works or other subject-matter and uses.

(7) [**additional subsection]** Subsections (3) and (4) do not apply to those works or other subject-matter the copyright those works or other subject-matter is owned by an owner referred to in subsection (3) and the owner provides to the collective society and to the Board a notice that states the owner wants to exclude certain works or other subject-matter owned by that owner from subsections (3) and (4) and the notice identifies the works or other subject-matter to be excluded.

(8) [**additional subsection]** A collective society referred to in subsection (3) shall give notice to any person who pays royalties referred to in subsection (3) of all works or other subject-matter that have been excluded by an owner referred to subsection (7).

(9) [**additional subsection]** The Minister may, by regulation, prescribe the form and content of the notices referred to subsections (7) and (8).

Proposed Amendment 2

66.503 [**new language is underlined]** For greater certainty, any person or entity may authorize any other person or entity to act on their behalf in any matter before the Board <u>and the Board may, on application by any person or on its own motion, consider in a single proceeding any matters involving more than one user when the same rights and subject-matter are in issue.</u>

67(3)(a) [**additional subsection]** For greater certainty, multiple users of the same rights in the same subject-matter may enter into a joint agreement with a collective society for the purpose of establishing the royalties referred to in 67(3).